Chapter 10
Employment Issues

General

Christian Bayart, Ilse Bosmans & Pieter De Koster*

1 INTRODUCTION

This chapter examines the employment law issues that should be considered in an outsourcing transaction. Outsourcing inevitably raises employment issues, as outsourcing is fundamentally part of a human resources (HR) strategy or of a business strategy with significant impact on HR. Indeed (first generation) outsourcing can be described as the externalization by an organization (the customer) of a business activity (tasks of services performed internally with its own assets and its own staff) to an external service supplier (often a professional specialized in that type of work). An outsourcing operation is referred to as ‘first generation outsourcing’ when an activity previously undertaken by the customer itself is transferred to a supplier. A ‘second generation outsourcing’ refers to a change of supplier after the expiry or termination of the first outsourcing contract. Lastly, ‘in-sourcing’ refers to the operation whereby a business activity returns in house after the termination of an outsourcing contract.

Outsourcing triggers a number of HR and employment law compliance issues. The main employment question is what will happen to the employees currently performing the work to be outsourced. The answer to this question can be influenced by several factors:

– A first factor being the legal aspect, namely the question of whether there is a transfer of the employees’ regime.

* Part of this chapter was co-written by Caroline Deiteren.
– A second factor being human resource considerations, e.g., what is the opinion and position of the customer’s employee representatives or trade unions, or what image (employer’s brand) does the customer want to have in the labour market?
– A third factor being commercial considerations. For example, in some cases there may be a commercial or operational need to maintain or transfer the majority of the employees concerned (e.g., because the supplier may not be able to find sufficiently qualified and skilled personnel in the labour market to provide the services to the customer).
– A fourth factor that may be relevant is the geographical factor. If, for example, a German company decides to outsource its IT services to a supplier located in India, it is unlikely that the employees will be transferred to India.

Moreover, these four factors will often have an influence on one another. For example, if the supplier decides, because of commercial considerations, that he wants to take over a part of the employees concerned, the legal factor may oblige him to take over all employees working in the business being outsourced.

The answer to the question of what will happen to the employees will thus be determined in the first place by what both parties (i.e., the customer and the supplier) want. In other words, the fate of the employees will be, to a large extent, determined by the commercial negotiations. However, the parties’ wishes are limited by their rights and obligations under the applicable legislation. The interaction between what parties want and what they are obliged to do means that the employment aspects of an outsourcing operation are complex and sensitive – complex, because of the rules on transfers of undertakings, and sensitive because of the business-critical nature of the operation and because it concerns people. It is thus important that the relevant parties thoroughly prepare for the commercial negotiations.

If the activity is outsourced to a supplier located in another country, the employee-related issues discussed in this section become even more complex. Some provisions of the customer’s local law will be difficult to apply to the employees that are relocated abroad. Moreover, discussions may arise as to whether or not the rules on transfer of undertaking of the country where the customer is located can have cross-border effects.

In this chapter, we will focus on the employment related rights and obligations of the customer and supplier in the context of an outsourcing transaction, or, in other words, on the legal boundaries of the parties’ playing field. A thorough analysis of employment related issues will of course largely depend on national (employment) legislation.
In the first section of this chapter, we will give an overview of the main points for attention and specific issues that must be examined for each jurisdiction involved in the outsourcing. In the second section, we will focus on one of these issues, namely the transfer of employees from the customer to the supplier and the rules that have been introduced in that respect in Europe. In the third and final section, we will highlight the country-specific points of attention for some European and non-European countries.

SECTION I MAIN EMPLOYMENT ISSUES IN AN OUTSOURCING TRANSACTION

In this first section, we will give an overview of the main employee-related points for attention and specific issues that must be examined for each jurisdiction involved in the outsourcing.

We will first indicate:

(1) what types of regimes exist across the world regarding the transfer of the employees from the customer to the supplier (see section 1.1 below); and

(2) whether the employees to be transferred in the context of an outsourcing can refuse to transfer to the supplier (see section 1.2 below).

We will then discuss the consequences of the transfer on the employees’ terms and conditions in general (see section 2.1 below) and on the employees’ collective terms and conditions (see section 2.2 below) and their occupational pension entitlements (see section 2.3 below) in particular.

Further, we will highlight the main advantages and disadvantages of a regime of automatic transfer of employees (see section 3 below) and briefly discuss two employee-related points of attention in an outsourcing, namely:

(1) the liabilities of parties relating to the past and future employment of the transferring employees (see section 4 below); and

(2) dismissal of employees in the context of an outsourcing (see section 5 below).

We will also discuss the role of the employee representative bodies in the context of an outsourcing transaction (see section 6 below).

Further, we will deal with the process of an outsourcing (i.e., the due diligence exercise and the contract negotiations) and we will list the main conflicting interests between a supplier and a customer and discuss some employee-related practical and commercial issues that have to be addressed during the contract negotiations (see section 7 below).
CHAPTER 10 § 1

After that, we will discuss the arrangements that must be agreed in relation to the expiry or termination of the services agreement (exit arrangements) and the fate of the employees in that context (see section 8 below).

Finally, we will give a schematic overview of the various employee-related topics that should be addressed in the outsourcing contract (or in the employee schedule to that contract) (see section 9 below).

1 TRANSFER OF EMPLOYEES

Most outsourcing operations will include, in addition to a transfer of assets, a transfer of employees. Indeed, the employees that formerly provided the service at the company (i.e., the customer) will often start working for the service provider to which the service is being outsourced. Although the employees concerned may in some cases continue to provide the same services at the offices of their previous employer, the outsourcing has an important impact on their situation, in particular because they will be employed by another employer and this change of employer may have an impact on their terms and conditions of employment.

The transfer of the employees is an important issue in an outsourcing transaction. The rules that apply in the various countries involved and the agreements that need to be included on this matter in the contractual documents need to be considered carefully.

It should be noted that this chapter only deals with issues related to persons who work in the outsourced business under an employment contract. Individuals working in the outsourced business under another status (e.g., as a self-employed contractor) are in principle not covered by any rules on employee protection. It is important to verify whether such individuals are working for the business and whether the supplier wants to take over their contract. In this respect, it must also be verified whether their contracts contain any clauses on outsourcing or transfer of undertaking.

1.1 TYPES OF TRANSFER REGIMES

A first important question will be which type of transfer of employees regime applies in the various countries involved. The major dividing line

1. Besides national legislation, any collective bargaining agreements that exist at inter-sector, sector or company level dealing with outsourcing and employees’ rights will need to be checked in this context.
between jurisdictions worldwide is whether the legal system of a particular jurisdiction provides for an automatic transfer regime or not.

1.1.1 Legal Systems That Provide for an Automatic Transfer of Employees

In some countries, the law provides for a regime of automatic transfer from the customer to the supplier of the employees that are working in the business that is being outsourced. This regime usually (but not always\(^2\)) applies only if the outsourcing operation constitutes a transfer of an undertaking or a part of an undertaking. The qualification of an outsourcing operation as a transfer of an undertaking or a part thereof is a complex legal issue. We will return to this later.

The automatic transfer of employees’ regime usually provides that all employees currently employed by the customer and working in the business that is being outsourced transfer by force of law to the supplier and are deemed employed by the supplier as soon as the outsourcing has been implemented. In most countries, this regime means that, in principle, the customer and the supplier cannot choose which employees transfer and which employees do not. If an employee is mainly working in the business that is being outsourced, he or she will automatically be transferred. National regulations and case law must be examined to determine whether or not an employee mainly works for the business.

In Europe, for example, the European Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (the Acquired Rights Directive) has introduced a regime of automatic transfer of employees. If the outsourcing operation constitutes a transfer of an undertaking or a part thereof, the transaction will trigger an automatic transfer of employees.

In section II of this chapter, we will discuss the rules on transfer of an undertaking or a part thereof and on employee transfer as laid down in the Acquired Rights Directive in more detail. These rules apply, in principle, in all countries of the European Economic Area (EEA), i.e., the countries of the European Union and Norway, Iceland and Liechtenstein. Most of those countries have further developed or supplemented certain aspects of these rules, or have provided for exceptions to the rules if permitted by the

\(^2\) In a very limited number of countries, specific legislation exists on the protection of employees in the event of an outsourcing as such (irrespective of whether the operation constitutes a transfer of undertaking).
Acquired Rights Directive. In section III of this chapter, the specific and additional rules of some European countries are included. Sometimes parties to an outsourcing transaction can influence whether the regime of automatic transfer of employees applies. In particular, the case law of the European Court of Justice on the difference between labour-intensive and capital-intensive sectors and the minimum conditions for a transfer of an undertaking in both sectors may provide parties in an outsourcing transaction (in some jurisdictions) with a certain margin to influence whether the regime of automatic transfer of employees will apply or not.

In principle, there is no need to explicitly describe the automatic transfer of employees in the outsourcing contract (as this happens by force of law). However, in practice, the parties do expressly include it in the contractual documents, in particular to avoid any discussions on whether the transfer of undertaking regime applies or not and on which employees are actually (mainly) employed by the business that is to be outsourced (i.e., which employees are ‘in scope’). The contractual documents also often provide for similar arrangements in case the automatic transfer regime does not apply.

1.1.2 Legal Systems That Do Not Provide for Automatic Transfer of Employees

In other countries, this system of automatic transfer does not exist, or only exists for a certain category of employees.

If no system of automatic transfer of employees exists, or if such a system exists but the conditions for its applicability are not fulfilled (e.g., if, in European countries, the outsourcing does not constitute a transfer of an undertaking or a part thereof), the most important factor (as described above), i.e., the legal factor, is no longer relevant. In such a case, the parties’ wishes regarding the employees become the most important factor, and those wishes are less restricted.

Parties may opt to transfer some or all of the employees working in the business that is to be outsourced. How this is practically structured will depend on what is feasible and common practice in the jurisdictions involved. In most countries, the employee will have to resign or be lawfully dismissed by the customer and the supplier will have to make an offer of employment to the employee concerned, which the employee can then decide whether to refuse or accept. In some countries, the supplier can, with the employee’s consent, take over its current employment contract from the customer (i.e., take over the employee’s acquired length of service and the employment contract’s existing terms and conditions).
If parties choose to not have employees transfer, the local rules on dismissal, and possibly also the rules on collective dismissal, must be applied and arrangements must be included in the outsourcing contract to address who must bear the costs of the dismissals. We will get back to this later in more detail.

If no rules on automatic transfer of employees exist, it is crucial that detailed arrangements on the transfer of the employees are included in the outsourcing contract (see also section 1.2 below). For example, the employees to whom the supplier will make an offer of employment must be indicated.

Although a regime of automatic transfer of employees is often considered an inconvenient factor, the absence of a regime of automatic transfer can also be a disadvantage. For example, if the supplier cannot find sufficiently qualified and skilled personnel in the labour market, it will prefer that the regime of automatic transfer of employees applies, as this would avoid the need for individual negotiations with the employees concerned.

1.2 Right of Refusal to Transfer?

Another important question is whether the employees that are to be transferred have a right to refuse to transfer to the supplier, and, if so, what the consequences are of such a refusal.

1.2.1 Legal Systems That Do Not Provide for an Automatic Transfer of Employees

In countries where no automatic transfer of employees’ regime applies, the employees logically have a right of refusal, as they are free to accept or refuse the offer of employment made by the supplier.

1.2.2 Legal Systems That Provide for an Automatic Transfer of Employees

In situations where a system of automatic transfer applies, employees sometimes still have the right to refuse to transfer to the supplier.

In Europe, the European Court of Justice has held that although an employee cannot be forced to work for another employer other than the one he or she has freely chosen, the consequences of a refusal by the employee to transfer to the supplier have to be determined by national law.
Consequently, the assessment of whether the employee actually has a right to remain employed by the customer, or whether the refusal implies that the employee must resign or that he is deemed to have terminated his employment, depends thus on the national law of the European countries.

1.2.3 Contractual Protection for the Supplier

If the employees have a right of refusal, the supplier does not have a guarantee that the desired (number of) employees will transfer. However, the employees and their know-how and experience may be an important element to the supplier in the outsourcing operation.

In such cases, the supplier will try to include in the outsourcing contract an obligation on the part of the customer to use its best efforts to convince its employees to agree to the transfer. Sometimes, the outsourcing contract will also include as a completion condition that a certain number of employees, or certain key employees, have to agree to transfer to the supplier. The customer can also benefit from such conditions, as it will want to make sure that the quality of the services provided remains at least at the same level as before the outsourcing.

2 TERMS AND CONDITIONS OF TRANSFERRED EMPLOYEES

Another important employee-related issue in the context of an outsourcing, which largely depends on the applicable transfer of employee regime, is the question of whether and, if so, to what extent the transferred employees’ terms and conditions of employment are protected, and consequently what margin the supplier has to harmonize the terms and conditions of the transferred employees with those of its existing workforce.

2.1 TERMS AND CONDITIONS OF EMPLOYMENT IN GENERAL

2.1.1 Transfer of Terms and Conditions to the Supplier

In those jurisdictions where there is some form of automatic transfer of employees to the supplier, strict rules usually apply with regard to the maintenance of the terms and conditions of employment of the transferred employees. In some countries, the supplier must provide a package of terms and conditions that is, as a whole, comparable to the terms and conditions that the employee received when employed by the customer. In other
countries, however, all individual terms and conditions must remain identical.

If employees are transferred (whether or not automatically), one must not only take into account the individual terms and conditions explicitly described in those employees’ employment contract, but also the terms and conditions that are laid down in other sources of law (such as the company’s work regulations, employee handbook, policies, separate letters, etc.) and terms and conditions that are not expressly agreed in writing (but are, for example, based on custom or on an oral agreement). Moreover, some of the employees’ terms and conditions will be established at a collective level (and then laid down in company collective (bargaining) agreements or sector regulations, etc.).

The terms and conditions which transfer will depend on the applicable national law and often also on the legal value of the sources from which the terms and conditions arise (i.e., legislation, employment contract, collective bargaining agreement, custom, etc.).

2.1.2 Disclosure of Terms and Conditions by the Customer

In this respect, it is imperative, in the context of the due diligence exercise, to draft a detailed overview of all terms and conditions of employment and their sources (see also section 7.1 below). This is especially important if national law provides that all terms and conditions of employment, irrespective of their source, transfer.

In practice, parties often try to find a pragmatic solution to this issue by agreeing that all terms and conditions of employment must be disclosed in an annex to the outsourcing contract and that only those terms, and no other terms, transfer. In most countries, such agreement between parties only governs the relations between the customer and the supplier, but does not affect the employee’s right to claim terms and conditions that he or she enjoyed at the customer even if they were not disclosed. In such cases, the supplier should grant the benefit concerned but can – if provided for in the contractual documentation – in turn claim compensation from the customer, as the benefit was not disclosed under the outsourcing contract.

2.1.3 Harmonization of Terms and Conditions by the Supplier

The supplier will often want to harmonize the terms and conditions of employment of the transferred employees as far as possible with those of its existing workforce. Such a harmonization process is limited by the
protection of the current terms and conditions of the transferred employees. The degree of protection of each term and condition of employment depends on its legal source and the legal value of that source in the relevant jurisdiction.

The extent to which the employees’ terms and conditions are protected, and thus the margin for harmonization, varies from country to country. In practice, it is accepted in some jurisdictions that a new employment contract with new terms and conditions can be agreed with the consent of the employee concerned. Whether local law requires an explicit consent from the employees or whether implied consent to a change in terms and conditions is acceptable will also need to be considered.

2.2 COLLECTIVE TERMS AND CONDITIONS

2.2.1 Special Status of Collective Terms and Conditions

Often, specific rules will apply to terms and conditions of employment that are laid down in collective (bargaining) agreements.

In some countries, the law provides for a minimum time period during which the terms and conditions laid down in collective (bargaining) agreements may not be changed by the supplier to the employee’s disadvantage. In other countries, such collective terms and conditions may become incorporated in the individual contract after the transfer.

Often, the supplier will be able to change the terms and conditions laid down in collective (bargaining) agreements by mutual consent with the employee itself or via negotiations with trade unions or other employee representative bodies.

The supplier will often pay more attention to the collective terms and conditions, as they determine to a large extent the margin of variation that it has in the future. In practice, given their specific status, the collective terms and conditions will often be separately disclosed in an annex to the outsourcing contract.

2.2.2 Scope of the Term ‘Collective (Bargaining) Agreements’

It should be noted that the term ‘collective (bargaining) agreement’ is interpreted in different ways in different countries. A collective bargaining agreement may include agreements between:

(1) the employer and a trade union;
(2) the trade union and an employers’ association or the chamber of commerce; and
(3) agreements between an employer and the works council (or an employee representation body).

Also, the legal value of collective agreements and collective bargaining agreements varies from country to country. For example, in some jurisdictions collective bargaining agreements are not (or not wholly) legally binding.

2.3 OCCUPATIONAL PENSION PLAN ENTITLEMENTS

2.3.1 General Background

In many jurisdictions in continental Europe, occupational pension plan entitlements used to be a secondary employee benefit. However, nowadays, it becomes an increasingly important benefit. Whether affiliation under an occupational pension plan is an important benefit largely depends on the social security system that applies in the employee’s country. If the employee receives a substantial pension benefit from its national social security system, there will be less need for an additional occupational pension.

As there is a large variation in national social security systems, there are also various types of occupational pension plans. In some countries, the system of occupational pension schemes is already well developed (e.g., in the UK and in the Netherlands); in other countries, this matter is far less developed (e.g., in France). However, in all industrialized European countries, the social security systems are facing tough times (in particular because of the ageing population), and, consequently, the importance of occupational pension schemes is increasing.

At first sight, this increasing importance of occupational pension schemes in Europe seems to be at odds with the fact that the Acquired Rights Directive excludes employees’ rights to old age, invalidity or survivors’ benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes from its scope, meaning that those rights are not protected in the event of a transfer of an undertaking.

However, this exception is to a large extent misleading. Indeed, the European Court of Justice interprets the exception of employees’ rights to old age, invalidity or survivors’ benefits under supplementary company or inter-company pension schemes outside the statutory social security
schemes restrictively.\(^3\) Also, in a number of countries, strict rules exist with regard to employees’ occupational pension plan entitlements that provide for a protection in the event of transfer of an undertaking.

### 2.3.2 Issues to Be Examined in Relation to Occupational Pension Plans

The occupational pension plans of transferred employees often raise complex issues in the outsourcing process. It is an important point of attention, not only in the transfer arrangements, but also in the exit arrangements (see section 8 below). Detailed provisions on this matter should be included in the outsourcing contract.

The supplier may have a pension plan for its own employees and may want to affiliate the transferred employees under that plan, or it may not have a pension plan in place, and therefore would prefer not to continue the pension plan of the transferred employees.

The following points must therefore be examined and discussed between the parties:

- whether the supplier is obliged to take over the existing pension plan of the transferred employees;
- if it is not obliged to take over the existing pension plan, whether it is obliged to provide similar or equivalent benefits under another pension plan or some other compensation;
- if the supplier takes over the existing pension plan, whether it can make changes to the plan rules;
- if the supplier offers a new pension plan, whether the employees’ acquired rights have to be or voluntarily can be transferred to the supplier’s plan; and
- whether past service pension liabilities and/or corresponding assets have to be transferred to the supplier and whether it is desirable that they transfer.

In order to answer these questions, it is essential to not only examine the local laws, but also the pension plan rules (as they may contain provisions on the employees’ entitlements in the event of a transfer or on the employer’s ability to modify the terms of the plan).

---

3. See section II of this chapter.

10 - 12 International Outsourcing Law and Practice Supp. 5 (September 2013)
2.3.3 Take-Over of an Occupational Pension Plan by the Supplier

Some countries provide for an automatic transfer of the occupational pension entitlements of the transferred employees. Other countries do not have such an automatic transfer system in place (e.g., because occupational pension plans are excluded from the scope of the automatic transfer regulations applicable in those countries), and thus the supplier will not be obliged to take over the occupational pension plans that were in place at the customer.

However, even in those countries without an automatic transfer system, the employees’ entitlements under the occupational pension plans may be protected by other employment laws. Consequently, in practice, the supplier will often not be able to withdraw the benefit of the occupational pension plan that the customer offered without offering at least some form of compensation. In many cases, the supplier will therefore be obliged to offer the transferred employees at least some kind of occupational pension plan, or another form of compensation to replace the benefit of the occupational pension plan.

In some cases, the supplier may want to make some changes to the pension plan (e.g., to harmonize it with its existing pension plan for its own employees). In some countries, the terms of the pension plan rules (e.g., the amount of the employer’s contribution) can only be changed by mutual consent between employee and employer, whilst in other countries the supplier will have, at least to a certain degree, a right to make some unilateral changes to the plan. Such a right may be limited by the pension plan rules.

2.3.4 Take-Over of Past Service Liabilities by the Supplier

If the supplier is not obliged to take over the existing plan, but offers a new plan to the transferred employees, it must be verified whether the employees’ acquired rights under the original have to be, or can be transferred to the supplier’s new plan.

If the supplier must take over or voluntarily takes over the employees’ existing pension plan, it must be examined whether local law requires that in such case past service pension liabilities and/or corresponding assets are transferred to the supplier. In other words, it must be examined to what extent the supplier is liable for the employees’ entitlements under the plan that relate to their service before the transfer and whether the transfer of pension assets fully funds such liabilities. Depending on the circumstances, appropriate provisions (e.g., regarding a more extensive transfer of assets so
that the transferred past service liabilities are fully funded) and/or specific indemnities and warranties may need to be included in the outsourcing contract.

In some countries, the supplier will be liable for any deficits in the financing of the plan (irrespective of whether they are caused by the customer or by the supplier). In other countries, the customer and the supplier will be jointly liable for any deficits relating to the employees’ service up to the transfer.

In view of any obligation to take over the existing pension plan or any liability for entitlements relating to past service, a due diligence review of the existing occupational pension plans needs to be carried out and it must be verified whether they have been sufficiently funded. Also, in assessing whether the transferred assets fully fund the liabilities, the parties will have to agree on the actuarial methods and assumptions to be used. Timely assistance from actuaries in the process is thus often required.

3 ADVANTAGES AND DISADVANTAGES OF AN AUTOMATIC TRANSFER REGIME

As explained above, whether or not the regime of automatic transfer of employees is applicable can, in some countries, to a certain extent be manipulated.

Depending on the factual circumstances and on the position that you are in (e.g., are you the customer or the supplier), it may or may not be in your favour for the automatic transfer regime to apply. It is thus useful to list the main advantages and disadvantages of the applicability of an automatic transfer of the employee’s regime.

3.1 MAIN ADVANTAGES OF AN AUTOMATIC TRANSFER REGIME

In most countries, the main advantages of a system of automatic transfer of employees working for the business are as follows:

- There can be no discussions between the supplier and the customer on whether or not the employees working for the business should be transferred (although the parties may in practice disagree on which employees are actually working for the business to be outsourced).
- There are usually no discussions on whether or not the terms and conditions of the employees should be respected or not (although terms and conditions with respect to occupational pensions are sometimes an exception to this rule).
– The supplier is sure that a sufficient number of employees will transfer (i.e., there is no need to set out a detailed procedure regarding the offers of employment that must be made to the employees concerned, or for minimum acceptance thresholds as closing conditions).
– The customer is (in most countries) sure that the supplier will maintain, as a minimum, the existing terms and conditions of the transferring employees.

3.2 MAIN DISADVANTAGES OF AN AUTOMATIC TRANSFER REGIME

The main disadvantages of the applicability of the system of automatic transfer of employees in most countries are as follows:
– As all employees working for the business have to be transferred, the customer and the supplier cannot freely determine which employees are ‘in scope’, i.e., they cannot agree that certain employees who are working for the business will remain with the customer (unless the employee concerned agrees).
– The supplier must respect the transferring employees’ existing terms and conditions, which may make it difficult for the supplier to harmonize the terms and conditions of the transferred employees with those of its own existing employees.
– Employees working in the business will often benefit from additional protection against dismissal, which may render a rationalization process difficult (e.g., if the supplier does not need all transferring employees to provide the services).

4 LIABILITIES OF PARTIES RELATING TO PAST AND FUTURE EMPLOYMENT

4.1 PAST SERVICE LIABILITIES

If employees are being transferred (whether or not via an automatic transfer regime), it is necessary to verify to what extent the transferee takes over (past) liabilities relating to those employees.

In some countries, local law will provide that the transferee is fully liable for all claims from the employees concerned or from third parties that relate to the employment of the employees with the transferor. In other countries, such liability will be limited either in time or to only certain matters. Consequently, the due diligence exercise is very important (see section 7.1 below).
It must also be assessed to what extent parties can mutually agree on whether these liabilities are taken over (or at least reach agreement on who will ultimately bear the costs).

4.2 FUTURE SERVICE LIABILITIES

Also, after the transfer, it must be assessed whether the transferor (customer) has any liability towards the transferred employees. For example, in some jurisdictions an outsourcing customer can become secondarily liable for employee and contractor/consultant claims as a ‘dual employer’.

5 DISMISSING EMPLOYEES IN THE CONTEXT OF OUTSOURCING

As the rationale behind an outsourcing is that a company wants to focus on its core business and outsource a secondary service to a specialized professional, it seems logical that this outsourcing operation may also have repercussions on the employment of the employees providing the service previously (as the supplier may not need the same number of employees as had been previously providing the service for the customer because he is more specialized). In the case of a cross-border outsourcing, it is even more likely that some or all of the employees working in the business being outsourced will lose their jobs.

5.1 RESTRICTIONS ON THE DISMISSAL RIGHT

Both the customer and the supplier should be careful when considering any reduction of headcount in connection with an outsourcing. If the customer and/or the supplier want to rationalize the outsourced business, i.e., dismiss a number of employees working in the outsourced business, their ability to do so may be restricted by strict limitations on the right to dismiss those employees.

5.1.1 Protection against Dismissal

Indeed, in the context of automatic transfer of employee regimes, transferring employees often benefit from protection against dismissal on the grounds of the outsourcing, meaning that they cannot be dismissed because
of the outsourcing’ and if they are dismissed for that reason, they are entitled
to additional compensation. For example, the Acquired Rights Directive
states that ‘the transfer shall not in itself constitute grounds for dismissal by
the transferor or the transferee’.

5.1.2 Rules on a Collective Dismissal/Plant Closure

Also, if several employees are dismissed, it should be assessed whether any
rules on collective dismissal and/or plant closure apply. Such rules may
trigger additional:

(i) compensation entitlements;
(ii) information and/or consultation requirements; and
(iii) requirements to obtain authorizations from government bodies, etc.

5.2 Arrangements in Outsourcing Contracts

Although a delicate (and sometimes legally extremely complex) issue, the
parties may wish to agree in the outsourcing contract on who will carry out
any planned dismissals and who will bear the costs. This choice may be
important for a number of reasons:

– Dismissing employees constitutes ‘bad publicity’, whilst transferring
personnel does not. The customer may want to avoid bad publicity
for business reasons.
– The customer may have a (company or sector) history of expensive
(collective) dismissals, whilst the supplier may not have such a
history, or vice versa.
– The trade unions may be more strongly represented at the customer’s
company than in the supplier’s company, or vice versa.
– Local legislation may provide for specific procedures to be followed
(e.g., requiring employees to be informed and consulted).

6 ROLE OF EMPLOYEE REPRESENTATIVE BODIES

Another important point for attention is the status and role of employee
representatives or employee representative bodies (e.g., works councils,
trade union delegations, etc.). The role of the employee representation
bodies and the impact they may have on the outsourcing process differs from
country to country.
6.1 ROLE IN AN OUTSOURCING TRANSACTION

6.1.1 Information and Consultation on Outsourcing

In many jurisdictions, the employee representative bodies have certain rights to be informed about and consulted with on the contemplated outsourcing. The obligation to inform and consult with its employee representative bodies may involve (or at least involve input from) the customer as well as the supplier.

6.1.1.1 Consequences of Non-compliance

Compliance with any rules on employee information and consultation is important, as the employee representatives may in some cases be able to delay the outsourcing transaction or even veto it. Also, from a practical and HR perspective, it is obviously advisable to comply with those rules, in order to maintain good relationships with the employees and to prevent strikes and other forms of business-disrupting industrial action. Further, in some jurisdictions, criminal sanctions and/or fines can be imposed if the company does not comply with these requirements.

6.1.1.2 Scope of Information and Consultation Rights

In some countries, the employee representatives will merely have to be informed about the contemplated outsourcing and its impact on the employment of the employees concerned.

In other countries, the employee representatives must be consulted with, i.e., they must be able to ask questions, make suggestions and propose alternative solutions and the employer must reply to those questions and proposals.

Sometimes, the employee representative bodies (usually the works council) must give a formal opinion or advice on the contemplated outsourcing, albeit that such opinion/advice usually has no binding effect on the company and its management.

Exceptionally, the employee representatives can under certain circumstances even go to court and request a prohibition or restriction of the planned outsourcing and/or compensatory damages.

6.1.1.3 Timeframe for Information and Consultation

Some countries have set specific time limits for the beginning and the end of the information and consultation process, or have provided that the
outsourcing contract cannot be signed until the applicable information and/or consultation procedures have been properly complied with or the required advice or opinion from the employee representatives has been obtained.

If no specific time limits have been set, local laws usually provide that the employees must be informed and consulted with at a time when they are still able to influence the company’s plans.

6.1.2 Negotiations on Harmonization of Terms and Conditions

In addition to their role as the employee representation body to be informed and/or consulted with on the contemplated outsourcing, the employee representatives (in particular the trade unions) may have an important role in the further development of the outsourcing. Indeed, in some countries, negotiations can be held with employee representatives on the harmonization of the terms and conditions of employment of the transferred employees.

6.1.3 Protection against Dismissal

Finally, it should be noted that employees who are part of an employee representation body usually benefit from some form of protection against dismissal. That protection may hinder a rationalization of the outsourced business.

6.2 Impact of an Outsourcing Transaction on Employee Representation

The outsourcing may have consequences for the employee representative bodies in place at the customer and the supplier (e.g., if a number of employees in those bodies are transferred). In many countries, specific rules exist with regard to the status and continued working of employee representation bodies and the (continued) protection of the members of those bodies in the event of business restructuring such as an outsourcing.

It has been reported that in some sectors, outsourcing has lead to a weakening of the capacity of organization, representation and intervention of the trade unions.⁴

7 OUTSOURCING PROCESS AND NEGOTIATIONS

7.1 DUE DILIGENCE EXERCISE

Before going ahead with an outsourcing that triggers an employee transfer, the supplier will usually conduct a due diligence review of the transferring employees, their terms and conditions and their employee representation. This means that the supplier will verify whether applicable laws and regulations have been complied with by the customer and will identify those potential liabilities existing with regard to the transferring employees. Such a due diligence exercise is important given that the supplier may take over liabilities relating to past employment with the transferor (customer) (see section 4 above).

Although a due diligence review is typically focused on compliance in the past, this due diligence review regarding an outsourcing needs also to focus on the future integration of the transferring employees in the supplier’s business as well as on the future harmonization of the terms and conditions of the transferring employees with those of the supplier’s own personnel. In this respect, a detailed and comparative overview of the terms and conditions of the transferring employees, and their legal sources, needs to be drafted in order to establish the extent to which the terms and conditions of the transferring employees correspond to those in place at the supplier and to what extent they can be modified.

7.2 NEGOTIATIONS

Once the supplier has conducted the due diligence exercise, the parties will be able to start negotiating on the employee-related terms of the outsourcing contract. In this section, we will briefly discuss the main conflicting interests of the supplier and the customer which form the background for the negotiations. We also comment on some employee-related practical and commercial issues that must be addressed during the contract negotiations.

7.2.1 Conflicts between the Interests of the Supplier and of the Customer

The supplier and the customer have a number of conflicting interests that influence their starting positions in negotiations on the outsourcing contract.
The main employee-related conflicting interests are as follows:

<table>
<thead>
<tr>
<th>Terms and conditions</th>
<th>Supplier’s interest</th>
<th>Customer’s interest</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>The supplier to whom the employees transfer wants to harmonize their terms and conditions of employment with the terms and conditions of its own employees. There may be various underlying reasons for this interest: e.g., payroll administration, internal HR policy, etc.</td>
<td>The customer will often want to obtain a guarantee from the supplier that it will maintain the existing terms and conditions of employment of the transferred employees, or at least that the supplier will not change them during a certain minimum period after the outsourcing. Possible reasons for taking this position may include internal pressure (from employee representatives, HR policy, etc.) or external pressure (e.g., protection of image or reputation).</td>
<td>The legal restrictions on amendments to the employees’ existing terms and conditions (e.g., in the context of an automatic transfer of employees regime) must be taken into consideration.</td>
</tr>
</tbody>
</table>
### Supplier’s interest
The supplier will want autonomy (in its capacity as employer) regarding how it manages its personnel (i.e., hiring, firing, evaluation, etc.) and will resist interference in this regard to the fullest extent possible.

### Customer’s interest
The customer will often require some insight in and impact on the personnel performing the services. The customer will want to make sure that certain (key) employees (continue to) perform the services for it and may want the ability to require certain employees to be removed from the team providing those services. In some cases, the customer may also want to have a say in the review/evaluation of (key) personnel and the award of any bonuses to them. The main concern behind this is to keep the transferred employees happy in order to maintain and improve the quality of the services provided.

### Comment
Attention must be paid to the restrictions that may exist in some countries on the customer’s influence on the supplier’s personnel policy (e.g., the restrictions imposed by legislation on secondment or ‘lending out’ of personnel).
<table>
<thead>
<tr>
<th><strong>Occupational pension schemes</strong></th>
<th><strong>Supplier’s interest</strong></th>
<th><strong>Customer’s interest</strong></th>
<th><strong>Comment</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>The supplier will be reluctant to take over an existing pension plan if it does not have a pension plan in place for its own personnel or if its own pension plan is less favourable. Moreover, the supplier will be reluctant to take over past service liabilities. If the supplier takes over the existing plan, it will probably want to change the terms of the plan in order to harmonize it with its own pension plan.</td>
<td>To keep the transferring employees motivated, the customer will probably want the supplier to take over the existing pension plan as well as past service liabilities and not make any changes to the existing plan.</td>
<td>It is necessary to take into consideration any local law provisions and pension plan provisions concerning (i) the supplier’s obligation to take over the existing pension plan or to offer a new plan; (ii) the supplier’s ability to modify the existing plan; and (iii) the transfer of acquired rights, past service liabilities and/or corresponding assets.</td>
</tr>
</tbody>
</table>
### Employee’s interest

The supplier wants to take over the employees that are key to the business and those employees that have specific know-how.

### Customer’s interest

The customer may want all employees working in the business to transfer or alternatively may try to retain its high-performing employees and yet have lower performers transfer to the supplier.

### Comment

Legal provisions and case law on definition of employees ‘in scope’ must be taken into account.

---

### Rationalization

The supplier will strive for an optimal personnel organization (i.e., the lowest personnel cost to efficiently provide the services). This means that the supplier does not want to take over employees that it does not need to perform the services and will want to rationalize the business before the take-over.

### Customer’s interest

The customer will be reluctant to rationalize the business. Reputational aspects and internal pressure will often lead the customer to resist a rationalization entailing dismissals.

### Comment

Legal provisions providing for protection against dismissal must be taken into consideration.

---

### Liabilities

The supplier wants all liabilities relating to past service to remain with the customer.

### Customer’s interest

The customer will try to avoid as far as possible (even past service) employee-related liabilities.

### Comment

The legal provisions on both parties’ liabilities must be taken into consideration.
Main Employee-Related Conflicting Interests Supplier-Customer

**SUPPLIER**

- Harmonisation T&C’s
- Autonomy in personnel policy
- No take-over of pension plan or past service liabilities
- Take-over of all employees key to business + employees with specific know-how
- Customer responsible for all past employment liabilities

**CUSTOMER**

- Guarantee maintenance existing T&C’s
- Impact on hiring, firing and rewarding of (key) employees
- Take-over of past service liabilities
- Retain high-performing employees / transfer low-performing employees + no redundant employees after outsourcing
- Supplier (also) responsible for past employment liabilities

- Contract: possibly guarantee on maintenance of existing TBCs
- Contract: impact customer on (key) employees
- Contract: arrangements on occupational pension plans
- Contract: list of employees in scope + cherry-picking + anti-dumping
- Contract: liability for rationalization process + costs
- Contract: partition of liabilities
7.2.2 Main Employee-Related Issues to Be Addressed during Negotiations

In negotiating on and drafting the contractual documents, there are a few practical choices that must be made in relation to employee-related matters. Often, those choices will depend on the (territorial) extent of the outsourcing operation (i.e., how many different jurisdictions are involved). Also, some commercial points have to be addressed during the negotiations. In this section, we will highlight the main employee-related practical and commercial issues that must be addressed during the negotiation of outsourcing contracts.

7.2.2.1 Overall Contract Structure

First, the parties have to determine the overall structure of the outsourcing contract. There are in this respect two main scenarios:

- In the first scenario, one agreement is drafted between the parties that includes detailed arrangements for all countries and employees involved. This means that an agreement is reached on all aspects of the outsourcing project in all countries involved at the time of signing of the services agreement. However, for large outsourcing projects in which several jurisdictions are involved, it is often not feasible to take this approach.

- In the second scenario, the parties agree on the general principles in a master services agreement and provide for a defined transitional period (e.g., one year) during which separate country arrangements are agreed for each country involved. Those country arrangements will include detailed arrangements concerning employee-related matters that are negotiated at local level between local advisors of each party but, insofar as permitted by local law, they must respect the principles agreed in the master services agreement. Although the outcome of the country arrangements is unsure at the time of signing of the master services agreement, this two-layer approach is often a more efficient, and sometimes even unavoidable, way of proceeding, e.g., in large multi-jurisdictional outsourcing projects.

For more detailed information on the various outsourcing contract structures, we refer to Chapter 8.5

---

5. ‘Outsourcing Contract Structures’ by Ian Ferguson.
7.2.2.2 Employee Records and Personnel Information

With regard to the employee information that must be disclosed and provided by the transferor, there are also two main options:

– The transferee may request that the transferor provides detailed employee records (i.e., details of each transferring employee, a copy of their employment contracts, a complete overview of their terms and conditions, copies of applicable collective bargaining agreements, etc.) before, or at the latest at the moment of signing the outsourcing contract. For smaller outsourcing projects, this approach is most common.

– However, the parties may also agree that this detailed information be provided at a later stage. In that case, in the outsourcing contract the parties only set some important parameters regarding the transferring employees (e.g., the number of transferring employees and the cost of their compensation package). The detailed information referred to above is then provided at a later stage (e.g., between signing and completion of the transaction or, if applicable, when the local agreement is signed). This approach is sometimes used in large and/or multi-jurisdictional outsourcing projects, as it is more efficient and practical.

7.2.2.3 Transferring Employees

Further, as highlighted above, it is often important for the supplier to make sure that the key employees working for the business or employees with specific know-how remain in the business when it is outsourced.

7.2.2.3.1 Cherry-Picking and Dumping

The supplier will thus want to avoid having the customer pick out the (highest performing) employees that it would like to keep for itself and transfer those employees out of the business before it is outsourced (i.e., ‘cherry-picking’). It should also be noted that, aside from any cherry-picking intentions, the customer may sometimes have a (justified) interest in retaining certain key employees (i.e., keeping those employees outside the scope of transferring employees), for example because it wants to retain the technical know-how relating to the outsourced business that some employees have (e.g., in view of the re-negotiation of the services agreement upon expiry or if any service level problems arise).
On the other hand, the supplier will also want to avoid having the customer transfer some (low performing) employees (that are not working for the business but that it no longer wants to employ) to the business, so that they are transferred to the supplier (i.e., ‘dumping’).

The supplier will thus want to include mechanisms in the outsourcing contract to prevent such cherry-picking and dumping. The supplier and customer will often agree on certain ‘freezing provisions’, providing that during the transition period between signing of the outsourcing contract and the effective transfer date, the customer will not, for example:

1. materially reduce the involvement of any employee in the business;
2. replace, redeploy, transfer away or dismiss any employee working for the business; and
3. assign, deploy or recruit any person to work in the business. Similar provisions will usually be included in the exit arrangements (see also section 8 below).

7.2.2.3.2 Definition of ‘Employees in Scope’

In this respect, it is also important to pay attention to the definition of ‘employees in scope’. It is possible that certain employees will only work partially for the business. For those employees, it could potentially be agreed that they are only a transferring employee if they work for more than – say 50% – of their time for the business. The higher this threshold, the easier it will be for the customer to pick out, and exclude from scope, the high-performing employees that it wants to keep for itself.

7.2.2.3.3 ‘Out-of-Scope’ Employees

As explained above, if an automatic transfer of employees regime applies, in most countries, the parties will not be able to choose which employees transfer (i.e., which employees are ‘in scope’) and which employees do not transfer. If an employee is mainly working for the business that is outsourced, he or she will automatically transfer. Although the outsourcing contract usually contains a list of the employees that are considered to be ‘in scope’, such a list does not prevent other employees from transferring to the supplier if they are mainly working for the outsourced business. Consequently, the parties should discuss what will happen if an employee employed by the customer, but who has not been identified as a transferring employee, actually transfers or is alleged to have transferred. For instance, the parties must agree on who will be liable for any costs or other liabilities associated with such employees.
7.2.2.4 Key Employees

As indicated above, during the term of the services agreement, the customer wants to make sure that the level of quality of the services that are rendered is maintained. For that reason, the customer may try to maintain a certain influence over the employees providing the services. It is, therefore, commonly expressly agreed in the outsourcing contract that the services will at all times be provided by qualified and trained personnel and that some transferred key employees will remain responsible for the provision of the services (and thus will not be transferred to another position within the supplier’s company or made redundant). Often, the customer’s consent is required for the replacement of a key employee. Sometimes, the customer will have the ability to require certain employees to be removed from the team providing the services. In some cases, the customer may also have a say in the review/evaluation of (key) personnel and the award of any performance-related pay or incentives to them.

It should be noted that, in some countries, there may be some legal restrictions on the customer’s ability to influence the supplier’s personnel policy.

7.2.2.5 Guarantees for Transferring Employees

As explained above, the customer may itself have reasons for seeking guarantees for the transferring employees regarding protection of their employment with the supplier and their terms and conditions. For example, the customer may experience internal pressure, e.g., from the employee representatives or in the context of its HR policy. The customer may also fear damage to its reputation. Finally, the customer often has an interest in keeping the transferring employees motivated as they will be providing services to the customer after the outsourcing.

Especially (but not exclusively) in countries where the transferring employees’ terms and conditions of employment are not substantially protected by the applicable legislation, the customer may require the supplier to guarantee that the employees’ existing terms and conditions of employment will not be changed, or at least not during a certain period after the transfer. The customer may also expect the supplier to guarantee that it will not put the transferred employees in a less favourable position than its own similarly situated employees and that it will immediately affiliate the transferring employees under its welfare (medical, disability, etc.) plans and insurance policies.

Sometimes the outsourcing contract also provides for arrangements regarding the ultimate dismissal of transferring employees. If both parties
agree that a rationalization of the business is required, the customer and supplier have to agree on who actually effects the dismissals and who bears the dismissal costs. The customer may also try to provide some guarantees for the employees if the supplier plans to dismiss a transferred employee (e.g., regarding offering alternative employment or a minimum termination package).

7.2.2.6 Other Employee-Related Issues

Other important employee-related issues that must be negotiated include:

- occupational pension entitlements of the transferring employees (we refer to sections 2.3 and 7.2 above);
- rationalization of the business entailing dismissals (we refer to sections 5, 7.2 and 7.2.2.5 above); and
- establishing the parties' liabilities for past and future employment liabilities (we refer to sections 4 and 7.2.1 above).

8 PERSONNEL EXIT ARRANGEMENTS

A final important employee-related point to note is the personnel exit arrangements. These are the agreements between the customer and the supplier on what happens to the employees employed by the supplier in the services offered to the customer in the event of expiry or termination of the service contract between customer and supplier. They are part of the broader set of arrangements upon expiry or termination of the service contract (exit arrangements).6

Upon expiry or termination of the services contract, the customer may decide to:

(1) extend the service contract with the supplier;
(2) take the services in house again (i.e., ‘in-sourcing’); or
(3) have the services provided by another supplier (i.e., ‘second generation outsourcing’).

In the event of in-sourcing and second generation outsourcing, it is necessary to determine what happens to the employees that are providing the services (and that are likely to have been transferred from the customer to the supplier).

6. For a more detailed description of exit provisions, we refer to Chapter 20 of this book (‘Exit from an Outsourcing Agreement’ by Ian Ferguson).
8.1 POSSIBLE PERSONNEL EXIT ARRANGEMENTS

The personnel exit arrangements will sometimes mirror the employee transfer arrangements (meaning, for example, that the employees employed in the services are transferred to (or retransferred back) to the customer upon termination of the services contract). However, this is not necessarily the case. Indeed, it may also be agreed that the transferred employees remain employed by the supplier after the termination of the service contract, or that they are transferred from the supplier to another supplier. Between these two extremes, there are various possible middle grounds, such as an arrangement under which:

1. only some of the employees are transferred to the customer or the new supplier while others stay with the supplier; or
2. the supplier rationalizes the employee group providing the services (possibly entailing some dismissals).

At the time of signing the services agreement, it is sometimes difficult to predict whether the in-sourcing or second generation outsourcing that may occur upon expiry or termination of the services agreement will lead to the application of an automatic transfer regime.

If the parties agree that, upon expiry or termination of the services agreement, the employees employed in the services will be transferred from the supplier to the customer or to a new supplier, the personnel exit arrangements will thus provide an arrangement that applies in the event that:

1. the automatic transfer of employees regime applies; and
2. the automatic transfer regime does not apply.

In the latter case, to summarize, the arrangement will consist of:

1. the customer or new supplier making an offer of employment to the employees; and
2. the supplier using its best efforts to convince the employees to accept that offer.

If, however, it is agreed that the transferred employees will stay with the supplier (and will thus work on other projects or for other customers), the personnel exit arrangements will provide that:

1. the supplier guarantees the employment of the employees concerned after the expiry or termination of the services agreement; and
2. the supplier holds the customer harmless for any liabilities that may arise from the expiry or termination of the services agreement.
Which personnel exit arrangement will be agreed, depends on a number of factors, including:

- the economic reality (e.g., intra-group versus external outsourcing, tailor made character of the services, etc.);
- the commercial relationship and balance of power between the customer and the supplier; and
- the influence and power of employee representation bodies.

8.2 Interaction with Automatic Transfer of Employees’ Regimes

A situation where employees employed in the business of providing services to the customer are transferred from the supplier to the customer, or are transferred from the supplier to a new supplier, can constitute a situation in which an automatic transfer of employees’ regime applies (e.g., in Europe, such situations may constitute a transfer of an undertaking). In countries where an automatic transfer of employees’ regime applies, the personnel exit arrangements entered into between the parties cannot prevent the application of that regime. In such case, notwithstanding any personnel exit arrangements between the parties stating that the employees remain with the supplier, under certain circumstances the personnel may still automatically transfer.

However, as the applicability of the automatic transfer of employees’ regimes can sometimes be manipulated to a certain extent (see also section 1.1 above), e.g., the personnel exit arrangements can sometimes in some jurisdictions be construed in such a way that the chance of applicability of those regimes increases or decreases.

Also, in many jurisdictions the parties are free to determine their mutual rights and obligations in the personnel exit arrangements, as the automatic transfer of employees’ regimes are often only binding in the relationship between the employees on the one hand and the supplier, the customer and/or the new supplier on the other hand. As between the parties, other arrangements may be put in place, for example, an agreement that the customer must pay an indemnity to the supplier if it or the new supplier refuses to take over the employees.

8.3 Other Provisions

As the personnel exit arrangements are part of a broader set of exit arrangements, they have to be tailored to fit with those other exit arrangements. The personnel exit arrangements may, for example, provide for a transition period, which should be tailored to reflect any transition
period applying to the provision of the services. Also, the timing of the eventual transfer of employees to the customer or the new supplier will depend on the timing of the transfer of responsibility over the services.

In the context of the exit arrangements, the same conflicting interests arise as in the context of the transfer arrangements, albeit *vice versa*. Consequently, the personnel exit arrangements will also contain *mutatis mutandis* (and depending on what is agreed in the transfer provisions) similar clauses to the transfer arrangements (e.g., clauses regarding employee records, ‘cherry-picking’, stand-still arrangements, anti-dumping, key personnel protection, etc.).

9 CHECKLIST EMPLOYEE-RELATED PROVISIONS IN AN OUTSOURCING CONTRACT

From what has been explained above, it is clear that there are various employee-related issues that must be addressed in an outsourcing contract. By way of summary, set out below is an overview of the main employee-related provisions that should be included in the outsourcing contract (or in a separate employee transfer schedule to the main contract).

- **Detailed list of transferring employees:** Is there a list setting out the particulars of the employees working for the transferring business?
- **Warranties by customer:** Is there appropriate wording to ensure the full transfer of all terms and conditions of the employees concerned? Have all terms and conditions been disclosed? Is there appropriate wording concerning past compliance with laws and regulations, etc.?
- **Freezing provisions during the transition period:** Is there appropriate wording to ensure that the customer will not make any changes to the terms and conditions of the transferring employees’ employment during the period between signing the services agreement and the actual transfer of the employees? Is there appropriate wording to avoid ‘cherry-picking’ and ‘dumping’ of employees?
- **Other provisions regarding transition period:** Is there appropriate wording regarding cooperation and mutual assistance between the parties (e.g., access to and delivery of employee records, notification of any resignation, etc.) and regarding the information of and consultation with the respective employees?
- **Provisions on transfer of employees:** Does the contract state that the regime of automatic transfer of employees applies or, alternatively, does it provide a transfer procedure (e.g., offer of employment by the supplier and best efforts engagement by the
customer to convince employees)? If the contract provides a transfer procedure, is there appropriate wording in the contract to ensure that a minimum number of employees must agree to transfer, etc.?

- **Provisions concerning apportionment of liabilities:** Is there appropriate wording concerning the respective responsibilities of the customer and the supplier for liabilities relating to the pre-transfer period? Is there appropriate wording to regulate the parties’ respective liabilities with regard to pro rata entitlements of the transferred employees (e.g., bonuses, holiday pay and end-of-year premiums)? Does the contract include agreements on who will carry out and bear the costs of the dismissal of redundant employees, etc.?

- **Provisions concerning occupational pension entitlements:** Does the contract include arrangements on the take-over of the occupational pension scheme of the transferring employees (if appropriate)? Is there appropriate wording to address what happens to the pension rights acquired by the transferring employees before the transfer, etc.?

- **Indemnities from the customer:** Does the contract provide for indemnities on the part of the customer for liabilities relating to a breach of the warranties, the employment or termination thereof of the transferring employees until the transfer date, etc.?

- **Provisions regarding out-of-scope employees:** Is there appropriate wording to ensure that the supplier is not liable for any employee who has not been identified as a transferring employee, but who has transferred or is alleged to have transferred?

- **Provisions concerning service level, staff resources and key personnel:** Is there appropriate wording to ensure the required quality of the services is maintained (e.g., requiring provision of services by certain key employees and guarantees concerning replacement of key employees)? Is there appropriate wording in the contract concerning confidentiality and compliance with policies, e.g., on health and safety matters, etc.?

- **Exit provisions:** Does the supplier give warranties concerning the employees that will be transferred to the customer or to another supplier and concerning their terms and conditions? Is there appropriate wording to ensure that the group of employees ‘in scope’ and their terms and conditions are frozen during the transition period? Does the contract specify the transfer procedure? Is there appropriate wording on the apportionment of liabilities between the relevant parties? Does the contract specify what happens to the employees’ occupational pension entitlements? Does the contract contain provisions on ‘out-of-scope’ employees?
SECTION II OUTSOURCING TRANSACTIONS AND EU LAW

1 INTRODUCTION

A key issue to consider is whether an outsourcing transaction in the European Economic Area is covered by the Acquired Rights Directive that protects the rights of employees in the event of a transfer of an undertaking. If it is, the employees working in the transferred undertaking will automatically transfer from the customer to the contractor. Moreover, the transferor must respect all the transferring employees’ acquired rights and the employees will be protected against dismissal.

Many outsourcing transactions turn out to be subject to the Acquired Rights Directive. If they are not, the relevant employees are often made redundant, unless the contractor is willing to engage them or the customer offers them alternative employment. In that case, the customer will be responsible for the redundancy costs.

This chapter deals with the question whether the Acquired Rights Directive applies to an outsourcing transaction and the issues that arise when it does.

2 SCOPE OF THE ACQUIRED RIGHTS DIRECTIVE

2.1 MATERIAL SCOPE

According to Article 1(1)(a) of the Acquired Rights Directive, the directive applies to ‘any transfer of an undertaking, business or part of an undertaking or business to another employer as a result of a legal transfer or merger’. Thus, for an outsourcing transaction to be covered by the Acquired Rights Directive, there must be a change of employer, resulting from a legal transfer or merger and that change must be caused by a transfer of undertaking, business or part of an undertaking or business (referred to below as a transfer of an undertaking).

In the early days of the old Acquired Rights Directive, it was uncertain if and to what extent the transfer of undertaking rules was to apply to outsourcing operations. However, as the European Court of Justice frequently ruled on the scope of the Acquired Rights Directive, it became

---

clear that it had a much wider application than was first thought. An important part of this European case law has developed around the question of whether outsourcing operations (including ‘second generation’ outsourcing transactions and in-sourcing operations) were covered by the Acquired Rights Directive.

2.1.1 A Change of Employer

The European Court of Justice has held that a change of employer involves a change in the legal or natural person who is responsible for carrying on the business and who enters into the obligations of an employer vis-à-vis the employees of the undertaking. 9

Thus, for the Acquired Rights Directive to apply, there must be a change in either the employer’s actual identity or its legal personality. In practice, this means the transferor must cease to be the employer in respect of the employees of the undertaking and the transferee must become the new employer of those individuals. 10 Even if the transaction in question takes place between two companies belonging to the same corporate group, that fact in itself does not prohibit the application of the Acquired Rights Directive. 11

It is safe to state that an outsourcing transaction will always result in a change of employer. In that framework, note that the fact that the ownership of the tangible assets of the undertaking may not change – which may be the case in some outsourcing transactions – does not preclude a change of employer. 12

---


10. Therefore, the transfer of ownership of the majority of the shares in a company or a change in the majority shareholder does not constitute a transfer of undertaking. Although a change of control can lead to changes in the undertaking, it does not affect the company’s rights and obligations: the legal employer remains the same and an application of the Acquired Rights Directive is not necessary to safeguard the employee’s rights (Commission Services working document – Memorandum on rights of workers in case of transfer of undertakings, European Commission, www.ec.europa.eu (August 2007), 2.4.1).


2.1.2 A Legal Transfer or Merger

The condition that there must be a legal transfer has been the subject of much discussion. While some versions of the Acquired Rights Directive (the German, French, Greek, Italian and Dutch) clearly refer only to transfers resulting from a contract, the English and Danish versions appear to indicate that the scope of the Acquired Rights Directive is larger. Given these differences and the fact that there is no common understanding of the concept of a ‘legal transfer’, the European Court of Justice has given the concept a very flexible interpretation so that the Acquired Rights Directive became applicable wherever there was a change of employer in the context of contractual relations.13

The European Court of Justice has also stated that it is sufficient for a transfer to be part of a web of contractual relations, even if they are indirect.14 The Acquired Rights Directive therefore applies even if there is no direct contractual relationship between the transferor and the transferee.15 Consequently, the means through which the change of employer takes place has now become somewhat irrelevant.16

The fact that there is no need for there to be a direct contractual relationship between the transferor and the transferee is of considerable importance when considering the application of the Acquired Rights Directive to outsourcing transactions. While it is obvious that the Acquired Rights Directive may apply to first generation outsourcing operations, i.e., under which an activity previously undertaken by the customer itself is transferred to a contractor,17 it may also be triggered each time there is a

---

16. In case C-343/98, Collino and Chiappero [2000] ECR I-6659 (34) which involved the privatization of an entity operating telecommunications services for public use, the European Court of Justice held that the fact that the transfer results from unilateral decisions of the public authority rather than from an agreement does not render the Acquired Rights Directive inapplicable (see also Case C-108/10, Scattolon [2011] ECR I-07491 (63) and Case C-151/09, UGT-FSP [2010] ECR I-07591 (24-25)). Advocate General Geelhoed relied later on the Collino and Chiappero case to state the following: ‘It is not necessary for there to be direct contractual relations between the transferor and the transferee. Where the transfer is based on a decision, the requirement is satisfied, irrespective of whether it is in the form of an agreement, a unilateral legal transaction, a court judgment or a law.’ (Opinion of A.G. Geelhoed, delivered on 19 Jun. 2003).
17. Case C-209/91, Rask and Christensen [1991] ECR I-5755 (21) (a situation in which one businessman assigned to another businessmen responsibility for running a facility for staff, which was formerly managed directly, in return for a fee and various advantages); Case C-392/92, Schmidt [1994] ECR I-1311 (14) (a situation in which an undertaking entrusted by contract to another undertaking the responsibility for carrying out cleaning operations which it previously performed itself); Case C-243/98, Allen [1998] ECR I-8643 (39) (a situation in which a company belonging to a group decided to subcontract to another company in the same
subsequent transfer following the expiration or termination of an outsourcing contract.

Thus, the Acquired Rights Directive may also cover a decision to in-source18 an activity or to assign the contract to a new service provider (second generation outsourcing).19 In the latter case, the transfer (of undertaking, and hence, of employees) occurs between the old contractor (or its subcontractor) and the new one. In that framework, the European Court of Justice has held that the mere fact that the transfer takes place in two stages (e.g., through the intermediation of a third party such as the owner) does not preclude a transfer of undertaking from taking place.20

---

18. Joined Cases C-127/96, C-229/96 and C-74/97, Vidal [1998] ECR I-8179 (25) (a situation in which an undertaking which used to entrust the cleaning of its premises to another undertaking decided to terminate its contract with that other undertaking and in future to carry out the cleaning work itself); Case C-51/00, Temco [2002] ECR I-969 (33) (a situation in which a contractor which had entrusted the contract for cleaning its premises to a first undertaking, which subcontracted the service, terminates that contract and enters into a new contract for the performance of the same work with a second undertaking); Case C-175/99, Mayeur [2000] ECR I-7755 (57) (where a municipality, a legal person governed by public law, operating within the framework of specific rules of administrative law, took over activities relating to publicity and information concerning the services which it offers to the public, where such activities were previously carried out, in the interests of that municipality, by a non-profit-making association which was a legal person governed by private law). See also Case 287/86, Ny Mølle Kro [1987] ECR 5465 (14) (where the owner of a leased undertaking took over its operation following a breach of the lease by the lessee).

19. Joined Cases C-173/96 and C-247/96, Sanchez Hidalgo [1998] ECR I-8237 (34) (a situation in which a public body which had contracted out its home-help service for persons in need or awarded a contract for maintaining surveillance of some of its premises to a first undertaking decided, upon expiry or after termination of the contract which it had with the first undertaking, to contract out that service or award that contract to a second undertaking); Case C-340/01, Ahler [2003] ECR I-14023 (43) (a situation in which a contracting authority which had awarded the contract for the management of the catering services in a hospital to one contractor terminated that contract and concluded a contract for the supply of the same services with a second contractor). See also Case C-172/99, Oy Liikenne [2001] ECR I-745 (44) (where, following procedures for the award of public service contracts, two undertakings were successively awarded a non-maritime public transport service – such as the operation of scheduled local bus routes, by a legal person governed by public law).

20. Case 342/86, Daddy’s Dance Hal [1998] ECR 739 (10) (the termination of a non-transferable lease followed by the conclusion of a new lease with a new lessee); Case 101/87, Bork International [1988] ECR 3057 (14) (the termination of a lease followed by a sale by the owner); Case C-299/1, Redmond Stichting [1992] ECR I-3189 (21) (a situation in which a public authority decided to terminate the subsidy paid to one legal person, as a result of which the activities of that legal person were fully and definitively terminated, and to transfer it to another legal person with a similar aim) and Joined Cases C-171/94 and C-172/94, Merckx and Neuhuys [1996] ECR 1253 (30) (a situation where a motor vehicle dealership for a particular territory concluded with one undertaking was terminated and the dealership was transferred to another undertaking which took on part of the staff and was recommended to customers, without any transfer of assets).
2.1.3 Transfer of an Undertaking and Service Contract

There is a ‘transfer’ within the meaning given in the Acquired Rights Directive when there is ‘a transfer of an economic entity which retains its identity, meaning an organized grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary’ (Article 1(1)(b) of the Acquired Rights Directive). Thus, one must consider first whether there is an economic entity capable of being transferred, and then whether that entity has been transferred.

As with the condition of establishing a ‘legal transfer’, the interpretation of the requirement that there must be a ‘transfer of an undertaking’ has also been largely affected by the existence of outsourcing transactions. The question rose whether the decision to contract out an activity was in itself enough to constitute a transfer of an undertaking. For a while it seemed that the European Court of Justice accepted a transfer of undertaking as soon as there was a similarity between the activity performed by a contractor compared with that carried out by its predecessor (i.e., the customer or a former contractor).21 Later however, the European Court of Justice emphasized that the transfer of an undertaking must relate to the transfer of a body of assets enabling the activities to be carried on in a stable way.22

Thus, the mere fact that an activity is contracted out to a service provider, or the mere loss of a service contract by a service provider (to a competitor or to the customer itself), at present does not in itself automatically constitute the transfer of an undertaking.23

2.1.3.1 An Economic Entity

For there to be a recognized transfer of an undertaking, the ‘undertaking’ that is being transferred must constitute an ‘economic entity’. This term refers to an organized grouping of assets and persons facilitating the exercise of an economic activity that pursues a specific objective.24 The term ‘economic

---

21. This approach was adopted in the Schmidt case, where the Court held the following: ‘According to the case-law of the Court the decisive criterion for establishing whether there is a transfer for the purposes of the directive is whether the business in question retains its identity. According to that case-law, the retention of that identity is indicated inter alia by the actual continuation or resumption by the new employer of the same or similar activities.’ (Case C-392/92, Schmidt [1994] ECR I-1311 (17)).
activity’ covers any activity consisting of offering goods or services on a given market. 25

As discussed above, the identity of an economic entity is not solely dependent on the activity entrusted to it. It also emerges from other factors such as its workforce, its management staff, the way in which its work is organized, its operating methods or the operational resources that are available to it.26

The entity must be ‘stable’, meaning that its activity must not be limited to performing just one specific works contract.27 However, it can consist of just one person. 28

An entity might be engaged in economic activities and be regarded as an ‘undertaking’ for the purpose of the Acquired Rights Directive even though it does not operate with a view to profit. The fact that an undertaking is engaged in non-profit-making activities is not in itself sufficient to deprive such activities of their economic character or to remove the undertaking from the scope of the Acquired Rights Directive.29

2.1.3.2 The Transfer of an Economic Entity

For the Acquired Rights Directive to apply, the economic entity must retain its identity after the transfer. A transfer of undertaking does not occur merely because a similar service is provided by the old and the new awardees of a contract or because the assets of an undertaking have been disposed of. The business in question must be transferred as a ‘going concern’.30

In order to determine whether this condition has been met, it is necessary to consider all the features of the transaction in question, including in particular:31

– the type of undertaking or business;

– whether or not the tangible assets, such as buildings and movable property of the undertaking or business are transferred;
– the value of intangible assets of the undertaking or business at the time of the transfer;
– whether the majority of the employees of the undertaking or business have been taken over by the new employer;
– whether the customers of the undertaking or business are transferred;
– the degree of similarity between the activities carried on before and after the transfer; and
– the period, if any, for which the activities of the undertaking or business were suspended.

No single feature is determinative as an overall assessment must be made.32

In the case of outsourcing operations, the most significant factors are:

(1) the transfer of assets (tangible or intangible); and
(2) the transfer of staff.

The degree of importance attached to these two factors (and the other factors cited above) will depend on the type of activity carried on, or the production or operating methods employed in the relevant undertaking.33 The European Court of Justice has made a distinction between:

(1) activities based essentially on assets; and
(2) activities based essentially on manpower.

Where the activity of a service provider is essentially based on assets and equipment (such as public transport), the determining factor is the taking over of the means necessary for carrying on that activity. Such an economic entity will only retain its identity if the assets that are essential to the provision of the services are transferred, regardless of whether the staff which the old operator employed to perform the same activity are taken over.34

In this framework, it must be noted that the transfer of actual ownership of the assets is not necessary in order to establish a transfer of an undertaking. Similarly, the fact that the tangible assets taken over by the new

service provider did not belong to its predecessor but were provided by the
customer does not preclude the transfer of an undertaking.\footnote{35}

In particular sectors where activities are based essentially on manpower
(such as cleaning and surveillance), an economic entity is established by a
group of workers engaged in a joint activity on a permanent basis.\footnote{36} As the
services can be provided without any significant tangible assets, it would be
illogical to make the maintenance of an identity dependant upon the transfer
of such assets. Therefore, such an entity can also retain its identity if an
essential section of the staff is transferred to the new service provider.\footnote{37} In
making this assessment, consideration must be given to both the numbers
and skills of those employees transfereing.

It is sometimes difficult to assess whether or not an activity is essentially
based on manpower, rather than on assets and equipment. The European
Court of Justice has only given some limited guidance by stating that an
industry is based essentially on assets where the (tangible) assets contribute
significantly to the performance of the activity\footnote{38} or where a significant
amount of equipment is required to perform the activity.\footnote{39}

Until now, the European Court of Justice has recognized the following
activities as essentially being activities based on manpower: cleaning,\footnote{40}
surveillance,\footnote{41} home-help service for persons in need\footnote{42} and temporary
agency work.\footnote{43} Conversely, the Court has categorized the following
activities as activities based essentially on assets: bus transportation,\footnote{44}
mining industry\footnote{45} and catering.\footnote{46}

Further, the European Court of Justice has also specified that an economic
entity does not necessarily need to maintain its exact organization after the
transfer. The condition of retaining its identity is also complied with in a
situation where the undertaking transferred does not retain its organizational
autonomy, but (i) the functional link between the various elements of

\footnote{35. Case C-340/01, Abler [2003] ECR I-14023 (42).}
\footnote{36. Case C-13/95, Sützen [1997] ECR I-1961 (21); Joined cases C-173/96 and C-247/96, Sanchez
Hidalgo [1998] ECR I-8237 (32); Case C-172/99, Oy Liikenne [2001] ECR I-745 (38); Case
37. Case C-13/95, Sützen [1997] ECR I-1961 (21); Joined cases C-173/96 and C-247/96, Sanchez
Hidalgo [1998] ECR I-8237 (31-32); Case C-151/09, UGT-FSP [2010] ECR I-07591 (29-30);
Case C-463/09, Clece [2011] ECR I-00095 (36, 41); Case C-108/10, Scattoloni [2011] ECR
I-07491 (62).
40. Joined Cases C-127/96, C-229/96 and C-74/97, Vidal [1998] ECR I-8179; Case C-463/09,
production transferred is preserved, and (ii) that link enables the transferee to use those elements to pursue an identical or analogous economic activity.\footnote{Case C-466/07, Klarenberg [2009] ECR I-00803 (46-48, 53).}

Finally, the European Court of Justice has set out more tailored criteria for temporary agency businesses in view of the specific nature of their activities.\footnote{The Court has held that the Acquired Rights Directive applies to ‘a situation where part of the administrative personnel and part of the temporary workers are transferred to another temporary employment business in order to carry out the same activities in that business for the same clients and (…) the assets affected by the transfer are sufficient in themselves to allow the services characterizing the economic activity in question to be provided without recourse to other significant assets or to other parts of the business.’ (Case C-458/05, Jouini [2007] ECR I-07301 (38)).}

### 2.2 Territorial Scope

The Acquired Rights Directive applies where and insofar as the undertaking, business or part of the undertaking or business to be transferred is situated within a Member State of the European Union (Article 1(2) of the Acquired Rights Directive) or the European Economic Area (Norway, Iceland, Liechtenstein).

Thus an outsourcing transaction concerning the transfer of an undertaking situated outside the European Union or the European Economic Area to a transferee situated in a Member State falls outside the scope of the Acquired Rights Directive, even if the transferor or transferee or both are governed by the law of a Member State.\footnote{First phase consultation of social partners under Art. 138(2) of the EC Treaty concerning cross-border transfers of undertakings businesses or parts of undertakings or businesses, European Commission (August 2007), www.ec.europa.eu, 2.}

In contrast, when the undertaking is located in the European Union or the European Economic Area, the Acquired Rights Directive will apply, even if the transferee is situated outside this area.\footnote{First phase consultation of social partners under Art. 138(2) of the EC Treaty concerning cross-border transfers of undertakings businesses or parts of undertakings or businesses, European Commission (August 2007), www.ec.europa.eu, 2.}

However, in that case, only the transferor will be bound by the obligations imposed by the Acquired Rights Directive.

If there is a cross-border outsourcing transaction to a country that is geographically far away, it is possible that such a transaction might entail radical changes in the legal, economic and social environment. Would that transaction be a transfer of an undertaking? With regard to relocations from one Member State to another, the European Commission seems to consider that, given the advanced stage of the internal market, a relocation is not in...
itself an obstacle to the existence of a transfer of an undertaking. Conversely, an outsourcing transaction to a country situated outside the EU or the EEA will often result in such extensive changes to the legal, economic and social environment that it is very unlikely that a transfer of undertaking occurs. However, cross-border outsourcing operation to countries close to the EU or EEA borders (e.g., to Switzerland or Turkey) can still trigger the application of the Acquired Rights Directive.

The Acquired Rights Directive is intended to achieve only partial harmonization and the different Member States thus have a wide margin of discretion in implementing it. In these circumstances, when the transferor and the transferee are governed by the laws of different Member States, problems of international private law may arise for which the Acquired Rights Directive does not provide a solution.

2.3 PERSONAL SCOPE

2.3.1 Transferor and Transferee

The Acquired Rights Directive applies to public and private undertakings engaged in economic activities, whether or not they are operating for gain (see Article 1(1)(c) of the Acquired Rights Directive). However, the undertaking that is transferred must develop business activities, i.e., it must provide goods or services in a market.

An outsourcing transaction from or to a public-law body is not automatically excluded from the scope of the Acquired Rights Directive. Only activities involving the exercise of public authority fall outside its scope. Thus, the question that needs to be considered is whether the activity that is outsourced amounts to an economic activity rather than the exercise of public authority.

51. First phase consultation of social partners under Art. 138(2) of the EC Treaty concerning cross-border transfers of undertakings businesses or parts of undertakings or businesses, European Commission (August 2007), www.ec.europa.eu, 7.1.2.
52. The Member States themselves define some of the notions used by the Acquired Rights Directive, for example: the notion of employee (Art. 2(1)(d) of the Acquired Rights Directive) or the definition of a contract of employment or employment relationship. Moreover, several provisions of the Acquired Rights Directive give Member States options they may use. The Acquired Rights Directive allows Member States to apply or introduce rules that are more favourable to employees or to promote collective agreements more favourable to employees.
55. In that framework, it must be noted that only very few activities are considered to fall within the exercise of public power. For example, in Case C-29/91, Dedmond Stichting [1992] ECR
An administrative reorganization of public administrative authorities, or the transfer of administrative functions between public administrative authorities is not considered to be a transfer within the meaning of the Acquired Rights Directive (Article 1(1)(c) of the Acquired Rights Directive). The European Court of Justice has held that the scope of this exclusion is limited to cases where the transfer concerns activities that fall within the exercise of public powers. 56

The company to which employees are assigned on a permanent basis can, in some circumstances, also be regarded as a ‘transferor’ within the meaning of the Acquired Rights Directive. 57

2.3.2 Employee

For the purposes of the Acquired Rights Directive, an ‘employee’ means any person who, in the Member State concerned, is protected as an employee under national employment law (Article 2(1)(d) of the Acquired Rights Directive). Thus, it is up to the Member States to lay down a definition of what constitutes an ‘employee’. However, part-time, fixed-term and temporary employees cannot be excluded from the Acquired Rights Directive’s scope (Article 2(2) of the Acquired Rights Directive).

57. Case C-242/09, Albron Catering [2010] ECR I-10309 (26, 32). In the case at hand, the employees concerned were linked by an employment contract with an undertaking part of the Heineken group (‘the contractual employer’), but they were assigned on a permanent basis to another company of the Heineken group without being linked to this other company by an employment contract (‘the non-contractual employer’). Said ‘contractual employer’ employed all of the staff of the Heineken group and thus performed the function of central employer. It assigned the staff to the various operating companies of the Heineken group in the Netherlands, amongst which was the group company which carried out catering activities. Those catering activities were transferred, by virtue of an agreement, to Albron. The European Court of Justice held that it is possible to regard the group company to which the employees were assigned on a permanent basis without being linked to this company by an employment contract as a ‘transferor’, within the meaning of the Acquired Rights Directive, even though there exists within that group a company with which the employees concerned were linked by an employment contract.
As a result of the non-existence of a uniform European definition for an ‘employee’, public-service employees fall outside the scope of the Acquired Rights Directive if they are subject to a national public-law instrument which denies them the status of employee under national law.  

The Acquired Rights Directive only relates to employees who are in service of the undertaking on the date of the transfer, i.e., it excludes former employees who have already left the undertaking before the transfer date and employees who are engaged by the transferee after that date. Also, the Acquired Rights Directive does not cover the employees employed at the transfer date but who do not want to continue to work for the transferee after the transfer (see below on the protection against dismissal).

The Acquired Rights Directive only applies to the employees that are wholly engaged in the transferred business. If an employee is engaged in the whole business or in several departments, he cannot be regarded as assigned to one specific part of the business, unless the extent of his duties outside his usual part of the business are negligible.

3 CONSEQUENCES OF THE APPLICATION OF THE ACQUIRED RIGHTS DIRECTIVE TO AN OUTSOURCING TRANSACTION

The application of the Acquired Rights Directive to an outsourcing transaction has a material impact on the transaction itself. First of all, all employees employed in the part of the business to be outsourced will transfer automatically to the transferee. Second, all rights and obligations arising from the employment contract or employment relationship and the collective agreements are also transferred to the transferee. Lastly, the affected employees are protected against dismissal.

59. Case 19/83, Knud Wendelboe [1985] ECR 457 (13-15); Case C-478/03, Celtec [2005] ECR I-4389 (29); Case C-386/09, Briot [2010] ECR I-08471 (28). However, in Case 51/00, Temco [2002] ECR I-969 (28), the European Court of Justice had made the necessary differentiations with regard to dismissals carried out a very short time before the transfer: ‘The fact that the staff of the transferor were dismissed only a few days before the employees in question were taken on again by the transferee, indicating that the reason for the dismissal was the transfer of the business, cannot have the effect of depriving workers of their right to have their contract of employment maintained by the transferee. In those circumstances, such staff must be regarded as still in the employ of the undertaking on the date of the transfer’. This was confirmed in the Briot case (Case C-386/09, Briot [2010] ECR I-08471 (30)).
62. Case C-186/83, Botzen [1985] ECR 519 (15-16), with regard to persons employed in an administrative department of the undertaking which has not itself been transferred, but who carried out certain duties for the benefit of the part transferred.
One of the main purposes of the Acquired Rights Directive is to safeguard the rights of employees in the event of a change of employer. This is achieved by making it possible for them to continue working for the transferee under the same conditions as those agreed with the transferor. As the rules of the Acquired Rights Directive are to be considered mandatory (it is not possible to derogate from them in an unfavourable way to employees), the transfer cannot be made subject to the consent of the transferor or the transferee. Equally, the transfer of the employment contracts does not depend on the employees (or the employee representatives) giving their consent. The only exception to this principle is that an individual worker has the option to decide that, after the transfer, he will not continue the employment relationship with the transferee. In practice, this has the effect that employees can elect to exclude themselves from the Acquired Rights Directive’s scope. In such a case, the Member States’ national law will determine what happens to the employment relationship. For example, it may be provided that the employment contract should be maintained with the transferor or, in contrast, that it
must be regarded as terminated either by the employee or by the employer. However, if the reason the employee refuses to transfer is because the transfer would involve a substantial detrimental change in his working conditions, the Member State is required to provide that the employer is deemed responsible for the termination.

The employees are transferred on the date of the transfer of the undertaking. The term ‘date of the transfer’ must be understood as referring to the date on which the responsibility as employer for carrying on the business moves from the transferor to the transferee. The transfer of the employees therefore necessarily takes place on the same date as that of the transfer of the undertaking and cannot be postponed to another date at the will of the transferor or the transferee.

As from the transfer date, the transferor is in principle discharged, by virtue of the transfer alone, from its obligations arising under the employment contracts or relationships. However, in accordance with Article 3(2) of the Acquired Rights Directive, Member States may provide that, after the transfer date, the transferor and the transferee are jointly and severally liable in respect of obligations arising before the transfer date from an employment contract or relationship existing on the transfer date.

The Acquired Rights Directive only regulates the relationship between the employees and employers concerned; it does not have an impact on the rights of third parties.

3.2 Protection of the Employees’ Acquired Rights

3.2.1 The Transfer of Acquired Rights

Besides safeguarding employment, the purpose of the Acquired Rights Directive is also to ensure, as far as possible, that the transferred
employment contracts or relationships continue unchanged, in order to prevent the employees concerned from being placed in a less favourable position solely as a result of the transfer.\footnote{Case 287/86, Ny Mølle Kro [1987] ECR 5465 (25); Case C-478/03, Celtec [2005] ECR I-4389 (26); Case C-386/09, Briot [2010] ECR I-08471 (26); Case C-108/10, Scattolon [2011] ECR I-07491 (76).}

Thus, not only must the transferee take over all employees of the transferred undertaking, but the transferee is also automatically bound by all terms and conditions of employment as they exist at the time of transfer (including accrued length of service,\footnote{The position of the European Court of Justice is nuanced as to the question of whether the transferee must respect the transferring employees’ accrued length of service with their former employer does not, as such, constitute a right which they may assert against their new employer. (Case C-343/98, Collino and Chiappero [2000] ECR I-06659 (50); Case C-108/10, Scattolon [2011] ECR I-07491 (69)). However, length of service is used to determine certain employee rights that are of a financial nature, and those rights must be maintained by the transferee in the same way as by the transferor. Consequently, in calculating rights of a financial nature (such as a termination payment or salary increases), the transferee must take into account the entire length of service of the employees transferred, insofar as the transferee’s obligation to do so is derived from the employment relationship between those employees and the transferor, and in accordance with the terms agreed upon within that relationship. (Case C-343/98, Collino and Chiappero [2000] ECR I-06659 (50-51)). On the other hand, where a transfer leads to the collective agreement in force with the transferor being immediately applied to the transferred workers, and where the conditions for remuneration in that collective agreement are linked, in particular, to length of service, the Court seems to indicate that the transferee does not necessarily need to take the entire length of service accrued with the transferor into account. (Case C-108/10, Scattolon [2011] ECR I-07491 (81-83)).} remuneration, benefits, working time and work place).\footnote{Case C-209/91, Rask and Christensen [1991] ECR I-5755 (31); Case C-343/98, Collino and Chiappero [2000] ECR I-6659 (51).} The Acquired Rights Directive cannot be relied on in order to obtain an improvement of remuneration or other working conditions in the event of a transfer of an undertaking.\footnote{Case C-108/10, Scattolon [2011] ECR I-07491 (77). In this case, the European Court of Justice also clarified that the Acquired Rights Directive does not prevent there from being certain differences in salary treatment between the workers transferred and those who were already, at the time of the transfer, employed by the transferee: ‘Whilst other instruments and principles of law might prove relevant in order to examine the legality of such differences, Directive 77/187 itself is aimed merely at avoiding workers being placed, solely by reason of a transfer to another employer, in an unfavourable position compared with that which they previously enjoyed.’ (Case C-108/10, Scattolon [2011] ECR I-07491 (77)).}

### 3.2.2 Contractual Variation

Although the transferee must respect all rights and obligations arising from the transferred employment contracts and relationships, it may alter these...
rights in a manner unfavourable to the transferred employees where national law allows such an alteration in situations other than the transfer of an undertaking.\textsuperscript{83} Thus, the transferee may alter the employment terms to the same extent as the transferor could have done so. However, the transfer of the undertaking itself may never constitute the reason for the amendment.\textsuperscript{84} In that framework, the European Court of Justice has held that the transfer is considered to constitute a reason as soon as the alteration of the employment relationship is ‘connected to’ the transfer.\textsuperscript{85} The European Court of Justice has also taken the view that an alteration to the employment relationship must be regarded as connected to the transfer when the reason for the amendment is the transferee’s wish to bring the employment terms of the transferred employees into line with those of its other staff (i.e., harmonization).\textsuperscript{86}

Can the employees themselves agree to unfavourable alterations in the terms of their employment relationship? On this question, the European Court of Justice has repeatedly held that the protection conferred by the

\begin{itemize}
\item[85.] Case C-343/98, Collino and Chiappero [2000] ECR I-6659 (52); Case C-4/01, Martin, Daby and Willis [2003] ECR I-12859 (44).
\item[86.] Case C-4/01, Martin, Daby and Willis [2003] ECR I-12859 (44). It must be noted that, in recent years, some authors have doubted whether the European Court of Justice still takes the view that an alteration of the employment relationship may not be connected to the transfer. These authors refer to the Delahaye case, concerning the transfer of undertaking from a legal person governed by private law to the state, who reduced the remuneration of the employees concerned for the purpose of complying with the national rules in force for public employees. The Court stated that the Acquired Rights Directive must be interpreted as not precluding in principle the new employer from reducing the remuneration for the purpose of complying with the national rules in force for public employees. Thus, the Court did not explicitly repeat the condition that the alteration must not be connected to the transfer. However, the Court went on to state that the competent authorities responsible for applying and interpreting the national rules for public employees are obliged to do so as far as possible in the light of the purpose of the Acquired Rights Directive. The Court also held that, were the application of the national rules governing the position of state employees would entail a reduction in the remuneration of the employees concerned by the transfer, such a reduction must, if it is substantial, be regarded as a substantial change in working conditions to the detriment of the employees in question. (Case C-452/02, Delahaye [2004] ECR I-10823).
\end{itemize}

It should be noted, however, that in the more recent Scattolon case, the European Court of Justice again referred expressly to the older case law in this respect: ‘As the Court has held many times and as is apparent, moreover, from Art. 4 of Directive 77/187, the latter does not deprive the Member States of the possibility of allowing employers to modify working relations in an unfavourable direction, notably as regards protection against dismissal and the conditions of remuneration. The directive only prohibits such modifications from taking place on the occasion of and because of the transfer (see to that effect, in particular, Case 324/86 Foreningen af Arbejdsklæde i Danmark, ‘Daddy’s Dance Hall’ [1988] ECR 739, para. 17; Case C-209/91 Watson [1992] ECR I-5755, para. 28, and Case C-343/98, Collino and Chiappero [2000] ECR I-6659 (52).’ (Case C-108/10, Scattolon [2011] ECR I-07491 (59)).
provisions of the Acquired Rights Directive is a matter of public policy and must be considered mandatory.\(^{87}\) It therefore follows that an employee is not entitled to waive his rights under the Acquired Rights Directive.

Consequently, an employee may object to being transferred to the transferee. However, in the event that he does not do this, the employee’s rights may not be restricted, even with the employee’s consent and even if the disadvantages resulting from the alteration can be offset by other benefits which, when taken as a whole, do not place the employee in a worse position.\(^{88}\) The only exception is when the employee and the new employer agree to an alteration of the employment relationship that is not connected to the transfer.

The principle that employees may not waive their protection conferred by the Acquired Rights Directive also applies to the employee representatives, who may not agree to different transfer arrangements with the transferor and the transferee.\(^{89}\)

If the employees (or the employee representatives) do accept inferior terms, in principle their consent is invalid.\(^{90}\) In such a case, the rules protecting the employees’ acquired rights are deemed to have been infringed at the employer’s initiative and therefore it is for the transferee to make good the consequences of this situation.\(^{91}\)

### 3.2.3 The Transfer of Collective Agreements

Following the transfer, the transferee must not only respect the existing employment contracts, but must also continue to observe the terms and conditions agreed in any existing collective agreement until the date of termination or expiry of that collective agreement or the entry into force or application of another collective agreement (Article 3(3) of the Acquired Rights Directive). Member States may limit this period (but the period must not be less than one year).

---

\(^{87}\) Case 324/86, Daddy’s Dance Hall [1988] ECR 739 (14).

\(^{88}\) Case 324/86, Daddy’s Dance Hall [1988] ECR 739 (14).


\(^{90}\) Case C-4/01, Martin, Daby and Willis [2003] ECR I-12859 (45).

\(^{91}\) Case C-4/01, Martin, Daby and Willis [2003] ECR I-12859 (46). This case involved the offering of early retirement to transferred employees on terms that were less favourable than the pre-transfer terms. The European Court of Justice held that the rule was infringed on the employer’s initiative, since it was he who offered the early retirement terms and he could always refuse to grant that retirement, whilst the employees wishing to take early retirement had no choice other than to accept those terms.
After the date of termination or expiry of the collective agreement, the transferee has no further obligation under the Acquired Rights Directive to respect the terms of that collective agreement.\(^{92}\)

Also, Article 3(3) of the Acquired Rights Directive must be interpreted as meaning that, from the date of transfer, it is lawful for the transferee to apply the working conditions laid down by the collective agreement in force to themself. This provision should, however, be interpreted in view of the Acquired Rights Directive’s objective which consists, in essence, of preventing workers subject to a transfer from being placed in a less favourable position solely as a result of the transfer. Consequently, implementation of the option to replace, with immediate effect, the conditions which the transferred workers enjoy under the collective agreement with the transferor with those conditions laid down by the collective agreement in force with the transferee, cannot have the aim or effect of imposing on those transferred workers conditions which are, overall, less favourable than those applicable before the transfer.\(^{93}\)

Further, this provision may only be relied on by employees who were already employed by the undertaking at the time of the transfer, i.e., it cannot be relied on by employees engaged after the transfer.\(^{94}\)

Moreover, the terms and conditions of the collective agreements must be observed in the form existing at the time of transfer. Changes to the collective agreement after the transfer should not affect the transferred employees (unless the transferee is or becomes a party to the agreement, for example through membership of the employer’s federation that entered into the collective agreement).\(^{95}\)

3.2.4 Pension Rights, Invalidity and Survivors’ Benefits

Unless Member States provide otherwise, the transfer of the employees’ rights does not cover rights to old-age, invalidity or survivor’s benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes (Article 3(4)(a) of the Acquired Rights Directive). It therefore follows that the transferee is not obliged to maintain the employers’ contributions to the employee’s occupational pension scheme and/or hospitalization insurance.\(^{96}\) This is regarded by many as a grave omission in the protective scheme of the Acquired Rights Directive. In many cases, the occupational pension scheme and the hospitalization

\(^{92}\) Case C-396/07, Juuri [2008] ECR I-08883 (34, 36).


\(^{95}\) Case C-499/04, Werhof [2006] ECR I-3129 (29).

\(^{96}\) EFTA Court, Case E-2/95, Eilert Eidesund [1996] IRLR 684.
insurance constitute a material element of the remuneration package and the loss of these benefits reduces the remuneration in fact. The severity of Article 3(4)(a) of the Acquired Rights Directive is softened in two ways. According to Article 3(4)(b) of the Acquired Rights Directive, even if the directive does not apply to old age, invalidity or survivor’s benefits, Member States must adopt the measures necessary to protect the interests of employees and of persons no longer employed in the transferor’s business at the time of the transfer in respect of rights conferring on them immediate or prospective entitlements to old-age benefits, including survivors’ benefits, under supplementary schemes.

Moreover, the European Court of Justice has stated that since Article 3(4)(a) of the Acquired Rights Directive is an exception to the general rule, it must be interpreted restrictively. It can therefore only apply to the benefits listed exhaustively in that provision, namely old-age, invalidity or survivor’s benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes. 97

For example, only benefits paid from the time when an employee reaches the end of his normal working life, as laid down by the general structure of a pension scheme, can be classified as old-age benefits. Benefits paid in other circumstances, such as dismissal or early retirement, do not fall under the exception. 98

3.3 PROTECTION AGAINST DISMISSAL

3.3.1 Constructive Dismissal

If the employment contract is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for the termination (Article 4(2) of the Acquired Rights Directive). 99

In principle, it is for the national court to determine whether the employment contract proposed by the transferee involves a substantial change in working conditions which is disadvantageous to the employees. 100

---

99. If it is impossible for the transferee to assign the employee to a position of employment which is equivalent to its pre-transfer position, this can, if it leads to a substantial change in working conditions to the detriment of that employee, be found to be equivalent to the termination of the employment contract as a result of an action by the employer. (Case C-466/07, Klarenberg [2009] ECR I-00803 (52)).
100. Although the European Court of Justice sometimes also rules on this point. For example, in Mareks the Court has held that a change in the level of remuneration awarded to an
The consequences of a constructive dismissal are not determined by the Acquired Rights Directive. In principle, it is up to the Member States to determine the sanction. However, the employee concerned should, at a minimum, be entitled to the protection of the national rules applicable in the case of termination of the employment contract by an employer.\textsuperscript{101}

### 3.3.2 Dismissal Because of the Transfer

The transfer of the undertaking may not in itself constitute grounds for dismissal by the transferor or the transferee. However, this prohibition does not stand in the way of dismissals for economic, technical or organizational reasons entailing changes in the workforce (Article 4(1) of the Acquired Rights Directive).

Thus, the protection against dismissal is limited to dismissals where the only reason is the transfer.\textsuperscript{102} In order to determine whether the employees were dismissed solely as a result of the transfer, it is necessary to take into consideration the objective circumstances in which the dismissal took place, for example, the fact that a dismissal took effect on a date close to that of the transfer and that the employee in question was taken on again by the transferee.\textsuperscript{103}

---

\textsuperscript{101} '(…) the Member States are not required to guarantee the employee a right to financial compensation, for which the transferee employer is liable, in accordance with the same conditions as the right upon which an employee can rely where the contract of employment or the employment relationship is unlawfully terminated by his employer. However, the national court is required, in a case within its jurisdiction, to ensure that, at the very least, the transferee employer in such a case bears the consequences that the applicable national law attaches to termination by an employer of the contract of employment or the employment relationship, such as the payment of the salary and other benefits relating, under that law, to the notice period with which an employer must comply.' (Case C-396/07, \textit{Juuri} [2008] ECR I-08883 (30)).

\textsuperscript{102} For example, the termination of the employment contracts would not be due solely to the transfer of the undertaking (and would thus be allowed under the Acquired Rights Directive) if it would be caused by additional circumstances, such as the failure of the transferee and the landlords to agree on a new lease, the impossibility of finding other commercial premises or the impossibility of transferring the staff to other stores. (Case C-313/07, \textit{Kirrtruna and Vigano} [2008] ECR I-07907 (46)).

As dismissals for economic, technical or organizational reasons entailing changes are not prohibited, it is possible for the transferor to dismiss surplus employees in order to prevent, as far as possible, more dismissals.\textsuperscript{104}

The non-renewal of a fixed-term temporary employment contract, due to the absence of a new agreement between the employer and the employee, cannot be regarded as a dismissal within the meaning of Article 4(1) of the Acquired Rights Directive.\textsuperscript{105}

The consequences of a dismissal by reason of the transfer are not governed by the Acquired Rights Directive. In principle, it is up to the Member States to determine the sanction. This could be that the dismissal is void or that the dismissed employee is entitled to compensation.

To avoid manoeuvres whereby the transferor dismisses the employees shortly before the transfer and then the transferee reengages them with inferior terms and conditions, the European Court of Justice has restricted the Member States’ discretion to determine the consequences of a prohibited dismissal by the transferor.

If an employee is dismissed only a few days before he is taken on again by the transferee, the employee must not be deprived of his right to have his employment contract maintained by the transferor. In those circumstances, the employee must be regarded as still employed in the undertaking on the date of the transfer, with the result that the transferor’s obligations towards this employee were automatically transferred.\textsuperscript{106}

Conversely, if the employee is never reengaged by the transferee, Member States may determine that the dismissal remains effective, leaving the employee with the option of claiming, either against the transferor or the transferee, that his dismissal was unlawful.\textsuperscript{107}

Member States may exclude certain specific categories of employees ‘who are not covered by the national laws or practice in respect of protection against dismissal’ from this protection against dismissal. However, as soon as employees enjoy some, albeit limited, protection against dismissal under national law, that protection may not be taken away from them or curtailed solely because of the transfer.\textsuperscript{108}


\textsuperscript{105} Case C-386/09, Briot [2010] ECR I-08471 (34).


\textsuperscript{108} Case C-237/84, Commission / Belgium [1986] ECR 2263 (13).
3.4 Protection of the Functions of the Employee Representatives

The continuation of the employee representation depends upon whether the undertaking preserves its autonomy after the transfer, i.e., whether it continues to constitute a separate operating unit instead of being absorbed into a more complex structure.

According to the European Court of Justice, the undertaking preserves its autonomy if, after the transfer, the organizational powers of those in charge of the entity transferred remain, within the organizational structures of the transferee, essentially unchanged as compared with the situation before the transfer.109

If the undertaking retains its autonomy, the status and function of the representatives or of the employee’s representation affected by the transfer must be preserved on the same terms and conditions as existed before the transfer (Article 6(1) of the Acquired Rights Directive). However, this does not apply if, under national law or by agreement with the representatives of the employees, the representatives need to be reappointed or the representation needs to be reconstituted (Article 6(1) of the Acquired Rights Directive).

If the undertaking does not preserve its autonomy, it is up to the Member States to take the necessary measures to ensure that the transferred employees who were represented before the transfer continue to be properly represented during the period necessary for the reconstitution or reappointment of the representation of those employees in accordance with national law or practice (Article 6(1) of the Acquired Rights Directive).

If the term of office of the representatives of the employees affected by the transfer expires as a result of the transfer, the representatives themselves continue to enjoy any protection afforded to such representatives by national law (Article 6(2) of the Acquired Rights Directive).

109. Case C-151/09, UGF-FSP [2010] ECR I-07591 (44). More particularly, the European Court of Justice held that ‘an economic entity which is transferred preserves its autonomy, within the meaning of Article 6(1) of Directive 2001/23, provided that the powers granted to those in charge of that entity, within the organizational structures of the transferor, namely the power to organise, relatively freely and independently, the work within that entity in the pursuit of its specific economic activity and, more particularly, the powers to give orders and instructions, to allocate tasks to employees of the entity concerned and to determine the use of assets available to the entity, all without direct intervention from other organizational structures of the employer, remain, within the organizational structures of the transferee, essentially unchanged. The mere change of those ultimately in charge cannot in itself be detrimental to the autonomy of the entity transferred, except where those who have become ultimately in charge have available to them powers which enable them to organise directly the activities of the employees of that entity and therefore to substitute their decision-making within that entity for that of those immediately in charge of the employees.’ (Case C-151/09, UGF-FSP [2010] ECR I-07591 (56)).
4 INFORMATION AND CONSULTATION

The transferor and transferee are required to inform the representatives of their respective employees affected by the transfer of:

1. the date or proposed date of the transfer;
2. the reasons for the transfer;
3. the legal, economic and social implications of the transfer for the employees; and
4. any measures envisaged in relation to the employees’ employment (Article 7 of the Acquired Rights Directive).

The transferor must provide this information ‘in good time’ and before the transfer is carried out. The transferee must also give this information ‘in good time’, and in any event before its employees are directly affected by the transfer (i.e., as regards their terms and conditions of work and employment).

Moreover, where the transferor or the transferee envisages measures in relation to their employees, they must consult the representatives of these employees on such measures in good time ‘with a view to reaching an agreement’ (Article 7(2) of the Acquired Rights Directive). This indicates that the employer has a duty to take the proposals of the employee representatives into further consideration. However, it is not required to reach an agreement.

Member States may limit the obligation to inform and consult with the employee representation bodies to undertakings or businesses which, in terms of the number of employees, meet the conditions for the election or nomination of a collegiate body representing the employees (Article 7(5) of the Acquired Rights Directive). In order to prevent employees being thereby deprived of all protection, if there is no representation through no fault of their own, the employees themselves must still be informed in advance about the issues set out above.

The obligation to inform the employee representatives or the employees themselves, applies irrespective of whether the decision resulting in the transfer is taken by the employer or an undertaking controlling the employer. In either case, the fact that the undertaking controlling the employer did not provide the necessary information cannot be accepted as an excuse for breaching the information and consultation requirements set out above (Article 7(4) of the Acquired Rights Directive).

The Acquired Rights Directive does not impose any specific sanctions in the event that the obligation to inform and consult the employees or their representatives is breached. However, the Member States are compelled to introduce into their national legal systems such measures as are necessary to
enable all employees and representatives who consider themselves wronged by a failure to comply with the obligations arising from the directive to pursue their claims by judicial process, possibly after recourse to other competent authorities (Article 9 of the Acquired Rights Directive). Moreover, the Member States are always required to take all measures necessary to guarantee the application and effectiveness of the Acquired Rights Directive.\(^\text{110}\)

For that purpose, while the choice of penalties remains within their discretion, they must ensure in particular that infringements of the Acquired Rights Directive are penalized with effective, proportionate and dissuasive sanctions.\(^\text{111}\)

### SECTION III COUNTRY-SPECIFIC PARTICULARITIES

The applicable rules on outsourcing and employee transfer differ of course from country to country. In section I of this chapter, we have highlighted the main issues that must be examined in the various countries involved in the outsourcing. In section II of this chapter, we have focused on the European regime of employee transfer in the event that the outsourcing constitutes a transfer of an undertaking.

In this final section, we will give a brief overview of the main particularities in some countries that should be taken into account when going ahead with an outsourcing.

We will successively focus on the following countries:

(1) Belgium;
(2) China;
(3) The Czech Republic;
(4) France;
(5) Germany;
(6) India;
(7) Italy;
(8) The Netherlands;
(9) Poland;
(10) Spain; and
(11) The United Kingdom.

---

\(^{110}\) Article 291(1) of the Treaty on the Functioning of the European Union.

Belgium

Christian Bayart & Ilse Bosmans

In this chapter, we will discuss the particular employment issues related to an outsourcing transaction in Belgium. The main issues concern:

(1) the rules on the transfer of an undertaking (or part of an undertaking);
(2) the prohibition on the ‘hiring in’ and ‘lending out’ of employees;
(3) the rules on well-being at work; and
(4) the rules on liability for (employment, social security and tax) debts of a (sub)contractor.

1 RULES ON TRANSFERS OF UNDERTAKINGS

As in other countries, in Belgium, an outsourcing transaction may constitute a transfer of an undertaking within the meaning of the Acquired Rights Directive. Belgium has fully implemented the Acquired Rights Directive, and thus the principles explained in section II of this chapter also apply in Belgium. However, there are a few Belgian particularities that should be taken into account.

In the first part of this section, we will give a brief overview of the way in which Belgium has implemented the Acquired Rights Directive and the case law of the European Court of Justice. We will comment on how Belgium has supplemented the law in those areas where the Acquired Rights Directive left room for Member States to exercise discretion. We also focus on the main particularities that should be taken into account when implementing an outsourcing transaction in Belgium. These particularities relate to:

(1) the employee’s right of refusal;
(2) harmonization of terms and conditions;
(3) collective bargaining agreements;
(4) supplementary social security benefits;
(5) protection against dismissal; and
(6) information and consultation requirements.

1.1 IMPLEMENTATION OF THE ACQUIRED RIGHTS DIRECTIVE

Belgium has fully implemented the Acquired Rights Directive. Most provisions of the Acquired Rights Directive have been implemented via National Collective Bargaining Agreement n° 32bis (CBA 32bis), although some provisions (such as the main provisions on information and consultation requirements) are covered in other legislations. In addressing areas of ambiguity, the Belgian courts follow the European Court of Justice case law on the interpretation of the Acquired Rights Directive.

In particular, the Belgian courts apply the same concepts (and the interpretation of those concepts) as recognized by the European Court of Justice. This means that Belgian courts usually follow the European Court of Justice in determining whether an outsourcing transaction constitutes a transfer of an undertaking or a part of an undertaking.2

In addition, the employee protection rules set out in the Acquired Rights Directive are restated in CBA 32bis and other Belgian regulations. In summary, this means that the following principles apply in the event of an outsourcing transaction that constitutes a transfer of an undertaking or part of an undertaking:

– Automatic transfer of employment contracts: All employment contracts that exist at the time of the transfer are automatically transferred to the transferee (i.e., the supplier) at the time of transfer.3 The transferee does not need to obtain the employees’ consent to the transfer.

– Transfer of rights and obligations arising from employment contracts and maintenance of terms and conditions: All rights and obligations arising from the employment contracts existing at the time of the transfer are transferred to the transferee (i.e., the supplier).4 Belgium has not implemented the option provided by the Acquired Rights Directive, which permits, but does not require, Member States to adopt measures to ensure that the transferor notifies the transferee of all rights and obligations that will transfer.

---

1. Collective bargaining agreement no. 32bis concluded on 7 Jun. 1985 in the National Labour Council on the maintenance of employees’ rights upon change of employer as a consequence of a conventional transfer of an undertaking and on rights of employees who are being transferred in the context of a transfer of assets after bankruptcy.
2. See section II of this chapter.
3. Article 7 CBA 32bis.
4. Article 7 CBA 32bis.
Following the transfer of all rights and obligations arising from the employment contracts, the general principle is that the new employer (i.e., the transferee/supplier) is bound by all terms and conditions of employment existing at the time of the transfer. However, in Belgian practice, this principle is not strictly applied in all circumstances (see section 1.3 below). Moreover, with regard to terms and conditions laid down in collective bargaining agreements, specific rules apply (see section 1.4 below).

- **Protection against dismissal:** The transfer must not involve any dismissals (except in certain exceptional circumstances). Also, if the new employer (i.e., the transferee/supplier) unilaterally and significantly changes an essential element of the employee’s terms and conditions, the employee will be able to claim constructive dismissal. However, if an employee is dismissed in breach of the protection against dismissal provisions provided in CBA 32bis, only limited sanctions are applied (see section 1.6 below).

- **Liability of transferor and transferee:** The old employer (i.e., the transferor/customer) and new employer (i.e., the transferee/supplier) are jointly and severally liable for the payment of all debts existing at the time of the transfer and arising out of the employment contracts that existed at that time. This means that the employee can bring a claim against the transferor and/or the transferee for those debts.

- **Information and consultation:** The employee representatives, or the employees themselves (if there are no employee representatives), must be informed and consulted with about the contemplated outsourcing transaction and the consequences that it will have on the affected employees’ employment. In section 1.7 below, we give more details on this information and consultation procedure.

- **Scope of rules:** In line with the Acquired Rights Directive, the Belgian rules on the transfer of undertakings do not apply to supplementary social security benefits. In section 1.5 below, we give more details on what happens with supplementary social security benefits in the framework of a transfer of an undertaking.

---

5. Article 9 CBA 32bis.
6. Article 10 CBA 32bis.
7. Article 8 CBA 32bis.
8. It is generally accepted that the transferor (i.e., the customer) is not liable for debts that have arisen after the transfer. However, depending on the circumstances, the employee may also have a claim against the transferor regarding post-transfer debts.
10. Article 4 CBA 32bis.
1.2 An Employee’s Right to Object to a Transfer

Based on the Court of Justice’s case law, Belgian courts generally accept that an employee has the right to object to the transfer of his or her employment contract to the transferee. If an employee objects to the transfer of his or her employment contract, the consequences of that objection (which, according to the European Court of Justice, must be settled by national law) are not entirely clear under Belgian law. The majority of Belgian courts and legal authors are of the opinion that, unless the transferor (i.e., the customer) agrees to further employ the employee, the employee must resign. However, the consequences for the employee if the employee refuses to resign remain the subject of debate.

1.3 Harmonization of Terms and Conditions

In the context of an outsourcing transaction, one of the main concerns of the transferee (i.e., the supplier) will be to harmonize the terms and conditions of employment of the transferred employees with the terms and conditions of its own workforce. However, the transferee is bound by all the terms and conditions of all employment contracts existing at the time of transfer (including provisions regarding accrued length of service, remuneration, benefits, status, role, working time and place of work). This implies that,

11. See section II of this chapter.
12. The employee must, however, clearly express this intention. Refusing to sign an agreement releasing the transferor of all of its obligations, or providing that the length of service acquired with the transferor will not be taken over by the transferee, does not imply that the employee is objecting to the transfer of his or her employment contract. Further, the employee’s actual intention (as may be demonstrated by the employee continuing to work for the transferee after the transfer) prevails over the expressed intention.
13. See section II of this chapter.
14. This is only the position provided no changes are made to essential employment terms (see section 1.6 below) and the employment contract is not concluded intuitu personae.
15. The majority view is that an employee’s refusal to work for the transferee will be considered to constitute an irregular termination by the employee of his or her employment contract. Consequently, the employee will be liable to pay termination compensation to the employer. The minority view is that an employee’s refusal merely constitutes a breach by the employee of his or her obligation to properly perform his or her employment contract, which in itself does not imply a termination of the contract. In this scenario, the employer has two options: it can either dismiss the employee for ‘serious cause’, or bring a legal claim against the employee requesting the judicial dissolution of the employment contract.
16. Article 7 CBA 32bis. This principle applies to all terms and conditions, irrespective of whether they are provided for e.g., by the individual employment contracts, the orally agreed working conditions, unilateral documents or customs and practices operated in the transferor’s company. The impact of collective agreements will be discussed under section 1.4 below. However, this principle does not include the supplementary social security benefits (including
in principle, the transferee is not permitted to change the terms and conditions of the transferred employee’s employment because of the transfer. Belgium has not exercised the option provided by the Acquired Rights Directive, which allows Member States to limit the period during which the terms and conditions should be maintained by the transferee.

It should be noted that, in Belgian practice, the basic rule that the transferee is bound by the terms and conditions of employment existing at the moment of transfer is applied with a degree of flexibility in two respects.

First, the transferee can never be placed in a worse position than the transferor. This means that the transferee will be able to amend the terms and conditions of the transferred employees to the extent that the transferor had been permitted to make such amendments pre-transfer. In Belgium, it is generally accepted that an employer can to some extent unilaterally modify those terms and conditions that are not expressly agreed and that are not essential terms of the relationship. Therefore, that right passes to the transferee.

Second, in practice, a lenient interpretation is given to the principle of maintenance of the terms and conditions. Belgian legal authors have argued that the transferee and the transferred employee may enter into a new employment contract. This presents an opportunity to change existing employment conditions resulting from the employment contract or from lower sources of law (such as, for example, unilateral documents or custom). In practice, in the event of an outsourcing transaction, the transferee (i.e., the supplier) will often harmonize the terms and conditions of the transferred employees with the terms and conditions of its existing workforce via negotiations with the employee representatives and by entering into a company collective bargaining agreement or by concluding new individual employment contracts.

---

17. According to Article 25 of the Employment Contracts Act and the interpretation thereof by the Belgian Supreme Court (Hof van Cassatie), it is also possible to agree in the employment contract that the employer will have the right to unilaterally change non-essential agreed terms and conditions.

18. Employment conditions that result from higher sources of law, such as collective agreements, cannot be changed in this way.

19. Whether this practice complies with the European Court of Justice’s case law that states that terms and conditions cannot be modified to the detriment of the employee solely because of the transfer of undertaking, even if the employee agrees to the change (see section II of this chapter), is questionable.
1.4 COMPANY AND SECTOR-WIDE COLLECTIVE BARGAINING AGREEMENTS

Under Belgian law, it may be particularly complicated for a transferee to harmonize the terms and conditions of transferred employees with those of its existing workforce, as many terms and conditions are laid down in plant level or industry-wide collective agreements.

Under the Act of 5 December 1968 concerning the collective bargaining agreements (the CBA Act),20 Belgian law provides protection that is at least equal to the requirements set out in the Acquired Rights Directive with regard to terms and conditions agreed by the transferor in collective agreements. Therefore, CBA 32bis does not explicitly implement those provisions of the Acquired Rights Directive relating to terms and conditions agreed by the transferor in collective agreements. Belgium has also not exercised the option provided by the Acquired Rights Directive, which allows Member States to limit the period during which the terms and conditions laid down in collective agreements should be maintained by the transferee.

In determining what happens to terms and conditions laid down in collective agreements in the context of an outsourcing transaction in Belgium, a distinction must be made between:

(1) collective agreements concluded at company level (Company CBAs); and
(2) industry-wide collective agreements (Sector CBAs).

It is also important to take into account the mechanism under which collectively agreed terms and conditions have been incorporated in the individual employment contracts.

The analysis can be briefly summarized as follows:

− **Company CBAs:** The transferee (i.e., the supplier) will be bound by the CBAs concluded at the company level by the transferor (i.e., the customer) prior to the transfer in the same way as the transferor was bound by them before the transfer.21 That means that the CBAs bind the transferee until those CBAs cease to have effect, that is:
  (1) for CBAs of indefinite term: until they are terminated (e.g., by signing a new CBA that expressly replaces the old one); and
  (2) for CBAs of fixed term: until the end of that fixed term.

---

21. This means that the Belgian rules go further than the Acquired Rights Directive, as the transferee is not only bound by the terms and conditions provided in the CBA, but also by the CBA itself.
– **Sector CBAs:** In outsourcing operations, the customer and supplier are by definition usually active in different industries and, therefore, subject to different Joint Committees and, thus, to different industry-wide collective agreements. Under Belgian law, the extent to which the transferee should comply with the terms and conditions laid down in industry-wide collective agreements concluded in the transferor’s industry remains unclear in certain respects:

- If the transferor and the transferee are part of the same sector and are members of the *same* Joint Committee, the same sector CBAs will apply, both before and after the transfer.
- The situation is more complex if, due to the transfer, the transferred business:
  1. becomes part of a different industry; and
  2. falls within the scope of a *different* Joint Committee that applies different collective bargaining agreements.

In that case, if, following the transfer, the transferred business:

- performs *different (main) activities* to those performed pre-transfer, the transferee does not have to respect the CBAs entered into before the transfer; and
- continues to perform the *same activities* after the transfer, the courts and opinions of legal authors are divided about whether or not the transferee must respect the sector CBAs entered into before the transfer.

---

22. A Joint Committee (*paritair comité/comité paritaire*) is a labour committee organized at sector level and jointly managed by employers’ federations and trade unions. It is a deliberative body that has advisory or decision-making powers in certain matters (e.g., in the context of the dismissal of protected employees) and that also drafts industry-wide collective bargaining agreements. All companies that are active in a certain industry in Belgium are grouped under a specific Joint Committee or Subcommittee and are bound by the sector collective bargaining agreements concluded by that Joint (Sub)Committee.

23. Belgian collective labour relations are characterized by industry-related sets of collective agreements, which set minimum standards of terms and conditions of employment. If rendered mandatory by a Royal Decree, those industry-wide collective agreements are mandatory and every employer must comply with those collective agreements that are applicable to its industry. See Article 20 of the CBA Act. The legal effect of the Royal Decree declaring a collective agreement to be of general applicability in practice has complex implications. Also, note that even if a collective agreement has not been rendered mandatory by Royal Decree, it may produce legal effects.

24. For example, if a bank decides to outsource its IT department to an IT services provider, the IT services department will change from the banking industry to the IT industry.

25. The discussion concerns the interpretation of Article 20 of the CBA Act. Some courts and legal authors have suggested that the transferee should comply with the CBAs of the Joint Committee of the transferor (until they cease to have effect). This means that the transferee needs to comply (at least during a certain period) with a double set of CBAs (i.e., those of the Joint Committee of the transferor and those of its own Joint Committee), which is highly unpractical. Others argue that as soon as the transferred business falls within the scope of
Incorporation of terms in individual employment contract:

It should be noted that, even if the transferee is not bound by the CBA, or if it is bound by the CBA but that CBA has ceased to have effect, the transferee will in most cases still be bound by the terms and conditions laid down in that CBA. Indeed, the provisions of a CBA are automatically incorporated in the individual employment agreements of the employees (unless otherwise provided by the CBA) and consequently continue to form part of the individual employment contract after the CBA itself ceases to have effect. This means that, even if the transferee is not bound by the CBA itself or the CBA has ceased to have effect, the transferee cannot unilaterally modify the terms and conditions that were laid down in that CBA to the extent they have been incorporated in the individual employment agreements of the transferred employees. Instead, it needs those employees’ consent if it wants to make any changes to those terms and conditions.

1.5 Supplementary Social Security (Pension) Benefits

As stated above, supplementary pension benefits are excluded from the scope of CBA 32bis. This means that, according to CBA 32bis, the transferee (i.e., the supplier) is not obliged to continue the supplementary social security benefits schemes (such as occupational pension schemes) of the transferred employees, nor to offer them a new benefit or scheme.

26. This is the mechanism of ‘incorporation in the employment contracts’, as provided for by Article 23 of the CBA Act.

27. With regard to occupational pension schemes, the comments in this section only relate to the future accrual of pension benefits. The transferred employee is in any event entitled to the pension entitlements that he or she has built up in the past (i.e., acquired rights). The transfer of an undertaking may never lead to a decrease in the pension rights that the transferred employee has already acquired up to the time of the transfer. The transferee and the transferor should agree on whether those acquired rights will be transferred to the transferee or will remain with the transferor. Note that unless otherwise agreed, the transferee is not obliged to take over the acquired rights. With regard to occupational pension schemes, general rules on occupational pensions should also be taken into account, as they may contain relevant provisions regarding for example employee rights or government notification obligations (see for example Chapter V and Chapter VI of the Law on Occupational Pensions of 28 Apr. 2003).

28. Article 4 CBA 32bis.
However, this exception is to some extent misleading, as the transferee may be required to offer at least an equivalent benefit to the transferred employees based on other legal requirements. Indeed, the supplementary social security benefit may be an express term of a collective bargaining agreement or an individual employment contract.\(^{29}\)

Even if the supplementary social security benefit is not expressly provided in a collective agreement or in the individual employment agreement, an increasing number of legal authors argue that the transferred employee is still entitled to maintain the supplementary social security benefit, or at least to be provided with an equivalent benefit.\(^{30}\)

### 1.6 Protection against Dismissal

An outsourcing transaction that constitutes a transfer of an undertaking, or part of an undertaking, must not itself cause any dismissals. Dismissals by the transferor (i.e., the customer) or the transferee (i.e., the supplier) are only allowed for serious cause or for economic, technical or organizational reasons.\(^ {31}\) In addition, if the transferee unilaterally and significantly changes

---

29. If the supplementary social security benefit is expressly provided in a Company CBA or in an individual employment contract, the transferee will be obliged to offer a similar benefit to the employee. This is because the transferee: (i) is bound by a Company CBA until it expires (see section 1.4 above); and (ii) may not unilaterally change the express and essential terms of an individual employment contract. If the supplementary social security benefit is provided in a Sector CBA, the transferee must usually offer an equivalent benefit. Indeed, if the transferee falls under the same Joint (Sub) Committee as the transferor, it will of course be bound by the same Sector CBAs as the transferor. It remains subject to debate whether a transferee who falls under a different Joint Committee than the transferor must comply with the Sector CBAs of the Joint Committee applicable to the transferor (see section 1.4 above). In any event, even if the transferee need not comply with such CBAs, the terms and conditions (i.e., the supplementary social security benefit) laid down in such CBAs will be incorporated in the individual employment contract (unless otherwise provided by the CBAs) (see section 1.4 above). Consequently, the transferee will thus still need to obtain either an individual or collective consent to any changes.

30. It is more and more argued in legal doctrine (and it has also been accepted by some courts) that the employer’s contribution to the supplementary social security benefit scheme forms a part of the employee’s remuneration package and, therefore, it is argued that the transferee cannot unilaterally change or withdraw those contributions, as: (i) the employee’s remuneration package is an essential element of the employment contract, and (ii) withdrawing such benefit may entail a significant unilateral change to an essential term of the employment contract (i.e., grounding a claim of constructive dismissal). In practice, the issue is more complex. Some legal authors make an exception to this view if the benefit scheme rules provide for a clause that gives the employer the right to unilaterally change the benefit scheme. Given the Belgian Supreme Court’s decisions, the validity of such exception is debatable.

31. Article 9 CBA 32bis. No further rules are set for the interpretation of the exception of dismissal for economic, technical or organizational reasons. Legal authors and courts acknowledge that a broad interpretation of this concept renders the protection against dismissal useless. There is conflicting case law in this regard. Some courts and legal authors
an essential element of the employee’s terms and conditions, the employee will be entitled to claim constructive dismissal. This will result in the employer being ordered to pay termination compensation.

CBA 32bis does not provide an explicit sanction if an employee is dismissed because of the outsourcing transaction. In Belgium, it is generally accepted that an irregular or unjustified dismissal does not imply that the dismissal itself is void or that a court can require an employer to re-employ the employee. The employee that has been wrongfully dismissed in the context of an outsourcing transaction can bring a claim for damages against the transferee and/or the transferor under criminal or civil proceedings. In practice, Belgian courts only rarely grant additional damages to the dismissed employees on top of the normal termination benefits.

1.7 **Informing and Consulting with Employees**

The information and consultation requirements that apply in the context of an outsourcing transaction are laid down in several regulations. The information and consultation procedures require the transferor to inform and consult with the works council. If there is no works council, the transferor must inform and consult with the trade union delegates. If there is no works council or trade union delegation, the transferor must inform and consult with the health and safety committee. If there is no works council, take the view that the outsourcing itself may never be a valid justification. Others argue that a dismissal for economic, technical or organizational reasons in connection with the outsourcing can be justified if the employer has made all possible efforts to continue the employment of the employee concerned. Courts often decide that a dismissal is unjustified in light of the protection offered by CBA 32bis if there is only a short time period between the outsourcing and the dismissal.

32. Article 10 CBA 32bis. Belgian courts have, for example, accepted a constructive dismissal situation where: (i) the employee’s status changes from white-collar to blue-collar; (ii) there is a change in the employee’s salary classification; or (iii) an agreed additional (on top of the actual accrued) length of service is not accepted.

33. As non-compliance with national CBAs, such as CBA 32bis, may be punished by criminal sanctions and/or administrative fines.

34. If additional damages are granted, the amounts roughly vary between EUR 500 and EUR 5,000.

35. These requirements are partly laid down in CBA 32bis, but mainly in CBA no. 9 dated 9 Mar. 1972 and the Royal Decree of 27 Nov. 1973. Non-compliance with information and consultation requirements can lead to criminal sanctions and/or administrative fines and claims for ‘moral’ damages by employees (although, in practice, such claims are rarely initiated).

36. Article 24 of CBA no. 5 concerning the status of the trade union delegation of the personnel of companies, dated 24 May 1971, B.S. 1 Jul. 1971. It should be noted that this CBA has not been given mandatory status by Royal Decree.

trade union delegation or health and safety committee, the individual
employees must be informed.\footnote{38}{Article 15bis CBA 32bis. Some
courts state that individual employees must be informed and
consulted with on the basis of Article 23 of the Belgian Constitution.}

No exact timeframe is set for the information and consultation procedures.
It may be argued that the employee representatives/employees should be
informed as soon as possible after signing the outsourcing agreement and
that the consultation should be finished before closing of the outsourcing
transaction. The information must in any event be provided before any
public announcement of the outsourcing arrangement and before any
changes to the employees’ terms and conditions of employment are decided
on.

2 PROHIBITION ON THE HIRING IN/LENDING OUT OF
EMPLOYEES

In the context of an outsourcing transaction, attention should also be paid to
the general prohibition under Belgian law on the ‘hiring in’ and ‘lending out’
of employees.\footnote{39}{Articles 31 to 32bis of the Law on temporary work, agency
work and the hiring in and lending out of employees dated 24 Jul. 1987.}
In summary, this means that the customer (on whose
premises the supplier’s employees often actually provide the services) may
not exercise control in the form of employer’s authority over the supplier’s
employees other than within the limitations set in the legislation (or vice
versa\footnote{40}{Although less common in practice, there may also be situations in
which the supplier gives instructions to the employees of the customer.}).
Severe sanctions apply if these rules are not complied with.\footnote{41}{For example, criminal sanctions and administrative fines may
be imposed. Also, in such circumstances an employment contract is automatically created between the customer and the
employees concerned and the customer and supplier are jointly and severally liable for the
payment of the employees’ remuneration and social security contributions.}

This law on the ‘hiring in’ and ‘lending out’ of employees was further tightened
in 2013.\footnote{42}{Program Act of 27 Dec. 2012. The changes made to the Law on temporary work, agency work
and the hiring in and lending out of employees dated 24 Jul. 1987 aim to allow for a better
assessment in practice of legitimate (sub)contracting versus forbidden ‘lending out’ of
personnel.}

Although in the context of a genuine outsourcing, these provisions usually
do not cause major problems, it is necessary to comply with the formalities
prescribed by the abovementioned legislation. Indeed, the law provides that
if any of the requirements (including the practical formalities) are not
complied with, any customer who gives instructions to the employees of the
supplier (that do not relate to well-being at work) is considered to be
exercising employer’s authority over those employees and thus to be in breach of the law. 43

The requirements that must be complied with are essentially as follows:

(i) Any instructions that can be given by the customer to the supplier’s employees (and vice versa) must be expressly recorded in detail in a written service agreement between the customer and the supplier.

(ii) The specified instructions which can be given by the customer must not ‘erode’ the employer’s authority of the supplier (and vice versa).

(iii) The performance in practice must correspond to the provisions of the service agreement.

The law on the ‘hiring in’ and ‘lending out’ of employees can also affect some other provisions of the services agreement between customer and supplier, for example, the provisions on key employees and their replacement (as a far-reaching impact of the customer in this respect may be an indication of the employer’s authority).

In addition, where an agreement sets out instructions that can be given to employees by a third party (e.g., where a service agreement sets out which instructions can be given by the customer to the supplier’s employees), that third party (i.e., the customer in this example) must inform its works council44 of the existence of that agreement.45 Upon request of any member of the works council, the third party must provide a copy of that part of the agreement which sets out the instructions.46

3 WELL-BEING AT WORK

In an outsourcing transaction, the customer and the supplier have specific obligations with regard to the well-being of employees at work if the supplier’s employees provide the services on the customer’s premises.47

Moreover, specific clauses should be included in the services agreement between the customer and the supplier.48

43. Unless one of the limited exception regimes is complied with.

44. If there is no works council, the information must be provided to the health and safety committee; and in the absence of a health and safety committee, to the trade union delegation.

45. If this obligation is not complied with, the agreement is considered to not exist for the purposes of this legislation.

46. The exact procedure for information sharing is still to be determined in a Royal Decree.

47. The obligations imposed on the customer and the supplier are, for example, obligations to (i) inform the other party of all risks and safety measures relating to the services that will be provided and to the activities of the company on whose premises the services will be provided; and (ii) co-operate with regard to safety measures. (See Articles 8 and 9 of the Law on well-being of employees at work dated 4 Aug. 1996).

48. These clauses relate to compliance with safety instructions that apply in the customer’s company and the consequences of any failure to comply with these instructions. (See Article
4 LIABILITY FOR DEBTS OF (SUB)CONTRACTOR

Whenever entering into a (first or second generation) outsourcing or a service agreement, attention should be paid to a number of provisions of Belgian law that, under certain circumstances, make the principal liable for specific debts of the contractor, or the contractor liable for specific debts of its subcontractor.

In particular, such regimes are in place in respect of the following debts:

- social security and tax debts of a (sub)contractor
- arrears of salary owed by a (sub)contractor to its employees
- arrears of salary owed by a (sub)contractor to its employees where the illegal employment of third country (i.e., non-EU) nationals is involved.

In view of these regimes of (joint or subsidiary) liability, it is advisable to include appropriate provisions in the service agreement between the customer and the supplier.


49. Articles 30bis and 30ter of the Law on the revision of the decree dated 28 Dec. 1944 on the social security of workers dated 27 Jun. 1969 (in respect of social security debts) and Articles 400 and following of the Code on Income Taxation (in respect of tax debts). Currently, this regime of joint liability only applies in the construction work sector. However, in 2012, the government announced that it wants this regime to also apply to other industries, which are fraud-sensitive. To this end, it is anticipated that a Royal Decree will be published that determines which other industries will be covered. Note that the aforementioned provisions also provide for ‘chain liability’, meaning that the joint liability does not only apply in respect of the direct contracting parties (e.g., the customer in respect of the supplier) but may also apply further down the subcontractor chain (e.g., it may apply to the customer in respect of subcontractors of the supplier).

50. Article 35/1 and following of the Law on the protection of employees’ salary dated 12 Apr. 1965. A Royal Decree that determines which industries will be covered by this regime is still to be published.

51. Article 35/7 and following of the Law on the protection of employees’ salary dated 12 Apr. 1965.

52. For example, to obtain specific representations or certificates from the supplier.
The aim of this chapter is to focus on the main employment issues related to outsourcing in the Czech Republic. The main issues concern:

1. the rules on the transfer of an undertaking (or a part of an undertaking);
2. the non-transferability of rights and obligations under a contract of employment; and
3. certain specific obligations of the employer relating to provisions concerning health protection and safety at work.

1 RULES ON TRANSFERS OF UNDERTAKINGS

In the Czech Republic, as in other EU Member States, a transfer of an employer’s activities, or part of those activities, or a transfer of some or all tasks to another employer (i.e., an outsourcing) may constitute a transfer of an undertaking (or a part of an undertaking) within the meaning given in the Acquired Rights Directive.

1.1 IMPLEMENTATION OF THE ACQUIRED RIGHTS DIRECTIVE

In general, it can be said that the Czech Republic has fully implemented the Acquired Rights Directive. The Acquired Rights Directive has been implemented in the Czech Republic via the Czech Labour Code, Act No. 262/2006 Coll., as amended (the Labour Code). The relevant sections of the Labour Code dealing with the Acquired Rights Directive are set out at Chapter XV, sections 338 to 345a. The Labour Code (Act No. 262/2006 Coll.) came into force on 1 January 2007 and supplemented Act No. 65/1965
Coll., via which the Directive was originally implemented in the Czech Republic.

Sections implementing the Acquired Rights Directive were amended by Act No. 365/2011 Coll. with the effect as of 1 January 2012.

On the basis of this amendment, further detailing terms and conditions related to the transfer of employees were included. The Czech Republic has further exercised certain discretions available to it under the Acquired Right Directive.

1.2 CZECH LEGAL REGULATIONS

For the purpose of assessing whether there has been a transfer of undertaking (via an outsourcing), section 338 defines the relevant activities or tasks of an employer that must be taken into consideration. In this regard, section 338 refers to tasks related to the production or to the provision of services or similar activities undertaken under specific statutory regulations by a legal entity or an individual under their own name and liability, on premises designated for their performance or in places usual for the performance of such activities. Outsourcing constitutes a transfer of an undertaking provided that post outsourcing, the new employer (i.e., the transferee) is capable of continuing the performance of the tasks or activities of the original employer (i.e., the transferor) or similar types of tasks or activities.

In making this assessment, it is irrelevant whether:

1. the transferred activities, tasks or assets are ancillary to the main business of the transferor;
2. the goodwill passes;
3. the customers are also transferred; or
4. whether the transfer occurs directly or through an intermediary (i.e., in two or more stages).

The Labour Code is generally based on the principles set out in the Acquired Rights Directive. It provides the same level of employee protection in the event of an outsourcing constituting a transfer of an undertaking (or a part of an undertaking) as is provided under the Acquired Rights Directive. This means that the following principles apply in the event of an operation that qualifies as a transfer of undertaking or part thereof:

– Automatic transfer of employment contracts (section 338(2) of the Labour Code): All employment contracts existing at the time of the transfer are automatically transferred to the new employer (i.e., the transferee) at the time of transfer. The transfer of employees occurs automatically by operation of law and independently of the intention
of the original employer (i.e., the transferor), the transferee or the employees. Consequently, it is impossible to exclude this transfer by agreement or otherwise. Similarly, neither the transferee nor the transferor need to obtain the consent of the employees for this transfer to occur (for more information, see point 1.3).

- Transfer of rights and obligations arising under employment contracts and maintenance of existing terms and conditions (section 338(2) of the Labour Code): All rights and obligations arising from the employment relationship with the transferor, regardless of their legal basis (i.e., irrespective of whether they arise under an individual employment contract, a collective agreement or as a result of another legal act or whether they emerge from the particular terms of the employment relationship (e.g., an internal regulation of the transferor)), existing at the time of the transfer are transferred to and binding on the transferee (i.e., in its status as the new employer). The Czech Republic has not used the discretion provided under the Acquired Rights Directive to adopt measures imposing a duty on the transferor to notify the transferee of all the rights and obligations which it will transfer.

According to the Labour Code, after the transfer takes place, the transferee becomes bound by all the terms, conditions, rights and obligations arising under any employment contracts and any collective agreements existing at the time of the transfer (see point 1.4).

Effective as of 1 January 2012, the Czech Labour Code specifically stipulates that terms and conditions set out in the collective agreement become binding upon the transferee for the period of the term of the collective agreement but no longer than until the end of the calendar year after the year in which transfer of employees occurred (see point 1.5).

- Protection against dismissal: The transfer must not entail any dismissal (save in exceptional and particular circumstances). Therefore, an outsourcing that constitutes a transfer of an undertaking (or a part of an undertaking) must not result in any dismissals (see point 1.6).

- Liability of the transferor and transferee: The Czech Republic has not exercised the discretion given under the Acquired Rights Directive to stipulate that, after the date of transfer, the transferor and the transferee shall be jointly and severally liable for obligations which arose prior to the transfer under a contract of employment or an employment relationship that was in existence prior to and at the date of the transfer. Consequently, there are no specific provisions on the joint liability of the transferor and transferee for the payment of
debts owed by the transferor to its employees. Therefore, the general rule on liability set out in the Labour Code applies, and both the transferor and the transferee are severally liable to the employees for any damage caused to their respective employees due to a breach of their statutory obligations.

The Labour Code further stipulates that the transfer shall not affect the rights and obligations owed by the transferor (i.e., the original employer) to the employees whose employment was terminated prior to the transfer. This means that, following the transfer, any and all liabilities of the transferor towards the transferred employees (e.g., for outstanding payments) are transferred to and binding on the transferee.

- **Information and consultation:** Under Czech law, employee representatives must be informed and consulted about the transfer and its consequences on the affected employees’ employment and in case there are no employee representatives, the employees themselves must be informed (however does not have to be consulted) about the transfer and its consequences (section 339 of the Labour Code). See point 1.7 below for more details on the employer’s information and consultation duties.

1.3 **Right of Refusal for the Employee and Right to Terminate the Employment Due to Change in Working Conditions**

Effective as of 1 January 2012, the Czech law reflects the decisions of the Court of Justice of the European Union on the employees rights to oppose the transferee, by means of termination of his or her employment.

The Labour Code provides the employees who do not want to be transferred to the transferee or are encountered with the change in working conditions after the transfer, with the following two options:

(1) **Pre-transfer employee right to object to transfer:** The employee has the statutory right to object to the transfer of his or her employment to the transferee only by filing the termination notice. In this case, the employment contract is not transferred, and his or her employment shall be terminated a day prior to the effectiveness of the transaction, that is, transfer of other employees to the transferee. Otherwise, the employee is not able to prevent the transfer of his or her employment contract because that transfer occurs automatically by operation of Czech law.

(2) **Post-transfer employee rights:** Should the transferred employee terminate his or her employment with the transferee within two
months following the effectiveness of the transaction (transfer of employees to transferee) due to substantial change in working conditions to the detriment of the employee, the employee is entitled to a severance payment.

1.4 Harmonization of Terms and Conditions and Protection against the Change of Employment Terms

As mentioned above, in the context of a transfer of undertaking (or part thereof) the transfer of rights and obligations arising under labour law relations means a shift of all rights and obligations from the transferor to the transferee. This implies not only the transfer of rights and obligations arising from an employee’s employment relationship, but also the transfer of rights and obligations arising under any ancillary work activity arising from an agreement to perform work outside that employment relationship. The transfer of the employee’s rights and obligations under their employment relationship to the transferee occurs automatically by operation of law (i.e., section 338(2) of the Labour Code), and the transferee cannot unilaterally alter those rights or obligations of the employees.

Section 338(2) is a part of mandatory law and therefore cannot be excluded by the parties. Therefore, one of the main areas where the transferee could incur liability or obligations is where it wants to harmonize the terms and conditions of employment of the transferred employees, bearing in mind that the transferee cannot change the rights and obligations of its new employees. There is no further guidance given on the interpretation of this principle by the Czech courts. For example, no guidance is given on the time period that must expire before changes to employment terms would be considered unrelated to the transfer and therefore permissible. Under the Labour Code, the parties can deviate from section 338(2) only where it is to the benefit of the employees and where it is based on both parties’ mutual agreement. It could consequently be argued that a change of employment terms to the benefit of transferred employees should be admissible. However, this interpretation has not been tested or confirmed by the Czech courts and, if challenged, the courts may adopt a different view. In any event, an agreement on a change in the terms and conditions of employment between the employee and the transferee may not be entered into prior to the transfer taking place.

The transferee is bound by all terms of all employment contracts as they exist at the time of the transfer. The transfer is not in itself capable of bringing about changes to the working conditions as set out in the employment contract, and the new employer must allocate the same kind of
work to the employees. This work must be also performed at the agreed work place as set out in the employment contract.

Neither the transferor nor the transferee is allowed to change the working conditions of employees before the transfer of rights and obligations has been completed. The Czech Republic has not exercised the discretion provided in the Acquired Rights Directive to limit the period during which the terms and conditions must be maintained by the transferee.

1.5 TRANSFER OF COLLECTIVE AGREEMENTS

Under Czech law, some terms and conditions of an employment relationship may be governed by a collective agreement. Once the collective agreement is entered into, it remains binding and enforceable until the expiry of the agreed term of the agreement or when terminated by notice.

The transfer of rights and obligations also includes the transfer of rights of employees arising under a collective agreement. The collective agreement must be valid and also effective at the date of transfer of the rights and obligations. Therefore, if the collective agreement is valid but not effective, the collective agreement does not transfer rights of the employees to the transferee.

If the transfer takes place, the operation of the collective agreement is not affected by the transfer, and it remains effective for the remainder of the originally agreed term but no longer than until the end of the calendar year after the year in which transfer of employees occurred. By limiting the period for which the collective agreement is binding upon the transferee, the Czech Republic has exercised the discretion made available under Article 3(3) of the Acquired Rights Directive. The purpose of the limitation is to avoid complicated situations, for example, when the trade union which originally was a party to the collective agreement does not exist anymore or in the cases when there is a plurality of collective agreements. The rights and claims of employees arising under a collective agreement are not affected by the fact that there is no employee representative body established at the transferee.

1.6 PROTECTION AGAINST DISMISSAL

Under the Labour Code, an employment contract may only be terminated by the employer serving notice of termination based on one of the specific statutory grounds. A transfer does not constitute a statutory ground for the termination of employment under the Labour Code and consequently the
employees cannot be dismissed by either the transferor or the transferee, in connection with or as a result of the outsourcing. If the employee is wrongfully dismissed in the context of an outsourcing, the employee could successfully challenge the termination of their employment contract and bring a claim for damages against the transferee and/or the transferor in civil proceedings.

1.7 INFORMATION AND CONSULTATION

At least thirty days before the transfer, both the transferor and the transferee must inform the employees’ representatives (i.e., a recognized trade union (if any) or the works council) of the intended transfer and consult with them, with the aim of reaching a consensus on the following issues:

1. the determined or proposed date of transfer;
2. the reasons for the transfer;
3. legal, economic and social consequences of the transfer for the employees; and
4. any envisaged measures relating to the employees.

Where there is neither a trade union nor a works council at the transferor, both the transferor and the transferee are obliged to inform on the matters set out above directly to the individual employees who will be affected by the transfer no later than thirty days before the effective date of the transfer.

In order to comply with their duty to inform and consult with the employees regarding the issues listed above, the transferor and transferee must provide the trade unions, works councils or employees (as applicable) with sufficient data to enable them to form a view on these issues in a good time, but no later than thirty days prior to effective date of the transfer. This data must be provided in a suitable manner so that it is possible for the trade unions or works council (as appropriate) to consider the data and prepare their positions on these issues for the discussion with the transferor and the transferee. The trade unions or work councils (as applicable) have the right to request:

1. additional information or explanation; or
2. personal negotiations with the transferor or transferee.

All involved parties (i.e., trade unions, works councils or employees (as applicable), the transferor and the transferee) are obliged to cooperate in this process.

Non-compliance with these information and consultation obligations towards trade unions and works councils (not employees) may lead to a fine.
up to Czech Koruna (CZK) 200,000 (approx. Euro (EUR) 8,000) being imposed on the transferee by the relevant state supervisory authority.

2 PROHIBITED TRANSFER OF RIGHTS AND OBLIGATIONS

In the context of an outsourcing transaction, it is also important to mention that under Czech law, a party is only permitted to transfer rights and obligations resulting from employment relationship in those situations or under those conditions that are specifically regulated by the Labour Code or in certain specific cases as set out in other relevant legal regulations. Any other transfer of rights and obligations resulting from employment relationship is prohibited under Czech law. In principle, this means that the rights and obligations of employees may not be transferred by a mere agreement concluded between the employers.

3 SPECIFIC OBLIGATIONS OF THE EMPLOYER CONNECTED WITH OUTSOURCING

Finally, it should be noted that it is common in an outsourcing situation for employees of two or more employers to fulfil tasks at one and the same workplace (the site).

In such a case, the respective employers must inform each other in writing of any risks and measures adopted in connection with risk prevention concerning the work performed at the site, and the employers must cooperate with one another to ensure the implementation of measures concerning protection of health and safety at work for all employees at the site. Under a written agreement between the employers, one employer should be authorized to coordinate the implementation of and adherence to the measures concerning protection of health and safety at work with other relevant procedures.

Non-compliance with obligations relating to health and safety protection may lead to significant fines being imposed on the transferor and the transferee by the relevant state supervisory controlling authority.
In this chapter, we will discuss the specific employment issues possibly arising out of an outsourcing process in Germany. The pivotal question in this respect usually is whether the respective outsourcing action constitutes a Transfer of Business as defined by the Acquired Rights Directive\(^1\) (Directive) (referred to below as a ‘Transfer of a Business’ or a ‘Transfer’). If so, several mandatory rules and consequences take place. The issues covered in this article are:

1. the history and ratio legis of the mandatory provisions in Germany;
2. the prerequisites of a Transfer; and
3. the consequences of a Transfer, inter alia including individual and collective consequences as well as the role of employees’ representative bodies.

1 HISTORY AND RATIO LEGIS

Since 19 January 1972, German Law centrally comprises transfer regulations in section 613a of the German Civil Code (Bürgerliches Gesetzbuch) (BGB). Whereas the first amendment contained only general provisions on the transfer of rights and obligations arising from employment relations in the event of a Transfer of Business, the legal impacts of section 613a BGB had been further expanded and harmonized due to European Directives.\(^2\) Section 613a BGB stipulates nowadays also the legal consequences concerning collective bargaining and work agreements and limits the right to dismissal. Either source of law pursues in particular the following objectives in the event of a Transfer:

---


– protection of existing employment relationships;
– upholding the continuity of the employees’ representative bodies;
– preservation of collective rights of the employees; and
– regulation of liabilities of the former and the new employer.

In line with these objectives, section 613a BGB has a mandatory and imperative character and cannot be waived mutually by agreements between the transferor and the transferee. However, an employee affected by the Transfer may waive the legal consequences of section 613a BGB by mutual agreement with his former employer or the transferee, if the agreement is the result of his own free conviction and constitutes no circumvention.

2 PREREQUISITES OF A TRANSFER OF A BUSINESS

Pursuant to section 613a, paragraph 1 sent. 1 BGB, a ‘Transfer of a Business’ means that a ‘business’ or ‘part of a business’ is transferred under a legal transaction to a new owner.

2.1 SCOPE OF APPLICATION

The personal scope of section 613a BGB covers all employees of a transferred business, irrespective of whether the transferred unit has been conducted under private or public law. Section 613a BGB applies to public and private undertakings engaged in economic activities whether or not they are operating for gain. Section 613a BGB does neither apply to an administrative reorganization of public administrative authorities nor to a transfer of public functions between public authorities.

The geographical scope of section 613a BGB is limited to businesses or part of businesses located in Germany. In the case of a cross-border Transfer, the applicable law is governed by the rules of the private international law.

5. Section 613a para. 1 sent. 1 BGB.
2.2. Definition of a Transfer of Business

Pursuant to Article 11(a) of the Directive, this Directive shall apply to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger. Pursuant to Article 11(b) of the Directive, a Transfer within the meaning of the Directive is defined as a transfer of an economic entity which retains its identity, meaning an organized grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.

Long time, the German Federal Labour Court (Bundesarbeitsgericht) (BAG) has defined a ‘business’ as a ‘long-term economic unit’, with ‘unit’ in this context meaning an organized entity of persons and assets brought together for the purpose of carrying out any economic activity with distinct objectives; a ‘part of a business’ meaning an organizational entity within a economic unit which is independent and severable from operations as a part of the overall pursued purpose.9

The European court of Justice (ECJ), however, does not define the terms ‘business’ or ‘part of a business’ but considers the identity of the economic entity to be decisive in determining whether there has been a Transfer of a Business. Since the Ayse Süzen decision 11 of the ECJ’s in 1997, the BAG has adopted this focus as settled case law. Hence, a ‘Transfer of a Business’ is deemed to occur if the entity in question exists as an independent and severable organizational unit at the transferor and retains its identity essentially unchanged at the transferee.12 Thus, the identity, meaning the organizational independence, has to be preserved autonomously but not identically.

Since the Klarenberg decision 13 of the ECJ in 2009, the Directive applies even if the transferred unit does not preserve its organizational autonomy; however, the functional link between the transferred production factors in

---

9. The German Federal Labour Court (Bundesarbeitsgericht) (BAG) held that the decisive criterion for establishing a transfer of all or part of a business was whether or not the new owner could in principle continue the business (or part thereof) by means of the operating resources (Betriebsmittel) assumed. However, the workforce was not counted among the ‘operating resources’ as, according to the BAG, the transfer of the employees was merely a legal consequence of the Transfer of Business and, therefore, could not be a prerequisite for the Transfer of Business at the same time, such as was held in its Judgment of 29 Sep. 1988 – 2 AZR 107/88.
their interdependence is maintained though and enables the transferee to pursue the use of those elements for the same or similar business activity.

The BAG has adopted the thus expanded coverage of the Directive to his case law. Therefore, the possibility to avoid the legal consequences of a Transfer of Business by dissolving the organizational structure of the respective unit and integrating it into the (larger) structure of the transferee are restricted.

Essential for a preservation of identity in particular is a multiplicity of evaluative criteria, including the type of the affected company or business, any transfer of tangible assets such as buildings or movable goods, the value of intangible assets at the time of transfer, whether the majority of its workforce or of the customers are transferred, the degree of similarity between the before and after of the activities performed, and the duration of any suspension of such activities. Very much depending on the specific activity which is actually carried out, different weight is given to each criterion. But nevertheless all the relevant circumstances of the individual case must be taken into consideration.

2.2 Legal Transfer by Business

German transfer regulations pursuant to section 613a BGB only apply if there is a change in the legal personality of the proprietor of a business pursuant to a private legal transaction. The German transfer regulations are neither triggered by a change of shareholders nor by a statutory transfer of employees by act of state. A change in ownership of the business assets is not necessary; it is sufficient if the right of use for its own economical purposes is transferred. On the contrary, the mere transfer of tangible assets and operational equipment constitutes no Transfer of business under section 613a BGB, if the acquirer undertakes no operational or business activity and the tangible goods are immediately transferred to a third party. Likewise, the conclusion of an exclusive purchasing and franchising agreement as a cooperation agreement between the former owner of the business and the transferee is not sufficient. Therefore, a leaseholder is only deemed to be the proprietor of a business if he runs the business in his own name and on his own economical account.

---

2.3 Legal Distinction to a Follow-up Contract

To determine whether an outsourcing process constitutes a Transfer of a Business in Germany, the following principles have to be applied according to precedents of the BAG: It is crucial to assess whether the tasks to be outsourced are performed using significant equipment and resources. This would be an important indication for a Transfer of a Business especially in branches which are characterized by a high use of working materials and machines (betriebsmittelgeprägter Betrieb). If the performance of the tasks, on the contrary, mainly depends on manpower and know-how (betriebsmittelarmer Betrieb), it is necessary to draw a distinction between a Transfer of a Business and a mere follow-up contract (Funktionsnachfolge), for the latter does not trigger the German transfer regulations.19

In the latter case, a Transfer of a Business is likely to be approved by German courts if the new contractor proceeds the outsourced services and takes over the working force to a large extent.20 As part of a judgmental overall-view, any further indications have to be considered for the question of whether a Transfer of a Business is to be deemed, such as the transfer of know-how, customer agreements, distribution licenses and similar intangible assets, as well as the fact that the new contractor renders its services in the premises and uses assets of the outsourcing entity. On the contrary, the outsourced services will be assessed a mere follow-up contract if neither tangible or intangible assets nor a large number of employees transfer to or can be used by the new contractor in order to provide the outsourced services on its own economical account. If it is only a follow-up contract, employees who rendered the outsourced services at the outsourcing entity (i.e., the original contractor) cannot claim the transfer of their employment relationships to the new contractor.

---

BAG has since confirmed this in several decisions, such as its Judgment of: (i) 6 Apr. 2006 – 8 AZR 222/04; and (ii) 13 Jun. 2006 – 8 AZR 271/05.


20. The definition of ‘a large extent’ depends on the kind of services to be provided in every individual case. The BAG, for example, held that the outsourcing of cleaning services does not trigger the German Transfer Regulations if only 60% of the respective employees are taken over by the new contractor, BAG Judgment of 24 May 2005 – 8 AZR 333/04. However, in a different case, the BAG held that a Transfer of Business was given if 85% of the respective employees were taken over, BAG, Judgment of 11 Dec. 1997 – 8 AZR 729/96. In short, if employees have a lower level of qualification, a higher number of them has to be taken over in order to suggest a continuation of work, while it might be sufficient if a significant portion of the workforce is transferred in businesses that are characterized by specialist knowledge and skills development. Crucial is whether the remaining employees constitute a viable, effective and functioning workforce, BAG, Judgment of 21 Jun. 2012 – 8 AZR 243/11.
2.4 Legal Distinction to an Operational Shutdown

A change in the business ownership and thus a Transfer of business is impossible, if the operational entity had been shut down prior to the Transfer. The Closure of Business and the Transfer of Business are mutually exclusive.\footnote{BAG, Judgment of 16 Feb. 2012 – 8 AZR 693/10.} A complete closure of business requires that the former owner of the business has taken the serious and final decision to dissolve the existing productive collective with his employees for a significant period of time. The shutdown of the business is not effective until the expiry of the notice period. Therefore section 613a BGB shall be applicable if a Transfer of Business takes place within the notice period. This might also apply by legal presumption, if the business is reopened shortly after the expiry of the notice period and business processes are resumed without delay.\footnote{BAG, Judgment of 21 Jun. 2001 – 2 AZR 137/00; BAG, Judgment of 16 Feb. 2012 – 8 AZR 693/10.} Whether a shutdown of business has to be considered as a complete closure of business or as an insignificant interruption of business, which has reasonably to be regarded as a preparatory action for a Transfer of Business, must be assessed according to all factors relevant for the specific circumstances of the case.\footnote{BAG, Judgment of 21 Jun. 2001 – 2 AZR 137/00.} Additionally, a substantial relocation of business might be deemed to be a complete closure of business, if the old operating collective had been legally and finally dissolved and the new business continues mostly with new staff.\footnote{BAG, Judgment of 12 Feb. 1987 – 2 AZR 247/86.}

3 Consequences of a Transfer of Business

In the following, we will give an overview of the most important legal consequences of a Transfer of Business.

3.1 Automatic Transfer of Employees

The employees working for the affected unit automatically transfer to the transferee, who will then be seen as their new employer. The term ‘employee’ in this context means all individuals in an active or passive employment relationship, including partial retired employees, executive employees and trainees, who are actually allocated to and integrated into the transferred entity,\footnote{BAG, Judgment of 18 Oct. 2012 – 6 AZR 41/11.} whereas the contractual relationships with managing
directors and freelancers are not being transferred. Eventually, temporary agency workers, who worked for the transferor, might also be affected by a transfer of the hiring business. The new employer assumes the rights and obligations under the employment contracts existing at the time of the Transfer. The term ‘rights and obligations’ covers agreements under individual employment law, as well as those agreements entered into under collective labour law which are part of the individual employment contracts by reference in such document to a collective labour agreement.

3.2 Information Obligations and the Employees’ Right to Object

3.2.1 Purpose and Content of Information

Section 613a, paragraph 5 BGB contains a legal obligation of the transferee and the transferor to comprehensively inform the employees who are affected by the Transfer. The information duty under German exceeds the European requirements set out in the Directive by far. Under German law, according to section 613a, paragraph 5 BGB, the transferor and transferee shall be required to inform the respective employees affected by the Transfer even if they are represented by a works council (which is only then required by the Directive if, without the employees’ respective intention, there is no works council in place). The duty to inform applies regarding the same issues as those set out in the Directive, namely:

1. the date or proposed date of the Transfer;
2. the reasons for the Transfer;
3. the legal, economic and social implications for the employees affected by the Transfer; and
4. any measures envisaged in relation to the affected employees.

However, the necessary scope and content of the information duty is not defined by the law. It is therefore governed by its purpose to provide a sufficient knowledge basis to enable the employee to decide on whether to object or not to object to the Transfer. In practice, the preparation of the information should not be underestimated, in particular given the consequences of incomplete or incorrect information (see below). In quite a
number of decisions, the BAG has established very high standards regarding what is required to meet the information obligation.31

3.2.2 Right to Object to the Transfer

The employee’s right to object to the transfer of his/her employment relationship is codified in section 613a, paragraph 6 BGB. If an employee exercises this right, his/her employment relationship will not transfer to the transferee, and he/she will remain employed by the transferor, with retroactive effect.32 According to section 613a, paragraph 6 BGB, an objection is only effective if the written objection notice is received by either the transferor or the transferee within a term of one month after the receipt of the necessary information pursuant to section 613a, paragraph 5 BGB.

Problems may occur if the information provided to the employees is incomplete or incorrect, or if the employees have not been informed about the Transfer at all. In those cases, the one-month deadline for raising an objection is not triggered and, therefore, the employees may object to the transfer of their employment relationship at a much later stage.33 This can have major consequences, in particular if a certain number of employees is transferred to a new employer which becomes insolvent within a certain period of time after the Transfer: since the legal consequence of a valid objection is that the employee has to be treated as if the employment relationship in fact never transferred, the (former) transferor will continue to be liable for all claims of those employees, even with regard to potential pension promises. If the transferee became insolvent, and since pension liabilities which transfer from the transferor to the transferee in a Transfer of Business scenario are usually compensated by the transferor by way of a reduction of the purchase price, the transferor will have to pay for the pension liabilities twice. The first time by way of compensating the transferee in the course of the Transfer of Business, and the second time when the objecting employees retire. Because of the transferee’s insolvency, compensation claims against the transferee usually cannot be enforced.

There is no definite time limit by when the employees must object in case of insufficient information, as this depends on the circumstances in the individual case. However, the BAG has held that the employees’ right to object can be forfeited in certain circumstances.34

32. BAG, Judgment of 20 Mar. 2008 – 8 AZR 1016/06.
33. BAG, Judgment of 13 Jul. 2006 – 8 AZR 303/05 and 8 AZR 305/05.
34. The question of forfeiture of the right to object depends not only on the time period between the Transfer and the objection, but also on the specific factors of each case. The right to object
3.3 Effects on the Terms of Employment

3.3.1 Employment

As a principle, post-transfer, the employment relationships have to be retained as they were agreed upon with the transferor. The new employer must pay the same wages and salaries as paid by the previous employer and compensate for any overdue remuneration claims. Moreover, the new owner must maintain all other benefits granted by the transferor, such as gratuities and other special benefits like attendance bonuses. If, due to continued company practices (betriebliche Übung) established in the past, certain benefits and other promises made in favour of the employees prior to the Transfer have binding effect, the transferee must continue to provide those benefits and adhere to those promises. Further, an employee’s accrued length of service, as accumulated whilst working for the previous employer, remains protected post-transfer.35

3.3.2 Contractual Terms

As mentioned above, all employees whose employment relationships transfer to the new employer will do so maintaining their existing rights and obligations and terms and conditions of employment. A harmonization of terms and conditions, post-transfer, without the transferred employees’ consent is invalid in principle. Furthermore, according to German case law, if the transferred employee consents to a change, such change is invalid if it is deemed to be forfeited if the employee: (i) does not pursue it over an extended period of time (i.e., an element of time); or (ii) creates the impression that he/she will not assert it by his/her conduct (i.e., an element of circumstance), and thus the fulfilment can no longer reasonably be required (i.e., an element of reasonableness). For example, the BAG has held in two cases that the objection of employees was effective when it was declared almost one year after the Transfer (Judgments of 13 Jul. 2006 – 8 AZR 382/05 and of 14 Dec. 2006 – 8 AZR 763/05), whilst in another decision (BAG Judgment of 15 Feb. 2007 – 8 AZR 431/06), it was held that the right to object was deemed to be forfeited after more than a year, because the employee had, at an earlier stage, suggested that he/she will not make use of his right to object. In General, the more time elapsed since the date of the Transfer of Business and the longer the employee has worked for the transferee, the lower are the requirements for the element of circumstance. An element of circumstance is regularly not given if at two consecutive Transfers of Business the employee objects, at first, to the second transfer of his employment relationship to a subsequent acquirer and later objects to the first transfer to the original acquirer (BAG Judgment of 26 May 2011 – 8 AZR 18/10). Especially neither the unopposed work for the transferee nor usual contractual adjustments without fundamental changes of the employment relationship can be given explanatory value as an element of circumstances (BAG, Judgment of 15 Mar. 2012 – 8 AZR 700/10.

is unfavourable to the employee and not justified by objective grounds. The same applies to a conclusion of a new employment contract with the transferee, if the prior termination agreement with the transferor was only designed to stop the employment relationship/working conditions from continuing with the transferee.

### 3.3.3 Pensions

As regards pension commitments made to transferring active employees, the transferee assumes full responsibility for any pension commitments for past services, irrespective of how long the employee remains with the business after the Transfer (e.g., if the employee has nineteen years of service with the transferor and leaves the company only one year after the Transfer of a Business, the transferee is liable for the total pension entitlement accrued by the employee for twenty years of service). Furthermore, in the event of the Transfer of a Business, it is irrelevant whether pension ‘expectancies’ (i.e., the right to future pension payments) have already vested. However, any pension commitments entered into regarding any pensioners and other employees that have already left the business with pension expectancies or entitlements before the Transfer remain unaffected by the Transfer, as those persons are not deemed to be ‘employees’ within the meaning given in section 613a BGB.

The fate of Contractual Trust Arrangements (CTA), which had been installed to cover and secure the transferor direct pension obligations, has not yet been decided by Labour Courts. Therefore, additional contractual provisions concerning the consequences of a Transfer of Business should be incorporated into existing CTA in order to remove any possible ambiguity.

### 3.4 Effects on Collective Terms and Conditions

#### 3.4.1 Collective Bargaining Agreements (CBAs)

If, at the time of the Transfer, a CBA is in force and effect, it will remain in force as a collectively binding agreement, even after the Transfer, if the business falls within the CBAs’ scope and the new employer and the

---

36. BAG, Judgment of 7 Nov. 2007 – 5 AZR 1007/06.
38. Established practice of the BAG, as confirmed in its Judgment of 11 Nov. 1986 – 3 AZR 194/85.
transferring employees are bound by it. If the latter is not the case, the German Transfer Regulations provide that the rights and duties agreed under CBAs automatically ‘transfer’ into the individual employment contracts where they cannot be changed to the employees’ detriment during a one-year period following the Transfer.39

The validity of a change, therefore, depends on whether the effects of such change are advantageous for the employees. According to the prevailing view, it is not possible to compare the overall whole set of provisions in the CBAs (and then decide which set is more advantageous for the employees). Instead, only ‘groups of subjects’ may be compared, for example, holiday provisions as one ‘group of subjects’, and provisions on a Christmas bonus as another group. This means that there must be a factual connection between the provisions being compared (e.g., the salary level may not be compared with the annual holiday entitlement). The terms and conditions of a CBA which are incorporated into the individual employment contracts may be changed if the parties (i.e., the new employer and the employee) agree to make reference to a CBA which at the time of the Transfer does not otherwise bind both parties by way of membership, for example, a CBA concluded between an employers’ association (to which the employer is not a member) and a trade union (to which the employee is a member) or vice versa, and also if neither the employer nor the employee is a member of one of the parties that have entered into the CBA, as long as this CBA is applicable in terms of region and function.

The continuance of a CBA under the individual employment contract as regulated under the German Transfer Regulations is excluded if the terms of employment are subject to the legal provisions of a different CBA or works agreement at the new employer which applies to both parties with direct and binding effect.40 In assessing the applicability of a provision under collective law (whether under a CBA or works agreement), it is irrelevant whether such a provision:

(1) already applied to the transferee at the time of the Transfer of Business;
(2) was concluded at a later date; or
(3) (in the event of a CBA) became binding through the new employer joining the relevant association.41

However, the priority of the new provisions under collective law (i.e., either under a CBA or a works agreement) only extends to those rights and obligations which were already provided for in the CBA applying to the

---

39. Section 613a, para. 1, sent. 2 BGB.
40. Section 613a, para. 1, sent. 3 BGB.
transferring employees prior to the Transfer of a Business. To the extent that the areas of regulation are not identical, the CBA that was applicable at the transferor under individual labour law continues to apply. If the subject matters are identical, the new collective agreement applies even if it provides less favourable working conditions. However, this change only applies with regard to the future; the new collective provisions cannot interfere with any expectancies (i.e., (vested) rights to future benefits) which already existed before the Transfer.

Furthermore, collectively regulated claims, which are 'transferred'\(^\text{42}\) into the individual employment contracts with the new employer cannot be redeemed via the so-called cross-over replacement by an operating works agreement existing at the new employer.\(^\text{43}\)

### 3.4.2 Works Agreements

Any existing local works agreements will be binding for the new employer if the whole business is transferred to the transferee, as in such circumstances the works council remains in office. In the same way that the transferee enters into the existing employment relationships by operation of law, he will also become bound by the works agreements concluded between the former employer (i.e., the transferor) and the works council. The same applies if only a part of a business is transferred and if the works council of the transferor retains a transitional mandate (Übergangsmandat). If a part of a business is incorporated or merged into another business and loses its identity, works agreements which are not replaced by works agreements with corresponding terms at the transferee (see below) are transferred into the individual employment contracts and cannot be changed to the employees’ detriment for a term of one year after the transfer (even if the respective employees would agree with the proposed changes).

However, if there is a works agreement with corresponding terms already in place at the new employer which would apply to the affected employees post Transfer, the terms and conditions of the original works agreements will not continue to apply. In such circumstances, the works agreements applicable at the new employer will also apply to the transferred employees, even if it is less favourable to them.

\(^{42}\) Section 613a, para. 1, sent. 2 BGB.
\(^{43}\) BAG, Judgment of 13 Nov. 2007 – 3 AZR 191/06.
3.4.3 Agreements of the Executives’ Committee

The German Executives’ Committee Act contains no provisions concerning a transitional or residual mandate of the executive committee or regarding the consequences of a Transfer of Business. Therefore, the impacts of a Transfer of Business on agreements of the executives’ committee are subject to much controversy.

3.5 Effects on Works Constitution

In particular, the following effects arise from the German Works Constitution Act (Betriebsverfassungsgesetz) (BetrVG):

3.5.1 Continuity of Works Council

The office of an existing works council (Betriebsrat) automatically terminates if the Transfer of (a part of) a Business leads to a loss of the business’ identity. In this case, the works council can continue to have a remaining mandate to represent employees, pursuant to section 21b BetrVG.

If the business is transferred as a whole (or at least remains largely intact), the works council stays in office, and its structure (e.g., number of representatives) does not change. However, if only a part of the business is transferred to the transferee, or if the business taken over loses its identity through its merger with or integration into another business of the new employer, the continuity of the works council depends on whether there is a works council established at the new employer.

If there is no works council established at the transferee, the works council of the former employer has a transitional mandate to represent the transferred employees. If there is an established works council in place, it will also represent the transferred employees. If the works council established at the transferee, the works council of the former employer has a transitional mandate to represent the employees transferred to the new employer until a new works council is elected, but for no longer than six months, pursuant to section 21a BetrVG, unless being prolonged by way of a CBA or works agreement.

The latter also applies if only a business unit is subject to the Transfer and if the transferee continues this business unit as separate business after the Transfer. In these cases, the business unit (which was represented by the works council being established at the transferor for the whole business), becomes a full business and, as stated above, the formerly responsible works council is obliged to initiate new elections within six months following the Transfer.
3.5.2 Informing and Consulting with the Works Council

The mere fact of a Transfer of Business does not in itself trigger consultation duties with regard to the works council.\footnote{44} The duty to consult with the works council is only triggered if the Transfer of the whole or part of the business also involves an operational change in the business (Betriebsänderung) within the meaning of section 111 BetrVG.\footnote{45} Such an operational change would, for example, arise if the business was split, or if the business was merged with a business of the transferee.

In that case, the works council would have to be comprehensively informed about the planned operational change in due time. Thereupon, the employer and the works council must negotiate an agreement on a reconciliation of interests (Interessenausgleich) and, if the operational change might cause detriments to the employees, agree on a social plan (Sozialplan). The intended measure, for example, the split of the business, cannot be implemented until the negotiations with the works council on the reconciliation of interests have been completed (i.e., either an agreement is reached or no agreement can be reached, but the required procedure aimed at seeking conciliation has been completed).

There is no fixed timetable for the consultation process, but experience shows that this will often take around three to six months starting from the date on which information is first given to the works council (in a worst case scenario, it could even take twelve months or more). In order to prevent the works council from delaying the procedure, the information given to the works council should be very detailed and accompanied by the relevant documents.\footnote{46}

Notwithstanding section 613a, paragraph 5 BGB, written notification stating the fact and the circumstances of the Transfer of a Business should also be transmitted to the works council in order to satisfy the duties owed to works councils under the BetrVG, as according to section 80, paragraph 2 BetrVG, the works council is entitled to be informed by the employer so ‘it may execute its duties pursuant to the BetrVG’.

\footnote{44} BAG, Judgment 11 Nov. 2010 – 8 AZR 169/09.
\footnote{45} BAG, Judgment of 31 Jan. 2008 – 8 AZR 1116/06.
\footnote{46} If the co-determination of the works council is not observed, the works council could apply for an injunction before the labour court in order to prohibit the implementation of the planned operational change. Furthermore, the affected employees may claim damages if they suffer disadvantages as a result of the operational change. However, the injunction would not prohibit the implementation of the Transfer of Business: it would only affect the operational change. Thus, the works council could not, for example, prevent the transfer of employees to the new employee, but only the actual split of the establishment (e.g., the moving of the employees to a different work location of the new employer).
3.5.3 Information of Economic Committee

If there is an economic committee,\textsuperscript{47} it should be informed about the Transfer comprehensively and in due time, irrespective of whether the Transfer of Business constitutes also a change of business or not.\textsuperscript{48}

3.5.4 Information of Executives’ Committee

Any executives’ committee of the transferee or the transferor must be informed accordingly about every Transfer of Business.\textsuperscript{49}

3.6 Prohibition on the Termination of Employment Contracts

Pursuant to the German Transfer Regulations, an employee’s employment cannot be terminated by the transferor or the transferee because of a Transfer of a Business.\textsuperscript{50} However, a termination on other grounds is permissible. Thus, a termination is effective if there is an objective reason justifying such termination irrespective of the Transfer. If the termination is ‘socially justified’,\textsuperscript{51} according to the German Act on Unfair Dismissal Act (\textit{Kündigungsschutzgesetz}) (KSchG), it is irrelevant that the notice termination was given on or around the time of the Transfer. Furthermore, a termination based on an acquisition or a restructuring and reorganization concept might be deemed to be permissible as a termination for operational reasons.\textsuperscript{52} If the employee is not subject to the protection provisions of the KSchG, any factual grounds for termination are acceptable provided that they:

\begin{enumerate}
\item are logical;
\item do not seem arbitrary; and
\end{enumerate}

---

\textsuperscript{47} An economic committee must be established by the works council in companies with more than 100 employees, according to sec. 106 BetrVG.

\textsuperscript{48} BAG, Judgment of 5 Feb. 1991 – 1 ABR 32/90.

\textsuperscript{49} Section 32 of the German Executives’ Committee Act.

\textsuperscript{50} Section 613a, para. 4 BGB, which constitutes a prohibition of dismissals and not only a protection against unjustified dismissal. Therefore sec. 613a para. 4 BGB applies regardless of whether the Protection against Unfair Dismissal Act is applicable or not.

\textsuperscript{51} Under the KSchG, a termination must be ‘socially justified’, which means that it must be based on one of the following grounds: personal grounds (e.g., a long-lasting illness), conduct grounds (e.g., misconduct which is in breach of contractual duties) or business grounds (e.g., a restructuring). The KSchG applies to employees in companies employing more than ten employees. For employees who commenced their current employment before 1 Jan. 2004, the KSchG also applies if and as long as there are more than five employees who have been employed since before that date.

\textsuperscript{52} BAG, Judgment of 20 Sep. 2006 –6 AZR 249/05.
(3) do not create the impression that they are merely intended to circumvent the German Transfer Regulations.\(^{53}\)

Equally, any termination agreement entered into in connection with an offer to be re-employed by the new employer with altered terms (which are to the detriment of the employee) is also deemed to be invalid on grounds that it is a circumvention of the German Transfer Regulations.\(^{54}\)

In contrast, the employment parties may legally terminate the relationship in connection with a Transfer of Business by way of a termination agreement even in absence of any objective reasons if the agreement is directed to finally terminate the employee from service.\(^{55}\)

### 3.7 Liability

Pursuant to section 613a, paragraph 2 BGB, as of the effective transfer date, the transferee will generally be liable for all claims arising from the transferred employment relationships, even if those claims relate to past periods of service. The transferor and the transferee will be jointly liable for all claims arising prior to the Transfer which are either due at the time of the Transfer or which fall due within one year following the Transfer.\(^{56}\) The transferee is not liable for any outstanding social security contributions or wage tax payments owed to the relevant public authorities, as those liabilities are obligations under public law rather than obligations under employment contracts. Thus, the transferee shall be liable for claims arising from partial retirement models during the release period.\(^{57}\) In the event of the insolvency of the transferor prior to the Transfer of Business, the liability of the transferee is limited to claims incurred after the public announcement of the opening of insolvency proceedings.\(^{58}\)

---

53. See for example: (i) BAG, Judgment of 18 Aug. 1976 – 5 AZR 95/75, where a former colleague agreed to take on the financially distressed business without obtaining any valuable assets, and the transferring employees waived their rights to outstanding salaries: the BAG approved an objective ground; (ii) BAG, Judgment of 12 May 1992 – 3 AZR 247/91, where the employees waived their entitlements to future pension benefits; and (iii) BAG, Judgment of 18 Aug. 2005 – 8 AZR 247/91.


56. See for example: (i) BAG, Judgment of 18 Aug. 1976 – 5 AZR 95/75, where a former colleague agreed to take on the financially distressed business without obtaining any valuable assets, and the transferring employees waived their rights to outstanding salaries: the BAG approved an objective ground; (ii) BAG, Judgment of 12 May 1992 – 3 AZR 247/91, where the employees waived their entitlements to future pension benefits; and (iii) BAG, Judgment of 18 Aug. 2005 – 8 AZR 247/91.

57. BAG, Judgment of 19 Aug. 2007 – 4 AZR 711/06.

4 CONCLUSION

Summarizing, the legal development in Germany on matters of outsourcing and a Transfer of Business is in flux. It is characterized primarily by progressive jurisprudence of the ECJ and BAG. The importance of the matter is, *inter alia*, embodied in the fact that there is a specialized panel of judges established at the BAG (the Eighth Senate) exclusively judging on all questions of outsourcing and a Transfer of Business, producing numerous decisions of fundamental importance each year. Therefore, investors and employers with employees and operations in Germany, should ensure they remain updated as to any further changes in the law affecting current and future employment relationships and outsourcing arrangements.
India

*Ajay Raghavan & Atul Gupta*

1 AN OVERVIEW OF EMPLOYMENT LAWS IN INDIA

India’s labour laws are frequently cited as one of the few remaining hurdles to complete investor comfort. Given India’s early history as a socialist democracy, previous Indian governments were concerned with the protection of the economically backward workforce from unregulated capitalist enterprises. Over time, with the sophistication of industry, the workforce and the law, the Indian judiciary has succeeded in creating a body of precedent that reconciles demands of employees with the needs of employers. There is no single comprehensive piece of legislation or code in India that governs employment laws. Given the federal nature of the democracy, statutes enacted by the Indian Parliament as well as various state governments are applicable to commercial and industrial establishments. Some of the principal statutes that are considered below are:

- Industrial Disputes Act, 1947 (ID Act);
- Factories Act, 1948;
- Contract Labour (Regulation and Abolition) Act, 1970 (CLRA);
  and
- Shops and Establishments Act in various states.

2 STATUS OF IT AND ITES EMPLOYEES UNDER INDIAN LABOUR LAWS

In India, employees are broadly classified as ‘workmen’ and non-workmen; the former have traditionally enjoyed greater protection under law whereas the latter have to look largely to the terms of their employment contracts for

---

* The update of this chapter is based on the text previously written by Karan Singh and Ameya Khandge
conditions of employment and termination. However, contracts should comply with provisions regarding conditions of work and employment in commercial establishments (including hours of work, leave, termination, overtime, etc.) that are contained in the ID Act and the respective Shops and Establishments Act applicable in the state in which the commercial establishment is situated.

The provisions of the ID Act apply to those individuals who can be classified as ‘workmen’ under the ID Act. The ID Act defines the term ‘workman’ to be any person employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of the employment are express or implied. Employees involved in ‘managerial’ or ‘administrative’ capacity and the employees employed in a supervisory capacity earning more than Indian Rupee (INR) 10,000 per month are excluded from the definition of workman. These employees are normally governed by the terms of their employment contract, and in certain circumstances by the provisions of the applicable Shops and Establishments Act, and not by the ID Act. Senior persons occupying the positions of Project Managers, Manager (Business Development) of project teams at an IT or outsourcing company, may not be termed as ‘workmen’ subject to their actual roles and responsibilities.

To conclude, in order to determine whether a person employed by a Business Process Outsourcing (BPO) is a ‘workman’ or not, one has to examine the role and responsibility of such a person. The determining factor is not the designation of the person, but the nature of work carried out by him. Therefore, each case has to be examined on the basis of its facts and merits.

The degree of statutory protection afforded to ‘workmen’ is circumscribed by the following conjunctive factors:

– where they work, that is, whether in factories, mines and plantations (or not);
– the size of the workforce in the industrial undertaking of which they are a part; and most importantly
– the nature of work they do (not incidental work and not their designation).

Varying degrees of protection are available under the ID Act, with the greatest degree of protection being offered to those workmen who are employed in ‘factories’, ‘mines’ and ‘plantations’ that routinely employ more than 100 persons. For factory workmen, where the workforce routinely involves fifty persons and above, the ID Act contains a series of pro-workman measures in relation to lay-offs. All industrial establishments
(i.e., any establishment where an industry is carried out) are governed by the various provisions in relation to retrenchment and closure.

Most IT/ITES companies need to be mindful of the provisions of both the ID Act and the Shops and Establishment Act of the state in relation to employee terminations.

In the past, mindful of the global recession that had hit this sector, certain state governments had exempted the applicability of certain labour legislations such as the Industrial Employment (Standing Orders) Act 1946, which would otherwise require BPOs having more than 20 / 50 / 100 employees (depending on location) in the previous year to maintain the classification of workmen, working hours, shifts and the wages payable and implement a set of certified ‘standing orders’ (which are essentially the key terms and conditions of employment) in consultation with its employees. This exemption has been discontinued in Karnataka this year, and BPOs with fifty or more workmen in Karnataka are required to follow this law.

3 CONDITIONS FOR LAY-OFFS, RETRENCHMENT, CLOSURE, AND TRANSFER OF UNDERTAKINGS

If the BPO is adjudged as a ‘factory’¹ and it engages at least 100 employees, the conditions mentioned in Chapter VB of the ID Act shall be applicable in the event of a lay-off or retrenchment or closure. In such a case, governmental permission is a condition precedent to termination of the employment relationship, in addition to as much as three months’ notice for

---

¹ Factories are understood to be premises where ten or more workers are working or have been working on any day for the preceding twelve months and in part of which any manufacturing process is being or is ordinarily carried out. It is pertinent to note that the definition of a manufacturing process is rather comprehensive; however, the industry view so far has been that mere software development does not qualify the IT company as a factory, and practically speaking none of the IT/ITES companies in India have sought registrations under the Factories Act, 1948 (unless they are engaged in some form of hardware manufacturing etc.). However, in a recent decision of the Bombay High Court in *The Assistant Director, ESIC v M/s Western Outdoor Interactive Pvt. Ltd. & Others* (a case in the context of the Employees’ State Insurance Act, 1948), software development was held to be a manufacturing process and firms involved in the creation of software were held to be factories. A consequence could be that Labour authorities will use this judgment to proceed against IT companies on the basis that they are factories and demand compliance with various additional laws. These additional compliances could be manifold – not only would compliance with the Factories Act prove tedious (which could significantly impact the start-up time of such businesses), various other labour laws (such as Standing Orders Act, etc.), as well as provisions of the Industrial Disputes Act, 1947 (relating to retrenchments, closure, need for government approvals for the same, etc.) would also apply that would make overall compliance more onerous and adversely impact the comparative flexibility IT companies today enjoy in managing employee relations. This ruling was however in the context of the Employees’ State Insurance Act, 1948, and so far we have not seen labour authorities actively implement this ruling.

---

International Outsourcing Law and Practice Supp. 5 (September 2013)
retrenchment or wages in lieu of such notice. The government may refuse permission or, upon the application of the workmen or the employer, review the decision to do so, such that industrial disputes may arise before appropriate industrial authorities or tribunals. Employers must seek governmental permission ninety days prior to the date they intend to close down an undertaking or establishment.

Most IT or ITES companies are not adjudged factories, however, and the conditions in Chapter VA of ID Act would apply in relation to terminations, closures and lay-offs. The requirements in this respect are quite similar to those under Chapter VB with the key differences being that there is no need for prior government approval for a termination or closure, and notice period that needs to be provided to the workmen is shorter. The following requirements would apply to closure and retrenchment in most IT/ITES companies:

- **Closure**: The workman would receive compensation as if he has been retrenched. A minimum of sixty days notice must be given to the appropriate government of the intention to close down any undertaking and clearly stating the reasons thereof.

- **Retrenchment**: The workman must be provided at least one month’s notice or payment in lieu of it. The appropriate government or authority must be intimated about the retrenchment in the prescribed format. In addition, the workman must be paid compensation for a prescribed number of days worked (calculated as fifteen days wages for every year of continuous service). While payment of compensation is a condition precedent to actual retrenchment, notifying the government is not, and non-compliance would not invalidate the retrenchment although it could invoke penalties. The company must also conform to the rule of ‘last in first out’, that is, while retrenching individuals belonging to a particular category in an establishment, unless there is an agreement to the contrary, the employer must retrench the workman who was the last person to be employed in that category.

In certain circumstances, such as when the termination of service is for disciplinary reasons, failure to renew fixed-term contract, voluntary resignation and so forth, the provisions of the ID Act – particularly relating to notice and compensation will not apply, even if the workman is employed in an industry as defined in the ID Act.

Section 25FF of the ID Act also specifically deals with transfer of an industrial undertaking or spinoffs of part of a business.

With the 2010 amendment to the ID Act which came into effect from 15 September 2010, employees have direct access to the Labour Court or
Tribunal in case of disputes arising due to discharge, dismissal, retrenchment or termination of service of workman under section 2A of the Act as opposed to the prerequisite of a referral to a forum by the appropriate government.

4 CLRA CONSIDERATIONS

Under the CLRA, principal employers who engage contract labourers might have to provide certain benefits to the contract labourers, even if such contract labourers are employed by a contractor and not by the principal employer directly. The CLRA would apply to a company if it engages a contractor or sub-contractor to fulfil a task or project by using or supplying contract labour. The requirement to register under the CLRA would arise if the number of contract labour exceeds twenty in number and the company who has engaged the contractor would be considered as the ‘principal employer’. As the principal employer, the company would be obligated to ensure that the contracted workforce receives its wages and benefits on time along with certain other basic amenities at the workplace (such as canteens, etc.). However, duties of the principal employer have been watered down through cases such as Group 4 Securitas Guarding Ltd v. Employees Provident Fund Appellate Tribunal & Ors where it was held that when the contractor is an independent legal entity with a large workforce and engaged in providing services to various clients, the onus to make provident fund contributions is not on the principal employer nor will a principal employer be held liable in case of non-compliance. While this is a stray case and is binding only with respect to provident fund contributions and that too in the region of Delhi, rulings such as this do provide principal employers in other parts of the country some ability to seek relief in the event they are proceeded against for non-compliances attributable to the contractor.

5 CONCLUSION

The status of software industries being classified as ‘factories’ remains untested by the Supreme Court. Should all software creation be deemed a ‘manufacturing process’ by the Supreme Court in any future litigation, it is likely that captive BPOs in the software sector would be treated as factories and, therefore, be entitled to higher levels of protection than others. Consequently, more stringent legal provisions applicable to the transfer of undertakings, dismissal of employees or closure of undertakings would apply.
CHAPTER 10 § III

India
The Netherlands

Ferdinand Grapperhaus*

In this chapter, we will discuss a number of employment issues associated with outsourcing in the Netherlands. These employment issues typically arise out of the mandatory rules regarding transfers of undertakings as set out in the Acquired Rights Directive.

Below, we will first briefly summarize the Dutch law on transfers of undertakings. We will then explore in more detail the issues associated with:

1. The transfer of employees;
2. Harmonization of employment terms;
3. Dismissals; and
4. Information and consultation requirements in relation to the transfer of an undertaking.

1 THE TRANSFER OF AN UNDERTAKING AND ITS CONSEQUENCES UNDER DUTCH LAW

On 27 July 1981, the Acquired Rights Directive was implemented into Dutch law (the Dutch Transfer Regulations).1 For the interpretation of the rules on transfers of undertakings, the case law of the European Court of Justice (ECJ) is the leading authority. This means that a Dutch court should apply the same criteria as the ECJ in determining whether an outsourcing transaction constitutes a transfer of an undertaking.2

As in other European Union countries, any outsourcing transaction in the Netherlands may constitute a transfer of an undertaking within the meaning

---

1. The Acquired Rights Directive has been implemented in sec. 7:662–7:666 of the Dutch Civil Code, Art. 14a of the Dutch Act on Collective Agreements (WCAO) and Art. 2a of the Collective Agreements (Declaration of Universally Binding and Non-Binding Status) Act (WA VV) (hereinafter, collectively referred to as the ‘Dutch Transfer Regulations’).

2. Section 234 of the European Treaty provides that a Dutch court may submit a ‘pre-judicial question’ (‘prejudiciële vraag’) to the ECJ with respect to the interpretation of the Directive.
given in the Acquired Rights Directive. It is important to note that the rules on transfers of undertakings may apply not only to first generation outsourcings\(^3\) (i.e., where a service is outsourced for the first time) and in-sourcing\(^4\) (i.e., taking the outsourced activities back in-house again), but may also apply to second generation outsourcing\(^5\) (i.e., the termination of the service contract with a service provider and the subsequent award of the contract to a new service provider).

Under Dutch law, there is a transfer of an undertaking if an undertaking (or a part of an undertaking) is transferred to another party.\(^6\) The rules apply if there is a transfer of a separate economic entity that retains its identity. If this test is satisfied, an outsourcing will be covered by the rules on transfers of undertakings. In line with ECJ principles, for there to be a transfer of an undertaking, it will generally be necessary for there to be a transfer of assets or employees, or both assets and employees. A transfer of employees is likely to be necessary for a transfer of ‘labour reliant activities’, and the transfer of assets is probably needed for the transfer of ‘asset reliant activities’. Whether an activity is asset or labour reliant depends on the specific circumstances of the case: there are no fixed determining factors. By way of example, the Court of Appeal in ‘s-Gravenhage ruled that an outsourcing in the ICT industry is to be considered a ‘labour reliant industry’.\(^7\)

The legal consequences of a transfer of an undertaking under Dutch law can be summarized as follows:

- **Transfer of employees:** all rights and obligations arising out of an employment agreement between the employee and the transferor existing as at the date of transfer are transferred to the transferee by operation of law.\(^8\) The Acquired Rights Directive itself speaks of employment agreements and employment relationships, which seem

---

7. Court of Appeal ‘s-Gravenhage 12 Jun. 2008, JAR 2008/222. It is debatable whether the whole of the ICT industry can be regarded as labour reliant. This may be the case for ICT consultancy services but, for example, may not be the case for hosting services, whereby the activities typically rely on assets (servers) and less on personnel.
8. See sec. 7:662 of the Dutch Civil Code. To ensure the protection provided to employees under the Acquired Rights Directive is effective, the transferor shall, for a year after the transfer, remain jointly and severally liable together with the transferee for the performance of the obligations under the employment agreement, which arose before the transfer date. When representing a supplier in an outsourcing, it is essential to include in the service agreement an indemnification clause covering employer’s liabilities (such as wages, bonuses, social security payments, etc.) that arise out of the employment agreements between the customer and the transferring employees prior to the transfer date.
broader than the term used in the relevant provision of Dutch law. The other issues attached to the transfer of employees are explored in more detail in sections 2.1 and 2.2.1.

- **Transfer of rights and obligations under collective labour agreements:** the Acquired Rights Directive expressly provides that the transferee must continue to observe the terms and conditions agreed in any collective labour agreement, that is, on the same terms as were applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement, or the entry into force or application of another collective agreement. This provision has been implemented in the Netherlands by section 14a WCAO. The transfer of rights and obligations under collective labour agreements is rather complicated under Dutch law (see section 2.2.2 for more information on this subject).

- **Transfer of pension rights:** as regards the transfer of pension rights, the Dutch Transfer Regulations provide that in principle, pension rights acquired under a pension agreement in accordance with the Pensions Act (Pensioenwet) are also transferred to the acquirer. An exception to this general principle applies if the transferee, before or after completion of the outsourcing, offers the transferred employees pension rights under the scheme, which before completion of the outsourcing applies to his own employees (see section 2.2.3 for more information).

- **Harmonization of employment terms:** a consequence of the transfer of an undertaking may be that the transferee is confronted with a group of employees whose terms and employment may differ substantially from those of its pre-existing workforce. The relevant issues in this regard are explored in more detail in section 3.

- **Protection against dismissal:** this principle has been implemented in Dutch law by section 7:670, paragraph 8 of the Dutch Civil Code, which provides that an employee who is dismissed (solely) because of a transfer of an undertaking may claim, within two months, that the purported dismissal is void. If successful, the transferee must reinstate the affected employee. A dismissal around the time of a transfer but for a reason other than a transfer of an undertaking is permitted under Dutch law (see section 4 for more information).

- **Information and consultation:** most outsourcing transactions will qualify as a material decision in the meaning given in Article 25 of the Dutch Works Council Act (WCA). Consequently, the customer (i.e., the transferor) and supplier (i.e., the transferee) are required to

---

10. Article 3(3) Acquired Rights Directive.
consult with their works council, if a works council has been established. It is important to note that the works council must be involved at an early stage, in order to enable them to have a meaningful influence on the proposed outsourcing transaction. If the duty to consult with the works council is not properly undertaken, the works council can appeal to the Enterprise Chamber of the Amsterdam Court of Appeal (refer to section 5 for more information).

2 TRANSFER OF EMPLOYEES

2.1 WHICH EMPLOYEES TRANSFER BY OPERATION OF LAW?

A crucial consideration in an outsourcing transaction is whether the employees who are involved in the outsourced activities will be transferred to the supplier by operation of law. The customer or outgoing supplier will wish to ensure that the relevant employees transfer to avoid redeployment and termination costs. The incoming supplier will wish to take account of the costs of employment obligations and liabilities it is taking over when determining the price. It will also need to ensure that service levels can be delivered by having adequate staffing levels.

The Dutch Transfer Regulations provide that only the rights and obligations of those employees who can rely on an employment agreement with the customer transfer to the supplier. This may lead to problems if the employees who are involved in the outsourced activities do not have an employment agreement with the transferor itself, but instead have an agreement with another group company, for instance a ‘personnel BV’, which is not an uncommon arrangement in the Netherlands.

Under the ‘personnel BV’ structure, all employees working in a group of companies are formally employed by a ‘personnel BV’. The core activity of the ‘personnel BV’ consists of providing staff to the other group companies. If an activity of a group company (e.g., catering) is outsourced, the initial conclusion based on section 7:663 of the Dutch Civil Code is seemingly that no employees transfer to the incoming supplier, as there are no employees employed in the undertaking being transferred. This was the conclusion reached in the *Heineken* ruling, but not in the (related) *Albron* rulings.

---

The Heineken ruling and the Albron rulings involved a case in which the catering activities of Heineken Nederland BV were outsourced to Albron, a large caterer. The Heineken employees who performed the catering activities were not employed by Heineken Nederland BV (the transferor), but were instead employed by a ‘personnel BV’ within the Heineken group, named Heineken Nederlands Beheer BV. The trade unions involved initiated litigation against Heineken Nederlands Beheer BV, claiming that the rules on transfers of undertakings applied and that the employees who were involved in the catering activities had been transferred to Albron by operation of law. During the interlocutory proceedings on this issue, the judge ruled that the employees were not employed by the transferred undertaking and, therefore, the Dutch Transfer Regulations did not apply.\(^\text{15}\) However, in proceedings on the same facts (initiated against Albron), the cantonal court in Utrecht reached the opposite conclusion (Albron I).\(^\text{16}\) The court ruled that those employees who were employed by the Heineken Nederland Beheer BV, but who in practice worked for Heineken Nederland BV, had been transferred to Albron as a result of a transfer of an undertaking. The court decided that Heineken Nederland BV should be regarded as the ‘material employer’ (materiële werkgever). One of the court’s reasons was that the employees of the personnel BV had in fact been working for Heineken Nederland BV since 1985, and that Heineken Nederland Beheer BV in fact did not have any other activities other then staffing the operating companies in the Heineken group.

In appeal, the Amsterdam High Court submitted pre-judicial questions at the ECJ.\(^\text{17}\) The ECJ\(^\text{18}\) ruled that as a principle and considering the protective nature of the Acquired Rights Directive, the ‘transferor’ within the meaning of the Acquired Rights Directive does not necessarily has to be the formal employer of the employees if such transferor is part of a group of companies and if the employees that are employed by the formal employer are seconded permanently to the material employer. The Supreme Court followed the ECJ and ruled that an employment agreement can transfer to an acquirer if the entity where the employee actually works is transferred. If the entity of the material employer is transferred, the rights of the employee arising from the employment agreement (can) also transfer to the acquirer by operation of law.

---

\(^\text{15}\) District Court in interlocutory proceedings Den Haag, 22 Feb. 2005, JAR 2005/63 (Heineken).
\(^\text{17}\) Court of Appeal Amsterdam 29 May 2008, JAR 2008/218 and 30 Jan. 2009 JAR 2009/195 (Albron II). In these rulings, the Court of Appeal Amsterdam posed and reformulated its pre-judicial questions.
Although both the ECJ and the Supreme Court ruled on this subject, there are still uncertainties. No clear guidance is given when an entity qualifies as the material employer. It is also unclear how or if the protection of an employees’ rights at the level of the material employer has any impact on the relation with formal employer. Furthermore, the Heineken and Albron rulings concern a situation where both the formal employer and the material employer belong to the same group of companies. Although the Supreme Court ruled that its judgment only applies to a group of companies, it is not (yet) clarified and subject to discussions whether these rulings also have impact on the situation where the formal employer and the material employer do not belong to the same group of companies, which is, for example, the case in payrolling situations.

The ECJ and the Court of Appeal Amsterdam did not explain in detail under what circumstances the material employer can be deemed a transferor under the Acquired Rights Directive, and, more importantly, which employment rights and obligations transfer from the transferor to the transferee in such case. To avoid any uncertainty, it is still advisable to enter into a so-called Employee Transfer Agreement in a case like the Heineken case in which the transferring employees are not formally employed by the undertaking that is outsourcing its activities.

2.2 RIGHTS AND OBLIGATIONS OF THE TRANSFERRING EMPLOYEES

2.2.1. Transfer of Rights and Obligations Arising from Individual Employment Agreements

The Dutch Transfer Regulations provide that all rights and obligations arising from the employment agreement existing as at the date of the transfer are transferred to the transferee, including e.g., the years of service.19 Orally agreed terms of employment are also covered, although they may be difficult to prove if contested. In principle, the protection also applies to those terms of employment, which are closely related to the business in question, for example the right to buy the employer’s products at a reduced price or options to acquire shares in the transferor.20

19. Section 7:663 of the Dutch Civil Code. Years of service will be recognized if it is an employment condition that can transfer to the acquirer. It does not mean that the employee becomes entitled to certain specific terms of employment of the acquirer, such as a long-service bonus that only exists in the company of the acquirer and not in the company of the transferor (ECJ 6 Sep. 2011, JAR 2011/262; Cantonal Court Bergen op Zoom 5 Oct. 2011, JAR 2011/285).

Any non-compete clauses that have been agreed between the transferor and employee also transfer automatically. There is no need for the transferee to renew the non-compete clause.\(^{21}\) However, if the scope of the transferee’s activities is significantly wider than that of the transferor, it is advisable to renew and restate the non-compete clause in affected employees’ contracts, in order to minimize the risk that after completion of the outsourcing, a court could find that the employees are no longer bound by the non-compete clause, as the implications of the non-compete clause have become too far-reaching.

### 2.2.2. Transfer of Rights and Obligations Arising from Collective Labour Agreements

The Acquired Rights Directive expressly provides that the transferee must continue to observe the terms and conditions agreed in any collective agreement on the same terms as were applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.\(^{22}\) This provision has been implemented in the Netherlands by section 14a WCAO. It should be noted, though, that the issue of transfer of rights and obligations arising from collective agreements is only partly regulated by section 14a WCAO. The transfer of such rights and obligations is a complicated issue in the Netherlands. This is because, provided certain requirements are met, Dutch law provides for the automatic incorporation in the individual employment agreement of collective terms of employment. In the event of a transfer of an undertaking, this may mean that the transferee will have to continue to observe terms of employment originating under a collective labour agreement, even after the expiry or termination of that collective agreement. This will arise if the collective terms of employment have become terms of the individual employment agreement, which must, therefore, be respected.\(^{23}\)

On 9 March 2006, the ECJ\(^{24}\) rendered an important judgment in relation to this matter. The ECJ was asked by a German court whether Article 3 of the Acquired Rights Directive must be interpreted as meaning that, where an undertaking is transferred and a contract of employment refers to a collective agreement to which the transferor is a party but to which the transferee is not, the transferee is bound by collective agreements that are subsequent to the version in force at the time of that transfer. The ECJ held that this was


\(^{22}\) Article 3 Acquired Rights Directive.

\(^{23}\) Supreme Court 10 Jan. 2003, JAR 2003/38 (Stichting Rode Kruis Ziekenhuis/Te Riet).

\(^{24}\) Case C-499/04, Werhof, [2006] ECR I-3129 (29).
not the case and referred to the general principle of the freedom of the parties to arrange their own affairs. In addition, the ECJ ruled that although the Acquired Rights Directive protects the interests of the employees concerned, the interests of the transferee (who must be in a position to make the adjustments and changes necessary to carry on his operations) cannot be disregarded. According to the ECJ, the Acquired Rights Directive was not intended to protect mere expectations of rights and, therefore, hypothetical advantages flowing from future changes to collective agreements.

2.2.3. Transfer of Pension Rights

The Dutch Transfer Regulations provide that, in principle, pension rights acquired under a pension agreement in accordance with the Pensions Act are also transferred. An exception to this principle applies if, before or after completion of the outsourcing transaction, the transferee offers the transferred employees pension rights under the scheme, which the transferee before completion of the outsourcing already applies to his own employees. In that case, the old pension scheme is not transferred. However, the pension scheme of the transferee will apply to the transferred employee instead. It should be noted that if the new pension rights are less favourable than the rights awarded by the transferor, there is no legal obligation for the transferee to compensate for the difference. However, in practice it is likely that the works council or the unions will ask for the difference to be compensated. If the transferee does not offer any pension rights to the transferred employees, the old pension scheme is transferred automatically. An exception to the principle that pension rights are transferred also applies if the transferee will be affiliated, on a mandatory basis, to an industry-wide pension fund and, after the transfer, the transferring employee is also obliged to participate in that industry-wide pension fund. In that case, the rights and obligations arising from the pension scheme applicable to the transferor are not automatically transferred. If an employee is obliged to participate in a mandatory industry-wide pension fund before the transfer and that obligation continues to exist after the transfer, the transferee is not allowed to offer the transferring employee alternative pension rights. Instead, the transferee must continue the employee’s participation in the mandatory industry-wide pension fund. It is also possible to depart from the principle that pension rights are transferred by entering into a collective labour agreement or by a decision of a competent administrative body.

3 HARMONIZATION OF EMPLOYMENT TERMS

A common consequence of the transfer of an undertaking is that the transferee may be confronted with a group of employees whose terms of employment in many cases differ considerably from those applicable to its pre-existing employees. If the transferred employees are entitled to substantially more favourable terms of employment, this may cause dissatisfaction among the transferee’s pre-existing employees. It may also constitute a financial stumbling block for the transferee. There is an undeniable conflict between the mandatory provisions of the Acquired Rights Directive and the principle of ‘equal pay for work of equal value’, which has been acknowledged by the Supreme Court in the Agfa case.26

In 2003, in the Parallel Entry case,27 the Supreme Court mitigated this judgment by holding that the general principle of ‘equal pay for work of equal value’ should not be placed on equal footing with more specific equal treatment provisions, such as the principle that ‘men and women who do the same work should receive equal pay’. Although this judgment suggests that a deviation from the principle of ‘equal pay for work of equal value’ may be justified in the case of a transfer of an undertaking, it remains a fact that the transferee is likely to want to achieve a harmonization of terms of employment.

In practice, harmonization is often achieved by changing the terms of employment after the transfer with the consent of all parties involved (i.e., the trade unions, the works council and the individual employees). Sometimes a special collective agreement is drafted in order to facilitate the harmonization. Up until now, this method has met little resistance from employees (and their representatives). However, in the Martin case,28 the ECJ repeated the comments that it made in the Daddy’s Dance Hall case regarding the mandatory nature of the Acquired Rights Directive. But it expressly added that a change in the employment relationship which aims to bring certain terms of employment of transferred employees into line with those offered to other employees must be regarded as a change which is connected to the transfer and which is, therefore, null and void. It is clear that the current practice of harmonization after the transfer sits uncomfortably with this judgment. In the Netherlands, a possible way of reconciling a harmonization after the transfer with the Martin judgment is to claim that the change is required for economical, technical or organizational reasons (an ‘ETO reason’). In that case, the change would not be seen as connected to the transfer. This construction is based on the view that, where

the Acquired Rights Directive allows dismissal for ETO reasons, it should also allow a change of the terms of employment for these reasons.

4 DISMISSALS

Although the Dutch Transfer Regulations are of public policy, an employee cannot be transferred against his or her will. This was decided by the ECJ in one of the earliest cases concerning the Acquired Rights Directive. However, an employee who, of his or her own volition, refuses to transfer must accept that his or her employment agreement with the transferor is terminated at the time of the transfer. It is important to note here that transferor (and transferee) should make sure that the employee is aware of the consequences of his or her objection to the transfer, since the Supreme Court has decided that an employee can only waive his or her rights under section 7:663 of the Dutch Civil Code by expressly doing so in an explicit statement. This means that it is advisable for the transferor (and transferee) to require the employee to confirm his refusal in writing.

A relevant transfer itself cannot be a valid reason for dismissal. However, a dismissal in connection with such a transfer may be made for an ETO reason that necessarily results in changes in the workforce. Before dismissing an employee for an ETO reason, the employer must first obtain prior permission to dismiss from the Officer for Legal Affairs of the Centre for Work and Income (CWI). This will only be granted if, balancing the employer’s and the employee’s interests, the dismissal is reasonable. Alternatively, an employment agreement may be terminated by mutual consent at any time on the payment of financial compensation. Additional collective consultation requirements apply where twenty or more dismissals are proposed.

5 INFORMATION AND CONSULTATION REQUIREMENTS

The obligation laid down in Article 7 of the Acquired Rights Directive for transferor and transferee to inform and consult employees involved in the transfer (or their representatives) can be found in:

(1) section 25 of the Works Councils Act, which applies if the employer has established a works council;

29. Case 105/84, Mikkelsen/Danmols inventar, ECR 2639.
(2) section 35c of the Works Councils Act, which applies if the employer has established a body for employee representation; and
(3) section 7:665a of the Dutch Civil Code, which applies if the employer has not established any form of employee representation.

Under section 25 of the Works Council Act, a works council, which must be established in enterprises with fifty or more employees, has information and consultation rights in respect of:

- a proposed change of control of a business or any division of a business;
- a discontinuation of the employer’s activities; and
- a significant change in the employer’s organization or activities.

The transferor and transferee must seek the advice of their works councils regarding any proposed transfer of undertaking in sufficient time to enable them to effectively influence the decision on whether to proceed with the proposed transfer.

If negative advice given by the works council is disregarded by the employer, meaning that the employer will carry out the outsourcing despite the negative advice of the works council, the outsourcing must be postponed for one month. During that period, the works council can appeal to the Enterprise Chamber of the Amsterdam Court of Appeal (Commercial Chamber), which may then block the decision if it considers it is not a reasonable decision.

The transferor and transferee may also have obligations to consult representative trade unions if certain criteria are met (Social and Economical Council Merger Code 2000). The trade unions must be allowed to express their views at such a time so that their views can genuinely influence both the decision on whether to proceed and the works council’s advice (see Article 4, paragraphs 6 and 7 of the Merger Code).

In enterprises with between ten and fifty employees, at the request of the majority of the workforce the employer must establish a body for employee representation. The body for employee representation must be consulted if the proposed transfer affects at least 25% of the workforce (see section 35c of the Works Council Act). This duty to consult with employees still applies if there is no established body for employee representation in an enterprise with between ten and fifty employees (section 35b, paragraph 5). In that case, the employees have the right to be consulted directly at a staff meeting, which must be held at least twice a year. There is no sanction if the employer does not comply with the duty to consult the employee representation body or the employees at a staff meeting. However, a failure to comply may result in the employees (or their representatives) initiating summary proceedings.
against the employer in order to ensure that their right to be consulted is respected.

In the absence of a works council or an employee representation body, section 7:665a of the Dutch Civil Code applies, which provides that transferor and transforee must inform their affected employees by the transfer in due time about:

(1) the proposed transfer;
(2) the proposed date of the transfer;
(3) the reason for the transfer;
(4) the legal, economic and social consequences of the transfer for the employees; and
(5) the measures envisaged with respect to the employees.
1 INTRODUCTION

In this chapter, we set out the provisions of Polish labour law connected with the outsourcing of services. Polish law does not specify any definition of outsourcing. The general practical understanding is that outsourcing occurs where an entity:

(1) does not intend to maintain an internal department, but still needs the services rendered by that department;
(2) closes its internal department; and
(3) enters into a civil law agreement with an external entity to render the services needed.

Closing an internal department may involve either:

(1) the transfer of part of the company’s undertaking together with the employees working in that department to another entity; or
(2) the dismissal of the employees working in that department.

Services provided by an external entity may be performed under a civil law agreement. The external service provider may be a company to which the relevant department has been transferred, or another external entity that renders the services needed.

Under Polish law, the transfer of an undertaking may result from the following events:

(1) the sale of an undertaking;
(2) the sale of assets material for the operation of the company;
(3) the transfer of material operations of the company;
(4) the entering into and termination of a tenancy agreement;
(5) the transformation of an undertaking into a company;

* The update of this chapter is based on the text previously written by Katarzyna Zbierska and Mateusz Wrzesiński.
(6) the termination of an agency agreement;
(7) the inheritance of the undertaking as a result of the death of an employer (a natural person); and
(8) the transformation of a cooperative undertaking into an independent undertaking.

Polish law is silent on whether outsourcing constitutes a transfer of undertaking; however, recent Polish Supreme Court rulings, which are in accordance with the European Court of Justice rulings, confirm that concluding an outsourcing agreement may result in the transfer of an undertaking, particularly if, as a result of the transfer, material operations and/or assets of the company are transferred to another entity. This also applies to the second generation outsourcing or exit from outsourcing agreements (in-sourcing). In its rulings regarding the transfer of an undertaking, the Polish Supreme Court underlined that each case should be assessed individually, and that it requires an analysis of following indicators (jointly): type of undertaking (whether the new employer conducts a similar activity as the previous employer); transfer of tangible and intangible assets; factual transfer of employees; the degree of organization of the part of the undertaking (separate entity/unit/division); takeover of clients; similarity of the activity carried out before and after the transfer of the undertaking; break/suspension of activity (services) after the transfer; the lack of demand for employee’s work after the transaction.

2 TRANSFER OF PART OF AN UNDERTAKING

As far as the transfer of part of an undertaking together with employees is concerned, Polish law includes provisions, which comply with the Acquired Rights Directive. This has been achieved in the form of Articles 231 and 2418 of the Polish Labour Code of 26 June 1974, as will be discussed further below. Nevertheless, there are still some differences between the scope of protection granted by the Acquired Rights Directive and that granted by Polish labour law (for further details, see section 2.6 below).

2.1 GENERAL PROVISIONS OF LAW

Under Polish law, employees who are employed by the transferor on the basis of employment contracts are deemed to transfer to the transferee at the moment of the transfer of the undertaking. If there is an agreement for the sale of an undertaking, the transfer of the relevant employees will take effect from the moment the agreement is validly signed and becomes effective,
unless the agreement specifies some other date for the transfer. Similarly, the outsourcing agreement may result in the transfer of employees, and usually the date of the agreement will be considered as the date of the transfer, unless there are different arrangements included in the agreement.

The employees are not obliged to take any action in this regard as the transferee becomes the new employer and a party to the employment agreements by operation of law.1 This provision has been formulated slightly differently from Article 3.1 of the Acquired Rights Directive which specifies that ‘the transferor’s rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee’. Article 231.1 of the Polish Labour Code does not mention explicitly whether the rights and obligations are transferred to the transferee; therefore, this provision may be confusing given the wording of Article 3.1 of the Acquired Rights Directive.

As a consequence of the above, the transferee does not need to enter into any new employment agreements with the individual employees. The transferee, in its capacity as the new employer becomes a party to the employment agreements of those transferred employees (i.e., those hired on the basis of an employment contract).

Employees who are employed on a legal basis other than an employment agreement2 are not automatically transferred.3 However, the transferee must offer them new employment and new payment conditions effective the date of transfer of the undertaking.4 Within seven days from this offer, these employees must accept or refuse the conditions offered.5 If an employee does not respond, that employee is deemed to have refused the new conditions offered by the new employer, and this will result in the employment relationship with the new employer being terminated on notice.

---

1. Article 231.1 of the Polish Labour Code.
2. Under Polish law, employees may perform work on the basis of an employment agreement which is governed by the provisions of the Polish Labour Code dated 26 Jun. 1974 as amended and other specific provisions, or on the basis of a civil law agreement (e.g., service agreement, works agreement) governed by the provisions of the Polish Civil Code dated 23 Apr. 1964 as amended and other specific provisions. In the case of an employment agreement, the provisions of the Polish Labour Code apply automatically even if the parties do not include them in the agreement itself or the agreement is in breach of the Polish Labour Code. This is to provide at least the minimum level of protection for an employee. In the case of a civil law agreement, the parties have more freedom to shape their relationship within the framework provided by Polish civil law. Consequently, the persons performing work on the basis of a civil law agreement do not enjoy the same protection as provided by the Polish labour law unless they include the relevant provisions in the civil law agreement.
3. Article 231.5 of the Polish Labour Code.
4. Article 231.5 of the Polish Labour Code.
5. Article 231.5 of the Polish Labour Code.
by the new employer. The notice period is usually regulated in the agreement itself; otherwise, the relevant statutory provisions apply, which vary depending on the type of agreement being terminated.

2.2 PROCEDURE AND TIMING ISSUES

2.2.1 Notification

The general rule is that unless the transferor has one or more trade unions, the transferring employees themselves must be notified of the anticipated transfer. If there is a trade union operating at the transferor, the provisions of the law on trade unions apply, and the transferor and the transferee must notify the trade unions at their respective companies of:

1. the date of transfer of the undertaking;
2. the reasons for the transfer of the undertaking;
3. the social, legal and economic consequences for their employees arising from the transfer of the undertaking; and
4. the plans regarding employment terms and conditions, in particular regarding the working conditions, payments and change of profession.

The above-mentioned information must be delivered to the trade union(s) at least thirty days prior to the transfer of the relevant part of the undertaking. The notification must be delivered in such a way that there can be no doubts as to the performance of the delivery. However, a failure to deliver does not mean that the transfer of the employees will be invalid.

2.2.2 Informing and Consulting the Works Council

In addition to the procedure specified under Article 231 of the Polish Labour Code, a notification obligation also arises under the Law on Informing and Consulting Employees of 7 April 2006 (the Law). This Law currently applies to companies employing fifty employees or more. In the companies to which the Law applies, employees must be informed about the possibility to set up work councils. That works council must be informed of:

1. the operation and economic situation of the company and any changes thereto;

---

6. Article 231.5 of the Polish Labour Code.
(2) the state, structure and any changes in employment, as well as any actions undertaken to maintain the level of employment; and
(3) any actions that may bring about substantial changes in the organization of work or employment.8

In the case of (2) and (3) above, the works council must also be consulted in a manner and at a time agreed with the works council.9

Since a transfer/acquisition of part of an undertaking together with its employees may bring about the circumstances mentioned in (1)–(3) above, the transferor must notify and consult with the works council on any such transfer of part of an undertaking, and the transferee must notify and consult with the works council operating at its company on acquiring part of another undertaking together with its employees.

### 2.2.3 Negotiations

If the transferee or the transferor intends to change the employment terms and conditions after the transfer of the undertaking, it must start negotiations with trade unions within thirty days following the notification of the transfer (i.e., no later than the date of the transfer of the employees) and enter into an agreement with trade unions in this regard.10 If the parties fail to enter into such an agreement, the employer may itself implement measures concerning the terms and conditions of employment, taking into account what the parties have agreed during the negotiations.11

As under Article 4.1 of the Acquired Rights Directive, the Polish Labour Code specifies that the transfer of an undertaking itself may not constitute a reason for termination of employment.12 This may imply that if there are other justified reasons, for example economic or organizational reasons, such termination of employment may be allowed. However, this is not expressly stated in Polish law.

It is not entirely clear from the provisions of law whether the same rule applies to the change of terms and conditions of employment. The Polish Labour Code sets out that in the case of a change in the terms and conditions of employment, in situations, which are not regulated specifically, the provisions concerning termination of employment apply accordingly.13 Therefore, this may mean that the transfer of an undertaking may not in itself constitute a reason to change the terms and conditions of employment.

---

13. Article 42.1 of the Polish Labour Code.
2.2.4 Collective Labour Agreement (CLA)

If the transferor is subject to a CLA, the following must be taken into account:

For a year following the transfer of the employees, the transferee must comply with those rights and obligations resulting from the CLA, which applied as at the date of the transfer. The provisions of the CLA will continue to be in force to the same extent as those existing at the moment of the transfer of the undertaking. However the transferee, in its capacity as the new employer, may grant more beneficial rights to the transferred employees than those stipulated in the CLA.

At the moment of the transfer of the undertaking, the transferee will also become a party to those remuneration and work by-laws that bind the transferor as at the date of transfer. However, the by-laws may be changed after the transfer of the undertaking.

2.2.5 Sanctions

If the transferor and the transferee do not fulfil their obligations specified in clause 2.2.1 (notifying trade unions) and 2.2.3 (negotiations with trade unions), they may be subject to a fine or a penalty of restricted freedom.

Failure to inform or consult the works council as described in clause 2.2.2 above results in a penalty of restricted freedom or a fine of up to PLN 5,000 (around EUR 1,190).

In Poland, there is a Polish Labour Inspectorate, which may carry out inspections at a company to check its compliance with labour law, health, and safety regulations. If necessary, the Polish Labour Inspectorate may require changes to be made as appropriate to ensure compliance. It may also impose a fine of up to Polish Zloty (PLN) 2,000 (around EUR 480).

2.3 Obligations and Liability of the Transferee and the Transferor

Under the Polish Labour Code, the transferee and transferor are jointly and severally liable for all obligations relating to the employment relationship arising prior to the transfer of part of an undertaking.
In the event of a claim relating to the employment obligations arising from the time before the transfer, the employee may choose which employer should fulfil the obligations. If one of the employers performs the relevant obligations, that employer will have recourse to the other to recover its costs, as appropriate.

The transferee is liable for the obligations under the employment relationship arising after the transfer of the undertaking.

2.4 TERMINATION OF EMPLOYMENT

Within two months following the transfer of an undertaking, the transferred employee(s) may terminate the employment without notice subject to giving seven days’ warning.\(^ {18} \) The concept of the above-mentioned warning is a special form of termination of employment applied only in certain situations specified by law. This concept creates a legal fiction since pursuant to the provisions of the Polish Labour Code, such termination upon seven days’ warning has the same consequences for the employee as termination of employment with notice by the employer.

In certain cases, employees who terminated the employment contract on seven days’ warning may be entitled to the statutory pay. The Polish Supreme Court stated that the termination of an employment relationship by the employee on seven days’ warning within two months after the transfer does not give them the right to receive statutory severance pay, unless a material change in working conditions to the employee’s disadvantage was the reason for terminating the employment relationship (change of the place of work, salary decrease, etc.).

Under Polish law, the employee may not object to the transfer or refuse to transfer to the new employer. Therefore, the above-mentioned employee’s entitlement to terminate the employment with seven days’ warning is not the same as the right to refuse to transfer, but it does allow the employee to terminate their employment quickly if they deem the transfer unfavourable.

2.5 SPECIAL PROTECTION OF TRADE UNION REPRESENTATIVES

Under Polish law, the transferee is bound by restrictions regarding termination of the employment of trade union representatives. The representatives may not be dismissed while they hold their position and for up to one year following the expiry of their function.\(^ {19} \) Consequently, if the

\(^{18}\) Article 23.14 of the Polish Labour Code.

\(^{19}\) Article 32.2 of the Law on Trade Unions dated 23 May 1991.
transferred employees include trade union representatives, this rule would apply to them.

2.6 DIFFERENCES BETWEEN THE ACQUIRED RIGHTS DIRECTIVE AND POLISH LABOUR LAW

The transferee’s and the transferor’s duty to inform their employees is broader under Article 7 of the Acquired Rights Directive than under Article 261 of the Polish Law on Trade Unions dated 23 May 1991. The latter specifies that the transferee and the transferor shall (among others) notify their employees of ‘any actions concerning terms and conditions of employment, in particular working conditions, payment and change of profession’. The duty to inform under the Acquired Rights Directive is broader, as Article 7 specifies the duty to inform concerning ‘any measures envisaged in relation to the employees’.

Additionally, the obligation to seek an agreement with trade union representatives in negotiations described in clause 2.2.3 above only refers to those companies where such trade unions exist (which in Poland means mostly state-run companies). Even if a similar consultation obligation arises from the provisions of Article 14.1 of the Law on Informing and Consulting Employees dated 7 April 2006, this applies to companies having fifty employees or more.20 Article 7.2 of the Acquired Rights Directive specifies that ‘where the transferor or the transferee envisages measures in relation to its employees, it shall consult the representatives of its employees in good time on such measures with a view to reaching an agreement’, which must be understood as being applicable to all companies, including those in which there are no trade unions or works councils.

---

20. Article 1.2 of the Law on Informing and Consulting the Employees; also see clause 2.2.2.
In this chapter, we will discuss the particular employment issues arising out of an outsourcing arrangement in the UK. The employment issues, which arise from an outsourcing arrangement are primarily in relation to the rules on employees on the transfer of an undertaking or part of an undertaking.

1 INTRODUCTION

The UK implemented Council Directive 77/187/EC by the Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE 1981). This Directive was subsequently revised and consolidated into Council Directive 2001/23 (the Acquired Rights Directive), and the changes introduced were implemented in the UK by the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) which replaced TUPE 1981. This note will examine the application of the TUPE legislation to outsourcing situations and the legal effects of this.

2 THE APPLICATION OF TUPE

The TUPE applies where there is a ‘relevant transfer’. A relevant transfer occurs where:

(1) there is 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 (a Business Transfer);\textsuperscript{2}
or

(2) where there is a ‘service provision change’.\textsuperscript{3} A service provision change can arise in any of the following situations:

– activities cease to be carried out by a person on his own behalf (whether or not those activities had been previously carried out by the client on his own behalf) and are carried out instead by another person on the client’s behalf (a First Generation Outsourcing); or

– 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 (a Second Generation Outsourcing); or

– 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 (an Insourcing).

(each, an Outsourcing Event)

The TUPE will usually apply to the above situations under the ‘service provision change’ criteria, but if a particular Outsourcing Event does not fall within the definition of ‘service provision change’ under TUPE), it may still be caught as a ‘Business Transfer’ under Regulation 3(1)(a) TUPE.

For the purposes of Regulation 3(1)(a) of TUPE, an ‘economic entity’ is defined as an organized grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.\textsuperscript{4} There must be a stable economic entity, and not merely an entity whose activity is limited to the performance of one specific works contract.\textsuperscript{5}

The TUPE will not apply to a function carried out by a business where there is no identifiable entity, such as a function, which is carried out by a group of employees in addition to their other duties. An activity on its own is not an entity. The identity of an entity emerges from factors such as its workforce, the management of its staff, the way in which the work is organized, its operating methods and the operational resources it has available to it. An organized grouping of wage earners who are specifically and permanently assigned to a common task may, in the absence of other

\textsuperscript{2} TUPE Reg. 3(1)(a).
\textsuperscript{3} TUPE Reg. 3(1)(b).
\textsuperscript{4} TUPE Reg. 3(2).
\textsuperscript{5} Rygaard v. Dansk Arbejdsgiverforening, acting for Stro Mølle Akustik A/S [1996] IRLR 51, ECJ.
factors of production, which might identify them as an entity, constitute an economic entity. A single employee can also be an entity.6 There is no need for a contractual link between the transferor and the transferee. In Temco Service Industries SA v. Imziluen,7 the ECJ held that the Acquired Rights Directive could apply where a cleaning contract between A and B (which B then subcontracted to C) was terminated and a new contract for the same service was agreed with D.

The entity that transfers must maintain its identity after the transfer. The courts have offered guidance as to when this is the case and have suggested that whether an entity retains its identity will require consideration of all of the facts characterizing the transaction in question,8 in particular:

1. the type of undertaking or business;
2. whether or not its tangible assets, such as buildings and movable property, are transferred, although TUPE states that as relevant;
3. the value of its intangible assets at the time of the transfer;
4. whether or not the majority of its employees are taken over the new employer;
5. whether or not its customers are transferred; and
6. the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities were suspended.

However, all of the above circumstances are only single factors in the overall assessment, which must be made and cannot be considered in isolation. The similarity of the service pre- and post- transfer of itself may not be enough for TUPE to apply.9 Also the failure of a new contractor to take over an essential part of an outgoing contractor’s workforce will not prevent TUPE from applying.

3 TUPE AND OUTSOURCING

Under TUPE 1981, there was ambiguity as to whether an entity subject to a service provision change would necessarily retain its identity after the change, and whether TUPE 1981 would, therefore, apply to outsourcing situations. Prior to the revision of the Acquired Rights Directive and the subsequent implementation of the new TUPE legislation, the European Court of Justice had given examples of circumstances when the Acquired

---

7. 2002 IRLR 214, ECJ.

1. the outsourced activity had its own employees and assets to achieve the outsourced objective;
2. there was a transfer of significant tangible or intangible assets, or a major part of the workforce; or
3. there was a transfer of the same economic entity as evidenced by the similarity of activity to which those assets were put before and after the transfer.

After the Acquired Rights Directive was amended, TUPE was implemented to widen the scope of the TUPE 1981 regulations by directly incorporating a provision that service provision changes, including First Generation Outsourcing Events would constitute ‘relevant transfers’ to which the legislation would apply. The supply of goods and ‘one-off buying in of services’ are excluded from the extended definition, and TUPE will not apply to a single specific event or a task of short-term duration. The widened scope of TUPE to include the service provision change means that TUPE will apply to most outsourcing arrangements. For there to be a business transfer, there must be an economic entity, which retains its identity, as explained above. Where there is a service provision change, which meets the criteria prescribed by TUPE, this is not necessary. It is not possible to avoid TUPE applying by carrying out the services in a different way or by not taking over the work-force or significant assets.

Under the new TUPE regime, it is likely that most Outsourcing Events will now fall within the definition of ‘relevant transfer’ within the meaning of TUPE.

While some Outsourcing Events will only fall into the definition of a service provision change, many will also fall within the definition of a Business Transfer (under Regulation 3(1)(a) TUPE). It is also possible in theory for Outsourcing Events to fall outside the definition of a service provision change but to still be a Business Transfer.

In order for the service provision change to apply:

1. there must be an organized grouping of employees situated in Great Britain before the change in provider whose principal purpose is carrying out the activities concerned on behalf of a client; and
2. the principal purpose must be the provision of services to a particular client.

---

11. TUPE Reg. 3(3)(a).
This may not be the case where the employees provide services to a number of clients.

An organized grouping of employees may be a single employee. The TUPE may also apply to a situation where an outsourcing contract is terminated, and the transferred employees transfer back to the client (an ‘in-sourcing’), or to a new supplier (a ‘second generation’ outsourcing).

The TUPE 2006 will not apply to a service provision change where:

1. the contract is wholly or mainly for the supply of goods for the client’s use;
2. the client intends that the activities will be carried out ‘in connection with a single specific event or task of short-term duration’.

It is not clear whether this applies where there is either a single event or a task of short-term duration or if it applies only to events that are both one-off and short-term.

4 THE LEGAL EFFECTS OF THE APPLICATION OF TUPE

The TUPE 1981 introduced a series of measures in relation to employees transferred in the transfer of an undertaking:

1. protection against dismissal in connection with a transfer to which TUPE applied;
2. the automatic transfer of all the employees’ contracts of employment to the purchaser’s business along with all rights, liabilities and obligations in relation to those employees; and
3. the obligation to inform and consult with representatives of the affected employees in relation to the transfer.

The TUPE, apart from importing the widened scope of the service provision to transfers of undertakings, added to these measures:

1. the requirement for the seller to provide the purchaser with certain specific information about transferring employees relating to their identity, employment history and terms and conditions of their employment (employee data);
2. the provision that, where the transferor is subject to certain qualifying insolvency procedures, the normal provisions relating to automatic transfer and protection against dismissal are disappplied;

---

12. TUPE Reg. 2(1).
(3) guidance on when an employee can agree to changes in his or her terms of employment and when it is unfair to dismiss an employee for a reason linked to the transfer; and

(4) joint and several liability transferor and transferee for any failure to inform and consult with the transferring employees.

5 RULES APPLYING UNDER TUPE ON AN OUTSOURCING

In a situation where TUPE applies to an Outsourcing Event, the following rules will apply:

5.1 AUTOMATIC TRANSFER OF EMPLOYEES

The contracts of employment of the employees who are transferring from the transferor will automatically transfer to the transferee on their existing terms. The transferee will assume all rights, powers, duties and liabilities under those contracts of employment (with the exception of certain rights under occupational pension schemes). The transferee will, therefore, take over all liabilities such as arrears of pay or liability for unlawful discrimination (although such liabilities can of course be contractually apportioned – although this may be difficult in a Second Generation Outsourcing where there will typically be no contract relationship between the transferor and transferee).

In Outsourcing Events, the parties will often agree which employees are to be transferred under the contract. Issues can arise otherwise where an employee divides his or her time between different areas of a business. In determining whether the employee will transfer, the key issue is whether an employee is assigned to the part of the business, which is transferring.

5.2 RIGHT TO OBJECT

The employees can avoid being transferred if they object to it. This means that their employment will terminate on the date of transfer. They do not have a right to a redundancy payment, but if the reason for their objection is that the supplier proposes a change to their employment, which constitutes a repudiatory breach of their contract, they may claim constructive

14. TUPE Reg. 10.
15. TUPE Reg. 4(7).
Similarly, where an employee envisage that the transfer will involve a substantial change in his or her working conditions, where such change is materially detrimental, that employee can resign and bring a quasi constructive dismissal claim. In a transaction, liability for this will normally remain with the transferor. Therefore, the transferor may require the transferee to indemnify it against this eventuality in the outsourcing agreement.

5.3 DISMISSELS AUTOMATICALLY UNFAIR

Under English law, an employee who has one year’s service or more can make a claim for unfair dismissal. If an employee is dismissed because of the TUPE transfer, this dismissal is automatically unfair. If the dismissal is only connected to the TUPE transfer, and the dismissing party has an economic, technical or organizational (ETO) reason entailing changes in the work-force\(^{17}\) for the dismissal, the dismissal is potentially fair.

The definition of an ETO reason is narrowly construed and in practice will normally only apply where there is need to reduce employee numbers leading to genuine redundancy situations. A genuine redundancy will normally be an ETO reason, and, therefore, a redundancy following a transfer may be fair providing that the correct procedure for a redundancy dismissal is followed. It should be noted that such an ETO reason will almost always arise post-transfer (i.e., the surplus headcount situation is likely to arise after employees have transferred, with the transferor then having an inflated headcount). As such, the ETO reason will not exist pre-transfer, and it will not be possible for the transferor to make the dismissals and seek to rely upon what would have been the transferees ETO (redundancy) reason.\(^{18}\)

5.4 D UTY TO INFORM AND CONSULT

Under TUPE, the employers of affected employees must inform employee representatives of its affected employees about the transfer. ‘Affected employees’ are not necessarily just transferring employees, but any employees of the transferor or transferee who are affected by the transfer or any measures to be taken in connection with it.\(^{19}\)

Employee representatives are either:

---

17. TUPE Reg. 7(1).
(1) employee representatives of an independent union which is recognized by the employer;
(2) employee representatives who have been appointed or elected by the affected employees for another purpose but who have authority from the affected employees to receive information and be consulted on the transfer on their behalf; or
(3) employee representatives who have been elected in an employee ‘election’ (Regulation 13(3)).

The employer of the affected employees must arrange for elections of employee representatives from among the affected employees.

An employer of an affected employee who proposes to take measures in relation to an affected employee in connection with the transfer must consult the appropriate employee representatives, and consider any representations made by them and reply to them with reasons. This is with a view to reaching agreement with the employees about the effects and consequences of the transfer and to clarify the timing of the transfer. These duties fall upon both transferor and transferee in an Outsourcing Event assuming each employs employees who will be affected by the transfer.

As mentioned above, the transferor and transferee in an Outsourcing Event may be jointly and severally liable for any claims for breaches of the duty to inform and consult representatives of affected employees.

5.5 **Changes to Terms and Conditions of Employment**

Under the old regime, changes to the terms and conditions of employment of transferring employees for a reason connected to the transfer were void, even if they were agreed with the employee. In *Power v. Regent Security Services Ltd*, it was held that employees could not be deprived of any rights that transfer with their contracts of employment, which operated to their benefit, but that this did not stop the transferee being bound by the terms it had agreed with the employee at the time of the transfer.

Under TUPE, changes are only void if the sole or principal reason for the change is the transfer itself or if they are made for a reason connected to the transfer, which is not an ETO reason. It is now possible to make changes to employment terms in connection with a transfer, but as for transfer-related dismissals, an ETO reason is likely to be narrowly construed.

---

23. TUPE Reg. 4.
5.6 TRANSFERRING BENEFITS

5.6.1. Share Schemes

There is case law to show that rights to participate in a profit-sharing scheme with a share-based element can transfer. However, it may not be possible to replicate the exact terms of a share scheme on a transfer. A supplier must therefore provide something substantially equivalent to the transferor’s scheme to the transferring employees. It is thought that this principle will apply generally to terms of employment, as exact replication of terms would be in some cases impossible. In *MITIE Management Services Ltd v. French*, it was said that transferring employees and the transferee should seek to agree and negotiate terms during consultation.

5.6.2. Pensions

Most rights under occupational pension schemes do not transfer. However if the client operated an occupational pension scheme, the supplier must provide minimum benefits or provide a matched employer contribution of up to 6% into a stakeholder scheme for the transferred employees.

There is also a question as to whether restrictive covenants will transfer, as these will only be enforceable if they protect legitimate business interests, which will vary from business to business. These may, therefore, need to be renegotiated during consultation.

5.7 EMPLOYEE LIABILITY INFORMATION

Under TUPE, the transferor must give the transferee ‘employee liability information’ at least fourteen days before the transfer. This information includes the age and identity or the transferring employees, information about the written particulars of employment of the employees, information on any collective agreements which will continue to have effect after the transfer, disciplinary and grievance information for two years prior to the transfer, and legal actions taken by transferring employees against the client in the last two years.

If the transferor does not provide this information to the supplier, an employment tribunal can make an award to the transferee of an amount that

---

25. Ibid.
26. TUPE Reg. 10.
it considers to be just and equitable in the circumstances. The award will take into account the supplier’s loss and award a minimum of Great British Pounds (GBP) 500 (unless it is just and equitable to award less) in respect of each employee about whom the information was not provided, or incorrect information was provided.

5.8 TRADE UNIONS AND COLLECTIVE AGREEMENTS

In the United Kingdom, unions can be recognized by an employer under statute, or voluntarily by an employer. Under Regulation 6 of TUPE, voluntary recognition agreements transfer from the client to the supplier if the undertaking ‘maintains an identity distinct from the remainder of the transferee’s undertaking’. Even if the recognition of the union does transfer, the supplier is free to de-recognize the union after the transfer as long as it is not prevented from doing so by the recognition agreement. However, the union can apply for statutory recognition if it is de-recognized, which means that the supplier is forced to recognize it for a period of three years. The TUPE does not provide any guidance as to whether statutory recognition will transfer.

Under TUPE Regulation 5, a collective agreement made by or on behalf of the transferor with a union will have effect after the transfer as if it was made between the transferee and the trade union. The supplier can terminate these agreements with immediate effect or with notice if they are contractual. Where rights under a collective agreement have been incorporated into individual contracts, these rights will continue to exist even after the agreement has been terminated. The supplier will be bound by terms of the agreement at the time of transfer, but not by any subsequent changes.

The supplier cannot offer more beneficial terms to employees where the purpose of this is to cease collective bargaining. It is also unlawful to subject the employee to a detriment in order to deter them from using a trade union’s services. If this is breached, a supplier may be liable to compensate an employee for loss of benefits they would have received if they had accepted the new terms.

6 SECOND GENERATION OUTSOURCINGS

If there is a Second Generation Outsourcing and there is no contractual provision between the transferor and transferee, TUPE will apply as follows:

---
29. Section 146 TUL.
(1) the relevant employees will transfer to the new supplier on their existing terms and conditions;
(2) the new supplier will, subject to the joint and several liability for failure to inform and consult mentioned earlier, inherit all liabilities under the contracts of employment; and
(3) the previous supplier will have to inform employees about the transfer, but liability for failing to do this can transfer to the new supplier.

The new supplier in a Second Generation Outsourcing will normally seek indemnities in respect of (2) and (3).