Romania

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GENERAL

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

In general, Romanian legislation does not specifically regulate outsourcing transactions. In certain areas, however, regulations regarding outsourcing have been implemented (for example, in the financial services sector there are various regulations concerning outsourcing of certain activities of investment firms, credit institutions, insurance companies, non-banking financial institutions and payment institutions) (*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 key pieces of legislation on outsourcing in the financial services field are:

- Emergency Government Ordinance No. 99/2006 regarding credit institutions and capital adequacy, as further modified and amended. In addition, various norms and regulations issued by the National Bank of Romania are applicable to credit institutions, in particular Norm 17/2003 regarding the organisation and internal control of the activity of credit institutions and the management of significant risks as well as the organisation and performance of the internal audit activity of credit institutions.
- Law No. 93/2009 on non-banking financial institutions and regulations issued by National Bank of Romania applicable to non-banking financial institutions, in particular Regulation No. 20/2009 regarding non-banking financial institutions.
- National Securities Commission Regulations, in particular Regulation No. 32/2006, which implements the outsourcing requirements of Directive 2004/39/EC on markets in financial instruments (MiFID).
- Insurance Supervisory Commission norms approved by Orders No. 18/2009 and No. 22/2009.
- Government Emergency Ordinance No. 113/2000 on payment services and National Bank of Romania Regulation No. 21/2009 on payment institutions.

All financial services entities are regulated by, and subject to the supervision of, distinct authorities, depending on the type of financial services. These authorities are:

- National Bank of Romania (NBR).
- National Securities Commission (NSC).
- Insurance Supervisory Commission (ISC).
- Supervisory Commission of the Private Pension System (SCPPS).

As a general rule, all financial services entities must fulfil certain conditions to be able to outsource their activities and/or functions. For example, common rules applicable to most entities that are regulated by law (that is, investment firms and credit institutions) provide that:

- Outsourcing must not result in the delegation of managers' responsibilities.
- A written outsourcing agreement must be in place, which contains a minimum set of clauses, including:
  - the rights and obligations of the parties;
  - provisions regulating the granting of access to relevant information in connection with the outsourced services;
  - the relevant entity can terminate the contract in certain cases.
- The outsourcing of certain activities should not preclude the supervisory authorities from exercising their authority, as provided for in the relevant regulations.

Regulated entities continue to be responsible for the outsourced activity and must manage the risks associated with the outsourcing of activities.

Additional requirements apply in outsourcings of "critical or important operational functions" (for financial services firms), "important operational functions" (for payment institutions) and "important activities" (for credit institutions).

In relation to financial services firms, a function is deemed to be "critical or important" if a defect or failure to act would impair the company's:

- Financial performance.
- Ability to comply with its regulatory obligations to provide adequate services or to manage the risks of failure to act.

Additional requirements apply to investment companies that outsource portfolio management for retail clients and operational functions to a supplier in a non-member EU state.

In relation to credit institutions, an activity is deemed important if "the activities are of such importance that any defect or failure to act would significantly impair in a negative manner the ability of the credit institution to comply with its regulatory obligations and/or continue its activity" (*NBR Regulation No. 19/2009 regarding the management framework of credit institutions' activity, internal process of valuation of capital adequacy to risks and outsourcing conditions*). Outsourcing "important activities" is subject to both:

- Prior notification to the NBR, which has the right to oppose the outsourcing in certain cases.
- Post-outsourcing notification to the NBR.

In addition, NBR norms contain prohibitions and/or limitations regarding the possibility of outsourcing certain types of activities, including main banking activities, internal audit and accounting activities.

In respect of non-banking financial institutions, the outsourcing of credit activities and of internal audit activities is prohibited.

Insurance regulations contain similar provisions on outsourcing as the regulations applicable to credit institutions. Only auxiliary and related activities can be outsourced by insurance/re-insurance companies.

Business process

There are no regulations specifically dealing with business process outsourcings.

IT

There are no regulations specifically dealing with IT outsourcings.

Telecommunications

There are no regulations specifically dealing with telecommunications outsourcings.

Public sector

Depending on the type of services representing the object of the contract and its value, a public-sector outsourcing may be subject to the Romanian public procurement legislation, which is in line with EC directives.

As a rule, any procurement above EUR15,000 (about US$21,549) (apart from the procurement of certain services where the threshold is either EUR125,000 (about US$179,573) or EUR400,000 (about US$574,632)) may be awarded by public entities or entities in specific industries (for example, provision of energy and water) and benefiting from certain special and exclusive rights, only through a regulated competitive procedure.

In addition, an agreement must be awarded under a competitive public procurement procedure if both:

- The awarding entity is established by a contracting authority in another state or by an entity that does not itself qualify as a contracting authority but at least 50% of the value of the agreement is financed or subsidised by a contracting authority.
- Certain thresholds are exceeded.

However, Romanian public procurement legislation exempts from the scope of its application agreements awarded under specific procedures of certain international institutions or bodies.

If the public procurement rules apply, certain requirements are triggered regarding:

- The contracting authority publishing invitations to tender in the Electronic System of Public Procurements and, if certain thresholds are exceeded, in the EU Official Journal.
- Time limits applicable to all procedures.
- The award procedure (mandatory phases, timelines, forms, conditions and so on).
- The award review procedure.

Under ECJ case law, a procurement authority should try to apply the public procurement principles set by the relevant directives even if the outsourcing does not fall under the provisions of these directives but the outsourcing may affect intra-Community trade.

The procurement of specific services may also be subject to particular industry-specific rules.

Other

It is important to establish whether a proposed outsourcing is subject to particular industry-specific legal requirements.

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.

Direct outsourcing

A direct outsourcing uses the simplest structure. It is governed by a contract between the customer and the supplier detailing, among other things:

- The rights and obligations of each party.
- Performance targets.
- The transfer of control and risks.
- The price.
- Consequences of a failure to adequately perform the relevant services.

The main categories of direct outsourcing are:

- **Business process outsourcing (BPO).** This refers to a particular process task that is outsourced (for example, payroll, marketing, answering calls, technical support, billing and purchase, multimedia or animation, bookkeeping, business consultancy, computer-aided design or manufacturing (CAD/CAM), the call centre, data entry, proofreading and editing, typesetting, handwriting services, marketing, medical billing and transcription, and web design and development). BPO activities involve providing standardised processes for the customer. A BPO that is contracted outside a customer's country is called an offshore outsourcing. A BPO that is contracted to a customer's neighbouring (or nearby) country is called a near-shore outsourcing.

- **Knowledge process outsourcing (KPO).** This typically relates to work that needs higher levels of involvement, advanced levels of research or analytical and technical skills (for example, pharmaceutical research and development, patent or intellectual property (IP) research, data research and analysis, legal services, content writing and development, and database development services).

Chain outsourcing

Chain outsourcing occurs when the external provider subcontracts to other external providers certain parts of the services that are outsourced. Potential disadvantages related to chain outsourcing are triggered, for instance, by:

- The increased risks that may be incurred by the customer (related to not knowing the capabilities of the subcontractor and potential difficulties in enforcing its rights against the subcontractor).
- Certain regulatory limitations triggered by the use of subcontractors (for example, the subcontracting party must undertake the same obligations as those established for the main supplier).
- Increased difficulty in regulating and monitoring the process.

Responsibilities and liabilities of the parties involved in a chain outsourcing should be clearly determined in the outsourcing contract.

Captive service

Captive service is a form of BPO where an organisation uses a wholly owned subsidiary to outsource the services instead of a third party supplier. Under this structure, the risks are not passed on to the supplier and set-up costs can be significant. However, this structure mitigates control and risk issues and may prove more tax efficient.

Multi-sourcing

This refers to large outsourcing agreements (predominantly related to IT) and is a framework to enable different parts of the customer's business to be sourced from different suppliers. In this structure, the customer should ensure the co-ordination of all suppliers to obtain optimal overall service.

Multi-sourcing outsourcing does not benefit from specific Romanian law provisions, but general contract rules apply.

Joint venture or partnership

This is a contractual business undertaking between two or more parties specifying mutual responsibilities and goals. This structure has certain advantages, such as a high degree of control by the beneficiaries and profit sharing. On the other hand, it can be costly and difficult to manage.

Build operate transfer

Under this structure, the customer contracts a supplier to build and operate a facility, with the undertaking that the supplier then transfers the facility to the customer. This structure can be costly.

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 private procurement process is not subject to specific legislative regulation in Romania. In practice then, private outsourcing procedures vary on a case-by-case basis. However, the main phases of the outsourcing process usually are:

- Due diligence conducted by the customer or its consultants to identify the operational need to outsource, the functions to be outsourced and related conditions and requirements of the outsourcing.
- Identification of potential suppliers and requests for offers or invitations to tender (together, RFO). The RFO should include (in its text or in an enclosed draft contract) at least the main elements related to the outsourcing, for example, the type of services, particular conditions of performance, time limits and warranty.
- Exchange of requests for clarification and responses to requests for clarification between the customer and the potential suppliers.
- Selection of the shortlisted suppliers.
- Commencement of negotiations with the selected supplier(s) regarding commercial, technical and legal issues related to the outsourcing. The aim of the negotiations is to set a consistent framework for the performance of the services and to agree on the form of the outsourcing.
- Execution and performance of the outsourcing agreement.

TRANSFERRING OR LEASING ASSETS

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

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

Immovable property

Transfer of ownership of immovable assets is subject to conclusion of a written authenticated agreement (in front of a Romanian public notary) and to registration of the transfer with public registries.

IP rights and licences

A transfer of IP rights must be in writing, signed by all of the parties. Depending on the type of rights involved, the transfer may need to be registered with the competent authority so that notice can be served on third parties. Certain provisions must be

stipulated within the transfer agreement (especially for copyright assignment), to avoid the possibility of:

- Termination of the agreement by the interested party (that is, either the transferor or the transferee).
- Registration of the transfer being rejected by the competent authorities.

The transfer of IP licences can be by way of a novation agreement. All parties to the initial licensing agreement must sign the novation agreement in addition to the new party. To serve notice on third parties, the novation agreement may need to be registered with the competent authorities, depending on the rights involved.

Movable property

A written sale and purchase agreement is sufficient to transfer ownership rights in movable assets.

Key contracts

Transfer of key contracts is usually done by written agreement. However, in theory, neither assignment nor novation is required to be concluded in written form, to be valid. Attention should be paid to whether the consent of the counterparty is required. The agreement usually takes the form of an assignment of rights (in which case certain formalities must be observed) or a transfer of rights and obligations by novation (in which case the consent of the counterparty is required).

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 leasing of certain immovable assets as part of an outsourcing should be recorded in a written lease agreement. Lease agreements concluded for a period of more than three years must be registered with the Land Book (registry) to serve notice on third parties of the existence of the lease agreement, including future purchasers of the immovable asset.

The right to lease immovable property can be transferred by way of a private deed, but the consent of the owner or landlord is usually required.

IP rights and licences

To grant a licence to use IP rights, a written agreement should be entered into to record the terms agreed. Depending on the rights involved, the licence agreement should be registered with the competent authorities to serve notice on third parties.

Movable property

Although not required by law, as a matter of good practice, the lease of movable assets as part of an outsourcing should be recorded in a written lease agreement. The rights and obligations of the parties should be clearly set out in the agreement.

Key contracts

The concept of a contract being leased or licensed is not recognised under Romanian law.

Romanian law generally provides that:

- Rights under a contract can be assigned, subject to certain notification and registration requirements to ensure that the rights assigned can be enforced against third parties.
- Obligations under a contract can only be assigned with the rights to which they relate.
- Rights and obligations can be transferred to a third party under a novation agreement, in which case the consent of the counterparty is required.
- The transfer of rights or rights and obligations must be made by written agreement.

TRANSFERRING EMPLOYEES

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

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

Initial outsourcing

Employees may be transferred by operation of law in an initial outsourcing to the extent that Law No. 67/2006 on the protection of the employees' rights in case of transfer of undertakings, business or parts thereof (Transfer of Undertakings Law) is applicable. This law implements Directive 2001/23/EC on safeguarding employees' rights on transfers of undertakings, businesses or parts of business (Acquired Rights Directive).

The decisive criterion for establishing the existence of a transfer of undertaking, and the application of the Transfer of Undertakings Law, is whether the transferred entity retains its identity. This is indicated by, among other things, the fact that its operation is actually continued or resumed.

If the Transfer of Undertakings Law is applicable, the customer's employees who work on the service being outsourced automatically transfer to the supplier (unless they opt out and resign from their employment). If the legislation does not apply, employees are not transferred automatically from the customer to the supplier, but they can accept employment with the transferee under a new employment agreement.

Change of supplier

Employees may also transfer by operation of law on a change of supplier to the extent the conditions of the transfer from the initial supplier (the transferor) to the new supplier (the transferee) match certain criteria (as provided by the Transfer of Undertakings Law). In this case, the employees working on the outsourced service automatically transfer from the existing supplier to the new supplier (unless they opt out and resign from their employment).

Termination

Employees may also transfer by operation of law on the termination of an outsourcing when the customer brings the services back in-house, to the extent the conditions of the transfer match certain criteria (as provided by the Transfer of Undertakings Law). In this situation, the supplier's employees automatically transfer to the customer (unless they opt out and resign from their employment). In this situation, the customer may take on more employees than it originally transferred, if the supplier employs new persons during the outsourcing period.

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

General terms

The rights and obligations of the transferor arising out of individual employment agreements and the applicable collective labour agreement, and existing at the transfer date, fully transfer to the transferee (*Transfer of Undertakings Law*).

Pensions

The Transfer of Undertakings Law does not expressly provide on whether or not pension rights transfer to the transferee. A cautious approach should be taken, and it should be assumed that a full transfer occurs.

Occupational pension schemes are not expressly regulated by Romanian legislation. In relation to systems where pension fund contributions are divided between the employer and the employee, the transferor's obligations to contribute transfer to the transferee only to the extent that such an obligation is provided for under individual employment contracts or under the collective labour agreement concluded at the level of the undertaking being transferred.

Employee benefits

The Transfer of Undertakings Law does not expressly contain provision on whether or not employee benefits transfer to the transferee. However, an employee's rights, including employee benefits based on the individual employment agreement or the collective labour agreement, represent a component of the employment relationship that the Transfer of Undertakings Law aims to protect. As a result, such rights should be fully transferred to the transferee.

Other matters

The transferee must comply with the provisions of the applicable collective labour agreement at the date of the transfer until that agreement is terminated or expires (*Transfer of Undertakings Law*). The provisions of the collective labour agreement may be renegotiated by the transferee and the employees' representatives or trade union, but only at least one year after the transfer date.

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

Before the transfer, the transferor must notify the transferee of all rights and obligations that will transfer to it (*Transfer of Undertakings Law*). The notification must include information such as:

- Certain aspects of the employment agreement to be transferred (including pay, notice, holiday, working hours, job title and place of work).
- Details of the content of the collective labour agreement (if any).

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

The transferor and transferee must notify in writing the representatives of their employees or, if there are no such representatives, all employees, at least 30 days before the date of transfer, of the following (*Transfer of Undertakings Law*):

- The transfer date or the proposed date of transfer.
- The reasons for the transfer.
- The legal, economic and social implications of the transfer for employees.
- Measures planned in relation to the employees.
- Working and employment conditions.

Where the transferor or the transferee plans measures related to the transfer that affect the employees, it must consult with the employees' representatives to reach an agreement at least 30 days before the date of the transfer (*Transfer of Undertakings Law*).

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

The transferee can harmonise the terms and conditions of the transferred employees with those of its existing workforce either:

- Collectively, by amending the collective labour agreement at company level. Note that provisions of the collective labour agreement applicable to the transferred employees can be renegotiated by the transferee and employees' representatives or trade union, but only at least one year after the transfer date.
- Individually, by amending the individual employment agreement of each transferred employee. Normally, changes of the individual employment agreement can be made as long as the general rules set out by the Romanian Labour Code are adhered to. Under these rules, individual terms and conditions can be changed only with the consent of the employee, by amendment of the employment agreement.

If the transfer entails an important change to working conditions that would not favour the employee, the employer is liable if that change of conditions triggers the termination of the employment agreement (*Transfer of Undertakings Law*). This rule is based on the general principle that the transfer cannot be a reason to terminate transferring employees. As a result, if an employee resigns because of an important change to working conditions, the affected employee benefits from the same legal treatment applicable to an employee made redundant, including the same payment rights (for example, severance payments).

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

The individual or collective dismissal of employees as the sole basis of the transfer is prohibited (*Transfer of Undertakings Law*). This prohibition applies to both the transferor and the transferee. However, the transferor and the transferee can terminate employment agreements for other reasons, such as reasons related to the employee (for example, disciplinary or professional inadequacy) or reasons not related to the employees (for example, redundancy), as long as specific procedures regulated by law are followed.

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

As employees transfer by operation of law (to the extent that the provisions of the Transfer of Undertakings Law are met), a secondment risks being cancelled as null and void by a court of law.

DATA PROTECTION

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

The outsourcing may place the customer and the supplier in the position of data controller and data processor, respectively. In this case, the following issues should be addressed (*Law No. 677/2001 on the protection of individuals with regard to the processing of personal data and the free movement of such data*):

- The customer and the supplier should include certain provisions in the outsourcing agreement, under which the supplier undertakes to:
  - act in accordance with the customer's instructions;
  - ensure it adheres to minimum technical and organisational measures designed to protect personal data against any form of illegal processing.
- The customer should notify the National Authority for the Supervision of Personal Data Processing (DPA) of the data processing operations to be taken over by the supplier, as well as any other relevant changes.
- If the outsourcing involves the transfer of data abroad, the notification to the DPA should reflect this transfer. In addition, if the transfer is to a country (or countries) that do not ensure an adequate level of protection in respect of the processed data, then the customer should obtain the DPA's prior authorisation for the transfer of personal data to those countries.
- The individuals whose personal data are subject to the processing to be outsourced must be informed of the nature of the processing changes.

SERVICES

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

As a general rule, the customer and the supplier agree on the services specification within the terms of the outsourcing agreement. However, there are also cases when these terms are decided by the supplier only (this is common practice where the supplier is a big IT company). Depending on the type of services provided, these agreements are generally drafted within the limits of established standards (IT Infrastructure Library for IT outsourcing services (ITIL)), which define how service management must be applied within an organisation.

Usually, the information included in the services specification refers to, among other things:

- The type of service and a detailed description of it.
- The time frame for the provision of the services.
- Whether the services will be performed on request or in accordance with a schedule agreed in advance.
- When a request submitted by the client will be considered fulfilled.

The services specifications (like all other terms such as price, termination and specific warranties) are generally established on conclusion of the agreement.

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

An outsourcing agreement specifies and details the outsourced services and the manner in which these will be performed. As a general rule, a detailed description of the service management is included in a service level agreement, either as a separate schedule to the main agreement, which includes the general rights and undertakings of the parties, or under the form of clauses and/or sections included in one and the same agreement, as part of the services specifications.

The service level agreement usually includes the following information:

- A detailed description of the services.
- Time limits for performance of the services.
- Minimum performance standards to which the services provided must conform.
- A detailed description of possible negative events which trigger the need for the supplier to take action, within the scope of its contractual commitments.
- Methods of communication and the delivery of notices between the parties.
- When liability of the supplier is triggered.
- When the agreement can be amended.

Depending on the type of service outsourced, the service levels agreements and/or the services specifications must comply with standards applicable in the supplier's sector of activity. Usually, the more detailed the clauses of the service level agreement are, the fewer the

risks that can be incurred by the parties. In practice, however, excessively detailed terms for performance of the agreement, and the setting of very high standards or parameters for performance of the service are usually avoided. This is because they may delay the supplier in complying with its obligations and give rise to excessive costs for the customer. Parties generally use a consultancy agent or in-house consultants to achieve a balance between their opposing interests.

The services credit scheme is established within the terms of the general outsourcing agreement in clauses that specify the price and fees due under the agreement. As a general rule, outsourcing agreements set out the price per service given the complexity and parameters set for the performance of the service.

However, it is not uncommon for the parties to agree to an off-set scheme in the same agreement if there is another business and/or contractual relationship between the parties that imposes pecuniary obligations on the supplier. Under the law, such a scheme is only permitted if certain conditions are met, for example concerning the determination of the payment amount, when it is due and that it is expressed in money. Penalties for breach of contractual obligations may be agreed by the parties 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).

Depending on, among other things, the type of services being provided, the basis of co-operation between the parties and risk allocation, the parties may adopt different charging methods. One or a combination of the following charging methods is usually adopted in an outsourcing agreement:

- Fixed price (usually used for regular and predictable volumes and scope of services).
- Cost plus (actual cost of the services plus a profit margin).
- Minimum charges (payment of an agreed price for specific service items).

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

The other main terms that the parties refer to in relation to costs (in addition to charging methods) are charge variation mechanisms and price indexation.

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 contractual obligations, the customer is entitled to any of the following:

- Damages and/or penalties for delay, in accordance with the provisions of the outsourcing contract and applicable legal principles.
- Termination of the agreement (with or without court intervention, depending on the provisions of the outsourcing contract).
- Specific performance, which may be awarded by the court in certain circumstances.

To the extent the parties did not pre-determine the value of damages in the contract, the party that has sustained loss is entitled to receive both the value of the damage effectively suffered and lost profit.

If the parties did not determine the value of any penalties for delay, the party at fault must pay an amount of interest based on a reference interest set by the NBR.

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

Customer protections typically included in the contract are:

- A detailed measurement of service performance, usually by transmitting time sheets, regular reports and other justifying documents (for some activities, the transmission of the documents is compulsory for fiscal reasons).
- Right to audit the accountancy documents of the supplier in relation to the fulfilment of its contractual obligations.
- Right to inspect the premises where the services are performed, often with prior notice and during normal business hours.
- Service credits.
- Warranties and indemnities (*see Question 21*).
- Guarantees granted by the supplier or by a third party.
- Right of the customer to terminate the outsourcing contract on the ground of a material breach (even if the breach is not one of the specified events of default under the contract).
- Insurance policies to be held by the supplier (in relation to liability against third parties, and property).
- Step-in rights (in certain circumstances, depending on the outsourced activity).

WARRANTIES AND INDEMNITIES

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

Typical warranties given by parties to an outsourcing contract include:

- They are entitled to enter into the outsourcing agreement and perform their obligations under it.
- They hold the necessary authorisations for the performance of their activities and obligations under the contract.
- They carry out their obligations with the diligence of a good professional in their field of activity.
- All information provided by them to the counter-party was and remains accurate, up to date and complete.
- Other assurances specifically related to the project or type of services to be outsourced.

In addition, each party undertakes to indemnify the other party against any and all liabilities, claims, losses, damages incurred by the other party or by a third party as a result of the performance or lack of performance of its obligations under the outsourcing agreement.

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

Romanian law regulates two types of warranties in relation to products and services: apparent defects and hidden defects.

Warranties concerning apparent defects relate to defects that can be detected at the time of delivery or, in certain cases, within two days of receipt of the relevant goods or services.

Warranties concerning hidden defects relate to defects of a particular severity that exist on delivery of the relevant service. The maximum term within which the client may claim the discovery of the defect is the warranty term, as agreed by the parties or, in the absence of any contractual provision, as set by law. The general warranty term is one year, which applies in all cases where the law does not provide for a specific term and the parties have not set a term.

If the customer finds any defect, it can claim damages, the amount of which varies depending on the good or bad faith of the supplier (whether it was aware of the existence of the defects or not). If the supplier acted in good faith, its liability is up to the value of the services affected by defects plus expenses incurred by the customer to enter into the outsourcing agreement. If the provider acted in bad faith, it is liable for the entire loss incurred by the client, which includes both actual loss and lost profit.

However, it is possible for the parties to limit their contractual liability. Such limitations are effective under Romanian law unless the supplier acted with gross negligence or wilful misconduct (*see Question 29*).

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?

As a general rule, Romanian law imposes no maximum or minimum term on an outsourcing. The parties are free to agree on the term of the outsourcing. However, in accordance with regulations applicable to credit institutions, the NBR can impose certain conditions on the length of the agreement where the outsourced activities are deemed to be important (*see Question 2*).

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

There are no general national law rules regulating the length of the notice period required for termination; the parties are free to negotiate this. As a matter of best practice, outsourcing agreements usually contain a termination clause allowing the customer to:

- Immediately terminate the outsourcing in the case of material breaches or imminent insolvency.
- Terminate the contract and outsource the activities to another supplier or internalise them if there is a risk of jeopardising the services provided to clients.

Usually, longer notice periods are established by contract where the supplier is terminating the outsourcing.

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 following events may justify the termination of an outsourcing agreement without giving rise to a claim in damages, if contractual provisions are observed:

- A material breach of the agreement by the other party (the materiality of the breach is assessed on a case-by-case basis).
- A breach of the agreement that strongly indicates that the counterparty cannot continue to perform the duties required of it by the contract.
- Change of control, if the contract was given in consideration of a certain shareholding structure of the supplier.

However, under Romanian insolvency law, termination of a contract due to the opening of an insolvency procedure against the counterparty is deemed null and void. So termination is not allowed because of an insolvency procedure being opened, unlike the position where there is imminent insolvency, which is allowed (*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 to the outsourcing contract can specify any events as justification for termination and can also allow unilateral termination for convenience.

The parties can, for instance, agree to terminate on the basis of:

- **Breach of contract.** The parties can agree additional remedies such as delay penalties or pre-determined damages for failure to comply with contractual obligations.
- **Change of control.** The parties can include clauses that require notification on a change of control or approval of any change in the corporate status of a party.
- **Convenience.** The parties can include in the agreement the option of terminating at any time without reason or without any party breaching its contractual obligations. The legislation applicable to credit institutions and financial services firms expressly provides that outsourcing agreements must include clauses permitting the unilateral termination of the agreement by the beneficiary at any time.

However, under Romanian insolvency law, termination of a contract due to the opening of an insolvency procedure against the counterparty is deemed null and void (*see 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?

Any rights for the supplier to continue to use licensed IP rights post-termination must be contractually agreed. Where such rights are not contractually agreed, the supplier cannot continue to use licensed IP rights post-termination without infringing the customer's rights.

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?

As know-how is in the supplier's confidential information, the customer usually expressly undertakes to hold the information in confidence and use it only in connection with the outsourcing agreement.

Where the supplier develops know-how during the term of the agreement for use in the performance of the services, or otherwise embeds such know-how into the assets and systems of the customer, the customer usually requires a written licence to continue using the know-how.

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?

The parties to an agreement are free to increase their liability. As a result, the parties could be liable not only for direct loss, but also for loss of profit or loss of business.

Under the general provisions of Romanian law, exclusion or limitation of liability clauses related to breach of contractual provisions or to damages caused by hidden defects of the delivered products or supplied services are generally valid and binding. However, such clauses may be considered null and void to the extent that they try to limit or exclude liability for:

- Wilful misconduct.
- Gross negligence.
- Serious damages (such as physical injuries or other damages to a person's health or life) that have occurred in connection with the use of the products or services supplied.
- Agreements concluded with individuals as consumers.

Limitation or exclusion of liability is not effective as against third parties that have incurred damages in connection with the products or services supplied. In addition, if a third party beneficiary of the outsourced services or products is an individual who is a consumer, that individual has the right to:

- Choose between the repair, replacement or refund of fees for the defective products or services (the manufacturer or seller cannot decide this).
- Receive full compensation for damages incurred due to the defective products or services during the warranty period.

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. It is usually fixed as a percentage of the total contract value. However, liability cannot be excluded or capped in certain circumstances (*see Question 29*).

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 to the supplier

If assets are transferred to the supplier on an outsourcing, the transfer is in substance a sale. As a result, the actual price or net book value (on a free of charge transfer) is treated as taxable income. If the transfer is made between affiliated parties, the market value will be considered for corporate income tax purposes.

VAT also applies in most cases (including on a free of charge transfer, when a deemed supply will take place, or if the transferor self-assesses output VAT). In other circumstances, the transferor may argue that it is transferring part of its business as a going concern, and VAT need not be charged.

Transfers of employees to the supplier

No tax applies to this transfer. From the date of the transfer onwards, the supplier acts as the employer and assumes all related withholding obligations for income tax and social security purposes.

VAT or sales tax

On a domestic outsourcing, the supplier of outsourced services charges Romanian VAT. If the customer's business is fully taxable for VAT purposes, the customer can recover VAT in full. However, if the customer's business is not fully taxable, the outsourcing may give rise to a real additional tax cost (because by using a third party, irrecoverable VAT arises).

Other

There are no other significant tax issues on an outsourcing.

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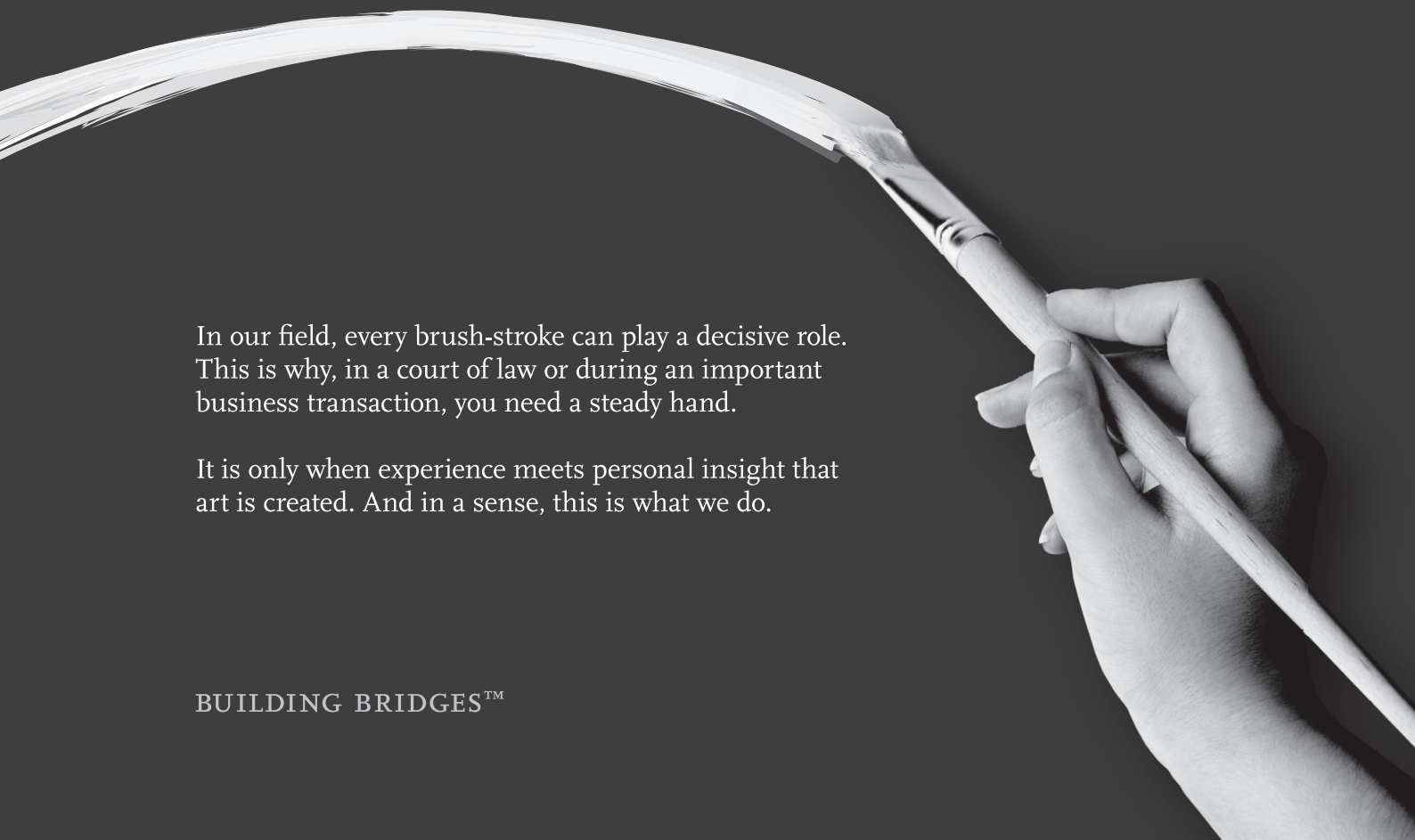

In our field, every brush-stroke can play a decisive role. This is why, in a court of law or during an important business transaction, you need a steady hand.

It is only when experience meets personal insight that art is created. And in a sense, this is what we do.

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