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Outsourcing 2017

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A practical cross-border insight into outsourcing

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Switzerland

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1 Regulatory Framework

1.1 Are there any national laws that specifically regulate outsourcing transactions?

No. There are no laws specifically regulating outsourcing transactions. However, the Federal Act on Data Protection of 19 June 1992 ("**FADP**") includes some general rules on outsourcing. Please note that the FADP is currently part of an amendment project. The time limit for consultation regarding the preliminary draft has just elapsed. The responsible Federal department will review the comments and consolidate the draft in order to present it to the Federal Parliament.

1.2 Are there any additional legal or regulatory requirements for certain types of outsourcing transactions, for example: a) public sector transactions; b) business process transactions; c) financial services transactions; d) IT transactions; and e) telecommunications transactions?

There are additional requirements for some types of outsourcing transactions. These additional requirements are mainly based on secrecy obligations of the data controller.

a) There are no specific outsourcing rules for public sector transactions; however, detailed requirements on data protection, secrecy and public procurement (in particular public calls to tenders) may apply.

b) There are no specific outsourcing requirements for business process transactions; however, there are rules on electronically storing accounting records and supporting documents. The annual report and the audit report must be signed and stored physically.

c) The Swiss Financial Market Supervisory Authority ("**FINMA**") has laid down principles for outsourcing financial services transactions in its Circular 2008/7 on Outsourcing for Banks. Chiefly, when outsourcing, banks must guarantee that its auditing companies can always exercise their auditing duties. Besides that, banks must comply with any secrecy obligations, in particular the banking secrecy. Finally, banks may not outsource management, supervision or control functions of the board and the management, nor any decisions on commencing or ending business relationships. Please note that FINMA currently revises the mentioned Circular 2008/7. At present, the time limit for consultation has elapsed; however, the amended version has not yet been publicised. The project foresees that the Circular will also be applicable to the insurance industry.

d) There are no specific outsourcing rules for IT transactions.

e) There are no specific outsourcing rules for telecommunications transactions.

1.3 Are there any further legal or regulatory requirements for outsourcing transactions in any particular industry sector?

Yes. Both the insurance industry and the healthcare sector face additional secrecy obligations, which require additional safeguards in outsourcing contracts. The secrecy concerns are often addressed by either encrypting outsourced data (only the data controller has the key to the data) or by entering into according contractual secrecy obligations with the outsourcer. In addition, please note that FINMA currently foresees that its revised Circular 2008/7 will be applicable also for insurance industry.

1.4 Is there a requirement for an outsourcing transaction to be governed by local law? If it is not to be local law, is there any generally accepted norm relating to the choice of governing law?

No. There is no requirement for an outsourcing transaction to be governed by Swiss law. However, the outsourcing must be conducted in accordance with all requirements of Swiss law (as described above). Obviously, mandatory Swiss statutory law will override any contractual provisions. Furthermore, mandatory public law (e.g. data protection laws, penal code, etc.) will apply despite a choice of law clause. Finally, there is no generally accepted norm relating to the choice of governing law.

2 Legal Structure

2.1 What are the most common types of legal structure used for an outsourcing transaction?

Generally, the outsourcing relationship is based on a contract between two independent companies. However, any other structure is possible as well, such as a joint venture or an affiliate within the same group of companies.

3 Procurement Process

3.1 What is the most common type of procurement process that is used to select a supplier?

In private procurement, the type of process mainly depends on the volume of the requested services and is often subject to specific corporate governance rules. In general, companies select their supplier by sending out an invitation to offer to a range of known suppliers. Usually, at least three potential service providers are contacted.

The type of process chosen for public procurement depends on several factors; chief among them, the value of the contract and whether it is a federal or cantonal/local entity procuring services. On both federal and cantonal levels, either open or selective tender proceedings are the usual process set by law. Under certain conditions, a tender by invitation is also a possible instrument, whereas a direct award (*freihändiges Verfahren*) is only permitted in exceptional circumstances.

4 Term of an Outsourcing Agreement

4.1 Does national or local law impose any maximum or minimum term for an outsourcing contract?

No. There are no mandatory minimum or maximum terms for an outsourcing contract.

4.2 Does national or local law regulate the length of the notice period that is required to terminate an outsourcing contract?

No. There are no mandatory notice periods for outsourcing contracts. Certain other forms of outsourcing, e.g. a joint venture, may be subject to mandatory notice periods.

5 Charging

5.1 What are the most common charging methods used in outsourcing transactions?

In practice, many different charging mechanisms are used. Regularly, companies choose volume-based charging, one-time fees, annually or monthly recurring fees or transaction-based charging.

5.2 What other key terms are used in relation to costs in outsourcing transactions?

Besides charging for outsourcing services based on different methods, such as volume-based charging or recurring fees, companies regularly agree on a bonus/malus system in order to guarantee a certain level of service quality. These bonus/malus agreements are regularly designed and set out in a service level agreement ("**SLA**"). Please refer to section 10 for further details.

6 Transfer of Assets

6.1 What formalities are required to transfer, lease or license assets on an outsourcing transaction?

The required formalities for transferring, leasing or licensing assets depend on the type of assets involved. Assigning any rights, such as intellectual property rights, requires the assignor to sign a written assignment declaration. Licences and leases are, generally, in written form, but there is no requirement for such form.

6.2 What are the formalities for the transfer of land?

Any transfer of land must be based on a written and notarised contract (public deed). In addition, the entry into the land register is generally constitutive for the transfer of land (exceptions apply for transfers according to the Swiss Merger Act).

In addition, some transfers of land may be subject to further authorisations. Land acquisition in Switzerland by a non-Swiss resident may be subject to an authorisation by the competent cantonal authority unless certain exceptions apply, such as acquiring land for living or commercial real estate (art. 2 of the Federal Act on the Acquisition of Land by Persons Abroad of 16 December 1983). Similarly, in order to transfer any contaminated site (according to art. 32d*bis* of the Federal Act on Protection of the Environment of 7 October 1983), an authorisation of the competent cantonal authority is required.

6.3 What post-completion matters must be attended to?

Assignments and licences of intellectual property rights must be recorded in the respective registers in order to become binding on third parties acting in good faith. However, such register entries are not constitutive for the actual transfer of the rights.

The transfer of land must be entered into a cantonal land register, which is generally constitutive for the transfer (see also question 6.2 above).

6.4 How is the transfer registered?

Intellectual property rights are registered in national registers, such as the trademark register or the patent register administered by the Swiss Federal Institute of Intellectual Property.

As mentioned above, land ownership is registered in cantonal land registers at the place where the land is located.

7 Employment Law

7.1 When are employees transferred by operation of law?

Art. 333 of the Swiss Code of Obligations ("**CO**") stipulates an automatic transfer of the employment relationship to the acquirer, if the employer assigns a business or parts thereof. The affected employee has the right to object to the transfer. This also applies to mergers, splits or asset transfers in accordance with art. 27 of the Swiss Merger Act ("**MA**").

Business transfer rules only apply if the business preserves its identity post transfer. This may not be the case in long-distance transfers, i.e. where the old place of work was Geneva and the new place will be in Zurich.

7.2 On what terms would a transfer by operation of law take place?

The employment relationship will transfer with all rights and obligations. This includes benefits granted through the employment agreement or based on a collective bargaining agreement. The former employer and the acquirer are jointly and severally liable for employee's claims which (i) are due prior to the transfer, or (ii) will become due up to the date the employment relationship can effectively be terminated or until its actual termination based on the employee's objection to the transfer (art. 333 CO). The transferring employer shall inform all employees about the transfer prior to the transfer (art. 333a CO).

7.3 What employee information should the parties provide to each other?

During the process of due diligence, providing personal data must be reasonable in relation to the due diligence status. Only personal data necessary for negotiations shall be disclosed and employee data anonymised to the extent possible. Usually, details on employment terms and conditions, salaries, notice periods and seniority of the affected employees are provided within the limits of the FADP.

Upon the transfer, the acquirer must be provided with the necessary information in order to fulfil the transferred rights and obligations.

Transferring personal data abroad is subject to further restrictions.

7.4 Is a customer/supplier allowed to dismiss an employee for a reason connected to the outsourcing?

Yes, provided the respective notice period is observed. Additional mass termination provisions may apply (art. 335d *et seqq*. CO).

7.5 Is a supplier allowed to harmonise the employment terms of a transferring employee with those of its existing workforce?

Yes. The employee's consent is required, since harmonising employment terms involves a change of the employee's employment agreement.

7.6 Are there any pensions considerations?

The transfer of an employment relationship also includes all pension-related obligations. Special attention must be given, *inter alia*, to the scope of an employer's obligation to contribute additional capital to the pension fund in the case of a possible shortfall, to any individual commitments regarding pension benefits, any existence of long-service awards or special pension benefits not financed through the pension fund.

In the case of a collective exit, the pension plan of the former employer gets partially liquidated. The pension plan rules stipulate the thresholds for a collective exit triggering a partial liquidation (art. 53b of the Federal Law on Occupational Old-age, Survivor's and Disability Insurance).

7.7 Are there any offshore outsourcing considerations?

Disclosure of personal data abroad is prohibited, if the personal integrity of the concerned data subjects would be seriously harmed (art. 6 FADP). The law assumes a serious harm if no appropriate protection is ensured in the country into which the data is transferred. Moreover, the transfer must comply with the general principles of the FADP. The data transfer must also not contradict statutory or contractual secrecy obligations. For further details, refer to the following section 8.

8 Data Protection Issues

8.1 What are the most material legal or regulatory requirements and issues concerning data security and data protection that may arise on an outsourcing transaction?

Generally, any outsourcing transaction must be in line with the requirements of art. 10a FADP. Any other regulatory requirements are highly dependent on the industry of the entity planning to outsource. FINMA has developed detailed guidelines for the outsourcing of banking services (Circular 2008/7 on Outsourcing for Banks), which will probably in the near future also apply to insurance industry (refer to question 1.3). In addition to the banking sector, other industries are subject to rules, guidelines and practices, such as the insurance and the healthcare sectors.

According to art. 10a FADP, the following requirements for outsourcing transactions apply:

- a written agreement between the principal (outsourcing party) and the mandated party (service provider) is required, unless the outsourcing is required by statutory law;
- personal data may only be processed in the manner permitted for the principal itself (outsourcing party);
- the processing of personal data must not be prohibited by a statutory or contractual duty of confidentiality; and
- the principal (outsourcing party) must ensure that the mandated party (service provider) provides for data security in accordance with the requirements of the Ordinance to the Federal Act on Data Protection ("**OFADP**").

Under the aforementioned requirements, the involved parties may make use of the so-called "outsourcing privileges", e.g. no consent from data subjects is required for outsourcing, data collections do not need to be registered with the Federal Data Protection and Information Commissioner ("**FDPIC**"), etc.

Furthermore, outsourcing agreements must contain provisions, which guarantee that the service provider will only process personal data in accordance with the instructions given by the principal (outsourcing party). In the financial services sector, FINMA requires an audit right for themselves to inspect compliance with the applicable regulatory provisions (Circular 2008/7 on Outsourcing for Banks).

Any data processor, whether it is a service provider processing data on behalf of a principal or a regular data processor, must fulfil the following mandatory data security requirements (art. 8 OFADP):

1. *Anyone who as private individual processes personal data or provides a data communication network shall ensure the confidentiality, availability and the integrity of the data in order to ensure an appropriate level of data protection. In particular, he shall protect the systems against the following risks:*
   - ***a.*** *unauthorised or accidental destruction;*
   - ***b.*** *accidental loss;*
   - ***c.*** *technical faults;*
   - ***d.*** *forgery, theft or unlawful use;*
   - ***e.*** *unauthorised alteration, copying, access or other unauthorised processing.*

2. *The technical and organisational measures must be adequate. In particular, they must take account of the following criteria:*
   - ***a.*** *the purpose of the data processing;*
   - ***b.*** *the nature and extent of the data processing;*
   - ***c.*** *an assessment of the possible risks to the data subjects;*
   - ***d.*** *the current state of the art.*
3. *These measures must be reviewed periodically.*

For cases of cross-border outsourcing, the FDPIC provides a sample Swiss Transborder Data Flow Agreement, which allows data processors and outsourcers to comply with the requirements stipulated in the FADP regarding cross-border data transfers.

9 Tax Issues

9.1 What are the tax issues on transferring the outsourced business – either on entering into or terminating the contract?

The transfer of assets generally results in income taxation of the hidden reserves (*stille Reserven*). The transfer of real estate may be subject to real estate gains tax and/or real estate transfer taxes (depending on the canton where the real estate is located). The transfer of securities and certain balances may result in federal securities transfer tax. Additional cantonal transfer and/or registration taxes may apply.

Intragroup transfers of business operations of fixed business assets, and of shareholdings of at least 10%, are basically exempt from taxation if the assets remain subject to taxation in Switzerland and if the tax basis is maintained. Depending on the form of the transfer, subsequent taxation applies if the transferee alienates the assets within five years.

Intragroup outsourcing must be at arm's length and in line with general transfer pricing principles. The termination of contracts without adequate compensation and/or a notice period may give rise to taxation of a constructive dividend/profit shift. According to prevailing doctrine, the mere shift of functions should not be taxed.

9.2 Is there any VAT leakage on the supply of services under the outsourcing contract?

In the case of a transfer of a going concern between parties subject to Swiss VAT, the transferee must take over the transferor's VAT basis. This may result in a VAT leakage if the transferee is entitled to a lower input VAT deduction than the transferor and/or if the transferor's VAT basis is not completely documented. Depending on the entitlement to input VAT deduction, intragroup outsourcing may result in a VAT leakage, which can be neutralised by group taxation. A reduced entitlement to input VAT deduction typically applies to institutions in the public and financial sectors.

9.3 What other tax issues may arise?

Depending on the form and scope of the outsourcing transaction, tax liabilities and/or tax loss carryforward may be transferred to the entity taking over the business operations/assets.

10 Service Levels

10.1 What is the usual approach with regard to service levels and service credits?

Swiss law has no specific provisions relating to service levels and service credits. Generally, SLAs set out specific and measurable service criteria to be fulfilled by the service provider and are usually included in an exhibit to the outsourcing framework agreement.

The cornerstones of an SLA can be summarised as follows:

- description of measurable service;
- specification of the service criteria (availability and reliability of the system, speed of system, trouble-shooting, etc.);
- measurement procedure of service criteria; and
- consequences of non-fulfilment of service criteria.

The parties often agree either on a contractual penalty or a so-called bonus/malus system in order to punish the non-fulfilment of service criteria. In the case of a bonus/malus system, the service provider must pay a penalty if service criteria are not met and is entitled to a service credit if the service goals are "overachieved". It is crucial to carefully distinguish between contractual penalties (and bonus/malus system) and claims which originate from the non-fulfilment of the outsourcing framework contract or a statement of work ("SOW"). In addition, the parties should draft clear rules on whether the outsourcing party (principal) may demand further damages in addition to the amounts received based on the contractual penalty or bonus/malus system. Finally, it must be kept in mind that, under Swiss law, a judge may in her/his sole discretion reduce any contractually agreed upon penalties (art. 163 CO), which, in turn, may warrant taking a conservative approach with regard to the amount of contractual penalties, such as liquidated damages.

11 Customer Remedies

11.1 What remedies are available to the customer under general law if the supplier breaches the contract?

Swiss law has no specific statutory provisions governing the outsourcing agreement and the breach of such agreement. Usually, outsourcing agreements contain elements of the statutory provisions relating to contracts for work and services, to sales contracts and to corporations. Consequently, the applicable statutory provisions and corresponding remedies are highly dependent on which part of the outsourcing agreement was breached. In addition, the parties are free to determine remedies, since many of the relevant statutory provisions are not mandatory.

Usually, parties agree on the following remedies in outsourcing agreements:

- reduction of outsourcing fees;
- remediation of defects;
- termination of the outsourcing agreement;
- replacement of hardware;
- monetary compensation for damages, including liquidated damages; and
- rescission of the outsourcing agreement.

11.2 What additional protections could be included in the contract documentation to protect the customer?

Many outsourcing agreements also include the following advisable provisions:

- a review mechanism of the ongoing outsourcing on a regular basis (e.g. annually) by both parties in order to redefine the outsourcing party's needs;
- a reasonably long announcement period for changes of the outsourcing agreement;
- an exhaustive and well-defined list of reasons, under which the amendment of the outsourcing agreement is permissible;
- a definition of the limits of tolerance and scope of scalability in order for the parties to be able to react to changes; and
- a mechanism to accommodate for price changes (including a right to benchmark).

11.3 What are the typical warranties and/or indemnities that are included in an outsourcing contract?

As described in more detail above, the parties are relatively free to choose the warranties and/or indemnities best suited to their needs in the outsourcing contract under Swiss law. Generally, no mandatory warranties or indemnities must be included in an outsourcing agreement, although it is advisable to include some corresponding provisions. In addition, the best suited warranties or indemnities are highly dependent on the type of outsourcing contract. In the case of a purchase of hard- and software, contract warranties should be included (art. 192 *et seqq*. CO). Contrarily, a mere service contract should include elements of mandate contract warranties (art. 398 *et seqq*. CO).

Typical warranties and/or indemnities found in outsourcing agreements are as follows:

- warranties for hardware and software;
- warranties for the diligent performance of the services (all other warranties in this context are generally included in the SLA); and
- indemnities for the infringement of third party intellectual property rights.

12 Insurance

12.1 What types of insurance should be considered in order to cover the risks involved in an outsourcing transaction?

Unfortunately, insurance coverage of the service provider is often not considered sufficiently in Switzerland. The outsourcing party's insurance often does not cover the outsourced business area, which causes an interruption of the outsourcing party's in-house business. In light of this, the risk for such interruptions is usually shifted to the service provider who would typically enter into indemnity insurance. The outsourcing contract should therefore contain an insurance clause, which sets out the cornerstones of insurance coverage, e.g. the type of damages, degree of default, amount of coverage and deductibles.

13 Termination

13.1 How can a party to an outsourcing agreement terminate the agreement without giving rise to a claim for damages from the terminated party?

Under Swiss law, there are no specific provisions relating to the termination of an outsourcing agreement. Therefore, the termination period and the reasons for termination are agreed upon in advance in the outsourcing agreement. If an outsourcing agreement is terminated in accordance with the ordinary resp. contractually agreed upon termination period, there will be no claim for damages. However, if the agreement is terminated without notice and for no valid reason, there may be a claim for damages.

13.2 Can the parties exclude or agree additional termination rights?

Yes. The parties are free to exclude or agree upon additional termination rights at their own discretion. However, a duration agreement can be terminated at any time for valid reasons.

13.3 Are there any mandatory local laws that might override the termination rights that one might expect to see in an outsourcing contract?

As detailed above, the applicability of any mandatory termination rights depends on the qualification of the outsourcing agreement. If statutory provisions of the mandate contract apply, an outsourcing agreement may be terminated by both parties, at any time, without reason and without any financial consequences (art. 404 CO). However, usually, outsourcing agreements contain elements of various contract types and are not considered "pure" mandate contracts. Therefore, other mandatory termination rights may apply.

14 Intellectual Property

14.1 How are the intellectual property rights of each party protected in an outsourcing transaction?

There is no specific statutory law applying to outsourcing agreements only. The parties are entirely free to agree on the applicable rules. If the parties do not agree on any provisions on intellectual property rights, the following statutory rules apply with regard to newly developed intellectual property rights:

- If employees make an invention or the like within their scope of work, the according intellectual property rights (in particular, inventions) vest automatically in the employer (art. 332 CO).
- Any intellectual property rights created by non-employees, such as contractors, vest in and are owned by such persons.

Consequently, it is crucial for the parties to agree in advance in their outsourcing agreement on who owns the rights to inventions and the like, and how these rights will be protected.

14.2 Are know-how, trade secrets and other business critical confidential information protected by local law?

Know-how, trade secrets and other business critical confidential information are not protected by law as such and must therefore

be protected by contractual agreement ("**NDAs**"). However, the Federal Act Against Unfair Competition and the Criminal Code provide for penalties for the breach of trade secrets and the exploitation of such secrets. NDAs usually provide for penalties for the breach/dissemination of know-how, trade secrets and other business critical confidential information.

14.3 Are there any implied rights for the supplier to continue to use licensed IP rights post-termination and can these be excluded from the agreement?

No, there are no such implied rights. Usually, the outsourcing agreement states that post termination the supplier must cease to use any licensed IP rights. Accordingly, the use can be excluded in the respective outsourcing agreement.

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

This is purely a contractual question. There are no statutory provisions in this context. It is therefore crucial that the outsourcing agreement stipulates provisions on these matters.

15 Liability

15.1 To what extent can a party limit or exclude liability under national law?

Under Swiss law, the parties cannot exclude liability for damages caused by intent or gross negligence, as well as for damages for bodily harm or death, in advance. Such provisions are void. Damages for slight to medium negligence may be excluded in advance.

15.2 Are the parties free to agree a financial cap on liability?

Generally, yes; unless such financial cap relates to damages caused by intent or gross negligence, or relates to damages for bodily harm or death. In such cases, the financial cap would not apply.

16 Dispute Resolution

16.1 What are the main methods of dispute resolution used?

There is no general or main method for dispute resolution. Swiss outsourcing agreements may include provisions on alternative dispute resolution ("**ADR**") (including mediation and arbitration) or provisions on state courts. Typically, parties provide for escalation procedures, which they must go through before they can resort to ADR or state courts.

17 Good Faith

17.1 Is there any overriding requirement for a customer and supplier to act in good faith and to act fairly according to some objective test of fairness or reasonableness under general law?

Yes, Swiss law stipulates the general principle that parties must act in good faith (art. 2 of the Swiss Civil Code). Claiming damages solely based on the breach of art. 2 of the Swiss Civil Code is difficult, however.

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