Sourcing World

This is a work of significant value to businesses from all industries which are considering their outsourcing options.

This second edition of *Sourcing World* serves as a single starting point of reference for corporations and their advisers. It provides valuable insights and guidance to international sourcing transactions, covering both contractual and commercial arrangements and their regulation.

Written by outsourcing experts, every chapter gives a detailed overview of the legal and regulatory framework within each jurisdiction and of the terms and conditions relevant to finalising an outsourcing deal. This is one of the first works to also cover commercial practices on key negotiation items, such as financial terms and pricing models. Further, this second edition contains a comparative chapter with an overview of common trends and local variations thereof, so that readers can build outsourcing arrangements on the lessons learned from many outsourcing transactions in multiple countries.

SECOND EDITION 2015

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General Editors:
Lukas Morscher Lenz & Staehelin
Ole Horsfeldt Gorrissen Federspiel

THE EUROPEAN LAWYER REFERENCE

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Jurisdictional comparisons **Second edition 2015**

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Foreword

Lukas Morscher, Lenz & Staehelin
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Today, outsourcing is an effective and, in most countries, mainstream management tool used to both reduce costs and achieve strategic goals. It is seen across many business activities in all industries, from back-office functions (such as finance & accounting, HR/payroll, facility management or call centres) to core processes (like research & development, production or banking transactions in securities trading) and infrastructure outsourcings (IT and telecoms including network communication and security services or application development and support).

Most businesses have long ventured beyond outsourcing of simple, commoditised services and rely deeply on well-designed value chains across nations and their outsourcing partners' ability and will to fulfil contractual arrangements that underpin strategic objectives, whether they operate onshore, nearshore or offshore.

Outsourcing arrangements, pricing models and the associated governance are becoming increasingly complex. While some globally accepted commercial models and practices have evolved, local regulations and customs still play a large role when negotiating deals. So how can firms be confident that they remain in charge of their own business and in control of their key risks?

The objective of this publication on sourcing law and practice across the globe is to create a single starting point of reference for practitioners – customers, vendors and advisers – involved in sourcing transactions covering both the contractual and commercial arrangements and the regulatory side to things.

The first edition of *Sourcing World* was published in 2012 and covered 19 jurisdictions. We are pleased that this second edition has been expanded and now covers 24 countries.

The format of the chapters, each from leading lawyers in that jurisdiction, follows a common order, thus enabling readers to make quick and accurate comparisons. While covering legal topics, the country contributions are strongly business-oriented and include valuable insights into local commercial practices, in particular related to financial terms and conditions, pricing models and key negotiation issues with price impact.

As local and regional commercial practices and risk allocation models vary significantly – even among countries that are all mature outsourcing markets – we have created a new comparative chapter in this second edition. It is intended to establish an overview and to enable practitioners to be inspired by recent common trends and local variations thereof, and on that basis to

craft outsourcing arrangements that are on the cutting edge and build on the lessons learned from many outsourcing transactions in multiple countries.

We would like to acknowledge the work and support of the legal experts who each have contributed with new or updated country-specific chapters.

Lukas Morscher, Partner and Head of IT, Telecoms & Media, Lenz & Staehelin
Ole Horsfeldt, Partner and Head of Outsourcing, Gorrissen Federspiel

Zurich and Copenhagen, November 2014

Comparative overview

Gorrissen Federspiel Ole Horsfeldt

1. INTRODUCTION

When embarking on an international outsourcing project, the contract drafting process often starts out with a few fundamental choices. What will the structure of the agreement look like? Will it be a framework agreement with local service agreements, central to central, central to local, etc? Very often, tax considerations will drive such structural choices. The other fundamental structural issue is choice of law (and the associated dispute resolution model).

In respect of choice of law, there are fundamentally two alternatives: either the main agreement and all local service agreements and service/work orders are governed by the same choice of law, or the main agreement is governed by the law of the jurisdiction of the customer's and the local service agreements are governed by local law. Irrespective of the choice of model, mandatory local law will apply in many aspects.

This book will assist you in assessing how the choice of a particular local law will work and which mandatory local laws will have to be complied with.

Generally, deciding between a single central law model or a local law model is not difficult, and depends on:

- the local service agreement and the structures of the local parties;
- how the governance model and dispute resolution model are intended to work;
- enforceability issues; and
- the choice of venue.

The real difficulty when negotiating international outsourcing agreements is in assessing and dealing with relevant local commercial practices. If a contract is negotiated in England between international parties but the service delivery is pan-European or pan-Asian, should English commercial practices prevail and how should local practices be taken into consideration? Is there such a thing as a common international outsourcing practice?

The short reply is that there are recognised international practices on a number of key negotiation items, that there are regional variations and that practices vary, based on the maturity of the outsourcing market in a particular region or country.

Based on the country chapters in this book, this comparative chapter identifies such common trends and practices on a number of key commercial issues.

2. AVERAGE DURATION OF PROCUREMENT PROCESSES

2.1 The average duration of procurement processes in months

It used to be that procurement exercises for large-scale outsourcing projects would take 12–18 months. Driven by a maturing professional advisor community and by customers' need for rapid implementation of business change and cost consciousness, the average procurement time now is only 6–8 months. See Figure 1.

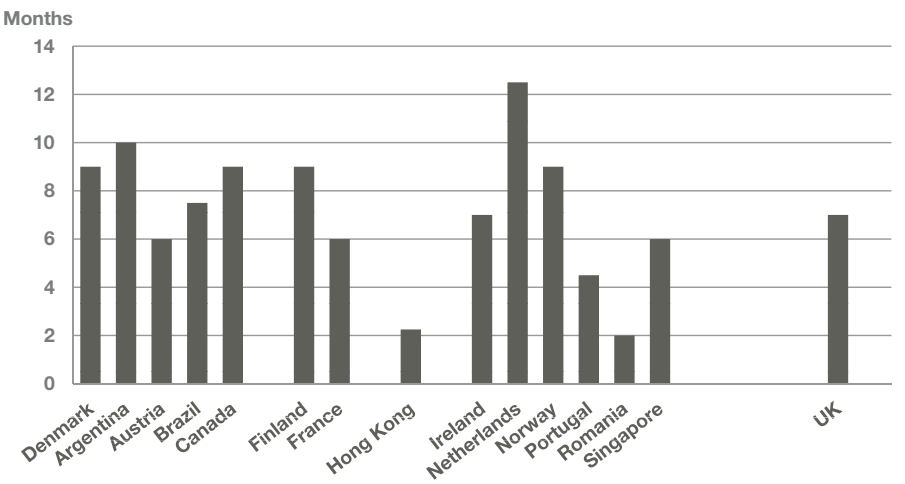

Figure 1: Average duration of the procurement processes

3. MANDATORY STATUTORY REGULATION ON OUTSOURCING

3.1 Mandatory statutory regulation of outsourcing

Very few countries have general legislation pertaining to the practice of outsourcing. However, just about every country has sector-specific regulation relevant to the outsourcing of business processes or IT infrastructure. In particular, the telecoms and banking industries are subject to mandatory legal requirements when outsourcing. See Figure 2.

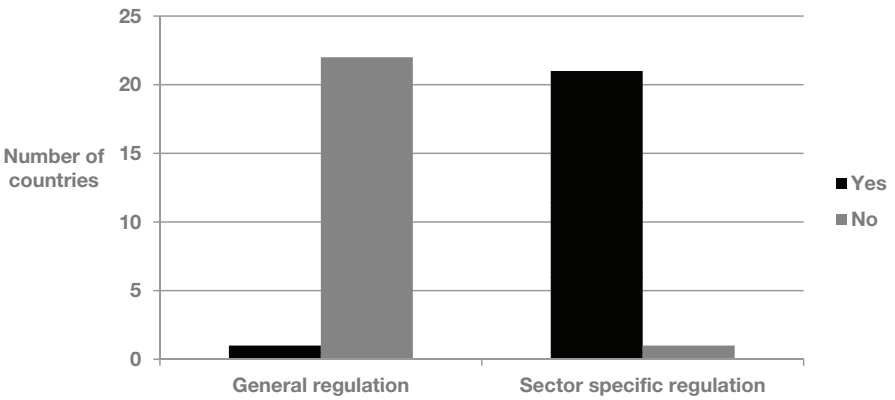

Figure 2: Number of countries with statutory regulation on outsourcing

4. PERSONAL DATA

4.1 Mandatory statutory regulation of processing of personal data

The EU's Directive on the Processing of Personal Data has set global standards (while of course only being relevant to processing of data within the EEA and export of data outside of the EEA). Countries such as Argentina, Turkey, Singapore and Hong Kong now have legislation that must be observed when considering the data flows that will apply under an outsourcing arrangement.

5. TRANSFER OF EMPLOYEES AS PART OF AN OUTSOURCING TRANSACTION

5.1 Mandatory statutory regulation of transfer of employees as part of an outsourcing transaction

Another EU-based concept, as presented in the Acquired Rights Directive, is the rights of employees when a part of a business is outsourced. This directive appears to be a European speciality – legislation or practices with similar effects will not generally be found outside the EEA.

6. TRUE-UP AND BASELINING

6.1 Is true-up or baselining a common commercial practice?

True-up or baselining is the practice associated with conducting a verification post-signing of the information and baselines compiled as part of the pre-signing negotiations. Mostly, such verification exercises work on the one hand as a reasonable safeguard to the benefit of the chosen vendor, while on the other hand as an opportunity to renegotiate at a time when the customer has lost all negotiation leverage.

In many mature markets, true-up exercises have been replaced by more elaborate pre-agreement due diligence and due diligence cut-off provisions. However, as illustrated in Figure 3, the true up or baselining practice is still in use in many countries.

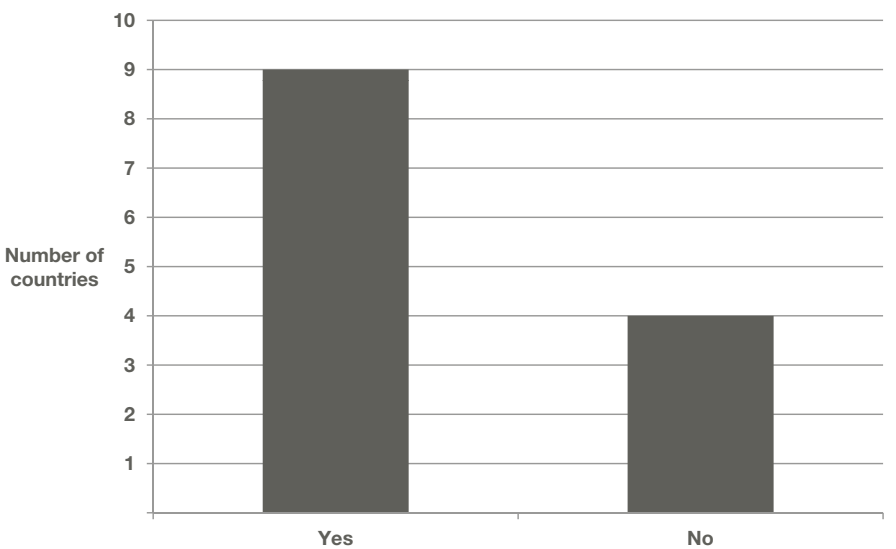

Figure 3: Is true-up or baselining a common commercial practice?

7. BENCHMARKING

7.1 Is it common commercial practice to benchmark at unit level, tower level or any other level?

The efficiency (from a customer perspective) of a benchmarking clause can be measured on two counts:

- the increments which are subject to benchmarking (fees per resource units, fees per tower or total fees); and
- whether automatic adjustment has been agreed or not. If not, any adjustment will be subject to negotiation and the customer's protection is weak.

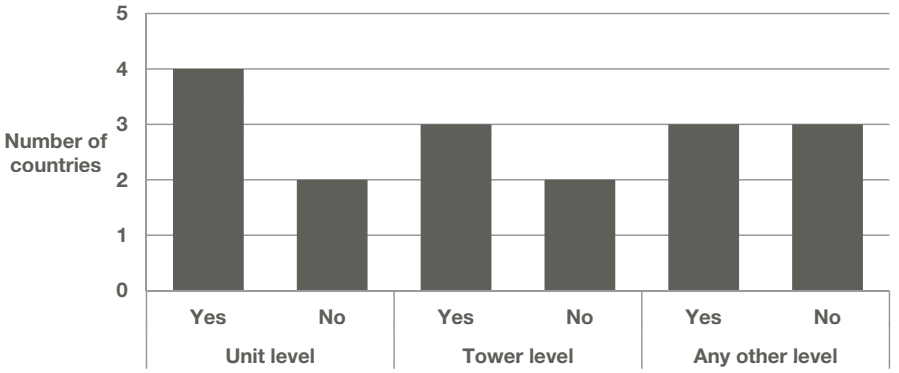

Figure 4: Is it common commercial practice to benchmark at...?

As illustrated by Figure 4, there is no common practice as to the incremental basis for outsourcing. Essentially, this is a negotiation topic that depends on the negotiation power of the customer.

Similarly, there are no clear trends towards automatic adjustments. In mature outsourcing markets, Western Europe and the USA, there is a tendency towards automatic adjustments. However, the unilateral right to require adjustments is tempered by caps applicable to yearly or total adjustments.

8. DURATION OF AN OUTSOURCING ARRANGEMENT

8.1 What is the common duration of an outsourcing arrangement in years

In recent years, most consultancies have advised that customers should opt for 4–5 year outsourcing arrangements. Certainly, there are few of the 10 year plus deals around, which used to be the norm for complex arrangements, but there is no evidence globally that outsourcing agreements in general have shorter terms than 5–7 years. See Figure 5.

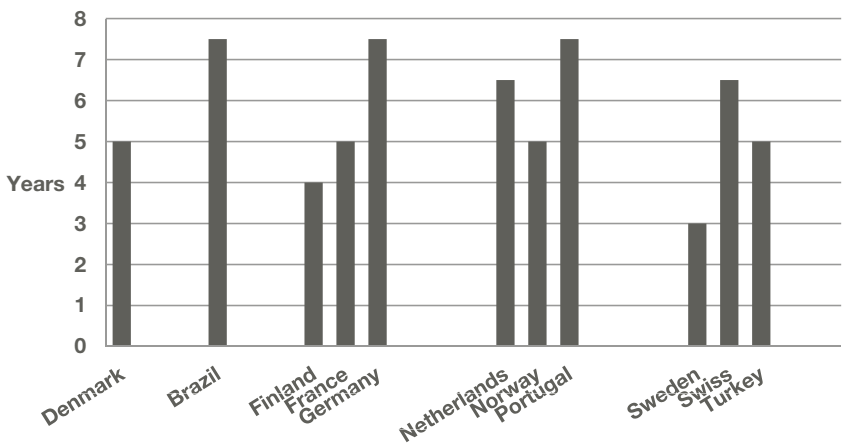

Figure 5: Common duration of an outsourcing arrangement

9. TERMINATION FOR CONVENIENCE BY THE CUSTOMER

9.1 Is it common practice for the customer to have a right to terminate for convenience?

A key element in the flexibility of an outsourcing agreement is whether the customer may terminate a part of an agreement for convenience, typically against the payment of termination fees. As illustrated by Figures 6 and 7, termination for convenience may take place per service tower, site or country, depending on the nature of the agreement. There is no clear global practice as to the parts of an agreement by which termination for convenience can take place, but there is an established practice that termination for convenience will apply in respect of both an agreement in its entirety and of parts of an agreement.

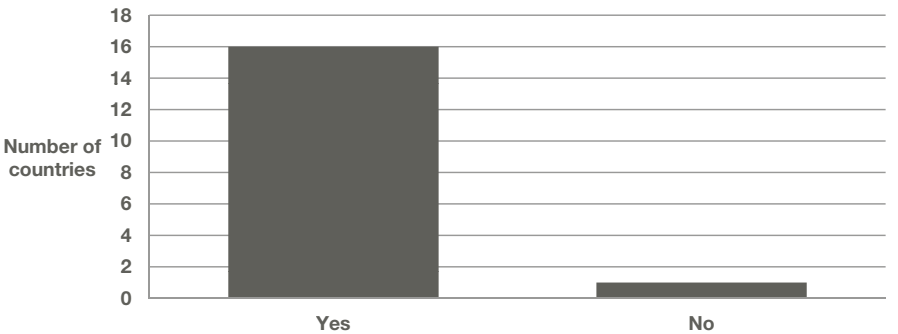

Figure 6: Is it common practice for the customer to have a right to terminate for convenience?

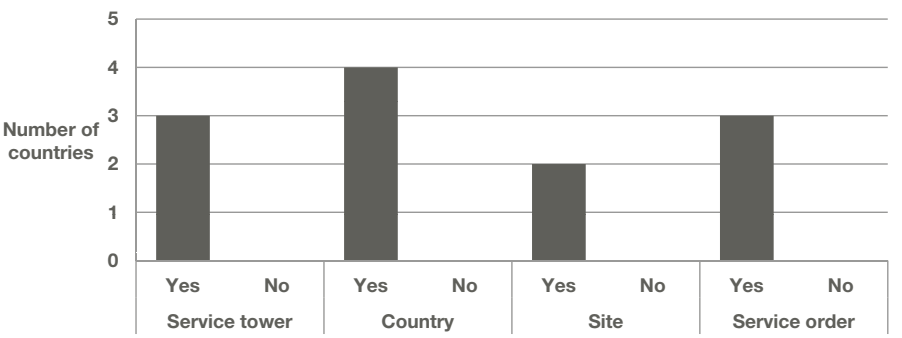

Figure 7: Which parts of an agreement may a customer commonly terminate for convenience?

Romania

Ţuca Zbârcea & Asociaţii Cătălin Băiculescu

1. BUSINESS PRACTICE (INTERNATIONAL DIVISION OF LABOUR, BREAKING-UP VALUE CHAINS)

1.1 Describe generally the maturity of the outsourcing market in your jurisdiction

The outsourcing market has been constantly growing in Romania in recent years. On the one hand, Romanian companies have started to understand the benefits of outsourcing non-core activities in order to increase their efficiency, while, on the other hand, Romania has become a significant provider of outsourcing services for multinational corporations. A significant number of data centres have been established and developed, capitalising on the specialised workforce available, especially in the IT industry, at salaries which are significantly lower than in Western European countries.

1.2 How are cloud-based services affecting traditional outsourcing models?

Cloud computing services are also growing. There are many local providers of cloud-based services, which are in effect combining the new cloud technologies with traditional outsourcing models. The increase in the worldwide awareness of the potential of cloud services has not negatively affected this type of player; rather, they have benefited from the increased trust of customers and have been able to sell their services more successfully.

1.3 Describe the current supplier landscape

The outsourcing of IT, call centres, payroll and accounting services are the core of the outsourcing market. According to recent estimations made by the Association of the Leaders in the Sector of Services for Businesses in Romania, the outsourcing market will exceed EUR 1.5 billion in 2014, and approximately 60,000 professionals are currently employed in outsourcing (*http://www.marketwatch.ro/articol/13493/ABSL_Industria_serviciilor_pentru_afaceri_din_Romania_va_depasi_15_miliarde_de_euro_in_2014/*). Foreign investments (ie subsidiaries of multinational corporations specialising in outsourcing) represent the majority of the market.

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

2.1 Describe generally the procurement process

Romania has implemented all the European Union Directives related to public procurement in its internal legislation. Government Emergency Ordinance No. 34/2006, regarding the awarding of public procurement

contracts, public works contracts and services concession contracts, regulates in detail the rules applicable to tenders organised by public authorities for the awarding of public procurement contracts for services exceeding EUR 30,000 (excluding VAT). It specifies in detail the procedure to be followed for the preparation of the tender documentation, the public announcements (including the use of a specific online system), the bidding process, the awarding announcement and the contestation procedure.

There is no mandatory tender process for private companies. Nevertheless, it is typical, especially for local subsidiaries of multination corporations, to implement internal rules and guidelines for the procurement process aimed at ensuring the transparency of the project and the acquisition of the best services at the best market price. Such internal regulations provide for minimum bid requirements, announcements, the process for the submission of bids, the award process, and contract negotiation and signing.

2.2 What is the average duration of a private procurement process?

The tender process for medium to large outsourcing agreements may take approximately one to three months, and at least three vendors are generally invited to submit bids. In the case of very specialised services, where only a few market players have the ability to satisfy the needs of the customer and conflicts of interest may appear, fast track procurement processes may be used. Such processes may involve direct negotiations with only one vendor.

2.3 Which roles and tasks are generally performed by business advisors, including legal advisors?

It is not customary to involve business advisors in the procurement process, as companies tend to have internal procurement specialists, trained to observe the internal rules approved by the corporation. For more complicated tenders, business advisors may be involved in defining the scope of services, establishing qualification and selection criteria, making price and budget estimations, and organising and conducting the tender and award process. Legal advisors are mainly used in relation to the preparation and negotiation of the procurement agreement, but also in reviewing the tender books.

3. STATUTORY RULES, INDUSTRY SPECIFIC REQUIREMENTS AND REGULATIONS

3.1 Which statutory rules govern sourcing transactions in general?

The Romanian law does not have any legislation that is specifically applicable to outsourcing agreements (in their very specific nature), but the provisions of Articles 1766–71 of the New Civil Code represent the general legal framework applicable to any supply agreement (for goods, services or both). Nevertheless, as already mentioned, the procurement of services in the public sectors is regulated by the Government Emergency Ordinance No. 34/2006. Supplementary regulations may be applicable in specific industries, as detailed below.

3.2 What are the legal or regulatory requirements concerning outsourcing in any industry sector?

Regulation No. 5/2013 of the National Bank of Romania (Regulation No. 5/2013) sets out the rules applicable for outsourcing in the banking sector, which is allowed provided that the banks remain liable for all the outsourced activities and they maintain a minimum internal capacity to allow them, if necessary, to resume direct performance of the outsourced activity. Control and superior management activities cannot be outsourced.

Order No. 18/2009 of the Insurance Supervision Commission (Order No. 18/2009) regulates outsourcing activities in the insurance field, in a manner similar to Regulation No. 5/2013. Currently, the regulator of the insurance market is the Financial Supervision Authority, which has a similar role in the insurance market as the National Bank of Romania in the banking sector.

3.3 What are the 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?

According to Regulation No. 5/2013, outsourcing in the banking sector has to be based on a written agreement, which must cover a number of minimum provisions:

- clear definition of the scope of work;
- minimum levels of quality of service;
- a clear definition of the rights and obligations of the parties;
- protection of confidential information;
- clauses regulating the transfer of the activities to another supplier or the resuming of the activity directly by the bank;
- provisions regarding the monitoring by the bank of the performance of services;
- the obligation of the supplier to allow the National Bank of Romania to directly access, inspect and audit the activity of the supplier; and
- the unilateral termination of the agreement at any time that the National Bank of Romania so requires.

Subcontracting is allowed only with the express prior approval of the bank and only if the subcontractor undertakes the same obligations as the main contractor.

Similar rules are applicable for insurance companies, based on Order No. 18/2009.

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

Various services, such as accounting and legal services, may be performed only by specially trained and licensed personnel.

3.5 What are the requirements for regulatory notification or approval of outsourcing transactions in any industry sector?

Regulation No. 5/2013 provides that any outsourcing must be notified to the National Bank of Romania at least two months in advance of the estimated date of the signing of the outsourcing agreement. The notification shall be accompanied by detailed documentation allowing the National Bank of Romania to evaluate the proposed outsourcing process and impose any conditions it considers necessary. The banks also have the obligation to notify the National Bank of Romania (at least one month in advance) in case they plan to change the provider or to resume the outsourced activities directly, or in case any other significant event occurs.

Similar rules are applicable for insurance companies, based on Order No. 18/2009.

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

4.1 What are the requirements for a third party to process data on behalf of the data controller?

Under Law No. 677/2001 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (the Data Protection Act), a third party (ie the data processor) is allowed to process personal data on behalf of another party (ie the data controller), based on a written data processing agreement. Such agreement must contain at least the following:

- the data processor's obligation to act only based on the specific data controller's instructions; and
- the processor's obligation to take appropriate technical and organisational measures to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing.

The data processor must also comply with general requirements applicable to any type of personal data processing, such as:

- the fair and lawful processing of personal data;
- the collecting of personal data for specified, explicit and legitimate purposes and the obligation not to further process it in a way incompatible with the initial purposes;
- the accurate processing of personal data and, where necessary, keeping such data up to date;
- keeping the personal data in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed; and
- observance of the rights conferred by law to the data subjects.

Furthermore, the Data Protection Act provides that the data controller must, where processing is carried out on his behalf, choose a data processor that provides sufficient guarantees in respect of the technical security

measures and organisational measures governing the processing to be carried out.

4.2 What are the rules and regulations regarding data protection and data security, confidentiality of customer data, banking secrecy and other professional secrecies?

There are a variety of laws containing provisions on data protection/security, confidentiality of customer data, banking secrecy and other professional secrecies. The main pieces of legislation regulating such matters are:

- Law No. 287/2009 on Civil Code (Romanian Civil Code) – general rules on the protection of privacy;
- Data Protection Act – general data protection and data security rules;
- Law No. 506/2004 on the processing of personal data and the protection of private life in electronic communications sector – data protection and data security rules applicable to providers of internet access services;
- Law No. 365/2002 on electronic commerce – specific data security and confidentiality rules generally applicable to the providers of electronic communications services;
- Law No. 53/2003 on the Labour Code – specific confidentiality rules applicable to employees;
- Government Emergency Ordinance No. 99/2006 on the credit institutions and capital adequacy – specific rules on the confidentiality of banking information;
- Law No. 51/1995 on the organisation and practice of the lawyer's profession – rules on the professional secrecy applicable to lawyers; and
- Law No. 46/2003 on the patients' rights – the confidentiality rules on patients' information.

4.3 Which rules govern the transfer of data outside your jurisdiction?

The transfer of personal data towards EU member states/EEA countries/third countries which have been recognised by the EU Commission as ensuring an adequate level of protection (Andorra, Argentina, Australia, Canada (commercial organisations), Switzerland, Faeroe Islands, Guernsey, Israel, Isle of Man, Jersey, New Zealand, Uruguay and the USA (safe harbour privacy principles)) is allowed without any prior authorisation from the National Supervisory Authority for Personal Data Processing (DPA) being necessary.

The transfer of personal data to 'unsafe' third countries may be performed:

- based on prior authorisation granted by the DPA. The authorisation is issued only if the parties establish sufficient contractual guarantees for the protection of the fundamental rights of the data subjects. In practice, the DPA grants such authorisations only if the parties undertake the transfer of personal data based on the agreements drafted in accordance with the standard contractual clauses adopted by the EU Commission (see Decision 2010/87/EU); or
- exceptionally, the transfer may be performed even in the absence of the agreement drafted in accordance with the EU Commission's standard

contractual clauses if the exporter of the personal data (ie the data controller) has obtained the data subject's express and, in certain cases, written consent on such transfer. In this case, no prior authorisation from the DPA is required.

Furthermore, the transfer of personal data from Romania to 'unsafe' third countries may be performed based on the EU Binding Corporate Rules (BCR) mechanism. However, BCR may be used only by multinational companies, being unavailable to non-affiliated companies.

Finally, note that the transfer of personal data, as any other type of processing, needs to be notified to the DPA electronically (by accessing the DPA's website – *http://www.dataprotection.ro* – and by pursuing the specific steps further indicated in-there).

4.4 Are data transfer agreements contemplated or in use?

Yes. As noted above, in case of transfers of personal data to 'unsafe' third countries, the data exporter and the data importer must conclude an agreement using the standard contractual clauses adopted by the EU Commission. In this case, the transfer needs to be authorised by the DPA (see section 4.3 above for details).

Where the transfer is made to EU member states/EEA countries/third countries recognised by EU Commission as ensuring an adequate level of protection, the parties have no obligation to use standard/predefined contractual clauses. However, the transfer still needs to be performed based on a formal contract (in accordance with the general requirement to conclude a data processing agreement – see section 4.1 above). In this case, no prior authorisation of the DPA is required.

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

Apart from the data transfer agreements (see sections 4.3 and 4.4 above) and the notification to be submitted to the DPA (see section 4.3 above), the following additional requirements need to be observed in order to legitimise the transfer:

Adequate information of the concerned data subjects

In order to comply with this obligation, the data exporter (ie data controller) must provide the data subjects with certain information:

- the identity of the data controller;
- the purpose of the processing (ie the transfer);
- the data recipients or categories of recipients;
- the rights granted under the Data Protection Act; and
- any other relevant information, including any information that may be required to be provided to the data subjects by decision of the DPA.

Such information is customarily provided by way of a specific notice submitted to the concerned data subjects.

Consent of the data subjects

According to Article 5(1) of the Data Protection Act, any type of processing, including transfer abroad, may only be undertaken, as a matter of principle, subject to obtaining the data subject's consent for such processing. Furthermore, in certain cases (ie where sensitive data is involved – health data, general identification data, etc), such consent must be given in written form.

The Data Protection Act provides certain exceptions when the transfer of personal data may be carried out even without any such consent (eg where the processing is necessary for the performance of a contract to which the data subject is party to, where the processing is necessary in order to fulfil a legal obligation of the data controller). Such exceptions to the consent requirements do not usually apply in the case of sensitive data.

Finally, as explained above (section 4.3), where the transfer to an 'unsafe' third country is contemplated to be performed based on an agreement which is not drafted in accordance with the standard contractual clauses adopted by the EU Commission, the transfer may still be performed if the data exporter obtains the express consent of the data subjects for such transfer.

4.6 In cloud computing, which precautions (contractual, factual, others) are usually taken to protect, or to allow control over, the data?

The security of data is one of the most common issues of concern with the use of cloud computing.

According to Article 21(3) of the Data Protection Act, cloud customers (ie data controllers) should choose cloud providers (ie data processors) that implement adequate technical and organisational security measures to protect personal data and to be able to demonstrate accountability, which means ensuring availability (reliable access to personal data), integrity (the data is authentic and has not been maliciously or accidentally altered), confidentiality (appropriate means such as encryption, authorisation mechanisms and strong authentication), transparency, purpose limitation, intervenability (the cloud provider and subcontractors are obliged to support the customer in facilitating the exercise of data subjects' rights), portability and accountability (reliable monitoring and comprehensive logging mechanisms).

Usually, any risks related to the data security breaches are to be covered under specific contractual safeguards, such as:

- specification of security measures that the cloud provider must comply with, depending on the risks represented by the processing and the nature of the data to be protected;
- subject and time-frame of the cloud service, extent, manner and purpose of the processing of personal data by the cloud provider as well as the types of personal data processed;
- conditions for returning the (personal) data or destroying the data once the service is concluded;
- provision of confidentiality clauses;

- prohibition of disclosure of data to third parties, except for subcontractors specifically allowed under the data processing agreement;
- responsibilities of the cloud provider to notify the cloud client in the event of any data breach which affects the cloud client's data;
- obligation of the cloud provider to provide a list of locations in which the data may be processed; and
- the general obligation on the provider's part to give assurance that its internal organisation and data processing arrangements (and those of its sub-processors, if any) are compliant with the applicable national and international legal requirements and standards.

Apart from such contractual safeguards, cloud customers should also thoroughly verify the selected cloud vendor(s)'s data security policy, as well as the track record of dealing with past security incidents (if any). It is important to check not only if there have been any security incidents, but also how they were handled, how rapidly the security breaches were notified and remedied, and what measures were implemented by the cloud provider in order to prevent a recurrence thereof.

Where sensitive data is involved (ie any data subject to a special regime, be it commercial secret, banking secret or other), it is highly recommended that cloud customers make sure that access to such data is precluded. A frequently used solution to avoid access to such data is to unidirectional encryption. The encryption services may be provided by the cloud provider itself or by a third party. Obtaining encryption from a third party provider may have the added benefit of extending the encryption beyond the cloud service itself (eg for internet transmission between the servers of the customer and those of the cloud provider), and may also alleviate possible concerns that the cloud provider might be able to reverse the encryption.

It should be noted that the use of encryption has practical consequences. First, it is possible that some features of the cloud services become impossible or more difficult to use (such as indexation and spotlight search of the contents of the data), and this must be verified with the selected cloud providers. Secondly, encrypted data is no longer considered personal data and thus no transfer of personal data occurs between the cloud customer and cloud provider, with the added benefits of excluding all requirements mentioned above (see sections 4.3–4.5 above).

4.7 How is supplier liability for breach of data protection requirements generally handled?

Failure to comply with requirements on data protection may trigger civil or administrative liability.

Civil liability

The civil liability of the supplier may be grounded upon the general rules of tort or contractual liability.

The liability towards the data subjects for the breach of the data protection rules is governed by tort liability rules, which means that both

direct and indirect damages, as well as pecuniary and non-pecuniary damages, shall be covered.

The data subject shall usually bring a claim against the data controller (being the entity for which the data processing is carried out). However, under the rules of general tort liability, the data subject will be able to bring a claim directly against the data processor if the data processor is liable for the breach of the data protection requirements. One difficulty for the data subject in triggering the liability of the supplier may arise where the data processing is carried out by a foreign data processor (eg if the foreign law of the data processor prohibits the data subject from bringing a claim directly against the foreign data processor). This potential issue is solved under third party beneficiary clauses laid down in the standard contractual clauses adopted by the EU Commission, which provide that even foreign data processors may be subsequently held liable if the data subject is not able to bring a claim for compensation against the data exporter (ie because the data exporter has factually disappeared, has ceased to exist in law or has become insolvent).

The liability towards the data controller (ie in case the data controller shall be sanctioned or held responsible for the illegal actions of its data processor) is grounded upon the rules of contractual liability. In this regard, the breach of the data protection requirements are covered under indemnification clauses inserted in the data processing agreements. Such identification clauses do not usually provide any specific indemnification cap, the data controller being able to request indemnification in accordance with the general contractual liability rules set out in the Romanian Civil Code (ie the indemnification of the entire damage suffered the data controller). Naturally, nothing precludes the parties from providing a specific indemnification cap.

Variations to the above-mentioned rules may apply when the data processing agreements are concluded with foreign entities and such agreements are governed by the laws of the data processor's country.

Administrative liability

The Data Protection Act provides various administrative fines for breach of the data protection requirements. While most of the sanctions are applicable to data controllers, some sanctions could also be applied to data processors (eg for the breach of obligations such as fair and lawful processing of personal data; collecting of the personal data for specified, explicit and legitimate purposes; the obligation not to further process it in a way incompatible with initial purposes; and observance of the data subjects' rights available under the Data Protection Act). The relevant administrative fines are from RON 1,000 to RON 25,000 (approx. EUR 220–5,500).

Because the Romanian DPA does not have jurisdiction to act beyond the Romanian territory, the aforementioned sanctions cannot be enforced against foreign data processors.

5. ASSET DEAL, LEGAL CONCEPTS AND MECHANICS

5.1 What legal concepts apply to the transfer of assets in an outsourcing?

The provision of outsourcing services does not necessarily imply a transfer of assets. Nevertheless, in case such a transfer occurs, the following rules apply:

Movable property

There are no specific requirements or registration formalities for the transfer of movable property. Nevertheless, various assets (cars, planes etc) may be subject to specific registration procedure.

Immovable property

The sale of immovable property is subject to specific notarisation requirements and land book registrations.

IP rights and licences

IP rights and licences may be transferred, with certain limitations (such as the author's moral rights). Trademarks, designs and patents can be transferred subject to specific procedures and registration formalities.

Contracts

Contracts may be transferred in their entirety (rights and obligations) if agreed by the parties. However, various limitations may appear under specific laws (such as public procurement contracts).

5.2 Are there particular considerations for the transfer of assets offshore?

The transfer of assets offshore is generally allowed, observing the general export procedures. Any restrictions must be specifically regulated by law.

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

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

6.1.1 to a supplier in an initial outsourcing?

6.1.2 to a supplier on a change of supplier?

6.1.3 back to the customer on termination of an outsourcing?

To the extent that outsourcing to a supplier qualifies as a transfer of undertaking, the employees pertaining to the acquired business (those having an individual employment agreement in force at the transfer date) shall be transferred by operation of law to the supplier.

Changing from the initial supplier to a new one could also trigger a transfer of undertaking. Should this be the case, the employees pertaining to the business transferred from the first supplier to the new one will be also transferred by operation of law.

If the termination of the outsourcing involves a reverse transfer of undertaking, then the employees pertaining to the respective business will be transferred back to their original employer by operation of law.

As a rule, the assessment of whether a certain transaction qualifies as a transfer of undertaking should be made by taking into consideration whether the undertaking or business in question retains its identity. In order to determine whether the conditions for the transfer are satisfied, it is necessary to consider all the facts that are relevant for the transaction in question, including:

- the type of undertaking or business;
- whether or not the business's tangible assets, such as buildings and movable property, are transferred;
- whether or not its customers are transferred; and
- the degree of similarity between the activities carried on before and after the transfer.

All of these circumstances are just single factors in the overall assessment which must be made, so cannot be considered in isolation.

6.2 If employees transfer by operation of law, which terms and effects apply?

One of the main protection rules set out under the transfer of undertaking legislation is the takeover by the transferee of all the rights and obligations incumbent upon the transferor at the transfer date based on the employment relationships with the transferred employees or arising out of the employment agreement applicable to the latter.

According to the law, the above-mentioned rule refers to both the individual employment agreements and the collective bargaining agreement existing at the transfer date. The transferor's obligation to observe the provisions of the employment agreements existing at the transfer date is valid until the date they are terminated or expire.

Note that the individual employment agreements are usually concluded for an indefinite term. Therefore, the transferor shall be bound by the terms and conditions thereof for the entire employment duration unless the employees consent to amend the mentioned terms and condition.

As far as the transferor's collective bargaining agreement is concerned, the transferee is allow to change its terms only after one year has elapsed from the date of the transfer, and then only based on negotiation with the employees' representatives.

However, if the undertaking does not preserve its autonomy further to the transfer, the transferred employees shall benefit from the transferee's collective bargaining agreement if the latter proves to be more favourable.

Pensions

The transferred employees will continue to be insured under the public pension system after the transfer. To the extent that any private pension schemes were provided by the individual employment contracts and/or by the applicable collective bargaining agreement (if any), the transferor has the

obligation to grant the transferred employees the same rights and benefits as before the transfer.

Employee benefits
If employee benefits are incorporated into the employment agreement, the employees that were transferred to another employer will keep their benefits.

6.3 How can the customer (contractual or other) retain particular employees, or make them redundant?

As mentioned above, the employees pertaining to the outsourced business should be transferred by operation of law to the transferee, provided that such outsourcing qualifies as a transfer of undertaking. Thus, only the employees who do not fall under the scope of the transfer (ie those who do not pertain to the outsourced business) can be retained by the customer.

The transfer of undertaking cannot itself be a reason for the individual or collective dismissal of the employees, either by the transferee or by the transferor.

This provision does not preclude the possibility of dismissing employees for disciplinary reasons, for poor professional performance or even for redundancy reasons (under the terms and conditions expressly provided by the Labour Code).

Such possibility must be recognised, as the transfer itself may not 'freeze' any process of restructuring. On the other hand, the mere existence of a transfer of undertaking is a reason to scrutinise any dismissal made in the context of such transaction closely. It has been underlined both in case law and relevant doctrine that there are strong incentives for the transferee to arrange with the transferor to carry out such dismissals in order to avoid or reduce costs associated with the labour force, thus the close scrutiny of such measures is justified.

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

Under the legislation related to the transfer of undertaking, the transferee should take over all the rights and obligations incumbent upon the transferor at the transfer date based on the employment relationships with the transferred employees or arising out of the individual employment agreements or the applicable collective bargaining agreement.

The transferor's obligation to observe the provisions of the employment agreements existing at the transfer date is valid until the date they are terminated or expire.

As far as the transferor's collective bargaining agreement is concerned, the transferee is allowed to change its terms only after one year has elapsed from the date of the transfer, and only based on negotiation with the employees' representatives.

However, if the undertaking does not preserve its autonomy further to the transfer, the transferred employees shall benefit from the transferee's collective bargaining agreement, if the latter proves to be more favourable.

Romanian law does not provide any criteria by which to determine the most favourable collective bargaining agreement. In the absence of such criteria, the application of the most favourable collective bargaining agreement may prove to be difficult, especially when the two collective bargaining agreements to be compared provide for different remuneration policies. Nevertheless, we deem that the comparison between the two collective bargaining agreements should reasonably be made by reference to the total financial value of the remuneration package provided by each of them. As the available jurisprudence on this matter is poor, however, we cannot assess the extent to which the courts would embrace such interpretation.

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

The transfer of the employees pertaining to the outsourced services/activities takes place by operation of law if such outsourcing qualifies as a transfer of undertaking. In other words, the transfer of the employees is a legal consequence of the outsourcing, provided that the outsourcing qualifies as a transfer of undertaking. Thus, neither the transferor nor the transferee can oppose such legal consequence by simply stipulating contractually that the outsourcing in question shall be classified as a 'secondment'.

6.6 Describe notice, information and/or consultation obligations of the customer and/or supplier in relation to employees or employees' representatives

As a principle, under the general legal framework for informing and consulting employees, the employer is under an obligation to inform and consult its employees on:

- recent and/or anticipated developments of the company's activities and economic situation;
- the situation, structure and anticipated developments of employment within the company and any related measures envisaged, in particular where a threat to current employment exists; and
- decisions likely to lead to substantial changes in work organisation or in contractual relationships with the employees.

In the particular case of a transfer of undertaking, Romanian law recognises the right of the employees, both of the transferor and of the transferee, to be informed in case of a transfer of undertaking at least 30 days prior to the transfer, with respect to the following:

- the (proposed) transfer date;
- the reasons of the transfer;
- the transfer's legal, economical and social consequences on the employees;
- the measures to be taken with respect to the employees; and
- the work conditions ensured by the transferee.

6.7 Describe the consequences (civil and/or criminal) of non-compliance with any of above requirements

Failure to observe such obligations to inform/consult the employees on the transfer of undertaking is not likely to prevent or invalidate the outsourcing transaction, but it may trigger fines of the employers ranging from RON 1,000 to RON 25,000.

7. DUE DILIGENCE, TRANSITION, SERVICE COMMENCEMENT, TRUE-UP

7.1 Describe the due diligence processes and methods commonly used by suppliers and customers

There are no standardised procedures for the due diligence process. Each corporation will follow its internal guidelines. The tender book may also require, at the beginning of the tender process, that various qualification documents be presented by bidders in support of their technical experience and financial status.

7.2 How do suppliers usually try to protect their business case?

The parties to the outsourcing agreement are free to agree upon any clauses regarding dependencies or cooperation duties.

7.3 How are services usually measured upon service commencement?

The outsourcing agreement may contain clauses regarding the evaluation of the quality of the services performed. As mentioned above, in the banking and insurance sectors, the regulatory authority has also reserved the right to make its own evaluation.

8. CHARGING, ADJUSTMENT OF FEES, AUDITING, BENCHMARKING

8.1 Describe the charging methods commonly used in an outsourcing

Numerous charging methods are used in outsourcing, and the parties may agree on any method of payment. The most common methods are:

- cost per unit (hour, man/day or other units), as set in the agreement;
- fixed prices, irrespective of the actual level of effort performed by the provider;
- variable prices, where costs can vary based on different types of service or levels of experience of the personnel performing the task; and
- cost-plus, where the customer covers the real cost of the supplier plus a certain margin.

8.2 Describe customary change management procedures

The parties to the outsourcing agreement may freely agree upon the contractual clauses covering this topic.

8.3 Are there other adjustment mechanisms?

Indexation based on the inflation rate and various foreign exchange rates are the most typical adjustment mechanisms.

8.4 Describe the contract rules for disputed charges and related consequences

Disputed charges are typically regulated in the contract. A suspension of payment for the disputed portion of the fees is normally agreed upon. Set-off procedures between reciprocal due debts are also allowed.

8.5 What are the contractual rules usually applied to auditing?

The outsourcing agreements must clearly regulate the audit procedure with regard to the frequency, prior notice and depth of information accessed.

8.6 Describe common benchmarking methodologies

The most common benchmarking methodologies used in Romania are:

- the comparable price method, by which the market price is determined based on prices paid to other persons that sell comparable goods or services to independent persons;
- the cost-plus method, by which the market price is determined based on the costs of the good or service provided in the transaction, increased by an appropriate profit margin; and
- the resale price method, by which the market price is determined by deducting from the resale price of the good or service sold to an independent person the selling expenses and other expenses of the taxpayer and a profit margin.

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

9.1 What are the main tax issues that arise in an outsourcing in relation to:

9.1.1 transfers of assets?

The transfer of assets may trigger corporate income tax and VAT. In Romania, VAT is charged with every supply of goods or services; however, the transfer of an entire business as an ongoing concern is VAT exempted. Transfers between related parties must be made following the transfer pricing rules.

9.1.2 value added tax (VAT) or other sales tax?

In Romania, the supply of most goods or services is taxed with VAT at a rate of 24 per cent.

9.1.3 service charges or other taxes at source?

Services are subject to 24 per cent VAT. However, if the outsourcing company is located in Romania while the outsourcer company is established outside Romania, no VAT will be charged by the outsourcing company based on the B2B general rule.

Also, with regard to outsourcing in the finance and insurance sectors, care should be taken with regard to the VAT status of the services provided by the outsourcing company. Thus, depending on whether the outsourced services are deemed to be specific to and essential for the main activities rendered by the outsourcer, such outsourcing services may benefit from the VAT exemption applicable for the finance sector.

No other taxes at source are involved in the outsourcing services.

9.1.4 withholding taxes?

For international transactions, if the outsourcer is Romanian, then it should withhold 16 per cent, depending on the nature of the services received. This rate could be decreased to 0 per cent under the provisions of the double taxation treaties in force.

9.1.5 stamp duty?

No stamp duty is applicable in relation to outsourcing services.

9.1.6 corporate tax?

Corporate income tax is set at 16 per cent.

9.1.7 other tax issues?

No other taxes are applicable in relation to outsourcing services.

9.2 What precautions are usually taken to arrange for tax efficiency?

With respect to transfer pricing, it is advisable to have available a transfer pricing documentation file prior to performing the transaction. The mark-up or margins should be applied after performing a benchmarking analysis in this regard.

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

10.1 What are the rules and regulations regarding the term of an outsourcing agreement and/or length of notice period?

Romanian law does not impose any particular term for outsourcing agreements. Such contracts are typically concluded for fixed terms, the length of which depends on the type of service.

10.2 Which events justify termination of an outsourcing agreement without giving rise to a claim in damages against the terminating party as a matter of mandatory law?

The outsourcing contract may be terminated in case of breach of the contractual obligations. The contract must regulate in detail the materiality thresholds of the breach, the notice of default and the eventual grace periods. It should be noted that, under Romanian law, the insolvency of one party is not allowed as a reason for termination to be initiated by the other party; to the contrary, the other party is supposed to continue the

performance of the agreement until the judicial liquidator determines if the agreement should be terminated or not or until the insolvent party fails to fulfil its obligations even during the insolvency procedure (such as during the implementation of a reorganisation plan).

10.3 What contractual termination rights are usually included in the outsourcing agreement?
The parties can freely agree upon the reasons leading to the termination of the agreement: breach of contract, change of control, etc.

10.4 Are there termination for convenience rights?
The contract may provide the possibility for any party to terminate the contract without any cause with an agreed prior notice.

10.5 Are there implied rights for the customer and/or supplier to continue to use licensed IP rights or gain access to relevant know-how post-termination?
There are no automatic implied rights applicable. The contract will have to clearly regulate the use of licensed IP rights post-termination.

10.6 Describe particular aspects of termination management, assistance by the supplier.
The contract will have to provide clear rules regarding the assistance given by the supplier with respect to the handing over of certain activities to the beneficiary or to another provider appointed by the beneficiary. The law does contain provisions in this respect.

10.7 Are disputes common in respect of exit services and transition from one vendor to another and if so please describe the nature of such disputes and how they are resolved?
Transition procedures from one vendor to another, if not regulated by contract, are typically subject to further negotiations and understandings between the parties aimed at avoiding litigation. If no agreement is reached, potential disputes will be resolved in accordance with the governing law and jurisdiction clauses of the agreement.

11. REMEDIES, RISK MANAGEMENT AND PROACTIVE MEASURES

11.1 Which remedies and/or reliefs are available to the customer under law for bad or non-performance by the supplier?
The remedies available in the event of bad or non-performance by the supplier are:

- suspension of payments until the breach is remedied;
- payment of penalties (if provided by the contract);
- compensation for damages and/or indemnities; and
- termination of the agreement.

11.2 Which customer protections are typically included in the contract to supplement statutory remedies/relief?

The contract may provide for SLAs (service level agreements), penalties for breach of such SLAs and failure to cure the breaches, compensation for damages, step-in rights and replacement of the vendor at the expense of the vendor.

11.3 Which warranties and indemnities are typically included in a contract?

The supplier usually undertakes the following representations and warranties:

- it has the capacity to enter into the agreement and perform the obligations arising thereof;
- it has provided correct information during the tender procedure;
- it will perform its obligations with professional skills and diligence; and
- it will indemnify the customer for damages caused to it and its own clients.

The customer usually undertakes the following representations and warranties:

- it has the capacity to enter in the agreement and perform the obligations arising thereof;
- it has provided correct information during the tender procedure; and
- it will perform promptly its payment obligations.

11.4 Describe the common limitation and/or exclusion of liability

The parties cannot limit or exclude liability for the prejudice caused by intentional or grossly negligent acts, or for the prejudice against the life or physical and psychological integrity of a person. The parties can freely negotiate limitations or exclusion of liability for prejudice caused by simple negligence.

11.5 Are there statutory set-off rights and can they can be contractually excluded or limited?

The New Civil Code expressly regulates the statutory set-off which operates by law between reciprocal due debts between the parties. Nevertheless, the law allows the parties to deviate and exclude the operation of the set-off.

12. INSURANCE

12.1 What types of insurance are readily available in your jurisdiction?

The following insurance types are readily available in Romania:

- employee liability;
- property damage;
- third party liability (including professional indemnity risks and fraud);
- business protection; and
- guarantee insurance.

13. SUBCONTRACTING AND ASSIGNMENT

13.1 Which rules and regulations apply to subcontracting and assignment of obligations under the contract?

Romanian law generally allows the assignment of rights, the novation of obligations and the assignment of the agreement as a whole. The parties can freely agree upon these changes when necessary (unless specific restrictions are provided by special laws, as is the case for public procurement), but they can also agree in advance upon situations where the contract can be assigned by a simple notification made by the assignor to the other party in the agreement (as is the case when the assignment is to an affiliated company).

13.2 What contractual arrangements are usually made regarding subcontracting and assignment?

Subcontracting is allowed by law, unless the contract is specifically made in consideration of the particular capacity of one party (*intuitu personae)*. Nevertheless, specific laws (such as public procurement) may impose certain limitations.

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

14.1 Describe statutory rules and practice regarding contract management, governance and escalation

There are no statutory rules on contract management, governance and escalation in Romanian contract law. The parties are free to include in outsourcing agreements specific clauses that are adapted to the specific object and content of the agreement. A mediation procedure prior to bringing a dispute in front of the courts can be used, and such procedure is regulated by a specific law. Arbitration can also be chosen by the parties to the outsourcing agreement, since arbitration is faster than regular court proceedings and provides for privacy and confidentiality.

14.2 What are the usual provisions regarding applicable law and arbitration clauses?

If one party to the agreement is a foreign company or if another significant element justifies the use of a foreign law, the contracting parties are free to include a governing law clause in the outsourcing agreement, whether of Romanian law or a foreign law. The EC Regulation on the law applicable to contractual obligations (Rome I) also applies. Therefore, certain mandatory provisions of Romanian law may not be excluded from application (such as employment law, consumer protection, data protection, competition and anti-trust). The parties can also select a dispute resolution procedure, either in front of regular courts or by arbitration.

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