Sweden

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GENERAL

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

Swedish law does not specifically regulate outsourcing transactions, except for financial services (*see Question 2*).

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 main legislation in a financial services outsourcing is the Banking and Financing Business Act (SFS 2004:297) (BFBA) and the Securities Market Act (SFS 2007:528). The regulatory body is the Swedish Financial Supervisory Authority (*Finansinspektionen*) (SFSA), which issues rules and guidance that, to a varying extent, apply to outsourcing transactions.

The BFBA and the SFSA's guidelines generally apply to supervised companies, that is, Swedish and foreign entities that both:

- Conduct banking or financing activities.
- Are supervised by the SFSA.

A supervised company can outsource parts of its operations to an external supplier, subject to the terms and conditions set out in the BFBA and the SFSA guidelines. If a supervised company intends to outsource part of its licensed operations, or activities that have a natural connection with financial operations or their support functions, it must notify the SFSA in advance and provide it with a copy of the outsourcing agreement. A supervised company can only outsource part of its licensed operations if:

- It is, at all times, responsible for the outsourced activities in relation to its customers.
- The external supplier provides the outsourced services with sufficient control and an adequate level of security.
- The assignment does not mean that the supervised company cannot fulfil its obligations under the BFBA or any other laws regulating the supervised company's business.

The Securities Market Act implements the outsourcing requirements of Directive 2004/39/EC on markets in financial instruments (MiFID). For outsourcing customers subject to MiFID, one issue of particular interest is the limitation on their ability to engage third parties to perform work and certain functions that are of "material significance" for the customer's operations. Such work and functions can be outsourced to a third party only if both (*Securities Market Act*):

- The operation is conducted by the third party under controlled forms and satisfactorily from a security perspective.
- The engagement of the third party does not significantly diminish the quality of the customer's internal monitoring and the SFSA's ability to monitor the customer's compliance with the laws, regulations and other rules applicable to the customer's operations. For example, this requirement means that the customer must ensure that the outsourcing contract permits the SFSA to perform audits and inspections of the supplier to the same extent as the SFSA is permitted to do so under the applicable law.

Further, the following SFSA guidelines and regulations are particularly relevant:

- The General Guidelines Regarding Governance and Control of Financial Undertakings (FFFS 2005:1).
- The Regulations Governing Investment Services and Activities (FFFS 2007:16).
- The Regulations Governing Investment Funds (FFFS 2008:11).

These guidelines and regulations, among other things, emphasise that the customer must retain control of the services to ensure the supplier's compliance with applicable laws and regulations, as well as the outsourcing agreement. The customer must have internal rules and policies regarding the following matters:

- Competence requirements of the customer's purchasing organisation.
- Procedures for risk management.
- Procedures for the protection of confidential information.
- Methods for controlling, regulating and modifying the outsourced services.
- Action plans for unforeseen events (for example, contingency plans, disaster recovery plans and so on).
- Exit plans and strategies which minimise negative effects for the customer in the case of the supplier's exit.

Finally, all outsourcing agreements must be in writing and contain service levels provisions.

Business process

There are no additional specific regulations for a business process outsourcing. However, accounting and tax regulations may apply to the extent that the business process outsourcing involves, for example, payroll or accounting services.

IT

There are no additional specific regulations for an IT outsourcing.

Telecommunications

Telecommunications services are regulated by the Electronic Communications Act (SFS 2003:389), which is supervised by the Swedish Post and Telecom Agency (*Post- och Telestyrelsen*) (SPTA). Under this Act, a transaction involving the outsourcing of a telecommunications operator's network may require notification to the SPTA.

Public sector

Depending on the nature of the contract and its value, a public-sector outsourcing may be subject to Swedish regulations that implement the EU public procurement directives, that is the Public Procurement Act (SFS 2007:1091) and the Procurement in Utilities Act (SFS 2007:1092). If so, the awarding authority may be required to:

- Advertise the contract in the *Official Journal* of the EU and follow special procedures.
- Ensure that all bidders are treated equally.

The EU public procurement rules are likely to significantly affect the:

- Timing of the pre-contractual procedure.
- Award criteria adopted.
- Duration of the outsourcing contract.

The Public Procurement Act and the Procurement in Utilities Act apply to the award of all contracts that are not expressly excluded from their scope. Therefore, the laws apply also to the award of contracts where the contract value does not reach the thresholds for application of the EU public procurement directives. In this case, however, the rules are less strict than those applicable to contracts which exceed the thresholds. For example, no advertisement in the *Official Journal* of the EU is required.

Other

No other relevant regulations apply.

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.

Traditional outsourcing structure (business transfer and outsourcing contract)

A traditional outsourcing involves the transfer of a business operation from the customer to the supplier. This transfer is normally structured as an asset transfer either:

- Directly to the supplier.
- To a special purpose vehicle that is sold to the supplier wholly or partially (*see below, Joint venture*).

Regardless of a transaction structure, the outsourcing is normally based on a single outsourcing contract, with the business transfer typically included as a separate schedule.

Further, the outsourcing can be based on either a single- or multi-sourcing model. Historically, the single-sourcing model has been the most common. Under this model, one supplier is responsible for providing a wide range of services and normally bears an end-to-end responsibility in relation to the customer. A single-source supplier normally engages several sub-contractors to provide its services to the customer (this may involve a degree of offshoring). The broad nature of the services typically provided in a single-sourcing outsourcing model means that these outsourcing agreements are usually very extensive and complex.

In recent years an increasing number of customers have preferred using a multi-sourcing model, where the customer engages different suppliers for different services. Naturally, a multi-sourcing model offers additional flexibility, transparency and independency for the customer, but it also requires the customer to possess a higher level of in-house expertise and resources. For a multi-sourcing model to be successful, the different suppliers must enter into operation level agreements (OLAs) regulating their interaction with one another and with the customer.

Irrespective of whether a single-source or multi-source model is used, the outsourcing contract is normally structured as a master agreement with several detailed schedules regarding, among other things:

- The transfer of assets and employees.
- Service description.
- Service levels, including the consequences of the supplier's failure to meet the service levels.
- The fee structure.
- Governance principles, including change of supplier procedures.
- Exit management.
- Transition and transformation projects.

Joint venture

An alternative way to structure an outsourcing transaction is through a joint venture, that is, an entity jointly owned by the customer and a third party entity (normally the supplier or in some cases another entity within the customer's group). The joint venture purchases the necessary assets and resources, and then provides services to the customer.

A joint venture provides an increased level of control and transparency for the customer, but also entails substantial transactional and maintenance costs.

Subsidiary

Another way to structure an outsourcing is to set up a separate and wholly owned subsidiary which acquires the necessary assets and resources to provide the services, as a third party supplier, to the customer. Although this structure is likely to increase control and transparency for the customer (compared to in-house sourcing and traditional outsourcing), the disadvantages include limited risk transfer and extensive transaction costs.

PROCUREMENT

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

Every outsourcing procurement process is adapted to the customer's specific requirements. It is fairly common for customers to approach one or more designated supplier(s) and commence the negotiations directly. A typical outsourcing procurement process can be described as follows:

- The first step for the customer and its advisers is usually to investigate the part(s) of its business that will be outsourced. This investigation aims to identify and rectify potential risks that could negatively affect the outsourcing. Therefore, the investigation may be similar to an internal due diligence process. Together with an internal investigation or due diligence, the customer will also attempt to identify and clarify the business requirements and objectives of the outsourcing transaction (for example, potential improvements to the current production of the services to be outsourced).
- The next step for the customer is to issue a request for information (RFI) to potential service providers. The RFI usually briefly outlines the matters which the customer is considering outsourcing and contains questions relating to the supplier's capabilities, competence, experience and proposed solutions for the customer's business requirements.

In practice, however, the starting point in many outsourcing transactions is the preparation of a request for proposal (RFP) or request for offer (RFO). These requests serve as an invitation for actual tenders from suppliers, and should be drawn-up to include at least:

- A description of the customer's current solutions.
- Evaluation criteria.
- A draft outsourcing contract (if possible).
- A preliminary service description.
- Service levels and remedies.
- The pricing methodology.
- The time scale.
- Non-disclosure commitments.
- Any other necessary information for suppliers to make proposals and offers for the contemplated outsourcing transaction.

After receiving the suppliers' offers based on the RFP/RFO, the customer will assess them according to the evaluation criteria and draw up a shortlist of potential suppliers. Following the shortlisting, more detailed negotiations begin. The potential supplier(s) are generally permitted to carry out some degree of due diligence. Generally, the customer selects one supplier as its preferred choice and initiate more advanced negotiations. For larger outsourcing projects, separate negotiation work streams are established to conduct commercial, technical and legal negotiations. It is imperative that these work streams are closely co-ordinated.

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

If the outsourcing transaction includes transfer of immovable property (real estate), the transfer is subject to certain statutory formalities under Swedish law. The purchase contract must be in writing and contain the following information:

- The names of the seller and buyer.
- The name of the real estate as registered with the Swedish Land Registry.
- An explicit transfer date of the real estate.
- The purchase price.

The transfer also requires registration with the Swedish Land Registry within six months of the execution of the sale. If the transaction includes a transfer of a lease agreement for the facilities/real estate, the transfer typically requires the landlord's consent (*see Question 6*).

IP rights and licences

A transfer of IP rights may require registration of the transfer to fully safeguard the new owner's interest in the relevant IP right. For example, the new owner of a trade mark cannot begin court proceedings regarding infringement of its rights unless it is registered as the owner of the trade mark. A transfer of a licence requires the licensor's consent.

The transfer of IP rights and licences should be by written assignment, although this is not a legal requirement.

Movable property

There are no mandatory formalities to transfer title to movable property from the customer to the supplier. However, to make a transfer of title enforceable against the customer's creditors on the customer's bankruptcy (right of separation), the movables must generally be physically transferred from the location where they were kept by the customer to the location specified by the supplier. This requirement can be avoided by registration at a district court.

Where assets are leased, the transfer usually requires the lessor's consent.

Key contracts

The assignment of key contracts must be in writing. Any contract to be assigned must be identified at an early stage and its terms reviewed, to identify whether assignment is possible without the counterparty's express consent. This consent is generally required.

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

No registration process is required to lease immovable property. The Swedish law regarding leasing of real estate may differ depending on the purpose and the legal classification of the lease. If the premises are to be subleased (for example by the supplier from the customer), consent from the landlord is required.

The concept of licensing immovable property is not recognised under Swedish law.

IP rights and licences

A written agreement should be entered into to record the terms agreed in relation to the grant of a licence to use IP rights (*see Question 5*). For the leasing or licensing of existing IP licences, see below, *Key contracts.*

Movable property

Subject to any contrary applicable contract terms, there are no mandatory requirements to lease or licence movable property.

Key contracts

The concept of leasing or licensing a contract is not generally recognised under Swedish law. A contract can be assigned to a third party, subject to the terms of the contract (*see Question 5, Key contracts*).

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

Directive (EC) No. 23/2001 on the approximation of the laws of the member states relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (TUPE) has been implemented into Swedish law by section 6B of the Employment Protection Act. TUPE applies if the following conditions are met:

- Outsourcing is carried out by way of an asset transfer.
- Transferred assets and liabilities result from a transfer of:
  - an undertaking;
  - a business; or
  - a part of a business.

Often the main issue is whether or not there is a transfer of a business. According to the European Court of Justice (ECJ), the following seven criteria are particularly important to assess that matter (the *Spijkers* criteria) (*Spijkers v Gebr Abbatoir CV [1986] ECR 119*):

- The type of undertaking or business.
- Whether or not the tangible assets of the business, such as buildings and movable property, are transferred.
- The value of the intangible assets of the business at the time of the transfer.
- Whether or not the majority of its employees are taken over by the new employer.
- Whether or not its customers are transferred.
- The degree of similarity between the activities carried on before and after the transfer.
- The period, if any, for which those activities were suspended.

However, these criteria are merely some of the factors in the overall assessment and cannot be considered in isolation.

If the outsourcing transaction qualifies under TUPE, the business' employees transfer to the transferee by operation of law. If, however, an employee opposes the transfer, he continues to be employed by the transferor but incurs the risk of termination due to redundancy.

Change of supplier

The same principles apply as for an initial outsourcing (*see above, Initial outsourcing*).

Termination

On termination of an outsourcing there is no transfer by operation of law of employees from the transferee back to the transferor unless there is a transfer of the business from the transferee to the transferor (*see above, Initial outsourcing*).

8. If employees transfer by law please describe the terms on which they do so, including any effect on pensions, employee benefits or other matters (including collective agreements) that the transfer may have.

General terms

When an undertaking, a business or part of a business is transferred, the transferee automatically assumes the transferor's rights and obligations to the employees regarding, among other things, their salary and holiday allowance, and other employment conditions. However, the transferee and transferor are jointly and severally liable to the employees for financial obligations relating to the period before the transfer.

Pensions

The transferor is normally responsible for the employees' accrued benefits regarding age, disability and survivors' benefits that the employees have acquired under employee pension schemes during their employment with the transferor. However, any contractual obligations to pay premiums for the benefits, as set out in an employment agreement, are transferred to the transferee along with other employment benefits under the employment agreement (*see below, Employee benefits*).

Further, the transferee can assume responsibility for pension benefits that the employees have acquired during their employment with the transferor, subject to the employees' consent (*Act on Securing Pension Obligations*). If the employees oppose the transfer of the obligations, the transferee can obtain an order from the County Administrative Board (the authority monitoring the labour market) authorising the transfer.

Employee benefits

Under TUPE, all the transferor's employees have a right to automatically transfer to the transferee on unchanged terms and conditions. Therefore, employment terms and conditions that apply during the employment with the transferor continue to apply following the transfer to the transferee (*see above, General terms*).

Collective bargaining agreements

When considering the effect of a transfer of business on collective bargaining agreements, three different situations must be considered (*section 28, Employment Co-Determination Act*):

- If the transferee but not the transferor is bound by a collective bargaining agreement, the transferee's collective bargaining agreement covers the transferred employees. Conditions of employment that are in breach of the transferee's collective bargaining agreement become invalid and are adjusted to comply with the collective bargaining agreement.
- If the transferor but not the transferee is bound by a collective bargaining agreement, the transferor's collective bargaining agreement will be automatically transferred together with the business and, where applicable, bind the transferee. However, this situation can be avoided if, for example, the transferor terminates the collective bargaining agreement within 60 days before the transfer of the business. If the termination takes place on a later date, the transferee is bound by the collective bargaining agreement until 60 days have passed from the date of termination. If the term of the collective bargaining agreement has not expired or another collective bargaining agreement has come into effect on an earlier date, the transferee is bound by the transferor's collective bargaining agreement, where applicable, for one year after the transition of the business.
- If both the transferor and transferee are bound by collective bargaining agreements, the transferee must apply the terms of employment included in the transferor's collective bargaining agreement to the transferred employees for one year after the transition of the business. After one year, the transferee's collective bargaining agreement applies to the transferred employees.

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

There is no statutory obligation to provide any specific information. In practice, however, the transferor must provide the information that the transferee considers necessary to assess the transferor's rights and obligations in relation to the employees (for example, the individual employment agreements and any applicable collective bargaining agreement).

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

If the transferor is bound by a collective bargaining agreement, the transferor must consult, on his own initiative, with the trade unions that are parties to the collective bargaining agreement. If no collective bargaining agreement binds the transferor, the transferor must consult all trade unions whose members are affected by the transfer of the business (that is, those who have a right to transfer their employment to the transferee).

During the consultations, the parties discuss the employer's motives for the proposed transition of the business. The final decision taken by the transferor regarding the transition of business must be made after the consultations have been finalised (since Swedish law supports the notion that the trade unions must be given a fair chance to influence the employer's decision). It is therefore important that the consultations start at an early stage of the employer's decision-making process and that the trade unions do not get the impression that the employer has already made its decision.

When the consultations have been finalised, the employer has the discretion whether to transfer the business or not, even if the trade unions have not given their approval. However, if the trade unions believe that the transition of business would lead to a situation where relevant legislative or collective bargaining agreement provisions are breached, they have a right to veto the transition of business.

The transferee has no statutory obligation to consult with trade unions regarding the possible transition. If, however, the transferee is bound by a collective bargaining agreement, the transferee must consult with the trade unions under the Co-determination Act.

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

Generally, all the transferor's employees have a right to automatically transfer to the transferee on unchanged terms and conditions, and detrimental changes made as a result of the transfer are invalid, unless the employees consent to them. Further, the terms of a collective bargaining agreement cannot be changed without the consent of the trade unions and employers' organisations that are parties to the agreement.

In practice, many transferees ask the transferred employees to enter into new employment agreements on transfer. This is not usually problematic, provided the conditions of the employment are substantially similar to, or more generous than, the previous conditions.

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

Dismissals due to redundancy (that is, dismissals that are not based on "personal related reasons") can only be implemented before the transfer of business if they are based on financial, technical or organisational changes that are not connected with the outsourcing. Further, the redundancy situation must be attributable to redundancy by the transferor and not the transferee.

There are no specific restrictions on the transferee's right to dismiss employees after the outsourcing other than general employment law restrictions.

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

If the outsourcing falls under TUPE, it is normally not possible to structure the employee arrangements as a secondment since the transferor's employees have a right to transfer their employment to the transferee (*see Question 7, Initial outsourcing*). A secondment is only possible if the employees explicitly consent to it and thereby waive the right to transfer their employment.

DATA PROTECTION

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

The Personal Data Act (SFS 1998:204) implements Directive 95/46/EC on data protection. The Swedish Data Inspection Board (*Datainspektionen*) (SDI) issues guidelines and regulations on matters regarding personal data. In an outsourcing transaction, several data protection issues may arise in relation to processing personal data.

The SDI employs a very extensive definition of personal data. For example, IP addresses and credit card numbers normally comprise personal data in Sweden.

Generally, personal data processing is prohibited unless the registered person consents to the processing. However, this is subject to extensive exceptions. For example, personal data can be processed if the data controller's (*see below*) interests outweigh the registered person's right to personal integrity. In addition, personal data can always be processed to the extent necessary to comply with contractual obligations.

Under the Personal Data Act, the customer is generally recognised as the personal data controller (that is, the party deciding the means and purpose of the data processing). The supplier is normally considered as the customer's personal data processor. This relationship must be evidenced by a written agreement, which normally forms part of the outsourcing agreement. The agreement must also contain certain specific wording as to how the personal data processor can process the personal data (*Personal Data Act*).

Any transfer of personal data to a location outside the EU/European Economic Areaa (EEA), for example as part of an offshoring process, is subject to specific legal restrictions. Personal data can only be transferred outside the EU/EEA:

- If there is an adequate level of protection in the recipient country according to, for example, the safe harbour principles or the EU Commission's decisions.
- If each data subject has consented to the transfer.
- In certain specific situations listed in Personal Data Act. (These situations are unlikely to be applicable for an outsourcing transaction.)
- If it is permitted in some other way according to the regulations or specific decisions by the Swedish government or the SDI and with reference to that there are adequate safeguards relating to the protection of the rights of the data subjects. These safeguards may result from:
  - standard contractual clauses approved by the EU Commission;
  - binding corporate rules (BCR) approved by the SDI.

SERVICES

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

The parties usually draft the services specification together. Historically, the supplier took the lead, based on its previous experiences of similar projects. Nowadays, there is a clear trend of the customer being more involved in the drafting of the outsourcing agreement, including the services description. The customer analyses the needs and purposes of the agreement more extensively than previously. However, it is still common, particularly for first-time customers, to strongly depend on the supplier to draft the agreement (considering the supplier's experience) to achieve a cost-effective service delivery that corresponds to the supplier's standards.

Further, the service descriptions are typically divided into separate service towers. The key reasons for this structure are increased cost-transparency and flexibility for the customer. For example, the customer normally requests that the contract includes a right to terminate the agreement partially by service tower.

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

The parties usually identify and agree a set of objective measurable criteria to measure performance, referred to as service levels or Key Performance Indicators (KPIs). To retain control of the services, the customer typically includes as many service levels as possible and subjects them to financial compensation as set out below. Conversely, the supplier will seek to minimise the number of service levels to reduce its administration and financial risk.

The service levels are normally combined with both:

- A process for recording and reporting on the success or failure to achieve the service levels.
- A formula under which the supplier financially compensates the customer if the service levels are not met (for example, variation from the required level of performance by a specified percentage). These are typically referred to as service credits or liquidated damages.

In addition, traditional remedies are often supplemented by proactive service levels and incentives for the supplier (for example, earn-back possibilities).

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).

The parties will agree on different charging methods depending on the type of service provided and general purpose of the agreement. As the quantity and scope of the services vary from time to time, the price model is normally flexible. Sometimes the parties combine several price models. Generally, the service fee reduces with time as the supplier is expected to use its increased experience to provide the services more efficiently.

Fixed price

A fixed price method is often used if there will be a regular and predictable volume and scope of services. An alternative is to agree on an anticipated consumption of service volume (a "baseline volume") if the parties negotiate a new price when the actual volume deviates from the baseline volume. The parties can also agree on a fixed price for all services during the initial period and then convert to one of the other price models described, or a combination of them.

Cost plus

The customer pays the supplier the actual cost of providing the services with the addition of a profit margin. Costs are assessed on an agreed and transparent basis, which the customer can review (open book). However, it is often difficult for the customer to verify the costs, particularly if the supplier uses transfer pricing for services procured from its group companies.

Pay as you go

This price model is commonly used if the level and volume of services is less predictable. The customer pays a pre-agreed unit price for specific items of service (such as volumes of data stored by the supplier). The parties can agree to combine the unit price with a minimum fee.

Risk-and-reward

This is a combination of a fixed price and a variable price whereby the parties agree on a budgeted price for the services. If the actual price is higher, the parties share the additional cost at an agreed percentage. If the actual price is lower, the parties share the surplus amount.

Bonus system

A bonus system may serve as incentive for the supplier to provide the services as efficiently as possible. The parties can structure the bonus system in various ways depending mainly on the charging methods and services. For example, the parties can agree on a default service level. If the supplier achieves a higher service level it will then be entitled to a bonus, corresponding to the price difference between the default service level and the higher service level achieved.

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

The principal terms used in relation to costs are indexation and benchmarking.

In Sweden, official price and cost indexes, published by the Agency for Official Statistics (*Statistiska Centralbyrån*), often serve as the basis for indexation clauses.

It is in the customer's interest to ensure that both:

- The services costs are continuously set at market level.
- The provided services are of market quality.

Therefore, the customer typically requests a benchmarking right at certain intervals during the term of the agreement. In practice, however, a benchmarking clause is often difficult to apply.

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 may be entitled to:

- Damages.
- Withhold payment.
- A price reduction.
- Require performance or redelivery.
- Step-in rights and rescission.

However, the available remedy(ies) depends on whether the breach relates to the delivery of goods or services.

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

The agreement normally expressly excludes the application of general law and sets out all customer remedies on the supplier's failure to perform. The customer's protections often include:

- A detailed evaluation of service performance (often by reference to KPIs (*see Question 16*)) and reporting of actual and foreseeable problems, sometimes combined with audit rights.

- Service credits (or similar) where there is deviation from KPI's (*see Question 16*).
- Indemnity from the supplier for loss suffered by the customer in specified circumstances.
- Price reduction.
- Step-in rights.
- Right to withhold payment.
- Specific provision for premature termination in defined circumstances (for example, material breach and supplier's insolvency) (*see Question 26*).
- An appropriate governance and escalation structure under which each party appoints specified relationship managers to manage problematic areas and escalate them to higher levels if solutions cannot be easily found.

Finally, the agreement normally provides that certain situations must not trigger the supplier's liability, for example where the breach of a service level is proven to be attributable to the customer's defective equipment.

WARRANTIES AND INDEMNITIES

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

An outsourcing typically constitutes a business transfer. Swedish law entitles the business' employees to retain their employment with the employer to which the business is transferred. The customer and supplier are mutually responsible for any debts to employees before the closing of the business transfer. Therefore, the parties often include a warranty that no employee has any claims against the customer, other than those specified in the agreement.

The customer usually warrants that:

- No employees, other than those specified, will be entitled to employment with the supplier.
- It is entitled to license or transfer the relevant IP rights to the supplier.

The customer also gives undertakings as to title, condition and maintenance of other assets transferred to the supplier, including the absence of any outstanding liabilities under the contracts transferred (although there may be negotiation over how exactly the customer transfers them).

The supplier typically warrants performance of the services with reasonable care and skill, in a timely and professional manner and in accordance with all applicable laws and regulations. Another common supplier warranty is that the services will not infringe any third party's intellectual property rights.

Any warranty in the outsourcing agreement is normally complemented with an obligation for the warranting party to indemnify the other party.

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

Swedish law does not impose any such limitations. However, general contract law states that the customer is entitled to expect that a service should be of a quality that corresponds to the price. The parties may agree to include an "as is" clause, which means that the supplier provides the services without any warranty regarding the fitness for purpose and quality of the services.

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?

Swedish law does not impose any maximum or minimum term on an outsourcing. The parties are free to negotiate the duration of the outsourcing agreement but a contract cannot be for an indefinite term.

The agreement is typically for a fixed term of at least five years. In some cases the customer has a unilateral option to extend the agreement after an initial period of, for example, three years. In public procurement processes (*see Question 2, Public sector* and *Question 4*) the contract term is affected by the initial tender statements in the *Official Journal* (or as published in another appropriate publication) and can only be extended in accordance with the public procurement rules. Generally, the term of the contract cannot be longer than that specified by the initial tender statements. If the arrangement is a framework agreement (that is, an agreement under which specific purchases can be made throughout the term of the agreement), the maximum duration is four years, save for in exceptional circumstances.

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

Swedish law does not regulate the notice period required to terminate an outsourcing agreement. The parties can specify that in the agreement. The length of notice varies depending on the grounds for termination and the type of services provided under the agreement.

Generally, the nature of an outsourcing arrangement requires an extended notice period, to enable the customer to make alternative arrangements. If the parties have not agreed on a notice period (which is rare in practice), the general law requires the notice period to be reasonable. This is mainly assessed against how long the agreement has been in force.

TERMINATION AND TERMINATION CONSEQUENCES

25. What events justify termination of an outsourcing without giving rise to a claim in damages against the terminating party (for example, fundamental breach, repudiatory breach, insolvency events and so on)?

The general law entitles a party to terminate an outsourcing in advance if the other party commits a fundamental breach of the agreement. The breach can be either one material breach or a sequence of repeated minor breaches. The termination does not prevent the terminating party from also claiming damages and, in practice, pursuing both actions is very common (*see Question 19*).

In practice, the parties normally specifically provide exhaustive termination clauses in the agreement (*see Question 26*).

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 are free to agree on which grounds each party can terminate the agreement in advance. The typical grounds for premature termination are as follows:

- A material breach of the agreement, which is not cured within a specified time period (normally 30 days) from the non-breaching party's written notice.
- Minor but repeated breaches.
- Insolvency (within the definition of insolvency set out in the agreement).
- Change of control (ultimate ownership) of the supplier.
- A *force majeure* event that persists for a longer period.
- Termination by the customer for its convenience, subject to the required notice. This enables the customer to switch suppliers without having to provide a reason (for example, if it is generally dissatisfied with the service but unable to demonstrate any clear breach). This is usually an expensive option since the supplier normally requires compensation for early termination.

Rescission is a specific type of termination. It allows the non-breaching party to nullify the agreement, as if it had not been entered into. For example, the customer may be entitled to rescind the agreement if the supplier is significantly late in starting to perform the services. The customer may, in this case, also be entitled to claim damages.

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

There are no implied rights for the supplier to continue to use licensed IP rights post-termination. The agreement should regulate the use of the other party's IP rights post-termination. In this regard it is important not to make arrangement in breach of any original licensor's terms and conditions.

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?

The parties are free to make any arrangements as to the other party's know-how, whether or not the customer's use of this is limited to the agreement period.

On termination of the outsourcing agreement, the customer often requires certain transitional assistance. This may include an obligation for the supplier to transfer its know-how for the customer's use after the termination.

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 are generally free to exclude most forms of liability. Typically, the parties exclude liability for indirect damage, which includes loss of profit under Swedish law. Sometimes the agreement specifies certain types of losses that are recoverable, to ensure the losses are not considered to constitute indirect damage.

However, it is generally not possible to exclude or limit liability where damage is caused intentionally or by gross negligence. The liability in this case is unlimited, including for indirect damage.

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

The parties can agree a financial limit on liability. The cap is normally set as a fixed amount or linked to the contract value (for example, payments during a 12-month period). In the latter case, it is important to clearly define the contract value. The parties should also agree on any circumstances when the cap does not apply (for example, for damages only or also for service level credits). Typically, the agreement stipulates that the cap does not apply in relation to the supplier's liability for infringement of third parties' IP rights or on either party's breach of a confidentiality undertaking. Further, the cap does not apply where damage is caused by intent or gross negligence (*see Question 28*).

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

A transfer of assets at market value may be subject to a deferred tax inherent in the assets (that is, if the market value is higher than the tax basis in the assets). The taxable gain attracts a tax charge at a flat rate of 26.3% (assuming that the transferor is a corporate entity).

In addition, if the assets are transferred at their tax basis, the customer will be taxed as if the assets had been sold at their market value, unless certain requirements are met. The most important requirements (provided the supplier is a corporate entity) are that:

- The supplier must be taxable within the EEA.
- The supplier must not have losses carried forward.
- The assets must constitute a "business division".

It is not possible for tax purposes to offset a low purchase price for the assets against a reduced price for services purchased from the supplier.

Transfers of employees to the supplier

Transfers of employees do not give rise to any tax consequences. The transfer may indicate that the transferred assets constitute a business division (*see above, Transfers of assets to the supplier*).

VAT or sales tax

The transfer of assets to the supplier is exempt from VAT provided both:

- The transferred assets qualify as a business division.
- The supplier carries on a business subject to VAT.

Services that the supplier provides are usually subject to VAT. If the customer does not carry out a business subject to VAT it is unable to recover input VAT. Consequently VAT on services that the supplier provides is a cost to the customer. Therefore, outsourcing by companies that are not subject to VAT can create additional costs and be more expensive than managing these functions internally.

Other

There are no other significant tax issues that are specific to outsourcing.

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