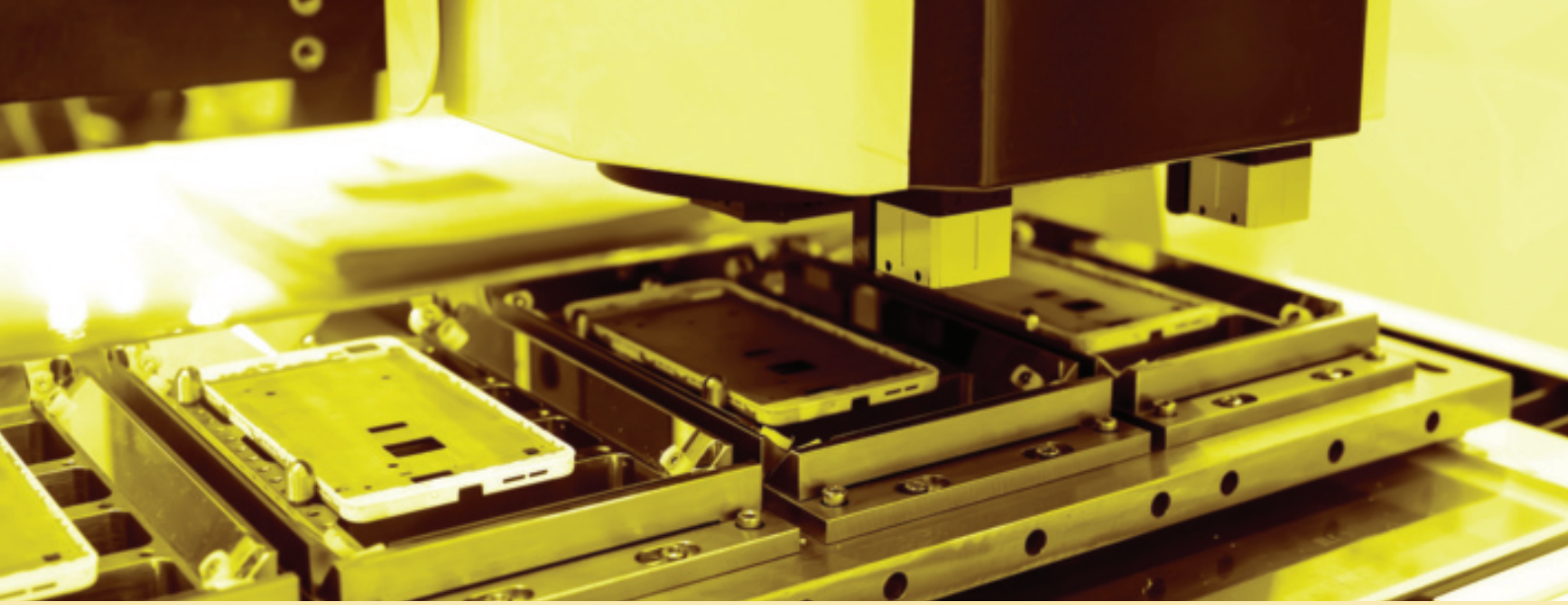

ICLG

The International Comparative Legal Guide to:

Outsourcing 2019

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A practical cross-border insight into outsourcing

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1 Regulatory Framework

1.1 Are there any national laws or regulations that specifically regulate outsourcing transactions, either generally or in relation to particular types of outsourcing transactions (e.g. business process outsourcings, IT outsourcings, telecommunications outsourcings)?

a) Business process transactions

No specific regulations apply to business process transactions. They can, however, be subject to certain sector-specific regulations (e.g. financial sector regulations as set out below under question 1.3) or labour regulations (e.g. supply of personnel).

b) IT transactions

IT transactions are typically regulated by general Luxembourg contract law (and the Civil Code in particular), but are in some sectors subject to specific regulations (e.g. IT outsourcing in the financial sector, see below "financial services transactions" under question 1.3).

c) Telecommunications transactions

No specific regulations apply to telecommunications transactions. However, if the outsourcing entails the provision of electronic communications to the public, the requirements of the amended Law of 30 May 2005 on electronic communications network and services could apply.

1.2 Are there any additional legal or regulatory requirements for outsourcing transactions undertaken by government or public sector bodies?

The outsourcing of public sector activities is regulated by the Act of 9 April 2018 on public procurement, which provides for specific requirements in relation to the award of service agreements by public bodies, notably in view of the nature and value of the contract.

1.3 Are there any additional legal or regulatory requirements for outsourcing transactions undertaken in particular industry sectors, such as for example the financial services sector?

a) Financial services transactions

The Act of 5 April 1993 on the financial sector, as amended ("the Financial Sector Act"), lays down the regulatory principles of central administration and internal governance in the financial sector and applies to professionals of the financial sector, which consists of credit institutions and so-called "PFS" which covers specialised PFS, investment firms and support PFS.

By virtue of Article 41 of such Financial Sector Act, any outsourcing (external and intra-group) to non-regulated Luxembourg companies and foreign companies is now also allowed, provided there is a service contract in place and there is acceptance of the clients in accordance with the law or the modalities agreed upon between the parties.

Such acceptance should extend to: (i) the outsourcing of the relevant services; (ii) the type of information transmitted within the context of such outsourcing; and (iii) the country of establishment of such subcontracting entities. Furthermore, the persons having access to confidential information covered by the professional secrecy obligation must be subject to a professional secrecy obligation or be bound by a non-disclosure agreement.

The *Commission de Surveillance du Secteur Financier* ("the CSSF"), which is the Luxembourg regulatory authority in the financial sector, has furthermore also released several Circulars on the interpretation and application of the Financial Sector Act in relation to outsourcing:

- Circular 17/654 regarding IT outsourcing relying on a cloud computing infrastructure, as updated by Circular 19/714 ("the Cloud Circular").

The Cloud Circular applies to every IT outsourcing scheme that is, even when partially, based on a cloud computing solution within the meaning of the 5 NIST criteria (i.e. on-demand self-service, broad network access, resource pooling, rapid elasticity and measured service), plus two specific CSSF criteria (no access to data/systems; no manual intervention). Any credit institution, PFS, payment institution, e-money institution and investment fund manager which intends to carry out an outsourcing relying on a cloud computing infrastructure shall keep a register and obtain prior authorisation from the CSSF in case of material outsourcing:

- Circular 12/552 on the central administration, internal governance and risk management, the outsourcing provisions of which have been updated by Circular 17/655; this Circular applies to credit institutions and investment firms;
- Circular 17/656 on administrative and accounting organisation and IT outsourcing; this Circular contains identical outsourcing provisions to those of Circular 12/552, but applies to payment institutions and e-money institutions and PFSs other than investment firms; and
- Circular 08/350, as amended by Circular CSSF 13/568 on the details relating to the amendments introduced by the Act of 13 July 2007 on markets in financial instruments to "support *PFS*".

Through the above-mentioned Circulars, the CSSF defines the conditions under which financial service providers may outsource activities, IT-related activities in particular, without infringing the regulatory principles of central administration and sound governance.

The professionals of the financial sector must in particular ensure that the outsourcing:

- is based on a risk assessment and is consistent with a predefined policy based on a risk assessment and validated by the board of directors;
- is formalised in an agreement including service levels and specifications; and
- is strictly controlled by the professional of the financial sector which ensures its quality and guarantees the protection of the customer's confidential information.

At EU level, the above-mentioned CSSF Outsourcing Circulars are complemented by the revised Guidelines on outsourcing arrangements of the European Banking Authority which were released on 25 February 2019 and which revise and replace both the current guidelines on outsourcing arrangements which date back to 2006 and the EBA guidelines for the use of cloud service providers by financial institutions dating back to 2017. Such EBA outsourcing guidelines form a significant layer of requirements on top of the CSSF Outsourcing Circulars requirements.

Lastly, companies in the financial sector must also comply with the Directive 2014/65/EU of 15 May 2014 (MiFID II) and its Luxembourg implementing law of 30 May 2018 when outsourcing call-recording.

b) Insurance sector

The amended Act of 7 December 2015 on the insurance sector provides for similar requirements to those foreseen in the Financial Sector Act as insurance companies are also regulated, notably by the *Commissariat aux Assurances* ("CAA"), and subject to professional secrecy. The CAA has however not issued any Outsourcing Circulars like the CSSF.

c) Electronic archiving

The amended Act of 25 July 2015 on electronic archiving allows paper documents to be digitalised and stored in an electronic format without any loss of probative value if some equivalence conditions in terms of the integrity and the authenticity are complied with. The same act also introduces a new category of regulated digitalisation and archiving professionals, the outsourcing to whom guarantees that the said conditions are met. The act also foresees in a list of obligatory items that must be covered in the contract and in the pre-contractual documentation with such regulated professionals.

d) Other

In a more general fashion, professions that are subject to professional secrecy (healthcare professionals, lawyers, etc.) must assure that their outsourcing arrangements do not lead to a potential breach of their secrecy obligations.

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?

There is no general legal requirement, but in relation to public sector transactions, it is typically one of the requirements included in the tender specifications.

In case of an outsourcing arrangement in the financial sector based on a cloud infrastructure, the service contract signed with the cloud computing service provider shall be subject to the law of one of the EU countries.

2 Legal Structure

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

1. Service contract with a third party

Description of structure: the customer enters into an agreement with a third party supplier to provide services. The third party is an independent contractor, intervening directly on the customer's premises or using its own infrastructure and employees to perform the services.

This type of outsourcing is generally arranged through a framework agreement along with one or several application contract(s) (statement of works/service orders).

Advantages:

- Quick implementation.
- Cost saving for customer.
- Benefit from the know-how of a specialised supplier.
- Flexibility.

Disadvantages:

- Less control.
- Loss of know-how.
- Data protection issues due to the transmission of personal data (e.g. conclusion of data processing agreement in accordance with Article 28 of the GDPR).

2. Service contract with a subsidiary

Description of structure: the customer is part of a group of companies and outsources certain activities to one of the subsidiaries which already exists or is specifically set up for this purpose.

Advantages:

- Control in particular over the employees providing the services.
- Control in implementing procedures for the handling of intellectual property and confidential information.
- Specialisation in the specific fields of services.
- Ability to manage day-to-day operations.

Disadvantages:

- Time to implement.
- Start-up (sunk costs) and recurring costs need to be carefully calculated.
- Lack of flexibility.

3. Joint-venture or partnership

Description of structure: the customer sets up a joint venture or partnership with the supplier for the outsourced activity.

Advantages:

- Control on the outsourced activity.
- Improvement of quality.
- Possibility to provide services to third parties.

Disadvantages:

- Complex to implement.
- Time to implement.
- Start-up (sunk costs) and recurring costs need to be carefully calculated.
- Lack of flexibility.
- Complex exit.

4. Build-Operate-Transfer ("BOT") Structure

Description of structure: this structure is a mixture of the first two structures. The third party service provider, an independent contractor, initially establishes a dedicated team to build a service and starts operating it before transferring such service to the customer.

Advantages:

- Quick implementation.

Disadvantages:

- Possible complicated transition process.
- Costly.

3 Procurement Process

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

Procurement processes are only mandatory in the public sector and are subject to specific regulations depending on the nature and value of the project. In the private sector, a procurement process usually consists of the following:

- The customer specifies its needs and describes the services to be outsourced.
- The customer establishes the invitation to tender which specifies the services to be provided, the process and rules of the tender and the criteria for the assessment of bids.
- The customer and selected suppliers can enter into a non-disclosure agreement along with a letter of intent or a memorandum of understanding in order to negotiate the main terms and conditions of their collaboration.
- The customer conducts due diligence on providers in terms of financial stability, employee mobility, state of the existing facilities, intellectual property protection and performance on similar projects.
- A proof of concept ("POC") and a test phase may also be part of this procurement process in order to determine feasibility of the outsourcing project.

4 Term of an Outsourcing Agreement

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

No, with the exception of outsourcing agreements concluded with public sector entities (which, in principle, cannot be longer than 10 years).

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

No. According to Luxembourg case law, the length and stability of the commercial relationship must be taken into account to determine the reasonable duration of the notice period if no such period has been contractually foreseen.

5 Charging

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

- Fixed-price method: the flat rate is fixed in the outsourcing agreement. If additional work is provided, it will be charged separately.
- Flexible-price method (time and material basis): the parameters to determine the final price should be set out in the agreement. The services can, for example, be billed at actual cost on a *pro rata* basis, depending on the use made of the service.
- Mixed-payment method: both charging methods can also be used in the same outsourcing agreement.

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

An indexation clause can be set out in the outsourcing agreement (e.g. based on the indicators of the National Institute of Statistics and Economic Studies of the Grand Duchy of Luxembourg).

Furthermore, the outsourcing agreement may contain a benchmarking clause so as to allow for the customer to benchmark the fees of the supplier against those of other suppliers and possibly obtain a fee reduction. Lastly, the supplier may be able to rely on a hardship clause in the event of an important decrease in its profit margin due to the increase of raw material prices.

In addition, under Luxembourg law, the recipient of an invoice is deemed to have accepted the invoice, unless he objects to the invoice within a reasonable term.

6 Transfer of Assets

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

Movable property: For evidence purposes, it is advisable to conclude a written contract to transfer movable property. Under the Luxembourg Civil Code, a sale is deemed completed once the parties have agreed on the asset and on the price to be paid for it, be it orally or in writing. There are no specific formalities for lease of movable property.

Intellectual property rights: Depending on the type of intellectual property rights, the transfer or license of such right may require a written agreement and/or registration of such agreement in order to be enforceable against third parties. Copyright, for instance, requires a written agreement *vis-à-vis* the author for any type of transfer of copyright.

Immovable property: The transfer of immovable property must be made in writing and registered by a notary. With regards to commercial leases (*bail commercial*), a written agreement is recommended for evidence purposes, but is not strictly required. In order for the lease to nonetheless be enforceable against third parties and have a fixed date, it should be registered by either party with the Registry (*Administration de l'enregistrement et des domaines*).

6.2 What are the formalities for the transfer of land?

Transactions having the effect of transferring a piece of land must be

executed through a notarial deed and must be registered in the Luxembourg mortgage register (*Bureau de Conservation des Hypothèques*).

6.3 What post-completion matters must be attended to?

A reversibility clause can be provided in the outsourcing contract so as to ensure a smooth transfer to another supplier; a reversibility clause is required for outsourcing arrangements in the financial sector and by Article 28 (3) (g) of the GDPR.

6.4 How is the transfer registered?

Movable property: in principle, no registration is required. Certain assets are however subject to specific formalities (e.g. the sale of a vehicle).

Intellectual property rights: when applicable (trademarks, patents or designs), a registration with the intellectual property office where the transferred right is registered may be required in order for the transfer of ownership to be enforceable against third parties.

Immovable property: the notary will handle all of the required registration formalities.

7 Employment Law

7.1 When are employees transferred by operation of law?

Employees can be transferred when the outsourcing qualifies as a transfer of undertaking. Under Article L. 127-1 *et seq.* of the Labour Code, a transfer of undertaking is a transfer of an economic entity constituting an organised grouping of resources with the objective of pursuing an economic activity. The latter must, however, retain its identity (i.e. its organisational autonomy).

The concept of transfer of undertaking is interpreted broadly by Luxembourg and EU case law. The following elements can notably be taken into account to determine whether the conditions of a transfer of undertaking are met:

- the duration of any interruption or suspension of activities;
- the value of any transferred intangible assets;
- the degree of similarity of activities before and after the transfer;
- transfer of any tangible assets; and
- the number of transferred employees (however, this criterion is less important when the outsourcing is based on assets rather than on human resources).

The qualification will ultimately be assessed by the judge based on the factual circumstances of the case.

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

All aspects of the former employment relationship should be maintained by the new employer. The latter is required to fulfil the obligations of the former employer. The transferor and the transferee are jointly and severally liable in respect of obligations that arose before the date of transfer from a contract of employment or an employment relationship existing on the date of the transfer.

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

The information relating to the transfer of undertaking should be provided by both parties to their respective employees' representatives and to the relevant employees (e.g. date, reasons, legal, economic and social consequences of the transfer for the employees and the envisaged measures towards employees).

The transferor must also notify the transferee of all the rights and obligations which will be transferred to the transferee and must submit a copy of this notification to the Labour and Mines Inspectorate ("*Inspection du Travail et des Mines*").

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

In the Event of a Transfer of Undertaking: Under the Labour Code, the transferee is not required to maintain the employment contracts of new employees for a certain period. However, in principle, a transfer of undertaking brought about by an outsourcing cannot lead to the dismissal of an employee (Article L. 127-4 of the Labour Code). There are, however, certain sector-specifics (e.g. the collective employment agreement for bank employees provides that during the first two years of the change in the situation of an employee as a result of Article L. 127-1 *et seq*. of the Labour Code, no modification to the employment contract may be effected to the detriment of employees).

Otherwise: The customer/supplier is allowed to dismiss its own employees in accordance with the rules set out in the Labour Code, notably for serious misconduct which may be linked to the outsourcing or otherwise, provided further conditions are respected (notice period and/or severance pay).

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

The transferee may impose new and less favourable working conditions on transferred employees to the extent such changes are required for economic reasons. The transfer of undertaking *per se* cannot justify such changes.

In this case, the employer must comply with the procedure of unilateral modification of a substantial element of the employment agreement (which is the same procedure as the one that must be followed for a dismissal) and respect a prior notice.

7.6 Are there any pensions considerations?

The pension rights acquired with the former employer are transferred to the new employer.

7.7 Are there any offshore outsourcing considerations?

Offshore outsourcing arrangements that entail the processing of personal data must comply with the GDPR provisions on the transfer of personal data outside the EU/EEA.

Furthermore, the Luxembourg financial sector regulatory framework is hostile towards offshore outsourcing. Such deals would need the consent of the clients of the financial institution that would like to proceed to an offshore outsourcing. When the outsourcing is based on a cloud infrastructure and in case of spread

of processing, data and systems over different data centres worldwide, at least one of the data centres shall be located in the European Union and shall, if necessary, allow the shared processing, data and systems to be taken over in order to operate autonomously the cloud computing services provided to the financial institution.

If employees are posted outside of Luxembourg, additional administrative steps may also be required (e.g. social security requirements, visa application, etc.).

8 Data Protection Issues and Information Security

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?

In terms of data protection, as from 25 May 2018, the main regulation is the (EU) General Data Protection Regulation 2016/679 ("GDPR"). The Luxembourg law of 1 August 2018 establishes the National Commission for Data Protection and "implements" and complements the GDPR.

According to Article 28 of the GDPR, a contract must be entered into between the data controller (usually the client in an outsourcing context) and the data processor (usually the supplier in an outsourcing context). The qualification of the parties is however a question of factual analysis and does not only depend on a contractual qualification. Such contract must include certain obligatory provisions, and moreover, precisely define the roles and responsibilities of the parties when it comes to data processing.

If the supplier is located outside of the EU/EEA in a country that does not ensure an adequate level of protection of personal data, additional safeguards should be put in place (e.g. entering into contractual model clauses or binding corporate rules).

Under Articles 13 and 14 of the GDPR, the data controller must also provide the data subject whose personal data are being processed with certain information (i.e. the purposes and the legal basis of the processing, details of the supplier who will be receiving the personal data, etc.).

One of the legal bases exhaustively listed in the GDPR is that of the concerned data subject's consent. In this regard, it must be pointed out that such consent is more strict than the consent of clients required under Article 41 of the Financial Sector Act for outsourcing to non-regulated Luxembourg companies and foreign companies (please refer to question 1.3 above). Consent under the GDPR requires an active explicit consent (i.e. "any freely given, specific, informed and unambiguous indication of the data subject's wishes"), whereas the wording of Article 41 (acceptance in accordance with the law or pursuant to the methods contractually agreed between the parties) leaves room for implicit consent/acceptance.

Lastly, in relation to information security, the competent supervisory authority and, under certain conditions, the data subjects, also need to be notified in case of a personal data breach.

8.2 Are there independent legal and/or regulatory requirements concerning information security?

In relation to so-called "operators of essential services" and digital services providers, which include companies in the energy, banking and financial market infrastructure and digital infrastructure sector, the EU NIS Directive, which is yet to be transposed into Luxembourg law (Bill n° 7314), sets out requirements in terms of security measures (for preventing risks, ensuring security of network and information systems and handlings incidents) and notification of serious incidents to the relevant national authorities.

In the financial sector, the CSSF requests all establishments under its supervision to report as soon as possible any frauds and any incidents due to external computer attacks (Circular CSSF 11/504). CSSF Circular 17/655 also requires institutions to implement (i) a security monitoring process allowing them to be informed promptly of new vulnerabilities, and (ii) a patch management procedure allowing timely correction of significant vulnerabilities.

9 Tax Issues

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

Any profit resulting from the transfer of assets by a customer to a supplier may be subject to corporate income tax and municipal business tax (together referred to as "**Income Tax**") in Luxembourg at the current aggregate rate of 26.01% (for a corporate customer located in Luxembourg-City). However, tax exemptions may apply on such a transfer depending on the nature of the transferred assets.

Stamp Duty and Transfer Tax

The transfer of goods (including real estate assets) may be subject to registration duty, at a flat or *ad valorem* rate, depending on the nature of the asset to be transferred. As a general rule, if such a transfer is subject to VAT in Luxembourg, only a flat tax is due (currently EUR 12), except for real estate assets.

The transfer of a business as a going concern is not subject to stamp duty.

The transfer of a real estate property is subject to a proportional 6% Luxembourg registration duty and to a 1% transcription tax. An additional charge of 3% or 3.6% is applicable if the property is located in Luxembourg-City.

VAT

As a general rule, any transfer of goods and assets in Luxembourg will be subject to VAT at a rate of 17%, unless reduced tax rates or exemptions apply. Under certain conditions, the transfer of a business as a going concern (*cession d'une universalité*) is, in principle, VAT exempt.

From a VAT perspective, a temporary transfer of employee to the supplier may be considered as a service subject to VAT. However, if the employee is transferred in the framework of the transfer of business as a going concern (as referred to above), the transaction should be VAT exempt. If the supplier is located in Luxembourg, it will have to comply with all the related administrative requirements (e.g. affiliation of each transferred employee with the Centre *commun de sécurité sociale*, declaration and payment of the tax to be withheld on the salaries paid to employees, etc.).

Income Tax and Net Wealth Tax

Any taxable income realised by a Luxembourg tax resident company is subject to Income Tax at the current aggregate rate of 26.01% (including the contribution to the employment fund). The taxable profit corresponds in principle to its accounting results, unless a specific treatment is provided for by the Luxembourg income tax law (e.g. the Luxembourg participation exemption regime) or a Luxembourg double tax treaty.

Furthermore, a Luxembourg company is subject to net wealth tax ("NWT") at the annual rate of 0.5% on a taxable base up to EUR 500m (a rate of 0.05% would apply on the taxable base exceeding EUR 500m). This tax is assessed on the company's worldwide net wealth as of 1 January each year (based on the assets held on 31 December of the preceding year). A minimum NWT of EUR 4,815 is notwithstanding due and payable by all corporate entities located in Luxembourg where the sum of fixed financial assets, transferable securities and "cash at bank" of such entity (i) represents more than 90% of their balance sheet total, and (ii) exceeds EUR 350,000. Otherwise, Luxembourg companies are liable to a NWT ranging between EUR 535 and EUR 32,100, depending on their total balance sheet.

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

VAT applies to the supply of goods and/or the performance of services by a person subject to VAT (i.e. a person that carries out on a regular basis an economic activity within the meaning of the VAT law).

As a general rule, any supply of services (e.g. services arising from an outsourcing arrangement) located in Luxembourg will be subject to VAT at a rate of 17%, unless reduced tax rates or exemptions apply.

Persons subject to VAT are entitled to deduct input VAT incurred in relation to goods/services used for the purpose of the transactions subject to VAT. Consequently, the customer may deduct input VAT paid on services if these services are directly linked to its activity which is taxable for VAT purposes (if any).

9.3 What other tax issues may arise?

All cross-border and domestic transactions taking place between related entities should correspond to arm's length market conditions. In accordance with Article 56*bis* of the Luxembourg income tax law, taxpayers have to demonstrate the arm's length nature of their dealings with related parties and must be able to provide the Luxembourg tax authorities with a proper transfer pricing documentation upon request.

10 Service Levels

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

Service levels are typically provided for in a specific service level agreement ("SLA") attached to the agreement as a schedule and usually drafted by the supplier who will try to limit any non-attainment of (certain) service levels to the sole and exclusive remedy of so-called "service credits". Such limitation of liability is, in general, valid under Luxembourg law to the extent that the amount of such service credits is not so limited that it boils down to an erosion of the effect of the contract.

11 Customer Remedies

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

The following remedies are available to the customer under general law if the supplier breaches the contract:

- The customer may ask for termination for breach of contract.
- The customer may seek damages before the courts when the supplier cannot establish that the non-performance was due to an external cause that cannot be attributed to him, provided there is no bad faith on his part.

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

The parties can include the following additional guarantees to protect the customer:

- Specific termination rights in case of certain events/types of breaches.
- A predefined exit arrangement, including recovery of data.
- Specific penalties in the event of certain breaches by the supplier (e.g. non-attainment of service levels set forth in the SLA).
- The right for the customer to audit and benchmark the supplier's performance.
- A parent company guarantee (when the supplier is the subsidiary of a parent company).

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

The supplier must:

- Comply with all applicable regulations.
- Comply with the provisions of the contract.
- Ensure continuity of service.
- Indemnify the customer where there is an IP right infringement claim.
- Offer guarantees in terms of functionality (e.g. a software warranty clause).
- Honour the obligations set forth in an exit clause/schedule (e.g. step-in rights can be included in order to enable a project to continue with the supplier being replaced by another service provider; furthermore, a reversibility clause is usually inserted to organise the resumption of all the tangible assets, skills and know-how).

12 Insurance

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

Suppliers are usually required to maintain the following insurance policies with reputable insurance companies to cover its relevant potential liabilities, whereby the amount of coverage and the requirement to provide proof of adherence upon simple request to the customer may be specified:

- A public liability insurance policy.
- A professional indemnity insurance policy.

- Employers' liability insurance.
- Product liability insurance.
- IT liability insurance.

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 general contract law, the contract can be terminated by either party without giving rise to a claim for damages from the terminated party, for the following reasons:

- Term of the contract (fixed-term contract).
- Mutual agreement.
- Termination for breach (please refer to question 11.1 above).
- Termination for convenience (with reasonable prior notice which can be defined contractually) in the event of a contract which does not have a fixed-term.

13.2 Can the parties exclude or agree additional termination rights?

The parties may decide to exclude or agree to additional termination rights. The termination rights mentioned under question 13.1 above can therefore be excluded or added to the contract, as the case may be. Nevertheless, since Luxembourg law prohibits perpetual commitments, the parties cannot exclude termination for convenience in cases of contracts with unlimited duration.

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

A Luxembourg draft bill on business continuity and modernisation of the bankruptcy legislation is currently under discussion (Bill n° 6539); such draft bill intends to provide new customised tools to help distressed companies continue their activities.

Article 567 of the Commercial Code was amended in 2013 in order to introduce a right to claim back "intangible" and non-fungible movable assets from a bankrupt company. The introduction of this right is intended to allow a client to recover data from a bankrupt provider of distance IT services or cloud computing solutions.

In the financial sector, the Luxembourg regulatory authority ("CSSF") may also require continuity of the services under certain conditions, and clauses that foresee the termination of a contract for a financial institution having financial problems risk being unenforceable.

For outsourcing arrangements requiring the processing of personal data, the GDPR requires that such personal data are returned or deleted at the end of the agreement.

Finally, the Act of 25 July 2015 on electronic archiving also lays down a specific procedure to be followed if the outsourcing agreement with a regulated professional for the digitalisation and the electronic storage of data is terminated because the regulated professional ceases its activities.

14 Intellectual Property

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

The intellectual property clause usually provides that each party retains ownership of the intellectual property rights owned or developed prior to the outsourcing agreement. Any licence or transfer of such rights should be expressly provided for in the contract. The contractual allocation of ownership of the rights created in the course of outsourcing varies, with the IP rights typically belonging to the customer if the outsourcing involves the development of a tailor-made product.

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

Yes, companies may act against trade secrets infringements by virtue of Article 309 of the Luxembourg Criminal Code against (ex) employees and their new employers, and/or on the basis of the 2002 Luxembourg Unfair Competition Act against competitors.

The Directive (EU) 2016/943 of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against unlawful acquisition, use and disclosure, which is yet to be implemented under Luxembourg law, will however mean a significant improvement in the legal position of innovative companies doing business in Luxembourg (e.g. a clear definition of "trade secret"; broader personal scope; principle of preservation of confidentiality of trade secrets throughout legal proceedings, etc.).

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, a specific clause or a separate licensing agreement needs to be concluded between the parties to allow for such post-termination use (limited scope, duration, fees, etc.).

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?

In principle, the customer does not have any right to gain access to the supplier's know-how post-termination, unless otherwise provided in the agreement.

15 Liability

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

Under Luxembourg law, limitation or exclusion of liability clauses are valid to the extent that they:

- do not erode the effects of the contract or do not tarnish one of its essential obligations (meaning that they do not deprive the contract of its essence), it being understood that Luxembourg case law accepts the exclusion of liability for "normal" faults (but not for serious faults);

- do not exclude an obligation of mandatory Luxembourg law (e.g. the warranty of the seller for hidden defects); and
- do not exclude and/or limit liability for death or bodily harm, or for wilful intent or personal fraud.

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

Yes, the parties can agree to a cap on liability, provided it does not deprive the contract of its essence or does not relate to liability for death or bodily harm, or for wilful intent or personal fraud.

16 Dispute Resolution

16.1 What are the main methods of dispute resolution used?

Clauses providing for alternative methods of settling disputes are *en vogue* in Luxembourg law governed agreements (e.g. arbitration, mediation via the Center for Civil and Commercial Mediation or the Belgian arbitration centre CEPANI). Traditional dispute resolution via the courts still, however, remains the standard practice and, to this end, a jurisdiction and applicable law clause is typically included in the agreement.

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, under Article 1134 of the Luxembourg Civil Code, agreements must be performed in good faith, the evaluation of which is done on a case-by-case basis by the competent judge.

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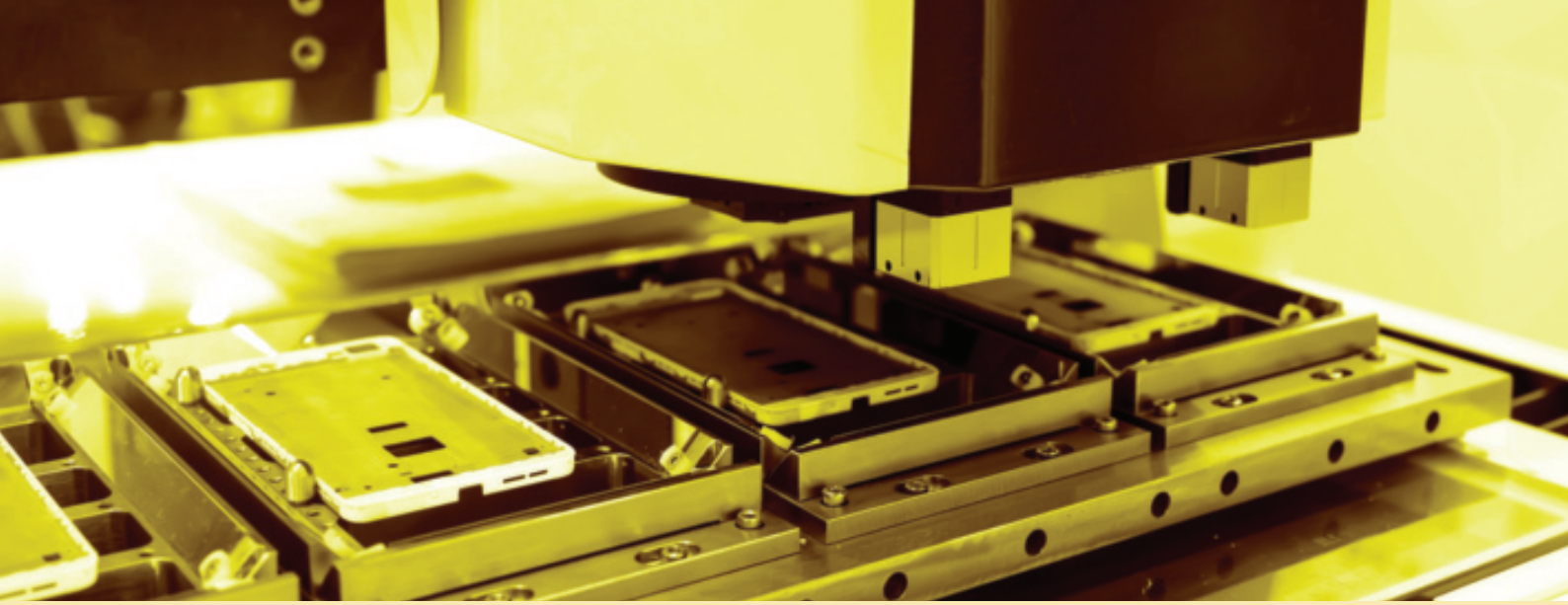

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