

# Russian Federation

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## GENERAL

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

The legal framework of outsourcing is still developing in the Russian Federation (RF) (Russia). The law neither specifically defines outsourcing (with an exception in relation to financial services, see *Question 2*) nor regulates it directly. However, the outsourcing market is growing rapidly and some kinds of outsourcing such as IT outsourcing, business process outsourcing (BPO) and HR outsourcing, are very popular in practice.

### 2. What additional regulations may be relevant on:

- A financial services outsourcing?
- A business process outsourcing?
- An IT outsourcing?
- A telecommunications outsourcing?
- A public sector outsourcing?
- Other outsourcings?

#### Financial services

Generally, outsourcing of financial services in areas such as investments, insurance, securities and so on must comply with the civil law rules regarding provision of services and any applicable specific legislation. In addition, the letters of the Central Bank of Russia (CBR) provide some guidance on outsourcing. However, the CBR is the statutory regulator for credit companies (that is, banks and non-banking credit companies) and therefore the letters are intended solely for credit companies. Unlike the CBR instructions and regulations, the letters are quite general recommendations.

Banking operations can only be outsourced to another bank, not a common service provider, due to strict licensing requirements. Treasury outsourcing, particularly cash pooling, is subject to special currency regulations. Due to restrictions on hard currency circulation, cash often cannot be actually accumulated at one account but must be pooled virtually. (Other functions in treasury can be outsourced without facing regulatory difficulties.) Banks can outsource some back-office functions such as accounting, IT support and internal audit to any appropriate supplier, as these operations do not require a licence.

The CBR recommends banks to consider the following matters when deciding on the applicability of outsourcing:

- Factors of operational risk arising from outsourcing.
- Control over those operational risks.
- The importance of outsourced functions to the bank and a risk of dependence on the service provider.
- Supervision over the quality of services and legal compliance.
- Contract terms including a proper assignment of rights and provisions regarding the bank and service provider's obligations.
- Internal regulations for procedures on mitigating risks arising from outsourcing, including the risk of refusal of services.

In addition, the CBR provides some guidance in relation to internal audit outsourcing (with reference to the Basel Committee on Banking Supervision):

- Due diligence of the service provider is recommended.
- Long-term contracts can be beneficial.
- Contract terms should contain a requirement for the bank management to give their preliminary consent to the supplier's audit plan and risks analysis, as well as enable them to access the supplier's records, working plans and working tables.

#### Business process

When outsourcing business processes (BPOs) such as accounting, tax compliance and payroll, the regulations for preserving information for accounting and tax purposes apply.

Accounting records must be retained for at least five years, tax records for at least four. Companies must permanently keep statutory documents such as the Charter, any changes to the Charter, annual financial statements and tax declarations, and the certificate of incorporation. Quarterly financial statements and tax declarations must be retained for at least five years, monthly financial statements and tax declarations for one year. Companies must keep directors' personal files permanently and files of other employees for 75 years. Personal data protection regulations (see *Question 14*) are also relevant to BPOs.

Representative offices of foreign companies often outsource accounting and tax compliance functions, and can choose between Russian law and their national law in relation to the accounting regulations (subject to their national law not

conflicting with International Financial and Reporting Standards (IFRS)). The selection, however, is not available in relation to tax compliance. Therefore, many companies choose to apply Russian law both for the accounting and tax purposes and then request transformation of reporting to their national law or IFRS. Under an outsourcing contract, the legally defined function of the chief accountant is transferred to the outsourcing provider. This may have legal consequences for the provider under the Administrative, Tax, Customs and Criminal Codes.

Foreign representative offices can, in theory, store the accounting and tax records abroad. However, companies must be able to present the records (in Russian) to the tax authorities within a few days. This option is not advised. The outsourcing of the accounting function is regulated by the law on accounting under which there are four ways to organise the accounting.

## IT

There are no specific regulations regarding IT outsourcing. However, if the outsourcing involves transferring or sublicensing software licences, intellectual property (IP) legislation applies. Software is protected by copyright. Copyright itself is not subject to any registration but arises solely from developing the software. To ensure the software is protected, it should be registered with the Russian Patent and Trademark Office.

New data protection regulations are also relevant. From January 2010, all organisations must comply with the new Law on personal data (No. 152-FZ) (Law on PD). This law was adopted in accordance with the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS 108). The Law on PD obliges organisations to ensure respect for individuals' fundamental human rights in relation to processing personal data.

## Telecommunications

There are no specific regulations that are relevant to telecommunications outsourcing (for example, outsourcing customer support services to a call centre). However, if a telecommunications operator outsources operation of a part of its network, the Law on Electronic Communications (No. 126-FZ) may apply as it regulates telecommunications operators.

## Public sector

Public procurement rules are contained in the:

- RF Civil Code (Civil Code).
- RF Budgetary Code (Labour Code).
- Law on contracts for state needs (No. 94-FZ) (in particular).

Works or services intended for the Russian state or public and financed by state, must generally be performed on the basis of a state contract. The only exception is contracts for a small amount, currently up to RUB100,000 (about US\$3,300), which can be charged every three months.

A state contract is placed through an open tender, an auction or after requesting quotations from several suppliers. Some works and services are exempt from this procedure, for example state order of military applications, development of narcologic and psycho-tropical medicine and financial support of cinematography. The awarding authorities must advertise the contract on the

official internet page [www.zakupki.gov.ru](http://www.zakupki.gov.ru) (currently only in the Russian language) and follow special rules and procedures.

## Other

There are no other relevant additional regulations.

## LEGAL STRUCTURES

### 3. In relation to the legal structures commonly used on an outsourcing, please describe how each structure works, and its potential advantages and disadvantages.

#### Service or works contract

The most common legal structure in outsourcing is a contract for services/works provided by a third party without acquiring or leasing assets or employees. Generally, two types of contracts are used:

- A service contract, which solely implies the delivery of the contracted scope of work. This contract favours the supplier.
- A works contract, which implies the delivery of a certain agreed result. This contract favours the customer.

This structure is often used on the outsourcing of IT, cleaning, recruiting, marketing, advertisement, security, legal or accounting services. In relation to accounting services, the customer is liable for the supplier's mistakes, as he is generally responsible for his financial statements. Therefore, additional warranties in relation to the supplier of outsourced accounting services are crucial for the customer.

#### Outsourcing of personnel

Outsourcing of human resources has become a widespread practice in view of the ever-growing demand for highly skilled professional staff. The supplier's employees work either at the customer's or supplier's place of business, retaining their current employment relations with the supplier. The following structures are most common:

- Staff leasing (that is, a secondment of the supplier's employees to the customer).
- Temporary staffing services (a secondment of the supplier's employees to the customer for a short-term period).
- Outsourcing of the whole departments of the customer's company, with full administration of work schedules, structure and job efficiency.
- Outstaffing. The customer's employees are transferred to the supplier's payroll, with the following secondment of these employees back to the client.

The general weakness of these legal structures is the absence of any labour law regulations regarding outsourcing of personnel, and resulting tax and legal risks under the current legislation. Tax authorities are suspicious of personnel outsourcing as outsourcing is sometimes used for tax optimisation. There is a risk that outsourcing may qualify as a tax offence. Courts have supported this position in relation to personnel outsourcing on two occasions (*Rulings of the Presidium of the Supreme Commercial Court of the Russian Federation No. 12418/08 of 25 February 2009 and No. 17643/08 of 28 April 2009*).

### Trust management agreement

A trust management agreement (or trust of estate contract) under Chapter 53 of the Civil Code can be particularly useful for the outsourcing of property management or production of goods functions. Under the trust management agreement one party (settlor of trust) transfers estate on trust to the other party (trust administrator) for a definite period, and the trust administrator undertakes to administer the estate in the interests of the settlor or the person indicated by him (beneficiary). Notwithstanding the transfer of estate in trust, the settlor remains the only owner of the estate. In addition, estate in trust forms a legally separated estate from both the trust settlor and the administrator. The trust administrator must separately account for it in the balance sheet. The debts and obligations in connection with the trust estate must be repaid at the estate's expense. (For more information see *Question 5*.)

The objects of trust can include enterprises and other property complexes, particularly facilities relating to real estate, securities, rights certified by non-documentary securities, exclusive rights and other property. Money cannot usually be an independent object of a trust.

### Other

In addition to the above structures, a number of other common legal structures and contracts can be used in outsourcing. For example, a subsidiary or a joint venture can be established. The assets and/or rights can be transferred to the supplier under a leasing agreement, sale or licensing. However, these structures have no specific advantages or disadvantages when used in an outsourcing, compared to using them in other fields.

## PROCUREMENT

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

The first step in choosing a supplier is defining the functions to be outsourced. Estimating the scope of those functions is very important, and should be performed by someone with at least a working knowledge of the specifics of the functions. An accurate estimate can reduce the range of potential suppliers considerably, as it may demonstrate, for example, that those functions are either highly specific (which means that a highly specialised outsourcing company should be hired) or have an extremely broad scope (in which case it would be preferable to choose a supplier with equally broad fields of expertise). The importance of this step cannot be overstated as having only a vague idea of the services the outsourcing company will perform when selecting one results, mostly, in tensions between the customer and supplier, and long-lasting mutual dissatisfaction. A relatively new outsourcing market and development of a service culture in Russia makes the estimate even more essential.

After clearly defining the scope of outsourced functions, the range of the suppliers must be selected. Various ratings, surveys and rankings carried out by independent market researchers (which are abundant nowadays in Russia), as well as other open sources of information are very helpful. However, considering the peculi-

arities of the relatively young Russian market, these sources are reliable only to a certain extent, which means that word-of-mouth is perhaps more important than in many developed economies. According to surveys, most businessmen think there is nothing more reliable than a personal recommendation from a trustworthy source.

After prospective suppliers are outlined, the customer often performs a brief due diligence of those. This procedure usually involves an analysis of the supplier's (among other things):

- Past and current projects.
- References.
- Integrity.
- Financial standing.
- Insurance.

The criteria for the selection of a supplier must be determined in advance, although they are also subject to review and adjustment after a direct contact with the potential suppliers.

The companies deemed suitable and shortlisted for further consideration are given a request for proposal (RFP) with a brief outline of the functions to be outsourced and other information the customer considers important. Alternatively, the customer may hold a tender, in which case the RFP looks more like an invitation to tender. However, tender is more suitable only if the outsourced function is relatively basic. For example, a tender for highly specialised legal services is not recommended.

The next step is creating a shortlist of suppliers and direct negotiation with them. The customer may choose only one or two potential suppliers at this point. This reduces transactional costs but also reduces competition. The initial draft contract is normally prepared by the supplier who usually has a number of model contracts. However, the customer can customise the contract, particularly if his market standing and the remuneration he is prepared to offer put him in a strong bargaining position.

## TRANSFERRING OR LEASING ASSETS

### 5. What formalities are required to transfer the following assets on an outsourcing:

- Immovable property?
- IP rights and licences?
- Movable property?
- Key contracts?

#### Immovable property

Generally, transfer of title to immovable property must be in writing and requires registration. In relation to outsourcing, however, transfer of title to immovable property is not necessarily required. If the supplier needs to use the customer's immovable property during outsourcing, the customer can instead lease or otherwise transfer the asset to the supplier (see *Questions 6 and 31*). A trust management agreement is one of the possible methods (see

*Question 3, Trust management agreement*). A trust management agreement regarding immovable property must be in writing. The transfer of immovable property into trust management must be registered in the Unified State Register of Rights to and Transactions with Immovable Property.

#### IP rights and licences

If IP rights (such as patents, utility models, industrial designs and trade marks) are to be used during outsourcing, the transfer must be registered with the Russian Patent and Trademark Office. Transfers of IP licences must also be registered. Transferring or licensing IP rights without registration is void.

#### Movable property

The transfer of movable property must be in writing. Some assets which are subject to specific regulation (for example, cars or trucks) require state registration. However, registration can be avoided by leasing out or otherwise transferring the property to the service provider.

#### Key contracts

Claims and liabilities under the contracts can be transferred with the consent of all three parties (that is, customer, supplier and a third party). The contract for the transfer must follow the same formalities as the key contract, for example, if the state registration of the key contract was required, the contract of transfer must also be registered.

#### 6. What formalities are required to lease or license the following assets on an outsourcing:

- Immovable property?
- IP rights and licences?
- Movable property?
- Key contracts?

#### Immovable property

Lease agreements must be in writing. If the term of immovable property lease is one year or more, the lease agreement must be registered in the Unified State Register of Rights to and Transactions with Immovable Property.

#### IP rights and licences

Any use of IP rights in relation to patents, utility models, industrial designs and trade marks, including their licence, must be registered with the Russian Patent and Trademark Office. The licence agreement must be in writing.

#### Movable property

Lease agreements that relate to movable property must be in writing. The owner must physically transfer possession of the property.

#### Key contracts

Key contracts cannot be leased or licensed under Russian law.

## TRANSFERRING EMPLOYEES

### 7. In what circumstances (if any) are employees transferred by operation of law:

- To an incoming supplier on an initial outsourcing?
- To an incoming supplier on a change of supplier?
- Back to the customer on termination of an outsourcing?

#### Initial outsourcing

Employees are not transferred by operation of law in most outsourcing arrangements. The subject matter of an agreement regarding provision of staff is the services provided by the staff of the outsourcing provider. The outsourcing supplier's employees typically work either at the customer's or supplier's place of business, retaining their existing employment with the supplier (see *Question 3*).

The outstaffing structure, however, is different. The employees are transferred from the customer's staff list to the supplier's payroll. (This implies a new employment contract for an employee.) The employees are then seconded back to the customer. This part of the legal relationship involves certain intrinsic ambiguity and risks, as outsourcing relations are not covered by the Russian civil and labour laws. Most of these risks arise if the outstaffing agreement is declared null and void under the Civil Code or Labour Code. This can happen, for example, if either:

- The parties define the subject matter of the agreement incorrectly, treating individuals as transactional objects, which is not possible under Russian law.
- The supplier's employees are recognised as the customer's employees for tax purposes, which also raises financial consequences for both the customer and the supplier.

#### Change of supplier

The change of supplier transfers employees to the new supplier by operation of law. The transfer requires the termination of the employees' employment contract with the current supplier and paying outstanding salary amounts to employees.

The following important aspects should be considered on the termination of employment contracts following a change of supplier:

- The employee's written consent to the transfer must be secured, expressed either unilaterally by the employee or as an agreement between the employer and the employee.
- The new supplier's written consent to employ the staff is required. Consent can be expressed either in the exchange of formal letters, or alternatively as an agreement between the two suppliers.

#### Termination

If the outsourcing terminates and the customer transfers the services back in-house, the employees are transferred from the supplier to the customer by operation of law. This terminates the employment contract with the supplier and creates a new employment contract between employees and the customer.

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

**General terms**

The termination of employees' employment contracts with the current employer involves paying out all outstanding amounts to employees such as payroll accrued for hours actually worked and indemnification for outstanding and not used days of paid leave, as well as bonuses, option payments, reimbursements and so on.

**Pensions**

There is usually no effect on the state pensions. Employee pension schemes are not commonly used.

**Employee benefits**

In theory, the parties to the contract can agree on new benefits as a new employment contract between the transferred employee and the new employer is concluded. In practice, most contractual benefits transfer as an employee's written consent to the transfer is required, and considering the rather "pro-employee" nature of the labour legislation (employer's internal regulations and decisions, as well as contract provisions infringing any of the employee rights are treated as null and void).

**Other matters**

There are no other matters.

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

There is no statutory obligation to provide any specific information. The information typically provided on initial employment is exchanged between the parties to an outsourcing contract. This includes:

- A passport or other identification document.
- A copy of an employment record book.
- A copy of a state insurance certificate.
- A copy of a military service registration document.
- An education certificate, if applicable.

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

Changes to the main provisions of the employment contract such as work schedule, place of work and employee's duties can only be made with the written consent of the employee or any existing employee's representatives. There are no statutory obligations in this respect but further information and consultation obligations may arise contractually.

If the employees are transferred into a hazardous environment, the parties to the outsourcing contract should inform the employees. However, it is a matter of good business practice as opposed to a legal requirement.

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

As mentioned above in *Question 3*, the outsourcing supplier's employees remain the supplier's employees in most cases. If the employees work at the customer's place of business, only those terms and conditions can be harmonised with that of the existing workforce that are beneficial for the supplier's employees and only with their written consent. Any change to an employment contract without an employee's written consent is void, except if the change is due to sufficient technical reasons. Article 74 of the Labour Code provides some clarification. For example, a reorganisation of a company or a merger of two or more companies can be considered a sufficient technical reason under Russian labour law. However, it is difficult to prove in practice that the technical reason is sufficient.

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

The employees can only be dismissed according to general employment law grounds and not specifically in relation to an outsourcing (before or after the outsourcing). Directors, however, can be dismissed without any notice on the shareholders'/participants' decision.

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

Although Russian labour law does not regulate secondment of personnel, it is widely used. The legal basis is freedom of contract under the civil law. The subject of a secondment contract is the provision of services by the supplier's employees, and not leasing of personnel. This arrangement involves some risk particularly if the outsourcing structure is used to minimise tax or social insurance payments.

**DATA PROTECTION**

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

All organisations employing staff or processing personal data (PD) of individuals (that is, personnel, customers, business counterparties and so on) are subject to the Law on PD (*see Question 2*). The parties to the outsourcing contract must comply with this Law irrespective of any contractual provisions.

The Law on PD imposes heavy requirements on organisations, including:

- To notify data protection authorities of the intent to process personal data.
- To develop internal regulations on PD processing standards and rules.
- To implement a PD protection system which complies, in particular, with the statutory requirements for technical security of premises.

A company implementing a PD protection system can rely on its in-house resources or seek external professional advice. The most efficient approach is a co-sourcing where the implementing company invites an external provider (an information security integrator company) and establishes a specialised in-house implementation team. This approach involves an additional expense of contracting an external company, but may be more appropriate as the service provider's know-how makes the whole process more efficient.

## SERVICES

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

The services specification is usually drawn up by the party drafting the entire contract, the supplier in most cases. Naturally, these clauses are drawn in close co-operation with the customer. However, service specifications are often drawn vaguely in the contract or in any of its attachments. The parties merely stipulate that the supplier will render services in a certain field of expertise based on the customer's individual orders.

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

Although many contracts do not include any service levels and service credits clauses and provide for nothing more than general obligations to render services of due quality in good faith, it is strongly advisable to define the quality expected from the supplier. This is not always possible, for example, with outsourcing legal functions, as:

- The successful performance greatly depends on a number of external factors.
- It is often not possible to define an expected result.

However, with most other functions, the customers want to achieve a specific result and the provisions regarding service levels are then helpful.

The service credits usually provide that in the case of the supplier's failure, either entire or partial, the fees paid to the supplier are reduced. These clauses are compensatory, rather than punitive. The service credits must be proportionate to the damage sustained by the customer. Their precise definition in the contract is nearly impossible, so they are usually decided on a case-by-case basis.

## CHARGING

### 17. Please describe the charging methods that are commonly used on an outsourcing (for example, risk or reward, fixed price, cost or cost plus, pay as you go, resourced-based charges, use of minimum charges and so on).

Depending on the type of services being outsourced, the parties to an outsourcing contract use different charging methods.

#### Fixed price

The fixed price method is commonly used, particularly for a relatively homogeneous work lasting a long time (usually several years), for example, accounting and reporting. This method implies defining, in advance, the minimum monthly volume of the services to be provided so that fixed price is viable. The fixed price method gives certainty to both parties to the outsourcing contract.

#### Pay as you go

Sometimes it is necessary to provide for possible changes in the volume of the services provided during an outsourcing agreement. The changes in the volume may result from seasonality of the clients' operations, business growth and changing legal requirements. These factors and resulting additional work can be dealt with by using flexible rates, depending, for example, on the number of documents, payment transactions or employees on the payroll.

#### Hourly rates

Hourly rates are appropriate for some additional or tailor-made services not directly included in the subject of the outsourcing contract. In respect of, for example, accountancy and reporting this may involve consultancy regarding internal control system development, accounting procedures and international reporting or reporting automation. The most rational approach is to set hourly rates for professionals according to their qualification. An hourly rate usually includes the cost of providing a service, as well as a profit margin.

#### Cost plus

The customer pays the supplier an agreed profit margin on the actual cost of providing the services. A foreign investor may find it difficult to understand the Russian supplier's cost structure and accounting system. Therefore, additional provisions are necessary, to ensure that both parties to the outsourcing contract agree to and understand the methods of calculating the costs.

For many outsourcing contracts a combination of charging methods is an optimal method of pricing. This ensures sufficient flexibility for both parties to the contract.

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

In addition to charging a good price for the outsourced services, it is essential to ensure the profitability of the rendered services for

the longer term. One of the factors influencing the profitability is the amount of time spent by the supplier. Therefore, it is vital to ensure the flexibility of the pricing (see *Question 17*) and to keep control of the time spent by the supplier. Further factors such as exchange rate and inflation are macroeconomic. Their impact can be dealt with by including the necessary clauses in the contract. It is particularly important to consider inflation. It may be useful to base the fee on the inflation index or another index to avoid the negative impact of the inflation for the service provider. As outsourcing is labour driven, the labour market must be considered. For example, the labour market conditions are changing this year, and there are more available specialists with wide-ranging qualifications in accounting and taxation. Therefore, specialists become cheaper and the companies may decide to in-source (or contract-in) the accounting and reporting functions.

## CUSTOMER ISSUES

### 19. If the supplier fails to perform its obligations, what relief is available to the customer under general law?

Generally, the discharge of obligations can be secured by a forfeit penalty, pledge, retention of the debtor's property, surety, bank guarantee and advance payments.

When the supplier fails to perform its obligations, the customer can demand from the supplier the following, at his discretion:

- Gratuitous removal of defects within the reasonable period.
- Adequate reduction of the fee for the works or services.
- Reimbursement of expenses incurred during the elimination of defects, when the customer's right to remove them is provided for by the contract.
- Damages.
- Termination of the contract, if the breach is material.

However, there is usually no provision for compensation above the fees already paid. Currently, this can be described as a general rule in most segments of services.

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

Reporting requirements, information security and property security are integral provisions of an outsourcing contract. The customer sometimes demands from the supplier a guarantee in the form of liability insurance. In relation to accounting services, the customer often has statutory audit obligations. Alternatively, these rights can be included in the outsourcing contract. In addition, specific provision for termination in specified circumstances, for example on insolvency, can be included in the outsourcing contract. Financial penalties are also a popular form of customer protection, for example, for late delivery of works or services.

## WARRANTIES AND INDEMNITIES

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

Russian law does not have the concepts of warranties or indemnities. However, the contract documentation may be drafted in a foreign-law style including warranties and indemnities. The warranties may still be considered as mere contractual obligations, giving rise, on their breach, to a claim for damages or to termination of an agreement (if the breach is material). Indemnities are also mostly treated as contractual obligations, leading to a claim for damages if they are breached.

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

Obligations must generally be duly performed in accordance with the contract terms and legal requirements. If no terms or requirements apply, obligations should be performed in accordance with business practice. Therefore, the parties can specify particular requirements regarding fitness for purpose and quality of service, or limit their responsibility.

## TERM AND NOTICE PERIOD

### 23. Does national law impose any maximum or minimum term on an outsourcing? If so, can the parties vary this by agreement?

Russian law does not impose any maximum or minimum term on contracts. Contracts are often concluded "until the fulfillment of all Parties' obligations". Where appropriate, a contract should specify a term to avoid uncertainty. It can also provide for an automatic renewal on an annual basis. Due to the business nature of the outsourcing, the contract should be concluded for a longer term.

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

Russian law does not regulate the length of the notice period. In practice, a reasonable notice period is usually set in the contract.

## TERMINATION AND TERMINATION CONSEQUENCES

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

On demand of one of the parties the contract can be terminated (by the court) if there has been an essential breach by the other

party. An essential breach results in losses for the other party that deprive it, to a considerable extent, of what it could have expected when concluding the contract. The terminating party is still entitled to claim damages.

An essential change of circumstances is also a termination ground, subject to the contrary provisions in the contract, whether express or implied. The change of circumstances must be recognised as essential (that is, the circumstances have changed to such an extent that if the parties could have envisaged it, the contract would not have been concluded by them or would have been concluded on essentially different terms). If the court terminates the contract on the ground of the essentially changed circumstances, it will define the consequences of the contract termination, attempting to justly distribute the expenses in connection with the contract execution between the parties.

Generally, the customer can terminate the contract, provided the supplier's incurred expenses are paid. The supplier can also terminate the contract provided the customer's losses are fully reimbursed.

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**26. In what circumstances can the parties exclude or agree additional termination rights (for example, for breach, change of control, convenience and so on)?**

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The parties are free to agree on additional termination terms. For example, the customer can include rights to terminate the contract if:

- The contract price exceeds a fixed amount.
- The contract is not performed with due care and diligence.
- There is change of control, particularly if the supplier becomes controlled by a third party that is a competitor or potential competitor of the customer.

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

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Licensing an IP right is a formal act requiring registration with the Russian Patent and Trademark Office (*see Questions 5 and 6*). Without the registration, the transfer or licence is void. There are no implied rights for the supplier to continue to use licensed IP rights post-termination.

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

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This depends on the terms regarding know-how agreed by the parties in the outsourcing contract. In some cases the supplier does not object to the customer using his know-how. More often the parties agree on a time period, when the customer is entitled to use the supplier's know-how, after which the use of this know-how can constitute a breach of confidentiality.

The customer often requires the supplier's know-how to in-source the works or services. The supplier can offer his know-how for an extra charge on the basis of a service contract. In addition, the supplier can train the customer's employees in the supplier's area of competence, which usually is also based on an agreement to render services. Finally, the supplier can act as a consultant for the client in its area of expertise.

## LIABILITY

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**29. What liability can be excluded? In particular, is it possible for the supplier to exclude liability for indirect and consequential loss and also any loss of business, profit or revenue?**

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The parties can agree on limitation of liability, in particular the liability for indirect and consequential loss. The exclusion of liability is rarely possible. An agreement on limiting liability for an intentional breach of obligations, concluded before the breach, is in any event void.

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

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The parties are free to agree a cap on liability. A court may view the cap as unreasonable and change it, but this is rare.

## TAX

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**31. What are the main tax issues that arise on an outsourcing in relation to:**

- Transfers of assets to the supplier?
  - Transfers of employees to the supplier?
  - Value added tax (VAT) or the equivalent sales tax on the service being supplied?
  - Other significant tax issues?
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### Transfers of assets to the supplier

The tax consequences of the transfer (not sale) depend on the provisions in an outsourcing contract which is in most cases deemed as services or works contract (*see Question 3*). If the supplier maintains the works himself with its own means, than the transfer of assets is deemed gratuitous and subject to profit tax and VAT. If the works/services contract stipulates that the customer transfers the assets, the opinion supported by the Ministry of Finance and some court decisions is that the transfer is a non-taxable operation.

Special issues may arise if the transfer of assets is treated as an actual or deemed lease. The asset transfer as such is considered a non-taxable operation. However, leasing assets will be subject to VAT and profit tax.

If the transfer is treated as a sale, which is not a widespread practice, it is also a taxable operation.

**Transfers of employees to the supplier**

Under general tax law, a company that employs individuals acts as a tax agent in relation to its employees' personal income tax and is liable for social insurance payments. This obligation arises when a company deals with individuals directly under employment contract. If the customer transfers employees to the supplier, this obligation remains with the customer.

**VAT or sales tax**

Under the general tax law, provision of any service in Russia is subject to VAT at the rate of 18% (of the amount of the fee). Provision of some services (for example, research and development (R&D)) may be exempt from taxation. Generally, the customer has the right to recover VAT amounts in full if the following conditions are met:

- The customer has a proper VAT invoice issued by the supplier.
- The services are acquired to carry out operations subject to VAT.
- The services are entered into accounting records.

A special rule regarding deduction of VAT exists for companies that perform both VAT-taxable and non-taxable activity.

Some services commonly outsourced may be non-taxable, if the place of the customer's activity is not considered the territory of the Russian Federation (*Article 148, RF Tax Code*). This is particularly relevant for the following:

- Consulting, legal, accounting, engineering, advertising, education services, processing of information services and R&D works.
- Transfer of property or assignment of patents, licences, trade marks, copyrights or other similar rights.
- Outsourcing of personnel if the personnel works at the place of business activity of the customer.
- IT services or works regarding developing software and databases, their customisation and modification.

**Other**

There are no other significant tax issues on an outsourcing.

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