Sourcing World

Jurisdictional comparisons **First edition 2012**

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1. BUSINESS PRACTICE (INTERNATIONAL DIVISION OF LABOUR, BREAKING-UP VALUE CHAINS) – GENERAL DESCRIPTION OF THE MATURITY OF THE OUTSOURCING MARKET IN YOUR JURISDICTION (COUPLED WITH RELEVANT MARKET DATA)

Portugal's outsourcing market has grown significantly in recent years, benefiting from private and public investment in electronic communications networks. Such investment was facilitated by a favourable legal and regulatory environment for infrastructure installation, which allowed the main players in the market to quickly roll-out fibre optic networks. In addition, public programmes allowed the development of high-speed internet networks in rural and peripheral areas, open to communications services providers in a non-discriminatory manner. Furthermore, Portugal was a pioneer in opening up the network infrastructure of the incumbent operator (PT) to electronic communications service providers, which has had a regulated reference offer on ducts since 2006.

Mobile broadband has undergone significant expansion in Portugal in recent years, which is expected to continue with the transition from UMTS into LTE (Long Term Evolution), following a spectrum allocation auction that took place at the end of 2011.

A successful programme of modernisation and simplification of the public administration system has been under implementation since 2005, which has allowed Portugal to have very good indicators for e-government.

Portugal also benefits from a dynamic IT sector, which has invested in expanding into Portuguese-speaking countries and other foreign markets and in consistently increasing its turnover originated from exports. Important investments in data centres were made across inner parts of the country.

In addition to a good technology base, Portugal offers other favourable characteristics for the development of the outsourcing business such as a trained workforce, pleasant climate and good quality of life capable of attracting to Portugal qualified professionals.

In 2008, a group of companies representing over 85 per cent of the outsourcing market decided to create the association 'Portugal Outsourcing', in order to promote more actively the development of the Portuguese near-shore outsourcing market. According to Portugal Outsourcing, the development of an outsourcing cluster in Portugal will entail an annual productivity growth of over EUR 1,500 million and the creation of 12,000 new net jobs in the years to come. It is also expected that the value of outsourcing services sold to external markets will be worth over EUR 1,300

million in 2015 and that the total contribution of outsourcing for Portugal's GDP, which presently represents annually EUR 1,400 million, will increase from around 0.6 per cent to 1.3 per cent.

The ongoing implementation by Portugal of a programme of specific economic policy conditionality negotiated in 2011 with the European Commission, the European Central Bank and the International Monetary Fund (IMF) – together referred to as the 'troika' – which is due to be concluded in 2013, is expected to bring along very positive improvements in labour market flexibility (an agreement on labour markets has recently been concluded between the Government and social partners), in greater effectiveness of the judicial system and greater competitiveness of the economy.

In spite of such opportunities, recent tax increases and cuts in public investment dictated by an austerity programme based on the measures negotiated with the 'troika', may hinder the prospects for outsourcing in the years to come, even if sales of outsourcing services to external markets had the best overall performance in exports during the first quarter of 2011, with a 17 per cent increase.

The improved performance of the outsourcing sector will bring gains to the economy as a whole, allowing companies to benefit from greater focus on value creation, efficiency improvement and cost reduction.

2. PROCUREMENT PROCESS, ROLE OF BUSINESS ADVISERS AND MATURITY OF THE CONSULTANCY INDUSTRY

2.1 Describe the procurement process that is usually used in a public as well as a private procurement to select a supplier of outsourced services (such as requests for information/proposal/quotation, invitation to tender, due diligence, negotiation)

Public sector

Portugal transposed the EU Directives on public procurement and as a rule public procurement is subject to competitive procedures. Under the Portuguese Code for Public Contracts and EU Regulation 1251/2011 of the Commission, of 30 November 2011 (which came into force on 1/01/2012), public entities wishing to contract goods or services must, as a rule, go through a competitive tender procedure.

In broad terms, the selection of a certain service award procedure is dependent on whether the awarding authority is a public entity (eg state, regional or local authority) or a body governed by public law (eg most of the Portuguese public owned companies) and the estimate amount of the award.

As a rule, if the estimated value of a contract award by a public entity exceeds EUR 75,000 or if the estimated value of a contract award by a body governed by public law exceeds EUR 200,000, a call for competition has to be carried out in the open market. If the estimated value of the award by a public entity exceeds EUR 130,000, a notice must be published in the OJEU.

If the estimated amount does not exceed the amounts indicated above, the contract may be awarded by means of a specific procedure initiated with an invitation to one or more interested parties to present their proposals.

The Portuguese Parliament adopted in December 2011 a resolution

recommending that the Government introduces rules in the Code for Public Contracts in order to prevent any conflict of interest from service providers, namely: (i) by making mandatory the publication of a statement confirming that the provider in question has no conflicting interest with the public interest; and (ii) by creating a list of situations that would qualify as a conflict of interests.

Private sector

There is no mandatory invitation to tender and no obligation to respect a formal procedure with specific transparency obligations in the private sector. However, it is advisable to use selection procedures with competitive elements, even if with a lot more flexibility than in the public sector.

Private companies should establish the minimum requirements for the services to be outsourced, such as a well defined scope, technical requirements, term, service levels, and also instructions on how to structure the proposal. Ideally, the criteria to be used in order to select the supplier(s) should also be known in order to allow the interested providers to better structure their 'bids'.

The customer should also choose a group of potential providers (preferably, a minimum of three), that are sufficiently representative of the market and able to fulfil the applicable requirements. It is important to carry out a preliminary search of the market in order to identify the players that would qualify to provide the services in question, as well as the applicable price range and technical requirements on offer in the market.

It is in the customer's interest to define as much as possible in detail the main aspects of the transaction in order to obtain more in-depth and accurate proposals. An indication of the main terms and conditions applicable to the purchase of services and, if possible, the provision of a draft agreement would be a positive strategy for the company wishing to outsource services.

Such a strategy, from the customer's standpoint, will greatly condition the future negotiations of the outsourcing agreement in its own favour. It would also be advisable, after the initial stage of the proposals, that the customer elaborates a shortlist of providers and starts discussing the terms and conditions of the outsourcing agreement with more than one provider, drawing an advantage from several potential providers being considered and increasing the chances of negotiating the best deal possible. Depending on the circumstances of the deal, a non-disclosure agreement should be entered into with each of the candidates on the shortlist.

2.2 Which roles and tasks are generally performed by business advisers?

It is a sensible strategy for the customer to have business advisers from an early stage of the outsourcing process, particularly when the services are very technical and specialised.

Depending on the type of services and on the value of the contract, business advisers normally advise on:

- identification of business areas subject to outsourcing;
- definition of the scope of services and price negotiation;
- service levels and penalties for poor performance;
- structuring and negotiation of the terms and conditions of the agreement;

- definition of selection criteria and evaluation of candidates and proposals against such criteria;
- general support in contract negotiation;
- execution of the tasks or quality review of the services performed by the outsourcer and in general improvement of the services provided.

3. STATUTORY RULES, INDUSTRY SPECIFIC REQUIREMENTS AND REGULATIONS

3.1 Statutory rules governing sourcing transactions in general

Portuguese law does not specifically regulate outsourcing agreements, as is the case with insurance, lease or labour agreements. The provision of services in outsourcing falls under the discipline of the Portuguese Civil Code and a number of different legal regimes, including labour law, data protection law, IP law and tax law.

- Civil Code (*Código Civil*), approved by Decree-Law 47344, of 25 November 1966, as amended, which deals, among other things, with general contract law, the framework of service contracts and property law;
- Copyright Law (*Código do Direito de Autor e Direitos Conexos*) approved by Decree-Law 63/85, of 14 March, as amended;
- Industrial Property Law (*Código da Propriedade Industrial*) approved by Decree-Law 36/2003, of 5 March, as amended;
- Labour Code (*Código do Trabalho*), approved by Law 7/2009, of 12 February, as amended;
- Securities Code (*Código dos Valores Mobiliários*), approved by Decree-Law 486/99, of 13 November, as amended;
- Competition Law (*Lei da Concorrência*) – Law 18/2003, of 11 June, as amended;
- Personal Data Protection Law (*Lei da Protecção de Dados Pessoais*) – Law 67/98, of 26 October;
- Law 41/2004, of 19 August, concerning the processing of personal data and the protection of privacy in the electronic communications sector;
- Law 32/2008, of 17 July, on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks.

3.2 Legal or regulatory requirements (formal or informal) concerning outsourcing in any industry sector

In the financial sector, the law establishes certain limitations on the outsourcing of functions associated with the role of financial intermediary. Under the Portuguese Securities Code (*Código dos Valores Mobiliários* or CVM), the outsourcing of financial intermediary functions or other operational activities that are essential to ensuring the quality and efficiency of the intermediary services must comply with a number of requirements (Articles 308.º to 308.º – C of the CVM).

For instance, the financial intermediary is prevented from outsourcing any company management functions or a number of activities that would significantly reduce the activity of the financial intermediary and the sub-contracting agreement must ensure that the requirements that

were instrumental upon the licensing and registration of the financial intermediary activity remain unchanged.

In addition, the service provider must also comply with a number of significant requirements set in the Portuguese Securities Code, which should be made mandatory upon such provider by the outsourcing agreement. One important requirement is that the service provider cooperates with the supervising authorities with regard to the activities that were outsourced.

3.3 Applicable rules regarding control or monitoring of the supplier, reporting to the regulator, rights of access to, and audit of, the supplier's records to be granted to the regulator, segregation of staff, functions or entities

In regulated industries, the customer is fully responsible before the regulator. Under an outsourcing agreement, the reporting obligations to the regulator are fulfilled directly by the customer and the rights of access and audit of the regulator are directed to the customer, even if the latter may require the cooperation of the service provider.

In order to allow the customer to comply with reporting obligations, it is advisable that the outsourcing agreement establishes upon the service provider the obligation to provide access to all the relevant information to the customer, the regulator(s) and other competent authorities, following the customer's request.

3.4 Which services (if any) must be performed by a regulated or specially licensed entity, or any specially trained personnel?

Under Portuguese law, no services in particular must be performed by a regulated or specially licensed entity, or any specially trained personnel.

3.5 Requirements (formal or informal) for regulatory notification or approval of outsourcing transactions in any industry sector

There are no particular formal requirements with regard to a regulatory notification or approval of outsourcing transactions. However, the regulators will tend to draw a line between activities that can be outsourced and activities that must be kept in the company. This will depend on the type of sector and the nature of the activity in question (there are specific limitations for the outsourcing of financial intermediary activities, as results from 3.2 above).

With regard the media sector (TV, radio and newspapers), the extent to which a media company is entitled to outsource processes and activities will be decided on a case-by-case basis. In the media area, it is an interesting question to draw the line between activities that can be outsourced and the minimum bulk functions that must be kept within the media company in order to ensure compliance with regulatory obligations.

4. DATA PROTECTION, TRANS-BORDER DATA FLOWS, PROFESSIONAL SECRECIES, CLOUD COMPUTING

4.1 Requirements (if any) for a third party to process data on behalf of the data controller

Under Portuguese Data Protection Law (Law 67/98, of 26 October), which is fully in line with Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995, if a third party processes data on behalf of the data controller a number of requirements must apply, namely:

- the controller must choose a processor providing sufficient guarantees in respect of the technical security measures and organisational measures governing the processing to be carried out, and must ensure compliance with such measures;
- the processing must be governed by a contract binding the processor to the controller and stipulating in particular that the processor shall act only on instructions from the controller;
- such contract must be entered into in writing;
- the technical security measures and organisational measures set by law shall also be incumbent on the processor, under the contract.

The customer remains in control of the data at all times (the controller), and the provider merely acts as a 'technical assistant'. As such, the processor is not considered a third party with regard to data privacy but part of the customer's business in the broadest sense and no notification obligations to the Data Protection Authority fall upon the data processor in relation to the processing of data. The transfer of data between the controller and processor is therefore not considered a 'data transfer' relevant in terms of data protection.

Security measures will be reinforced when the data in question is sensitive data or data relating to offences, criminal convictions or security measures (Articles 7, 8, 14 and 15 of the Data Protection Act). The customer must contractually establish control mechanisms that allow for periodical inspection by the customer.

4.2 Rules and regulations regarding data protection and data security, confidentiality of customer data, banking secrecy and other professional secrecies

Data protection and data security

Under the Portuguese Data Protection Law (Law 67/2009, of 26 October), the processing of personal data is generally subject to a prior notification to the Portuguese Data Protection Authority (CNPD).

After such notification is effected, the data in question can be freely processed and the CNPD registers the database in a public registry, which can be accessed at the CNPD's site (*www.cnpd.pt*).

The processing of certain categories of data – namely sensitive data (data relating to health, private life, etc), credit or data relating to suspects of offences, criminal convictions or security measures – is subject to a prior authorisation issued by the CNPD.

The company wishing to legalise a database subject to an authorisation must wait until the CNPD issues such authorisation before it can start any processing

of data, including collecting the data that will be kept in the database.

The notification is a relatively straightforward procedure, which has recently been simplified. It is processed via the internet, by filling in an online form which can be accessed on the CNPD's site. The information requested by the CNPD includes, *inter alia*, the identification of the data controller, the categories of data processed, the purposes of the database, third parties that may receive information from the database and the security measures implemented.

Law 67/98, of 26 October, provides that the CNPD may simplify the notification or exempt from notification certain categories of databases that do not threaten to harm the rights of data subjects (the individuals the data relates to), and a number of less intrusive and clearly necessary data processing activities were exempted from notification in 2000.

Unlike other jurisdictions, the Portuguese legislator decided not to provide for the existence of a data protection officer and as such the internal responsibility for compliance with the data protection laws lies essentially with the company's management.

Companies processing data must comply with security obligations set by law, by taking adequate technical and organisational measures to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access. Such measures must be reinforced when the data processing in question relates to sensitive data or to data on offences, criminal convictions or security measures.

Banking secrecy

Articles 78 and 79 of the Legal Framework of Credit Institutions and Financial Companies (Decree-Law 298/92, of 31 de December, with amendments), establishes the legal framework for bank secrecy, which is a form of professional secrecy applicable to the administration and auditing bodies of credit institutions, their employees, attorneys or service providers.

The exceptions to banking secrecy obligations are defined by law and comprise the disclosure of data covered by banking secrecy to third parties: (i) expressly authorised by the client; (ii) to regulators such as the Bank of Portugal and the Portuguese Securities Market Authority (CMVM); (iii) to a Fund for Deposit Guarantee and to the System of Investors Indemnity; (iv) to the judiciary authorities; (v) to the tax authorities; (vi) or to any other third party, when such disclosure is authorised by law.

If the customer in an outsourcing transaction is subject to banking secrecy, the outsourcing agreement with the supplier must include security requirements and the supplier's obligation to comply with business, banking and professional secrecy rules.

4.3 Rules governing the transfer of data outside your jurisdiction

The transfer of data to other countries is regulated in Articles 19 and 20 of Law 67/98, of 26 October.

The transfer of data to countries within the European Economic Area (EEA) is free – it does not depend on special requirements or authorisation from the Data Protection Authority – and is subject to the same

requirements applicable to a transfer within Portugal.

If the importing country is outside the EEA, the transfer may take place if such country offers an adequate level of protection. The European Commission has declared that a number of countries offer an adequate level of protection but the rule is still that no such level of protection is offered by most countries, including countries like India which are players in the global outsourcing market.

Transfers to countries not offering an adequate level of protection can take place if such transfers are authorised by the CNPD. The CNPD may authorise the transfer: (i) if the data subject authorises such transfer; or (ii) if a number of requirements in connection with the data processing in question are met, namely with regard to the purpose and necessity of the transfer. In addition, such authorisation will be automatically granted if the controller (data exporter) and the data importer enter into a data transfer agreement strictly following the model clauses adopted by the European Commission. In the event that the data importer is located in the US, such authorisation will also be granted if the importer is part of the Safe Harbour list.

Furthermore, Law 67/98, of 26 October, imposes that when a data controller uses a third party processor in order to process personal data (namely, under an outsourcing relationship), both entities must enter into a written contract whereby the data processor will be bound: (i) to process the personal data solely in accordance with the instructions received from the data controller; and (ii) to comply with the security obligations set by law by taking adequate technical and organisational measures to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access.

The CNPD has a restrictive position with regard to Binding Corporate Rules (BCRs), and is not likely to issue an authorisation for an international transfer of data solely based on the existence of BCRs.

4.4 Are data transfer agreements contemplated or in use? Does the relevant national regulator need to approve the data transfer agreement? Have any standard forms or precedents been approved by national authorities?

Data transfer agreements are contemplated and in use. As previously mentioned, the authorisation for an international data transfer to a country outside the EEA not offering an adequate level of protection will be automatically granted if the controller (data exporter) and the data importer enter into a data transfer agreement with clauses that strictly follow the model clauses adopted by the European Commission.

There are no standard forms or precedents approved by the CNPD. This could be explained by the fact that the market tends to adopt the European Commission model clauses, a solution that ensures a swift approval of the data transfer. This practice is therefore very common in Portugal.

4.5 Is a data transfer agreement sufficient to legitimise transfer, or must additional requirements (such as the need to obtain consent) be satisfied?

Consent from the data subject for international transfer is obligatory under Law 67/98, of 26 October.

4.6 Has cloud computing for outsourced services evolved in your jurisdiction? Which services (if any) are outsourced to the 'cloud' so far? Which precautions (contractual, factual, others) are usually taken to protect, or to allow control over, the data?

International providers together with some local companies such as the incumbent communications operator are the main players in the Portuguese cloud computing market. Cloud computing raises a number of legal issues, from data protection and data security to liability and enforcement of contractual obligations, which act as deterrents to a massive and swift expansion of cloud solutions in the Portuguese market.

In addition, the distant location of the underlying infrastructure, often in different points of the globe, and the sense of insecurity deriving from the sharing of a public cloud by different clients makes it more difficult for SMEs and companies without international links to adhere to the concept.

Nonetheless, certain sectors such as banking and insurance and multinationals all adhered significantly to cloud computing, with an emphasis on private clouds and on Infrastructure as a Service (IaaS) and Platform as a Service (PaaS) solutions in public cloud models. Cost reductions and increase in flexibility are often advantages of cloud computing, but many SMEs need to improve the automation of their internal processes and their interaction with the IT department before they can evaluate their needs in cloud computing. The investment in facilities such as data centres in recent years by local operators is an indication that the cloud computing market is likely to grow.

One important aspect of its development would be future increase in the use by the public administration of cloud computing solutions and technological outsourcing. Considering that the economic rescue programme negotiated with the 'troika' puts an emphasis on cost reduction and on a radical reform of the public administration, such scenario is not an unlikely one in the near future.

5. ASSET DEAL, LEGAL CONCEPTS AND MECHANICS

5.1 What legal concepts apply to the transfer of assets in an outsourcing? Which formalities are required for the transfer of assets (such as movable property, immovable property, IP rights and licences, contracts)?

Movable property

No formal requirements generally apply to the transfer of movable property in an outsourcing agreement. Certain movable goods, such as cars and airplanes, are subject to mandatory registration. The contract should be in writing for evidential purposes.

Immovable property

The transfer of immovable property requires a notarised contract or a private document authenticated by a lawyer, and the registry at the land registrar.

IP rights and licences

IP rights can generally be transferred onto someone else (see Article 31 of the

Industrial Property Code). If a trade mark is being transferred, a document signed between the parties is sufficient to execute the transfer. However, in order to be enforceable before third parties the transfer must be registered by one of the parties with the relevant authority (Industrial Property Institute if it is a Portuguese trade mark).

The transfer of an IP right generally does not affect any licences. Licences can be transferred if the original licensee is authorised in writing to do so by the licensor/IP right owner.

Contracts

A party must authorise a transfer of another party to an agreement, prior or after such transfer occurs. The consent is subject to the same formalities as the contract itself (Articles 424 and 425 of the Civil Code).

5.2 Particular considerations for the transfer of assets offshore (such as export or licence requirements)

The transfer of assets offshore may raise concerns with regard to differences in the standards of protection of IP rights or the level of data protection. Export restrictions may apply to outsourcing to certain countries that are subject to sanctions or embargoes in the context of the United Nations.

6. HR, TRANSFER OF UNDERTAKING, MASS DISMISSAL, REPUTATION ASPECTS

6.1 In what circumstances (if any) are employees transferred by operation of law?

Pursuant to the Portuguese Labour Code (PLC), in case of transfer, by any means, of the company's ownership, or undertaking or a part of the company or undertaking that constitutes an economic unit (ie an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary), the transferee automatically assumes the employer's position within the employment contracts of the employees allocated to the transferred company, undertaking or economic unit.

For a period of one year following the transfer, transferor and transferee are jointly and severally liable for all obligations accrued until the date of transfer.

The transfer regime also applies in case of change of supplier and also in the case of reversion of the economic unit or undertaking to the customer.

6.2 If employees transfer by operation of law, which terms and effects apply (including on pensions, employee benefits, collective agreements)?

The PLC foresees that the transferee/new employer shall assume the position of the transferor/previous employer on the employment contracts, being implicit that the contracts remain the same, that is, the transferee remains subject to the rights and obligations of the transferor/customer.

Collective bargaining agreements

The collective labour instrument that binds the transferor is applicable to

the transferee until the end of its duration period and applies at least for a period of 12 months as of the transfer, unless, in the meantime, another collective labour instrument becomes applicable to the transferee.

Pensions

The PLC does not address the issue of pensions.

However, considering that the transfer mechanism not only implies the transfer to the transferee of the transferor's assets, but also of its liabilities, we envisage it possible that, if the pensions' scheme contains no constraints, the transferee takes over the transferor's position in relation to any benefits and pension schemes which applied before the transfer.

Employee benefits

As previously stated, all rights and obligations arising from the employment contracts of the transferred employees are automatically transferred to (and assumed by) the transferee.

Therefore, the employees' rights and benefits are not, in principle, affected by the transfer.

6.3 Means for the customer (contractual or other) to retain particular employees, or make them redundant. Can dismissals be implemented before or after the outsourcing? How is redundancy pay calculated?

Prior to the transfer, the transferor can either retain particular employees by transferring them to an undertaking or economic unit not affected by the transfer, or terminate the employment agreement in accordance with the mandatory termination regime.

It should be noted that the transfer of business is not considered itself as a 'just cause' for terminating the employment contract. However, the employer (transferor or transferee) is not prevented from terminating the employment contract under the general rules, namely under a collective dismissal or a termination of job position procedure (eg due to economic or structural reasons).

In case of collective dismissal or termination of a job position, employees are currently entitled to compensation corresponding to one month's base remuneration plus seniority bonus (if applicable) per year of service, being the fraction thereof calculated on a pro rata basis, subject to a minimum of three months' compensation.

With reference to contracts executed after 31 October 2011, in case of collective dismissal or termination of a job position, employees will be entitled to compensation corresponding to 20 days base remuneration plus seniority bonus (if applicable) per year of service, being the fraction thereof calculated on a pro rata basis, with certain maximum limits (12 times the monthly base remuneration plus seniority bonus; and 240 times the minimum monthly salary – currently EUR 485 per month).

In the case of termination by mutual agreement, there is no minimum or maximum limit for compensation foreseen by law.

6.4 To what extent can a supplier harmonise terms and conditions of transferring employees with those of its existing workforce?

Where measures/changes are envisaged, the transferor and/or the transferee must not only inform but also consult the appropriate representatives of affected employees with a view to reaching an agreement: the duty to inform and the duty to consult are two separate duties; the provision of information is mandatory; consultation is only necessary if the transferor and/or transferee intend to introduce new measures that may affect the employment agreements concerned.

In addition, terms and conditions can be changed individually by agreement between the employer and employee.

Please note that all changes are subject to the applicable mandatory conditions and requirements established by the law and/or by any applicable collective bargaining agreement.

6.5 Can the parties structure the employee arrangements of an outsourcing as a secondment?

From a certain perspective, one may say that instead of an outsourcing arrangement, the supplier may have an employee temporarily seconded to the customer provided that the legal requirements are met, namely that supplier and customer are linked companies – the companies are reciprocally held by each other, one of the companies holds a dominant position over the other or there is a parent-subsidiary relationship between them – or they have a common organisational structure.

From a different approach, it is possible to address the question by stating that, in the event that the outsourcing comprises the transfer of an economic unit and the transferor does not retain the employee prior to the transfer, the employment contract will be transferred to the transferee by operation of law. In such event, it would not be possible to structure the employee arrangements of an outsourcing as a secondment.

6.6 Notice, information and/or consultation obligations of customer and/or supplier in relation to employees or employees' representatives (including timing, duration, usual process and sequence of events)

Both the transferor and the transferee are required to inform the employees' representatives of: (i) the date and the reasons for the transfer; (ii) the legal, economic and social implications of the transfer for the affected employees; and (iii) the transferor and transferee's envisaged measures for the affected employees.

If the employees do not have representative bodies, this information must be provided directly to the employees affected by the transfer.

The information must be provided in writing before the transfer date and in due time, ie at least 10 days before the consultation process referred to below.

Prior to the transfer, both the transferor and the transferee are required to consult the employees' representative bodies in order to reach an agreement regarding the measures they intend to apply to the employees in light of the transfer and that may affect the transferred employees' employment

contracts.

The law does not set out any specified time scale over which consultation must take place. The only time requirements are those set out above in relation to the provision of information.

For information and consultation purposes, employee representatives are deemed to be the workers' committee, the inter-union and union committees and the companies' delegates.

6.7 Consequences (civil and/or criminal) of non-compliance with any of above requirements (including whether any such consequences can be avoided or mitigated by contractual means)

In case of infringement of the automatic transfer of employer's position from the transferor to the transferee in the event that the transfer regime is applicable, a fine ranging between EUR 2,040 and EUR 61,200 can be applied. In case of infringement of the information and/or consultation duties above described, the employer may be subject to a fine ranging between EUR 204 and EUR 1,530 (the amount of the fine will depend upon the company's turnover and whether the breach was committed with intent or negligence).

Employees who have been transferred and consider that, by virtue of the transfer, a breach of their rights and guarantees has occurred may claim grounds for termination with just cause. In such cases, if a court of law confirms the existence of just cause for the unilateral termination of the employment contract, the employee will be entitled to severance payment for all the pecuniary and non-pecuniary damages suffered, which will correspond to an amount of between 15 and 45 days' base remuneration and seniority bonus for each complete year of service (the fraction of a year is calculated on a pro rata basis and the severance amount may not be less than three months' base remuneration and seniority bonus). The transfer, or a reason connected with the transfer, does not amount to just cause.

Employees may also terminate the employment contract due to significant changes legally introduced by the employer but, in such circumstances, they will not be entitled to any severance payment.

7. CHARGING, ADJUSTMENT OF FEES, AUDITING, BENCHMARKING

7.1 Charging methods commonly used in an outsourcing (risk or reward, fixed price, cost or cost plus, pay per use, resource based charges, minimum charges or commitments etc)

A number of factors can influence the charging methods such as the type of services outsourced, the risk allocation between the parties or the SLAs, and the charges can be structured under different levels of complexity. Charging methods in outsourcing contracts can be structured on the basis of cost plus (where the charges are based in the actual costs with a profit margin), and include a fixed price or a pay as you go price (a pre-agreed unit price for specific items) structure, which allows more flexibility and better adapts to the needs on outsourcing in a given moment.

7.2 Charge variation mechanisms (eg, based on business volume changes), indexation or other ways for addressing COLA (labour and/or non-labour based), variations in F/X rates

A good practice for outsourcing contracts with longer terms (eg more than five years), entered into in technology-based industries, is the inclusion of a charge variation mechanism such as a benchmarking clause, which forces the service provider to regularly review its prices according to a particular benchmark. Such a clause provides scope for a regular adjustment of prices.

7.3 Contractual rules usually applied to auditing (including verification of charging mechanisms during the term) and benchmarking

With regard to auditing, contractual rules cover matters such as: (i) access to information relating to the service provider, including object and scope of audit; (ii) frequency and method for setting the date and location(s) or the audit; (iii) degree of co-operation from the service provider; and (iv) allocation of audit costs.

The usual clauses on benchmarking include: (i) the frequency of a benchmarking exercise; (ii) who will execute the benchmarking - the outsourcer or an external entity; (iii) scope of benchmarking; and (iv) consequences of the benchmarking exercise in the contract, such as price adjustments.

8. TAX ASPECTS, TAX EFFICIENCY IN GROUP STRUCTURES, TRANSFER PRICING

8.1 Main tax issues that arise in an outsourcing

Transfers of assets

The transfer of assets may trigger income taxes (Corporate Income Tax or *Imposto Sobre o Rendimento de Pessoas Colectivas* IRC), Value Added Tax (VAT) or stamp duty in certain cases of transfer of business as a going concern and under specific conditions.

From a Portuguese VAT perspective, as a general rule, the transfer of assets to the supplier constitutes a supply of goods or services and is, in principle, subject to VAT.

Value added tax (VAT) or other sales tax

In most cases, outsourced services provided by the supplier to the customer trigger a VAT charge. If the customer's turnovers are subject to VAT, this will usually be of little concern as the customer is entitled to deduct charged VAT in full. However, if the customer's turnovers are not fully subject to VAT (for example if the customer is an insurance, bank or healthcare company), the outsourcing may give rise to substantial additional VAT costs, as the customer can only partially deduct VAT charged by the supplier.

For the purposes of VAT, any set-off of purchase price for assets transferred to the supplier against fees for services supplied by the supplier leads to VAT liability on the gross consideration of each supply (and not only on the net consideration paid). The price of each supply should therefore be specified in

the relevant agreements.

The recipient of a supply or a service may be under the obligation to pay the VAT instead of the supplier.

Income taxes

Service fees may be exempt from withholding tax depending on the nature of the services and also, the provisions set forth in the relevant double taxation treaty. As a general rule, service fees charged by the supplier qualify as deductible expenses for income tax (Corporate Income Tax and Municipality Contribution or 'derrama'), if such fees are indispensable to the activity of the client.

8.2 Precautions that are usually taken to arrange for tax efficiency (between customer and supplier, or within the customer group and/or the supplier group, including aspects of transfer pricing)

In the context of an intra-group outsourcing (cost sharing), in order to avoid unexpected tax consequences, an appropriate price must be determined for: (i) the assets to be transferred to the intra-group service provider as well as for; (ii) the services to be provided by the intra-group service provider. In international tax law every group entity needs to be considered as an independent taxable entity. Therefore, income between two connected entities needs to be attributed as if such entities were independent enterprises. Thus, (transfer) prices must correspond to prices agreed between independent parties in a similar transaction (dealing at arm's length).

In the event of a transfer of assets to a foreign entity which includes the transfer of a function and the chances and risks in this connection an appropriate transfer price needs often to be determined according to a so-called transfer package.

In addition, the relevant transfer pricing documentation requirements need to be observed

9. TERM AND TERMINATION, NOTICE PERIODS, MANDATORY TERMINATION, PROLONGATION RIGHTS, TERMINATION MANAGEMENT

9.1 Rules and regulations regarding term of an outsourcing and/or length of notice period (maximum or minimum)

The term of the service provision is freely defined by the parties on the basis of different factors such as the object and scope of the outsourcing and the value of the initial investment from the service provider. The service provider will be generally interested in a long-term relationship in order to amortise the initial investment made and to lower the costs of acquiring new clients.

Outsourcing agreements are not standardised, but one could admit fixed terms varying between five to 10 years.

The termination clause should establish that early termination will only be possible in the event of a serious breach by the other party of applicable terms and conditions. It is advisable that the contract provides for the manner in which early termination can occur, together with associated financial aspects such as the eventual compensation to the service provider.

9.2 Events that justify termination of an outsourcing without giving rise to a claim in damages against the terminating party as a matter of mandatory law (fundamental breach, important reasons, insolvency events etc)

The parties can agree that no indemnity will be owed to the service provider if the contract is terminated in the event of a serious breach or non-compliance. The declaration of insolvency and the appointment of a judicial administrator may give rise to the termination of the agreement without damages.

9.3 Contractual termination rights usually included in the outsourcing agreement (for bad performance or other breach, change of control, convenience etc)?

The parties can freely agree on different termination rights (with immediate effect or with an escalation procedure, with a longer or shorter notice), on the basis of the gravity of the breach. An isolated breach in SLAs should not give rise to termination but a series of persistent breaches may and the number and type that would give rise to termination can be defined in the agreement. The change of control of the supplier, a data security breach, or the breach of material regulations by the supplier all could give rise to immediate termination. However, this should not occur with late payments of the client, which should only be sanctioned with termination if they persist in time (otherwise, financial penalties and interest rates can apply).

The convenience of the customer in terminating the agreement (with an appropriate pre-defined indemnity), could also be a possibility regulated in the outsourcing agreement.

9.4 Implied rights for the customer and/or supplier to continue to use licensed IP rights or gain access to relevant know-how post-termination (including whether this can be excluded by contract)

It is important to define what will happen with IP rights after termination of an outsourcing agreement takes place. Termination can entail the possibility for the customer to transfer hardware, software and data.

The IP rights repercussions of termination is a business matter that should be defined at an early stage, especially if the object of the outsourcing agreement includes the licensing or development of software that the customer will find difficult to obtain in the market after termination. Therefore, the outsourcing agreement should include an IP rights provision where the terms and conditions of the IP rights licensing are defined, especially with regard to the manner in which such rights will cease to apply (or how they will persist), after termination.

Therefore, it is up to the outsourcing agreement to regulate whether any IP licences shall go on beyond termination of the contract. In the absence of a specific provision, it will be up to a judge to freely interpret the contract.

9.5 Particular aspects of termination management, assistance by the supplier

From the customer standpoint, it is very important to regulate the transition

from one service provider to another or to the internal provision of the services formerly outsourced. In such exercise, it may be important to define the obligation of the service provider to provide assistance and cooperation with reintegrating the outsourced area into the original business or transferring it to a third party.

Specifically the supplier may be under the obligation to: (i) provide training to the new staff providing the services; (ii) release documents; (iii) (re)transfer hardware and software (together with the associated licences); and (iv) perform technical assistance.

The scope of such services, together with the remuneration and duration should also be described in detail in order to ensure to the fullest extent possible a peaceful transition.

10. REMEDIES, RISK MANAGEMENT AND PROACTIVE MEASURES

10.1 Remedies and/or relief available to the customer under law in case of bad or non performance by the supplier (including fitness for purpose and quality of service warranties, and whether or not, and if yes to what extent, they can be excluded by contract)

Remedies or relief in the event of non-performance by the supplier can include: (i) withholding payments until non performance ends; (ii) the termination of the agreement; (iii) payment of penalties in the event of breach of SLAs; (iv) indemnity; or (v) agreed amendments to the agreement.

Remedies cannot generally be excluded by contract.

10.2 Customer protections typically included in the contract to supplement statutory remedies/relief (including mechanisms such as quality assurance, no interruption or suspension, audit rights, reporting and governance, service credits and penalties, hold-back, step-in rights etc)

Contractual regulations regarding customer protection include: (i) detailed measurements of service performance (KPIs) and audits; (ii) obligation to provide information on contract performance; (iii) Service Level Agreements or SLAs and penalties for failure to comply with SLAs; (iv) indemnification by supplier for specific losses incurred by the customer; (v) or specified termination rights; (see 9.3 above); (vi) step in rights; or (vii) appropriate governance or an escalation structure in order to resolve disputes.

10.3 Warranties and indemnities typically included in the contract, protection of customer and/or supplier regarding liabilities and obligations arising from outsourcing (including those relating to employee arrangements)

Warranties and indemnities are typical in common law and they appear frequently in outsourcing agreements in Portugal and can relate to a number of aspects. A supplier may warrant/agree:

- to be entitled to enter into the agreement and perform its obligations;
- to perform the services with reasonable skill and care, in a timely

and professional manner and in accordance with applicable laws and recognised industry standards (SLAs);
- to indemnify the customer against harm suffered due to the supplier's actions;
- to indemnify the customer against future liability in relation to employees transferred to the supplier as part of the outsourcing;
- that material information provided in the pre-tender and tender stages was and remains accurate, complete and not misleading (for example that the statements made about its services or financial resources are true);
- certain other assurances specifically related to the project or type of services (for example, that the supplier has particular accreditations or operates in accordance with a particular quality assurance system or audit standards, such as ISO 9001), specifically in the case of agreements with the public administration.

Typical customer warranties are to: (i) confirm its entitlement to enter into the agreement and perform its obligations; (ii) confirm the information provided during the pre-tender and tender stages is accurate, complete and not misleading; and to (iii) give assurances concerning title, condition and/or maintenance of assets transferred to the service provider, including the absence of liabilities.

10.4 Limitation and/or exclusion of liability (in particular for indirect and consequential loss, loss of business, profit or revenue, and how any available cap on liability is usually fixed)

The parties cannot limit or exclude liability for intentional or grossly negligent acts or acts that do not cause death, injury (moral or physical) and damage to health. Therefore, an exclusion or limitation of liability for gross negligence or wilful misconduct (such as fraud) is not valid and it is not possible to exclude or limit liability for death or personal injury resulting from negligent breach of contract.

Subject to the above limitations, the parties can agree on any financial limitation on liability (fixed amount, or percentage/multiple of contract value), and identify areas where the liability shall not be subject to a cap (for example, the supplier's indemnity in relation to IP rights is often unlimited). Usually, the supplier (and often also the customer) aims to exclude liability for indirect and consequential loss or damages. The supplier may also seek to exclude liability for loss of business, profit or revenue (even where these constitute direct loss or damage). In contrast, the customer may try to recover for any particular loss or damage (whether direct or not) by specifying certain categories which are recoverable (deemed direct damage).

The supplier should ensure that any cap does not restrict its right to recover for non-payment of charges that are properly due to it from the customer.

10.5 Statutory set-off rights (and whether or not they can be contractually excluded or limited)

The statutory set-off right (Articles 847 to 856 of the Civil Code) allows either party to set-off a claim against a claim of the other party if both are identical in nature (eg monetary) and due. Such set-off right cannot be contractually excluded or limited.

11. INSURANCE

11.1 Types of insurance readily available in your jurisdiction (and to what extent), such as employee liability, property damage, third party liability (including professional indemnity risks and fraud), business protection, fidelity and guaranty insurance

Insurance readily available in Portugal includes personal and professional liability insurance, third party liability (including professional indemnity risks), property insurance, directors and officer's liability, professional liability and legal protection insurance.

12. SUB-CONTRACTING AND ASSIGNMENT

12.1 Rules and regulations which apply to sub-contracting of obligations under the contract as well as to the assignment of rights and obligations under the contract, or of the contract as a whole

Sub-contracting

It is generally possible to appoint sub-contractors under Portuguese law. This does however not relieve the principal of its liability *vis-à-vis* the customer. The principal is liable before the customer for the actions of the sub-contractor to the same extent as he would be liable for his own actions and the sub-contractor is liable before the principal.

Assignment of rights and obligations under the contract

The assignment of rights and obligations under the contract is generally permitted under Portuguese law. The parties must agree upon the extent and conditions of such assignment.

Assignment of the contract as a whole

The assignment of the contract as a whole is permitted under Portuguese law (Article 424 of the Civil Code). The assignment to a third party will only be effective if the other party to the contract consents upon the assignment.

12.2 Contractual arrangements usually taken regarding sub-contracting (material, non-material obligations) and assignment (group internal versus assignment to third parties)

The customer will usually want to reserve the right to approve any sub-contracting and a list of approved sub-contractors may be drawn and inserted as an annex to the contract. With regard to assignment, the service provider must obtain prior authorisation of the customer for the assignment of the agreement to another group company or third party.

13. JURISDICTION, LITIGATION, ARBITRATION, MEDIATION, FAST TRACK DISPUTE RESOLUTION

13.1 Statutory rules and practice regarding contract management, governance and escalation (including fast track for disputes with operational impact), mediation

There are no statutory rules on contract management, governance and escalation in Portuguese contract law. Based on relevance, scope and long-

term nature of outsourcing agreements, dispute resolution procedures should be tailored to the specific transaction. The aim is to provide a structured negotiation process which allows the dispute to be escalated to the top management or board level of the parties.

Ideally, a first dispute resolution instance on project level is followed by dispute resolution at a level with representatives without day-to-day involvement in the project to assess the dispute on a more strategic level (such as, eg, a steering committee comprised of an equal number of representatives of both parties). If on a management level no resolution is achieved, a mediation procedure before an independent mediator may be used to find a solution to the dispute and prevent court or arbitration proceedings (any mediation procedure must however be limited to a certain time period).

13.2 Applicable law, arbitration versus ordinary courts litigation

Generally, the parties can agree the governing law. In the great majority of outsourcing agreements, the parties include an express governing law clause, although it is impossible to avoid certain mandatory rules of other jurisdictions. It is advisable that the governing law keeps a connection with the nationality of the parties or the place where the contract will be executed.

Regardless of a choice of governing law, there may be rules of the governing law that cannot be excluded, or rules of other jurisdictions that will apply on a territorial basis, such as: (i) mandatory data protection rules relating to privacy and data security that apply as soon as there is a territorial link; (ii) mandatory rules of local employment law, and mandatory rules of the licensing and assignment of IP rights. Competition laws of all affected jurisdictions shall also apply, regardless of the governing law in question.

Due to the often complex nature of outsourcing projects, it will often be advantageous to choose an alternative dispute resolution over court litigation. Some advantages of arbitration in particular are:

- it is faster than state court litigation;
- parties can determine rules of procedure;
- arbitrators will often have a higher expertise than judges in state courts;
- privacy and confidentiality;
- binding outcome;
- possibility to overcome cross-border jurisdictional issues, eg enforcement.