April 2012

Employment Law Newsletter No 3

OUTSOURCING

Employment law issues in the UK and Germany

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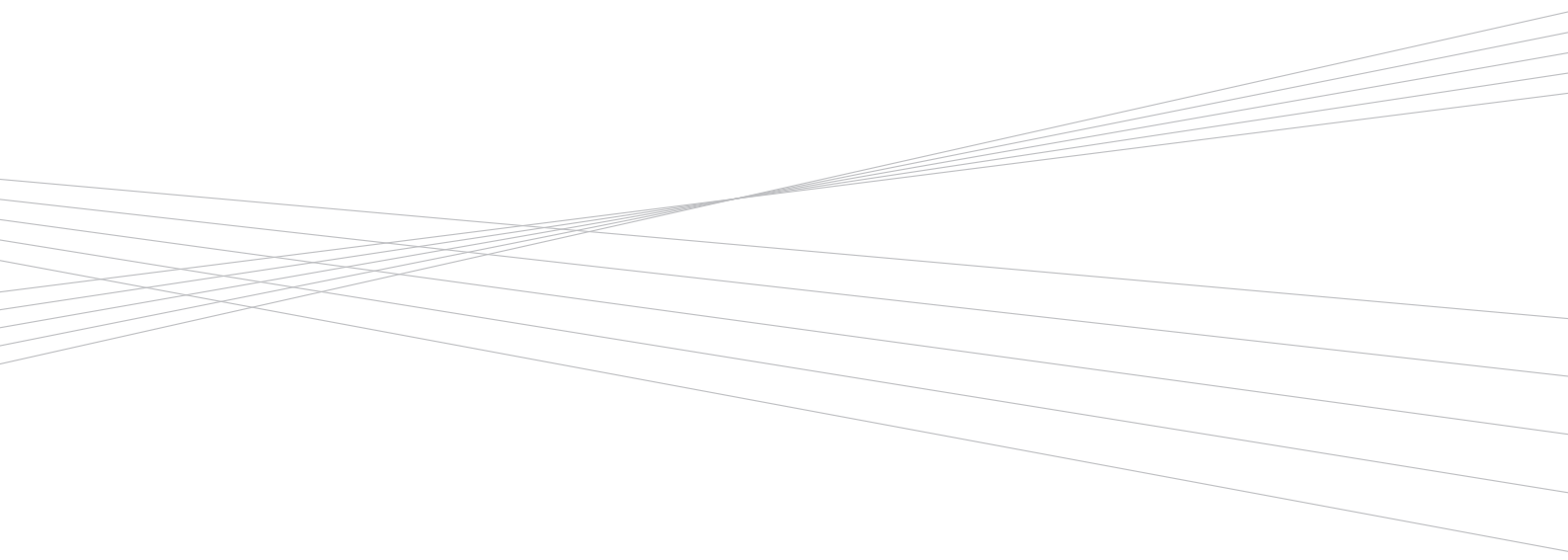

1. Introduction

Outsourcing is generally defined as the transfer of the performance of specific tasks by a business to a third party. It is often used to effect cost savings, *e.g.* on the basis that the transferee is not bound by such cost-intensive collective bargaining agreements, or is located in a country where the cost of labour is generally lower (so-called 'off-shoring'). Another reason for outsourcing may be that the business lacks certain know-how or a critical mass for cost-efficient production or service provision.

Outsourcing began to play a role in the 1960s, mainly in the field of production. In the 1980s there was a boom in IT outsourcing, and since the turn of the millennium, it has been used industry-wide in both the production and the services sector. While some large corporate groups are reversing the process by bringing outsourced production or services back in (*e.g.* Philips insourcing electronic razor production from China back to the Netherlands, which was announced in January 2012), outsourcing remains a prominent instrument for cost-saving. In the UK the trend towards outsourcing has continued through the recession, as companies focus more on competing for and securing new work, and less on resourcing non-core functions. Data from 2011 suggests that the total value of outsourcing contracts in the UK increased by 13 per cent from the same period in 2010, to reach £6.7 billion[1]. In a 2011-study for Germany, over 50 per cent of the companies involved had plans to outsource entire business processes or had already done so[2].

From a legal perspective, outsourcing will usually involve the performance of services (or production of items) by another party under the terms of a service or a product delivery contract. The contract may be a stand-alone arrangement, or be concluded as part of a wider transaction (either a share or asset purchase). Under German law, it may also occur on spin-off (*Abspaltung*) or hive-down (*Ausgliederung*) under the German Company Reorganisation Act (*Umwandlungsgesetz – UmwG*). The employment law issues which arise on an outsourcing may be fundamental to the way in which it is structured, particularly where the service or part of the business being outsourced is a labour-intensive one.

This briefing summarises the principal employment law issues which arise in outsourcings in both Germany and the UK. In particular, it considers the circumstances in which an outsourcing may amount to a business transfer, what the consequences of this will be for the parties involved, and concludes with some practical guidance. It will focus on outsourcings and so will refer to the parties as "client" and "contractor".

1 TPI Index for Q2 2011. The survey also found that globally, the overall value of the outsourcing market declined by 18 per cent in the same period, due to a drop in the number of large contracts, and a greater focus on short-term cost savings. However, demand for outsourcings continued in the Netherlands and France as well as the UK.

2 Press release by Steria Mummert business consultants of 3 February 2012.

2. The Business Transfers Directive

The employment law issues on outsourcing, in both Germany and the UK, derive from the EU Acquired Rights Directive (the "**Directive**"), and the national laws adopted for its implementation. The declared purpose of the Directive is to safeguard employee rights in the event of transfers of undertakings or businesses.

The Directive applies to transfers of undertakings, businesses or parts thereof to another employer as a result of a legal transfer or of a merger. It requires that there is a transfer of an economic entity (being an organised grouping of resources which has the objective, whether central or ancillary, of pursuing an economic activity) which retains its identity. It applies where and to the extent that the undertaking or business to be transferred is located within the territory of the EU.

The Directive contains the following key provisions:

- Following a transfer, the transferor's rights and obligations under the employment relationship automatically transfer to the new employer (the transferee). National law may provide for joint and several liability between the transferor and transferee in respect of obligations which arose prior to the transfer. It may also provide for measures to ensure that the transferor informs the transferee of the transferring rights and obligations.
- The transferee must observe the terms and conditions of any collective agreements which are applicable to the employment relationship prior to the transfer, until the date of termination or expiry of the agreement, or the entry into force of another collective agreement. National law can provide that this observance is limited to a period of not less than one year following the transfer.
- Unless national law provides otherwise, the above points do not apply to employees' rights to old-age, invalidity or survivors' benefits under company pension schemes. Member States must nonetheless adopt the measures necessary to protect the interests of affected employees in relation to these rights.
- Dismissals cannot be justified on grounds of a transfer, unless they occur for economic, technical or organisational reasons entailing changes in the workforce.
- Employee representation is safeguarded on a transfer. Where the transferred undertaking or business preserves its autonomy, the status and function of employee representatives (*i.e.* works councils and similar bodies) remains in place.

Where the autonomy is not preserved, national law must ensure that employees remain represented until an employee representative body can be reappointed or reconstituted.

- The transferor and transferee must inform representatives of their employees of the transfer and its consequences, and consult with them if the transferor or transferee envisages 'measures' with respect to its employees.

3. Is outsourcing a business transfer?

3.1 UK

In the UK, the Directive is now implemented via the Transfer of Undertakings (Protection of Employment) Regulations 2006. While it was originally unclear whether outsourcing was caught within the definition of "relevant transfer", TUPE introduced specific provisions to include service provision changes within its scope. These provisions go beyond the requirements of the Directive, and are not replicated in any other European jurisdictions, including Germany.

A service provision change for the purposes of TUPE involves a situation in which:

a) activities cease to be carried out by a client on his own behalf, and are carried out instead by a contractor on the client's behalf ("**outsourcing**");

b) activities cease to be carried out by a contractor on a client's behalf, and are carried out instead by a subsequent contractor on the client's behalf ("**re-tendering**"); and

c) activities cease to be carried out by a contractor or subsequent contractor on a client's behalf, and are carried out instead by the client on his own behalf ("**insourcing**").

Immediately before the transfer, there must be (i) an organised grouping of employees situated in Great Britain whose principal purpose is to carry out the services on behalf of the client, and (ii) it is intended that the services will continue.

For part (i) of this condition, there must be an "**organised grouping**" *i.e.* a team which is essentially dedicated to carrying out the activities that are to transfer. This will depend on there being a sufficiently structured and autonomous unit of employees who spend the majority of their time carrying out these activities[3]. The unit must be "**organised**" by reference to the way that services are provided to the client[4]. The organised grouping can however include a single employee.

3 *See Hunt v Storm Communications Ltd*, where an employee who spent 70% of her time on the activities was held to be part of the organised grouping, and *Royden v Barnetts Solicitors*, where the same applied to solicitors who spent 'the majority' of their time working for a particular client. Contrast this with *Williams v Executive Committee of the North Wales Society for the Blind*, where two employees who spent 50% of their time on a contract did not constitute an organised grouping.

4 *Eddie Stobart v Moreman & Ors*, where it was held not to be sufficient that the employees were "organised" by shift patterns which were unrelated to the work for any particular client.

Part (ii) of this condition can be problematic where there is a change in the way that the service is provided following the outsourcing. TUPE will apply where the activities carried on by the contractor are "fundamentally or essentially" the same as those carried out by the client[5]. This is a question of fact. A change in the location of the provision of the services is unlikely to be enough. On the other hand, if the contractor takes on less (or more) of the activities that were previously undertaken by the client, this may be sufficient to prevent TUPE applying[6].

Where the services are fragmented between different service providers, TUPE may still apply. However, this will be less likely where there is little or no discernible pattern for the allocation of the services amongst the contractors. It is difficult to predict with any certainty how TUPE will apply where fragmentation takes place, and careful assessment of the facts will be required.

There is an exclusion from the TUPE provisions on service provision changes where either:

- The contract is wholly or mainly for the supply of goods for the client's use. The Department of Business, Innovation and Skills (BIS) guide to TUPE provides an example of a contractor supplying sandwiches and drinks to a canteen for the client to sell on (where TUPE is unlikely to apply) and a contractor who is responsible for the running of the canteen (where TUPE may well apply).
- The activities are carried out in connection with a single specific event or a task of short-term duration. The BIS guide suggests examples of the provision of security advice to the London 2012 Olympics organisers over a period of several years (which is unlikely to fall within the exclusion and therefore will be covered by TUPE), and the hiring of security staff to protect athletes during the Olympics themselves (which may fall within the exclusion).

5 *Metropolitan Resources Limited v Churchill Dulwich Limited*. Contrast this with *OCS Group UK Limited v Jones*, where it was held that there was a fundamental difference between the provision of hot food and the sale of pre-packaged sandwiches. It found that there was therefore no relevant transfer.

6 *Enterprise Management Services Ltd v Connect-Up Ltd and ors*, where a reduction of 15% in the activities carried out by the contractors, along with the fact that the services were fragmented, meant that there was no relevant transfer and TUPE did not apply.

3.2 Germany

In Germany, the central norm incorporating the Directive is sec. 613a German Civil Code (*Bürgerliches Gesetzbuch* – "**BGB**") which was introduced in 1972 and has been amended several times. Over the years, abundant case-law has been generated on issues related to sec. 613a BGB, predominantly further specifying the concept of a relevant transfer, setting the principles for the transfer of collective rights, defining the requirements of a proper information of employees on such transfer and of forfeiture (*Verwirkung*) of an employee's right of objection. The transferring (part of a) business must be located in Germany and may be transferred within or to a location outside Germany (and even the EU).

Sec. 613a BGB applies in the case of the transfer of a business or of part of a business to a third party on the basis of a legal transaction. Legal precedent has interpreted this to require that an organisational unit with a purpose of its own transfers, and that its structures are made use of by the new owner[7]. Whether an organisational unit transfers, is determined on the basis of a number of factors which may be weighted differently depending on the individual case, namely (1) the type of business which transfers (production, services, etc.), (2) whether material assets are transferred, (3) the importance of any transferring immaterial assets for the business, (4) whether employees transfer who are by number and/or know-how material to the business, (5) whether clients or contractual relationships are transferred, (6) a similarity of the occupation of the business prior to and after the transfer, and (7) the duration of an interruption, if any, of the business activity prior to a transfer.

In an outsourcing context, it is important to note that, principally, under German law, the mere commission of services or of a function to another party (*Auftrags- oder Funktionsnachfolge*) will not constitute a business transfer if the new service provider does not take on employees or assets from the former provider thereof. In order to constitute a business transfer, besides the task itself, employees who are key to the business must transfer in a number material for the business and/or assets must transfer that are so material to the business that they are essential for the fulfilment of the commissioned tasks or function. Therefore, if the mere production of specific products is outsourced to a contractor which produces these with its own personnel and assets, that will in principle not constitute a business transfer. However, if the use of machinery or personnel by the client is involved, matters will no longer be clear-cut.

7 BAG 14 August 2007 - 8 AZR 1043/06, NZA 2007, 1431, 1433/4. It suffices if the functional relations between transferred assets and other production factors (*e.g.* client relations or production methods) of the transferred unit are retained (*Funktions- und Zweckzusammenhang zwischen den übertragenen … Betriebsmitteln sowie den sonstigen Produktionsfaktoren*), while the unit may be integrated into another business, BAG 26 May 2011 - 8 AZR 37/10, DB 2011, 2323, 2324.

The same applies with respect to the provision of services. Since the factors involved will be weighted differently on a case-by-case basis, it is typically difficult to determine whether a scenario constitutes a relevant transfer and there is an inherent risk that a court may decide otherwise.

For example in a case where the provision of technical services for a hospital had been outsourced to a contractor, and these were subsequently commissioned to another contractor who performed them on the same technical appliances and with six of nineteen employees of the former contractor, it was held that there was no business transfer between the contractors. The Court argued that the services were provided *for* the technical appliances involved (as opposed to *with the help of* these) and that the organisational structures of the former nineteen-employee-contractor who only performed part of the services provided by the new contractor and only for a limited number of buildings were not upheld by the new contractor who performed a wider scope of services for a larger geographical area and with a considerably higher number of employees[8].

By contrast, a business transfer was found in the case of airport security controls: These had been provided by one contractor with the help of security devices owned and supplied by the client (the Federal Department of the Interior), and, subsequent to a public tender, were provided by another contractor which did not take on any employees or assets from the former contractor, but worked with the same security devices provided by the client. The Court found essential that the new contractor used the same material assets (which were owned by the client!) as its predecessor and that there had been no interruption in the provision of the contracted services. The Court further argued that the organisational structure had remained virtually identical, client and subjects of the services had remained the same, and – curiously enough, while stressing that the mere succession into a contract did not constitute a business transfer – that the major immaterial asset of the predecessor contractor had been the service contract with the client, and such asset had transferred[9].

In another case, a business transfer was denied between two contractors subsequently operating a battered women's shelter in the same building as the new contractor operated under a fundamentally changed concept[10].

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8 BAG 14 August 2007 - 8 AZR 1043/06, NZA 2007, 1431, 1431, 1434.

9 BAG 13 June 2006 - 8 AZR 271/05, NZA 2006, 1101, 1104; similar BAG 6 April 2006 - 8 AZR 222/04, NZA 2006, 723, 725 *et seq*.

10 BAG 4 May 2006 - 8 AZR 299/05, NZA 2006, 1096, 1100.

This demonstrates that in seemingly similar cases, the outcome may be materially different. Therefore, in a planned outsourcing which involves a transfer of personnel or assets (even if the latter may be owned by the client), prior legal analysis is essential, and may enable the contractor to choose a structure avoiding (or minimising) the risk of a business transfer.

If a transfer constitutes a relevant transfer, the employment relationships of all those employees transfer who belong to the transferring (part of the) business; employees in central or overhead functions do not transfer unless their work relates exclusively or predominantly to the transferring business.

4. What are the consequences of an outsourcing being a business transfer?

4.1 Transfer of rights and obligations

In **the UK**, TUPE provides that the employees of the client who are assigned to the organised grouping carrying out the services pass automatically to the contractor. This is subject to the right of employees to object to the transfer (see section 4.3 below). The contractor therefore inherits all the rights and liabilities associated with those employees, and effectively stands in the shoes of the client. There is an exception for criminal liabilities and rights relating to provisions of occupational pension schemes dealing with benefits for old age, invalidity or survivors[11]. In relation to share option and bonus schemes, employees are entitled to participation in a scheme of "substantial equivalence" which is free from unjust, absurd or impossible features.

In relation to collective agreements, any agreement which is in place at the time of the transfer in respect of employees to be transferred has effect as if made by or on behalf of the contractor. Therefore, the rights of the transferred employees under existing collective agreements will be protected by TUPE. The extent to which rights under future collective agreements are protected is currently unclear[12]. However, this point is not of great significance in the UK, as under English law collective agreements are generally only binding to the extent that their terms have been incorporated into the individual contracts of employment (and these will, in any event, be automatically transferred).

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11 However, this exception is restrictively construed and therefore, for example, pension entitlements on an early retirement by reason of redundancy (see *Beckmann v Dynamo Whicheloe MacFarlane Ltd* and *Martin v South Bank University*) and/or under personal pension schemes, may transfer.

12 Pending the ECJ's decision in *Parkwood Leisure Limited v. Mark Alemo-Herron*.

Where a trade union is recognised[13] by the client in respect of employees who are transferred (provided that the transferred employees maintain an identity distinct from the remainder of the contractor's undertaking), the union shall be deemed to have been recognised by the contractor to the same extent. Again, in the UK this is of limited importance, given the voluntary nature of trade unions recognition arrangements, which can be varied or rescinded.

In **Germany**, in the event of a business transfer, the new employer enters into all rights and obligations under the existing employment relationships of affected employees. *I.e.* all terms and conditions contained in employment agreements as well as any company practices (*betriebliche Übungen*) continue to apply without change. Rights and contingent rights based on years of employment remain in effect and accumulate further. This concerns, *e.g.* the calculation of notice periods and accrued pension rights (*Altersversorgungsanwartschaften*). In contrast to the situation in the UK, and although neither specifically stated in sec. 613a BGB nor required under the Directive, this is interpreted to include company pensions.

With regard to rights and obligations conferred by collective bargaining agreements (*Tarifverträge*), the following principles apply: If client and contractor are bound by the same collective bargaining agreements as they belong to the same employers' association or relevant collective bargaining agreements have been declared universally applicable (*allgemeinverbindlich*) for the industry by the government, these agreements remain applicable on the same legal basis as prior to the transfer. If, on the other hand, client and contractor are bound by different collective bargaining agreements agreed upon with the same union, the ones binding the contractor will govern the employment relationship after the transfer. Finally, if and insofar as the contractor is not bound by collective bargaining agreements agreed upon with the same union, all rights and obligations applicable on the basis of a collective bargaining agreement prior to the transfer become part of the individual employment relationship between employee and contractor, and in principle may not be amended to the employee's detriment for one year from the transfer (sec. 613a para. 1 phrases 2 and 4 BGB). However, the result may well be different if the employment agreements of the transferred employees contain provisions referring to the applicability of collective bargaining agreements, so that a proper analysis must be conducted not only related to the applicable collective bargaining agreements, but also has to cover the employment agreements.

13 In the UK, a trade union must be 'recognised' by the employer in order to enter into collective bargaining arrangements. Recognition can occur through either a voluntary or statutory process, and may be limited to specific issues or specific parts of the workforce (or 'bargaining units').

Shop agreements (*Betriebsvereinbarungen*) of the client's business continue to apply on a collective basis if the identity of the business remains unaffected by the transfer. However, if the transferred business is integrated into another business with shop agreements of its own, the latter become applicable to the transferring employees from the time of the transfer. Finally, in so far as issues are regulated by shop agreement at the client's business, but not at the absorbing business, the content of the client's shop agreements become part of the individual employment relationships between the transferring employees and absorbing employer. Unless the relevant shop agreement expires, these may not be amended to an employee's detriment for one year from the transfer (sec. 613a para. 1 phrases 2 and 4 BGB).

The works council (*Betriebsrat*) of a business that retains its identity after a transfer remains in office without change. Transferring employees whose business does not retain its identity will be represented by the already-existing works council of the absorbing business, their own works council or, on a transitional basis, by the works council which remained with the retained parts of the client's business (sec. 21a para. 1 German Works Constitution Act, *Betriebsverfassungsgesetz* – "**BetrVG**"), depending on the facts of the individual case.

4.2 Duty to inform

In **the UK**, TUPE imposes an obligation on the client to provide employee liability information (ELI) to the contractor before the outsourcing. The information that must be provided includes the identity, age, and principal terms and conditions of the employees who will transfer, as well as any disciplinary or grievance procedure or legal proceedings within the past two years, and details of any applicable collective agreements. The ELI must generally be provided at least 14 days before the outsourcing. Failure to comply entitles the contractor to claim compensation, which is based on any loss it sustains and any contractual agreement with the client, and is subject to a minimum of £500 per employee.

In addition, TUPE imposes separate information and consultation obligations in relation to the employees. There is an obligation in all transfer situations to inform employee representatives of certain aspects and a second duty, to consult employee representatives where "measures" are envisaged as a result of the outsourcing. In either case, employee representatives are either representatives of a recognised independent trade union, or if there are none, representatives of an existing consultative body, or those which are specifically elected under TUPE for this purpose (failing which, information may be provided to affected employees individually).

The obligation to inform applies to both the client and the contractor, in relation to their own employees. It requires employee representatives to be informed in writing of the fact that a transfer is to take place, when it is to take place, the reasons for it, and the legal, economic and social implications of the transfer for the affected employees. It also requires them to be informed of the measures which the employer envisages he will take in relation to his affected employees (or if no measures are envisaged, that fact), and in the client's case, on the measures which the contractor envisages he will take in relation to the transferring employees whose employment is to automatically transfer (or if no measures are envisaged, that fact). The contractor must give the client the information it needs to comply with this obligation. In all cases the information must be given long enough before the transfer to enable meaningful consultation on any envisaged measures to take place.

The obligation to consult is only triggered where measures affecting employees are envisaged. "Measures" has a wide meaning and can include acts or omissions, but should be definite plans or proposals, not mere hopes. The employer must consult "with a view to reaching agreement" about the measures to be taken.

Where there is a failure to inform and consult, the relevant trade unions, employee representatives (or where there are none, the affected employees) can claim compensation of up to 13 weeks' actual pay per affected employee. TUPE generally makes the client and the contractor jointly and severally liable for such awards.

Under **German** law, the client and the contractor have to inform the employees to be transferred in text form about the business transfer and its consequences prior to the transfer taking effect. Pursuant to sec. 613a para. 5 BGB, that is to include information on the (intended) time of the transfer, the reasons for it, its legal, economic and social consequences for the employees, as well as any measures planned with respect to the transferring employees. Apart from the question whether the facts of a case trigger a business transfer, this piece of information has become one of the key elements of legal advice in the context of a business transfer: Legal precedent has refined the requirements of such information to the point where these are nearly impossible to fulfil. And if the requirements are not met, the one-month-period during which an objection to the transfer must de declared (see section 4.3 below) is not triggered. Employees who have not been properly informed may object to their transfer until the right to object is considered forfeited (*Verwirkung*). Forfeiture of the right to object has strict requirements: It requires a combination of time and facts that may rightfully lead the employer to assume that the employee has accepted the transfer and will no longer

exercise the right to object. Precedent has accepted objections as late as 13 months after information on a transfer and legal writers have argued that objections should be permissible even longer, *e.g.* in case of incorrect information on the effect of the transfer on company pensions. The issue of purported improper information is regularly raised when an employer falls insolvent after a business transfer.

German law has not incorporated a duty of the client to inform the contractor. Nor has it introduced special duties to inform and consult with employee representatives in the context of a business transfer, but pursuant to sec. 111 BetrVG a company having 20 or more employees eligible to vote in works council elections that plans operational changes to a business (*Betriebsänderungen*) which may have detrimental effects for employees, must timely and comprehensively inform the competent works council. Operational changes within the meaning of sec. 111 BetrVG may *e.g.* be constituted by changes to the organisation of the business. Business transfers which do not affect a business as a whole (*i.e.* which do not solely constitute a change in ownership) will usually qualify as operational change. Further thereto, for companies with regularly more than 100 employees, duties to inform and consult with an economic committee (*Wirtschaftsausschuss*) may arise pursuant to sec. 106 *et seq*. BetrVG.

4.3 Effect of an objection to transfer

In **the UK,** if an affected employee objects to the transfer, his employment terminates. That termination is generally not treated as a dismissal, and therefore does not give rise to any liability on the client or contractor. However, where the affected employee considers that the relevant transfer involves or would involve a substantial change in working conditions to his "material detriment", and objects to the transfer in these circumstances, he will be treated as dismissed, and liability for unfair dismissal may arise. An employee affected by a relevant transfer will also be able to claim constructive dismissal in the normal way by resigning if he can show that there is or will be a repudiatory breach of contract by his employer (except in relation to a change to occupational pension provision).

Under **German law**, employees may object to their transfer within one month from proper information on the transfer. As described, the time-period for an objection can be extended considerably in case the provided information does not meet the legal requirements. Employees who object to their transfer remain employed by the client who may in principle terminate the employment relationship by notice mandated by overriding operational requirements (*betriebsbedingte Kündigung*) if he can no longer offer the employee a job and there are no other comparable employees enjoying less social protection.

4.4 Dismissals and changes to terms and conditions

In **the UK**, TUPE affects the dismissal of employees in four ways:

- The dismissal of an employee where the sole or principal reason is the transfer itself, will be automatically unfair.
- The dismissal of an employee where the sole or principal reason is a reason connected with the transfer, which is not an economic, technical or organisational reason entailing changes in the workforce (an "ETO" reason), will be automatically unfair.
- The dismissal of an employee for a reason connected to the transfer, which is an ETO reason, will be potentially fair (subject to the normal legal requirements governing unfair dismissal).
- A dismissal unconnected to the transfer will be potentially fair (subject to the normal legal requirements governing unfair dismissal).

The right to complain about a dismissal occurring because of a transfer does not apply where the employee does not meet the normal qualifying conditions for an unfair dismissal claim (including the requirement for at least one year's continuous service (or two years, for employees who commence employment on or after 6th April 2012)).

In order for there to be an ETO reason, the reason must be one "entailing changes in the workforce", meaning a change in the overall number or the functions of the persons employed. The BIS guide suggests that an economic reason relates to the profitability or market performance of the business. In other words, it must relate to the conduct of the business or service, rather than the desire of the client to enhance the price or indeed make the business saleable at all. The BIS guide also suggests that a technical reason would relate to the nature of the equipment or production processes, and an organisational reason would relate to the management or organisational structure of the business. The latter may in some circumstances include a need to cut staff in order to secure the contract. A genuine redundancy situation is likely to suffice as an ETO reason, although this is usually easier for the contractor to establish than the client.

TUPE also imposes similar restrictions on changes to terms and conditions. Any purported variation to a contract of employment which has or will be transferred is void if the sole or principal reason for the variation is either the transfer itself, or a reason connected to the transfer that is not an ETO reason. This goes beyond the requirements of the Directive, and can cause real difficulties for contractors who may want to

harmonise terms and conditions to avoid having a two-tier workforce. Although there is no specific period of time which is determinative of this test, the variation is less likely to be connected with a transfer the longer after the transfer it occurs. What is relevant is what caused the contractor to make the variation. If there is some unconnected reason (such as the contractor thinking that employees are not paid in accordance with standard market rates), the variation may be valid. Similarly, if the changes are motivated by the transferee's need to increase productivity, by bringing the transferred employees in line with its existing employees, without which it would have lost the contract, the variation may also be valid.

Under **German law**, terminations for reason of the transfer are void, whereas terminations declared for other reasons in the context of a transfer, *i.e.* for reasons lying within the person or the conduct of the employee, or for overriding operational reasons (*betriebsbedingte Kündigung*), remain permissible. However, in terminating an employee in the context of a business transfer, an employer must use utmost care to make sure that he can demonstrate that the termination was not declared due to the transfer, *i.e.* that the transfer was not the predominant reason for the termination. Otherwise there is a considerable risk that the termination is void for circumvention of sec. 613a BGB. Severance agreements concluded in the context of a business transfer will be effective if the objective is to end the employment relationship for good. However, a severance agreement concluded prior to a business transfer (and, similarly, a termination declared by the employee) will be void if it can be assumed that it was concluded to circumvent the application of sec. 613a BGB which will *e.g.* be the case if the relevant employee has been promised (*verbindlich in Aussicht gestellt*) employment by the contractor.

Changes to terms and conditions of employment after a business transfer are in principle permissible, subject to the general requirements of such changes. However, changes to terms accorded by collective bargaining agreements or shop agreements which have become part of the individual employment relationships as a consequence of the transfer, are barred from amendments to the detriment of an employee for the twelve months following the transfer.

4.5 Liability of client and contractor

In **the UK**, the contractor inherits all the client's rights, powers, duties and liabilities in relation to the transferring employees (subject to the exclusions noted in section 4.1 above), as well as responsibility for all the client's acts and omissions. The UK has not taken advantage of the option under the Directive for liability for pre-transfer obligations to be shared between the transferor and the transferee on a joint and several basis. The client will remain liable for any unfair dismissal claims arising out of an employee's objection to the transfer, and for any dismissals that it carries out before the transfer which are not automatically unfair (but are unfair under the normal legal requirements governing unfair dismissal). Liability for pre-transfer dismissals which are automatically unfair will pass to the contractor. The client will also be liable for any failure to provide employee liability information (ELI), and jointly and severally liable with the contractor for any failure to inform and consult. However, despite the TUPE provisions, the liability of the client and the contractor is often allocated on a different basis in the contractual agreement.

Under **German law**, the contractor will be liable for all employment-related obligations vis-à-vis the transferring employees (in particular including all pension obligations), irrespective whether these have arisen prior to or after the transfer. In contrast to the situation in UK, the client is jointly and severally liable with the contractor for obligations that relate to time-periods prior to the transfer, have come into existence prior to the transfer and become due within one year thereafter.

Conclusion and practical guidance

Outsourcing is a valuable business tool which can allow a business to operate more effectively, by saving costs and focusing on core functions. However, the employment law implications must be dealt with carefully.

Both TUPE and sec. 613a BGB may impose onerous burdens and restrictions on the parties to an outsourcing transaction. However, to some extent these can be managed through appropriate structuring or negotiating of appropriate contractual documentation at the outset. Issues to consider include:

- Does the outsourcing amount to a transfer for the purposes of TUPE and/or sec. 613a BGB (see section 3 above)?
- If TUPE and/or sec. 613a BGB applies, the contractor should try to obtain as much information as possible about the employment situation and the existing employment-related liabilities at an early stage. This will help to plan and price the bid appropriately (in a tender situation), and negotiate appropriate contractual protections.
- Ascertain which employees are likely to transfer as a result of the outsourcing, and consider whether contractual provisions can be put in place to change this. It may be that the client will not want to lose its employees to the contractor, who may be equally reticent to inherit them, given that it will likely have its own team in place.
- Consider what changes may be needed to terms and conditions of any transferring employees (for example, in relation to new restrictive covenants), and whether these can be validly implemented.
- Negotiate contractual provisions where appropriate/necessary/permissible to deal with the rights and liabilities that will transfer to the contractor.
- Consider provisions to govern what happens on termination of the outsourcing. If the client 'in-sources' by taking the services back in-house, or awards them to a different contractor, this may result in another relevant transfer. In the UK, if there is a re-tendering, these sort of "exit provisions" are often more important, as the outgoing contractor will likely have no direct contractual link with the incoming contractor. The client may therefore need to ensure that it can manage the re-tendering (and in particular, the provision of information from the outgoing contractor to the incoming contractor) through the exit provisions in the original outsourcing agreement.

Summary

	UK	Germany
Is outsourcing a business transfer?	Yes – specific provisions of TUPE govern service provision changes.	Typically, but not necessarily.
Transfer of rights and obligations	All employment-related rights and obligations transfer, except criminal liabilities and certain pension rights.	All employment-related rights and obligations transfer, incl. pension rights.
Effect on collective agreements	Agreements have effect as if originally made with contractor. Position is unclear regarding rights under future agreements.	Rights are maintained, unless contractor has different applicable agreement (in which case that applies) or no applicable agreement (in which case rights become contractual and may not be amended to employee's detriment for twelve months).
Effect on employee representation	Trade union recognition transfers to the contractor where transferred employees maintain a distinct identity.	Works council remains in place if business retains its identity; if not, alternative arrangements apply.
Information and consultation	Client must provide employee liability information to the contractor. Client and contractor must inform (and in some cases consult) their employee representatives.	Client or contractor must provide information on transfer to employees. No duty on client to provide information to contractor. Further information and consultation obligations may arise under separate provisions.
Effect of objection to the transfer	Employment terminates. Termination may be treated as a dismissal in some circumstances.	Employee remains employed by the client.
Dismissals	Automatically unfair if by reason of the transfer or a reason connected to the transfer that is not an ETO reason.	Void if by reason of the transfer.
Changes to terms and conditions	Automatically unfair if by reason of the transfer or a reason connected to the transfer that is not an ETO reason.	Permissible, except terms incorporated from collective agreements, which cannot be changed to the detriment of the transferring employees in the twelve months following the transfer.
Liability of client and contractor	Contractor inherits pre-transfer liabilities.	Contractor is fully liable. Client remains jointly and severally liable for pre-transfer liabilities which become due in the twelve months following the transfer.

Further information

If you would like to find out more about any of the issues raised in this briefing, or require advice in relation to a specific matter, please contact:

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