

France



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GENERAL

1. To what extent does national law specifically regulate outsourcing transactions?

Outsourcing transactions are not specifically regulated in France. However there are regulations that:

- Apply specifically to outsourcing transactions in certain sectors.
- Have a general effect on outsourcing transactions, for example:
 - regulations under Article L1224-1 of the Labour Code (Article L1224-1) concerning transfers of employees;
 - IP laws (*see Questions 5 and 6*);
 - data protection regulations (*see Question 14*);
 - competition law.

2. What additional regulations may be relevant on:

- A financial services outsourcing?
- A business process outsourcing?
- An IT outsourcing?
- A telecommunications outsourcing?
- A public sector outsourcing?
- Other outsourcings?

Financial services

There are two sets of rules governing the outsourcing of financial services:

- Regulation No. 97-02, issued by the Banking and Financial Regulatory Committee (*Comité de Réglementation Bancaire et Financière*), which applies to the outsourcing, operations and ancillary services in relation to banking and investment services.

- The provisions of the General Regulations of the Financial Markets Authority (*Autorité des Marchés Financiers (AMF)*), which applies to portfolio management companies. A portfolio management company is a company that has been licensed by the AMF to manage funds belonging to third parties, either through mandates (*gestion sous mandat*) or through the management of investment vehicles.

Outsourcing of banking and investment services. This includes (*Regulation No. 97-02*):

- Subcontracting within the meaning of Act 75-1344 of 31 December 1975.
- Canvassing within the meaning of Articles L341-1 and L341-4 of the French Monetary and Financial Code.
- The use of a tied agent as defined in Article L545-1 and following of the French Monetary and Financial Code.

The outsourcing must be established under a written contract that contains specific provisions, including:

- The right for the regulated entity or the banking authorities to carry out onsite inspections.
- Guarantees regarding the confidentiality of information concerning the regulated entity's clients.

Regulated entities must ensure that their internal controls cover their outsourced activities and must adopt appropriate outsourcing risk management programmes and due diligence.

Outsourcing for portfolio management companies. When a portfolio management company outsources operational tasks or functions that are critical to or important for its services or activities, it must take reasonable steps to avoid undue additional operational risk. An operational task or function is considered critical or important when a defect or a default in its performance is likely to seriously harm the management company's capacity to comply at any time with:

- Its obligations necessary to maintain its authorisation or its professional obligations set out in Article L621-15 of the French Monetary and Financial Code.
- Its financial performances.
- The continuity of its activities.

When the tasks or functions are critical or important, the outsourcing must not materially impair the quality of the portfolio

management company's internal control and the ability of the AMF to monitor its compliance with all obligations. Any outsourcing that turns the portfolio management company into a mere mailbox is considered a breach of these requirements. The portfolio management company remains fully responsible for the performance of its professional obligations, and must ensure that the outsourcing does not:

- Lead to a delegation of the managers' liability.
- Alter the portfolio management company's relationship with, or its obligations towards, its clients.
- Undermine the conditions or commitments that governed the conditions under which its authorisation was granted.

It must act with all necessary expertise and care when concluding, performing or terminating an outsourcing agreement.

It must provide the AMF on request with any information necessary for the AMF to check that the outsourced tasks or functions are performed in accordance with its General Regulations.

Business process

Outsourcing of a general business process (such as human resources, payroll or accounts payable management) is not specifically regulated. However, certain regulations can apply to some particular transactions.

An extraordinary general meeting of the company is required to authorise outsourcing of a business process where the following two conditions are met:

- The business process is part of the corporate object, that is, the purpose of the company as described in its articles of association.
- The proposed outsourcing represents a change in this object.

IT

There are no additional regulations that are specifically relevant to an IT outsourcing.

Telecommunications

There are no additional regulations that are specifically relevant to a telecommunications outsourcing.

Public sector

Specific rules govern public/private partnerships. When public entities award service contracts (either procurement or longer-term types of partnership contracts) to a private economic operator, different regulations govern the contractual relationship. These set:

- Tender procedures.
- Rules on advertising and transparency.
- Assessment methods.

- Criteria and conditions for the performance of contracts.

Depending on the type of public contract, the private operator receives payment either from the public entity or from the users of the service.

Public servants' statutes are also relevant to a public outsourcing. Public entities must comply with specific rules when they award contracts and transfer employees to private operators. For example, public servants' remuneration and retirement are regulated. They continue to be regulated after their transfer to the private sector.

Other

There are no other relevant additional regulations.

LEGAL STRUCTURES

3. In relation to the legal structures commonly used on an outsourcing, please describe how each structure works, and its potential advantages and disadvantages.

Common structures

The commonly used outsourcing structures can be classified according to the extent that the customer is involved in the outsourcing and maintains ties with the outsourced activity, which can be significant or be reduced to a minimum. They are as follows:

- **A simple service agreement with no specific sale or transfer of assets and employees.** The customer remains the owner of the assets which are put at the supplier's disposal (for example, through a lease agreement). This structure has the advantages of:
 - being easy to put in place;
 - being flexible;
 - not requiring many legal steps.

However, the customer remains very involved in the running of the outsourced activity, for example, by remaining the owner of its assets and the employer of the employees.

- **Placing assets to be outsourced into a new company (Newco), where Newco's shares are sold to the supplier.** This structure clearly removes the customer's title to the assets and employment relationships. However it needs to be carefully checked in relation to tax since, in certain circumstances, it can be deemed to constitute an abuse of law (see *Question 31, Transfer of assets to the supplier*).

If the customer's employees are worried about the transaction, the customer can convince them that it still has an interest in the outcome of the outsourced activity by retain-

ing some of Newco's shares. However, in certain circumstances the customer is liable if Newco runs into financial difficulties. For example, if Newco goes bankrupt after the transaction, it may be held to have been obvious from the outset that the structure was not financially viable, which would result in the customer's potential liability.

The customer and Newco can decide to place the transaction under the spin-off regime (*régime des scissions*). This regime allows a universal transfer of assets and contracts relating to the outsourced activity. Therefore the agreements relating to the outsourced activities automatically transfer (unless they were granted on a personal basis).

- **Selling assets to be outsourced directly to the supplier.** This structure has the advantage of being easy to complete. However, if the direct asset sale is the sale of a going concern (*fonds de commerce*), it is subject to a registration duty (see *Question 31, Transfer of assets to the supplier*). A direct sale can also bring up assignment issues, as it is generally not possible to assign a contract without the other party's approval (see *Question 5, Key contracts*).

In the sale of a going concern, once notice of the completion is published in an official newspaper, the customers' creditors can oppose the supplier paying the customer or force the supplier to repay the creditors where it has already paid the customer. To avoid this risk, the payment is generally put in an escrow account pending clearance of potential oppositions by creditors.

- **Supplier models.** The most commonly used supplier model is an exclusive contract for a pre-determined period. The supplier usually asks to carry out a guaranteed amount of work for the customer for a fixed time period. This ensures the financial viability of the outsourced activity. The contract sometimes includes minimum revenues from the customer, which reduce over time.

PROCUREMENT

4. **Please briefly describe the procurement process that is usually used to select a supplier of outsourced services (including due diligence and negotiation).**

Usually, tender offers are made. However, sometimes private negotiations take place with a specific supplier (in particular, this may happen when the supplier is the one that takes the initiative of suggesting the outsourcing operation to its customer, as is increasingly the case). The customer's aim is to select the supplier based on its financial situation and its ability to diversify the outsourced activity's client base so that it does not rely on the customer in future.

The supplier usually carries out due diligence of the customer's business. Customers increasingly use the vendor's due diligence reports to speed up this process.

If there is an open bid process, each potential supplier makes an offer with a marked-up version of the outsourcing agreement,

whether this is an asset sale or other structure (see *Question 3*).

TRANSFERRING OR LEASING ASSETS

5. **What formalities are required to transfer the following assets on an outsourcing:**

- **Immovable property?**
- **IP rights and licences?**
- **Movable property?**
- **Key contracts?**

Immovable property

A title to real estate assets can only be transferred using a notary. The notary publishes the transaction at the Mortgage Registry (*Conservation des Hypothèques*) after completion of the sale.

In some towns, the local administrative authority has a pre-emption right over a transfer of immovable property. The customer must therefore notify the municipality before the transfer's completion. The municipality has two months to respond.

If the property is situated in an area where specific risks may exist (for example, asbestos) or if it was built before a certain date, the transferee may need reports or certificates from the transferor.

Where the property is used for certain industrial activities, the parties must notify the Ministry of Economy, Finance and Industry (*Ministère de l'Économie, des Finances et de l'Industrie (DR-IRE)*) so that the supplier can be registered as the new person running the activity.

IP rights and licences

Assuming that the transferring party is entitled to transfer IP rights and licences (which is not necessarily obvious where copyrights are not documented and certain licences are not properly stored) the following rules apply:

- The assignment of patents and trade marks must be in writing to be valid. Copyright assignment must also be in writing, in a document where each assigned right is identified and its field of exploitation precisely defined.
- For an assignment of patents and trade marks to be enforceable against third parties it must be registered with the French Trade Mark and Patent Office (*Institut National de la Propriété Intellectuelle (INPI)*).
- For the transfer of an IP licence the licensor's consent is required (unless otherwise provided in the licence) and the transfer should be made by written assignment to ensure its enforceability against third parties. However, it is possible to transfer commodity software without the consent of the relevant editors as provisions prohibiting assignment of the software medium would likely be considered unenforceable.

Movable property

The transfer of movable property has no general requirements. However, administrative or private notification may be required for:

- Assets subject to specific regulation (for example, in relation to car or truck registration).
- Assets which have been pledged or kept by a third party and similar situations.

Key contracts

A party to a contract cannot transfer it without the other party's approval, unless this is expressly provided for in the contract. However, approval is generally sought only for key contracts. If other contracts are linked to the outsourced activity and are not considered key, the customer can simply notify their transfer to the other party, although this is not a valid transfer and the other party can challenge it if it wishes.

The situation is unclear where the customer had a contract with a third party, and after the outsourcing the third party does not specifically and precisely authorise the transfer of this contract, but continues to work with the supplier on the basis of the former contract. Case law is not consistent on whether the third party's implicit recognition of the transfer means the customer is released from the contract. It is prudent to assume that the customer is not released.

6. What formalities are required to lease or license the following assets on an outsourcing:

- **Immovable property?**
 - **IP rights and licences?**
 - **Movable property?**
 - **Key contracts?**
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Immovable property

No specific formalities are required to lease or license immovable property. However, a lease must be published at the Mortgage Registry if it lasts for more than 12 years.

IP rights and licences

The licensing party must ensure that it has the capacity to license IP rights and licences. A patent licence must be in writing to be valid. A trade mark licence does not need to be in writing to be valid. However, it is recommended to have a written document to evidence its scope and duration. A copyright licence may be implied, for example, when the supplier develops software at the express request of the customer. For a licensing of patents and trade marks to be enforceable against third parties (which is necessary for an exclusive licensee to bring an infringement action), it must be registered with the INPI. The granting of IP sub-licences requires the consent of the licensor and should be made in writing to ensure enforceability against third parties.

Movable property

There are no specific requirements for the lease or licensing of movable property.

Key contracts

Leasing or licensing a key contract is not possible under French law. Either the key contract is transferred (*see Question 5, Key contracts*) or it is kept by the customer and subcontracted to the supplier. In that case, the supplier does not have a direct contractual relationship with the third party.

If the key contract contains a clause prohibiting the customer from subcontracting it, doing so requires the third party's approval. If the customer fails to pay the supplier, the latter could, in certain cases, have a direct claim against the third party.

TRANSFERRING EMPLOYEES

7. In what circumstances (if any) are employees transferred by operation of law:

- **To an incoming supplier on an initial outsourcing?**
 - **To an incoming supplier on a change of supplier?**
 - **Back to the customer on termination of an outsourcing?**
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Initial outsourcing

Article L1224-1 reflects Directive 2001/23/EC on safeguarding employees' rights on transfers of undertakings, businesses or parts of businesses (Transfer of Undertakings Directive). If a company undergoes a change in its legal identity through, for example, a change in ownership or sale, all employees automatically transfer to the new company, so long as it continues to operate a similar business activity. This applies to all transfers of autonomous economic entities carried out in France, even where the transferor and the transferee are established abroad.

There is no strict test defining an autonomous economic entity. However, in general, an autonomous economic entity exists, and employees are transferred automatically on an outsourcing, if:

- The employees form an organised group.
- The activity being outsourced has its own tangible and intangible assets.
- These assets are used for a specific objective and purpose.
- The activity remains the same after the outsourcing, utilising the same working conditions, equipment, and skills.

Alternatively, in a labour-intensive business, the key element may simply be the team's specific objective with no associated assets.

Article L1224-1 only applies to employees who, on the date of transfer, have existing employment contracts and hold a position in the economic entity being transferred. Employees who are on

a trial or notice period, or whose employment contract has been suspended, are considered to have an existing employment contract.

Neither the employer nor the employees can waive Article L1224-1. Therefore, in contrast to the situation under EC case law, employees cannot object to the transfer. If employees refuse to work for the transferee, the transferee can dismiss them on the grounds of serious misconduct (*faute grave*). Issues that can arise include:

- Employees who work on an occasional basis can refuse to transfer to the transferee. If so, they then cannot be dismissed due to the outsourcing itself as this would constitute a dismissal without real and serious cause.
- Employees with two different activities, one of which is transferred, may still be covered by Article L1224-1. These employees continue to work for the transferor with respect for the activity that is not transferred and are partially transferred to the transferee for the activity that is transferred. This results in these employees having a part-time employment contract with each of these two companies. However, since this solution often proves impossible to implement in practice, the employees may opt to work for one of the companies concerned on a full-time basis.
- Article 2-2a of the Transfer of Undertakings Directive prohibits excluding part-time employees from the application of Article L1224-1. Therefore, part-time employees may also be affected by the transfer on an outsourcing.
- A recent trend is for employees to choose to contest the application of Article L1224-1 and the proposed transfer to avoid being transferred, instead seeking a collective redundancy plan from the transferor with favourable severance terms.
- The transferor can undertake to continue employing employees that should have been transferred, as long as there is an agreement between the parties involved.
- If the outsourced employees are protected (for example, staff delegates, members of the works council, trade union representatives and so on), a labour inspector must authorise the transfer of their employment contracts.

Change of supplier

The Supreme Court (*Cour de Cassation*) does not expressly exclude services contracts from the scope of Article L1224-1. However, other criteria demonstrating a transfer of an economic entity must be satisfied and the change of supplier does not itself transfer employment contracts unless both:

- The proposed new supplier operates in the same market.
- The applicable collective bargaining agreement imposes a transfer of employees in the event of a change of supplier.

To trigger the transfer of employment contracts, the change of supplier must involve the transfer of operating resources, such as equipment, inventory, premises, patents and exploitation rights. This interpretation is well established by Supreme Court case law,

which is less flexible than European Court of Justice (ECJ) case law. In practice, these criteria are rarely satisfied and French case law only rarely applies Article L1224-1 to services contracts.

Termination

Case law indicates that Article L1224-1 applies if an outsourcing contract is terminated, but only if the contract termination constitutes a transfer of an autonomous economic entity (*Centre de réadaptation fonctionnelle Les Grands Chênes v Gallo, Empl Div. Supreme Court, 28 November 2001*) (see above, *Initial outsourcing*).

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- 8. Please describe the terms on which employees would transfer by law, including any effect on pensions, employee benefits or other matters (including collective agreements) that the transfer may have.**
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General terms

The transferee automatically takes over the employment contracts of all the employees who were employed in the business immediately before the transfer (see *Question 7, Initial outsourcing*). These contracts keep the same conditions and therefore the employees keep their previous status and remuneration. All rights based on the employees' presence or length of service (for example, accrued paid vacation, seniority premiums and severance pay) are calculated from their start date with the transferor, and not from the date of transfer.

Collective agreements

Collective agreements do not transfer automatically from the transferor to the transferee and each employer is entitled to negotiate specific collective rules adapted to its undertaking with the relevant trade unions.

However, this termination of collective agreements triggers a procedure attempting to make the new employer negotiate new collective rules that are binding on the transferred employees rather than simply imposing its own new rules.

The procedure is as follows:

- Negotiations must be launched with a view to drawing up new collective provisions within three months following the transfer.
- Until a new agreement is entered into, and for a period of at least 15 months (a minimum three months' notice period plus 12 months from the term of the notice period), the transferred employees continue to be entitled to the collective rights in force with their former employer. If the collective rights in force with the transferee are more advantageous to the employees they also apply.
- If no new agreement is entered into within this 15-month period, the former collective agreement or company agreement no longer applies, but the employees maintain their acquired individual rights (*avantages individuels acquis*). These might include monthly premiums for length of service (although the new employer is not required to continue to

increase these as the employee continues to accrue more service). These acquired individual rights are deemed to be contractual terms and conditions and cannot be terminated without each concerned employee's prior written consent. Provisions that concern employees as a group do not constitute individual rights (for example, company working time rules, employee representation rules or severance pay calculation).

When an industry-wide collective agreement is in force within the transferor, it remains in force within the transferee if their main line of business is identical.

Common practices

A benefit that has become mandatory as a result of a common practice is binding on the new employer (*Empl. Div. Supreme Court No. 99-43661 (9 October 2005)*). The Supreme Court has extended this rule to apply to unilateral undertakings and collective atypical agreements. The latter include all agreements other than those entered into with union delegates. However, only employees who are contractually bound to the former employer on the date of the transfer are eligible to the benefit. The new employer can subsequently end the common practice under the Supreme Court's standard rules (*Empl. Div. Supreme Court No. 03-43532 (21 September 2005)*). The employer must give sufficient notice of termination to both the employee representatives and each employee concerned and, depending on the terminated agreement or common practice, it may also be necessary to consult them as well (for example, over employee benefits) (see *Question 10*).

Pensions and employee benefits

The consequences of a transfer on the pension or employee benefits schemes depend on how the scheme was implemented, for example, whether it was through a collective agreement or by common practice (see *above, Common practices*). Where the scheme is set out in the employees' employment contracts, it is transferred with the contracts.

9. What information must the transferor or the transferee provide to the other party in relation to any employees?

There is no legal obligation for the transferor or the transferee to provide information on the company's employees. However, in practice, the transferee may ask for certain information to plan the transfer, for instance, individual employment contracts or prior pay slips.

10. What information and consultation obligations arise for the transferor and the transferee in relation to employees or employees' representatives?

As an outsourcing involves a change in the economic organisation of the company (*Article L2323-19, Labour Code*), the transferor and the transferee must inform and consult both works councils as soon as the transfer project is:

- Sufficiently precise to form an opinion.

- Not yet final.

The works councils must be provided with detailed written information on the planned outsourcing, and any possible consequences for the transferred employees' terms and conditions of employment. The transferor and the transferee must answer any questions raised by the respective works councils. Otherwise, the transferor and the transferee may be accused of obstructing the works council's rights (*délit d'entrave*), which is a criminal offence.

Although the works council's opinion on the transaction triggering the transfer is not binding on the employer, consultation is necessary as non-compliance would allow the works council to obtain a court order barring the transfer and/or file criminal actions. In certain cases, the Health, Safety and Working Conditions Committee must also be consulted.

Although European rules provide that, in the absence of staff delegates, each employee affected by the transfer must be directly informed, French law does not require this. However, it is common and advisable to inform each concerned employee.

11. To what extent can a transferee harmonise terms and conditions of transferring employees with those of its existing workforce?

Before, or at the time of, the transfer, the new employer cannot amend the transferring employees' contracts as the employees' rights survive under Article L1224-1 (see *Question 7, Initial outsourcing*).

However, after the transfer the new employer can make substantial amendments, as long as the employees agree to these changes and the new employer has no fraudulent intent.

12. To what extent can dismissals be implemented before or after the outsourcing?

Dismissal by the transferor

The continuation of an employment contract is compulsory for the transferee and the employee. Therefore, a dismissal of employee before the transfer is deemed null and void (*Fiori v Mourgues, Empl. Div. Supreme Court (12 April 2005)*). An employee who is dismissed by the transferor may choose to:

- Ask for reinstatement within the transferee. The employee can request this through a legal action for summary judgment.
- Accept the dismissal and claim damages for the loss incurred. The employee is entitled to file a lawsuit for damages against both the transferor and the transferee, who are held jointly and severally liable to pay.

If the transferee informs the employee of its intention to continue the employment contract before the end of the notice period the employee must join the transferee.

Dismissal by the transferee

The transferee must take over the contracts of all employees who were employed in the business immediately before the transfer (see *Question 7, Initial outsourcing*). However, following the transfer, the new employer can take measures to restructure and downsize the transferred business, as long as it complies with collective redundancy laws and the statutory redundancy procedure. It can also dismiss employees on personal grounds or for professional misconduct after the transfer. Any severance payments or compensation in lieu of notice must take into consideration the employees' length of service with the transferor (see *Question 8, General terms*).

13. In what circumstances (if any) is it possible for the parties to structure the employee arrangements of an outsourcing as a secondment?

Article L1224-1 is a public policy rule, and therefore cannot be avoided (see *Question 7, Initial outsourcing*). However, if Article L1224-1 does not apply, the employee arrangements of an outsourcing can be structured as a secondment on a temporary basis. Before doing so, it is necessary for the parties to consider the risk of the arrangement being seen as an illegal loan of personnel (*Article L8241-1, Labour Code*). Care must also be taken to ensure that the secondment does not amend the terms and conditions of the employees' contracts. In any case, the employees' prior consent regarding the transfer is mandatory.

DATA PROTECTION

14. What data protection issues may potentially arise on an outsourcing and how are they typically dealt with in the contract documentation?

Under the Act of 6 January 1978 on Data Processing, Files and Individual Liberties (1978 Act), which implements Directive 95/46/EC on data protection, issues can arise in relation to transferred employee data, when the outsourcing leads to a transfer of employees to the supplier. This is generally dealt with by the contract specifying the terms and conditions of the employee transfer. The new employer then becomes the new "data controller" of the relevant employee data.

When the outsourcing leads to the supplier processing any personal data under the control of the customer, it must be specified in the contract that the supplier will only act under the customer's instructions (*Article 35, 1978 Act*). The supplier must offer sufficient warranties to ensure the data's security and confidentiality, and its obligations must be described in the contract. The customer, as data controller, remains liable to data subjects for any breach of data protection laws, including any breach by the supplier. The customer may have to amend existing declarations and sometimes individuals whose data is processed must be informed or their consent obtained.

When the supplier is located in a non-EU country that the European Commission does not consider offers an adequate level of data protection, the customer can only transfer personal data to its supplier if both parties agree on appropriate data protection

principles to apply and the transfer is approved by the French data protection authority (*Commission nationale de l'informatique et des libertés (CNIL)*). This is generally achieved by drafting an international transfer agreement based on the European Commission Model Clauses.

SERVICES

15. How is the services specification typically drawn up and by whom?

The party initiating the outsourcing usually draws up the services specification. This is not always the customer (see *Question 4*). The parties normally negotiate in detail the services specifications before inclusion in the contract and closely specify:

- The services to be provided by the supplier.
- The means used to provide the services.
- Service levels to monitor quality and performance (see *Question 16*).

16. How are the service levels and the service credits scheme typically dealt with in the contract documentation?

Agreed service levels are typically included in a service level agreement. Service levels must be objective and measurable. The contract generally describes which party is measuring the service levels and how, and specifies the mechanisms used to report the results of such measurements.

The contract documentation often includes specific penalties triggered by the supplier's underperformance with regard to the agreed service levels. However, the French courts can revise these penalties if they are clearly excessive or too lenient (*Article 1152, Civil Code*).

When negotiating the contract the parties must consider whether the supplier has to meet pre-defined targets or only be bound by a duty of care (see *Question 15*).

CHARGING

17. Please describe the charging methods that are commonly used on an outsourcing (for example, risk or reward, fixed price, cost or cost plus, pay as you go, resourced-based charges, use of minimum charges and so on).

Charging methods depend on the type of outsourcing structure (see *Question 3*). In practice, fixed price, unit price (pay as you go) and cost plus are commonly used methods.

It is relatively rare for the supplier to share losses and profits with the customer, although sometimes contracts provide for the passing back over time of some savings achieved by the supplier to the customer. Minimum charges are often required by the supplier in the unit price method to limit their exposure if the outsourced activity is reduced.

Additional services that were not provided for in the original contract are usually charged on a time and material basis or according to a pre-approved budget.

18. Please briefly describe any other key terms used in relation to costs, such as charge variation mechanisms and indexation.

Some services are highly dependent on expenses that vary unpredictably, such as energy. The contract documentation may therefore contain specific clauses that vary the supplier's fees accordingly. If such clauses are not included, the supplier cannot later renegotiate the contractual terms. Under general French contractual principles, a private law contract cannot be varied due to a change in economic conditions.

When a contract is signed for a relatively long period, it generally includes a price revision mechanism based on an agreed index. The Syntec index is often used in French outsourcing transactions.

The customer tries to reduce costs by introducing provisions such as:

- Most favoured nation.
- Benchmarking.
- Decreasing unit prices based on volume, in pay as you go contracts.

CUSTOMER ISSUES

19. If the supplier fails to perform its obligations, what relief is available to the customer under general law?

If the supplier fails to perform its obligations, the customer can either terminate the contract and/or ask for damages. Termination is only available if the supplier's breach is serious. If the contract does not include a specific termination for breach provision, the court determines whether the breach is serious enough to justify a termination (see *Question 25*).

Generally, specific performance is difficult to obtain for negative obligations and unavailable for positive obligations.

20. What customer protections are typically included in the contract documentation to supplement relief available under general law?

The following protections are typically included:

- Termination for cause provisions (see *Question 26*).
- Penalties in the form of services credits payable to the customer, or provisions for withholding or reducing payments to the supplier (although the courts can reduce penalties (see *Question 16*)).

- A clause allowing the customer to outsource the services to another supplier, at the original supplier's cost.
- Insurance.
- Parent company guarantees.
- Escalation provisions to escalate resolution of the issues within the respective organisations.

WARRANTIES AND INDEMNITIES

21. What warranties and/or indemnities are typically included in the contract documentation?

Generally, the supplier must provide the following warranties and indemnities:

- That it has the capacity to enter into the contract.
- That it complies with all applicable regulations, and has and will maintain all the authorisations needed to carry out the services.
- That it has the human, financial and material means to provide the services.
- That it will provide the services in a professional manner.
- That the services will comply with the specifications agreed by the parties.
- When the outsourced activity is placed in a specific Newco and the customer makes a payment to the Newco (as a down payment or a subsidy), that it will not use this payment for any purpose other than the proper running of Newco (see *Question 3, Common structures*).
- That it will indemnify the customer if its employees working on the outsourcing contract make any employment claim against the customer.

The contract also generally stipulates that the customer or supplier must indemnify the other for IP rights that it gives under the contract that infringe a third party's IP rights.

Where employees are transferred, the customer or the supplier will indemnify the other party for transferred employee claims, depending on whether they relate to events before or after the transfer.

22. What limitations are imposed by national law on fitness for purpose and quality of service warranties?

French law does not impose or imply fitness for purpose and quality of service warranties in outsourcing agreements. However, the customer often requires these (see *Question 16*).

TERM AND NOTICE PERIOD

23. Does national law impose any maximum or minimum term on an outsourcing? If so, can the parties vary this by agreement?

French law does not impose any maximum or minimum term on an outsourcing. In practice, outsourcing contracts are often for between three and seven years. However, exclusive supply agreements of more than five years are subject to specific rules under European competition law.

24. Does national law regulate the length of notice period required (maximum or minimum)? If so, can the parties vary this by agreement?

Usually, outsourcing contracts are entered into for a fixed term with a tacit renewal provision. The length of the notice period to terminate in indefinite term contracts, or the length of the notice period not to renew in fixed term contracts, is not regulated and it can be set by the parties to the agreement. However, the notice must be reasonable (taking into account the length, the stability and the strength of the contractual relationship), failing which the termination may be deemed unfair.

For contract terms between three and seven years, it is common to have notice periods of between six and 12 months.

TERMINATION AND TERMINATION CONSEQUENCES

25. What events are considered sufficient under national law to justify termination of an outsourcing rather than a claim in damages (for example, fundamental breach, repudiatory breach, insolvency events and so on)?

The law does not state which specific events can justify termination, but the right for one party to obtain termination of the contract in court if the other fails to perform its obligations is implied into every contract (*Article 1184, Civil Code*).

In principle, it is necessary to ask a court to pronounce the contract terminated unless the contract specifically allows the parties to terminate for breach without a court decision. Only a serious breach can give rise to termination, the seriousness of the breach being a factual question.

As a matter of public policy, insolvency events in themselves are never a valid reason for termination by the other party. However, French law gives a specific mechanism for terminating a contract in bankruptcy situations, subject to particular conditions.

26. In what circumstances can the parties exclude or agree additional termination rights (for example, for breach, change of control, convenience and so on)?

It is possible for the parties to include a provision in the agreement allowing them to terminate the contract for a specific rea-

son, such as breach of a particular obligation or change of control. In that case, it is not necessary for a court to order termination. However, the other party may ask the court after the event to determine whether or not the termination conditions were met.

As a matter of public policy, a provision providing for the right to terminate for the supplier's bankruptcy is void (*see Question 25*).

27. What implied rights are there for the supplier to continue to use licensed IP rights post-termination? To what extent can these be excluded or included by contract?

There are no implied rights for the supplier to continue using licensed IP rights following termination of the outsourcing agreement.

However, parties are free to make specific arrangements for the supplier to use the IP rights post-termination.

28. To what extent can the customer gain access to the supplier's know-how post-termination and what use can it make of it?

In principle, the customer has no right to access the supplier's know-how after termination. However, the outsourcing agreement generally has a reversibility clause, which allows the customer to either perform the outsourced activity itself or to outsource the services to a new supplier on termination. The clause should list the conditions and formalities of this reversibility, which can include an undertaking by the supplier to help to train the customer's or new outsourcer's staff for a certain period of time. During this transitional period, the customer gains limited access to the supplier's know-how. The reversibility clause may authorise the customer to use the supplier's know-how to the extent necessary for it or the new outsourcer to continue performing the outsourced activity.

The customer may also gain access to the supplier's know-how when the contract or the specific situation provide for the return (transfer back) of certain employees to the customer at the end of the outsourcing.

LIABILITY

29. What liability can be excluded? In particular, is it possible for the supplier to exclude liability for indirect and consequential loss and also any loss of business, profit or revenue?

The breaching party is only responsible for the direct loss suffered by the other party (that is, a loss directly resulting from the breach). However, it is advisable for the supplier to include in the agreement an express exclusion of liability for indirect and consequential loss in order to precisely list and define in advance what does not constitute direct loss.

Parties are free to agree on limitations or exclusions of liability subject to the following restrictions:

- A limitation or exclusion of liability will not apply to cases of:
 - wilful misrepresentation (*dol*);

- gross negligence (*faute lourde*);
- death or personal injury.
- The courts have cancelled limitation or exclusion provisions applying to an essential duty arising out of the contract where these provisions are considered to deprive the agreement of consideration.

30. Are the parties free to agree a cap on liability? If so, how is this usually fixed?

Parties are free to agree on a provision setting a cap on liability in case of damages resulting from a breach, even though the direct loss suffered may be higher than the cap. However, such a provision is subject to the general restrictions on limitation of liability (see *Question 29*).

Generally, the cap is applied per event or for a period (frequently a calendar year or a contractual year). In practice, the cap is often calculated on the basis of around 12 months' fees.

TAX

31. What are the main tax issues that arise on an outsourcing in relation to:

- Transfers of assets to the supplier?
- Transfers of employees to the supplier?
- Value added tax (VAT) or the equivalent sales tax on the service being supplied?
- Other significant tax issues?

Transfers of assets to the supplier

In a sale of assets to the supplier, the customer is subject to corporate income tax on the capital gains generated on the assets.

The supplier can be subject to one or both of the following:

- **VAT.** VAT is payable on the assets sold, unless the transaction qualifies as a whole or part of assets (*universalité totale ou partielle de biens*). Receivables are not subject to any duties while inventories are subject to VAT.
- **Registration duties.** These are due on the value of the going concern (*fonds de commerce*), goodwill (*clientèle*) and equipment at:

- 3% on values between EUR23,000 (about US\$32,300) and EUR200,000 (about US\$281,000);
- 5% on values over EUR200,000.

Real estate assets are subject to registration duties at 5.09%.

Where assets are contributed to a Newco by a customer subject to corporate income tax and Newco's shares are then sold to the supplier, registration duties on the contribution are capped at EUR500 (about US\$700) if it qualifies as a transfer of a full and autonomous line of business (*apport d'une branche complète d'activité*). However, the sale of the shares just after the asset transfer may constitute an abuse of law where the sole aim is to reduce tax. This can be shown by the sale of the entire shareholding without any commercial justification.

Transfers of employees to the supplier

The transfer of both employees and assets can be considered a business transfer and subject to registration duty at the same rate as assets (see *above, Transfers of assets to the supplier*).

VAT or sales tax

Services supplied in France are subject to VAT at the ordinary rate of 19.6%, unless French territoriality rules provide otherwise. VAT paid by the customer for the services is deductible, unless the customer itself is partially liable to tax.

Other

There are no other significant tax issues. However, if the outsourcing contract transfers important tangible fixed assets, it can increase the supplier's business tax liability (*taxe professionnelle*). The supplier may sometimes ask for such additional business tax to be reimbursed by the customer.

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