Austria

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GENERAL

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

There is no legislation that specifically regulates outsourcing transactions. However, certain statutes may affect outsourcing transactions and agreements:

- The Employment Law Harmonisation Act (*Arbeitsvertragsrechtsanpassungsgesetz (AVRAG)*), which implemented Directive 2001/23/EC on safeguarding employees' rights on transfers of undertakings, businesses or parts of businesses (*see Questions 7 to 13*).
- The Civil Code (*Allgemeines Bürgerliches Gesetzbuch (ABGB)*), which as the main source of contract law regulates the formalities and interpretation of various types of contract that the laws do not otherwise specifically regulate.
- The Commercial Code (*Unternehmensgesetzbuch*), which regulates the transfer of assets (*see Question 5*).
- The Lease Act (*Mietrechtsgesetz (MRG)*), if an outsourcing transaction involves a commercial lease (*see Question 6, Immovable property*).
- Regulatory statutes on certain industries, such as:
  - financial services under the Banking Act (*Bankwesengesetz (BWG)*) (*see Question 2, Financial services*);
  - data protection under the Data Protection Act (*Datenschutzgesetz (DSG)*) (*see Question 14*);
  - telecommunications under the Telecommunications Act (*Telekommunikationsgesetz*) (*see Question 2, Telecommunications*).

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

The BWG does not expressly allow or prohibit the outsourcing of credit and financial services, but sets out certain principles that must be observed:

- Services that do not touch on the core activities of banks and portfolio managers and that are only of minor importance to the business operations can be outsourced, for example, IT-related services or customer support via call centres.
- The outsourcing of a banking activity that would require a licence (as defined under the BWG) is not permissible, such as portfolio and risk management, securities transactions or granting mortgages and loans.
- Strategic and core-management activities (for example, risk management and strategic controlling) cannot be outsourced.
- In any financial services outsourcing, the Financial Services Agency (*Finanzmarktaufsicht*) and the Austrian National Bank (*Österreichische Nationalbank*) must have access to the outsourced data and remain in a position to monitor the outsourced business activities or services.
- Any outsourcing of financial services must not violate the principle of banking secrecy, which has constitutional protection (*section 38, BWG*).
- The customer's management must constantly monitor the supplier (*section 39, BWG*).

It is common practice in the financial services industry to set out a written contract on the customer's monitoring and managing of the outsourced activities, with clear exit provisions and defined services levels.

The Austrian Investment Funds Act (*Investmentfondsgesetz*) regulates outsourcings by investment companies. It generally follows the principles described above.

Business process

The AVRAG regulates outsourcings of human resources and facilities support (*see Questions 7 to 13*).

IT

There are no regulations specific to IT outsourcings.

Telecommunications

The Telecommunications Act provides that:

- The Telecommunications Authority (*Telekom-Control-Kommission*) must give its approval of the transfer of whole or part of a licence that it previously granted.
- Subcontractors must observe the principles of secrecy in telecommunications.

Public sector

The Procurement Act (*Bundesvergabegesetz*), as amended in 2006, was enacted on the basis of:

- Directive 2004/17/EC co-ordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.
- Directive 2004/18/EC on the co-ordination of procedures for awarding public works, supply and service contracts.

It regulates:

- Tender procedures (*see Question 4*).
- The government's or government-funded entities' award of construction, service and supply contracts.

If these awards exceed certain financial thresholds, the outsourcing must be carried out through an EU-wide tender procedure. The threshold values depend on the tender's subject matter and are currently between EUR137,000 (about US$192,390) and EUR5.278 million (about US$7.4 million) of the estimated transaction value (exclusive of value added tax (VAT)).

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

Outsourcings are generally structured as direct or indirect outsourcings. Usually, several suppliers contract with the customer so that the risk of default or failure is evenly spread.

Direct outsourcing. A direct contract between the customer and the supplier is the most common outsourcing structure. Traditionally, this structure comprises one or more service agreements under which the supplier agrees to provide a pre-defined set of services in exchange for payment of a service charge under a specified schedule. It is also common to define service levels and to agree on the customer's legal remedies if the supplier fails to meet them (*see Questions 15, 16 and 19 to 22*).

The major advantage of the direct model is that risk allocation is generally clear-cut. The supplier has control over the services and is responsible for maintaining service levels, while the customer gains service quality in exchange for service charges that reduce start-up costs. On the other hand, the loss of customer control typically entails a drain of the customer's know-how, and makes it impossible for the customer to provide the outsourced services to unrelated third parties.

Indirect outsourcing. The supplier subcontracts its obligations to a third party that has no contractual relationship with the customer.

The advantage of this structure is that the subcontractor can provide services to other third parties. However, although the supplier typically remains liable for its subcontractor's acts and omissions, both the supplier and customer lose a certain level of control over the outsourced services. To mitigate its loss of control, the customer can insist on its right to consent to the choice of subcontractor.

Another disadvantage is that if the rights under the subcontract are assignable and the supplier defaults, the customer must honour the supplier's obligations and safeguard the provision of services.

Other structures

Joint venture. The customer and supplier can share the risks of an outsourcing by setting up a joint venture, either contractually or in the form of a partnership.

The advantage of this structure is that the customer contributes assets and know-how to the outsourcing, and can also influence and control the performance of the services. Generally, the customer can also share in the profits that the joint venture generates, which typically also include services provided to third parties.

However, because there is only one supplier in this model, the risk of its default is greater than in models that allow for risk-sharing. In addition, a joint venture's transactional costs can be considerable, and cost savings that can be made in other structures may be harder to implement. This disadvantage is mitigated by the fact that a joint venture is a saleable business, so any value created through this structure is not lost and allows the customer to achieve a return on the initial investment if the outsourced business operation is subsequently transferred or sold to a supplier or third party.

Captive entity/strategic outsourcing. A customer can outsource services to itself by setting up a subsidiary (captive entity). This means that it has full control over the outsourced services, avoids lay-offs and minimises loss of its know-how. However, it typically sources the services from third party suppliers and consultants, which can be expensive. In addition, the cost of establishing the structure and the operational risk that remains with the customer often more than offsets potential gains.

If the captive entity is subsequently sold to a third party supplier (through an asset or share deal) the captive-entity structure then takes the form of a strategic outsourcing. The potential gain in service quality is often offset by the unavoidable loss of know-how and control.

Build, operate and transfer. The supplier builds the entire infrastructure required to provide the outsourced services, and also operates and manages related facilities and staff. When the agreed outsourcing term ends, the supplier transfers the infrastructure to the customer so that it can continue to provide the outsourced services. This structure combines the comparably low costs of a direct outsourcing (*see above, Common structures: Direct outsourcing*) with the advantages of the captive-entity structure (*see above, Captive entity/strategic outsourcing*) after the customer takes on the outsourced services.

PROCUREMENT

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

The customer usually carries out due diligence at the start of the process (*see below, Outsourced services*), and it usually intensifies shortly before negotiations start.

In particular, legal due diligence is carried out to clarify issues such as:

- The transfer of employees and redundancies (*see Questions 7 to 13*).
- The transfer of tangible and non-tangible assets (contracts, licences and IP) (*see Questions 5 and 6*).
- Legal succession and change-of-control provisions.

The procurement process usually roughly follows these steps:

- **Outsourced services.** The customer and its advisers define the business or services that are to be outsourced (*see Question 15*). At this stage, the customer usually carries out a due diligence exercise to identify the scope of the services to be outsourced and the requirements that a supplier must meet (*see above*).
- **Request for information (RFI).** The customer sends an RFI to suppliers, through a tender process or by directly requesting information. The RFI describes the proposed outsourcing's scope and seeks to gather information on potential suppliers' competence and previous experience.
- **Short-list and request for proposal (RFP).** Suppliers submit indicative offers following the RFI. The customer reviews these offers and clarifies open issues with suppliers (where needed). It then shortlists its preferred suppliers. Ideally, this will result in two competing bidders. Extended negotiations with more than two bidders are costly, and restricting negotiations to only one preferred bidder reduces leverage during negotiations (*see below, Negotiation*). Often, the customer also sends an RFP to potential suppliers asking for additional assurance that they can meet its requirements.
- **Negotiation.** The supplier negotiates with its preferred suppliers as to the terms and price of the outsourcing contract.

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

The transfer of immovable property requires:

- A written, notarised instrument. This means that in an outsourcing, land can be transferred by a separate deed, or by the outsourcing contract being notarised.
- Subsequent registration with the land register (*Grundbuch*). Without registration, title does not pass.

These formalities still apply if immovable property is re-transferred when an outsourcing contract terminates.

IP rights and licences

Except for copyright, any transfer of IP rights must be in writing and notarised. In addition, a transfer of any IP right should be recorded with the competent IP registry (*Österreichisches Patentamt*), because generally, legal remedies for infringement of IP rights are only available to registered IP owners (exceptions apply, for example, with respect to trade marks).

The transfer of an IP licence does not require a written agreement but should be mentioned in the outsourcing agreement (and typically is). Part of the due diligence exercise is to identify whether IP licences are transferable or require the licensor's consent. The transfer of IP licences need not be recorded or otherwise made public to become effective between the contracting parties, but registration with the IP registry (*Österreichisches Patentamt*) is required for legal effect in regard to third parties (for example, in connection with infringement claims brought by the transferee).

Movable property

The transfer of movable property only requires (oral or written) agreement on the transfer and subsequent physical possession of the property. If the transferring party is not the owner of the property, the transfer requires the owner's prior consent.

Key contracts

Austrian law does not permit an entire contract to be assigned without the consent of all parties to the contract. Therefore, a contract must contain an assignment clause for its transfer to have legal effect. However, some statutes provide that if a business is transferred, the following contracts attached to this business transfer to the new owner by law:

- Commercial leases (*see Question 6, Immovable property*).

- Employment contracts (*see Questions 7 to 13*).

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?**

Immovable property

A lease of immovable property should be in writing, and must be in writing if concluded for a definite term. If the customer only has leasehold in the property rather than freehold, any sublease requires the landlord's consent. However, if the outsourcing involves a change of ownership in the tenant company or an asset deal where material assets (including the lease) are transferred to a separate legal entity, the lease transfers by operation of law (*MRG*). The customer must still notify the landlord of the transfer, and the landlord can then raise the rent to its market value if it was lower.

IP rights and licences

For the formalities in connection with IP rights and licences, see *Question 5, IP rights and licences*.

Movable property

There are no formalities required to lease or license movable property, but it is recommended that leases be made in writing to avoid any confusion as to their scope and terms.

Key contracts

The parties to key contracts must consent to their assignment (*see Question 5, Key contracts*). Austrian law does not recognise the concept of leasing or licensing contracts, so there are no other required formalities.

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?**

Initial outsourcing

Section 3 and following of the AVRAG concern employees' rights on a business transfer. Where an outsourcing constitutes the transfer of a business or part of a business (usually through a share or asset deal), the affected employees transfer from the customer (transferor) to the supplier (transferee). Affected employees are those who work in the business unit that is transferred, provided that the business conducted before the transfer retains its identity, that is, it is not materially altered after the transaction has closed. In determining whether a business retains its identity, the following criteria are material:

- Whether and to what extent tangible and intangible assets are transferred.
- Whether key employees are transferred.
- Whether the business activity is acquired as a ongoing activity without its overall operational structure changing.

Change of supplier

If a change of supplier constitutes a business transfer that retains its identity, employees transfer to the new supplier (*see above, Initial outsourcing*).

Termination

If the insourcing of services after termination of an outsourcing constitutes a business transfer that retains its identity, employees transfer back to the customer (*see above, Initial outsourcing*).

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.

General terms

If there is a business transfer that retains its identity (*see Question 7, Initial outsourcing*), affected employees transfer to the transferee on an "as is" basis. The terms and conditions of the employment relationship must not change for one year after the transfer.

The supplier cannot avoid this responsibility, other than by using its own assets and staff to perform the outsourced services. If the supplier must take on the employees, it is advisable that it insist on the parties allocating the financial risks of the outsourcing accordingly.

Pensions

The transferee takes on pension plans if the transfer is made through universal legal succession (for example, a share deal or a demerger to an outsourcing joint venture) (*see Question 3, Other structures*).

In all other cases (for example, in an asset deal), pension entitlements do not transfer automatically. However, on a business transfer that retains its identity (*see Question 7, Initial outsourcing*), if the transferee refuses to accept a transfer of pension entitlements, the employees can resist their transfer for up to one month following this refusal. If so, the employees stay employed with the transferor. If the employees do not exercise this right to object, they can request that the transferor pay off his accrued pension entitlements, or transfer them to a pension fund.

(*See also Question 10.*)

Employee benefits

On a business transfer that retains its identity (*see Question 7, Initial outsourcing*), the transferee takes on all contractual benefits, including:

- Bonus payments.
- Benefits under option plans.
- Car and housing allowances.
- Other fringe benefits.

Other matters

On a business transfer that retains its identity (*see Question 7, Initial outsourcing*), the terms of the transferor's applicable collective bargaining agreements (CBAs) continue to apply to the transferred employees until that transferred CBA is amended or terminated. This does not apply when the transferee has a separate CBA in place. However, even in the latter case, payments and remunerations granted under the old CBA must remain in place, regardless of the new CBA's payment scheme.

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

The transferor or transferee are not expressly required to provide specific information relating to employees. However, it is crucial to provide employee-related information during the due diligence process (*see Question 4*). This is because the transferee is not liable towards the transferred employees for any entitlements that accrued before the transfer if they were not brought to the transferee's attention and the transferee could not otherwise have knowledge of such entitlements. Liability remains with the transferor in that case. Therefore, providing employee-related data is crucial during the due diligence process that both parties typically carry out before concluding an outsourcing transaction (*see Question 4*).

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

On a transfer, both the transferor and transferee must inform affected employees of the:

- Proposed timeframe of the transfer.
- Business reasons for the transfer.
- Legal, economic and social consequences for the affected employees.
- Proposed measures for affected employees to mitigate any detrimental consequences.

This information must be provided to affected employees before any transfer of a business, that is, before the outsourcing transaction closes. Therefore, the transferor usually provides the information.

This triggers a one-month notice period, during which the employees can oppose their transfer if the transferee refuses to assume any material employment terms and conditions, including under applicable CBAs. If the employee objects to the transfer due to a refusal by the transferee to accept special protection against dismissal under the transferor's CBA or honour pension entitlements, his employment relationship with the transferor remains intact. If the objection is caused by worsening work conditions under the newly applicable transferee CBA, the employee can terminate his employment keeping all statutory or contractual severance entitlements. These rules apply regardless of whether the terms and conditions to be assumed by the transferee were specific to the transferor.

However, the transferee and transferor are not required to consult with transferred employees, unless both:

- A works council (*Betriebsrat*) is elected by and represents the employees (this is mandatory in companies with more than five full-time employees).
- The transfer qualifies as an operational change, as defined in section 109 of the Labour Relations Act (*Arbeitsverfassungsgesetz (ArbVG)*).

In that case, a separate set of statutory provisions in the ArbVG applies. This also applies if the outsourcing is structured as an intra-group arrangement. The transferor must:

- Provide the works council with the information described above.
- Consult with the works council before closing the transaction.

If the operational change would result in material disadvantages for a majority of transferring employees, the works council could force the transferor to conclude a social plan, which is a type of shop agreement aimed at mitigating the transfer's detrimental consequences. Usually, under a social plan, the transferor pays the employees:

- Voluntary severance packages.
- Payments for future obligations that the transferee will not be taking on (for example, the future treatment of option plans and pension plans).

If the transferor and the works council cannot agree on a social plan's terms, either party can call on the competent labour court to settle the dispute and issue a legally binding decree to decide on the issues on the parties' behalf.

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

Transferred employees' employment terms must not be modified within one year after the transfer. This includes CBAs and shop agreements (*see Question 8, Other matters* and *Question 10*). Therefore, transferred employees often have more favourable employment terms than the transferee's existing workforce. Employees can terminate their employment with the transferee (observing contractual or statutory notice terms) if their terms and conditions materially deteriorate after the transfer (*see Question 12*).

Once the one-year period has lapsed, the transferee can downgrade the transferred employees' terms. The transferee could dismiss employees because they are not willing to accept certain pay reductions or an alignment of their terms and conditions with its existing employees. However, if the changes to the terms and conditions are material, the employees can challenge such dismissals on the grounds that they lack social consideration, which is the case if a dismissal under the specific circumstances disproportionately burdens an employee in terms of job security and financial consequences. The employer could only respond to such a challenge if it can justify the dismissal on other grounds, such as:

- Business-related reasons (for example, the downsizing of the transferred business).
- The employee's conduct (for example, poor performance or misconduct).

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

A dismissal based solely on the transfer of a business is prohibited. Dismissals for business-related reasons are acceptable (*see Question 11*), although if a dismissal is carried out around the time of the transfer, it may be hard for the transferee to prove that it is not related to the transfer.

In addition, for one month after learning of a transfer's negative consequences, the employees can terminate their employment relationship if their terms and conditions materially deteriorate. The transferee is deemed to have given the employee notice of dismissal on the date that it implemented the term that materially deteriorates the employee's situation. It is therefore liable for severance payments for the employee, which can be costly, reaching up to one year's annual salary for senior employees. Therefore, the transferor and transferee should allocate the legal and financial risks associated with a transfer before carrying out the transaction.

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

If there is a business transfer that retains its identity (*see Question 7, Initial outsourcing* and *Question 8, General terms*), the employee arrangements cannot be structured as a secondment. A secondment structure may be a viable option as a first step in a strategic outsourcing (*see Question 3, Other structures: Captive entity/strategic outsourcing*).

DATA PROTECTION

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

The processing of personal data, including processing on a transfer, requires compliance with certain principles, such as (*DSG*):

- Access and entry control.
- Data secrecy.
- Protection from loss of data.
- Reporting requirements.

Typically, on an outsourcing transaction, the:

- Customer is the data controller (the person with autonomous decision-making powers with respect to data processing operations).
- Supplier is appointed as data processor (the person who processes the personal data on the data controller's behalf).

To the extent that the supplier acts in the legal capacity of a data processor, it must observe the DSG. If it only processes data for the customer and does not otherwise conduct similar business it is only subject to the customer's directions, and the customer remains liable under the DSG.

Data processing outside the European Economic Area (EEA) generally requires the employee's express permission, unless the data protection standard in the target country is higher than the EEA standard. In general, employees do not need to consent to a transfer within the EEA.

SERVICES

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

The customer usually drafts the initial services specification, with the assistance of outside consultants (*see Question 4*). The supplier then reviews the specifications and provides input to align the customer's needs with the supplier's competence and experience.

Services specifications should be as specific as possible but also contain some broader language to cover related services.

The services description is usually attached to the outsourcing agreement as a set of separate schedules. It is common to add further services or amend service descriptions in line with the list of requirements that are set out in the outsourcing agreement.

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

It is crucial to specify service levels in the contract documentation. This allows the customer to:

- Calculate cost effects precisely.
- Avoid statutory provisions that would otherwise apply.

In addition, under Austrian law, a contract's performance level need only be average if the parties have not agreed otherwise.

The parties usually specify service levels in either:

- Schedules attached to the outsourcing agreement.

- A service level agreement (SLA), if the definition of service levels and contractual remedies is more complex.

The customer often uses service credits to encourage the supplier's proper performance of agreed service levels. The customer increases the supplier's pay if it exceeds service levels, and decreases it if it does not reach them, in accordance with a pre-arranged system.

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 provisions in outsourcing contracts vary according to whether the scope of services is pre-determined.

Fixed price

This is a regular payment (for example, monthly or quarterly) of an agreed service fee. A fixed-price agreement is very easy to administer, but is only advisable where the volume and scope of the services will not change during the contract term.

Fixed-price contracts often contain a best-value clause, that is, a clause that guarantees to the customer that its fee is at least equivalent to the fees that the supplier charges to its other customers.

Cost plus

The customer pays the supplier both:

- The costs that the supplier will incur when providing the services (including overheads, and the cost of outsourcing-related investments in new assets).
- A reasonable profit, as agreed between the customer and supplier.

To avoid paying for items that represent no additional cost to the supplier, the customer should ensure that the supplier's cost structure is:

- Transparent.
- Subject to customer's review.

If the outsourcing agreement will run for several years, the supplier should insist on an indexation clause, that is, a mechanism that adjusts prices according to inflation.

Once the cost structure is open to review and improvement, the parties can also agree on how to apportion any costs savings between them.

Pay as you go

The parties ascribe a certain unit price for each of the services to be provided under the outsourcing agreement. The customer then pays the supplier on the basis of how many units of services the supplier provides. This has advantages over the other methods where the volume of the provided services is less clear.

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

The parties must base any cost-plus method on a transparent calculation that the customer can review. Other key terms include:

- Indexation clauses (*see Question 17, Cost plus*).
- Benchmarking provisions, which allow an external consultant, such as an auditor, to review the supplier's costs.
- Cost-saving provisions.
- Best-value clauses (*see Question 17, Fixed price*).

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:

- Request specific performance.
- Sue for damages. Damages are calculated as the difference between the:
  - cost of a third party replacing the services;
  - agreed price for the same services under the outsourcing contract.
- Terminate the contract with immediate effect, if the failure to perform qualifies as a material breach of the contract.
- Reduce payments to the supplier, if the contract does not prohibit this remedy. This is typically used for minor breaches.

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

Typical customer protections are:

- A service credit system (*see Question 16*).
- Indemnification clauses in connection with specific losses.
- Price reductions.
- Clauses that allow the customer to rescind or terminate the contract under certain circumstances (*see Question 25*).
- A requirement for the supplier to hold insurance.

- A guarantee letter issued by the supplier's parent company.
- Contract management clauses and governance provisions. These provide for management of any disputes in connection with agreed performance levels.
- Escalation clauses. These escalate disputes to management level.
- Replacement provisions. These allow the customer either to step in, or obtain the services from a different supplier, in both cases at the supplier's cost.

WARRANTIES AND INDEMNITIES

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

Warranties

The ABGB already implies certain warranties into the contract. However, it is advisable to specifically include them. Warranties should refer to performance-related provisions, such as service levels and credits (*see Question 16*).

Common supplier warranties include that:

- It has the legal capacity to enter into the agreement.
- It has the capacity to perform its obligations under the contract.
- It will perform the services with reasonable skill and care, in a timely and professional manner and in accordance with all applicable laws and regulations.
- That the customer can demand, as it sees fit, specific performance, reduction of charges or a remedy of any breach of the contract through third parties, at the supplier's cost.
- The information it provided during the negotiation phase was accurate and complete.

Common customer warranties include:

- That information provided during the negotiation phase is accurate and complete.
- That it holds legal title to any assets transferred.
- Representations on the condition of transferred assets.
- Representations on (potential) liabilities relating to transferred contracts.

Indemnities

The most important indemnification in an outsourcing is the supplier stating that the customer will not be liable towards the transferred employees in future. In addition, a general indemnification clause is typically included, to protect the customer from the supplier's wilful or negligent breach of contract.

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

There is a statutory rule that services must be provided up to an average standard (*see Question 16*). The parties can exclude or limit this provision, unless this is regarded as unreasonable in the circumstances. The parties rarely agree to set service levels below the statutory standard.

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?

Austrian law does not impose any maximum or minimum terms on an outsourcing agreement. The average duration of a service contract is three to five years.

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

Notice periods are subject to negotiation by the contracting parties. They vary according to the scope and volume of services and are usually between three to six 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)?

If one party commits a material breach of the contract, and it is unacceptable or unreasonable for the other party to continue the contract, this other party can terminate the contract with immediate effect, without adhering to notice periods (*see Question 24*). The parties cannot exclude this statutory right.

Special rules apply with respect to insolvency procedures. A bankruptcy trustee can terminate an outsourcing agreement without regard to agreed notice terms.

Termination of the contract, whether in the circumstances outlined above or according to contractual provisions, does not exclude the customer from bringing damages claims (*see Question 19*).

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

The parties can agree on any additional termination rights, including grounds for termination with immediate effect. The parties cannot, however, exclude their ability to terminate for material breach (*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?

As a general rule, a licence to use IP rights terminates with the outsourcing contract. There is no implied right for the supplier to continue to use IP rights post-termination. However, the parties can agree to include such a clause.

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?

Generally, the supplier's know-how belongs to the supplier unless the outsourcing contract specifically provides otherwise.

However, the customer will indirectly use the supplier's know-how where the employees who used it transfer back to the customer after the outsourcing (*see Question 7, Termination*).

It is common to agree broad confidentiality obligations in the outsourcing contract that expressly prohibit any post-termination transfer of know-how.

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 parties cannot exclude liability for:

- Intentional or wilful breach of contract.
- Recklessness.
- Gross negligence.
- Product liability claims.

This rule applies to both:

- The actual damage caused.
- Indirect and consequential damages.

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

The parties can agree a cap on liability, where this liability can be excluded (*see Question 29*). The cap is often agreed at the maximum insurance coverage.

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

If a transfer is structured as an asset deal, the transfer of assets triggers income tax. The tax is based on the higher of the:

- Assets' purchase price.
- Assets' fair market value.

If it is structured as a share deal, the transfer of assets does not trigger tax.

Stamp duty is charged at:

- 3.5% on real property transfers.
- 0.8% on the assignment of IP rights and trade receivables.

Transfers of employees to the supplier

When the supplier becomes the new employer (*see Question 7, Initial outsourcing*), it must withhold and pay income tax and social security contributions on any remuneration paid to transferring employees.

VAT or sales tax

The supplier pays VAT of 20% on the services it provides.

Other

There are no other significant tax issues.

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Graf & Pitkowitz is one of Austria's leading full-service business law firms with offices in Vienna and Graz. Clients include national and international corporations and institutions of very different industries. A broad variety of projects in Central and Eastern Europe underscore the versatility of our international experience. Strict adherence to quality and up-to-date knowledge are fundamental to our commitment to clients regardless of nationality or legal issues concerned.
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- Negotiation of plant-level collective agreements and redundancy programmes
- Structuring employment aspects of corporate transactions (legal and practical implications of Transfer of Undertakings Directive)
- Executive Compensation and Employee Benefits
- Executive Service Agreements
- Employment litigation



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