



outsource

ICLG

The International Comparative Legal Guide to:

Outsourcing 2018

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Spain

Javier Fernández-Samaniego



Blas Piñar Guzmán



SAMANIEGO Law

1 Regulatory Framework

1.1 Are there any national laws that specifically regulate outsourcing transactions?

No, outsourcing transactions are not regulated by any specific piece of legislation in Spain. Therefore, outsourcing is subject, as any other voluntary relationship, to what the parties foresee contractually without prejudice of the whole legal order and, specifically, commercial, tax and labour regulations.

1.2 Are there any additional legal or regulatory requirements for certain types of outsourcing transactions, for example: a) public sector transactions; b) business process transactions; c) financial services transactions; d) IT transactions; and e) telecommunications transactions?

Public sector transactions must comply with public procurement regulations, mainly Law 9/2017, of 8th November, on Public Sector Contracts, but also additional regulations from the specific Public Administrations currently contracting.

Even though there are no additional material requirements regarding financial services and telecommunications transactions, it is true that some types of outsourcing operations made by financial entities or communications operators may be communicated to, authorised by, or registered with the relevant supervisory body, i.e. the Bank of Spain or the National Commission on Markets and Competition ('CNMC' in Spanish).

There are no additional requirements for business process or IT transactions.

1.3 Are there any further legal or regulatory requirements for outsourcing transactions in any particular industry sector?

No, there are not.

1.4 Is there a requirement for an outsourcing transaction to be governed by local law? If it is not to be local law, is there any generally accepted norm relating to the choice of governing law?

No, outsourcing transactions are subject to the general choice of governing law regime for business-to-business contracting, mainly

the ROME I Regulation. In any case, it must be considered that Spanish mandatory provisions will prevail over any foreign law chosen by the parties when the outsourcing transaction affects corporate, tax, labour, intellectual property or data protection issues in the Spanish territory.

In practice, there is strong pressure to choose Spanish law as the governing law of an outsourcing contract, not only for those aspects of the deal where application of Spanish law might be partially or totally mandatory, but also in relation to the whole commercial relationship. Adapting some of the key international outsourcing practices and contracting policies of global outsourcing suppliers to Spanish legislation, case law and legal practice is a challenging exercise, both from the perspective of the Spanish judiciary and the commercial culture.

2 Legal Structure

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

BPO (Business Process Outsourcing), SaaS (Software as a Service) platforms, cloud solutions, mobility, offshoring and new shared service concepts offer promising potential to organisations (customers) which embrace the strategic golden rules of sourcing: be the best at your core business; ensure technological innovations are used to their maximum potential; and ensure underlying operations and IT is being utilised in the best possible way. In Spain, despite that outsourcing transactions were initially legally structured as simple business-to-business agreements, the market has become more developed so it can be said that joint ventures are now the most common legal vehicle, permitting a better articulation of the operation's assets to the parties.

3 Procurement Process

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

The Request for Proposals ('RFPs') between a number of specialists is widely used within the medium and large-sized companies in Spain, especially by listed companies which are subject to special transparency requirements. In any case, no procurement processes are compulsory in Spain except for Public Administrations.

4 Term of an Outsourcing Agreement

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

No. Typically, an outsourcing agreement in Spain has a duration of approximately five years.

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

No; however, please note that if no specific periods have been agreed, case law forbids unfair or sudden notice periods.

5 Charging

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

There is not a typical charging method; it depends on the specific type of outsourcing transaction. However, as a rule, there is a fixed fee and a variable remuneration related to the achievement of the outsourcing's cost reduction.

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

Pricing review mechanisms where there has been a change of the service requirements, benchmarking provisions, service levels and related penalties are key elements in relation to costs in outsourcing transactions.

6 Transfer of Assets

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

In general, there are formalities required by the Registry when the asset that is transferred, leased or licensed is subject to a public registration regime, such as: land; corporate; guarantees, intellectual property including software, authorial rights, trademarks and patents; vehicles; and energy production. Should the asset be not subject to public registration, no more formalities beyond the agreement between the parties are required.

6.2 What are the formalities for the transfer of land?

The agreement should be granted before a Public Notary within a public deed and then be registered with the Land Registry.

6.3 What post-completion matters must be attended to?

Registration, if needed. Voluntary registration is possible through a public deed before a Notary, widely used for software rights (escrow).

6.4 How is the transfer registered?

In case the asset transferred is subject to public registration, some formalities must be observed, including filing a request before the relevant registrar, payment of the fee and obtainment of the relevant publication.

7 Employment Law

7.1 When are employees transferred by operation of law?

Employees are transferred by operation of law when the outsourcing transaction includes the acquisition of an autonomous production unit capable of carrying out services and activities.

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

The transferee of an undertaking assumes all the labour rights and obligations that the employees had with the former employer, including those regarding social security and private pension plans. Therefore, the transfer itself does not entitle the employees or the transferee to terminate any of the existing employment contracts.

In addition, employees do not have a right to remain employed by the former employer; once the transfer of undertakings takes effect, the employees become employees of the transferee.

Regarding collective bargaining agreements, unless otherwise agreed, the agreement that applies to the transferor at the time of the transfer of undertakings will continue to apply until it expires or a new one is agreed.

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

There are no particular requirements on employee information to be disclosed by the parties, but both must provide certain information to the employee representatives prior to the transfer, such as the anticipated transfer date, reasons for the transfer or consequences for employees.

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

Yes, based on 'objective reasons' it can dismiss an employee who renders the specific services that are going to be outsourced.

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

Yes, through a consultation period with the employee representatives, and based on objective grounds.

7.6 Are there any pensions considerations?

No, apart from consolidated rights of the employees.

7.7 Are there any offshore outsourcing considerations?

No, there are not.

8 Data Protection Issues and Information Security

8.1 What are the most material legal or regulatory requirements and issues concerning data security and data protection that may arise on an outsourcing transaction? Are there independent legal and/or regulatory requirements concerning information security?

As in the rest of European Member States, the European General Data Protection Regulation ('GDPR') is fully applicable in Spain as from the 25th May 2018, also to any outsourcing transaction if personal data are exported, imported or internally transferred from one company to another. A new Organic Law on Data Protection will be passed by the Spanish Parliament in order to complement the GDPR.

Since the outsourcing supplier usually gets access to the personal data collected by the client, both must enter into a data processing agreement so that the supplier will keep such data strictly confidential and comply with certain security measures.

9 Tax Issues

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

The supply of services or the transfer of goods undertaken by a VAT taxpayer with respect to the outsourced business will be subject to VAT, generally at a rate of 21%. In certain cases, a reduced tax rate or an exemption from VAT may apply.

If the transfer qualifies as the transfer of an autonomous economic unit, the transfer is not subject to VAT, in which case Transfer Tax may apply if the transfer includes real estate assets.

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

No, unless the trade or business activity carried out by the principal related to the outsourcing is exempt from VAT, in which case VAT charged by the provider on the outsourced services to the principal will not be tax deductible for the principal.

9.3 What other tax issues may arise?

Transfer pricing rules will apply in the case that companies belonging to the same group ('related parties') enter into an outsourcing transaction.

10 Service Levels

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

Service Level Agreements ('SLAs') are quite often used within outsourcing transactions in Spain to measure the performance of the contract's execution. Conversely, service credits are restricted to complex long-term transactions.

11 Customer Remedies

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

Both the Spanish Civil and Commercial Codes provide for general remedies including requests for correct performance and claims for damages in the case of a breach of contract.

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

Additional protections include step-in rights or penalty clauses.

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

There is a broad variety of warranties and/or indemnities, including expertise, ownership rights, insurance or prior assessment of needs.

12 Insurance

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

Directors' and Officers' insurance, as well as cover for IT losses, should be considered.

13 Termination

13.1 How can a party to an outsourcing agreement terminate the agreement without giving rise to a claim for damages from the terminated party?

In terms of termination, outsourcing agreements are subject to the general contracting regime. Hidden defects may be claimed even in the case of a friendly termination.

13.2 Can the parties exclude or agree additional termination rights?

Yes, to the extent that mandatory limits foreseen by the Civil Code are observed.

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

No, there are not.

14 Intellectual Property

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

Primarily by what the parties agree contractually. Special care should be taken regarding any pre-existing materials, software developments and third-party licences.

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

Yes, the Commercial Code, the Intellectual Property Law, the Trademarks Law, the Patents Law, and the Unfair Competition Law provide legal resources for business critical confidential information. Also, the Directive (EU) 2016/943 on Trade Secrets, having a direct effect in Spain from 9th June 2018, since the future Law implementing it has not been passed yet.

14.3 Are there any implied rights for the supplier to continue to use licensed IP rights post-termination and can these be excluded from the agreement?

No, unless the parties agree on that point.

14.4 To what extent can the customer gain access to the supplier's know-how post-termination and what use can it make of it?

In principle, the customer does not gain any access whatsoever to the supplier's know-how post-termination, but the parties can agree otherwise.

15 Liability

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

Limitation or even exclusion of liability is fair in Spain with the sole limit of wilful misconduct and, in some cases, gross negligence. The limitation of liability provisions that outsourcing suppliers request from customers usually leads to tough negotiation, not only because of the economic relevance of the issue itself, but also because this is one of the points where the difference between continental- and common-law legal systems and other cultural legal differences clearly appear (frequently at later stages of the negotiation) between global outsourcing operators and Spanish customers and advisers. Reasonable and justified caps are better understood and accepted by Spanish lawyers and courts, while limitations or exclusions on different types of damages, based on common law systems, imply strong differences and, in some cases, serious concerns on the adaptation and enforceability of contractual provisions before Spanish courts.

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

Yes, but please consider wilful misconduct and gross negligence cases.

16 Dispute Resolution

16.1 What are the main methods of dispute resolution used?

Both litigation before national courts and arbitration are often used. More and more, mediation is being introduced to complex outsourcing transactions, even in the form of escalation clauses. From the perspective of the enforcement of the agreements where disputes arise and cannot be solved by the parties, given the highly complex and sector-specific nature of the legal issues mentioned above together with the international nature of some of the legal concepts typically used and the technical matters implied in IT outsourcing projects, escalation clauses (including mediation and arbitration) become options to be seriously considered. The advantages and disadvantages of such dispute resolution mechanisms in comparison with those of the submission to courts must be carefully assessed (an assessment that needs to be done on a case-by-case basis considering the features and circumstances of the specific outsourcing project and the companies involved).

17 Good Faith

17.1 Is there any overriding requirement for a customer and supplier to act in good faith and to act fairly according to some objective test of fairness or reasonableness under general law?

Good faith is a general rule of the Spanish legal system (Article 7.1 of the Civil Code) and, additionally, a specific rule for construing contracts and behaviour of the parties (Article 1258 of the Spanish Civil code). Furthermore, according to Articles 225.1 and 226.1 of the Royal Decree 1/2010 on the Spanish Corporates Law, professionals shall act with the diligence of a 'devoted businessman', implying to act in good faith, without personal interest in the matters being decided, with enough information and according to the suitable decision-making procedure.



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SAMANIEGO

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