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National reports on Outsourcing

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1. Concept and basis

The concept of outsourcing is not defined in Finnish statutory labour law. Instead, the concepts of “external manpower” and “subcontracting” are used in two recent legislative acts. The Cooperation within Undertakings Act (334/2007) provides that if an undertaking plans to use external manpower, the matter shall be treated in the prescribed negotiation procedure. In this context the use of external manpower refers to both temporary agency work and subcontracting. As to the concept of subcontracting, the Act makes a reference to another statute, the Act on the Customer’s Obligations and Liability when Work is Contracted Out (1233/2006). According to this Act a subcontract means a contract made between the customer (user firm) and its contracting partner to produce a certain work outcome against compensation.

As a labour law concept, outsourcing usually refers to an arrangement where an undertaking decides to contract out the supply of services (sometimes goods), necessary to its operation, to another undertaking, which then takes on to carry out the work using its own staff and equipment. The arrangement is intended to be more or less permanent and it often amounts to a transfer of undertaking. It is difficult to draw a dividing line between outsourcing and subcontracting. Perhaps the only difference is that of a process and its result.

Although the term outsourcing is frequently used to denote phenomena taking place in the labour market, we seldom find the term in legal texts. An important exception is the collective agreement made for paper and pulp mills. Previously the collective agreement contained a prohibition concerning all but temporary use of outside labour in the normal production and maintenance tasks inside a paper mill. In a landmark decision (1995:A 48) the Supreme Administrative Court held that the prohibition was in conflict with national competition law in so far as it prevented traders in cleaning, security and similar businesses from offering subcontractor services to companies in the paper industry. In the current collective agreement the prohibition is replaced with a negotiation procedure which must be followed if a paper company intends to outsource such activities. Outsourcing in these cases is ultimately subject to the consent of the Paper Workers’ Trade Union.
2. Decisions on outsourcing

The general rules of the Coordination within Undertakings Act apply to, among other employer decisions affecting the personnel, the use of external workforce. The rules require that sufficient information is provided and consultations are carried out prior to making a decision on e.g. subcontracting. The duties on information and consultation rest with the prospective outsourcer. If the duties are neglected, the sanction can be a fine and, in some cases where the projected measure results in a reduction of the workforce, a compensation to be paid to the employees made redundant.

Outsourcing may constitute a transfer of undertaking. For these cases Chapter 7 of the Act contains special rules. They provide that also the transferee has duties of information and dialogue in relation to the representatives of the personnel, normally shop stewards of the respective personnel groups.

3. The position of employees

The position of the employees affected is guaranteed under the regular rules concerning transfer of undertaking, if applicable. An employee whose work is transferred does not have a right to remain in the employ of the transferor.

If the outsourcing measure does not constitute a transfer of undertaking, the employees in question are not transferred either. This may result in lack of work, which entitles the employer to terminate the employment contracts due to financial or production-related reasons, as stated in Sec. 3, Chapter 7 of the Employment Contracts Act (55/2001). Collectively agreed rules on the order of termination (suborning) may require that the employees to be made redundant are selected on the grounds of for instance seniority or parental duties from among all employees performing the same kind of work tasks.

4. Terms and conditions at the recipient

Here again the crucial question is whether the outsourcing amounts to a transfer of undertaking or not. If the answer is yes, the consequences are the following:

- The employees transferred maintain their terms and conditions of employment, based on individual employment contracts. These terms may be changed only by means of mutual agreement, or unilaterally by the new employer if the general prerequisites for such a measure are at hand.

- Collectively agreed terms remain applicable until the end of the original contract period. It makes no difference whether the collective agreement is concluded at company level or at a higher level. The recipient is bound by the agreement, in relation to the employees transferred, directly by virtue of mandatory law and cannot oppose this legal effect. It is irrelevant if the recipient is already bound by another collective agreement.

If there is no transfer of undertaking, new employment contracts are concluded between the recipient and the employees that the recipient agrees to hire. Such contracts are independent of the terms of employment that were applied to the employees in the outsourcing company. The commercial contract made by the two companies may, however, sometimes include a clause guaranteeing the employees’ position in one way or the other. If the recipient is bound by a collective agreement,
which is common, this agreement will normally become applicable to the new employees as well.

After the outsourcing has taken place, the personnel representatives at the outsourcer have a right to receive information concerning the conditions at the recipient firm under a new statute, the Act on the Customer’s Obligations and Liability when Work is Contracted Out (1233/2006). Since also the other regulations of the Act might be of interest in this connection, an account of the main features of the whole Act is given below.

The stated purpose of the Act is to promote fair competition between companies and compliance with employment rules by ensuring that enterprises which engage in labour hire and subcontracting meet their statutory obligations as employers and contract parties. An impetus to the Act was the observation that the use of “grey workforce” was common especially in the construction industry.

The Act is applicable to a customer (user firm) who in Finland uses temporary agency workers or workers who are in the service of an employer having a subcontract with the customer. In building, and in repair, servicing and maintenance relating to building, the Act is applied also to all customers and service providers that are in a contractual chain and carry out activities at the same worksite. A further condition for the application of the Act is that the hired employees must work in Finland for more than ten days, or the value of the subcontracting agreement must exceed EUR 7,500.

According to the Act, before a contract on the use of external labour is made, the customer is required to request and the service provider is liable to provide the following data concerning the service provider:

- clarification that the service provider is entered in the Withholding Tax, Employer and VAT Registers;
- extract from the Trade Register;
- a certificate of payment of taxes, a tax liability certificate or information on the existence of a payment plan for outstanding tax liabilities;
- certificates concerning pension insurance and payment of pension payments; and
- information on the applicable collective agreement or central employment conditions.

Corresponding information must also be obtained concerning foreign service providers. The information may not be older than three months. As an exception, the customer is not required to request the information if there are justified reasons to rely on the contracting party meeting its statutory obligations. Such reasons are deemed to exist if

- the contracting party is, e.g., a government or municipal entity, a public company, or a corresponding foreign company;
- the contracting party’s operations have continued for a minimum of three years;
- the contractual relationship can be regarded as established; or
- there is another comparable reason for reliance.

Representatives of the customer’s personnel have a right to obtain certain information from the customer, but not the service provider. Under the Act the
customer is required to inform, on request, the shop steward and the occupational safety and health representative of an agreement to use external labour force. The information shall include the size of the outside workforce, the name of the contracting party, the site, tasks, duration of the contract and the collective agreement or central employment conditions to be applied.

The labour protection authorities are in charge of supervising compliance with the Act. The sanction for violations of certain major duties under the Act is a negligence fee, the maximum amount of which is 15,000 euros.

5. Cross-border outsourcing

It happens that the production of goods (components etc.), used in the production process of a company, is transferred to another country. This will create an ordinary redundancy situation in the host country and is treated accordingly.

It seems to be exceptional that the provision of services is outsourced to another country. Unless one can identify a cross-border transfer of undertaking, the only labour law rules applicable to such an arrangement relate to collective dismissal. Otherwise the special rules on subcontracting, for instance those included in the new Act on the Customer’s Obligations and Liability when Work is Contracted Out, are relevant only if the work is done at the premises or work site of the user undertaking.

6. Factual aspects and considerations

It is difficult to present any statistical data concerning the frequency of use of outsourcing. However, it has been estimated that in the manufacturing industry, which employs directly some 450,000 workers, another 140,000 workers are engaged in subcontracted services. Outsourcing is taking place in nearly all sectors of the economy, even in the public sector where for instance municipal health care services are privatized.

Examples of outsourced work tasks are numerous: cleaning, catering, security, maintenance, IT services, financial administration etc.

The aim of companies and establishments in outsourcing is to benefit from lower costs and better efficiency. This is often, but not always achieved through lower wages paid by outside service providers. Another reason for the trade unions’ opposition to outsourcing lays in the fact that traditional trade union activity, especially through the shop steward system, is hampered if the workers are employees of several undertakings instead only one. The general policy of the Central Organization of the Finnish Trade Unions is that permanent work tasks in an undertaking should be carried out by the undertakings’ own work force.

From the point of view of an individual trade union outsourcing may also present a threat to its membership number. An illustrative example of this is the Finnish Paper Workers’ Trade Union with its 29,000 members. The Union has succeeded in maintaining far-reaching restrictions on outsourcing in force in the collective agreement for paper and pulp mills. Not even the seven weeks’ lockout, undertaken by the employer federation in 2005, managed to bring about any significant changes to the system. The struggle is about workers who are engaged in the kind of service activities that in other industries have been outsourced long ago. If the same happened in paper industry, the Union would lose some 10,000 of its members.
1. Concept and basis

- Is “outsourcing” a legally defined concept and, if so, on what ground (statute law, case law, etc.)?

  a) After hesitations on the meaning of the term “outsourcing” it seems that it can be translated in French by the term “externalisation”, which is a variety of “transfert d’entreprise” (transfer of undertaking). I found the following definitions of externalisation:

  - It consists in exiting tasks, activities, staff, from their original legal framework (Lamy social 2007 n° 1639)
    - Externalisation can result in a redeployment inside the group or by a widening of the group of societies (Lamy social)
    - A particular way of undertaking transfer, consisting in the transfer to a third party of an activity which is an autonomous branch of the undertaking (Pierre Bailly, Semaine sociale Lamy 2007)

  b) In French labour law, outsourcing thus understood is contemplated by article L. 122-12 of the code du travail (Labour Code), which lays out the principle of continuation of the contract of employment between the employee and his new employer. The change is seen as a juridical modification of the contract of employment by change of employer. It means that a legal operation such as succession, sale, merge, alteration of business, transformation in company, is only considered as a change of the form of employer’s personality, the rest of the contract of employment remaining unchanged.

  Article L.122-12-1 provides about some effects of the transfer on previous obligations of the former employer, especially in wind-up procedures.

  Article L.132-8 governs the effects of the transfer on existing collective agreements.

  c) Case-law is determinant for outsourcing. After a period when a nexus or tie of right (lien de droit) between outsourcer and recipient was requested by the Cour de cassation to enable the transfer of contract of employment – which expelled employees belonging to a concession (res inter alios acta) – the influence of ECJ occurred and the regime changed. Since 1990 the Cour de cassation applies the European definition of the transfer, as relating to an economic entity which retains its identity and whose activity is either continued or resumed.

- To the extent the concept is being used, on one ground or another (including professional language), what does it encompass (assuming that it is to be distinguished from business reorganization or restructuring in a general sense and from “privatization”)?
The scope of outsourcing is wide. It encompasses “publicization” of private undertakings and “privatization” of publicly held companies or enterprises (for instance a cinema held by a municipality, granted to a private “repreneur” (recipient)). Sole agencies, Management agreement (“location-gérance”), Representation of trademark, Subcontracting.

- What body of law (if any) is primarily important with regard to outsourcing in a labour law context (statutory law(s), regulations, collective agreements, case law)?

Case-law is primordial as to the scope and effects of outsourcing. Statutory law must be respected as long as procedure is concerned. Collective agreements also interfere in the field and effects of outsourcing: they often provide rules similar to legal ones while the definition of outsourcing would not apply: for instance in the case of market loss, in certain branches (security, cleaning).

- Is recourse to outsourcing in any way prohibited or specifically restricted (beyond procedures, legal effects, etc., such as are the subject of the ensuing questions)?

Outsourcing is generally permitted.

2. Decisions on outsourcing

- Do rules on information/consultation/co-determination apply to the phase preceding the making of a decision on outsourcing? If so, briefly state the substantive content of the rules, their legal basis, possible coordination problems between different sets of rules, as the case may be, and the effects of infringements of such rules. A particular point here is whether employees (trade unions) at the prospective outsourcer have a right to receive information on the conditions of the workers at the firm to which work is proposed to be outsourced.

Yes, rules on information/consultation apply.

It results from article L. 432-1 of code du travail that the outsourcer as well as the recipient must inform in due time their workers’ representatives on the motives, measures and consequences of the prospective operation in terms of economics, finances and employment.

3. The position of employees

- Do employees that are affected (involved in functions that are being outsourced) have a right (and obligation) to have their employment relationships transferred to the recipient service provider (the transferee)?

The transfer of employment relationships resulting from outsourcing is automatic, at the date of the operation, and binding for the former employer, the latter and employees. Employees are therefore entitled to take advantage of this right.

- If yes, do the employees also have right to refuse to have their employment relationships transferred and, in that case, a right to maintain their employment relationships with the outsourcing employer? If so, what rules on notices, time limits, etc., apply?
* The Cour de cassation denies to employees the right to refuse the transfer of their employment relationships. “Through the effect of article L. 122-12, subparagraph 2, it is the same contract of employment that is pursued as of right with the new employer, to whom are transmitted all the rights and obligations of the former, not mattering the refusal of the transfer by the employee”.

The employee who refuses and is dismissed for this reason cannot be granted damages or termination pay (Soc.14 dec. 2004, société alsacienne des hypermarchés Auchan vs Mr Bousquet).

The court says that its refusal produces the effects of a resignation (Soc. 10 oct. 2006, société Compagnie d’exploitation des ports et aéroports (CEPA) n°04-40.325)

So, the employee bears the burden of the termination of the contract of employment resulting from his refusal to change employer, while the contract is not modified. And it is not permitted that employer and employee agree in the contract of employment that the agreement of the latter will be a necessary to the change of employer. (Cass. soc., 20 avr. 2005, n° 03-42.096).

On the whole, the imperative of stability of employment, which is at the origin of article L. 122-12, subpar.2, is carried out not only in the interest of the employee himself, but also in order to meet with the needs of the undertaking, whose sustainability depends on employments continuation. Besides, acknowledge the "transferred" employee’s right to demand the continuation of his contract of employment by the transferer would result, finally, in subordinating the change of employer to the employee’s agreement and would thus deprive of any effectiveness article L. 122-12, subpar.2 of Code du travail”. (Pierre Bailly, op.cit.)

There is an exception: journalists may oppose a consciousness clause (“clause de conscience” (art. L. 761-7 code du travail).

* When a private law employee refuses to sign the contract of public law which is proposed to him by the public law transferee, the dispute comes within the competence of judiciary (and not of administrative courts) because the employee has never been linked with the new employer by a public law relationship (Tribunal des Conflits, 26 juin 2006, n° 06-03.508)

- If, in a case as above, a worker chooses to remain in employment with the outsourcing employer, can he be dismissed (for business reasons), and/or do special protections apply?

In the case of partial transfer of activity, the only workers concerned are those whose contracts are affected to the externalized activity.

- If the employees who are affected do not have the right to transfer to the recipient, what is their position with the outsourcing employer? Does dismissal protection apply? Are the affected employees per se those who are redundant, or must the selection of whom to dismiss as redundant be made on a broader basis?

It is up to the new employer (transferee, recipient) to deal with the refusal of transfer of the employees. By the effect of article L. 122-12 indeed, the outsourcer ceased to be their employer. And if he had terminated their contract of employment with regard to the transfer, this termination would be of no effect.

According to the last case-law of the Cour de cassation, the refusal produces the effects of a resignation.
4. Terms and conditions at the recipient

- If outsourcer employees transfer to or otherwise enter into employment with the recipient firm, will they maintain the terms and conditions they had at the outsourcer, or are they subject to what applies at or is offered by the recipient?

The contract of employment being transferred to the recipient, its terms and conditions are automatically binding for him.

This applies to contractual terms and conditions as well as rights or advantages created by custom or unilateral commitment of the former employer (outsourcer).

The recipient will be able to revoke the custom of commitment but only if he complies with the procedure required for such an operation: information of employees’ representatives in a delay allowing collective bargaining and individual information given to employees.

The transferee is also allowed to change the work conditions if they are not contractual, and he also is enabled to propose to the new employee a modification of his contract of employment, complying with the legal procedure needed for this. The employee may refuse the change in his contract, and it belongs then to the transferee to forgo his proposition or to make the employee redundant.

- Does it make a difference in this respect if the terms and conditions are set in a collective agreement?

The effects or the collective agreements are pursued during 15 months (3 months notice and 12 months survival period, to start negotiations with unions. After this time limit, whether a collective agreement is reached with new provisions, or it is not, in which case the employees keep their precedent rights.

- If the outsourcer is bound by a collective agreement, will that agreement (or relevant parts thereof) apply as such to employees who transferred to the recipient firm?

Yes they will, but during the aforesaid time-limit.

- Is the recipient firm (also) legally bound by the collective agreement by virtue of taking over the operations being outsourced? Is there a difference in this regard between firm-specific collective agreements (concluded directly with the individual firm) and collective agreements concluded at a higher level? If bound as above, can the recipient firm nonetheless oppose or denounce being bound, and what procedures apply if so? If the recipient firm is already bound by a different collective agreement for the same kind of work, how is the conflict then resolved?

Maybe the take over will entail the change of collective agreement by the only fact that the activity of the firm changed and entered the scope of this new collective agreement. The survival of the former collective agreement meets the mandatory application of the one already existing in the recipient firm. In such a situation, case law rules that there must be a coupled application of both agreements. The most favourable provisions will apply to the employee. The employer and the union committeemen of the recipient may negotiate in order to organize the consequences, inside the firm, of the change of collective
agreement, even if it is a branch agreement. The new agreement is called “accord de substitution”.

- Do employees (trade unions) at the outsourcer have a right to receive information on the terms and conditions of workers at the recipient firm after the outsourcing has taken place?
  
  I did not identify answer to this question.

5. Offshore outsourcing

- Do the rules applicable to outsourcing domestically also apply to outsourcing of work to other countries? What, if any, are the main differences?

- What are otherwise the main legal problems involved in offshore outsourcing and to what extent have such outsourcing and accompanying problems appeared in practice?

  Problems: lack of job security; loss of curtailment of social guarantees for the employees once they have been transferred; risk of non-compliance of the recipient firm with labour law, even if it is deemed “more flexible” than French labour law; short-termism in offshore choice.

6. Factual aspects and considerations

- To the extent such information can be gleaned without undue effort: How frequent and extensive is the use of outsourcing? How many undertakings and employees are involved (e.g., annually)?

| PME ayant eu recours à l'externalisation pour, au moins, une partie de leurs processus par taille de chiffre d'affaire (en %) |
|---|---|
| Total | 47% |
| 7 à 9 M€ | 40% |
| 7 à 12 M€ | 43% |
| 12 à 20 M€ | 43% |
| 20 à 50 M€ | 54% |
| 50 à 75 M€ | 73% |

Source Etude KPMG 2006

- In which sectors (public, private), branches and industries and for what kinds of work is outsourcing being (mainly) used?
  
  Production, logistique, computing, financial services.
A 52% of the contracts of outsourcing and offshore have been signed by IBM, CSC, Accenture, ACS, EDS or HP in the first quarter of 2006. (Source: Technology Partners International)

- Are the terms and conditions of employment for workers in recipient firms generally less favourable than those for workers at the outsourcers as far as the same job functions are concerned?

- What influence does outsourcing have on the unionized work force? Is trade union density generally lower in recipient firms than in outsourcer undertakings? Has outsourcing resulted in a decline in union density overall and/or to a weakening of the position of trade unions at the enterprise level or higher levels?

- Is outsourcing as a labour law or labour market policy issue being debated, and if so, what are the main positions and arguments made?

In a draft advisory opinion of 2005 the Conseil Economique et Social (Economic and Social Council), considering the noteworthy rise of outsourcing in France, set forth propositions for a National Charta of Outsourcing. This document tends to prevent the most negative aspects of outsourcing and to promote the reflection on:

- a better representation of the employees of the two firms:

- the acknowledgement of the “site” as level of particular social dialogue and the creation of joint boards for site social dialogue:

- the creation of unions and employer organizations at this site level:

- the conclusion of site agreements with the recipient firm:

- the “transferabilité” (transferability) of rights connected to mandates of employees’ representatives, so that the transferee’s staff representation should take in full account the specific interests of the transferred employees:

- the strengthening of the role of the Workplace Health and Security Committee, which could be inter-undertakings on a site:

- the development of collective bargaining at the level of the territory, which is a relevant level of negotiation between branch and firm:

- the mention in the contract of employment of guarantees provided for by collective agreements, to ensure their transfer:

- the possibility of amending article L. 122-12 code du travail so that an option would be left to the employee to join or not the new enterprise.
Germany
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1. Concept and basis

“Outsourcing” is not legally forbidden by German labour law, but “outsourcing” is not a legally defined concept.

In the political and legal discussions in Germany, the term “outsourcing” stands for a certain organizational concept. It refers to the delegation of non-core operations from internal production, tasks and functions to an external entity (supplier, recipient) specializing in the management of that operation. The work output, so far internally produced, is now purchased on the outside on the basis of long-term contracts;

e.g.: the employer (outsourcer) closes (or transfers) an internal work area like the service for data processing and makes a treaty with a supplier.

The decision to outsource is often made in the interest of lowering the costs. Apart from the cost argument also quality, safety or know-how are good reasons to outsource a function or task. Through outsourcing, the working process can be rationalized and focused on the “core business” – “do what you can do best – outsource the rest”.

In German labour law “outsourcing” is discussed under several aspects. To understand the legal dimension better, you must differ between two main forms of outsourcing:

- the separating and transferring form (a)
- the cooperation (b)

In the cases of “separating and transferring”, an organizational unit (division) is transferred to a recipient; e.g.: in a case of a “comprehensive outsourcing”, a whole division is moved. Not only the assets, but the employees and other enterprise values are also transferred to the transferee.

In the cases of “cooperation” only an enterprise process (a “function” or a labour intensive task) go to a third entity. In a “business process outsourcing”, for example, the purchase activities or the HR-management, are carried out by a third party.

In the first case (a), questions of interpretation and use of statutory labour law (“transfer of an undertaking” – Bürgerliches Gesetzbuch (BGB) § 613 a; dismissal for business reasons – Kündigungsschutzgesetz (KSchG) § 1) are of concern, as well as questions of continuation/settlement of collective agreements and works agreements (Betriebsvereinbarung).

In the second case (b), less labour law questions arise. For the previous employer, questions regarding employee termination will come up because the outsourcer will generally end the division/function at the conclusion of the outsourcing contract and terminate the employees involved. Specific problems of the right to give notice,
however, are not raised thereby. If the unit is really closed, the outsourcer is able to dismiss the employees for business reasons.

In a few but very rare cases outsourcing takes place by law; e.g. sometime when the state transfers a task to a private supplier. For example, the employees of the German Opera in Berlin were transferred by law to a (private) foundation.

2. Decisions on outsourcing

The works council (der Betriebsrat) does not have special or separate rights in participation or co-determination in the case of outsourcing. However, due its general participation rights, the works council can exercise some influence on outsourcing processes.

By law, the outsourcer has to inform the works council in time - with presentation of the necessary and main documents - on the “planning of working procedures and operational sequences” in case of an outsourcing (Betriebsverfassungsgesetz BetrVG - § 90 Nr. 3 – right of information).

Additionally, the works council has the right to participation and co-determination, especially in economic and organizational matters (BetrVG § 111 (2) Nr.4). In enterprises with more than 20 employees, the employer has to inform the works council when he intends to shut down the plant or wants to change the operational organization. Also he has to inform the council about any intended fundamental changes and negotiate with the works council a reconciliation of interests (Interessenausgleich).

e.g. Decision of the German Labour Law Court: 2003-11-18 - 1 AZR 637/02 – AP BetrVG 1972 § 118 Nr. 76:

LS.: In der Übertragung einer bislang mit eigenen Arbeitnehmern durchgeführten Aufgabe auf selbständige Handelsvertreter liegt in der Regel eine Betriebsänderung nach § 111 Satz 3 Nr. 4 BetrVG.

In the case of a restructuring, the employer must - if necessary – attempt to conclude a “social compensation plan” (Sozialplan) with the works council (BetrVG § 112). The social compensation plan serves to offset or reduce the disadvantages and losses that the employees will experience as a result of the planned restructuring. In contrast to the reconciliation of interests, the works council can have the social plan enforced by the conciliation committee (Einigungsstelle). The social compensation plan mostly arranges for compensation for those employees being laid off.

Recently in Germany, it was discussed whether the trade unions could settle a collective agreement (so called Tarifsozialplan) and could go on strike in case of an outsourcing. This was often doubted, because the BetrVG (§§ 111,112) already regulates “social plans”. The German Labour Law Court decided in a new decision of April 24th, 2007, that collective agreements on outsourcing matters and a strike to fix these terms are not illegal.

3. The position of employees

The employment relationship of those employees, whose enterprise or division is turned to the transferee, is transferred to the recipient. These employees have the right to refuse the transfer of their employment relationship to the recipient.
If only the function – without any operational organization – is transferred to a recipient, the employment relationship does not turn over to the recipient. In most cases the outsourcer will (and can) dismiss those employees by business reasons.

e.g.: (a) Employee A was working in a forwarding department of a big department store. The employer E decides not to deliver the goods any longer by his own forwarding department. All trucks were sold and the forwarding department was closed. E settled a forwarding contract with Transport Company S. From now on S transports the good with his own trucks and his own personnel.

In this case, German labour law will accept a dismissal by business reasons.

(b) The situation differs, if S takes over the forwarding department, especially when he takes over the trucks of E and some of the employees. In this case German labour law sees a transfer of an undertaking. So the employment relationship of all employees in the forwarding department is transferred to the recipient.

In case (b), the employees could contradict the transition of their employment relationship. They have the right to maintain their employment relationship with the outsourcing employer (BGB § 613 a Abs. 6). But the outsourcer can quit the relationship and dismiss the employee for business reasons, if no other jobs in the firm are available. In these cases, the general rules of dismissal for business reasons are applicable. These employees are not per se redundant. As always, the social selection (Sozialauswahl, KSchG § 1 Abs.3) is also to be accomplished in the case of a contradicting employee (Decision of the German Labour Law Court – May 31, 2007), i.e., it is to be examined whether comparable employees with better social data (younger, no children etc.) have to be dismissed.

4. Terms and conditions at the recipient

The employees, who are transferred to the recipient in the process of a transfer of an undertaking (case b), maintain their conditions of work. The transferee enters into the rights and obligations of the working relationship existing at the time of the transfer (BGB § 613 a (1) 1).

If the rights and obligations of the employee are regulated in a collective agreement or in a works agreement, then they become an individual foundation of the working relationship between the employee and the new owner of the company (division). To the benefit of the employees, in principle these conditions could not change for at least one year. Exceptionally, the transferee’s different and corresponding working conditions apply when they are also regulated by collective agreement or works agreement (BGB § 613 a (1) 2,3).

The situation is completely different in case (a). The employment relationship is not transferred to the recipient. The terms and conditions of the “old” agreement are not maintained. The outsourced employee has to settle a new contract with the recipient employer. Normally new (and worse) terms and conditions of the work agreement will be settled. It does not make a difference, if the terms and conditions of the old relationship are set in a collective agreement. The terms and conditions are only regulated by a collective agreement, when both – the employee and the recipient-employer – are tariff-bound (Tarifvertragsgesetz (TVG) § 4 (1)).

In a case of a transfer of undertaking the employee has the right to object. Therefore the outsourcer or the recipient has to inform the employee extensively about the
transfer, in particular about the timing and its economic and social consequences (BGB § 613 a (5)).

If no transfer of an undertaking takes place a right of information for the employee or the trade unions does not legally exist.

5. Offshore outsourcing

It is to be observed that today “offshore outsourcing” activities mainly shift qualified jobs in the IT business to Southeast Asia (India and China).

The German labour law does not hold special rules for that phenomenon. Normal labour law standards are valid. Dismissals on the basis of business reasons are socially justified, when an enterprise closes his division in Berlin and gets – in future – the service and the goods from China.

In such cases trade unions and the works council will try to prevent the decision over the misalignment or try to get compensation by a social collective agreement.

6. Factual aspects and considerations

No details of the extent of “outsourcing” activities in Germany exist. It is generally assumed that the IT industry is most affected. Many IT services were transferred to external entities. Only for the IT industry, a valid estimate exists: 8-10 billion euros in revenue are generated through outsourced IT production.

All other sectors, public and private, are affected by outsourcing – manufacturing companies as well as sub-contractors or insurance companies. Most frequently, cleaning services and IT services are the objects of outsourcing.

In general, the working conditions in the new enterprise (recipient) are worse than at the former employer, because outsourcing is accomplished to lower the costs. One can also say that the level of organization in trade unions is typically smaller than in established (outsourcer) companies.

With the public sector being one of the most avid users of the outsourcing concept, it should not come as a surprise that in Germany, no specific political debate has taken place regarding the “outsourcing” subject.

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Hungary

Judge Tünde Handó,
President,
Labour Court of Budapest

1. Concept and basis

- Is “outsourcing” a legally defined concept and, if so, on what ground (statute law, case law, etc.)?

  For the concept of “outsourcing” the Hungarian law does not give a concrete definition neither in statute law nor in case law.

  However we have a concrete definition for transfer/succession, that is the following:
An employer shall be deemed dissolved and a new entity established (hereinafter referred to as “succession”)

a) when the succession takes place by virtue of legal regulation, and

b) when an independent unit (such as a strategic business unit, plant, shop, division, workplace, or any section of these) or the material and non-material assets of the employer are transferred by agreement to an organization or person falling within the scope of this Act for further operation or for restarting operations if such transfer takes place within the framework of sale, exchange, lease, leasehold or capital contribution for a business association (Section 85/A para. (1) of Labour Code).

Because this concept is so broad most of the outsourcings are qualified as succession. Besides this the case law also gives a very broad interpretation for succession.

To the extent the concept is being used, on one ground or another (including professional language), what does it encompass (assuming that it is to be distinguished from business reorganization or restructuring in a general sense and from “privatization”)?

The Act does contain only the conditions of transfer/succession which are the following:

- an independent unit or the material and non-material assets of the employer are transferred,
- for further operation or for restarting operations,
- upon the basis of an agreement of sale, exchange, lease, leasehold or capital contribution for a business association

As we previously indicated most of the outsourcings are qualified as transfer with the exception if one or more elements of succession is missing. For example if there is no independent unit or an agreement for the transfer, the outsourcing won’t fill the requirements of succession. In that case the concrete legal basis is missing, and the employment relationship does cease.

The distinction between the reorganization or restructuring and the outsourcing are the followings:

1. The activity is not transferred in the case of reorganization, it is just the inner matter of the company,
2. There is no change in the person of employer,
3. The employment relationship does not cease in the case of reorganization, while in case of outsourcing it does it is not qualifies as succession.

The distinction between privatization and outsourcing are the followings:

1. The decision is derived from the state or not.
2. For privatization an independent Act contains regulation of specific provisions.

Privatization can be qualified either as transfer/succession or as outsourcing regarding the special circumstances.
What body of law (if any) is primarily important with regard to outsourcing in a labour law context (statutory law(s), regulations, collective agreements, case law)?

Because there is no regulation for “outsourcing” at statutory law level, the case law has priority.

Is recourse to outsourcing in any way prohibited or specifically restricted (beyond procedures, legal effects, etc., such as are the subject of the ensuing questions)?

No, the only general provision is that it mustn’t be improper exercising of rights. Outsourcing is part of the management rights of the employer, so it is upon his consideration. The labour court does not have the right to question its necessity in any way.

2. Decisions on outsourcing

Do rules on information/consultation/co-determination apply to the phase preceding the making of a decision on outsourcing? If so, briefly state the substantive content of the rules, their legal basis, possible coordination problems between different sets of rules, as the case may be, and the effects of infringements of such rules. A particular point here is whether employees (trade unions) at the prospective outsourcer have a right to receive information on the conditions of the workers at the firm to which work is proposed to be outsourced.

Yes, there is a general rule:

Employers shall consult the local trade union branch prior to passing a decision in respect of any plans for actions affecting a large group of employees, in particular those related to proposals for the employer’s reorganization, transformation, the conversion, privatization and modernization of a strategic business unit into an independent organization (Subsection (2) of Section 21 of Labour Code).

There is the same obligation towards the workers’ council since the Act states: shall consult the workers’ council prior to adopting a decision in connection with plans for actions affecting a large group of employees, in particular those related to proposals for the employer’s reorganization, transformation, the conversion, privatization and modernization of a strategic business unit into an independent organization (Subsection (2) of Section 65);

The Labour Code also contains detailed rules for the appropriate time and method of consulting:

Consultation shall take place with a view to reaching an agreement, while ensuring that the timing, method and content consistent with the objective thereof are appropriate, as well as ensuring:

a) the relevant level of management and representation, depending on the subject under discussion;

b) direct exchange of views and establishment of dialogue;
c) substantive discussions on the basis of information supplied by the employer and of the opinion and views of the trade union or workers’ council (shop steward) (Subsection (3) of Section 15/B).

With respect to the information the employer has supplied in connection with any proposed actions to the employees’ representatives so as to formulate an opinion, the trade union or the workers’ council (shop steward) shall have fifteen days from the date the information was supplied within which to request a consultation (Subsection (4) of Section 15/B).

The employer may not carry out the proposed action during the time of consultation, or for at least seven days from the first day of consultation unless a longer time limit is agreed upon between the workers’ council or the trade union and the employer. In the absence of an agreement the employer shall terminate consultation following the deadline (Subsection (5) of Section 15/B).

There are certain specific rules for consultation and information in case of transfer/succession and collective redundancy.

In the case of legal succession, the Act states that the predecessor and the successor employer shall, within fifteen days prior to the date of succession, inform the local trade union branch or, if there is no trade union, the workers’ council or, if there is no workers’ council, the committee formed from the representatives of non-union employees concerning

a) the schedule or proposed date of legal succession,
b) the reasons,
c) the legal, economic and social consequences affecting the employees,

and shall initiate talks aiming to reach an agreement concerning other proposed actions that affect the employees.

The above-specified talks shall cover the principles of the actions, the ways and means of avoiding detrimental consequences as well as the means for mitigating such consequences.

Where legal succession is decided by the organization or person who controls the predecessor employer it shall have no affect concerning the predecessor and successor employer’s obligation to supply the information and to hold talks as specified above. The predecessor and the successor employer shall not be excused regarding their failure to satisfy the obligation to supply information and hold talks on the grounds that the controlling organization or person had failed to inform them concerning its decision for succession (Section 85/B).

3. The position of employees

- Do employees that are affected (involved in functions that are being outsourced) have a right (and obligation) to have their employment relationships transferred to the recipient service provider (the transferee)?

  Yes, if the outsourcing is qualified as legal succession. (But if the transfer is not succession the employment relationship can cease.)

- If yes, do the employees also have right to refuse to have their employment relationships transferred and, in that case, a right to maintain their employment
relationships with the outsourcing employer? If so, what rules on notices, time limits, etc., apply?

In case of normal transfer, where the employers are private employers, there is no such possibility.

There is a specific regulation in case of the employee between the Labour Code and the Act of Public or civil servants.

There are several laws regulating employment in Hungary. The general one is the Labour Code, which applies if the other ones do not, with some simplification that means that it applies to the business sector. The second law to mention is the Act on Civil Servants, with certain simplification including employees of ministries and other state and local government authorities. The third group is a special one not existing in most of the European countries, the “public service employees”. This group includes teachers, doctors, actors etc. of state owned institutions.

For the case of transfer between the Labour Code and the Act on Civil or Public servants the regulation states:

Where an employer that falls within the scope of this Act changes because the employer is transferred in whole or in part (strategic business unit, specific material or non-material assets, or specific duties and competencies) – by decision of the founder or the employer – to an employer that falls within the scope of the act on the legal status of public servants or the act on the legal status of civil servants, the strategic business unit that is transferred and the employment relation of the employees it employs shall terminate at the time of transfer.

The transferring and receiving employers shall inform the employees affected as to whether their employment at the new employer will be continued in public service or civil service. The information supplied shall also contain a proposal pertaining to the content of appointments for further employment. The information supplied shall also address the obligations that the employees must fulfill once the legal relation has been created in order to be promoted and to maintain the legal relation.

Within fifteen days of receiving the information, the employee shall inform the transferring employer in writing of his decision as to whether he will continue the employment relation at the receiving employer. The employee’s failure to convey such decision within the specified deadline shall be construed as meaning that the employee has not consented to further employment.

If the employee does not wish to continue the employment relation at the receiving employer, the transferring employer shall notify the employee by the date of transfer concerning the termination of his employment relation.

- If, in a case as above, a worker chooses to remain in employment with the outsourcing employer, can he be dismissed (for business reasons), and/or do special protections apply?

There is no right to maintain the employment relationships with the outsourcing employer.
If the employees who are affected do not have the right to transfer to the recipient, what is their position with the outsourcing employer? Does dismissal protection apply? Are the affected employees per se those who are redundant, or must the selection of whom to dismiss as redundant be made on a broader basis?

If an employee affected by the transfer is not eligible to enter into a public service or civil service relation with the receiving employer by virtue of the act on the legal status of public servants or the act on the legal status of civil servants, his employment relation shall be terminated at the time of transfer. Because it is an automatic termination the dismissal protection is not applicable.

4. Terms and conditions at the recipient

If outsourcer employees transfer to or otherwise enter into employment with the recipient firm, will they maintain the terms and conditions they had at the outsourcer, or are they subject to what applies at or is offered by the recipient?

As it is qualified as a legal succession the employment relationship is continued with the same terms and conditions but these can be subject of modification.

But if the outsourcing is not qualified as succession there is no regulation for this.

Does it make a difference in this respect if the terms and conditions are set in a collective agreement?

See below.

If the outsourcer is bound by a collective agreement, will that agreement (or relevant parts thereof) apply as such to employees who transferred to the recipient firm?

In the event the employer is replaced by legal succession, the work conditions, not including the work order, as prescribed in the collective agreement applicable to the predecessor at the time of succession shall be honoured by the successor employer, in respect of the employees affected by the succession, until the collective agreement is cancelled by the predecessor employer or the expiration of the collective agreement, or until another collective agreement is concluded with the successor employer, or in the absence of such for at least one year following the date of succession.

Is the recipient firm (also) legally bound by the collective agreement by virtue of taking over the operations being outsourced? Is there a difference in this regard between firm-specific collective agreements (concluded directly with the individual firm) and collective agreements concluded at a higher level? If bound as above, can the recipient firm nonetheless oppose or denounce being bound, and what procedures apply if so? If the recipient firm is already bound by a different collective agreement for the same kind of work, how is the conflict then resolved?

If the work conditions stipulated in a collective agreement which applies to the successor employer are more favorable for the employees than those stipulated in the collective agreement that applies to the predecessor employer, the collective agreement applicable to the successor employer shall be authoritative.
Do employees (trade unions) at the outsourcer have a right to receive information on the terms and conditions of workers at the recipient firm after the outsourcing has taken place?

No.

5. Offshore outsourcing

Do the rules applicable to outsourcing domestically also apply to outsourcing of work to other countries? What, if any, are the main differences?

What are otherwise the main legal problems involved in offshore outsourcing and to what extent have such outsourcing and accompanying problems appeared in practice?

Regarding the scope of the Act, it states that unless otherwise prescribed by international private law, this Act shall apply to all employment relationships on the basis of which work is performed in the territory of the Republic of Hungary, as well as to work performed by an employee of a Hungarian employer abroad under temporary status.

So in case of a Hungarian employer decides outsourcing regarding temporary status employees the same regulations are applicable even if it operates abroad.

6. Factual aspects and considerations

To the extent such information can be gleaned without undue effort:

- How frequent and extensive is the use of outsourcing? How many undertakings and employees are involved (e.g., annually)?
  
  It is quite frequent and extensively used.

- In which sectors (public, private), branches and industries and for what kinds of work is outsourcing (mainly) used?
  
  Both private and public sectors, in public sectors just supplementary activities could be outsourced because for the main activity it is prohibited.

- Are the terms and conditions of employment for workers in recipient firms generally less favourable than those for workers at the outsourcers as far as the same job functions are concerned?
  
  Yes, if it is in the frame of hiring out or the employer changed from public to private.

- What influence does outsourcing have on the unionized work force? Is trade union density generally lower in recipient firms than in outsourcer undertakings?
  
  Yes.

- Has outsourcing resulted in a decline in union density overall and/or to a weakening of the position of trade unions at the enterprise level or higher levels?
  
  Yes.

- Is outsourcing as a labour law or labour market policy issue being debated, and if so, what are the main positions and arguments made?

  The average question of balance between flexibility and employee protection is highly debated.
Besides this we do not have a regulation for outsourcing just for succession therefore the employees’ right is not ensured appropriately in case of outsourcing.

It is also debated whether the court should have the right to examine the necessity of the outsourcing.

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**Iceland**

Judge Eggert Óskarsson  
President,  
Labour Court of Iceland  
Reykjavík

### 1. Concept and basis

- Is “outsourcing” a legally defined concept and, if so, on what ground (statute law, case law, etc.)?


  The concept “outsourcing” is not defined in Act No. 72/2002, on Workers’ Rights in the Event of Transfers of Undertakings or elsewhere in Icelandic labour law. If the need arises to decide whether employees, in a case of outsourcing, enjoy rights according to the Act, that decision would be made based on the facts of the case using the criteria which make up the term “economic entity” as interpreted in the rulings of the ECJ and the courts in Iceland.

- To the extent the concept is being used, on one ground or another (including professional language), what does it encompass (assuming that it is to be distinguished from business reorganization or restructuring in a general sense and from “privatization”)?

  The concept is a new one with an uncertain legal definition.

- What body of law (if any) is primarily important with regard to outsourcing in a labour law context (statutory law(s), regulations, collective agreements, case law)?

Is recourse to outsourcing in any way prohibited or specifically restricted (beyond procedures, legal effects, etc., such as are the subject of the ensuing questions)?

No.

2. Decisions on outsourcing

Do rules on information/consultation/co-determination apply to the phase preceding the making of a decision on outsourcing? If so, briefly state the substantive content of the rules, their legal basis, possible coordination problems between different sets of rules, as the case may be, and the effects of infringements of such rules. A particular point here is whether employees (trade unions) at the prospective outsourcer have a right to receive information on the conditions of the workers at the firm to which work is proposed to be outsourced.

In addition to Act No. 72/2002, on Workers’ Rights in the Event of Transfers of Undertakings, Act No. 151/2006, on Information and Consultation of employees, which transposes Directive 2002/14/EC into Icelandic law, would apply to this scenario, provided the company has at least 50 employees (100 employees until March 1, 2008).

Both Acts replicate the minimum requirements of the EC Directives.

There is no provision in the Act which gives the unions or the employee representatives a right to receive information on the conditions of the workers at the firm to which work is proposed to be outsourced.

Employers or representatives of the employees who violate their key duties under the Act can be made subject to a fine. Procedure in cases involving violations are in accordance with criminal procedure. General rules on damages also apply.

3. The position of employees

Do employees that are affected (involved in functions that are being outsourced) have a right (and obligation) to have their employment relationships transferred to the recipient service provider (the transferee)?

Yes. They have this right if the outsourced entity fulfils the criteria of being an economic entity which retains its identity. They are however not obliged to continue in their employment with the transferee.

If yes, do the employees also have right to refuse to have their employment relationships transferred and, in that case, a right to maintain their employment relationships with the outsourcing employer? If so, what rules on notices, time limits, etc., apply?

They can refuse to have their employment relationship transferred. This right is not referred to in the Act No. 72/2002, but is a general principle in labour law. The Act does not clarify the status of their employment contract in this case.

Since there are no court cases which clarify the legal aspect of this situation only general observations on the bases of a simple scenario can be considered.
If they are employed in an entity which is transferred and their employment rights are maintained with the transferee in accordance to the Act, and they nonetheless refuse to have their contracts transferred, the outsourcing employer is not obliged by law to retain their employment contracts. He is regarded as having fulfilled his duties, i.e. to protect their employment by transferring their contracts to the transferee. He is no longer party to their employment contract according to principle of automatic transfer of employment contracts. The employees would be obliged to hand in their notice to the transferee and not the outsourcing employer. The general principle in labour law, which states that entitlement to continued payment of wages during the notice period is contingent on the employee working during that period, would apply in this case. General rules on the length of notice periods also apply.

- If, in a case as above, a worker chooses to remain in employment with the outsourcing employer, can he be dismissed (for business reasons), and/or do special protections apply?

- If the employees who are affected do not have the right to transfer to the recipient, what is their position with the outsourcing employer? Does dismissal protection apply? Are the affected employees per se those who are redundant, or must the selection of whom to dismiss as redundant be made on a broader basis?

The employer is according to Act No. 72/2002 prohibited do dismiss his employees solely on the basis of the transfer, unless their dismissal take place for economic, technical or organizational reasons “entailing changes in the workforce”.

The Act refers to “his employees” and “entailing changes in the workforce” which indicates a broad personal scope of protection. How broad would be decided on the facts of each case.

There is no legal provision which obliges employers to make their selection (in this case or otherwise) based on a predefined criteria, such as length of service. The employer must not infringe principles of non-discrimination based on sex, nationality etc. when selecting employees to dismiss. Employee representatives also enjoy special dismissal protection.

Act No. 63/2000, on Collective redundancies would apply if the number of employees which the employer contemplates to dismiss is over the threshold set by the Act.

4. Terms and conditions at the recipient

- If outsourcer employees transfer to or otherwise enter into employment with the recipient firm, will they maintain the terms and conditions they had at the outsourcer, or are they subject to what applies at or is offered by the recipient?

Their individual rights under their previous employment contract are maintained with the transferee. This holds until a new collective agreement is signed by the transferee or he becomes bound by a new collective agreement by affiliation to an employer’s organization.

The employees are also protected under the Act No. 55/1980, on Working Terms and Pension Rights Insurance, which establishes the principle of general applicability (erga omnis) of collective agreements.
Does it make a difference in this respect if the terms and conditions are set in a collective agreement?

Their set of individual employment rights is probably broader in scope if it is derived from a collective agreement which their previous employer was bound by.

Also, if there is some ambiguity as to whether they enjoy status under the Act, they can always base their status on the applicable collective agreement.

If the outsourcer is bound by a collective agreement, will that agreement (or relevant parts thereof) apply as such to employees who transferred to the recipient firm?

No. Only the individual employment terms which the employee derive from that collective agreement are maintained.

Is the recipient firm (also) legally bound by the collective agreement by virtue of taking over the operations being outsourced? Is there a difference in this regard between firm-specific collective agreements (concluded directly with the individual firm) and collective agreements concluded at a higher level?

If bound as above, can the recipient firm nonetheless oppose or denounce being bound, and what procedures apply if so? If the recipient firm is already bound by a different collective agreement for the same kind of work, how is the conflict then resolved?

The recipient firm is not, under the Act on the transfer of undertakings, bound by the collective agreement by virtue of taking over the operations being outsourced.

If the recipient firm takes over the operations being outsourced it would be considered as taking over the collective agreement as well. (exp. company A purchases the majority of shares in company B which is bound by a firm specific collective agreement.)

If there is no firm-specific collective agreement the recipient firm would be bound under the Act No. 55/1980, on Working Terms and Pension Rights Insurance, which establishes the principle of general applicability (erga omnis) of collective agreements. This principle applies to general collective agreements negotiated by trade unions on a national basis or for particular regions.

If the recipient firm is already bound by a different collective agreement for the same kind of work, how is the conflict then resolved?

This problem arises primarily in cases of transfers from the state or municipality to private entities and vice versa, but can also happen in transfers between companies on the private market. If there is a need to converge terms of employment, (wages, working time, pension rights etc) then this will be done through negotiations by the relevant trade unions. Convergence of terms between two groups of workers doing the same type of work can not be imposed unilaterally by the transferee.

Do employees (trade unions) at the outsourcer have a right to receive information on the terms and conditions of workers at the recipient firm after the outsourcing has taken place?

They do not have a legal right.
5. Offshore outsourcing

- Do the rules applicable to outsourcing domestically also apply to outsourcing of work to other countries? What, if any, are the main differences?

As far as EU/EEA Member States are concerned the same rules might be applicable but to outsourcing of work to other countries the main rules in conflict of laws will come into consideration.

- What are otherwise the main legal problems involved in offshore outsourcing and to what extent have such outsourcing and accompanying problems appeared in practice?

As far as known offshore outsourcing problems have not been dealt with in Icelandic labour law practice.

6. Factual aspects and considerations

To the extent such information can be gleaned without undue effort:

- How frequent and extensive is the use of outsourcing? How many undertakings and employees are involved (e.g., annually)?

Information or statistic is not available about this.

- In which sectors (public, private), branches and industries and for what kinds of work is outsourcing being (mainly) used?

Information or statistic is not available about this.

- Are the terms and conditions of employment for workers in recipient firms generally less favourable than those for workers at the outsourcers as far as the same job functions are concerned?

No, not as known of.

- What influence does outsourcing have on the unionized work force? Is trade union density generally lower in recipient firms than in outsourcer undertakings? Has outsourcing resulted in a decline in union density overall and/or to a weakening of the position of trade unions at the enterprise level or higher levels?

Information about the possible influence that outsourcing might have on the unionized work force are not available. As far as known such influence has not been measured, if existed. There is no reason to suppose that outsourcing has resulted in a decline in union density in any way.

- Is outsourcing as a labour law or labour market policy issue being debated, and if so, what are the main positions and arguments made?

No, not as known of.
1. Concept and basis

- Is “outsourcing” a legally defined concept and, if so, on what ground (statute law, case law, etc.)?

Not as such. The National Legislation relating to redundancy provides that a situation of redundancy arises where an employer contracts out work previously undertaken by direct employees. Thus where services are outsourced the employees are redundant and the normal law in relation to redundancy applies. However in some situations the Transfer of Undertakings Regulations apply, where the transferor transfers tangible assets or the new entity retains its character. This can be problematic and the question of whether or not there is a transfer, within the meaning of the regulations, depends on the facts of the case.

- To the extent the concept is being used, on one ground or another (including professional language), what does it encompass (assuming that it is to be distinguished from business reorganization or restructuring in a general sense and from “privatization”)?

 Outsourcing has been a feature of Irish employment for some time. It generally arises where ancillary services are contracted out, such as cleaning or catering. However in recent years manufacturing industry has tended to outsource aspects of production, often to third country facilities. A recent example of outsourcing which attracted a significant level of notoriety involved Irish Ferries, a Company which operated ferry services between Ireland and the UK and Ireland and France, re-flagged its fleet and outsourced its entire crew to third country nations on rates of pay significantly below Irish minimum rates. This lead to a change in the law, referred to below.

In most cases outsourcing has been achieved by offering voluntary redundancy or severance terms to existing staff.

- What body of law (if any) is primarily important with regard to outsourcing in a labour law context (statutory law(s), regulations, collective agreements, case law)?

The Redundancy Payments Acts 1967–2003 provides a definition of redundancy and entitles employees to compensatory payments where they are dismissed by reason of redundancy. 60% of the statutory lump sum paid to employees is recoverable from the State. As indicated above outsourcing of services can constitute redundancy. Where there is a collective redundancy (as is generally the case with outsourcing) employee representatives and their trade Union must be consulted with a view to reaching agreement on matters relating to the redundancy. The relevant Government Department must also be notified. This process must take place within a 30 day period prior to the redundancies taking effect.
Where the outsourcing arrangements constitute a transfer of a business or part of a business the domestic regulations which transposed Directive 2001/23/EC apply.

In recent months new legislation has been enacted to specifically address problems associated with outsourcing. The Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act 2007 now provided, in effect, that where employees are dismissed and replaced by other employees, whether directly employed by the same employer or otherwise, and their pay and conditions of employment are materially inferior to those of the dismissed employees, an exceptional collective redundancy arises. Where a redundancy is an exceptional collective redundancy, as so defined, the employer will not be entitled to the statutory rebate on the redundancy payments which would normally be payable by the State.

The provisions of this legislation do not apply where the redundancies are effected on a voluntary basis. Disputes concerning whether a particular redundancy is an exceptional redundancy are referable to the Labour Court.

- Is recourse to outsourcing in any way prohibited or specifically restricted (beyond procedures, legal effects, etc., such as are the subject of the ensuing questions)?

Outsourcing is not prohibited but is restricted in the manner referred to above under the terms of the Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act 2007

2. Decisions on outsourcing

- Do rules on information/consultation/co-determination apply to the phase preceding the making of a decision on outsourcing? If so, briefly state the substantive content of the rules, their legal basis, possible coordination problems between different sets of rules, as the case may be, and the effects of infringements of such rules. A particular point here is whether employees (trade unions) at the prospective outsourcer have a right to receive information on the conditions of the workers at the firm to which work is proposed to be outsourced.

In the case of collective redundancies, including redundancies arising from outsourcing the employer is obliged to consult employee representatives or their trade unions, with a view to reaching agreement. The employer is also obliged to provide relevant information. These requirements are prescribed by the Protection of Employment Act 1977. Section 9 of that Act provides that the employer must initiate consultation with a view to reaching agreement on:

(a) the possibility of avoiding the redundancies
(b) reducing the numbers affected,
(c) mitigating their affect
(d) the possibility of retraining or redeploying those affected,
(e) The basis for deciding which employees will be selected for redundancy.

This consultation must commence as early as possible and in any event at least 30 days before the first redundancy takes effect.
Section 10 of the Act requires an employer to provide information to employees or their trade Union on; -

(a) The reason for the proposed redundancies
(b) The numbers to be made redundant
(c) The period during which the redundancies are to take effect,
(d) The criteria for selection for redundancy
(e) The calculation of compensation for those being made redundant.

Where the employer fails to comply with these requirements a complaint may be made to a Rights Commissioner who can award each employee affected compensation equal to four weeks wages.

If the outsourcing involves the transfer of a business or part of a business Council Directive 2001/23/EC applies and the consultation provisions of the Directive apply. Also, the transferee is entitled to information concerning the terms and conditions, including collective agreements of the employees concerned.

3. The position of employees

- Do employees that are affected (involved in functions that are being outsourced) have a right (and obligation) to have their employment relationships transferred to the recipient service provider (the transferee)?

Only if the circumstances of the transfer come within the ambit of Directive 2001/23/EC.

- If yes, do the employees also have right to refuse to have their employment relationships transferred and, in that case, a right to maintain their employment relationships with the outsourcing employer? If so, what rules on notices, time limits, etc., apply?

Employees have no right to remain with the original employer if the Directive applies. If they chose not to transfer they would not have a right to remain with the original employer. Consequently there are no rules on notice or time limits.

- If, in a case as above, a worker chooses to remain in employment with the outsourcing employer, can he be dismissed (for business reasons), and/or do special protections apply?

Dismissal can take place for economic technical or organisational reasons.

- If the employees who are affected do not have the right to transfer to the recipient, what is their position with the outsourcing employer? Does dismissal protection apply? Are the affected employees per se those who are redundant, or must the selection of whom to dismiss as redundant be made on a broader basis?

If there is no right to transfer (because the Directive is not applicable) the displaced employees are redundant. Redundancy is a fair ground for dismissal under Irish unfair dismissal legislation. Generally the employer must have objective criteria for selection for redundancy. This can be provided in a collective agreement. If there is no agreement on criteria applicable the employer can make a choice but it must be on objective grounds. Moreover,
where it is a collective redundancy the employer must seek to obtain agreement on the criteria to apply.

4. Terms and conditions at the recipient

- If outsourcer employees transfer to or otherwise enter into employment with the recipient firm, will they maintain the terms and conditions they had at the outsourcer, or are they subject to what applies at or is offered by the recipient?

  If Directive 2001/23/EC applies then the transferred employees retain all of their conditions of employment. Normally employees only transfer where their conditions of employment are preserved.

- Does it make a difference in this respect if the terms and conditions are set in a collective agreement?

  No.

- If the outsourcer is bound by a collective agreement, will that agreement (or relevant parts thereof) apply as such to employees who transferred to the recipient firm?

  If the terms with the transferor are more favourable they are retained

- Is the recipient firm (also) legally bound by the collective agreement by virtue of taking over the operations being outsourced? Is there a difference in this regard between firm-specific collective agreements (concluded directly with the individual firm) and collective agreements concluded at a higher level? If bound as above, can the recipient firm nonetheless oppose or denounce being bound, and what procedures apply if so? If the recipient firm is already bound by a different collective agreement for the same kind of work, how is the conflict then resolved?

  If Directive 2001/23?EC applies then the collective agreement of the transferor applies only in respect of those transferred. It matters not if the agreement is with the individual employer or with the sector of which it is part.

- Do employees (trade unions) at the outsourcer have a right to receive information on the terms and conditions of workers at the recipient firm after the outsourcing has taken place?

  No.

5. Offshore outsourcing

- Do the rules applicable to outsourcing domestically also apply to outsourcing of work to other countries? What, if any, are the main differences?

  The legislative provisions do not apply to outsourcing of work to other countries

- What are otherwise the main legal problems involved in offshore outsourcing and to what extent have such outsourcing and accompanying problems appeared in practice?

  There have been many cases in which work has been outsourced to other countries. In such cases the employees are made redundant and the normal rules relating to redundancy apply. Generally, in such situations, where workers are
members of a trade union enhanced redundancy payments are negotiated (in excess of the statutory entitlements)

6. Factual aspects and considerations

To the extent such information can be gleaned without undue effort:

- How frequent and extensive is the use of outsourcing? How many undertakings and employees are involved (e.g., annually)?
  
  There are no official statistics available.

- In which sectors (public, private), branches and industries and for what kinds of work is outsourcing being (mainly) used?
  
  Mainly the private sector.

- Are the terms and conditions of employment for workers in recipient firms generally less favourable than those for workers at the outsourcers as far as the same job functions are concerned?
  
  Yes.

- What influence does outsourcing have on the unionized work force? Is trade union density generally lower in recipient firms than in outsourcer undertakings? Has outsourcing resulted in a decline in union density overall and/or to a weakening of the position of trade unions at the enterprise level or higher levels?
  
  In many cases unionised workers resist outsourcing as it is seen as a way of undermining the quality of employment in terms of pay and conditions. Where there is a trade union presence the union will seek to negotiate a provision providing for recognition with the new employer but they have not always been successful in that regard. In general terms outsourcing has, in practice, resulted in a weakening of trade unions and a decline in trade union density at enterprise level.

- Is outsourcing as a labour law or labour market policy issue being debated, and if so, what are the main positions and arguments made?
  
  Generally it is a matter of major concern to trade unions. The unions argue that it erodes established conditions of employment and leads to inferior quality of employment. Employers argue that it is necessary to respond to competitive pressures and is a way in which many businesses remain viable, thus preserving the core jobs in an enterprise.
1. Concept and basis

- Outsourcing is legally defined in case law as contracting out work previously done by the economic entity to another economic entity.

- This can also be done by transferring a part of the economic entity, or by closing part of the economic entity and obtaining the products it produced from other economic entities. It can also be done by outside economic entities performing part of the work in the economic entity, such as janitor services, cafeteria, computer maintenance, etc.

- The body of law which is relevant to outsourcing is protective labour legislation; collective labour law; contract law (Israel has no special law governing labour contracts); and company law.

- Recourse to outsourcing is not prohibited or restricted by statute. Various statutes, which will be described below, give workers some protection when an economic entity, which they work for, is being transferred. Case law and some collective agreements have restrictions on outsourcing, generally requiring and consultation prior to outsourcing.

2. Decisions on outsourcing

- Case law requires an economic entity to provide information and consult with the union prior to transferring all or part of the economic entity. This is also mandatory according to some collective agreements. In a few collective agreements such decisions cannot be taken without the union’s agreement.

- However, in Israel about 2/3 of the workforce is not organized and in these economic entities there are no restrictions of management ability to outsource. The high tech industry, which is very important in Israel, is mostly not organized and the sale of companies, mergers, and outsourcing is common, with no worker involvement.

- Case law has discussed the conflict between the union’s right to information and consultation and the employers’ constitutional property right. The tendency has been to balance these rights by requiring information and consultations but not preventing the employer from outsourcing in any form. This, of course, is subject to the duty to consult and provide information.

- In practice when there is a sale of an economic entity, or a part of it, the transferor and transferee have their attorneys prepare a memorandum detailing the workers’ rights and the obligations of the buyer and seller of the economic entity before and after the transfer.
• In practice, when an organized economic entity is transferred the union attempts to negotiate favorable conditions for the workers and, if necessary, strikes in order to achieve this.

3. The position of employees

The Protection of Wages Law of 1958, section 30:

New employer’s liability for debt of predecessor

30. (a) Where an undertaking has changed hands or been partitioned or been amalgamated with another undertaking, the new employer, too, shall be liable for any payment of wages, and for payments to a benevolent fund, due from the previous employer; but the new employer may, by notice published in the undertaking and the press in the manner prescribed by regulations, demand that claims for payment as aforesaid be submitted to him within three months from the day of the transfer, partition or amalgamation or, if he publishes the notice after that day, from the day of publication. The new employer shall not be liable for the settlement of claims submitted to him after the expiration of the period of three months as aforesaid.

(b) The provisions of this section shall not apply to the transfer, partition or amalgamation of an undertaking in consequence of bankruptcy or in consequence of the winding up of a company or cooperative society by reason of insolvency.

• Section 30 noted above makes both the transferor and transferee of the workplace responsible for wage and benefit payments owed by the workers prior to the transfer of the workplace to another employer. This includes the employer’s obligation to make payments for the workers to pension funds and other funds, which the worker has. The law limits the new owner’s liability by allowing him to publicize a call for the workers to demand their rights and if rights are not demanded within 3 months of the call, the new owner is not responsible for them. This limitation of liability does not apply when the economic entity is transferred because of insolvency or bankruptcy.

The Collective Agreements Law of 1957, sections 18-19:

Change of employer

18. Where an undertaking has changed hands or been partitioned or amalgamated, the new employer shall be regarded as an employer to whom the collective agreement applies.

Rights and obligations of employee and employer

19. Provisions of a collective agreement concerning terms of employment and termination of employment, and personal obligations imposed on, and rights granted to, an employee and employer by such provisions (hereinafter referred to as “personal provisions”), shall be regarded as a contract of employment between each employer and each employee to whom the agreement applies, and shall have effect even after the expiration of the collective agreement, so long as they have not been validly varied or repealed; participation in a strike shall not be regarded as breach of a personal obligation.

• Section 18 of this statute provides that when a factory or workplace is transferred or divided or merged the collective agreement which obligated the employer prior to the change continues to apply and bind the new employer and owner. This includes both collective and individual rights set in the collective agreement. According to section 19 of this Law the individual workers’ rights set down in the collective agreement are incorporated into each workers individual labour contract. However, the statute does not require the transferor to provide information to individual workers at a workplace which is not organized.
The Severance Pay Law of 1963, section 1:

Right to severance pay

1. (a) A person who has been employed continuously for one year or, in the case of a seasonal employee, has been employed for two seasons in two consecutive years, by the same employer or at the same place of employment and has been dismissed is entitled to receive severance pay from the employer who has dismissed him. For the purposes of this Law, “season” means three consecutive months, in any one year, during which the employee has been employed for not less than 60 days.

(b) Where, after an employee had passed from one place of employment to another under the same employer, the employers have changed at this present place of employment, such employee shall be entitled to receive severance pay from the previous employer in respect of his period of employment with him, or at the previous place of employment, as if he had been dismissed on the date of the change of employers. If the new employer, by a written undertaking to the employee, has assumed responsibility for the severance pay which the employee would have been entitled to receive from the previous employer, the previous employer shall be exempt from the payment of severance pay, and the employee’s period of employment with the previous employer or at the previous place of employment shall, for the purposes of this Law, be deemed to have been a period of employment at the present place of employment.

• Section 1 of this statute provides the continuation of the period for which the workers’ right to receive severance pay is calculated. When ownership at a workplace is transferred and the worker continues to work there under a new employer, or when the workplace moves to another location with the same employer, the worker’s right to severance pay is calculated for the period beginning with his work for the prior employer until he is dismissed by the new employer, or from the time he began working at the previous workplace until he is dismissed at the new workplace. In Israel the Severance Pay Law entitles workers, if they meet certain conditions, to one month’s salary for every year worked for the employer.

• In 2007, section 1(g)(1) was added to the Foreign Workers Law of 1991, which made the economic entity receiving the work responsible, under certain conditions: a. for the payment of the worker’s salary by the manpower contractor; b. that the manpower agency provide medical insurance for the foreign worker; c. and also provide appropriate living conditions.

• In the janitor and security industries there are special legal protections for workers, since there are frequent changes of companies who succeed in tenders at workplaces. The situation in general, as determined by collective agreements and statute, and case law, is that each contractor performing these services at a workplace is responsible to his workers for all labour law rights which the worker is entitled to, for the period during which the contractor performs work at the workplace. He is not responsible for the obligations and debts of his predecessor contractor or the contractor providing janitor or security services who succeeds him, unless he undertook to do so. A worker, who decides to remain at the workplace as a worker of the company which succeeds his former company, is entitled to receive from the former company which employed him, severance pay and other benefits who he acquired as a worker of the former company.

• Neither the Severance Pay Law nor case law grants workers the right to quit and receive severance pay when their workplace or the work they are doing is transferred or outsourced in other ways.
• However, case law, which leaves some issues open, grants workers whose workplace is transferred the right to continue working for their same employer and not be transferred to the new employer. If the worker chooses to remain at his same workplace and not be transferred, there is no statute which prohibits the employer from dismissing him. Where the workplace is organized the collective agreement gives the worker protection against dismissal.

• If a worker chooses to become an employee of the new employer which is operating the workplace or function which has been outsourced, he is protected by the Wage Protection Law and the Severance Pay Law, as described above.

• Workers at a workplace which has been transferred do not have a statutory right to work at the new workplace. Sometimes such a right is granted in the contract between the former and new employer or by a collective agreement. If the worker does not have a right to work for the new employer he is protected by general dismissal protections found in the collective agreement which applies to his workplace. However, most collective agreements allow collective redundancy dismissal, so that when a workplace or part of it cease to function because of outsourcing the employer can usually make a collective dismissal of all workers at the workplace transferred.

Statutes protecting manpower workers and foreign workers

• Various statutes have provisions which protect manpower and foreign workers, such as the Foreign Workers Law of 1991, and the Employment of Workers by the Manpower Contractors Law of 1996. Case law also does this.

• Such protections for workers, especially in the janitorial and security industries, are necessary because work at their economic entities is transferred often, since janitorial work is given to companies by tender and it is common that the companies who win the tender change frequently.

• The protections granted consist of regulation of the companies which bring foreign workers to Israel and the companies which employ them when they arrive; prohibition for the employer to take the passport of a foreign worker; requiring the employer to provide certain insurance for the foreign worker, including medical coverage; government monitoring of the manpower companies.

4. Terms and conditions at the recipient

This issue has been dealt with in some of my above answers, to which I add the following.

• Statutory protections cannot be waived or changed by contract, so in that sense they provide more protection than collective agreements. In general, protections in collective agreements granting workers individual rights also cannot be waived by the individual, but can be changed with the union’s agreement. However, workers protected by collective agreements are generally in a better position than unorganized workers, since their union can negotiate favorable terms for them.

• As mentioned above, a collective agreement at a workplace at which the ownership is transferred continues to be binding on the new employer.
• However, when there is genuine outsourcing and the economic entity employing workers ceases to produce a product and purchases it from another company, without transferring anything, the workers have no special rights. Furthermore, the collective agreement binding on the employer who has outsourced part of his production or services, is not binding on the workers of the economic entities which are selling the product or service to the employer who has outsourced.

• As mentioned above, section 18 of the Collective Agreements Law applies only to instances where the work continues to be done at the same workplace or with the same workers, but there is a new employer, or a merger or the workplace is divided up.

• When the recipient economic entity is already bound by a collective agreement that agreement does not apply to the workplace at which there has been a transfer in ownership or management. The collective agreement which applied to the workplace which was transferred continues to be in effect. This has caused difficulties when there has been a transfer of the workplace and the new employer brings some of his functions to that workplace, so that in the same workplace there some workers are covered by one collective agreement and others by another one.

• The union at the outsourcer has a right, set by case law, to information about terms and conditions at the recipient economic entity, if the outsourcer wants to transfer his workers, or some of them, to the recipient economic entity. Individual workers have no such right.

5. Offshore outsourcing

• When production or services are transferred abroad the workers at the transferor or economic entity outsourcing have the rights described above at their workplace. This generally regards severance pay and pension rights. Sometimes, the workers have rights set by a collective agreement to protection against dismissal. A major problem of outsourcing abroad is when the local employer closes or reduces his local production, which results in collective dismissals. In union workplaces this often results in collective disputes.

• However, the local workers have no rights relating to information about the recipient workplace abroad.

6. Factual aspects and considerations

• In low paying industries, outsourcing has been used extensively when the local company can produce the same product abroad or closes his Israeli factory and purchases the same products from abroad. The low costs of production abroad, especially of clothing and textiles, have drastically reduced local production in many low skilled industries. Much outsourcing in these industries has been done by transferring entire factories or many functions in such factories to Jordan, Egypt, the Palestinian Entity and Turkey. Much of the outsourcing has been to China and other Far East countries.

• Many international companies have branches in Israel. These firms can transfer functions and sometimes workers from country to country. In high tech, there is much fluidity in companies, workers and functions. Outsourcing is part of this industry. There are very few collective agreements in high tech companies; therefore, the only protection for these workers is by statutes, which are in many
cases not relevant to high tech workers who receive. However, despite absence of unions and labour law protection there have been few claims filed in the Labour Courts by high tech workers.

- There has also been a trend for Israeli companies to be sold to large international economic entities, or merge with them. This results in the transfer of production and functions between the mother company and the local company. In some instances the Israeli company purchases the foreign company or production line and integrates it with the Israeli workplace.

- Many high tech companies, who transfer company or functions and, as a result, dismiss workers, provide the dismissed workers with services relating to finding new employment. In addition the high tech companies generally give dismissed workers generous severance benefits.

- Outsourcing is common in both the private and public sectors. In both sectors there is much outsourcing of janitorial and security services. Outsourcing in other ways is common in private industry, as described above. In the public there is outsourcing of functions for which the public body cannot perform with its’ workers. Since 1985 there has been a policy to privatize by transferring government functions to a government agency, then to a government company, and then converting the government company to a private company. Theoretically, the final stage of this privatization process is to open the function to competition; however, this has not been widespread because of pressure on relatively weak governments by management and unions.

- The main purpose of outsourcing is to reduce costs and avoid union labour. Another purpose is to take advantage of extremely low production costs in China and other such nations. In some instances, especially in high tech and mid tech industries, the outsourcing is done for functions and products which the outsourcer does not want to produce or cannot produce efficiently.

- Israel has been a recipient of outsourcing from many foreign economic entities in the high tech and mid tech industries. This has provided employment for many skilled workers and assisted the development of the Israeli high tech industry.

- Outsourcing has enabled many Israeli companies to be competitive and develop. It has also enabled Israeli companies to specialize and have certain functions they are not specialized in to be done by other companies. However, much of the outsourcing is in the janitor and security services. This has resulted in low wages and poor conditions and a insecurity for these workers. It has also enabled large companies and the government offices and economic entities to avoid giving these workers wage conditions set by collective agreements. Thus, one result of outsourcing has been an increase of non-union workers at organized workplaces and the reduction of union power.

In 2000 the Knesset (Parliament) passed statutes protecting manpower workers by adding section 12A to the Employment of Employee by Manpower Contractors Law of 1996, which says:

12A.(a) An employee of a manpower contractor shall not be employed with an actual employer for a continuous period in excess of nine months; employment for the purposes of this section shall be deemed to have been continuous even where employment has ceased for a period of not exceeding nine months.
(b) Notwithstanding the provisions of subsection (a) the Minister may, in exceptional cases, allow an employee to be employed with an actual employer for a period in excess of nine months, provided that the total period of employment with that actual employer does not exceed fifteen months.

(c) Where an employee as aforesaid is employed with the same actual employer for a period in excess of nine continuous months or for an additional period that has been extended in accordance with subsection (b) such employee shall be deemed to be an employee of the actual employee at the end of such nine month or extended period, as the case may be.

(d) Where an employee of a manpower contractor is deemed to be an employee of the actual employer as provided in subsection (c), the period of service seniority acquired by the employee during the period of his employment by the manpower contractor with the actual employer shall be added to the period of service seniority acquired by the employee during the period in which he has been employed by the actual employer.

This statute compels the recipient of work to change the status of manpower company workers to be workers of the recipient, after they have worked at the recipient for 9 months. However, the implementation of this statute has been delayed by the annual budget law, from year to year, so it does not yet apply.

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1. Concept and basis

- Is “outsourcing” a legally defined concept and, if so, on what ground (statute law, case law, etc.)?

Up to now, there is no explicit legal definition. The jurisprudence of the Supreme Court has made some effort to identify the conditions of an outsourcing case (see below). However recently, in modifying with the legislative decree n. 276 of the year 2003, the article 2112 of our civil code, which deals with the transferring of an enterprise, our legislator established that the same rules applying to the transferring of enterprise are to be applied whenever the parties to the contract want to transfer only a branch of the enterprise which they identify at the same moment of the contract as a functionally autonomous division of an organized economic activity.

It has also to be noticed that another legislative decree issued in October 2004 (251) provides that if the seller of the branch of the enterprise enter into a contract work with the buyer, by which the buyer is engaged to perform the contract work making use of the branch of the company he has bought, the buyer and the seller as well are responsible toward the employees for complaining with the obligations resulting from the employment contract.

So, if it gives no legal definition of outsourcing, the Italian legislator shows to be aware of at least some problems relating to this phenomenon.

- To the extent the concept is being used, on one ground or another (including professional language), what does it encompass (assuming that it is to be
distinguished from business reorganization or restructuring in a general sense and from “privatization”)?

The main idea is that every activity (production of goods or services) which is not the core business of a company can be performed for the company by someone else, and that the product of the activity being transferred to the company on the basis of a contractual relationship.

- According to the definition given by the Supreme Court in some recent judgements (see for instance 2 October 2006. n.21287) outsourcing includes every possible means by which a company stops to produce some goods or services directly, provided that these goods or services are not part of its core business. This may happen in particular by entering in a contract work with a third party or by selling a branch of the company. What body of law (if any) is primarily important with regard to outsourcing in a labour law context (statutory law(s), regulations, collective agreements, case law)?

- Is recourse to outsourcing in any way prohibited or specifically restricted (beyond procedures, legal effects, etc., such as are the subject of the ensuing questions)?

There is no prohibition. A restriction can be considered the responsibility of both parties for the obligations resulting from the contract work (see above).

2. Decisions on outsourcing

- Do rules on information/consultation/co-determination apply to the phase preceding the making of a decision on outsourcing? If so, briefly state the substantive content of the rules, their legal basis, possible coordination problems between different sets of rules, as the case may be, and the effects of infringements of such rules. A particular point here is whether employees (trade unions) at the prospective outsourcer have a right to receive information on the conditions of the workers at the firm to which work is proposed to be outsourced.

According to the law 29 December 1990 n.428 (by which European rules, in particular the CEE Directive 77/187, have been implemented in Italian law) if a transferring of a firm, or of a part of it, employing more than 15 workers has to take place, Unions have to be informed before the agreement about the transferring has definitively been signed.

The information must include the time of the transferring, the reasons of it, the legal, economic and social consequences of it for the workers, the remedies envisaged, if any.

The infringement of the duty of information does not allow the single worker to put any plaint against the company. Only the trade unions can do that. According to the jurisprudence of the Supreme Court (see, 4 January 2000 n. 23) even if they win this has no effect on the validity of the transferring.

3. The position of employees

- Do employees that are affected (involved in functions that are being outsourced) have a right (and obligation) to have their employment relationships transferred to the recipient service provider (the transferee)?
The employees have the right to have their employment relationship transferred. This results from art. 2112 of the Italian civil code which provides that the transferring of a company isn’t in itself a cause for a valid dismissal of the workers.

The employees have also an obligation to accept the new employment relationship. This latter can be refused only if it results in substantial modification of the work conditions, as provided in the above mentioned art. 2112. In this case the worker has the right to resign. There is a time limit of three months for that. In no way has he/she the right to maintain the former employment relationship.

In other terms, according to our jurisprudence the agreement of the transferred workers is irrelevant and this doesn’t result in any violation of the constitutional rights of the workers.

- If yes, do the employees also have right to refuse to have their employment relationships transferred and, in that case, a right to maintain their employment relationships with the outsourcing employer? If so, what rules on notices, time limits, etc., apply?
- If, in a case as above, a worker chooses to remain in employment with the outsourcing employer, can he be dismissed (for business reasons), and/or do special protections apply?
- If the employees who are affected do not have the right to transfer to the recipient, what is their position with the outsourcing employer? Does dismissal protection apply? Are the affected employees per se those who are redundant, or must the selection of whom to dismiss as redundant be made on a broader basis?

See above (first answer).

4. Terms and conditions at the recipient

- If outsourcer employees transfer to or otherwise enter into employment with the recipient firm, will they maintain the terms and conditions they had at the outsourcer, or are they subject to what applies at or is offered by the recipient?

The recipient has the duty to apply to the outsourcer employees the collective agreement which have been applied by the outsourcer until their expiration, unless they are replaced by other collective agreement applicable to the recipient. It should be noticed that the replacement takes place between collective agreements of the same level.

- Does it make a difference in this respect if the terms and conditions are set in a collective agreement?

See previous answer.

- If the outsourcer is bound by a collective agreement, will that agreement (or relevant parts thereof) apply as such to employees who transferred to the recipient firm? See above, first answer

- Is the recipient firm (also) legally bound by the collective agreement by virtue of taking over the operations being outsourced? Is there a difference in this regard between firm-specific collective agreements (concluded directly with the individual firm) and collective agreements concluded at a higher level? If bound
as above, can the recipient firm nonetheless oppose or denounce being bound, and what procedures apply if so? If the recipient firm is already bound by a different collective agreement for the same kind of work, how is the conflict then resolved?

See above, first answer.

- Do employees (trade unions) at the outsourcer have a right to receive information on the terms and conditions of workers at the recipient firm after the outsourcing has taken place?

There is no explicit legal provision about that. For the unions the information about the conditions of workers at the recipient firm can result from the information relating the consequences of the transferring (see above answer to question 2)

5. Offshore outsourcing

- Do the rules applicable to outsourcing domestically also apply to outsourcing of work to other countries? What, if any, are the main differences?

- What are otherwise the main legal problems involved in offshore outsourcing and to what extent have such outsourcing and accompanying problems appeared in practice?

If the two parties of the contract by which the outsourcing has been agreed are Italian firms operating abroad and the outsourcing contract is subject to Italian law there is little doubt that the internal rules are applicable.

If these conditions are not fulfilled it has to be decided first if, according to the international law, to contract is subject to the Italian law or not. Up to now there have been no cases of international outsourcing before the Italian Supreme Court.

6. Factual aspects and considerations

To the extent such information can be gleaned without undue effort:

- How frequent and extensive is the use of outsourcing? How many undertakings and employees are involved (e.g., annually)?

  No precise information about that.

- In which sectors (public, private), branches and industries and for what kinds of work is outsourcing being (mainly) used?

  In the private sector mainly for the cleaning and transportation service. In the public sector for the refuse collection and street cleaning service.

- Are the terms and conditions of employment for workers in recipient firms generally less favourable than those for workers at the outsourcers as far as the same job functions are concerned?

  No precise information about that. Nevertheless, considering that many times the transferred employees try to challenge before the labour judges the transferring as null and void, for lack of the legal conditions, one may gather from that that the work conditions by the recipient are generally deemed to be worse.
What influence does outsourcing have on the unionized work force? Is trade union density generally lower in recipient firms than in outsourcer undertakings? Has outsourcing resulted in a decline in union density overall and/or to a weakening of the position of trade unions at the enterprise level or higher levels?

No precise information about that. Generally speaking the recipient firms are much smaller and therefore unions have less importance in them.

Is outsourcing as a labour law or labour market policy issue being debated, and if so, what are the main positions and arguments made?

There are strong discussions about outsourcing.

The opponents maintain that it is an easy way for the firm to escape the application of the rules about the collective dismissal of workers.

Those who are in favour hold that it is an important tool for reducing labour cost and rationally restructuring a firm, allowing it to concentrate on its main production.

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**Slovenia**

Judge Miran Blaha,
Supreme Court
Ljubljana

1. **Concept and basis**

- Is “outsourcing” a legally defined concept and, if so, on what ground (statute law, case law, etc.)?

  No, “outsourcing” is not legally defined in any regulation. It is just a generally adopted concept for contractual transfers of performance of certain services (activities) to the outside contractors (contracting out).

- To the extent the concept is being used, on one ground or another (including professional language), what does it encompass (assuming that it is to be distinguished from business reorganization or restructuring in a general sense and from “privatization”)?

  The concept is used both for the transfers of performance of services to outside contractors in the case when the transferor ceases to perform such services by himself and in the case when an independent agreement for the performance of certain services is concluded with an outside contractor or only a former contractor is substituted for a new one. In the public sector, such change is bound to public procurement proceedings as a rule.

  In the practice, outsourcing is frequently (particularly in the first case) associated with reorganization or restructuring of the transferor and thus indirectly also with determining redundant workers.

- What body of law (if any) is primarily important with regard to outsourcing in a labour law context (statutory law(s), regulations, collective agreements, case law)?
The Employment Relationships Act regulates the cases when due to the transfer of undertaking or part of undertaking – that is including in the cases of outsourcing –, the employer is changed. Collective agreements do not contain anymore the special provisions related to the transfer of the undertaking or change of employer. The former statutory framework in Slovenia was different and this issue was regulated also by collective agreements.

- Is recourse to outsourcing in any way prohibited or specifically restricted (beyond procedures, legal effects, etc., such as are the subject of the ensuing questions)?
  No.

### 2. Decisions on outsourcing

- Do rules on information/consultation/co-determination apply to the phase preceding the making of a decision on outsourcing? If so, briefly state the substantive content of the rules, their legal basis, possible coordination problems between different sets of rules, as the case may be, and the effects of infringements of such rules. A particular point here is whether employees (trade unions) at the prospective outsourcer have a right to receive information on the conditions of the workers at the firm to which work is proposed to be outsourced.

Under the Employment Relationships Act the outsourcing employer and the recipient employer must notify at least 30 days before the transfer the trade unions at the employer on:

- date or proposed date of transfer,
- reasons for the transfer,
- legal, economic and social consequences of transfer for the workers and
- the planned measures for workers.

The outsourcing employer and the recipient employer must consult the trade unions at least 15 days before the transfer on the legal, economic and social consequences of the transfer and on the planned measures for workers with the aim of reaching an agreement.

If there is no trade union at the employer, the workers to whom the transfer concerns must be notified directly on the time limits and circumstances of the transfer.

The Workers Participation in Management Act regulates the obligations of employers concerning the informing and consulting with the representatives of workers also on the transfers of the undertaking and their consequences for the workers (indirectly through a workers’ representative or through a workers’ council).

Disputes arising because of failure to carry out the obligation to inform or consult with trade unions or workers representatives are collective labour disputes (under the Labour and Social Courts Act). Court can decide about infringements of this (collective) rights of workers or there representatives. But, since the transfer of undertaking us such is not a subject of Labour Court decision (its legality, necessity or even expediency), the decision about
infringements of this rights has no direct effect on individual rights of worker – namely on the fact that there was the change of the employer. Workers representatives have on the basis of the Workers’ Participation in Management Act more possibilities as they can temporarily stop some employers decision which influence to workers rights in the case of transfer the undertaking. Trade unions do not have such right.

3. The position of employees

- Do employees that are affected (involved in functions that are being outsourced) have a right (and obligation) to have their employment relationships transferred to the recipient service provider (the transferee)?

Yes. If a legal transfer of a undertaking or part of undertaking performed on the basis of a law, another regulation, legal transaction or final court decision or merger or division causes a change in employer, the contract and other rights and obligations arising from the employment relationships held by the workers on the day of transfer at the outsourcing employer shall pass to the recipient employer.

- If yes, do the employees also have right to refuse to have their employment relationships transferred and, in that case, a right to maintain their employment relationships with the outsourcing employer? If so, what rules on notices, time limits, etc., apply?

Yes. The Act does not specify (express) provisions concerning the method or form of refusal to have the employment relationship transferred to the new employer or concerning the time limits – these rules will have to be adopted by the case-law.

- If, in a case as above, a worker chooses to remain in employment with the outsourcing employer, can he be dismissed (for business reasons), and/or do special protections apply?

Yes. If a worker refuses the transfer and the actual performance of work with the recipient employer, the outsourcing employer may terminate his employment contract.

This is a special reason for extraordinary termination of the employment contract (without period of notice), to which apply the same rules and provisions on the protection against termination as in all other cases of extraordinary termination.

- If the employees who are affected do not have the right to transfer to the recipient, what is their position with the outsourcing employer? Does dismissal protection apply? Are the affected employees per se those who are redundant, or must the selection of whom to dismiss as redundant be made on a broader basis?

When the outsourcing employer ceases to exist or perform a certain activity or service, those workers who have been performing such work will be as a rule dismissed as redundant workers.

In the case, however, where a larger number of workers are affected (for example, at least 10 workers at the employer who employs from 20 to 100 workers), the employer has to adopt a special programme for dismissal of
redundant workers and take into consideration criteria defined in advance when determining redundant workers.

4. Terms and conditions at the recipient

- If outsourcer employees transfer to or otherwise enter into employment with the recipient firm, will they maintain the terms and conditions they had at the outsourcer, or are they subject to what applies at or is offered by the recipient?

Yes, they will maintain them. The contract and other rights and obligations arising from the employment relationships held by the workers on the day of transfer at the outsourcing employer shall pass to the recipient employer. The former employment contract shall remain in force, only the employer is changed.

- Does it make a difference in this respect if the terms and conditions are set in a collective agreement?

No.

- If the outsourcer is bound by a collective agreement, will that agreement (or relevant parts thereof) apply as such to employees who transferred to the recipient firm?

Yes. Rights and obligations from the collective agreement that bound the outsourcing employer must be granted by the recipient employer to the workers for at least one year, except if the validity of the collective agreement ceases before the expiry of one year or if a new collective agreement is concluded before the expiry of one year.

- Is the recipient firm (also) legally bound by the collective agreement by virtue of taking over the operations being outsourced? Is there a difference in this regard between firm-specific collective agreements (concluded directly with the individual firm) and collective agreements concluded at a higher level? If bound as above, can the recipient firm nonetheless oppose or denounce being bound, and what procedures apply if so? If the recipient firm is already bound by a different collective agreement for the same kind of work, how is the conflict then resolved?

Yes, the recipient firm is legally bound by the collective agreement by virtue of taking over the operations being outsourced.

No difference between firm-specific collective agreements (concluded directly with the individual firm) and collective agreements concluded at a higher level.

Cannot oppose or denounce. However, if the rights from the employment contract at the recipient employer diminish due to the objective reasons, the worker may terminate the employment contract and has equal rights as if the employer terminated the employment contract for business reasons. In determining the period of notice and right to severance pay, the worker’s years of service with both employers shall be taken into account.

Under the Labour and Social Courts Act a collective labour dispute on the mutual conformity of collective agreements and validity of collective agreement and its implementation between the parties to the collective agreement or between the parties to the collective agreement and other persons is admissible.
Do employees (trade unions) at the outsourcer have a right to receive information on the terms and conditions of workers at the recipient firm after the outsourcing has taken place?

No, such right is not specifically prescribed.

5. Offshore outsourcing

- Do the rules applicable to outsourcing domestically also apply to outsourcing of work to other countries? What, if any, are the main differences?
  
  Yes, rules applicable to outsourcing domestically also apply to outsourcing of work to other countries.

- What are otherwise the main legal problems involved in offshore outsourcing and to what extent have such outsourcing and accompanying problems appeared in practice?
  
  No practice to date.

6. Factual aspects and considerations

To the extent such information can be gleaned without undue effort:

- How frequent and extensive is the use of outsourcing? How many undertakings and employees are involved (e.g., annually)?
  
  There are no statistical data available, but in the nineties outsourcing was frequent because of the restructuring of firms and their adjustment to the changed economic system and new market conditions.

- In which sectors (public, private), branches and industries and for what kinds of work is outsourcing being (mainly) used?
  
  There are no statistical data available, the majority of court disputes arises in the private sector.

- Are the terms and conditions of employment for workers in recipient firms generally less favourable than those for workers at the outsourcers as far as the same job functions are concerned?
  
  Generally they are less favourable, consequently there are a lot of disputes in which the workers oppose the transfer or change of employer.

- What influence does outsourcing have on the unionized work force? Is trade union density generally lower in recipient firms than in outsourcer undertakings? Has outsourcing resulted in a decline in union density overall and/or to a weakening of the position of trade unions at the enterprise level or higher levels?
  
  No essential differences exist regardless whether the affected workers are trade union members or not.

  Outsourcing does not affect trade union density. However, the recipient firms tend to be smaller employers where the workers are usually not trade union members and/or the influence of trade unions is lower.

- Is outsourcing as a labour law or labour market policy issue being debated, and if so, what are the main positions and arguments made?
No, outsourcing as a labour law or labour market policy issue is not a separate subject of debate.

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**Spain**

Professor Antonio Martín Valverde,
Judge

Honorary Professor Bartolomé Ríos Salmerón
Retired Emeritus Judge

Professor Miguel Ángel Limón Luque
Legal Counsel
Supreme Court
Madrid

1. **Concept and basis**

   - Is “outsourcing” a legally defined concept and, if so, on what ground (statute law, case law, etc.)?

     To the extent the concept is being used, on one ground or another (including professional language), what does it encompass (assuming that it is to be distinguished from business reorganization or restructuring in a general sense and from “privatization”)?

   - What body of law (if any) is primarily important with regard to outsourcing in a labour law context (statutory law(s), regulations, collective agreements, case law)?

   - Is recourse to outsourcing in any way prohibited or specifically restricted (beyond procedures, legal effects, etc., such as are the subject of the ensuing questions)?

     In Spain we consider “outsourcing” as a specific kind of contracting out services by an entrepreneur, regulated by Commercial Law. There is no regulation in Labour & Employment Law on such concept, but Labour and Employment Law refers to three related concepts:

     a) Contracting and subcontracting out services between two or more employers in order to perform the same activity. It is mainly regulated into the section 42 of the Spanish Statute of the Workers (Estatuto de los Trabajadores) since 1980, but some amendments were passed in 2001 and last year (2006). It regulates (1) joint liability in Employment and Social Security Law for employers who contract out services related to the same activity that they perform exception made of an employer who is an individual and contracts out in order to build or make repairs at home and the owner of a business that contracts out for reasons not related to the fact of running the business; (2) several information rights for the employees representatives of the contractor and the contracting out companies. Outsourcing as it is understood in Spain would be affected by these regulations if the contract is related to the same activity of the employer who contracts out the services of a different company.
b) Contracting out and subcontracting services between two or more employers in order to perform a different activity. Then Social Security Law provides subsidiary liability exception made of an employer who is an individual and contracts out in order to build or make repairs at home and the owner of a business that contracts out for reasons not related to the fact of running the business. Outsourcing as it is understood in Spain would be affected by these regulations if the contract is related to an activity different to the one that it is performed by the employer who contracts out the services of a different company.

c) Illegal work for a user undertaking and legal temporary work through a temporary work agency. In Spain there is a specific Act regulating temporary employment agencies (Act 14/1994, of 1st June). Before this date, temporary employment agencies were considered illegal. Today any work performed for an employer different to the one that signed the employment contract is prohibited by Law, exception made of the services performed through an employment temporary agency.

d) Transfers of undertakings and/or part of undertakings. In Spain a transfer of an undertaking occurs when the undertaking changes its owner and a transfer of assets and activity occurred. According to European case Law and as an exception, it is possible that if the assets related to the activity would not be relevant (as for example it happens on cleaning services), then a transfer of employees (totally or even partially) and activity could be enough to state that a transfer of undertaking occurred. Regulations on transfer of undertakings are placed in section 44 of the Statute of the Workers and it establishes: (1) joint liability between the transferor and the purchaser during three years regarding the rights and obligations that were occurred before the transfer; joint liability with no time restrictions if the transfer is deemed a crime; (2) right for the transferred employees of maintaining the conditions of the employment contract and those regulated at the collective agreement – in the latter case only temporarily – of the purchaser company; (3) rights of information for the employees representatives of the transferor and the purchaser companies.

For the purposes of this paper, we will call “contractor” to the recipient of the contracting out services and “contracting out company” to the one that perform the services for another company.

A formal contracting out services could cover a fraudulent work performed by an employee for a user undertaking different to the employer that hired the employee. A formal contracting out could cover a transfer of undertaking.

Recently Act 32/2006 of October 12th established some restrictions for contracting out in the construction of buildings branch because of the high number of accident at work, reinforcing Health and Safety regulations for contracting out companies and providing some restrictions in order to contracting out companies that only bring work performed by employees without any kind of machinery or technical support.

2. Decisions on outsourcing

- Do rules on information/consultation/co-determination apply to the phase preceding the making of a decision on outsourcing? If so, briefly state the substantive content of the rules, their legal basis, possible coordination problems
between different sets of rules, as the case may be, and the effects of infringements of such rules. A particular point here is whether employees (trade unions) at the prospective outsourcer have a right to receive information on the conditions of the workers at the firm to which work is proposed to be outsourced.

If we identify outsourcing with contracting out services, the answer is positive. The employee is entitled to know the name, address and main activity of the company to which the company that hired him shall perform services. The contracting out activity must be also notified to the Social Security authorities. The contractor company must inform to its employees representatives on the name, address and tax identification number of the contracting out company; reason and expected duration of rendering services; place in which the contracting out company will perform it duties; number of employees that will work in the duties carrying out by the contracting company; health and safety coordination measures taken by the contractor company. The contracting out company also must notify to his employees representatives an equivalent information. A new Act in 2006 (act 43/2006 of December 29th) has added several collective rights to the employees of the contracting out company: they can be represented by the employees representatives of the contractor company if they do not have employees representatives and share the workplace; if the workplace should be the same for both companies, employees representatives would have the right of joint assembly and the employees representatives of the contracting out company would have the right to use the employees representative premises of the contractor company. Administrative fines are established by Law to those employers who do not accomplish Law. Employees representatives mean works councils and trade unions representatives at the company involved.

The Law also establishes information rights in favour of the legal representatives of the employees of the undertaking that is to be transferred. Basically, both transferor and purchaser employers have to bring information on the date of the transfer, reasons of the transfer, economic and social consequences of the transfer, and measures affecting employees conditions of work. Those measures if related to the transfer, require an additional opening of a negotiation period between the involved employer and the employees legal representatives.

3. The position of employees

- Do employees that are affected (involved in functions that are being outsourced) have a right (and obligation) to have their employment relationships transferred to the recipient service provider (the transferee)?

- If yes, do the employees also have right to refuse to have their employment relationships transferred and, in that case, a right to maintain their employment relationships with the outsourcing employer? If so, what rules on notices, time limits, etc., apply?

- If, in a case as above, a worker chooses to remain in employment with the outsourcing employer, can he be dismissed (for business reasons), and/or do special protections apply?

- If the employees who are affected do not have the right to transfer to the recipient, what is their position with the outsourcing employer? Does dismissal
protection apply? Are the affected employees per se those who are redundant, or must the selection of whom to dismiss as redundant be made on a broader basis?

In a contracting out business, the employee that will carry out the services that were contracted out will not be considered transferred to the contractor employer during or at the end of the contracting out activity. Sometimes, when successive contracting out of the same services are carried out by different contracting out companies, in practice or through collective bargaining agreements (for example, at cleaning services or security services branches) the new contracting out company assumes the obligation to maintain totally or partially the contract of the employees that were performing services for the former contracting out company. But in any case, exception made of a transfer of undertaking, the employee can choose to stay at the former contracting company even if the collective agreement provides so. There is no specific time in order to refuse the transfer. It seems that the limit of one year since the change on the contracting out business changed applies. If the former contracting our company refuses to maintain his job, the employee is considered unfairly dismissed.

4. Terms and conditions at the recipient

- If outsourcer employees transfer to or otherwise enter into employment with the recipient firm, will they maintain the terms and conditions they had at the outsourcer, or are they subject to what applies at or is offered by the recipient?
- Does it make a difference in this respect if the terms and conditions are set in a collective agreement?
- If the outsourcer is bound by a collective agreement, will that agreement (or relevant parts thereof) apply as such to employees who transferred to the recipient firm?
- Is the recipient firm (also) legally bound by the collective agreement by virtue of taking over the operations being outsourced? Is there a difference in this regard between firm-specific collective agreements (concluded directly with the individual firm) and collective agreements concluded at a higher level? If bound as above, can the recipient firm nonetheless oppose or denounce being bound, and what procedures apply if so? If the recipient firm is already bound by a different collective agreement for the same kind of work, how is the conflict then resolved?
- Do employees (trade unions) at the outsourcer have a right to receive information on the terms and conditions of workers at the recipient firm after the outsourcing has taken place?

As it was explained above, the contracting out business do not carry a transfer of employer for the employees that are involved. There are some close kinds of transfers of undertakings, as for example temporary unions of companies or businesses leasing, in which such transfer happens but because a transfer of undertaking takes place and there is no such a contracting out activity. In the case of transfers of undertakings it is established a mandatory transfer of employees, and the maintenance of the same work conditions, including those regulated into the collective agreements, at least, until its expiration or the entering into force of a new collective agreement in the transferred company. There are information rights for employees representatives of the purchaser and
the former company and if the purchaser wants to adopt measures affecting working conditions of the employees that have been transferred, a negotiation period with its employees representatives will take place.

Otherwise, as it was explained above (see answer 2), the contracting out company must accomplish some obligations of information regarding its employees representatives.

It has to be noted that workers of a temporary work agency that work of a user undertaking are entitled to carry out their activity at least in the same wage conditions of those provided for the applicable collective bargaining agreement at the user undertaking. In practice, the rule does not give equal salary treatment for both kind of employees, but it is a very important guarantee for employees of temporary work agencies.

5. Offshore outsourcing

- Do the rules applicable to outsourcing domestically also apply to outsourcing of work to other countries? What, if any, are the main differences?
- What are otherwise the main legal problems involved in offshore outsourcing and to what extent have such outsourcing and accompanying problems appeared in practice?

The only specific regulation on international contracting out is located in Act 45/1999, of November, 29th, that implemented in Spain the Directive 96/71, on the posting of workers in the framework of the provision of services. As it is known, the Act establishes minimum conditions of work for employees posted to Spain by companies located into the European Union in the cases regulated under the section of the said Directive 96/71. It is expected that each European country should have equivalent regulations protecting Spanish employees that will be post in another European country.

6. Factual aspects and considerations

- How frequent and extensive is the use of outsourcing? How many undertakings and employees are involved (e.g., annually)?
- In which sectors (public, private), branches and industries and for what kinds of work is outsourcing being (mainly) used?
- Are the terms and conditions of employment for workers in recipient firms generally less favourable than those for workers at the outsourcers as far as the same job functions are concerned?
- What influence does outsourcing have on the unionized work force? Is trade union density generally lower in recipient firms than in outsourcer undertakings? Has outsourcing resulted in a decline in union density overall and/or to a weakening of the position of trade unions at the enterprise level or higher levels?
- Is outsourcing as a labour law or labour market policy issue being debated, and if so, what are the main positions and arguments made?

Contracting out is used very frequently in Spain, specially in some branches, as cleaning services, security services, shipping or construction companies, and it is well developed in some cases for State, Regional and Municipal services. Also it is extended in computer support services and the like.
It is common in large companies, by creating minor companies with less favourable conditions of work. Large companies intend to avoid the application of the collective agreement signed at the main company of the group. It is a way to have a less unionized environment, as it is more frequent than in other companies the hiring of temporary workforce, usually strongly tightened to the contracting out services performed. In Spain it is possible to sign a temporary contract in order to develop a contracting out service and establishing as its duration the duration of the contracting out services signed.

As it was explained before, contracting out services is a major issue in current Labour & Employment Law. As it was said, there has been an amendment in 2006 of section 42 of the Statute of Workers (and other sections, such as section 81) that tries to give collective protection to the employees and the employees representatives of the contracting out companies, by authorizing the employees to be represented by the employees representatives of the contractor company if they do not have representation and share the workplace, and by authorizing the employees representatives of the contracting out company that performs its duties at the same place as other employees of the contractor company to meet and discuss collective problems with the representatives of the contractor company and in their premises. Also in 2006 a new Act entered into force in construction services in order protect employees in Health and safety at work because of the significant number of accidents at work that occur in Spain and that are related to the contracting out phenomena.

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Sweden

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The answers to this questionnaire are based on the assumption that the concept of “outsourcing” is something else than the concept of transfers of undertakings.

1. **Concept and basis**

   The concept of “outsourcing” is not legally defined.

   The term “outsourcing” is frequently used journalistically and in professional language in relation to situations when an undertaking decides to buy production or services from an outside body instead of producing or handling matters itself.

   The Swedish legislation contains no provisions on “outsourcing”. There may be provisions in collective agreements, but we are not able to give examples on this.

   The recourse to outsourcing is not prohibited or specifically restricted, with the exception for some examples in the public sector.
2. **Decisions on outsourcing**

General provisions on the right to information and negotiation in the Employment (CO-Determination in the Workplace) Act are applicable to the phase preceding the making of a decision on outsourcing. The essence of these provisions is an obligation for the employer to inform and negotiate with the employees organisation before he takes the decision. If these provisions are infringed the employer can be liable for damages.

In the Act there is also an explicit provision obliging the employer, before allowing someone who is not an employee of the employer to perform work on his behalf or in his business, to inform and negotiate with the employees organisation. If, after negotiations have been carried out, the employees organisation declares that the measures which the employer intends to adopt may be deemed to violate legislative provisions or the collective bargaining agreement or otherwise contravene generally accepted practices within the parties area of agreement, such measures may not be adopted or implemented by the employer. If this provision is infringed the employer can be liable for damages.

There is no special provision in the legislation giving employees organisations a right to receive information on the conditions of the workers at the firm to which work is proposed to be outsourced.

3. **The position of employees**

Employees that are involved in functions that are being outsourced have no legal right to have their employment relationships transferred to the recipient service provider. There are however in some collective agreements provisions aiming at protecting the employees that are affected by an outsourcing decision. For instance such provisions can give the employees a priority for employment with the recipient service provider and, if they will be employed, have a right to keep their level of salary.

If the worker remains in employment with the outsourcing employer he or she can be dismissed for business reasons.

For the employees who remain with the outsourcing employer the general law rules on security of employment are applicable. That means the employer must have objective grounds for a dismissal. Dismissal occasioned by redundancy is generally accepted as an objective ground. When making dismissals due to redundancy the employer also have to follow law rules (or corresponding rules in collective agreements which can differ from the law rules) concerning the order of priority of dismissals. The principal law rule is that the order in which employees are to be dismissed is to be determined according to each employee’s total period of employment with the employer. If the employer has several production units, the order of dismissal shall be determined separately within each unit. And if the employer is bound by a collective agreement, a special order of dismissal shall be established for each agreement sector. The employees that are affected by a decision on outsourcing thus not per se are those who are redundant; the selection of whom to dismiss as redundant has to be made on a broader basis.

If the outsourcing complies with the conditions for a transfer of an undertaking then the employments of the affected employees will automatically be transferred to the transferee. However the employee, according to an explicit law provision, have the
right to refuse to have his or hers employment relationship transferred. In such a case the employee can be dismissed by the outsourcing employer on the same conditions and in accordance with the same rules as described above.

4. Terms and conditions at the recipient

If outsourcers employees enter into employment with the recipient firm they are subject to the terms and conditions that applies at or is offered by the recipient. If both employers belong to the same group of enterprises the employee however may count the time of service with the former employer when the period of service with the subsequent employer is to be calculated.

It could make a difference if the recipient firm is bound by a collective agreement (see the answer above under 3, the first paragraph).

The outsourcer’s collective agreement will not, as such, apply to employees who are employed by the recipient firm.

The recipient is not legally bound by the collective agreement by virtue of taking over the operations being outsourced (see however the answer below).

The employees and trade unions at the outsourcer do not have a right to receive information on the terms and conditions of workers at the recipient firm after the outsourcing has taken place.

If the outsourcing fulfils the conditions for a transfer of undertaking the principal rule is that the terms and conditions for the affected employees will be the same at the transferee as at the transferor. You can describe what will apply in this respect with the following four typical examples.

- If neither employer is bound by a collective agreement the terms and conditions follow each employee’s individual contract of employment which will automatically be transferred to the new employer.
- If both employers are bound by the same collective agreement the transferee has to apply the agreement also regarding the transferred employees.
- If the transferor is bound by a collective agreement applicable to the affected employees while the transferee is not bound by such an agreement, the transferor’s agreement will apply in relevant parts at the transferee.
- The situation could also be that the employers are bound by different collective agreements, each separately applicable regarding the affected employees. The transferee will then not be bound by the transferor’s agreement. Due to a specific law rule he is nevertheless obliged to apply the conditions in the transferor’s agreement on the transferred employees. This obligation lasts one year if the transferor’s agreement does not expire before that or a new collective agreement regarding the transferred staff has been negotiated.

5. Offshore outsourcing

As already said there is no Swedish legislation on outsourcing apart from the rules on information and consultation before a decision on outsourcing and the rules concerning transfer of an undertaking. There are no specific rules concerning outsourcing of work to other countries.
As far as we know there are no main legal problems, especially not from the courts point of view.

6. **Factual aspects and considerations**

We do not have access to any statistics on how frequent the use of outsourcing is or in which sectors outsourcing is mainly used.

We do not know if the terms and conditions of employment in recipient firms are generally less favourable. If the work is done at a recipient firm in Sweden the conditions are dependent of if the employer is bound by a collective agreement and if so what collective agreement that is applicable. If it is an offshore outsourcing one has to assume that the conditions are less favourable.

We do not know what effects outsourcing has had on the unions.

Of course the issue of outsourcing is being debated, especially offshore outsourcing as one important part of the debate of the globalisation

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**United Kingdom**

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1. Concept and basis

- Is “outsourcing” a legally defined concept and, if so, on what ground (statute law, case law, etc.)?

- To the extent the concept is being used, on one ground or another (including professional language), what does it encompass (assuming that it is to be distinguished from business reorganization or restructuring in a general sense and from “privatization”)?

- What body of law (if any) is primarily important with regard to outsourcing in a labour law context (statutory law(s), regulations, collective agreements, case law)?

- Is recourse to outsourcing in any way prohibited or specifically restricted (beyond procedures, legal effects, etc., such as are the subject of the ensuing questions)?

The term “outsourcing” is not found as a term of art in United Kingdom statute or in any of the regulations governing this field of activities.

Up until 2006, the activity described as “outsourcing” was governed by the Transfer of Undertakings (Protection of Employment) Regulations 1981 (as amended) which purported to implement the EU Directive on acquired rights, as amended [Directive 77/187/EEC, as amended by Directive 98/50 EC]. Since the adoption of the consolidated EU arrangements in Directive 2001/23/EC, the United Kingdom government has now enacted fresh Regulations –
notwithstanding a five-year delay by reference to the due date for implementation.

It should be borne in mind that the approach to the use of collective agreements in the United Kingdom does not normally entail legally enforceable obligations being created, even if matters related to “outsourcing” were to be included in agreements made between an employer and a trade union. In consequence, such instruments are unlikely to emerge as a significant source of regulation except in the most unusual circumstances.

There has been a well developed body of case-law concerning the operation of the pre-2006 Regulations, also involving references to the ECJ on a number of occasions. The normal manner in which issues arise in this area is during the course of proceedings before the Employment Tribunals, or in the course of appeals from those bodies to the Employment Appeals Tribunal, the Court of Appeal, or the House of Lords.

United Kingdom regulation in this field now encompasses:

(i) “relevant transfers” of the kind which have been well established by the 1977 Directive, and defined by the United Kingdom Regulations as “a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity”.

(ii) what is described as any “service provision change”, satisfying a new definition which would appear to go beyond the strict scope of the EU Directive. That definition of “service provision change” covers three separate situations, of which only the first relates to what is commonly recognised as ”outsourcing”.

The three situations are where: (i) activities cease to be carried out by a person (“a client”) on his own behalf and are carried out instead by another person on the client's behalf (“a contractor”); (ii) activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person (“a subsequent contractor”) on the client's behalf; or (iii) activities cease to be carried out by a contractor or a subsequent contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf.

In order for any such situation to fall within the regulatory framework of the 2006 provisions, it is also necessary that (a) immediately before the service provision change, (i) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client; (ii) the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and (b) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use.

The governing provisions are now [with effect from 6 April 2006] to be found in the Transfer of Undertakings (Protection of Employment) Regulations 2006, as amended (to take account of certain technical problems) by the the Transfer of Undertakings (Protection of Employment) (Consequential Amendments)
Regulations 2006 [effective from 1 October 2006]. The statutory instruments have been supplemented by updated Guidance issued in March 2007 by the Department of Trade and Industry, under the title of “Employment Rights on the Transfer of an Undertaking: A Guide to the 2006 TUPE Regulations for Employees, Employers and Representatives”.

As a general rule, there is no prohibition or specific restriction upon outsourcing as an activity. The regulatory impact is limited to the designated procedures and employment protection effects which follow from such activity.

2. Decisions on outsourcing

- Do rules on information/consultation/co-determination apply to the phase preceding the making of a decision on outsourcing? If so, briefly state the substantive content of the rules, their legal basis, possible coordination problems between different sets of rules, as the case may be, and the effects of infringements of such rules. A particular point here is whether employees (trade unions) at the prospective outsourcer have a right to receive information on the conditions of the workers at the firm to which work is proposed to be outsourced.

Rules on the first two of these matters apply in line with the relevant provisions established in the EU Directive. Indeed, there has been substantial development of new frameworks for information and consultation in the United Kingdom, reflecting a combination of influences from the level of the EU.

The United Kingdom does not operate a system of “co-determination” in the German or Continental Europe sense. Instead, the traditional collective bargaining system has proceeded on the basis of what Allan Flanders described in 1968 as “joint regulation”, where the final decision-making remains in the hands of the employer.

In relation to information, the transferor employer must provide the new employer with a specified set of information intended to assist him to understand the rights, duties and obligations in relation to those employees who will be transferred.

The information in question is (i) the identity of the employees who will transfer; (ii) the age of those employees; (iii) information contained in the “statements of employment particulars” for those employees; (iv) information relating to any collective agreements which apply to those employees; (v) instances of any disciplinary action within the preceding two years taken by the transferor in respect of those employees in circumstances where United Kingdom domestic statutory dispute resolution procedures apply; (vi) instances of any grievances raised by those employees within the preceding two years in circumstances where the statutory dispute resolution procedures apply; and (vii) instances of any legal actions taken by those employees against the transferor in the previous two years, and instances of potential legal actions which may be brought by those employees where the transferor has reasonable grounds to believe such actions might occur.

If any of the specified information changes between the time when it is initially provided to the new employer and the completion of the transfer, then the transferor is required to give the new employer written notification of those changes.
In respect of consultation, arrangements have been introduced for the United Kingdom in the wake of the 1994 ECJ judgment in Commission v United Kingdom, and these are now to be found in Regulations 13 – 16 of the 2006 TUPE Regulations. It should be noted that the consultation arrangements are not confined to trade unions – with complementary arrangements to ensure representation being required where the necessary “employee representatives” are not present by reason of trade unionised activity.

Particular note may be taken of the provisions in Regulation 13(1), which make it clear that duties of information and consultation are owed in relation to “affected employees”, where “references to affected employees, in relation to a relevant transfer, are to any employees of the transferor or the transferee (whether or not assigned to the organised grouping of resources or employees that is the subject of a relevant transfer) who may be affected by the transfer or may be affected by measures taken in connection with it; and references to the employer shall be construed accordingly”.

3. The position of employees

- Do employees that are affected (involved in functions that are being outsourced) have a right (and obligation) to have their employment relationships transferred to the recipient service provider (the transferee)?

- If yes, do the employees also have right to refuse to have their employment relationships transferred and, in that case, a right to maintain their employment relationships with the outsourcing employer? If so, what rules on notices, time limits, etc., apply?

- If, in a case as above, a worker chooses to remain in employment with the outsourcing employer, can he be dismissed (for business reasons), and/or do special protections apply?

- If the employees who are affected do not have the right to transfer to the recipient, what is their position with the outsourcing employer? Does dismissal protection apply? Are the affected employees per se those who are redundant, or must the selection of whom to dismiss as redundant be made on a broader basis?

The general principle in relation to situations which fall within the United Kingdom’s 2006 TUPE Regulations is that, in line with the purpose of the EU Directive, the employment relationships transfer to the transferee in their entirety.

The employees affected by the transfer have a right to refuse to have their employment relationships transferred, but this will not result in maintenance of their employment relationship with the outsourcing employer. The United Kingdom, in an earlier amendment of the former TUPE Regulations, implemented the effect of the ECJ’s 1993 decision in Katsikas v Konstantinidis, which left the situation to the discretion of individual Member States, in a manner highly unfavourable to the objecting employee. The position has been confirmed in Regulation 4 of the 2006 TUPE Regulations.

Thus, Regulation 4(1) provides the normal rule that, “Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and
assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee”.

Picking up on the exception indicated at the outset of Regulation 4(1), Regulation 4(7) provides that the normal rule “shall not operate to transfer the contract of employment and the rights, powers, duties and liabilities under or in connection with it of an employee who informs the transferor or the transferee that he objects to becoming employed by the transferee”.

Regulation 4(8) then goes on to provide that, except in two designated situations, “where an employee so objects, the relevant transfer shall operate so as to terminate his contract of employment with the transferor but he shall not be treated, for any purpose, as having been dismissed by the transferor”.

Only in one of the designated situations [set out in Regulation 4(9) and 4(11)] will the employee be able to invoke what otherwise would have been the normal regime of employment protection under the United Kingdom’s framework relating to “unfair dismissal”. The first possibility is where “a relevant transfer involves or would involve a substantial change in working conditions to the material detriment of a person whose contract of employment is or would be transferred” – in those circumstances, “such an employee may treat the contract of employment as having been terminated, and the employee shall be treated for any purpose as having been dismissed by the employer”. The second situation operates in respect of “any right of an employee arising apart from these Regulations to terminate his contract of employment without notice in acceptance of a repudiatory breach of contract by his employer” – so-called “constructive dismissal”.

It follows from the wording of the Regulation in respect of the first situation that liability for any “unfair dismissal” will be that of the transferor employer. In relation to the second situation, the 2000 Court of Appeal case of Humphreys v University of Oxford, decided under earlier, but equivalent provisions, makes it clear that liability in such a situation, too, will remain with the transferor employer.

It should be noted that, where there is a proposed transfer with employment available in the transferee enterprise, there will not normally be any question of redundancy, since there would not be a so-called “redundancy situation” as defined in the United Kingdom’s Employment Rights Act 1996. This means that not only will there be no question of a State “redundancy payment” entitlement, but there will also be no prospect of a successful “unfair dismissal” claim being brought by reference to a dismissal by reason of “redundancy” for the purposes of the Employment Rights Act.

It should also be noted that, in order to succeed with any claim relying upon a so-called “constructive dismissal”, the claimant will have to establish that, in the course of setting up the proposed transfer, the transferor has committed a repudiatory breach of the contract of employment. The Humphreys case makes it clear that this will leave open possible claims by reference both to the Common Law of the contract of employment and under the complementary statutory regime providing protection against “unfair dismissal”.


4. Terms and conditions at the recipient

- If outsourcer employees transfer to or otherwise enter into employment with the recipient firm, will they maintain the terms and conditions they had at the outsourcer, or are they subject to what applies at or is offered by the recipient?
- Does it make a difference in this respect if the terms and conditions are set in a collective agreement?
- If the outsourcer is bound by a collective agreement, will that agreement (or relevant parts thereof) apply as such to employees who transferred to the recipient firm?
- Is the recipient firm (also) legally bound by the collective agreement by virtue of taking over the operations being outsourced? Is there a difference in this regard between firm-specific collective agreements (concluded directly with the individual firm) and collective agreements concluded at a higher level? If bound as above, can the recipient firm nonetheless oppose or denounce being bound, and what procedures apply if so? If the recipient firm is already bound by a different collective agreement for the same kind of work, how is the conflict then resolved?
- Do employees (trade unions) at the outsourcer have a right to receive information on the terms and conditions of workers at the recipient firm after the outsourcing has taken place?

The general rule is that the terms and conditions of transferred workers should be the same as those which applied in relation to the transferor employer. Thus, under the pre-2006 rules in force for the United Kingdom, the courts and tribunals sought loyally to apply the developing analyses proclaimed by the ECJ – particularly under the case-law of Foreningen af Arbejdsledere I Danmark v Daddy’s Dance Hall, Rask v ISS Kantineservice A/S, and the two Crédit Suisse First Boston (Europe) Ltd cases (Padiachy and Lister). Under the 2006 TUPE Regulations, there has been an attempt to codify the case-law, and to clarify the situations in which changes to terms and conditions will, or will not, be permitted.

The current general principle is set out in Regulation 4(4), which provides that, “in respect of a contract of employment that is, or will be, transferred … any purported variation of the contract shall be void if the sole or principal reason for the variation is (a) the transfer itself; or (b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce”. These, then, are prohibited changes.

However, that is subject to Regulation 4(5), which states that the general principle “shall not prevent the employer and his employee, whose contract of employment is, or will be, transferred … from agreeing a variation of that contract if the sole or principal reason for the variation is (a) a reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce; or (b) a reason unconnected with the transfer”.

It can thus be seen that there is very little scope for the transferee enterprise to harmonise the terms and conditions of incoming transferred workers with the terms and conditions of existing workers, where such harmonisation would
involve more than minor adjustments to those terms and conditions. The United Kingdom government has been concerned about this limitation upon the freedom of action of the transferee employer. However, during the course of consultation over the eventual 2006 TUPE Regulations, the government eventually expressed the view that, notwithstanding a desire to provide more flexibility to the acquiring employer, it was not felt, in the light of the case-law of the ECJ on the relevant components of the EU Directive, that this could be achieved while acting compatibly with the Directive.

One issue which remains unresolved in the United Kingdom is whether varied terms and conditions which are more favourable to the worker could be enforced, notwithstanding the apparent “void” quality accorded to variations of terms in the context of an outsourcing which falls within the transfer provisions. Current recent United Kingdom case-law (albeit only at the level of the Employment Appeals Tribunal), purporting to derive its validity from an absence of any suggestion to the contrary in the ECJ cases of Foreningen af Arbejdsledere i Danmark v Daddy’s Dance Hall and Crédit Suisse First Boston (Europe) Ltd v Lister, suggests that this might be possible – although a variety of problems remain to be addressed if that proposition is to prevail. However, it may be noted that the Guidance on the 2006 TUPE Regulations, issued by the Department of Trade and Industry, now proclaims that such beneficial variations are not prohibited by the regulations – that Guidance having been amended in March 2007 to reflect the position adopted by the Employment Appeals Tribunal.

In relation to matters set out in collective agreements, it has to be borne in mind that the legal treatment of the collective agreement under the Common Law makes this a less significant distinction than in many Continental European legal systems. Consequently, even though there is mention of collectively agreed arrangements in the United Kingdom regulations, this, to some extent, pays “lip service” to the original wording of the EU Directive, and tends not to give rise to issues outside the normal scope of operation of the contract of employment as an instrument between an employer and an individual employee. Indeed, Regulation 5 of the 2006 instrument, which is headed “Effect of relevant transfer on collective agreements”, has a distinctly “strange” sense upon reading, while the various caveats set out in that provision, coupled with a reluctance on the parts of trade unions to make their agreements subject to legal enforceability, make it difficult to envisage where and when it may become particularly relevant in the context of United Kingdom outsourcing.

Information and consultation in relation to terms and conditions at the recipient firm are, on the face of the regulations, limited to matters prior to the transfer, as is clear from Regulation 13, which is concerned with the disclosure of relevant information “long enough before a relevant transfer to enable the employer of any affected employees to consult the appropriate representatives of any affected employees”, and makes particular reference (if the employer is the transferor) to “the measures, in connection with the transfer, which he envisages the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer”.
5. Offshore outsourcing

- Do the rules applicable to outsourcing domestically also apply to outsourcing of work to other countries? What, if any, are the main differences?

- What are otherwise the main legal problems involved in offshore outsourcing and to what extent have such outsourcing and accompanying problems appeared in practice?

In principle, it would appear that any outsourcing which falls within the 2006 TUPE Regulations would be subject to the legal regulatory regime set out there, irrespective of whether the outsourcing is to another employer in the United Kingdom, a new employer within the EU (i.e. where the EU Directive will be applicable), or a new employer outside the EU. Indeed, given the high volume of outsourcing that takes place to locations such as India, this would appear to be of major significance – although it has to be recognised that so-called “offshoring” of activities will normally involve cessation of employment opportunities in the United Kingdom, and their replacement with equivalent work performed locally by non-UK national workers.

The impact will thus be felt in respect of workers in the United Kingdom who are put out of employment by reason of a transfer of activities which are no longer to be performed domestically.

Problems arising in this context relate to the amenability of an off-shore transferee to the jurisdiction of the regulatory regime operating in the United Kingdom, as well as to the practical problems and transaction costs associated with instigating enforcement proceedings against such a party.

6. Factual aspects and considerations

To the extent such information can be gleaned without undue effort:

- How frequent and extensive is the use of outsourcing? How many undertakings and employees are involved (e.g., annually)?

- In which sectors (public, private), branches and industries and for what kinds of work is outsourcing being (mainly) used?

- Are the terms and conditions of employment for workers in recipient firms generally less favourable than those for workers at the outsourcers as far as the same job functions are concerned?

- What influence does outsourcing have on the unionized work force? Is trade union density generally lower in recipient firms than in outsourcer undertakings? Has outsourcing resulted in a decline in union density overall and/or to a weakening of the position of trade unions at the enterprise level or higher levels?

- Is outsourcing as a labour law or labour market policy issue being debated, and if so, what are the main positions and arguments made?

The United Kingdom demonstrates a significantly higher level of outsourcing activity than any other economy in Europe. Thus, in the first half of 2006 (a year in which this activity was showing a marked decline in most of Continental Europe), it has been reported that United Kingdom companies had signed outsourcing contracts totalling over €5.2 billion, up 9% from €4.8 billion at the
same stage in the previous year. By the same stage, the total value of contracts signed in Continental (€4.8 billion) was some 30% lower than the equivalent figure at the same time the year before.

Taking a global perspective, at the same time, the United Kingdom accounted for 17.2% of the value of contracts signed, Germany 6.6%, and the Netherlands 2.6%, with no other country in Europe representing over 2% of the global market.

The strength of the United Kingdom market was also demonstrated by the growth in business process outsourcing (BPO) by United Kingdom companies. Thus, the United Kingdom accounted for over a quarter (27%) of the total value of business process contracts signed worldwide in the first half of 2006, up from 19% in 2005 and 23% in both 2004 and 2003. The next largest user of BPO in Europe was Germany, representing 3.8% of the value of contracts signed globally in the first half of that year.

However, in relation to reliable research data, the position is remarkably unclear. Neither the official Labour Force Survey, which is the fundamental source of data on the United Kingdom labour market, nor the Workforce Employment Relations Survey (WERS), which provides a 5-yearly detailed evaluation of trends in the labour market and employment relations, furnishes statistics which are easy to disaggregate in order to provide helpful responses to the specific questions posed.

According to evidence given by the Engineering Employers’ Federation (EEF) to a United Kingdom Treasury Select Committee in January 2005, “Most prevalent was outsourcing the manufacture of parts and components abroad with 40% of companies having done this and a further 20% planning to do so or considering it. Over a third of companies have looked closer to home for outsourcing opportunities and have sub-contracted some manufacturing to another UK company.” However, apart from limited internal surveys by bodies such as the EEF, there is little data available in order to provide substance to these propositions about the domestic scale and impact of outsourcing in the United Kingdom.

So far as data on the extent and nature of offshoring is concerned, the situation is just as unclear. Thus, citing an OECD assessment of the possible impact of offshoring on the workforces of developed nations, the United Kingdom’s TUC maintained in its 2003 report “Labour Market Flexibility: Building a Modern Labour Market” that there are no reliable data on the scale of the problem. A 2004 discussion paper issued by the United Kingdom government’s Department of Trade and Industry similarly stated that “… there are no official figures on international job movements which would enable us to give a definitive figure as to the number of service related jobs moving in and out of the UK”. There is nothing to suggest that the informational position has improved since then.
1. Concept and basis

1.1 Is outsourcing a legally defined concept and, if so, on what ground (statute law, case law, etc.)?

1.1.1 Outsourcing is defined in Venezuela as the transference of the third party’s activities to a contracting company that shall benefit from the service. There are 3 types of outsourcing activities in the National Legislation: contracting company and an intermediary in Article 55 of the Organic Labour Law, 23rd Article of the current laws and the Temporary Work Companies considered from Article 23 on of the repealed Organic Labour Law:

1.1.1.1 Contracting companies: They provide services non inherent to the company that benefits from the service which, under such circumstances, shall only answer to the workers for the maintenance of the same working conditions of their own workers (Articles 50, 57 and 58 of the Organic Law on Work Prevention, Conditions and Environment – LOPCYMAT in Spanish) with the aggravating circumstance that the responsibility for accidents or professional illness, which was supportive in the past, is now direct for the LOPCYMAT, but it is also an objective responsibility even though it is subjective for the direct employer.

1.1.1.2 Intermediaries: Contractors who develop an activity inherent to the main function of the contracting or beneficiary company; it is also stated as intermediary an external contracting company which obtains its main income from the contracting or beneficiary company. In this case, there is a supportive responsibility in terms of labour rights and indemnities and a direct responsibility in terms of illness or labour or professional accidents (Articles 50, 57 and 58 of the Organic Law on Work Prevention, Conditions and Environment – LOPCYMAT in Spanish and 55, 23 and on of the current Organic Labour Law).

1.1.1.3 Temporary Work Companies: (Article 23 and on of the repealed Organic Labour Law). At first, contractors or beneficiaries misused this kind of outsourcing by not fulfilling the origin requirements of this kind of companies and the Temporary Work Companies (ETT in Spanish) also failed to supply permanent personnel both in inherent areas and areas unconnected with main activities of the beneficiary. Therefore, the Government decided to compare the Temporary Work Companies with intermediary companies, eliminating the competitive advantage of this kind of company now obsolete.

1.2 To the extent the concept is being used, on one ground or another (including professional language), what does it encompass (assuming that it is to be distinguished from business reorganization or restructuring in a general sense and from “privatization”)?

1.2.1 At first, outsourcing was defined as “contractor” to which the non-essential activities are transferred. However, our legislation allowed the contractor to perform functions connected or inherent to the contracting company which generated the change
of the outsourcing definition to the one we embrace now: the hiring of proper services through the process of business externalization or cession of certain areas of a company. In the industrial, commercial and professional language, outsourcing is understood as the strategy and decision of a company to turn to the services of an external company in order to develop an essential (the intermediary) or non-essential (the contractor) function.

1.2.2 Geographical functional criteria, or location criteria, is related, first, to whether the company is inside or outside the country and, second, to whether the contractor operates or not in the facilities of the contractor or beneficiary company.

1.2.3 Control functional criteria is related to whether the contracting or beneficiary company controls, partially or totally, or not the contractor.

1.2.4 Economic functional criteria which refers to whether the contractor company has established the contracting or beneficiary company as the main income source.

These three criteria help us establish a difference between the contractor and the intermediary.

1.3 What body of law (if any) is primarily important with regard to outsourcing in a labour law context (statutory law(s), regulations, collective agreements, case law)?

1.3.1 In this sense, we consider as relevant the differentiation established in the Organic Labour Law referring to contractors and intermediary companies, as well as the definition of the beneficiary of a service offered by an intermediary company and its role as an employer, namely:

Organic Labour Law – Article 49. The employer is a natural person or legal entity that, in his/her name and account, runs a company, establishment, exploitation or work or any nature or relevance and employs any number of workers. When the exploitation is made through an intermediary, both the latter and the entity that benefit from such exploitation are considerer employers.

Rules of the Organic Labour Law. Article 23 – Contractors (Inherence and connection): It shall be understood that the works and services executed by the contractor are inherent and framed in the same type of activity as the contracting company when they permanently constitute an indispensable phase of the productive process developed by the contracting company. Therefore, in case of non-fulfilment of the requirements by any of the parties involved, it would not possible to accomplish the objective.

It shall be understood that the works and services executed by the contractor are connected with the activities developed by the contracting company, when:

a) They are closely connected,

b) Its execution or development is a consequence of its activities; and

c) They include a permanent character.

Sole Paragraph (Presumption): When a contractor often executes works and services for a contracting company in a volume that constitutes its main income source, the may be presumed inherent or connected with their own activity until the contrary is proven.

1.4 Is recourse to outsourcing in any way prohibited or specifically restricted (beyond procedures, legal effects, etc., such as are the subject of the ensuing questions)?

1.4.1 Outsourcing, as an image of Temporary Work Company, has not been specifically forbidden but when it was compared with the intermediary, the industries and
establishments lost interest in it. The Temporary Work Companies had to fulfill requirements and special dispositions, such as register in a Temporary Work Company Registry, to offer a sum of money to the Ministry of Labour to guarantee the rights of their workers, to have contracts approved by the Ministry of Labour and, specially, the service offered by these companies should be limited to the personnel supply to cover temporary vacancies produced by sick leaves, vacations, permissions or holidays.

2. Decisions on outsourcing

2.1 Do rules on information/consultation/co-determination apply to the phase preceding the making of a decision on outsourcing? If so, briefly state the substantive content of the rules, their legal basis, possible coordination problems between different sets of rules, as the case may be, and the effects of infringements of such rules. A particular point here is whether employees (trade unions) at the prospective outsourcer have a right to receive information on the conditions of the workers at the firm to which work is proposed to be outsourced.

2.1.1 There are no legal-general rules about information, consultation or co-determination before the hiring of an outsourcing company, except such hiring implies the change of work conditions of direct employees of the company contracting or benefiting from the outsourcing. If this is the case, the co-determination is required according to what is established in Article 2 of the Presidential Decree of Labour Permanence.

2.1.2 There are particular cases in expansion in which the collective agreements establish limitations, requirements and consequences for outsourcing hiring.

2.1.3 Trade unions of the outsourcing beneficiary have the right to know the work conditions of the workers. If these conditions are not better then the own conditions and the contractor is framed on one of the situations explained above that define it as an intermediary, its workers could have the right to the same work conditions than the contracting company or beneficiary’s workers as long as those conditions are in fact better than their own.

3. The position of employees

3.1 Do employees that are affected (involved in functions that are being outsourced) have a right (and obligation) to have their employment relationships transferred to the recipient service provider (the transferee)?

3.1.1 No. At first, no outsourcing company can execute works that are being developed by other workers at that time, except in the case of prior agreement with the latter. If that is not the case, there could be a decrease in the work conditions, except for workers who are not protected by absolute labour permanence, who may be dismissed from their posts through the unilateral will of the employer as long as the latter pays the indemnity established in Article 25 of the Organic Labour Law.

3.1.2 If the answer is affirmative,

3.2 If yes, do the employees also have a right to refuse to have their employment relationships transferred and, in that case, a right to maintain their employment relationships with the outsourcing employer? If so, what rules on notices, time limits, etc., apply?

3.2.1 If the outsourcing company comes in to substitute the original employer in the execution of the works, the case would be a substitution of employer where the worker
protected by absolute labour permanence could refuse to be transferred, while the employee protected by relative permanence could consider that he/she has been dismissed unjustifiably and claim the indemnity payment mentioned above. To do this, he/she has a 30-day period of time according to Article 192 of the Organic Labour Law. It is worth mentioning that this is a very unusual hypothesis in outsourcing so this is an absolutely conjectural exercise.

3.3 If, in a case as above, a worker chooses to remain in employment with the outsourcing employer, can he be dismissed (for business reasons), and/or do special protections apply?

3.3.1 If the employee has absolute permanence, the employer should address to a labour authority to justify the dismissal. In case the permanence is relative, the employer only needs to pay for the indemnity, except in the case the number of employees equals or exceeds 10% of the payroll. In this case, the employer could be sanctioned for massive dismissals and warrant, unless there was a prior procedure that justifies this act with economic or technological reasons.

3.4 If the employees who are affected do not have the right to transfer to the recipient, what is their position with the outsourcing employer? Does dismissal protection apply? Are the affected employees per se those who are redundant, or must the selection of whom to dismiss as redundant be made on a broader basis?

3.4.1 This question is answered in question 3.3 (see question 3.3).

4. Terms and conditions at the recipient

4.1 If outsourcer employees transfer to or otherwise enter into employment with the recipient firm, will they maintain the terms and conditions they had at the outsourcer, or are they subject to what applies at or is offered by the recipient?

4.1.1 There is not written rule that bounds this case. We are aware of what the law case may say about this issue. However, we consider that basing on the constitutional precedence principle of reality over form, the worker under such circumstances should enjoy the solidarity regime during the transfer and maintain his/her labour rights.

4.2 Does it make a difference in this respect if the terms and conditions are set in a collective agreement?

4.2.1 If such issue was established in a Collective Agreement, such agreement, as a source of Law in our legal ordinance, should rule everything related to the issue addressed.

4.3 If the outsourcer is bound by a collective agreement, will that agreement (or relevant parts thereof) apply as such to employees who transferred to the recipient firm?

4.3.1 By constitutional order, the collective agreements of a company should be applied to all its workers, unionized or not, who have been offering their services to the company since their contract was signed, except in the case of issues admitted in the Law that cover personal and direct employees and Human Resources employees who had participated in the negotiation as long as this was determined in the collective agreement.

4.4 Is the recipient firm (also) legally bound by the collective agreement by virtue of taking over the operations being outsourced? Is there a difference in this regard between firm-specific collective agreements (concluded directly with the individual firm) and collective agreements concluded at a higher level? If bound as above, can the recipient
firm nonetheless oppose or denounce being bound, and what procedures apply if so? If the recipient firm is already bound by a different collective agreement for the same kind of work, how is the conflict then resolved?

4.4.1 The beneficiary company’s worker shall receive the benefits of his/her own collective agreement (if such exists). If the collective agreement does not exist, then the law shall be applied.

4.4.2 The outsourcing company’s worker, if the company qualifies as intermediary, shall receive the same benefits than the workers from the beneficiary’s collective agreement as long as it is more favourable that his/her own benefits.

4.4.3 The outsourcing company’s worker, if the company qualifies as a contractor and not as an intermediary, shall not have the right to receive the benefits from the collective agreement of the contracting company.

4.5 Do employees (trade unions) at the outsourcer have a right to receive information on the terms and conditions of workers at the recipient firm after the outsourcing has taken place?

4.5.5 Yes, according to Articles 50, 55, 119 numeral 24 of the Organic Law on Work Prevention, Conditions and Environment – LOPCYMAT in Spanish)

5. Offshore outsourcing

5.1 Do the rules applicable to outsourcing domestically also apply to outsourcing of work to other countries? What, is any, are the main differences?

5.1.1 In the case of outsourcing workers, they have the territorial protection included in the Organic Labour Law in the country as long as they work in Venezuela. Therefore, outsourcing is regulated by the Venezuelan legislations in Venezuela but such legislations change and do not apply for foreign countries or for works developed abroad.

5.2 What are otherwise the main legal problems involved in offshore outsourcing and to what extent have such outsourcing and accompanying problems appeared in practice?

5.2.1 The trade union problem because trade unions tend to believe that outsourcing is hired in order to weaken trade unions. Some trade unions have recently unionized outsourcing workers in the case of intermediaries that are in charge of personnel supply.

5.2.2 For companies, outsourcing, even if it dilutes labour risks in conflict terms, it also affects the quality of labour life because of the lack of commitment and responsibility of outsourcing workers, which also contributes to the diminishment of the company both for material losses and productivity decrease.

6. Factual aspects and considerations

To the extent, such information can be gleaned without undue effort:

6.1 How frequent and extensive is the use of outsourcing? How many undertakings and employees are involved? (e.g. annually)

The frequency and extensiveness of the use is limited. There is no registration of how many undertakings and employees are involved.

6.2 In which sectors (public, private), branches and industries and for what kinds of work is outsourcing being (mainly) used?
6.2.1 In the public sector, outsourcing mainly takes care of oil and its derivatives, constructions and maintenance and heavy transportation.

6.2.2 In the private sector, the most demanded lately have been personnel administration, mechanic maintenance, recruitment and training.

6.2.3 In general, primary freight, transportation and distribution of raw material and finished products.

6.3 Are the terms and conditions of employment for workers in recipient firms generally less favourable than those for workers at the outsourcers as far as the same job functions are concerned?

6.3.1 In the empirical approach, we can notice that, in general, companies that receive or benefit from the outsourcing service are bigger and more stable. Therefore, their work conditions are better, especially in terms of labour life quality and non-wage economic benefits.

6.4 What influence does outsourcing have on the unionized work force? Is trade union density generally lower in recipient firms than in outsourcer undertakings?

6.4.1 In the empirical approach of this matter, we find an important rotation of outsourcing companies which makes even more difficult the trade union stabilization.

6.5 Has outsourcing resulted in a decline in union density overall and/or to a weakening of the position of trade unions at the enterprise level or higher levels?

6.5.1 So far, the effect has been quite neutral.

6.6 Is outsourcing as a labour law or labour market policy being debated, and if so, what are the main positions and arguments made?

6.6.1 In our opinion, outsourcing is a labour market policy with the purpose of adapting the domestic markets to the requirements of globalization with an obvious impact in the labour sector, creating situations that may be positive or negative depending on what strategy is used. The consequences could be a decrease of the work and retribution conditions or the total opposite. Unfortunately, if the criterion taken into consideration is related only to costs as it has been so far in Venezuela, the effect could be perverse and negative for workers, who will see their work conditions and stability affected despite the governmental measures.
Questionnaire on
Outsourcing

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Prefatory observations

The questions are intended as an outline and are thus indicative. They should be construed and adapted to accommodate specific traits of the individual national situation. However, it will be helpful if the general structure of the questionnaire can be maintained in the national reports.

For EU/EEA Member States a number of the issues addressed are also governed by EU/EEA law, in particular Directive 2001/23/EC on transfers of undertakings. There is no need in the national reports to expound on the general facets of EU/EEA law. The focus should, rather, be on domestic particularities concerning choices and approaches in transposition and application, in case law and otherwise, as the case may be.

Offshore outsourcing (offshoring) raises some particular problems, i.e., conflict of laws and jurisdictional issues. If offshore outsourcing is dealt with, such problems should be addressed briefly at the end of the report (item 5, below).

1. Concept and basis

- Is “outsourcing” a legally defined concept and, if so, on what ground (statute law, case law, etc.)?

- To the extent the concept is being used, on one ground or another (including professional language), what does it encompass (assuming that it is to be distinguished from business reorganization or restructuring in a general sense and from “privatization”)?

- What body of law (if any) is primarily important with regard to outsourcing in a labour law context (statutory law(s), regulations, collective agreements, case law)?

- Is recourse to outsourcing in any way prohibited or specifically restricted (beyond procedures, legal effects, etc., such as are the subject of the ensuing questions)?

2. Decisions on outsourcing

- Do rules on information/consultation/co-determination apply to the phase preceding the making of a decision on outsourcing? If so, briefly state the substantive content of the rules, their legal basis, possible coordination problems between different sets of rules, as the case may be, and the effects of infringements of such rules. A particular point here is whether employees (trade unions) at the prospective outsourcer have a right to receive information on the
conditions of the workers at the firm to which work is proposed to be outsourced.

3. The position of employees

- Do employees that are affected (involved in functions that are being outsourced) have a right (and obligation) to have their employment relationships transferred to the recipient service provider (the transferee)?
- If yes, do the employees also have right to refuse to have their employment relationships transferred and, in that case, a right to maintain their employment relationships with the outsourcing employer? If so, what rules on notices, time limits, etc., apply?
- If, in a case as above, a worker chooses to remain in employment with the outsourcing employer, can he be dismissed (for business reasons), and/or do special protections apply?
- If the employees who are affected do not have the right to transfer to the recipient, what is their position with the outsourcing employer? Does dismissal protection apply? Are the affected employees per se those who are redundant, or must the selection of whom to dismiss as redundant be made on a broader basis?

4. Terms and conditions at the recipient

- If outsourcer employees transfer to or otherwise enter into employment with the recipient firm, will they maintain the terms and conditions they had at the outsourcer, or are they subject to what applies at or is offered by the recipient?
- Does it make a difference in this respect if the terms and conditions are set in a collective agreement?
- If the outsourcer is bound by a collective agreement, will that agreement (or relevant parts thereof) apply as such to employees who transferred to the recipient firm?
- Is the recipient firm (also) legally bound by the collective agreement by virtue of taking over the operations being outsourced? Is there a difference in this regard between firm-specific collective agreements (concluded directly with the individual firm) and collective agreements concluded at a higher level? If bound as above, can the recipient firm nonetheless oppose or denounce being bound, and what procedures apply if so? If the recipient firm is already bound by a different collective agreement for the same kind of work, how is the conflict then resolved?
- Do employees (trade unions) at the outsourcer have a right to receive information on the terms and conditions of workers at the recipient firm after the outsourcing has taken place?

5. Offshore outsourcing

- Do the rules applicable to outsourcing domestically also apply to outsourcing of work to other countries? What, if any, are the main differences?
- What are otherwise the main legal problems involved in offshore outsourcing and to what extent have such outsourcing and accompanying problems appeared in practice?
6. **Factual aspects and considerations**

To the extent such information can be gleaned without undue effort:

- How frequent and extensive is the use of outsourcing? How many undertakings and employees are involved (e.g., annually)?

- In which sectors (public, private), branches and industries and for what kinds of work is outsourcing being (mainly) used?

- Are the terms and conditions of employment for workers in recipient firms generally less favourable than those for workers at the outsourcers as far as the same job functions are concerned?

- What influence does outsourcing have on the unionized work force? Is trade union density generally lower in recipient firms than in outsourcer undertakings? Has outsourcing resulted in a decline in union density overall and/or to a weakening of the position of trade unions at the enterprise level or higher levels?

- Is outsourcing as a labour law or labour market policy issue being debated, and if so, what are the main positions and arguments made?