

The Netherlands

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GENERAL

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

Outsourcing is not specifically regulated, but there are applicable rules contained in financial services and public sector regulations (see *Question 2*).

In addition, laws relating to employment, data protection, intellectual property (IP) and taxes must be complied with (see *Question 2*).

2. What additional regulations may be relevant on:

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

Financial services

The Financial Supervision Act (*Wet op het financieel toezicht*) (Wft) regulates the Authority for the Financial Markets (*Autoriteit Financiële Markten*) (AFM) and the Authority for Safeguarding Financial Stability (*De Nederlandse Bank*) (DNB). Outsourcing activities of financial enterprises supervised by either of these authorities are subject to restrictions.

The Wft implemented Directive 2004/39/EC on markets in financial instruments (MiFID). It contains specific provisions relating to the outsourcing of activities by financial enterprises and the manner in which these outsourcings must be assessed. In the Wft, outsourcing is defined as the issue of an instruction to a third party by a financial enterprise for the third party to carry out on behalf of that financial enterprise activities which form part of, or arise from, the:

- Operation of its business or the provision of financial services.
- Essential operating processes in support of the activity.

Article 3:18 of the Wft states:

- If a financial enterprise with its registered office in The Netherlands delegates (that is, outsources) activities to a third party, the financial enterprise must ensure that the third party complies with the relevant rules applicable to a financial enterprise relating to these activities.
- A clearing institution, entity for risk acceptance, credit institution or insurer must not outsource activities to be designated by decree.
- By or under a decree:
 - rules must be provided for the purpose of supervising compliance with the provisions of this part in relation to the delegation of activities by financial enterprises;
 - rules must be provided relating to controlling the risks of delegating activities by clearing institutions, entities for risk acceptance, credit institutions and insurers; and
 - rules must be provided relating to the outsourcing agreement to be concluded between a clearing institution, entity for risk acceptance, credit institution or insurer, and the third party.

A financial enterprise must not outsource activities if this constitutes an obstacle to the proper supervision of compliance with the relevant part of the Wft (*Decree on the Supervision of the Conduct of Financial Enterprises*).

The customer must comply with applicable laws and regulations and the supplier must comply with the rules and regulations that would apply to the customer if the services were rendered in-house.

Business process

There are no laws specific to business process outsourcing.

IT

IT outsourcing is not specifically regulated.

The transfer of software licences or other IP rights are important issues in IT outsourcing. Thorough due diligence must be carried out before transferring or sublicensing any IP rights (see *Questions 5 and 6*).

Telecommunications

If typical telecommunication activities (such as part of the network) are being outsourced, the Telecommunications Act and regulations under it may be applicable. This must be assessed on a case-by-case basis.

Public sector

Public sector outsourcing is regulated by the:

- Framework Act EC-regulations procurement (*Raamwet EEG-voorschriften aanbestedingen*).
- Decree on Tender Rules for Government Assignments (*Besluit aanbestedingsregels voor overheidsopdrachten*) (BAO).
- Decree on Tender Rules for Special Sectors (*Besluit aanbestedingen speciale sectoren*) (BASS).

These are based on:

- Directive 2004/17/EC co-ordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (Utilities Directive).
- Directive 2004/18/EC on the co-ordination of procedures for awarding public works, supply and service contracts (Consolidated Public Sector Directive).

The BAO and BASS implement these Directives, but there are differences between the Decrees and the Directives. To remedy this, a new Procurement Act was intended to be adopted in 2008, but the Senate rejected it. A new bill is expected to be presented to the house of representatives in 2010 and the draft proposal has already been adopted.

Directive 2007/66/EC amending Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (Remedies Directive), implemented by the Act Implementing the Remedies Directive (*Wet implementatie rechtbeschermingsrichtlijn*) (Wira), is also important. It requires public authorities, among others, to wait a certain number of days (standstill period) before concluding a public contract. This enables rejected bidders to start an effective review procedure while unfair decisions can still be corrected. If this standstill period is not respected, the Remedies Directive requires national courts under certain conditions to set aside a signed contract.

The Framework Act and the BAO or BASS also apply to the procurement of goods and services above certain financial thresholds (exclusive of VAT):

- EUR4,845,000 (about US\$6.7 million) for public work contracts (central and local government).
- EUR125,000 (about US\$173,220) for public supply and services contracts (central government).
- EUR193,000 (about US\$267,450) for public supply and services contracts (local government).

Public bodies must not discriminate and the choice of a supplier must be based on objective and verifiable economic criteria.

Procurement under the BAO or BASS usually affects the:

- Timing of the pre-contractual phase.
- Award criteria.
- Duration of the outsourcing contract.

Other

Both supplier and customer should ensure that an outsourcing is not subject to additional regulatory requirements in other sectors.

LEGAL STRUCTURES

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

General

An outsourcing usually consists of two parts:

- Transfer of an operation (or part of an operation) to one or more suppliers. This can be structured as a transfer of shares or a transfer of assets.
- Provision of services by the supplier (or suppliers) to a customer.

The manner in which the outsourcing is structured largely depends on the nature of the outsourcing, the number of parties involved and the jurisdictions they are in.

One supplier

Basic outsourcings involve one supplier and one customer who are in the same jurisdiction. Depending on the nature of the outsourcing, assets and personnel can be transferred to either:

- The supplier (or one of the entities within the supplier) directly.
- A joint venture.

In this outsourcing, the customer is fully dependent on the supplier (particularly if all resources are transferred to the supplier and the customer itself has no assets or personnel left to provide the services itself).

Multiple suppliers

If there is more than one supplier, the customer is less dependent. However, a multi-supplier outsourcing requires substantial effort and a well-equipped demand organisation to ensure each supplier delivers its services (and, where necessary, communicates with other suppliers to align the services). For example, there must be sufficient expert personnel on the customer side and they must be able to co-ordinate suppliers to avoid, for example, gaps in the service provision.

Indirect outsourcing/offshoring

The customer concludes an agreement with a supplier based in the same jurisdiction and the supplier immediately subcontracts to another supplier. The subcontractor may be based in another jurisdiction or even on another continent (indirect offshoring).

A disadvantage of this type of outsourcing is that it may be harder for the customer to enforce its rights against the subcontractor that actually delivers the services. At a minimum there should be a guarantee from the initial supplier that it will render the services if the subcontractor does not comply with the agreement.

Joint venture or partnership

A joint venture (or special purpose vehicle) can be set up. The customer and one or more suppliers transfer assets, contracts and personnel to the newly established business.

The customer may opt for a joint venture because:

- It gives him greater control through the management of the joint venture.
- The services are specialised and other parties may also be interested in receiving the services.

The joint venture option can be used to address employee sensitivities. For example, employees may continue to feel that the customer is their employer, so if the outsourcing is terminated it is easier to transfer their activities to another supplier or to in-source.

Captive entity

The customer outsources the operation to a wholly owned subsidiary, located in the same or another jurisdiction. The choice of jurisdiction depends on possible tax or other benefits. The customer can take advice from local suppliers on a consultancy basis.

A disadvantage of this type of outsourcing is that the start-up costs can be significant, and losses and risk cannot pass to the third party supplier.

PROCUREMENT

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

The process is usually as follows:

- **Internal due diligence and preparation of the request for proposal (RFP).** The customer must decide which services or part of its operation it wishes to outsource. Once the customer has completed the internal due diligence it can draw up the RFP. During this phase the customer must produce information, manuals and other business descriptions, so that the RFP can be both:
 - sent to selected suppliers;
 - published in the open press, so all potential suppliers can respond.

A customer can hire a consultancy firm to assist in the outsourcing process, including:

- drafting the RFP;
- identifying potential suppliers;
- assisting in the selection process and (contract) negotiations;
- ensuring a smooth transition of the operation to the selected supplier and delivery of the services by the supplier.

- **Issuing the RFP and setting a time frame for the receipt and evaluation of the answers.** The RFP must specify the:
 - goals of the outsourcing;
 - services to be outsourced;
 - assets and personnel to be transferred.

A draft agreement is often issued, identifying mandatory (non-changeable) clauses. Suppliers must provide their amendments to the agreement in the answer to the RFP. If the drafting instructions are clear, the suppliers' answers can form the basis of drafting the agreement's schedules (for example, a description of the services, financial terms, exit plan and so on). Suppliers wishing to receive the RFP must usually sign a non-disclosure agreement (NDA) before they receive it, as RFPs are usually very detailed and provide inside information on the customer's business.

After receiving the information, potential suppliers have a specified term to read the RFP and ask questions. The answers to these questions are collected into one document and shared with all potential suppliers that have indicated that they intend to bid. The suppliers and customer must adhere to the time frame for this process, contained within the RFP.

The potential suppliers' answers may cause the description of the services or the goals set out in the initial RFP to change. All suppliers then usually receive an amended RFP.

- **Selection of potential suppliers and negotiations.** On receipt of the answers, the customer can select two or more potential suppliers. These suppliers can conduct a due diligence investigation. All relevant materials are placed in a virtual data room and can be viewed by the selected suppliers. Unlike in a public sector outsourcing, it is not obligatory to provide all suppliers with the same information, but it is common practice to do so. The RFP often also specifies that the supplier cannot contact the customer's personnel during the whole process, to prevent inequality in information shared.

The customer can then enter into negotiations with both potential suppliers (there are usually two left by this point), which should take place on equal terms and for a specified period of time.

- **Letter of intent (LOI) or memorandum of understanding (MOU).** Sometimes it is useful to conclude an LOI or MOU on agreed points. The supplier may require this if the customer asks it to calculate costs before execution of the agreement.
- **Negotiation and conclusion of the agreement.** If a draft agreement with mandatory clauses has been provided to the suppliers during the RFP, the negotiations may take less time than if an agreement must be fully drafted by this stage. It is advisable to discuss the time frame and the manner in which the negotiations will take place beforehand.

TRANSFERRING OR LEASING ASSETS

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

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

Parties can either:

- Transfer assets.
- Grant a right (which can be exclusive) to use the assets to provide services to the customer. The advantage of this for the customer is that it retains title to the assets and has greater protection (continuity of service) if the outsourcing agreement is terminated.

Immovable property

Immovable property must be transferred in writing and registered through a notary public. If the immovable property is leased, the landlord's consent is required.

IP rights and licences

Depending on the IP right, the transfer must be:

- In writing (for example, copyrights).
- Registered (for example, patents).

IP licences can be transferred if the original licence provides for this. The transfer may be subject to the prior written consent of the licensor.

Movable property

No formalities apply to the transfer of tangible movable property fully owned by the customer. If the ownership is shared or the tangible movable property is leased, the other owner's or lessor's consent is required.

Key contracts

Whether key contracts can be transferred depends on the contract's terms. If the contract does not provide for transfer, the contract can only be transferred if the transferor and transferee agree in writing. The other party's consent is required. It is advised to obtain written consent, although this is not required.

In relation to outsourcing, all relevant contracts should be identified at an early stage and consents for the contracts' transfers should be obtained as early as possible.

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

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

Immovable property

The consent of the owner should be obtained and the lease should be in writing. Immovable property is not licensed.

IP rights and licences

See *Question 5, IP rights and licences*.

Movable property

There are no formalities but it is good practice to record in writing the terms and conditions agreed.

Key contracts

Key contracts are not leased or licensed.

TRANSFERRING EMPLOYEES

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

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

The Acquired Rights Directive is incorporated into the Transfer Regulations in the Civil Code under Articles 7:662 to 7:666 and Article 14a of the Act on Collective Agreements. This applies where there is a transfer of an undertaking (or part of an undertaking) to another party. Where only the shares of an undertaking are being transferred, the rules do not apply as there are no changes in the employees' employment (they remain employees of the entity whose shares have been transferred, under the same conditions as before the transfer of the shares).

Dutch courts must take ECJ decisions into account when assessing whether or not a transfer is a relevant transfer under the Transfer Regulations.

Initial outsourcing

The Transfer Regulations usually apply in outsourcing transactions where an asset and employee transfer takes place (*see above*).

Change of supplier

See above, *Initial outsourcing*.

Termination

Where employees are transferred back to the original employer or to a third party, the transfer may qualify as a transfer of an undertaking and be subject to the Transfer Regulations.

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

General terms

All rights and obligations arising from the employment agreement (written or oral) at the date of the transfer are transferred to the supplier. Rights to buy the employer's products at a reduced price or options to buy shares are also transferred.

Pensions

Pension rights acquired under a pension agreement in accordance with the Pensions Act are transferred. There is an exception where the supplier offers its own pension scheme to the transferred employees. The supplier is not obliged to adjust his pension scheme to match the pension received by the transferred employees. However, works councils and the trade union prioritise discussing and negotiating pension rights before approving the intended outsourcing.

Employee benefits

Under the Transfer Regulations (*see Question 7*) all contractual benefits are transferred to the supplier. In principle, other terms of employment related to the customer, such as share option plans or the right to buy the customer's products at a reduced price, are also transferred. However, whether the share option plan transfers depends on the nature of the entity offering the option plan. For example, if the parent company offers the share option plan, it can be argued that it is merely a method to encourage employee loyalty and is therefore not a term that must be transferred under the Transfer Regulations.

Other matters

Collective labour agreements give rise to a number of issues that must be addressed with the trade unions at an early stage of the outsourcing.

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

Before concluding the agreement and transferring employees, the customer may provide aggregated information on (provided the information cannot be related to identifiable employees):

- The number of employees.
- Function descriptions.

- Salary information.
- Bonus schemes.
- Age.
- The number of employees leaving per year.
- Sick leave and so on.

If more specific information is required, the parties can agree to provide information to one or two selected persons who can report this information to the supplier in an anonymous report (so that no personal data is transferred to the supplier).

Transferring personnel data outside the EU during the RFP and negotiation process can be complicated by applicable data protection legislation, and should be assessed on a case-by-case basis.

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

Article 7 of the Acquired Rights Directive has been implemented into Dutch law.

If there is a works council (which must be established in companies with 50 or more employees), its advice must be sought through information and consultation procedures in relation to:

- A proposed change of control of a business or any division of a business.
- The discontinuation of the employer's activities.
- A significant change in the employer's organisation or activities.

This advice must be sought in time for the works council to be able to influence the decision. If the works council does not approve of the outsourcing and the employer disregards this advice, the outsourcing must be postponed for one month. During this period the works council can ask the Commercial Chamber of the Amsterdam Court of Appeal to block the employer's decision.

The trade union representing the employees must also be consulted. This consultation must be based on the Social Economic Council Merger Code 2000 (*Fusiegedragsregels*) (SER). The trade unions must be allowed to provide their opinion in time for it to influence both the:

- Decision on whether or not to proceed.
- Works council advice.

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

The transferee cannot harmonise terms and conditions of the transferring employees with those of its existing workforce. This is because the Acquired Rights Directive provides that transferred

employees must remain employed under the same conditions that applied to them before the transfer. However, in specific circumstances, it is possible to claim that a change is required for economical, technical or organisational reasons (ETO reasons), and is not connected to the transfer.

Historically, conditions have been changed where all parties involved (that is, the new employer, works council, trade union and the individual employees) agree to the change. The ECJ ruled in *Martin v South Bank University (C-4/01)* that a change in the employment conditions intended to harmonise employment conditions must be regarded as a change which is connected to the transfer and therefore void. The transferee would have to argue that the change is required for ETO reasons.

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

A dismissal due to the transfer of the undertaking is invalid.

Employees can be dismissed for ETO reasons, before and after the transfer of the undertaking, but the dismissal must not be connected to the transfer of the undertaking. Even where the dismissal is not due to a transfer of an undertaking, an ETO reason must still apply. Dismissal for ETO reasons requires permission to dismiss from the Officer for Legal Affairs of the Centre for Work and Income (CWI). Permission is only granted if the CWI finds the dismissal to be reasonable after balancing the employer's and the employee's interests.

The employment agreement can also be terminated by mutual consent, usually with payment of financial compensation.

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

If the outsourcing falls under the Transfer Regulations, all employees that are part of the transferred undertaking have a right to transfer to the in-sourcer. It is not possible to structure the employee arrangements as a secondment.

DATA PROTECTION

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

The Data Protection Act (*Wet bescherming persoonsgegevens*) (DPA) applies to the processing of personal data by a data controller established in The Netherlands.

Data controllers can contract data processors to process data on the data controller's behalf. The DPA imposes obligations on the data controller, some of which the data controller must ensure the data processor complies with.

The following data protection issues must be considered:

- Which party (the customer or the supplier) qualifies as the data processor for the purposes of the DPA.
- Issues arising in relation to the transfer or processing of personal data.

Both issues can be addressed in the contract documents. However, the Data Protection Authority (*College bescherming persoonsgegevens*) (CBP) will consider the facts rather than how the outsourcing is structured on paper.

If personal data is processed outside the EU in a country with less developed data protection rules (such as India, China and the US), the parties may need to take additional measures to ensure that the data transfer is permitted. For example, it may be necessary under the DPA to obtain a permit from the Minister of Justice to transfer data. The permit request can take six to 18 weeks to process, depending on the measures taken to provide adequate safeguards.

Personal data must not be transferred before a permit is obtained unless, for example, the:

- Data subjects have unambiguously given their consent.
- Transfer is necessary on account of an important public interest.
- Transfer is necessary for the establishment, exercise or defence in law of any right.

Parties should take this into account when negotiating the agreement and set a time frame for the transfer of services.

SERVICES

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

The customer draws up the service specifications before the start of the RFP process. During the RFP process and period of contact with potential suppliers, the service specifications can be amended to reflect the:

- Actual situation.
- Intended situation.
- Possibilities of the supplier relating to infrastructure, software and other materials used in providing the services.

The specifications are usually contained in a schedule to the agreement and are subject to specific change controls (so that the agreement need not be entirely amended when the services change).

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

Service levels and service credit schemes are usually set out in schedules to the agreement. Objective and measurable criteria (key performance indicators (KPI)) must be identified to measure

performance. A reporting and measuring tool must be agreed on at the same time.

Only key services that are essential to the business continuity of (or otherwise of importance to) the customer need to be linked to a service credits system (for example, cash registers are essential to retailers while the telephone service is essential to call centres). At the start of the agreement, the parties should identify the minimum level of performance that the supplier should meet. This baseline can be agreed based on the information that the customer and supplier gathered in the due diligence process before the conclusion of the agreement.

The parties can either:

- Take service credits into account in the fees that the customer must pay.
- Agree to other payment arrangements.

The parties can choose that the service credits are either:

- The sole remedy for a supplier's failure to properly perform the agreement.
- Due without prejudice to the customer's other rights and remedies under the agreement (such as damages, termination and step-in rights).

This choice must be included in the agreement.

CHARGING

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

The charging method chosen by the parties depends on:

- The type of service being provided.
- Whether or not the supplier is appointed on an exclusive basis.
- The risks involved in the transaction and the services to be delivered.

Various pricing mechanisms are usually agreed on in each outsourcing arrangement, including:

- **Cost plus.** All costs incurred by the supplier are charged and the customer pays a profit margin. The profit margin may not be applied to certain services or may be included in the costs. Parties should identify these issues before executing the agreement.
- **Time and material.** This type of charging is not often used as it does not give the customer control over the costs incurred. Cost control is usually the main reason to outsource services. For example, a supplier may wish to apply time and material to certain services in relation to which it cannot give an accurate cost estimate. Parties can decide to allow time and material for a certain period (to measure costs) and then alter the pricing mechanism for the service.

- **Fixed price.** A supplier will only accept a fixed price mechanism if the services are predictable and stable. Often a fixed price is quoted for the transition phase. On completion of the transition phase, other prices or charges are applied for the services.

Parties can include any other type of pricing mechanism, such as:

- A decrease of costs if a technology adjustment results in lower costs for the supplier.
- Pay as you go.
- Payment per unit or volume.

Parties usually add wording relating to the financial consequences of an increase or decrease of services in the event of a divestiture or merger (charge variation mechanisms).

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

The following other key terms are used in relation to costs:

- Charge variation mechanisms.
- Yearly indexation of prices in line with officially published indexation numbers. These may differ depending on the services, or the parties can choose to apply one indexation number to all services rendered.
- Benchmarking, which may be done once a year or at other intervals. Suppliers will only accept a clause that makes it possible to compare the services and costs with other suppliers in comparable or identical situations. Usually a specialised benchmarking firm is appointed in the agreement and a specific benchmarking schedule is attached to the agreement. The parties should set out in the outsourcing agreement the consequences of the outcome of the benchmarking (that is, a price increase or reduction, and how it will be effectuated).
- KPIs to measure the services against an agreed baseline.

CUSTOMER ISSUES

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

If the supplier fails to perform its obligations, the customer can:

- Demand performance.
- Demand performance and claim damages.
- Suspend the agreement.
- Claim damages.
- Claim termination (or partial termination) of the agreement, with or without damages, for breach.

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

Customers are usually granted the following protections in the contract documentation:

- A right to audit. There will also be provisions relating to the consequences of a negative or positive audit outcome.
- Step-in rights for the customer or a third party appointed by the customer.
- Service performance indicators and service credit arrangements for certain services.
- Indemnity from the supplier for certain losses.
- Specific provisions relating to termination.
- Reporting and governance structures (including escalation arrangements).
- Insurance requirements.
- Parent company guarantees.
- Warranties.

WARRANTIES AND INDEMNITIES

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

Each party warrants that:

- It is entitled to enter into and perform the agreement.
- The agreement has been executed by a duly authorised representative of that party.
- There are no actions, suits or proceedings pending (or, to the warranting party's knowledge, threatened against or affecting that party) before any court, administrative body or arbitral tribunal that may affect the party's ability to meet and carry out its obligations under the agreement.
- Once duly signed, the agreement will constitute its complete legal, valid and binding obligations.

Supplier warranties

The supplier warrants that:

- It will perform its obligations under the agreement:
 - using only competent persons with appropriate levels of qualification and experience;
 - with all reasonable diligence, skill and care;
 - in a professional manner in accordance with the agreement.

- The services will conform to the highest commercial standards applicable to the relevant services in the business in which the supplier is engaged.
- The services will at all times comply with the service levels.
- All equipment, including hardware and software, used by supplier to provide the services will be suitable and conform to the applicable standards in the sector the customer operates in.
- It has obtained all necessary consents (including licences for using the software) from third parties to enable it to assume its obligations under the agreement.
- It will optimise the services in accordance with the agreement.
- It will perform the technology refresh set out in the agreement, to provide state of the art service provision in the sector the customer operates in.
- It will employ transferred personnel within the region the customer employed its personnel.
- It will comply at all times with the DPA and any relevant regulations.
- All services will be performed in accordance with applicable legal requirements.

Customer warranties

The customer warrants that:

- All equipment, including hardware and software, that it provides will be suitable and in conformity with the applicable standards in the sector the customer operates in.
- During its office hours its contract manager will be available if there are difficulties.
- It will, on receipt of relevant information from the supplier, inform its end users of all procedures, changes in procedures and availability of IT systems.

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

There is no concept of fitness for purpose and quality of service warranties in The Netherlands. However, general contract law requires that goods (*zaken*) meet certain standards (that is, the "conformity requirement" (*Article 7:17, Civil Code*)).

TERM AND NOTICE PERIOD

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

There are no national law restrictions on the term of an outsourcing. The parties can negotiate any term, but the term is usually between three and ten years.

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

The parties are free to negotiate the notice period required. The customer should only agree to a notice period that allows it to retain the services from another supplier or to in-source the services.

The agreement also usually contains an exit arrangement obliging the supplier to keep performing the services for a certain period after termination of the agreement. It is good practice to:

- Attach a framework of the exit plan to the agreement.
- Oblige the supplier to fill out the exit plan within a certain period after contract signing.
- Keep the exit plan up-to-date during the term of the agreement.

TERMINATION AND TERMINATION CONSEQUENCES

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

The parties can provide for the right to rescind the outsourcing agreement by registered letter where both:

- A party has provided written notice of material breach, stating a reasonable period within which to remedy the breach.
- The other party fails to remedy the breach within that period.

A party may also have the right, without any demand or notice of breach, to rescind the agreement by registered letter if the other party, among other things:

- Files a provisional petition for suspension of payment (or if provisional suspension of payment is granted).
- Files a petition for liquidation (or is in liquidation).
- Has passed a resolution for its winding-up.
- Is otherwise no longer capable of performing its duties under the agreement.

The parties can also add a provision relating to a change of control in either party. The consequences of the change of control and termination of the agreement must be set out in the agreement or exit plan. If there is a change of control, the customer can terminate the agreement. In this event (and in the other termination events), the parties execute the exit plan annexed to the agreement (see *Question 24*).

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

The parties can agree to terminate for convenience. Usually, the customer must pay a certain amount to the supplier, depending on both the:

- Duration of the agreement.
- Costs the supplier has incurred to deliver the services (start-up costs).

See also *Question 25*.

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

There are no implied rights for the supplier to continue to use licensed IP rights post-termination. However, parties can agree that the supplier can do so, provided the owner of the IP agrees.

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

The parties can agree to any arrangement relating to the access of know-how. This is usually provided for in the exit arrangement or service agreement.

LIABILITY

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

Parties can exclude liability, but not for wilful misconduct.

Terms such as "indirect", "direct", "consequential" damages or loss are frequently used in outsourcing agreements. As their meaning is not clear, a description or definition should be added to avoid misunderstanding about the scope of the liability.

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

The parties are free to agree a cap on liability, but not for liability relating to wilful misconduct. A court can view the cap as unreasonable under the circumstances and change it, although this rarely happens. The cap can be a percentage or multiple of the contract value, or a fixed amount.

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

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

Transfers of assets or employees to the supplier

In a related party transaction, the transfer of tangible and intangible assets, and employees, must be priced at arm's length. The transfer may result in profit tax, with no immediate compensating tax deduction in the hands of the transferee. It must be analysed which group company should bear the redundancy cost, relocation cost and other restructuring expenses. The income tax position of the employees in relation to salary, pension and social security must be monitored.

VAT or sales tax

Any change in the flow of goods or invoicing can have VAT consequences and a transfer of assets in itself can attract VAT. Depending on the nature of the services and the country of the counterparty, either the customer or the supplier must charge VAT. There may be exceptions:

- In the financial services industries.
- For governments and educational institutions.

VAT compliance obligations must be met, such as:

- Invoice requirements (for example, central billing through a shared service centre).
- Completion of VAT returns.
- Statistical returns.

Formal local rules should also be taken into account (for example, relating to archiving).

Other

A company can sometimes be held liable for its supplier's failure to pay VAT or payroll tax.

Real estate transactions can attract transfer taxes.

Withholding taxes may be due on service charges.

Tax planning strategies may be available to create a tax-efficient outsourcing structure.

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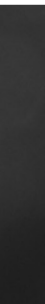
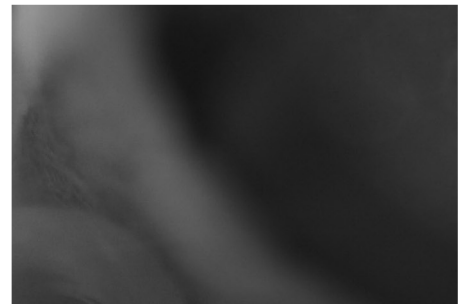
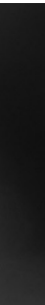
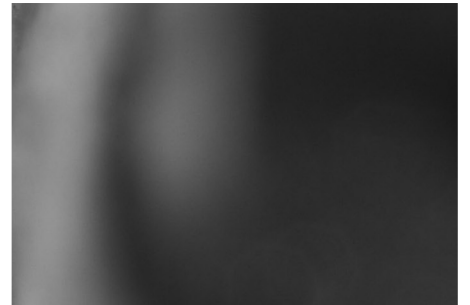
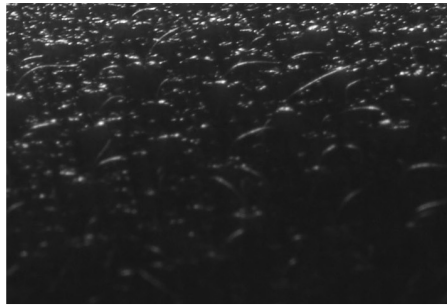
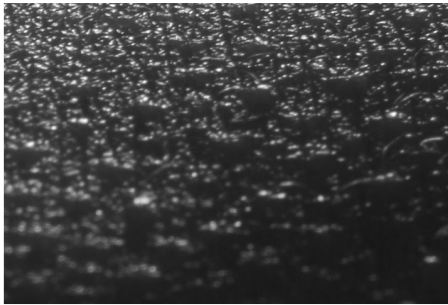
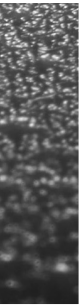
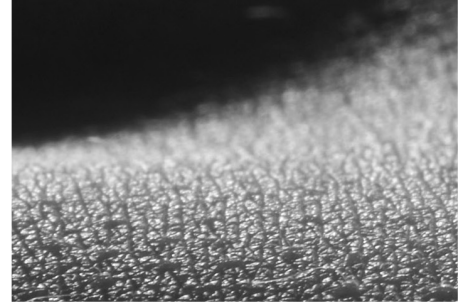
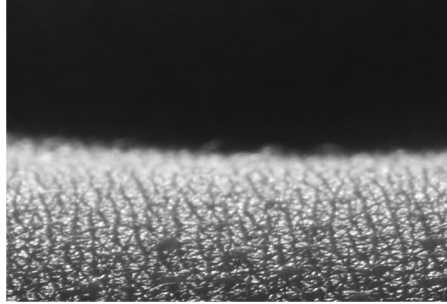
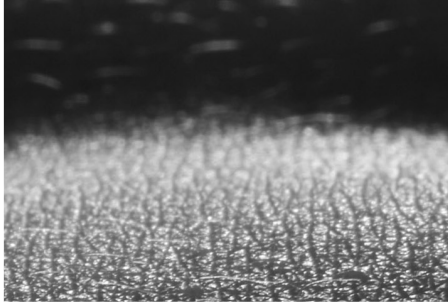
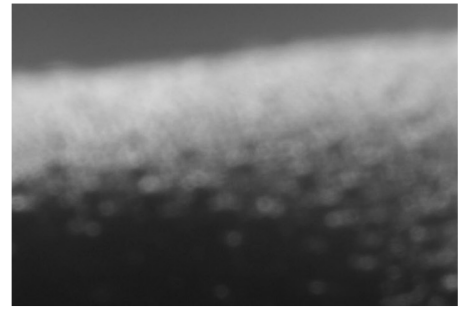
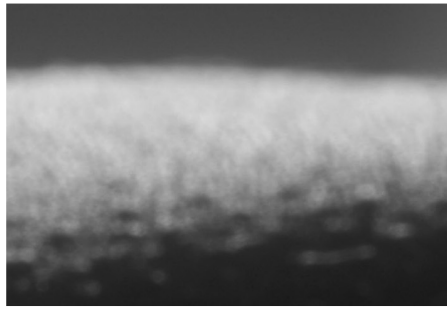


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