



# Outsourcing of Data: dos and don'ts for in-house counsel

29 October 2020

# Agenda

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## Welcome by ACC country representative

### Part 1: Input presentations

- Main provisions of outsourcing agreements under Swiss law ([Sarah Drukarch](#))
- Swiss data protection issues in the context of processing and data storage abroad and in the cloud ([Nando Lappert](#))

### Part 2: Panel discussions

- Panelists:
  - [Lukas Gysi](#), Attorney-at-law, LL.M., IBM Law Department
  - [Christof Höfner](#), Senior Legal Counsel, Zurich Insurance
- Moderator: [Sarah Drukarch](#)

## Part 1 – First presentation

# Main provisions of outsourcing agreements under Swiss law

*by Sarah Drukarch*

# Introductory questions

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- Did you already negotiate an outsourcing agreement?
- If so: which services or data were the subject of your outsourcing agreement(s)?

*Please answer the questions using mentimeter via your mobile phone using the following link: [www.menti.com](https://www.menti.com)*

*and the following password/code: **69 47 72 9***

*Any questions to the panel may also be sent via mentimeter or via e-mail to [nando.lappert@pestalozzilaw.com](mailto:nando.lappert@pestalozzilaw.com)*



# Outsourcing of data

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"the practice of using an **outside organization** to provide **computing services**, rather than the company's own employees"

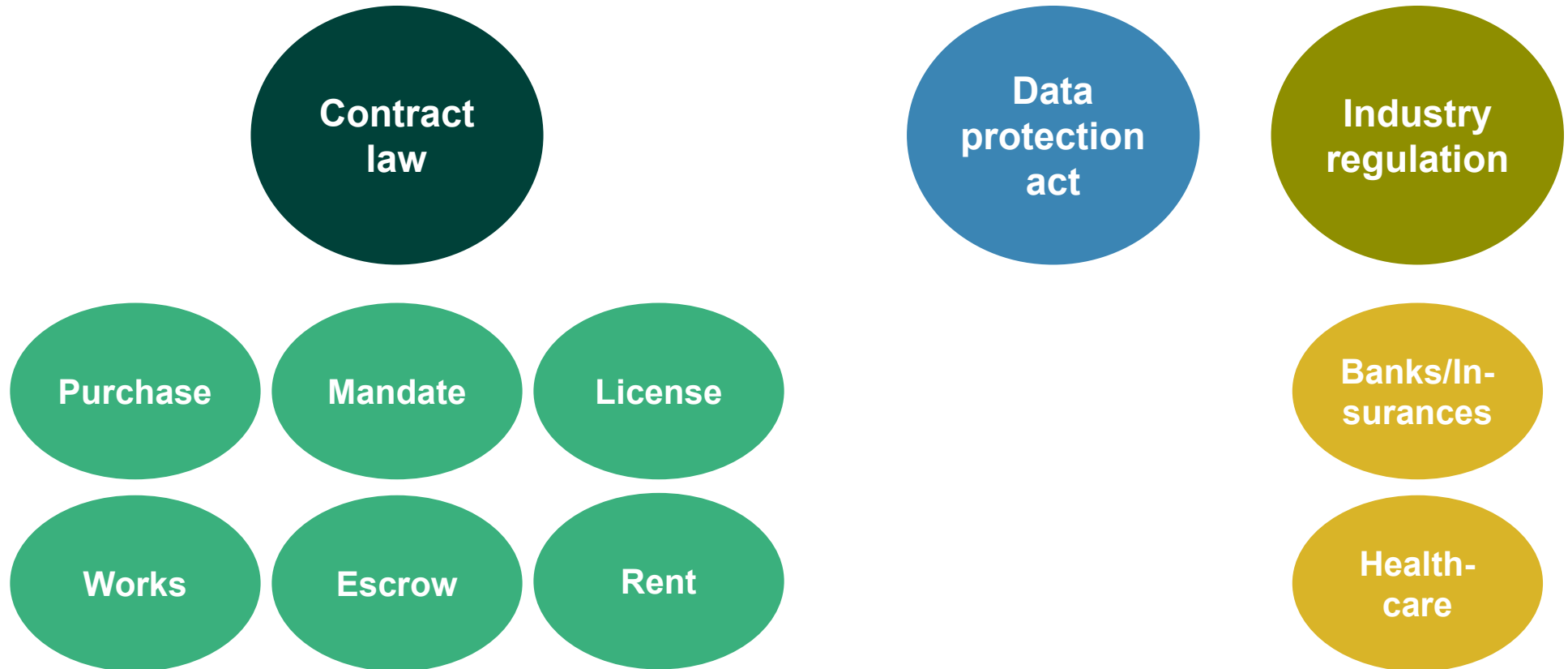
Cambridge Business English Dictionary

"Outsourcing within the meaning of this circular occurs when a company mandates a **service provider** to perform all or part of a function that is significant to the company's **business activities** independently and on an **ongoing basis**. Significant functions are those that have a material effect on compliance with the aims and regulations of financial market legislation."

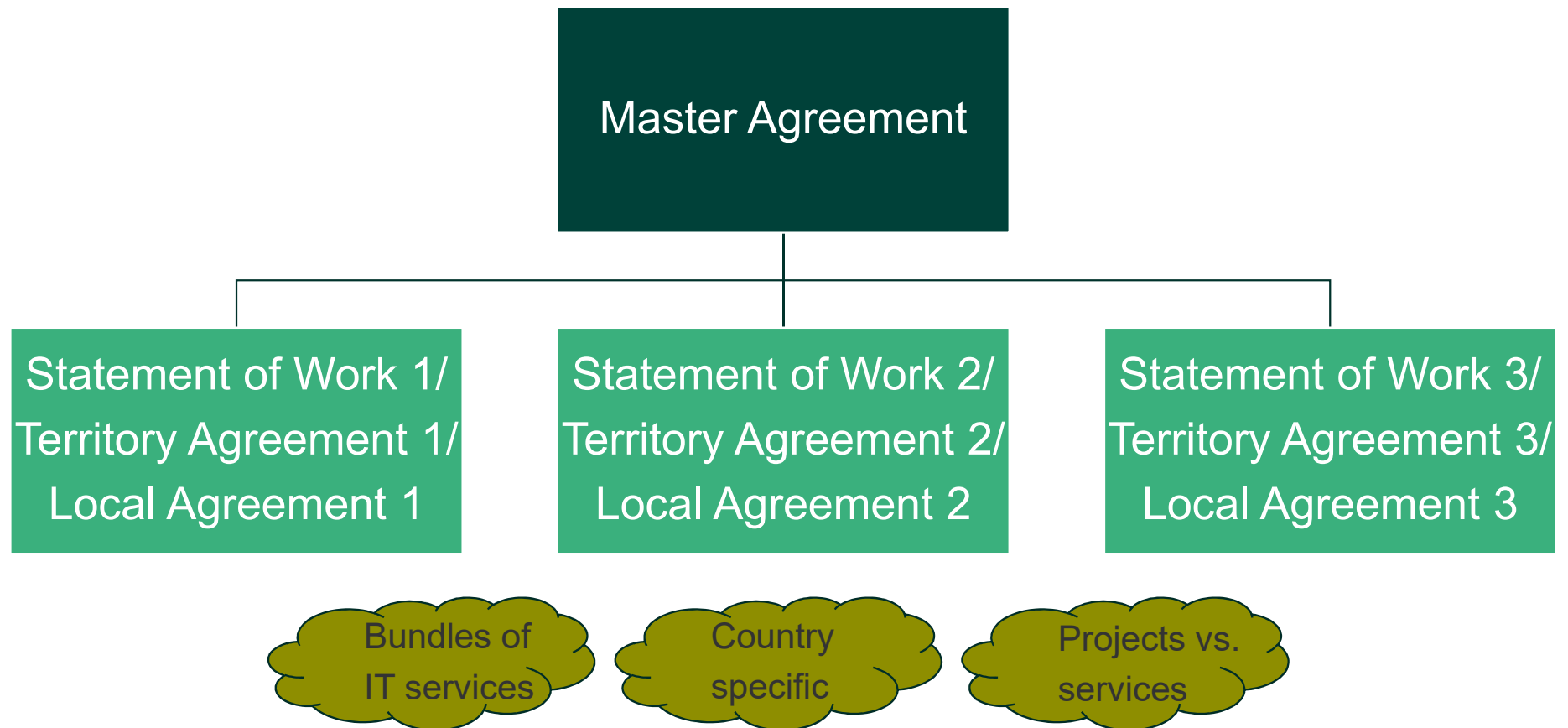
FINMA Circ. 18/3 "Outsourcing – banks and insurers"

- **IT outsourcing may include utility services, software as a service and cloud-enabled outsourcing**

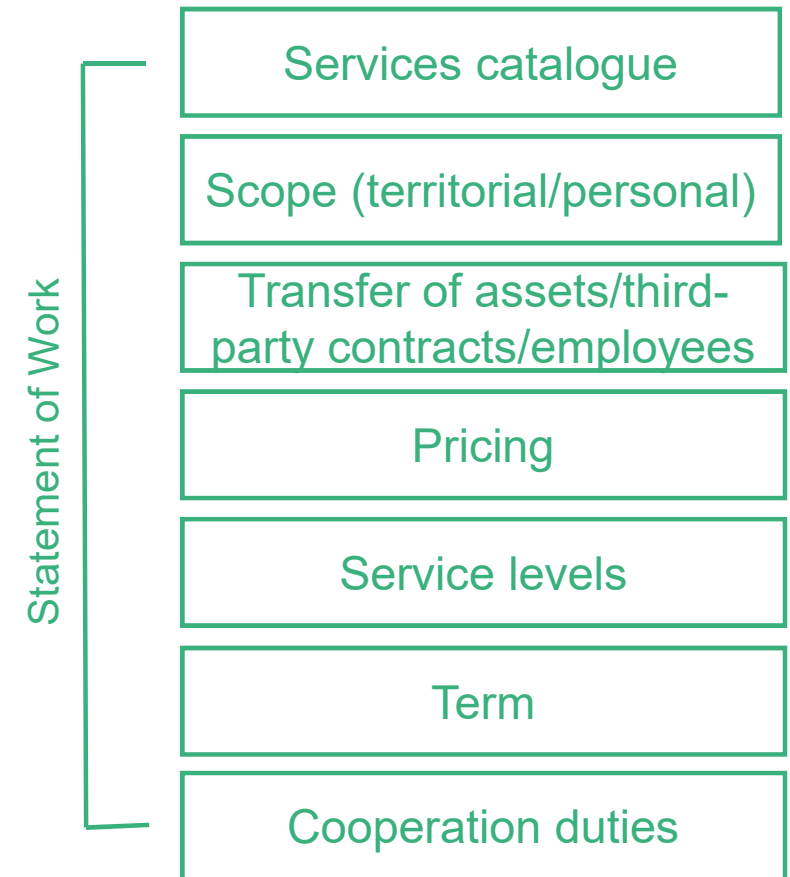
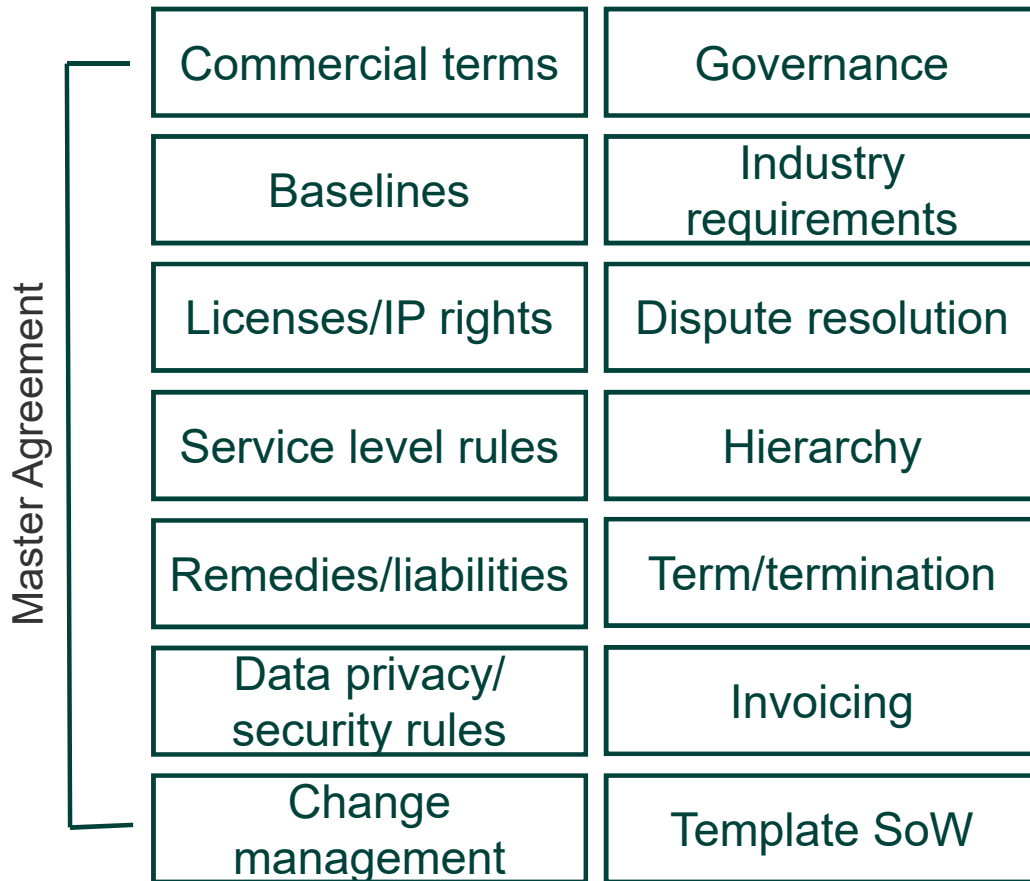
# Legal framework



# Typical agreements' structure



# Typical agreements' structure





# Remedies and liabilities

## Remedies

Items	Qualification (approx.)	Remedies
Hardware	rental	fixing or replacement
Applications	mandate	fixing, service credits
Maintenance	mandate	fixing, service credits
Customization	work	non-acceptance, re-doing, default, substitute performance

## Liabilities

- Liability caps and their effects on service credits
  - Exclusion of liability for simple negligence?
- Exclusion of remedies available under applicable law (?)

# Dispute resolution

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- Escalation procedure
- Consider alternative dispute resolution: arbitration and mediation
- If state courts, consider cantons with commercial courts (Zurich, Aargau, St. Gallen, Bern)

# Question

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- In the aftermath of this summer's Schrems II decision, did you have to answer questions related to data transfers abroad and their feasibility within your company?

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## Part 1 – Second presentation

# Swiss data protection issues in the context of processing and data storage abroad and in the cloud

*by Nando Lappert*

# Agenda



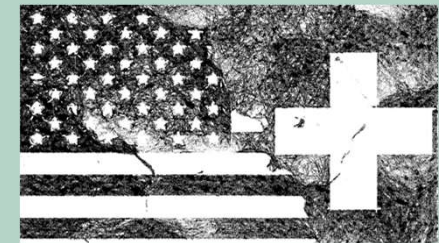
Data categories /  
Applicable law



Requirements for  
assignment of data  
processing



Requirements for  
cross-border data  
disclosure



Impacts of Schrems II  
on Swiss companies

# Determine the applicable law

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- **Factual data:**

- Anonymized data;
- Pseudonymized data where the key for decryption remains with the "data controller" (or client) and decryption is not reasonably possible.



- **Personal data:** All information relating to an identified or identifiable natural or legal person.
- Sensitive personal data (*inter alia*): Data on religious views or activities, health, or administrative or criminal proceedings and sanctions.
- Personality Profiles: Collection of data that permits an assessment of essential characteristics of the personality of a natural person.



# Respect FADP's restrictions

## Data processing by third parties (art. 10a FADP):

### Art. 10a<sup>16</sup> Data processing by third parties

<sup>1</sup> The processing of personal data may be assigned to third parties **by agreement** or by law if:

- a. the **data is processed only in the manner permitted for the instructing party** itself; and
- b. it is **not prohibited by a statutory or contractual duty of confidentiality**.

<sup>2</sup> The instructing party must in particular ensure that the third party guarantees **data security**.

<sup>3</sup> Third parties may claim the same justification as the instructing party.

## Cross-border data disclosure (art. 6 FADP, *excerpt*):

### Art. 6<sup>11</sup> Cross-border disclosure

<sup>1</sup> Personal data may not be disclosed abroad if the privacy of the data subjects would be seriously endangered thereby, in particular due to the absence of legislation that guarantees **adequate protection**.

<sup>2</sup> In the absence of legislation that guarantees adequate protection, personal data may be disclosed abroad only if:

- a. **sufficient safeguards**, in particular contractual clauses, ensure an adequate level of protection abroad;
- b. the data subject has consented in the specific case;
- g. disclosure is made within the same legal person or company or between legal persons or companies that are under the same management, provided those involved are **subject to data protection rules** that ensure an adequate level of protection.

<sup>3</sup> The Federal Data Protection and Information Commissioner (the Commissioner, Art. 26) must be informed of the safeguards under paragraph 2 letter a and the data protection rules under paragraph 2 letter g. The Federal Council regulates the details of this duty to provide information.

# Requirements for data processing by third parties (art. 10a FADP)

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Agreement, i.e. Data Processing Agreement (DPA), or statutory provision.



Processing only in the manner permitted for the instructing party.



Not prohibited by statutory or contractual duty of confidentiality.



Data security is ensured.

# Requirements for cross-border data disclosure (art. 6 FADP)



- Cross-border disclosure of personal data **permitted**, if recipient state guarantees an adequate level of data protection.
- Meaning of "adequate": see FDPIC's "list of countries".

(<https://www.edoeb.admin.ch/edoeb/en/home/data-protection/handel-und-wirtschaft/transborder-data-flows.html>)



- Cross-border disclosure of personal data **not permitted**, if recipient state does not guarantee an adequate level of data protection.
- Exception: art. 6 para. 2 FADP, **additional protective measures**, for example, **additional safeguards**:
  - EU standard contractual clauses (?);
  - Swiss-U.S. Privacy Shield (?); or
  - Binding Corporate Rules (BCRs).

# Schrems II: Impacts on Switzerland?

- Decision C-311/18 of the European Court of Justice of 16 July 2020 ("**Schrems II**"):  
*"Transfer of personal data to the US and other countries without adequate data protection based on the EU-US Privacy Shield and EU standard contractual clauses?"*

*EU-U.S. Privacy Shield is no longer a valid basis to legally transfer personal data to the USA.*



*SCC remain legally valid. However, data controller may need to take additional protective measures on a case-by-case basis or to refrain from exporting personal data to the country in question if protection is not guaranteed despite the SCC.*

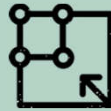
- Statement of the Swiss FDPIC of 8 September 2020 supporting ECJ's decision.

# Reduce the risk of being subject to enforcement measures

## "Operational"



Data Protection  
Impact Assessment



Minimize data



Anonymize  
Pseudonymize

## "Legal"



Use updated SCC



Identify and amend



Amend templates

## "Organisational"



Check alternatives



Create Data  
Management Office



Use certified providers



Inform and train legal  
teams / business units



## Part 2 – Panel discussion



## Team

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# Appendix I: Summary and Overview

	Data processing in Switzerland / no disclosure abroad	Data processing in country <b>with</b> adequate data protection level	Data processing in country <b>without</b> adequate data protection level
Data processing within company			art. 6 para. 2/3 FADP
Data processing within group	art. 10a FADP	art. 10a FADP	art. 10a FADP art. 6 para. 2/3 FADP
Data processing by third party	art. 10a FADP	art. 10a FADP	art. 10a FADP art. 6 para. 2/3 FADP