Multi-jurisdictional outsourcing

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Status: **Maintained** | Jurisdiction: **International, United Kingdom**

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This note considers some of the key issues that arise in relation to multi-jurisdictional outsourcing, including the process involved in managing the outsourcing of services globally, how to structure such a transaction, transfer and service issues and other global and local issues.

Scope of this note

This note considers the key issues that arise in relation to multi-jurisdictional outsourcing, including:

- The process involved in managing the outsourcing of services across borders or globally.
- How to structure such a transaction.
- Transfer and service issues.
- Some of the other global and local issues that may arise.

Terminology: "outsourcing"

In this note, the term "outsourcing" refers to any type of externalised service arrangement (regardless of what the agreement is called). That is, where the services that are, or could be, delivered from within an organisation (or by another group entity within an organisation), are to be delivered instead by an external third party, or where those services that are already being provided by a third party are being considered for review and the related services contract for renewal or to be let to another third party.

Currently, the term "outsourcing" tends to be applied less frequently to transactions that are, in effect, outsourcing arrangements in all but name. For example, to certain cloud computing services, digitisation projects and services, and managed or other services delivered from vendor technology platforms. It is therefore important to analyse and understand the elements of such transactions to ensure that good outsourcing practice, risk management disciplines, deal optimisation and suitable contract terms should apply in relation to them where appropriate and practicable. For example, it will not always be appropriate or practicable to seek to apply some or any of the above kinds of term to a standard public cloud computing contract, where, realistically, there may be little or no room to negotiate or vary such terms for generally available standardised services.

When referring to multi-jurisdictional outsourcing, this note focuses primarily on outsourcing arrangements where a group's services are outsourced across different jurisdictions. These services may be outsourced as follows:

- "In country" outsourcing. For example, a group's operations in France are outsourced to a supplier's group company in France while its operations in Germany are outsourced to a supplier's group company in Germany.
- Outsourcing in different jurisdictions to an entity in a particular jurisdiction or jurisdictions. For example, to a shared services centre or hub network providing services to different jurisdictions.

Multi-jurisdictional outsourcing may also refer to the outsourcing of services from one jurisdiction to another, say, China or India. This is commonly referred to as "offshoring" or, in the case of outsourcing to a jurisdiction which is near to the customer's home base, such as, in relation to the UK, a country in Eastern Europe, "nearshoring". However, the focus of this note is on those aspects of an outsourcing transaction that arise from it being a multi-jurisdictional transaction, rather than a nearshore or offshore transaction (although many similar issues may arise in this context). For information on offshoring, see Practice note, Offshore outsourcing.

Where cloud computing deployment models (for example, public or hybrid cloud) and service models (for example, software-as-a-service, or SaaS) are incorporated in multi-jurisdictional outsourcing arrangements, customers must pay particular attention to the terms applicable to the cloud computing services, see Cloud computing, automation and AI enabled systems and processes.

Cost reduction and other factors affecting the decision to outsource

Multi-jurisdictional outsourcing transactions continue to be a feature of the outsourcing market and cover a wide variety of different service areas. These include IT, telecoms services, digitisation and platform-delivered services, artificial intelligence (AI)-enablement, cloud computing and business process outsourcing arrangements (such as back office and HR functions) and the outsourcing of other types of services or functions. The reasons behind these global outsourcing arrangements are complex and may include the need to adopt and implement advanced technologies like AI and machine learning, global or regional technology platforms or consolidate business processes or functions on a global or regional basis.

Where multi-jurisdictional outsourcing includes nearshore or offshore service delivery, the main driver for the customer is often the desire to reduce or control costs. To benefit from multi-jurisdictional outsourcing arrangements, it is essential that such transactions are well planned and executed, and that the operational and contractual arrangements provide a flexible, workable, legally and tax compliant, effective and commercially sound solution.

Increasingly, with projects involving digitisation, the deployment of advanced technologies like AI and machine learning, and the need for specialist technological and project skills, organisations turn to providers for skilled software developers at all levels, data scientists and programme managers. The rationale for such assignments may include a shortage of suitably qualified skills within the customer organisation, as well as pressure on internal resources from staff shortages. Often the external specialists are based in nearshore or offshore locations. Such arrangements may be referred to as "staff augmentation", but in many cases they should still be considered as outsourcing arrangements.

Cloud computing, automation and AI enabled systems and processes

Cloud computing and the adoption of automation technologies (often referred to as "robotic process", "intelligent automation" or "RPA") and AI-enabled services are increasingly eroding (among other things) the offshore / nearshore labour cost arbitrage of traditional offshore / nearshore outsourcing models, as well as the cost efficiencies of the traditional outsourcing model itself. It is often said that cloud computing is location-neutral (or a "no-shore" computing utility service). But this is a simplistic view, as the servers that process the cloud computing are based terrestrially. Nevertheless, the cost effectiveness of cloud computing, computing automation and AI means that some multi-jurisdictional outsourcing arrangements are beginning to reflect this change, with the focus now shifting from offshore / nearshore labour cost arbitrage to the adoption of lower cost, standardised, utility-based technologies (such as public and hybrid cloud computing, RPA and actionable AI, as well as other advanced IT-enabled processes. These new computing, business and service delivery models will therefore be requested by customers and increasingly reflected in multi-jurisdictional outsourcing arrangements. Where public, hybrid or private cloud deployment models are incorporated in multi-jurisdictional outsourcing, customers should take particular care to review all applicable cloud computing terms. These terms are often modular and may comprise a mix of hard-copy, digital and purely online modules, with variation by region or territory, subject matter (such as data protection, or financial services regulation), according to the cloud services provided, or the sectors concerned. Customers should understand how and the extent to which such terms may differ from more traditional outsourcing contractual provisions.

Areas that will most likely require such attention include:

- Data location ("residency") or sovereignty provisions, where required by customer need or regulation.
- The governing law and jurisdiction of the cloud computing service contract(s), and in particular the extent to which those governing law and jurisdiction provisions enable or facilitate compliance (or not) with the customer's local laws and regulations. Customers should also be aware of applicable overriding local laws in the cloud service provider's home jurisdiction that may give rise to legal, regulatory, operational or commercial concerns for the customer organisation.
- The cloud service provider's commitment to service levels, for example, availability of service, as well as other performance metrics.

- Additional cloud service providers. There may be instances where third parties provide cloud services in addition to, or in support of, the outsource or cloud service provider. For example, where the prime outsource provider has sub-contracted cloud services to a third party, or in certain hybrid cloud deployments, or multi-cloud environments. In such arrangements, customers should be aware of which cloud service providers (or additional cloud service providers) are in the "cloud chain", where those providers are located, and ensure that there are suitable contractual terms to govern those arrangements. See Multiple suppliers, subcontractors and supply chain management and the European Banking Authority's (EBA) guidelines on outsourcing arrangements.
- Business continuity arrangements, or resilience of the cloud services, in the event of unscheduled outages.
- Acceptable Use Policies (AUPs), which create service and contractual dependencies on customer user actions and behaviour, including rights for the cloud service provider to suspend or terminate services for specified breaches of an AUP.
- The extent to which security features may be a shared or delineated responsibility between the customer and cloud service provider, making the customer responsible for certain security configurations.
- Data security arrangements and terms, and the extent to which the cloud service provider is willing to accept liability for data breaches within its control.
- Data protection and the international transfers of personal data, including ensuring such terms comply with the EU General Data Protection Regulation ((EU) (2016/679)) (EU GDPR) and/or, in the UK, the retained EU law version of the EU GDPR (UK GDPR), in each case where relevant.
- Ownership of intellectual property rights generated through the customer's use of the cloud services.
- Limitations on the cloud service provider's liability, both as to quantum and the kinds of loss and damage limited and excluded.
- Termination events and the consequences of termination, in particular regarding the availability and portability of customer data on expiry or termination of the cloud contract element(s) of the multi-jurisdictional outsourcing arrangements.

Where the customer is a regulated financial services institution, it will almost certainly have to comply with specific regulations applying to cloud computing. For example, for UK institutions the EBA's guidelines on outsourcing arrangements, and for EU institutions Regulation (EU) 2022/2554 on digital operational resilience for the financial sector and amending Regulations (EC) 1060/2009, (EU) 648/2012, (EU) 600/2014, (EU) 909/2014 and (EU) 2016/1011 (DORA).

In such cases, the customer must itself ensure that the proposed cloud services terms incorporated in the multi-jurisdictional outsourcing provisions will enable it to comply with its regulatory obligations.

Customers in the financial services sector and their ICT outsource service providers will now also need to consider the implications for the outsourcing arrangement of the EU's Digital Operational Resilience Act, DORA, which came into force on 17 January 2025, the UK's equivalent operational resilience rules and, during 2025, the UK's broadly equivalent critical third parties (CTPs) requirements under Part 18 of the Financial Services and Markets Act 2023, and the various designations and rules to be made pursuant to it, see Practice notes, Financial Services and Markets Act 2023: Critical third parties and Hot topics: Operational resilience: UK regime for critical third parties to the financial sector.

For more information on the effect of RPA and AI on sourcing arrangements, see Practice note, Outsourcing: developments in models and strategies: Effect of new technologies on sourcing practice.

For more information on cloud service provision generally, see Practice note, Cloud services: overview.

Structuring a multi-jurisdictional outsourcing

The main factors in structuring a multi-jurisdictional outsourcing transaction are:

- The continuous need for central control and direction from one or occasionally more than one centre within the customer group. The latter is often seen in the case of shared services or global business services transactions, where different service lines (such as finance and accounting or HR) may be run centrally from different locations.
- Where practicable, the adoption of a single contractual "code" or framework to regulate all call-off transactions under the arrangement.
- The need to comply with all applicable regulations, for example, in regulated sectors

such as financial services, and more generic regulations such as data protection and privacy.

- The requirement to keep legal and regulatory compliance under review for the life of the outsourcing arrangements, in every jurisdiction concerned.
- The need to achieve workable and legally effective and compliant local solutions.
- The ability to deliver the benefits of a transaction, most often pricing based on economies of scale and pre-agreed commercial and contractual terms, to different group entities based in several countries (each with similar or different needs).

The arrangements will need to be closely managed and controlled at a global level to ensure that any risks involved in outsourcing a group's services in different jurisdictions are minimised while the benefits of the outsourcing are achieved. At a local level, the legal, regulatory and operational issues need to be understood so that practical solutions can be implemented.

Global Framework Agreement and Master Services Agreement

Many multi-jurisdictional outsourcing arrangements are structured through a global framework agreement (GFA) that is then implemented locally through local agreements. In addition to the GFA, a separate master services agreement may sometimes be agreed at the same time as the GFA.

However, the GFA is more frequently referred to as a master services agreement (MSA), meaning that there is only one global agreement.

The interplay of the GFA and MSA is discussed below.

Separate GFA and MSA

Where the GFA and MSA are separate, the higher-level agreement (most usually the GFA) may be used at the highest corporate level to define the long-term global relationship between the two main contracting parties. (It may then be called a relationship agreement.) This usually applies where the parties have decided on one of the following approaches:

- To collaborate to exploit their respective technologies, skills and resources or markets, or a combination of these.
- To collaborate in adopting and integrating new service-related digital technologies, such as RPA and AI, to help the customer transform its business or business model.
- To "partner" (in a loose, mostly non-legal sense) in the delivery of outsourced services to the customer's global organisation. In this instance, great care should be taken to ensure that the contract remains at arm's length between the customer and the supplier. It should be emphasised that the interests of the customer and supplier will be fundamentally different. This should be borne in mind whatever the commercial objectives of the customer of the supplier may be said to be, or however much talk there is of their respective interests being "aligned".

As such, the lower-level agreement (usually the MSA) will be used to set out the overarching terms between the parties. These terms will typically include:

- The overall objectives and mutual benefits of the arrangement.
- Customer service beneficiaries.
- The global contracting and delivery models.
- Agreed form templates for call-off contracts.
- Price and pricing models.
- Warranties and indemnities.
- The approach to regulatory and liability issues at higher and local levels.
- Term and termination at a global level.

GFA and MSA not separate, just one master agreement

Alternatively, all overarching terms are contained within one master agreement which may, somewhat confusingly, be referred to as a GFA or MSA. In this context, these terms are often used interchangeably. In this note, the term "GFA/MSA" will be used to refer to the agreement or agreements governing the overarching obligations between the parties at a global or overarching level, regardless of whether they are referred to as GFA or MSA.

Local agreements and master transfer agreements

In addition to the GFA/MSA, additional agreements such as those relating to the local elements of the services will need to be executed. These agreements and their interplay with the GFA/MSA are considered below.

Local transfer agreements

In both models (a separate GFA and MSA, or just one master agreement), the roll-out of services locally is dealt with by means of a call off contract. In Anglo-US transactions this is often called a local country agreement, a statement of work (commonly shortened to “SoW”) or a work order. In this note, we will refer to this contract as the “local agreement”, regardless of what they are called.

The local agreement is usually intended to take effect as a separate contract between, on the one hand, the global supplier or a local supplier affiliate or other entity and, on the other, the local entity of the customer. As stated above, the terms of the local agreement are designed to be regulated by those of the GFA/MSA, so that the benefits of the centralised functions, pricing and other terms agreed at the highest corporate level are achieved with the minimum of variance at local level. Accordingly, a template for each local agreement is usually appended as a schedule or appendix to the GFA/MSA, containing a limited number of clauses that allow a restricted (but specified and documented) range of variances from the terms of the GFA/MSA.

To regulate this structure, the GFA/MSA will often provide for a global engagement or contracting model, which will include a requirement that services are provided only on the terms of local agreement in the form as appended to the GFA/MSA. For a diagram illustrating the structure and key terms in a GFA/MSA and a local agreement, see Structure of agreements.

Master transfer agreement

If there will be significant (tangible or intangible) asset or staff transfers (or both), the parties may agree a separate master transfer agreement alongside the GFA/MSA to address issues such as the transfer of assets, third-party contracts and employees. The problem with attempting to regulate such transfers at a master transfer agreement level is that local transfers of assets (for example, real estate and buildings) and staff will (most likely) be governed by local law, which might result in each local transfer being quite different from the others. In regulated sectors, like the financial services sector, transactions for material, critical or important outsourcing or operational services like IT are likely to be regulated locally or regionally (for example under DORA throughout the EU). Accordingly, the most a master transfer agreement will do is seek to apply high-level principles to the transfer of assets and staff. Even here, however, there are difficulties, such as a term that the customer sells assets to the supplier “as is”. Such terms may be negated by overriding local law.

The most common use of master transfer agreements is where there are significant staff transfers in a number of jurisdictions and where the element of the contract dealing with the transfer of employees needs to be approved by local works councils or sometimes a central works council for the whole customer group. Often there will also be complex issues involving pensions and other important issues such as staff benefits which will also have to be dealt with at this level. For example, there may be a requirement on the supplier to match the occupational pension scheme arrangements of the customer that, in turn, requires the customer to pay a substantial sum to the supplier from scheme surpluses or otherwise.

Relationship between GFA/MSA and local agreements

Where a multi-layered contracting approach is adopted, it is important to understand the relationship between the GFA/MSA and the local agreements. The GFA/MSA will, for example, often set out the range of services to be provided, the service levels that are applied to them and the prices for those services.

However, individual jurisdictions may not need to be provided with certain of the service elements, or they may have a need for a different service level for a particular service and, of course, the costs of providing the service to a particular location may be higher than the contractual norm. The customer and supplier will need to agree the extent to which the services and service levels are to be imposed centrally or the degree of autonomy that is allowed within each country. Will a group company be entitled, for example, to pay for and receive increased response or availability targets?

The dangers of allowing what is, in effect, a renegotiation of the terms of the global deal for individual countries is that it may affect the outsourcing deal as a whole. The simpler approach is that illustrated above: where the GFA/MSA is to be adhered to in each country save only for limited variances. For examples of the interrelationship between the GFA/MSA and local agreements, see Global transfer and services issues.

If a service hub or shared services centre will be used or newly established by a supplier in order to supply services to a customer’s group, a GFA/MSA structure may still be appropriate. The GFA/MSA would still set out the overall terms of the transaction and any overarching commercial and legal arrangements and specify a template local agreement. The local arrangements relating to the way local services in different jurisdictions are outsourced to the service hub or shared service centre would then be addressed through the local agreements.

For more information on framework agreements generally, see Practice note, Framework agreements in the private sector.

Choice of law and jurisdiction

Where a GFA/MSA and local agreement structure is to be used, one key consideration is the choice of law which will govern the agreements. The choice of law will depend on various factors, including:

- The location of the parties to the agreements.
- Where UK entities are concerned, the impact of Brexit on the agreements, including the enforcement of judgments, see Brexit and multi-jurisdictional outsourcing.
- Local or regional (for example, the EU) law that may, by extraterritorial reach or otherwise, override the choice of law for the GFA/MSA either wholly or in relation to material parts of the local agreement, for example, regulatory requirements.
- Enforceability issues.
- The location in which the services are to be provided.
- The relative bargaining power of the parties.
- The commercial and behavioural needs to achieve a "balance of inconvenience" between the parties, so the governing law here may be the law of a jurisdiction in which none of the contracting parties is resident, to discourage resort to formal dispute resolution.

From an interpretation and enforcement perspective, it is simpler and prudent for the GFA (or MSA, if separate) and local agreements each to be governed by the same law. This helps to standardise the approach taken in each of the agreements and minimise the risk of conflict. But affiliates may have their own views on the choice of law which governs their own agreements and may not wish to be bound to accept the choice of law in the GFA/MSA. Further, in some jurisdictions, the choice of law may be directly, or indirectly mandatory as local courts may not recognise the choice of a law which is foreign to them. Local or regional (for example, GDPR) or the Artificial Intelligence Act ((EU) 2024/1689) (EU AI Act) will, in any event, govern some elements of the agreement regardless of the choice of law, such as:

- The transfer(s) of employees.
- Transfer of assets.
- Data protection.
- Sector regulation, such as financial services and banking secrecy.
- Specific technology regulation, such as the EU AI Act (for more information on the EU AI Act, see Practice note, EU AI Act).
- Ownership and licensed use of intellectual property rights.
- Exclusions and limitations of liability.
- Real estate matters.
- Export controls

For more information, see Local transfer and services issues.

The same considerations will apply to the choice of, and submission to, venue by the parties: which court(s) will have jurisdiction to determine disputes arising out of the transaction, or where and under what rules will an arbitral tribunal be convened?

In a multi-jurisdictional outsourcing, it is particularly important that disputes will be dealt with expeditiously by suitably qualified courts or tribunals. In jurisdictions where the judicial process can take many years to run its course or there is doubt about the expertise or experience of the judiciary, it may be necessary, if permissible, to have the parties submit to the jurisdiction of other, better qualified and more efficient courts or tribunals. However, as with choice of law, in some cases, because of local conflicts of laws, rules or other overriding local law (such as certain EU laws), it will not always be possible to exclude the jurisdiction of local courts or tribunals. For more information on governing law and jurisdiction, see Practice note, Governing law and jurisdiction clauses.

As part of the due diligence process, the customer and supplier should identify those jurisdictions where a global choice of law will not be effective (either in whole or in part), and those jurisdictions in which their submission to jurisdiction may not be recognised.

There has been a trend for the parties to GFA/MSAs to select international arbitration provisions to govern disputes. There are several reasons for the trend, most notably that in some jurisdictions the judicial process is perceived to be too slow, inefficient, inflexible, or that the judges are not sufficiently experienced in the technical and legal issues that may arise in some cases. Another perceived advantage of arbitration is that it may be possible to avoid publicity in relation to the dispute, though this is more likely to benefit the supplier rather than the customer. Local courts may also effectively negate the submission to arbitration on application by one of the (local) parties.

Tax-efficient and compliant structures

Parties should consider whether the structures that are put in place are tax efficient and compliant, for both direct and indirect taxation. The way in which a foreign establishment (whether of the customer or supplier) is structured and operates may give rise to a permanent establishment in the jurisdiction concerned, so exposing that party to local direct tax liability. For example, in some countries, by the siting of servers and other operations in that jurisdiction.

The supply and receipt of services in a jurisdiction may attract indirect taxes such as VAT or sales taxes that are not applied in the parties' home jurisdictions. Liability to these taxes may significantly add to the cost of the services. VAT may apply according to the place in which supplies are consumed or used, rather than the place from which supplies are provided. As a result, there may be more limited scope for the customer parties under GFAs/MSAs to avoid VAT or take advantage of most supplies at lower VAT rates, unless, for example, the services concerned are within the relatively limited range of financial services that may benefit from the EU or UK exemption from VAT. Even then, care will have to be taken to structure the services to minimise the charge to VAT.

From a supplier's perspective, it may suffer withholding taxes in some jurisdictions. Of course, any assets that are transferred to the supplier may affect the tax position. Both parties should therefore seek local tax advice as part of the due diligence process.

Multi-jurisdictional outsourcing arrangements may also give rise to transfer pricing issues if the services are provided by one or more group companies to other group companies. This may affect both customer and supplier organisations. Transfer prices are the prices at which associated entities (such as group companies) transfer goods, services and other things between each other. In the absence of preventative legislation, these associated entities could manipulate transfer prices to create tax advantages by moving taxable income from a high-tax jurisdiction to a lower one (or moving tax-deductible expenses the other way). For more information on transfer pricing, see Practice note, Transfer pricing issues in commercial agreements.

While most multi-jurisdictional outsourcing transactions now use contractual structures such as GFAs, MSAs and local agreements, in certain circumstances the setting up of a joint venture company or the establishment of some other special purpose vehicle may be appropriate. For a discussion of the different vehicles which may be used and some of the specific tax issues to consider when deciding on the business form, see Practice note, Outsourcing: tax.

Customers and outsource service providers in the UK or where UK entities are concerned should also consider the impact of Brexit (if any) on the tax treatment of the multi-jurisdictional outsourcing arrangement, see Brexit and multi-jurisdictional outsourcing. In certain multi-jurisdictional outsourcing transactions involving the UK and European financial services sector, Brexit may be a significant consideration especially in relation to which (if any) VAT exemptions may apply (or may have applied before the Brexit transition period ended).

In any event, advisers should recommend the early engagement of client tax functions or external advice (whether for customer or supplier organisations) to consider the tax effective and compliant structures and processes for the outsourcing.

Multiple suppliers, subcontractors and supply chain management

Multiple suppliers

It may make commercial and operational sense for services to be outsourced globally to different suppliers. For example, outsourcing a group's services in certain jurisdictions to one supplier and its services in another jurisdiction to another supplier. This may be done in different ways. One approach may involve entering into GFAs (and possibly agreeing MSAs) with more than one supplier covering different jurisdictions.

It is often considered commercially beneficial if customers have viable alternative sources of supply for their outsourced services. The rationale for this includes the following:

- Having a single supplier of all the outsourced services may not be as competitive, or operationally or financially effective as say, a specialist supplier for a particular IT or operations service. In other words, the customer may prefer to buy "best in class" or engage several suppliers to maintain financial leverage and tension.

- A supplier may become complacent that the outsourced services will remain with it. As customers are looking at the outsourcing of entire functions covering both IT and business processes, it is increasingly perceived that a single supplier may not have uniform or in-country capability for both IT and business process outsourcing, or even particular kinds of IT or a specified range of business process services.
- Increased technological and operational specialisation in digitisation and the deployment of RPA and AI, as well as in other advanced IT-enabled processes (for example, in the financial services sector, including specialist FinTech applications and processes) is resulting in the need to include within supply chains specialist providers as prime or sub-contractors in the outsourcing transaction. It is therefore essential for the customer to ensure that contractual arrangements deal with which contractors are primarily or otherwise responsible for providing such services, and the operational and contractual bases on which they are contracting to provide such services. For example, whether the specialist provider is acting as a sole prime contractor, as one or more prime or co-contractors in multi-sourced services, or as a sub-contractor within the prime contractor or contractors' third-party supply chain(s).

Consequently, multi-sourcing arrangements, including the ability to add services provided in other countries, have become more common. For the customer though, managing different suppliers globally is a complex exercise that relatively few customers can achieve successfully, whatever their level of sophistication.

This presents additional transactional risks for the customer. Some customers now outsource the management of multi-vendor outsourcing to a single supplier. This arrangement is often referred to as a "managed service", in that the appointed supplier manages the end-to-end delivery of an entire service, whether the component services are provided by it or by other third-party suppliers (in effect, sub-contracted). Another variant in the management of multi-vendor outsourcing contracts is the use of a "service integrator" or "service integrator and management" agreement with a single third party. (For simplicity, such integrators and agreements are referred to in this note as "SIAM", though current nomenclature will vary.)

Under these arrangements, there is a separate contract between the customer and the SIAM (noting that the SIAM does not usually itself provide the underlying outsourced services). The SIAM's specific role under the integrator agreement is, broadly, to integrate the various services or manage the various suppliers under the underlying multi-sourced services contracts.

Typically, the SIAM:

- Integrates and manages those underlying services contracts.
- Administers them legally, exercising the rights and sometimes performing the obligations of the customer (with certain exceptions, for example the right of termination, which is usually reserved for the customer) and operationally.
- Ensures the quality, timeliness and compatibility of the services delivered under the underlying contracts.
- Reports to the customer on the performance of, and issues arising under, the underlying contracts.

However, both the managed services and SIAM models do not address all the risks associated with multi-vendor outsourcing. If the customer has not appointed a single prime contractor, or managed service provider, it should ensure that each of the outsourcers is contractually obliged to co-operate with those others and, if there is a SIAM, with it, where the nature of the infrastructure or services to be provided requires this. The GFA/MSA will, accordingly, have detailed service requirements, backed by similarly detailed service levels, governing the scope of such co-operation.

Subcontractors

As discussed in Multiple suppliers a customer may, in some circumstances, appoint one or more global suppliers of services who, in turn, may subcontract the provision of some or all the services to suppliers in different jurisdictions. It is important in this case that the obligations of each of the parties, and the contractual implications of such arrangements, are clear. For example:

- Is the global supplier acting as prime contractor?
- Who are the subcontractors?
- Are the services to be subcontracted material or even critical to the customer's business operations or within a range of regulated sub-contracted services? This is especially important where the customer is subject to certain financial services regulations, for example, including where the customer or the outsource service provider

(or both) may, as applicable, be subject to the EU's DORA and the UK's equivalent operational resilience regulation or designation of critical third parties to the financial sector (see Cloud computing, automation and AI enabled systems and processes and Practice note, Hot topics: Operational resilience: oversight regime for critical third parties to the UK financial sector).

- Do the contracted services include the operation or provision of network and information systems? This will be important if the customer falls within scope of the Directive (EU) 2022/2555 (NIS 2) because the supplier will need to ensure certain levels of security for those systems and will need to have a mechanism in place to notify promptly the customer of any significant incidents affecting those systems, which in turn impact the provision of the customer's services.
- Where are the subcontractors based? Among other reasons, this is relevant for data residency, sovereignty and compliance with the EU GDPR/ UK GDPR and other regulation, for example under DORA Article 30(2)(b).
- Does the customer have visibility of the terms (or at least the relevant terms) of important sub-contracts?
- Is there a regulatory or reputational need to flow down certain prime contract terms to one or more subcontractors?
- Does the customer have a right of action against the global supplier for the acts of its subcontractors or need it pursue each of the subcontractors directly?

The position is further complicated by the potential international aspect of such subcontractor arrangements. Where a subcontractor deploys proprietary technology or processes or intellectual property rights in performing the services (as happens frequently where FinTech providers are included in a financial services institutions' supply chain), it will be vital for the customer to have access directly to such technology or rights in the event that the prime contractor or subcontractor ceases to provide services. This may be achieved either by the prime contractor procuring such access (stated to subsist beyond the involvement of the prime contractor and possibly supported by collateral warranties with the subcontractor), or by the customer entering into a direct relationship with the subcontractor concerned for that specific purpose, in each case at the time the GFA/MSA is entered into.

As mentioned above, a further issue is, if the customer operates in a regulated sector (for example, financial services or critical national infrastructure), it must consider specific regulatory guidelines and recommendations governing subcontracting and third-party supply chains in the context of outsourcing (such as DORA and NIS 2).

For more information on subcontracting in IT contracts generally, see Practice note, Subcontracting in major technology services deals: the contract process (UK).

Supply chain management and ESG considerations

Companies have been under increasing pressure to consider environmental, social and governance (ESG) implications within their sourcing arrangements. This may be required by legislation or stem from an organisation's voluntary stance on these issues (which in turn could be driven by investors' and other stakeholders' expectations).

Previously, similar considerations were seen in a more limited way in the governance of sourcing and supply chain management. For example, legislation that prohibits modern slavery or human trafficking practices. ESG considerations are, however, much broader in scope. As a result, many customer organisations now tend to apply ESG-related obligations within their supply chains.

For materials on ESG, see ESG and sustainability toolkit (UK).

Parent company guarantees

In an outsourcing agreement, it is vital that the supplier entity which is ultimately accountable for delivering the outsourced services is financially sound. It is often the case that, where a joint venture structure or special purpose vehicle is created for service delivery, it may not have a strong enough balance sheet to satisfy the customer's needs (or a regulator's requirements, as in the case of UK and EU financial services regulation). Similarly, many large offshore outsourcing providers have local subsidiaries, alternatively local branches, which may be legally part of the provider. Depending on the financial status of the local supplier, a parent company guarantee may be required to guarantee the financial and the operational performance of the supplier, and its potential liability, under the GFA/MSA, and potentially of the affiliates under the local agreements.

The international nature of such a guarantee needs to be considered, including:

- The scope of the guarantee in so far as it applies to the performance of the services and fulfilment of the liabilities by the guaranteed entity.

- The choice of law and jurisdiction governing the guarantee.
- The suitability of the scope of the guarantee and its legal effect under applicable regulatory requirements.
- The ability of the parent company to enter into the guarantee under the local rules governing its incorporation.
- The initial validity and enforceability and continuing validity and enforceability of the guarantee, especially under the law of the guarantor's home jurisdiction.
- Any specific restrictions under the laws of the guarantor that might impair or restrict the performance of the guarantee, for example exchange control restrictions such as those imposed by the Reserve Bank of India in the context of offshore outsourcing to India.

For a sample parent company guarantee for use in an outsourcing context, see Standard document, Parent company guarantee (outsourcing).

Partnering agreements

In outsourcing, much is often made of the partnering nature of the relationship between the supplier and customer. See Structuring a multi-jurisdictional outsourcing.

This is particularly the case where a new venture is set up to provide the services, such as a shared services centre or as a joint venture or special purpose vehicle. As mentioned in Structuring a multi-jurisdictional outsourcing, the parties may refer to themselves and each other as "partners" but they are unlikely to be, or indeed wish to be, partners in the strict legal sense of the word. However, there may be an element of transparency in the accounting with a sharing of risks and rewards (typically, gainshare structures) depending, for example, on whether the costs come in under or over budget.

From a customer's perspective, the idea of partnership in the context of service delivery needs to be treated with caution as this is often a supplier's way of sharing, or seeking to share, delivery or execution risk, or even liability, with the customer. For example, while it is usual for the customer to agree that it will be responsible for certain activities on which the provision of service by the supplier will depend, the extent of such dependencies should be carefully scoped in the agreements.

"Partnering" or so-called "partnership" outsourcing agreements may be distinguished from formal relational contracts. The latter are contracts that are structured and drafted by the parties for longer-term, complex, arrangements (including outsourcing), for example, where the underlying circumstances and contractual relationship are expected to change and develop over time. At the very least, relational contracts specify in detail the parties' mutual goals and provide for governance structures and processes to ensure so far as possible that the parties' interests and expectations remain aligned over the term of the contract. The important point to note here is that these relational contracts are designed and drafted by the parties to be legally enforceable in the last resort, and not having been imposed on them subsequently through the developing legal theory of relational contracts under English law (see, Practice note, Contracts: good faith: Implication in a relational contract).

Merger regulation

The European Commission has the power to vet major cross-border mergers, acquisitions and certain joint ventures, and to prohibit them when they are incompatible with the internal market, by virtue of EU Merger Regulation (139/2004/EC) on the control of concentrations between undertakings (Merger Regulation). This may also apply to outsourcing transactions, and the Merger Regulation should be considered in this context. UK companies doing business in the EU, or involved in transactions that meet the relevant thresholds of the EU Merger Regulation, are subject to the application of EU merger control, enforced by the European Commission. For more information, see Practice note, EU Merger Regulation: jurisdiction and process.

The impact of relevant domestic legislation should also be considered. For example, the Enterprise Act 2002 in the UK. For more information about merger control regulation in the UK, see Practice note, UK merger control: jurisdiction and process.

In addition, Article 101 of the Treaty on the Functioning of the European Union and the European Commission's guidelines on horizontal agreements may also be relevant (for more information on Article 101, see Practice note, Article 101 of the TFEU (restrictive agreements)). Post-Brexit, the EU competition rules continue to apply to agreements or conduct of UK companies that have an effect within the EU. Again, these will be investigated and enforced by the European Commission.

Domestic competition legislation that may be relevant is Chapter I of the Competition Act 1998, which prohibits agreements that have as their object or effect the restriction, prevention or distortion of competition within the UK, and which have an effect on trade within the UK. For more information (see Practice note, UK Competition: Chapter I prohibition (restrictive agreements)).

The procurement process

It is complex to manage a bid process for a multi-jurisdictional outsourcing transaction. It is desirable that the customer ensures that it can compare outsource provider proposals like-with-like. Very often, the approach that is taken commercially is that managers are appointed in each country with responsibility for that country. To a degree, the difficulty is that the needs of the group may differ from those within individual countries and a conflict may arise. It may therefore be more desirable for the outsourcing project to be managed and agreed centrally, but with the input from country managers where necessary. Closer involvement by the country managers will be needed to develop the GFA/MSA and the form of local agreement.

The customer should consider, among other things, the following as part of its due diligence process:

- The benefits case for the outsourcing and what may be achieved in the market to deliver those benefits.
- The scope of the services to be outsourced.
- The short-listed suppliers' experience (supported by credentials) of delivering successful and, of course, similar, outsourcing arrangements to those covered by the request for proposal (RFP).
- Whether the outsourcing will contribute to the customer's need for business transformation at a particular time or over a period, including the availability, integration and pricing of advanced technologies where there is a suitable use-case for them, for example, in the deployment of distributed ledger technology or blockchain, AI and RPA.
- The regulatory implications of the outsourcing (for example, any material, critical or important outsourcing in the regulated financial services sector may require consultation with, or clearance from, regulators).
- The risks arising from the outsourcing, including (increasingly) potential reputational risk generally, and more specifically the need to have regard to ESG considerations and failure to comply with ESG regulation, obligations, standards or investors' and other stakeholders' expectations (see Supply chain management and ESG considerations).

For more information on due diligence in an outsourcing transaction, see Practice note, Due diligence in outsourcing.

The customer will often engage external consultants to support some areas of this process, including:

- The creation of a suitable commercial structure, or structures for the outsourcing.
- The development of service levels reflecting current provision of service.
- The development of a request for a proposal.
- Due diligence and the evaluation of bidders.
- The pre-contractual benchmarking of bids.
- Finalising and validating the business and benefits case for the outsourcing.

In many cases, and with good reason, in offshore or nearshore outsourcing the customer's project management (and often its senior executives) will physically inspect the offshore or nearshore provider's facilities as part of the due diligence process. This is essential in any strategic or business critical outsourcing, and especially in the case of multi-jurisdictional outsourcing. There will then be detailed discussions and negotiations with the supplier or suppliers to agree the contractual terms. It is likely, therefore, that, together with the complexity of such projects, the timetable for a multi-jurisdictional outsourcing project will be longer than that for a single-jurisdiction outsourcing. Both parties will require input from different specialists to help with areas such as:

- IT infrastructure, applications and services.
- Operations, including operations manuals.
- Cybersecurity and resilience.
- Data security.
- Compliance.
- Internal audit.
- Risk management, including IT and cyber risk management.
- Business continuity and disaster recovery.
- HR.
- Law and regulation.
- Commercial.
- Finance.
- Tax.

The timing of the process across jurisdictions will need close attention. It is likely that in outsourcing transactions involving different jurisdictions, the outsourcing will not take place simultaneously in each jurisdiction but will be staggered as each country comes on board following signature of the GFA/MSA and the local agreement.

Often it is not possible in a multi-jurisdictional outsourcing to establish the existing service levels that are being achieved in each country. In such circumstances it will be necessary for the contract to provide for a robust process to verify and agree the service levels after the contract has been signed. The contract will need to specify how these levels are to be objectively ascertained so that the contract is not, effectively, an "agreement to agree". The contract may also provide for termination by the parties if the service levels cannot be agreed, although this would be a highly undesirable outcome. For this reason, it is strongly recommended that the parties agree the service requirements and all key service levels by the time a GFA/MSA is signed. Any local adaptations will then fall to be dealt with in the local agreements.

For an overview of a typical private procurement cycle see Practice note, Private sector procurement cycle.

Global transfer and services issues

The transfer issues raised by a multi-jurisdictional outsourcing transaction are very similar to those of an international business sale. The parties need to consider at a framework level, for example, what warranties and indemnities are to be given in respect of the assets and employees. Sometimes the supplier will require broader warranties than those expected in a business sale on the basis that it has not been able to carry out extensive due diligence in relation to the assets and services across so many jurisdictions, and that the customer will have far greater knowledge of the state and effectiveness of its legacy assets.

From a tax perspective, it may also be more beneficial to lease or license the assets to the supplier rather than to transfer them. For a discussion of some of the tax issues that arise, see Practice note, Outsourcing: tax.

There are two critical phases in an outsourcing, relating to the initial transfer of services from the customer or an incumbent third-party supplier to the new supplier:

- Transition.
- Transformation.

Typically, transition will involve several phases. Invariably, it will cover the transfer (or migration) of people, IT systems and infrastructure, data and processes from the customer or an incumbent supplier to the new supplier(s). There may be an element of immediate improvement in the transferred services, but the main purpose of transition is to secure a robust and viable migration or transfer of the service and data, rather than any major improvement. Transition should be completed by a pre-agreed date, failing which the supplier may face the imposition of liquidated damages and other contractual remedies.

During the transformation phase, the transitioned services are improved to contractual specification and improved service levels, and pre-existing defects in those services are identified and corrected. Transformation may take place over several years.

Typically, the framework, MSA or local agreement will make specific provision for transition and transformation, including detailed and contractually binding transition and transformation plans with deliverables and stages to have been completed by contractual milestones.

The GFA/MSA should contain all the elements required to be implemented at a local level in relation to the services and will require significant commercial and operational input to make it work in practice. Against this context, several important areas will need to be considered in detail, including:

- The scope of the services.
- Detailed service requirements.
- Service levels.
- Service credits and other specific remedies for service delays or failures.
- Implementation.
- Charges.
- Customer and supplier protections.
- Change control and management.
- Contract governance.
- Liability issues.
- Termination and its consequences.

(For more information about these provisions, see Practice note, Main issues in outsourcing contracts.)

The parties should also consider the relationship between each of the local agreements and the GFA/MSA. For example:

- How will the GFA/MSA and local agreements be managed at their respective levels and how will problems be escalated between the levels?
- In what circumstances will breach of a local agreement trigger termination rights of other local agreements or of the GFA/MSA (and consequently terminate the outsourcing in all countries)?
- Can individual local agreements be terminated for breach or for the customer's convenience (or both) and, in the case of termination for convenience, what will the termination charges be, if any?
- How do any limitations on liability at a global level relate to the individual limitations on liability at a local level?

If the GFA and MSA are separately entered into, the interrelationship between these two agreements together with any local agreements (such as, for example, in relation to termination) will also need to be considered.

Local transfer and services issues

Local law may also have a bearing on, and effectively override, other aspects of the GFA/MSA, or even the local agreement itself. Both parties should consider this during the due diligence stage. It is also important for the parties and their advisers to consider any impending or likely changes in local law that could override the terms agreed at global and local level by the parties. An obvious example remains the UK's departure from the EU. Other examples include a government indicating that it intends to introduce a general sales tax. Areas that require attention include the following (noting that this list is not exhaustive):

Data protection in relation to both employee, supplier/provider and customer data

In some countries, there may be specific requirements that must be complied with prior to moving personal data out of those countries for processing by the outsource supplier. For example, it may be necessary to obtain the approval of, or simply notify, the local data protection authority prior to such transfer.

In terms of compliance, where the data subjects' consent needs to be obtained prior to transferring their data, the customer may need to look at the data protection law in the country in which the data subject resides in order to understand what constitutes valid consent. For data processing in or relating to data subjects in the EU, this is governed by the EU GDPR while in the UK this is regulated by the UK GDPR and Data Protection Act 2018. Under the UK GDPR and EU GDPR consent must be specific, informed and freely given by the data subject. In addition, consent must be an unambiguous indication of the data subject's wishes and it must be specific to the relevant processing activities.

For information about consent requirements under under the EU GDPR, see Practice note, Overview of EU General Data Protection Regulation: Consent Requirements and under the UK GDPR, see Practice note, Overview of UK GDPR: Consent rules.

It is important to understand the roles of the parties to an outsourcing arrangement, as well as where they are based, to ensure that appropriate safeguards and contractual provisions are put in place when processing personal data. For example, if a controller and processor relationship arises, there are mandatory provisions under Article 28 of the EU GDPR and UK GDPR which state that certain contractual terms must be in place between such parties. For more information about international data transfers under the EU GDPR and what to consider, see GDPR Cross-Border Transfers Checklist.

Regulatory issues

These may need consideration depending on the nature of the business carrying out the outsourcing and the type of services to be outsourced.
For example, in the outsourcing of certain loan administration processes across multiple jurisdictions that include countries governed by Islamic law, services, processes and legal obligations may need to be varied to comply with applicable Sharia legal principles affecting loan terms, processes and enforceability.

Increasingly, as countries enact homeland security legislation (sometimes with extra-territorial effect), that legislation may override contractual provisions in the GFA/MSA and conflict with the applicable law in the customer's home country jurisdiction (an example of this is the GDPR). Typically, the local agreement will have to deal with such issues.

In areas such as national critical infrastructure, energy and other utilities, postal and courier services, manufacturing and production of food, chemicals, medical devices, electrical equipment and machinery, financial services, healthcare, transportation and certain digital and cloud services, there are likely to be detailed initial and ongoing requirements and regulatory notifications, registrations and consents that will need to be followed or obtained at local level. This may require additional and highly specific local adaptation of services and processes and legal obligations. For example, if the customer is within scope of NIS 2, it will be subject to cybersecurity and resilience, notification and incident reporting requirements.

NIS 2, which must have been implemented by EU member states on or before 17 October 2024, covers, among others, essential entities (for example, depending on the size of the entity, those involved in the transport, health and energy sectors, and providers of digital infrastructure) and important entities (for example, manufacturing, waste management and digital providers). Customer organisations that are subject to NIS 2 must ensure that the relevant security requirements are met, regardless of whether the customer or a third party delivers those services. Accordingly, an affected organisation that uses an outsourcing provider to deliver those services is responsible for driving compliance into its supply chain. This is likely to be achieved through contractual arrangements by including appropriate clauses in the local agreement. In the UK, the NIS 1 Directive was implemented by the Network and Information Systems Regulations 2018 (SI 2018/506). In 2022 the UK government undertook a review of the UK NIS Regulations and announced various measures to strengthen and broaden those Regulations. In 2024, the UK government announced that it would be introducing a Cybersecurity and Resilience Bill (Bill) to strengthen the UK's defences and ensure essential services are protected. The intention is for the Bill to cover five sectors (transport, energy, drinking water, health and digital infrastructure) and some digital services (including online marketplaces, online search engines and cloud computing services) with twelve different regulators being tasked with responsibility for compliance. At the time of updating this practice note, a draft of the Bill has not been published but we expect it to include similar provisions to those found under NIS 2. For more information, see Practice note, Cybersecurity Directive: UK implementation.

Intellectual property (IP) rights

Different countries will have different IP requirements, for example:

- There may be a requirement for the transfer of ownership in IP right to be in a written and signed form.
- Certain IP rights such as copyright cannot be transferred and may therefore need to be subject to an exclusive licence.
- Statute, commercial codes or case law may imply licences of use that are wide in scope for the benefit of the party that does not own the IP rights concerned.
- The approach of AI developers "scraping" online proprietary data to train AI systems, such as large language models, and the possibility of resulting copyright infringement (see, for example, in its early stages, Getty Images (US) Inc and Ors v stability AI Ltd [2025] EWHC 38 (Ch)) (for more discussion of this case, see Practice note, AI and copyright: Current case: Getty v Stability AI).

Warranties

In some countries, a party's ability to limit or exclude the warranties given in relation to ownership and "quiet enjoyment" covenants, fitness for purpose and quality of supply or service may be prohibited or curtailed.

Exclusion and limitation of liability and termination

Local law may also impact both parties' ability to exclude or limit their liability and their termination rights. For example, some countries have legislation that makes it virtually impossible for a supplier to terminate certain "essential" supply contracts on grounds that the customer has entered insolvency (in the UK, this is provided under sections 233 and 233A of the Insolvency Act 1986 (as amended by the Insolvency (Protection of Essential Supplies) Order 2015, see Practice note, Restrictions on terminating supply contracts in insolvency proceedings). In such circumstances, the supplier may, subject to it being legally effective, want to consider including a clause that gives it the right to terminate early on in a customer's financial difficulty (that is, before the customer enters formal insolvency).

Local trading conditions or requirements

In some countries, there may be requirements that certain processes or structures are applied in certain kinds of operations or services arrangements. For example, the empowerment of disadvantaged groups through the mandatory inclusion in supply chains of businesses owned by member of those groups. Here the local agreement will need to address such issues as a variation to the governing principles under the GFA/MSA. The existence of such conditions or requirements emphasises the need for the customer and supplier to undertake full due diligence of local laws, regulations and trading conditions and requirements before the GFA/MSA is concluded, and certainly well before any local agreement is called off.

Transfer of employees

The commercial considerations and practicalities for the customer and new service provider regarding the transfer of employees are likely to differ depending on whether the transaction concerns a first generation outsourcing (that is, the service provider taking over the service provision from the customer) or a second generation outsourcing (that is, a new service provider taking over the service provision from an incumbent outsourcing provider). Negotiating the terms concerning the transfer of employees for a second generation outsourcing can be more challenging. This is due to the tension between the incumbent and incoming service providers who are often competitors (which itself gives rise to additional complexity in the negotiation of the transfer) and where the incumbent service provider has already integrated the customer's and other employees into its workforce on modified terms.

While the parties may wish to agree the principles that apply to transferring employees by setting these out in the GFA/MSA, in many jurisdictions it is not possible to contract out of the local laws concerning the transfer of employees and the employees often transfer in accordance with local law. For example, in the case of businesses operating in the EEA employees transfer by mandatory operation of law, under the Acquired Rights Directive (2001/23/EU) (Acquired Rights Directive).

It is vital to ascertain at the outset whether employees will transfer automatically to the supplier at the commencement of the outsourcing arrangement, the date when this will occur, and the effect such an automatic transfer will have on the rights of the affected employees and the liabilities of the transferor and transferee employers.

In the UK, the Acquired Rights Directive was implemented by Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) (TUPE) (for an overview of TUPE, see Practice note, TUPE: overview).

Where the automatic transfer provisions apply, the employees will usually transfer on the same terms and conditions as those on which they were employed immediately before the transfer (although there may be some variance in relation to the transfer of certain rights such as their pension rights, especially where these are under occupational pensions schemes that are excluded from the scope of the Acquired Rights Directive). In some countries, such as the USA, where no automatic transfer provisions will apply, it is for the parties to agree suitable contractual provisions. Often these are similar or approximate to those under the Acquired Rights Directive.

While the Acquired Rights Directive provides for the automatic transfer of employees, it remains open to the parties to address (as between them) such transfers expressly in the GFA/MSA, and, local agreements, particularly in relation to their respective obligations and liabilities up to the point of, and after, the transfer. It is often the case in multi-jurisdictional outsourcing that the transferee, for commercial reasons, does not want to take on the employees that would otherwise transfer at law, or the transferor is keen to retain certain employees. Therefore, the parties should agree what happens to the employees and the party responsible for any related exposures and liabilities. For example, it may be necessary to redeploy them or provide for redundancy in accordance with local law.

For countries where the Acquired Rights Directive or similar legislation does not apply, the contract will, if required or agreed by the parties, still need to address transfers, for example, by imposing an obligation on the supplier to make offers of employment to relevant employees, and to make pension provisions for them, on specified terms.

In some cases, especially where there may be tax considerations, restrictions or other concerns arising on the transfer of staff (for example, because staff would otherwise lose pension entitlement by ceasing employment), secondment arrangements have been used for the secondment of staff to the supplier for the life of the outsourced arrangements. This route, however, is not used very often because it is restricted in relation to certain jurisdictions and may, in any event be caught by the Acquired Rights Directive, or be rendered inefficient by changes in the tax treatment of such arrangements.

The parties will, therefore, need to consider the following:

- Whether the Acquired Rights Directive applies in a country and, if not, if laws having similar effect apply.
- How the Acquired Rights Directive or other similar laws have been implemented in the country or countries concerned.
- If the Acquired Rights Directive or similar legislation does not apply, how local law deals

with employment and related rights in an outsourcing scenario.

- Which employees would transfer (if it is open to them to do so), and commercially whether the transferor wants to retain any such employees or the transferee does not wish to acquire any such employees.
- What employment or other rights would transfer from the current employer (either the customer or an incumbent outsourcing supplier) to the new employer (either the first generation supplier or a second or later generation outsourcing supplier).
- Where the Acquired Rights Directive (or similar local law) applies, whether employees (or groups of employees) would benefit from certain enhanced rights, or if particularly onerous obligations transfer to the transferee. For example, on redundancy, rights that are treated as being part of their employment rights (such as, early retirement benefits) and that therefore transfer under the Acquired Rights Directive, notwithstanding that such protective rights are enshrined in pensions schemes (see Beckmann v Dynamco Whicheloe Macfarlane Ltd [2002] IRLR 578 and Martin v South Bank University [2002] IRLR 74). In such cases, the financial impact could, of course, be material to the party liable to meet the liability arising under *Beckmann* and *Martin* principles. For an overview of these principles, see Practice note, Pensions issues on a TUPE transfer: The Beckmann, Martin and Procter & Gamble cases.
- How the process, costs and liabilities are to be addressed in the contract. For example, how and when affected employees are notified, including any obligations to inform works councils. If multiple territories, and numerous groups of employees, are involved, the timing and manner of communication to affected employees is crucial (it is important to avoid a process in one-territory negatively impacting another).
- How the resulting responsibilities and liabilities as between the customer and supplier(s) will be allocated contractually.

These issues should be addressed in the due diligence process and subsequently at local agreement level, where the supplier will need to be provided with the relevant information on the employees who are to transfer. As the costs of the supplier taking on staff or redundancy costs may be considerable, both parties will also need to factor in this consideration during the procurement process.

In the context of a GFA or MSA, both parties should undertake the due diligence of staff transfer issues at the outset for all jurisdictions within scope of the agreement. This ensures that when local agreements are prepared, the parties go into those arrangements with the full knowledge of the legal, operational and financial implications of staff transfers or redundancy programmes. Where local agreements are executed within a short time of signature of the GFA/MSA, and the parties only begin due diligence of staff issues at the local level just before signing the local agreement, they may find themselves unable to comply with the timing and consultation requirements under the Acquired Rights Directive and local legislation implementing that Directive, or other similar local laws.

Where employee information is to be handed over during a transfer, some of it may need to be provided in an anonymised format in order that the restrictions on the processing of personal data pursuant to UK and EU data protection law (and other applicable data protection laws) are not contravened. For more information, see Practice note, Employee due diligence issues on transactions.

An important aspect in relation to the transfer of employees is the employee communication plan that will need to be put in place. Information and consultation obligations often apply to the supplier and the customer. In any event, it is good practice to ensure that employees are kept informed. The timing and process in relation to such consultations will need to be taken into account, especially if there are different transfers comprised in the phasing of the outsourcing programme.

Questions are often raised as to the extent to which a supplier may harmonise the terms and conditions of any employees who transfer with those of its existing employees and whether, and at what stage, any employees can be dismissed. Again, this will depend on the jurisdictions involved and the local law which applies. Detailed advice in relation to individual jurisdictions will need to be obtained.

Brexit and multi-jurisdictional outsourcing

Where the multi-jurisdictional outsourcing involves the UK and the EU, Brexit-related considerations may still be relevant. Some of the key areas where issues could arise are set out below.

For an overview of the implications of Brexit on commercial contracts (including outsourcing agreements), see Practice note, Brexit: effect on commercial contracts.

Key areas for consideration

- Governing law, jurisdiction and the enforcement of judgments. This includes the availability of interim measures and the effectiveness of arbitration clauses. For resources on the implications of Brexit on civil justice and judicial co-operation, see Brexit implications for civil justice and judicial co-operation toolkit.
- Staff mobility (for both the outsourcing provider and the customer), including visa requirements. For resources on Brexit-related immigration and employment issues, see Help and information note, Brexit materials: Immigration, employment and pensions.
- The application of the Acquired Rights Directive and / or TUPE on the transfers of staff affected by multi-jurisdictional outsourcing. For information on TUPE and cross-border transfers, see Practice note, TUPE and cross-border transfers.
- Data protection, in particular, the continuing validity of UK data protection laws in the EU, data transfers between the UK and the EU, and between the UK and the USA, and data protection supervisory authority status. For a summary of UK data protection laws after Brexit, see Practice note, Brexit post-transition period: data protection (UK).
- Software and application (including encryption software) export controls under the EU General Export Authorisation and the UK's Open General Export Licence. For more information, see Practice note: overview, Trading with the European Union after Brexit: Dual-use goods.
- Import and export of goods, including computer hardware and peripherals, and resulting customs processes and the required customs and transport declarations. For more information on tariffs and customs arrangements for UK-EU trade, see Practice note: Trading with the European Union after Brexit: Tariffs and customs.
- Intellectual property rights (IPRs), in particular, copyright for the licensing of computer software. For information on the implications of Brexit for IPRs, see Practice note, Brexit: implications for intellectual property rights. For a summary of computer software generally under UK law and issues to consider when drafting software licences, see Practice note, Main issues in software licensing and maintenance contracts.
- Direct and indirect VAT treatment of goods and services, especially where exemptions from VAT may apply in relation to the provision of certain outsourced services in the UK and EU financial services sectors. For information on VAT issues arising in UK-EU trade, see Practice note, Post-transition period UK VAT changes: overview and Practice note, Cross-border VAT: exports and imports of goods.
- Sector regulation, for example, in financial services outsourcing and related cloud service provision and the Network and Information Security Directive regime. For an overview of the main legal and regulatory issues affecting the financial services arising from Brexit, see Practice note, Brexit and financial services: overview.
- Currency and currency fluctuation contractual provisions, in particular, those likely to be affected by any inflationary or deflationary pressures on sterling as a direct or indirect consequence of Brexit. For a sample currency fluctuation clause and information on it, see Standard clause, Currency fluctuation and its integrated drafting notes. Other standard clauses that could be helpful when drafting provisions to deal with currency fluctuation include the following:
  - Currency conversion.
  - Payment currency (dual currency option).
  - Price change.
  - Automatic price change.
- Ongoing need for customers and outsource providers to monitor any likely post-Brexit changes in applicable law in the UK and the EU that would have an impact on the multi-jurisdictional outsourcing. For example, under the contractual change management provisions and allocation of cost of changes in law. To that effect, the parties may want to consider including a clause that deals with the impacts of Brexit-related events, for which see Standard clause, Brexit trigger, renegotiation and

termination clauses. For information on the key issues to consider when drafting such a clause, see Practice note, Drafting for Brexit: Brexit clauses.

- Ongoing need for customers and outsource providers to monitor likely post-Brexit regulatory, legal and political developments that may have an organisational, operational and therefore commercial impact on the multi-jurisdictional outsourcing. For example, where there is an actual or perceived need for UK-based corporate headquarters or subsidiary locations to be relocated to the EU, or where there may be significant staff, organisational or functional transfers from the UK to EU locations. For a tracker that charts Brexit-related developments in the UK and the EU, see Brexit key developments tracker. For a list of Practical Law's materials on Brexit-related planning within the EU, see Help and information note, Brexit materials: EU planning and legislation.

For a full list of our Brexit-related resources, see the Beyond Brexit: the legal implications landing page.

Structure of agreements