



# ICLG

The International Comparative Legal Guide to:

## Outsourcing 2017

### 2nd Edition

A practical cross-border insight into outsourcing

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## 1 Regulatory Framework

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

There are no specific Finnish acts or regulations which specifically regulate outsourcing transactions.

However, e.g., the following general Finnish legislation is applicable to outsourcing transactions:

- the Personal Data Act (523/1999);
- the Accounting Act (1336/1997); and
- the Information Society Code (917/2014).

Currently, the Personal Data Act sets forth certain limitations on the transfer of personal data outside the European Union (EU) and the European Economic Area (EEA). The privacy regulation is about to change as the Personal Data Act is to be replaced with the European Union General Data Protection Regulation (EU) 2016/679 (GDPR), which enters into force on 25 May 2018. The regulation brings about substantial changes to provisions related to data protection and introduces new sanctions. See section 8 for more information on data protection.

The Finnish Accounting Act sets forth certain requirements for access to book-keeping documentation that also apply to outsourcing. Accounting records must be stored in a manner that enables the review of documentation from Finland by auditors and authorities without undue delay. This requirement also applies to business process outsourcing services concerning general finance and accounting services and functions.

The Information Society Code sets forth certain principles which must be complied with when determining security practices, access rights to the data content and the processing of electronic communications in connection with outsourcing arrangements. The users of outsourced systems also have extensive right to privacy of communication. This must be taken into account when contracting service provider's rights and obligations.

### 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?

- a) Public sector transactions are subject to the Act on Public Procurement and Concession Contracts (1397/2016) if the

- outsourcing transaction constitutes a public procurement by the state, municipalities or other similar public entities, and the value of the contract exceeds the relevant national/EU thresholds.
- b) For certain business process transactions, Finnish regulations concerning accounting and unfair business practices may be applicable.
- c) The Financial Supervision Authority of Finland (FSA) has issued detailed regulations and guidelines concerning outsourcing for the financial and insurance sector in Finland. According to the regulations, certain outsourcing transactions must be carried out in accordance with FSA's rules and such transactions shall be notified in advance to the FSA. The FSA regulations and guidelines have been issued based on certain legislation applicable to the financial services sector. Such legislation includes, e.g.: the Credit Institutions Act (610/2014); the Act on Trading in Financial Instruments (748/2012); the Investment Services Act (747/2012); the Mutual Funds Act (48/1999); and the Payment Institutions Act (297/2010).
- d)/e) There are no specific regulations that specifically apply to IT and telecommunications outsourcing transactions. However, as set out above, the Information Society Code sets forth certain principles which must be complied with when determining the security practices, access rights to the data content and the processing of electronic communications. In addition, in IT and telecommunications outsourcing transactions, general legislation concerning copyright and other intellectual property rights shall be considered when determining the rights to use, and ownership of, pre-existing IP, as well as IP created during the outsourcing arrangement.

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

There are certain regulations that apply to particular industry sectors that one must also consider when determining outsourcing transactions within these sectors. For example, in the health care sector, due to the fact that data stored in health care systems is often sensitive data, there are particular confidentiality and data protection provisions that apply to storing and processing of such sensitive data.

Also, for example, for electronic medical prescriptions, the Social Insurance Institution of Finland shall arrange the prescription centre in a manner that the data is available without interruptions and that the systems have sufficient data recovery functionalities and adequate backup systems.

In addition, there are specific public sector procurement regulations that apply to certain services and commodities that are considered to be vital for the general public, such as water and energy supply, as well as traffic and postal services. These are further regulated in the Act on Public Procurement and Concession Contracts of Entities Operating in the Water, Energy, Transport and Postal Services Sectors (1398/2016).

#### 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?

In general, local law is not required under Finnish legislation. However, the mandatory provisions of certain legislation may apply to outsourcing arrangements despite the parties' choice of law. In most outsourcing transactions, Finnish law is chosen as the governing law.

## 2 Legal Structure

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

The most common structure for an outsourcing transaction is based on an outsourcing contract between the customer and the supplier.

Outsourcing may also be carried out by means of a combination of a contract-based outsourcing and an asset transfer. In addition to the outsourcing contract, assets and/or employees are also transferred to the service provider. Assets and/or employees may be transferred either directly to the service provider or to a new outsourcing vehicle established for the outsourcing operations. Such outsourcing entity may be created in a form of a joint venture of the parties or a subsidiary or an affiliate of a party.

## 3 Procurement Process

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

The procurement process is in most cases divided into several phases. Such phases may comprise data gathering of the service providers or potential bidders, planning and pre-selection of bidders and a request for information (RFI), if additional information from bidders is required. After a short-list or another selection of bidders has been established, a request for proposal (RFP) is usually sent to the selected bidders. Thereafter, the customer conducts an evaluation of the responses to the RFP and invites usually one to three selected bidders to the negotiation phase. Often, prior to the actual contract negotiations, further due diligence of the selected bidders is also conducted. At the end of the process, an outsourcing agreement is executed between the selected service provider and the customer.

In public sector procurements, a negotiated procedure set out in the Act on Public Procurement and Concession Contracts is the most common process and such procedure shall be carefully complied with. One of the main characteristics of the negotiated procedure is to treat the selected tenderers in a fair and equal manner during the procedure.

## 4 Term of an Outsourcing Agreement

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

In general, Finnish law does not impose a maximum or minimum term for contracts and the term of the outsourcing contract may be agreed between the parties. However, the Act on Public Procurement and Concession Contracts limits the duration of the term of framework agreements to four (4) years in most cases.

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

No, there is no specific notice period which is required under Finnish law. Usually, the parties agree on certain notice period(s) in the outsourcing agreement. Also, in accordance with Finnish contracting practice, a long-term contract can be terminated with a reasonable notice period even if the parties had not agreed on a specific notice period.

## 5 Charging

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

The most common charging method is based on monthly service fees (e.g. time and materials-based fees or agreed fixed service fees).

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

Other cost-related key terms include provisions on price revisions/adjustments (e.g. index provisions), payment terms, delay interest, benchmarking clauses, redemption of assets and fees/reimbursements related to termination of contract. In addition, the parties may also agree on the cost allocation relating to travel and accommodation expenses, *per diem* allowances and other similar costs and expenses.

## 6 Transfer of Assets

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

The transfer, lease and license of assets are usually agreed in detail in the outsourcing agreement or in a separate business transfer agreement.

### 6.2 What are the formalities for the transfer of land?

The Finnish Code of Real Estate (540/1995) sets out the formalities for the transfer of land. In order to be lawful, the transfer of title shall be a) made in writing, b) signed simultaneously, and c) witnessed by a notary in the presence of all the signatories. The contract of sale shall include the intent to convey, the real estate to be conveyed, the seller and the buyer, and the price or other consideration.

### 6.3 What post-completion matters must be attended to?

The most important phases of post-completion include registration of title as set out below in question 6.4.

### 6.4 How is the transfer registered?

The transfer of land requires a registration of title. There is a general obligation of applying for the registration of title after having acquired a real estate or a share or parcel thereof. As a main rule, the registration of title shall be applied for within six (6) months from the date of entering into the transfer agreement (transfer of title).

In addition, the transfer of title to certain movable property may require registration. The sale of motor vehicles, ships and aircraft shall be conducted in writing for the transfer to be registered.

## 7 Employment Law

### 7.1 When are employees transferred by operation of law?

If an outsourcing constitutes a transfer of business in the sense provided in the Finnish Employment Contracts Act (55/2001), which in principle corresponds to Directive 2001/23/EC on safeguarding employees' rights on transfers of undertakings, businesses or parts of businesses, all employees engaged in the business operations in question transfer to the transferee by operation of law.

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

A basic prerequisite for a transaction or arrangement to constitute a transfer of business is that the object of the transfer is an economic entity, namely an organised grouping of resources that has the objective of pursuing an economic activity and which entity retains these characteristics also after the transfer. To determine whether an outsourcing transaction constitutes a transfer of business, it is evaluated on a case-by-case basis taking into consideration the relevant characteristics of the transaction. A transfer of business is therefore likely to occur when the transferor discontinues certain business operations or a part thereof, and the transferee then continues to operate the same business in the same or similar manner (using, e.g., the transferred assets, same employees and other properties). Share purchase transactions do not constitute a transfer of business in this sense. Changing an outsourcing supplier can also in certain cases constitute a transfer of a business if the above criteria are met. In that case, all employees of the business in question transfer to the transferee by operation of law.

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

The Finnish law does not contain any provisions regarding employee information that the parties should provide to each other. Therefore, the parties should agree on the specific information which will be disclosed in a due diligence process when outsourcing a business.

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

No, employees may not be dismissed based on reasons solely relating to the outsourcing.

The customer/supplier can, however, dismiss employees on the same individual or collective grounds as permitted to any employer under Finnish law.

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

No. Transferred employees are entitled to retain the existing terms and conditions of their employment and the supplier is not entitled to unilaterally harmonise the terms and conditions with its existing workforce. However, it is possible for the supplier to offer new employment contracts to the transferring employees with terms that are equal to or more beneficial for the transferring employees than their old employment contracts. The supplier and the transferring employees may also mutually agree on less beneficial terms and conditions; however, employees are never obliged to accept such new terms and conditions.

### 7.6 Are there any pensions considerations?

Following a transfer of business, the transferee, i.e. the supplier, must meet and maintain all the existing terms and conditions of employment of the transferring employees, including supplementary pension benefits, if any.

### 7.7 Are there any offshore outsourcing considerations?

As long as the outsourcing does not constitute a transfer of business, there are no specific offshore considerations regarding the outsourcing under Finnish employment law. However, in the case the outsourcing would constitute a transfer of business involving also an outsourcing entity in an offshore location, local legal requirements should be adhered to.

## 8 Data Protection Issues

### 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?

According to the current Personal Data Act, the controller (i.e. usually the customer) must carry out the technical and organisational measures necessary for securing personal data against unauthorised access and unlawful processing. This must be done by taking into account the techniques available, the associated costs, the quality, quantity and age of the data, as well as the significance of the processing to the protection of privacy. Processors (e.g. outsourcing suppliers) should, before starting to process data, provide the controller with appropriate commitments and other adequate data security guarantees.

Furthermore, in order to comply with its general data protection obligations, the controller should oblige the processor to process personal data only in accordance with instructions given by the controller and only for providing the agreed service(s). In addition, the

GDPR increases processor obligations and requires detailed written data processing agreements, which is advisable to be considered already before the GDPR becomes applicable. The parties should specifically agree on the transfer of data, as mandatory legislation restricts the transfer of personal data outside the EU and EEA.

## 9 Tax Issues

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

Assets are to be transferred on an arm's-length basis. The transferor is subject to corporate income tax at 20% over the difference between the assets' sale price and the residual tax acquisition cost. For the transferee, the values of the assets are stepped up to their acquisition price.

Usually, the purchase price is allocated to the different assets, and any residual amount is generally treated as goodwill. Corporate tax charges do not arise if the transfer is deemed a transfer of a branch of activity as defined in the Finnish Business Income Tax Act (360/1968), provided that the transfer complies with certain criteria as set out in section 52(d) of the Business Income Tax Act.

A transfer tax of 4% of the purchase price shall be payable for transfers of real property. Transfers of securities are in most cases subject to a transfer tax (general rate of 1.6%, and 2% for securities issued by a real estate company).

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

Generally, outsourced services are subject to VAT. If the operations are VAT exempted, e.g. in the finance sector, the outsourcing customer may not be able to recover input VAT. If the outsourced services are not VAT exempt, the costs of the outsourcing transaction are also increased.

The transfer of assets from the customer or its previous supplier to the new supplier is in general not subject to VAT, if:

- the transfer is made in connection with the transfer of a going concern; and
- the outsourcing supplier continues the use of the transferred assets in activities that allow the deduction of VAT.

### 9.3 What other tax issues may arise?

Withholding taxes may apply to payments of royalties related to licences.

Further, issues concerning transfer pricing and revenue recognition may arise if a group consisting of several affiliate companies would procure outsourced services, or affiliated companies from various jurisdictions would perform outsourced activities.

## 10 Service Levels

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

A service level agreement (SLA) is attached to most outsourcing agreements. Service levels and service credits are defined in the SLA. Service levels may be measured for availability of the service,

response and resolution times, performance guarantees, customer satisfaction and other similar measurable indicators.

Service credits or other consequences for not achieving the agreed service levels may contain liquidated damages, penalties and other similar financial compensations. Bonuses and incentive mechanisms for meeting the service levels have also become increasingly common in outsourcing agreements.

## 11 Customer Remedies

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

The general principles regarding contractual remedies are derived from the Sale of Goods Act (355/1987). In general, the act applies to the sale of goods. However, the act is also often analogously interpreted for procurement of services. Under general law, the primary remedy is correction of errors and defects. Other remedies become available to the customer only if the supplier is unable or unwilling to correct the defect within a reasonable time. Thereafter, the customer has a right to remedy the defect itself or to have a third party perform the remedy at the cost and expense of the supplier. If the quantity and/or quality of the goods or services received by the customer do not comply with the agreed quantity and/or quality, and if the supplier does not correct the defect, the customer may become entitled to a price reduction. It should be noted that a price reduction is applicable only in connection with defects and it is not available for delay.

In addition, the customer is entitled to rescind or cancel the contract with immediate effect, if the supplier is in material breach of contract. The existence of the cancellation right is mandatory under Finnish law, i.e., the contracting parties cannot agree otherwise.

The Sale of Goods Act is not mandatory general law and the contracting parties may in most cases agree that the act is not applicable. The parties may usually also agree that certain remedies available under general law are not available under the outsourcing contract in question or that other than the general remedies are made available for the parties.

Compensation for damage is also available under general law. The main goal of damages is to have the customer in the same financial position as where it would have been if the contract was duly fulfilled. In addition to financial loss, damages are also applied to personal injury and damage to property. Damages require the customer to show a) the breach of contract, b) the damage itself and amount thereof incurred by the customer, and c) the causal connection between a) and b). In order to be released from liability, the supplier must show that the breach of contract resulting in damages is due to a reason beyond its control, e.g., *force majeure*, or that the breach occurred despite supplier acting with all due care. The customer does not need to prove the existence of negligence on the part of the supplier.

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

Additional protections may include, e.g., liquidated damages which are payable regardless of whether or not actual damages are incurred.

The contract documentation may also include, *inter alia*, the following terms and conditions for the protection of the customer:

- non-exclusivity provisions;
- termination clauses containing shorter notice periods for the customer and longer ones for the supplier;

- termination and transfer assistance provisions;
- audit provisions;
- benchmarking clauses;
- favourable pricing terms;
- clauses rejecting any minimum or volume commitments;
- quality system requirements;
- step-in rights;
- parent company guarantees and other collaterals, e.g. bank guarantees and on-demand bonds; and
- indemnification clauses.

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

Outsourcing contracts typically include the following various representations and warranties, *inter alia*:

- authority to enter into the outsourcing contract;
- professional and diligent performance of the outsourced service(s);
- performance of the outsourcing contract by not infringing any intellectual property rights of third parties;
- warranties given for any service deliverables;
- warranties for having sufficient, experienced and skilled resources; and
- compliance with applicable legislation and regulation.

In addition, outsourcing contracts may include indemnities, *inter alia*, relating to:

- infringement of intellectual property rights;
- non-compliance with data protection and data security provisions; and
- breach of confidentiality obligations or other material contract terms.

## 12 Insurance

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

Insurance policies related to professional liability, business interruption, errors and omissions and damage of property are often considered in outsourcing transactions. However, the types and the coverage of insurance depend on the nature of the outsourcing transaction in question and specific insurance, e.g., for environmental liability, may be considered for a particular outsourcing transaction.

## 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?

A party may terminate the agreement based on the agreed contract terms; for example, on termination for convenience.

In addition, an outsourcing agreement can usually be terminated with immediate effect if a material breach by the other party occurs and the defaulting party fails to remedy such breach in a reasonable time which may be defined in the outsourcing agreement.

### 13.2 Can the parties exclude or agree additional termination rights?

Additional termination rights may be agreed between the parties. A common contract term is to allow termination in the case of a change of control of the other contracting party. Furthermore, financial distress or insolvency can be defined as grounds for termination of the agreement. The parties may also agree additional termination rights if, for example, the supplier repeatedly fails to achieve the agreed minimum service levels or if the supplier has paid the maximum liquidated damages for failing to achieve the agreed service levels during an agreed time period.

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

In most cases, there is no mandatory local regulation which would override the termination rights set out in the outsourcing contract. However, the Emergency Powers Act (1552/2011) may affect termination rights in an outsourcing contract in certain cases. In order to be applicable, the Act provides that emergency conditions, such as an armed attack against Finland or a serious threat to the livelihood of the population or the foundations of the national economy, exist.

## 14 Intellectual Property

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

Usually, each party retains the intellectual property rights it has created prior to or outside the scope of the outsourcing agreement. The outsourcing agreement may also contain other protective clauses such as non-assertion clauses and IP indemnification clauses. Instead of transferring or assigning IP rights, a party may grant a licence to the other party for such IP rights to be used for the purposes of the outsourcing transaction.

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

Know-how, trade secrets and other business critical confidential information are protected under Finnish law to a certain extent. The Unfair Business Practices Act (1061/1978) sets out a general confidentiality obligation in business relations according to which no one may unjustifiably obtain or seek to obtain information regarding a trade secret or use or disclose information obtained in such a manner.

The Criminal Code of Finland (39/1889) includes sanctions for trade secret infringements. In addition, the Employment Contracts Act (55/2001) includes provisions on employees' confidentiality obligations.

As the local law does not fully protect know-how, trade secrets and other business critical confidential information, it is common to enter into separate non-disclosure agreements and confidentiality undertakings.

#### 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?

There may be, for example, post-termination transfer assistance obligations where the supplier could use implied licences in order to continue providing certain services or fulfil its exit plan obligations. Under Finnish copyright law, the supplier may also receive certain implied licences which it may continue to use post-termination.

Most implied licences can be excluded from an outsourcing contract. However, there are certain mandatory provisions, e.g., in the Finnish Copyright Act (404/1961), which cannot be excluded.

#### 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?

The outsourcing contract may contain provisions which allow the use of certain supplier data and know-how post-termination for the retendering of outsourced services. The contents of the licence rights granted in the outsourcing agreement may also be of relevance when considering the rights of the customer to access supplier's know-how post-termination. The customer may use the know-how to a certain extent in order to continue the procurement of the outsourced services.

### 15 Liability

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

Generally, the parties enjoy freedom of contract and may limit their liability rather extensively. However, the parties may not exclude liability for wilful conduct or gross negligence.

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

Yes. Parties commonly agree on financial or liability caps in their outsourcing agreements.

The total aggregate liability cap in a supplier-friendly contract may be limited to 20% of the total price of the service fees paid under the outsourcing contract or service fees paid in a six-month period prior to the occurrence of the damage. In a customer-friendly outsourcing contract, the liability cap may be 100% of the service fees paid or payable during the term of the contract or the outsourcing contract may contain high liability caps for the agreed monetary amount.

### 16 Dispute Resolution

#### 16.1 What are the main methods of dispute resolution used?

Disputes are resolved either in arbitration or in general courts of law. Arbitration is commonly used as a dispute resolution mechanism in the private sector whereas disputes with a public sector entity are usually resolved in general courts. The Arbitration Rules of the Finland Chamber of Commerce are commonly agreed in outsourcing contracts.

### 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?

There is a concept of duty of loyalty that is emphasised especially in long-term contracts.

In addition, the Unfair Business Practices Act includes provisions regarding forbidden business practices. Moreover, there are provisions related to making agreement clauses more reasonable under the Finnish Contracts Act (228/1929). Such provisions are very seldom applicable in business-related agreements.

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