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Outsourcing

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Porzio Ríos García

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Porzio Ríos García was founded in 1993. The firm has clients both in Chile and internationally, and provide its clients with a full legal service, including corporate law and intellectual property law covering trademarks, life sciences, data protection, the financial market and labour and employment law. Porzio, Ríos, García consists of a team of highly educated lawyers. Many of them also act as arbitrators in

domestic and international procedures and are academics at the main law schools in the country. The team is completed by an entrenched group of paralegal and administrative staff with extensive experience, and also by scientists in the fields of engineering, chemistry, pharmacy, biochemistry, biotechnology and design.

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1. Outsourcing Market

1.1 IT Outsourcing

Key market developments in IT outsourcing in Chile share the same features as general BP outsourcing. Since 2007, with the enactment of Law N°20.123, which “regulates work in outsourcing and the operation of transitory services companies”, there has been a sustained growth in the outsourcing services market in Chile. The outsourcing regulation that exists in Chile, contributes to keeping this system expanding and more and more companies are opting for outsourcing as a way to allocate and use resources efficiently. This regulation provides security in the provision of services for both outsourced employees and the outsourcing company, who have their rights and obligations well defined in law.

It is attractive for companies to outsource processes or hire transitory services because it increases their productivity, reduces fixed costs and allows them to focus on their main business activity. In addition, it allows companies to access highly trained personnel and adequate infrastructure for services without incurring large investments. It is estimated that the outsourcing services market will continue to grow, with a strong focus on IT outsourcing.

1.2 BP Outsourcing

The key market developments in BP outsourcing are almost the same as those mentioned in **1.1 IT Outsourcing**. Furthermore, it is common in Chile to see the externalisation of processes and services that are complementary to the main activity of the company, this being a tool currently used mainly in large and medium enterprises. It should be noted that, in Chile, there is no limitation to the services and processes that the company may outsource, so there is no impediment in outsourcing works, tasks or services falling under the main line of business of the company.

1.3 New Technology

There have been no relevant impacts of new technologies in the Chilean Outsourcing market so far, but is expected that, over the next few years the emphasis will be on the outsourcing of processes through IT and process automation.

The emergence of tech platforms such as Uber, Cabify and Cornershop has generated a strong change in the market and in labour relations both in Chile and in the rest of world. This is an important contingency issue, given that tech platforms have been established as an alternative to the traditional market economy and generate a series of challenges for governments in employment, tax, regulatory and social matters.

In employment matters, these tech platforms bring the provision of personal services to individual providers, while the company takes the role of intermediary. As such, the classic concept of subordination and dependence between the employer and the employee disappears.

As a consequence of this change and this new way of organising work, a strong debate has arisen to determine whether current labour laws are applicable to these new forms of service provision and whether it is possible to establish the legal nature of the employment or outsourcing relationship between individual providers and intermediary companies.

1.4 Other Key Market Trends

Two bills are currently undergoing parliamentary discussion that could have a significant impact on outsourcing. The first of these projects seeks to regulate tele-work or distance work, while the second project incorporates into the labour legislation a series of reforms related to the duration of the work day, regulation of platform economies, regulation of conventional suspension of the employment contract and other matters that seek to give greater dynamism to the employment relationship. These projects have arisen in response to the needs of the labour market and the regulations surrounding employment in Chile and hope to provide greater adaptability and promote the reconciliation between the work and private lives of employees. It is foreseeable that, given this greater adaptability that the labour market will present, companies will seek to further outsource accessory services and processes that are not directly related to their main activity.

2. Regulatory and Legal Environment

2.1 Legal and Regulatory Restrictions on Outsourcing

In Chile there are 2 types of outsourcing systems.

Contractors/Subcontractor's Regime

This applies when the main or customer company hires a secondary company to perform a specific service, normally under a “Services Agreement”. The customer company does not exercise employment or disciplinary control over the contractor or subcontractor's employees.

The customer company is not required to convert any personnel outsourced under a contractor/subcontractor regime into regular employees, no matter the duration of the services.

The use of outsourced personnel under a contractors/subcontractors regime is permitted even for activities falling under the main line of business of the company. No restrictions regarding the type of services that may be rendered by contractors and subcontractors are set forth in Chilean regulation. Nevertheless, customer companies may not give direct instructions of any kind to the contractor's or subcontractor's personnel. Failure to comply the latter may allow the contractor's or subcontractor's employees to claim a direct employment relationship with the customer company.

Employee’s Provision by a Temporary Services Company (“Empresa de Servicios Transitorios”)

This applies when the customer company (legally calls in this regime “users”) hires a Temporary Services Company to provide employees to perform a specific task. The provided employees are subject to the directions, control and disciplinary faculties of the customer company.

Employees may only be provided by a Temporary Services Company to perform one or more of the following services and/or under the following circumstances (only):

- To replace employees with medical leave, vacations or maternity leaves.
- To work in specific events, such as congresses, conferences, exhibitions.
- To render services in new and specific projects of the customer company, such as the construction of new facilities, expansion to new markets, etc.
- To render services during the period of activities initiation in new companies.
- When the customer company has occasional increases in the demand of its products or services.
- To perform emergency, precise and urgent services that requires immediate execution, such as repairs in the facilities of the customer company.

Employees provided by a Temporary Services Company will be considered as regular employees of the customer company if they rendered services for it exceeding the following time limits:

- 90 days, extendable for another 90 days if the circumstances that motivated the hiring persists at the end of the period, for example in the case of specific events or when there is occasional increases in demand for products or services.
- 180 days, extendable for another 180 days if the circumstances that motivated the hiring persists at the end of the period, for example in the case of specific projects, construction of new facilities or the initiation of new companies.
- The period of the medical leave, vacation or maternity leave. Temporary Services Companies are companies specially authorised to provide this type of outsourced employees, and must meet legal requirements in order to be able to provide these services. The provision of temporary service employees cannot be agreed with a company that does not meet these legal requirements.

2.2 Industry Specific Restrictions

Regarding the contractors/subcontractor’s regime, there are no specific restrictions or compliances issues.

Regarding Employee’s provision by a Temporary Services Company, it is not possible to hire the provision of temporary service employees in the following cases:

- to perform tasks in which the employee has the power to represent the customer company, such as managers, assistant managers, agents or representatives;
- to replace employees who have declared a legal strike as part of the respective negotiation process collective; or
- to assign employees to other companies of transitory services.

2.3 Legal or Regulatory Restrictions on Data Processing or Data Security

It is not necessary to obtain a licence or permit to collect employees’ personal data. The Laws provide that anyone may treat personal data, if it is authorised by law, or if the data subject consents, and in order to consent the individual must be informed about the purpose of the data collection and the eventual communication to the public or third parties, if this is indeed the case.

Nevertheless, this authorisation or consent is not necessary if the personal data:

- is economic, commercial, financial or banking information and it is originated or is collected from sources available to the public;
- is contained in lists relating to a class of persons and is limited to indicating information such as the fact of belonging to such a group, the person’s profession or business activity, educational degrees and address or date of birth;
- is necessary for direct response commercial communications or direct sale of goods and services; or
- when the personal data is processed by private legal entities for their exclusive use, or the exclusive use of their associates and entities that are affiliated with them, for statistical or rate-setting purposes or other purposes of general benefit to these private legal entities.

2.4 Penalties for Breach of Such Laws

An outsourcing contract may be considered as illegal when it is undertaken without complying with the legal requirements for adopting a contract of this kind.

In such cases, the risk exists that the contractors’ employees or Temporally Services Companies’ employees may claim a labour relationship with the main or customer company, demanding from it all the unpaid labour and social security obligations.

Depending on how the services were provided, the Labour Authorities may deem that the services agreements executed by and between the main or customer company and its contractors were just a mechanism for engaging contract-

ing employees through third parties in terms to avoid the payment of labour and social security obligations, practice which is expressly forbidden in Labour Legislation.

In a case such as this, the main or customer company would become directly liable for all labour and social security obligations involved in a labour relationship (ie, wages and salaries, taxes, bonuses, overtime, vacation, severance payments, among others).

A temporary agency employee assigned to a customer company will be deemed to be an employee of the customer company if:

- there is no assignment contract meeting the statutory requirements between the temporally services company and the customer company;
- the employee continues to work for the customer company after the end of the assignment;
- the employee is assigned to a customer company to perform work other than that for which statute permits the use of temporary agency workers;
- the employee is assigned to a customer company for longer than the maximum time permitted by law;
- the temporary agency employment contract is used to disguise what is in reality a permanent employment relationship between the employee and the customer company; or
- the temporally services company is not properly registered with the public authorities.

In addition, the Labour Authority may impose a penalty against the companies which make the illegal outsourcing contract.

In the instance of the use of outsourced personnel under a contractors/subcontractors without complying with the legal requirements for adopting these employees, the main or customer company could suffer administrative sanctions imposed by the Labour Authority with fines.

In case of a temporary employees supply agreement, should this not comply with the legal requirements for adopting these employees, the customer company may be punished with a fine for each employee hired. However, the contractors or the temporary services company might be exposed to a fine for supplying transitory employees without complying with the legal requirements to operate as a temporally services company.

2.5 Contractual Protections on Data and Security

There are no special contractual protections on data and security.

3. Contract Models

3.1 Standard Supplier Customer Model

Regarding a standard supplier customer model, it is necessary to distinguish between the two outsourcing regimes that exist in Chile.

Contractors/Subcontractor's Regime

There are no standard supplier customer models in Chile. In the contractor/subcontractor regime, there is complete contractual freedom and parties may freely agree to the terms and conditions of the service contracts that binds them.

The contractual relationship between the contractor/subcontractor and the customer company may even occur without the need of a written contract. The terms and conditions of the contract between the contractor/subcontractor and the customer company do not affect or alter any legal rights that outsourced employees may have under this regime, or any legal rights that the customer company has as a principal company.

Employee's Provision by a Temporary Services Company ("Empresa de Servicios Transitorios" or "EST")

There are minimal legal mentions that an outsourcing contract must have under the regime of a Temporary Services relationship. Moreover, in this regime the contract must have a special name of "contrato de puesta a disposición de trabajadores de servicios transitorios". The contract between EST and customer company must always be complete and in writing within the period required by law. The minimal legal mentions are:

- grounds invoked for the contracting of transitory services in accordance with the Labour Code (the Labour Code has a list of specific grounds or motives that can allow a company to retain transitory services);
- specifically indicate the jobs or activities for which it is performed;
- indications of the duration of the provision of services (it may not exceed 90 days);
- indications of the agreed price or fee for the services;
- indications of whether or not outsourced employee will be entitled, during the term of said contract, to the use of transportation and use of other collective facilities that exist in the customer company's premises; and
- the individualisation of the parties (EST and customer company).

3.2 Alternative Contract Models

As mentioned in **3.1 Standard Supplier Customer Model**, given the contractual freedom that applies generally to outsourcing, there are no alternative contract models in Chile.

3.3 Captives and Shared Services Centres

Shared services are beginning to proliferate in Chile, such as shared work spaces. In these types of services, various companies (in general, start-ups) share facilities, administration services and mobile spaces. Currently there is no legislation limiting or defining labour responsibilities in these kind of services, so issues regarding lack of compliance of work schedule control, safety regulations, etc, may generate some contingencies that will need to be addressed in the future.

4. Contract Terms

4.1 Customer Protections

As a general practice, an indemnity clause in favour of the customer company is included in the contractors/subcontractor's regime in order to protect the customer company from possible payments that must be made to the contractors/subcontractor's employees should any breaches in the contractors/subcontractor's regime incur with respect to its employees. However, there is no legal regulation regarding customer protections.

4.2 Termination

The termination of the commercial contract is not regulated by law. As such, the parties to the contract can determine when to terminate any contract or agreement.

4.3 Liability

The liability between the customer company and outsourcing company is ruled by the civil contractual liability regime in relation to all those obligations that emanate from the provision of services contract that binds the parties. This is applicable for both the contractors/subcontractors regime and the Temporary Services Company regime.

The Civil Code is the main legal source of regulation for damages claims arising from a breach of an outsourcing contract. Under Chilean civil law, damages are intended to fully repair any injury caused by a breach of legal or contractual obligations.

Injury includes any harm, whether material or moral. A party may recover damages for actual loss, loss of profits and moral damages. In addition, all categories of losses may also be classified as direct and indirect losses. Direct losses are those that consider the necessary and logical effect of the breach of an obligation in regard to what would have been produced had there been no breach. Indirect losses are those that do not have a breach as a direct or immediate cause, but rather independent facts, foreign to the non-execution or delay, have induced harm. According to civil legislation, only direct losses are compensated (Article 1558 Civil Code).

As a general rule, damages are assessed on the basis of the evidence provided by each party during a civil proceeding,

unless the parties have agreed on liquidated damages. Liquidated damages may be agreed by the parties according to the principle of freedom of contract, and a common criterion to establish them is the price afforded to the main obligation.

It is a common commercial practice for outsourcing contracts that the parties establish certain clauses in order to determine liquidated damages as a pre-estimation of damages. This kind of clause is known as a penalty clause and it prevents the damaged party from having to value damages arising from a contract breach. There are some regulations in the Civil Code establishing that the penalty clause may be claimed in all cases in which it has been stipulated, without it being possible for the debtor to argue that the contract breach has not caused prejudice to the creditor or has produced a benefit (Article 1.542 of Chilean Civil Code), and there is the possibility of reducing the penalty clause when it twice exceeds the price of the main obligation ("huge penal clause") (Article 1.544 of Chilean Civil Code).

Another alternative used in outsourcing contracts is that the outsourcing company grants a bank guarantee in favour of the customer company for possible breaches, also considering the price of the main obligation as the foundation of choosing this option.

Since there are no legal regulations on this matter, parties may use different remedies in case of damage, since the owner has the right to use bank guarantees, retentions in parallel and, eventually, claim in a court or arbitration for damages not covered by the previous instruments.

In the contractors/subcontractors regime, the customer company has a legal right of retention on the outstanding payments for the contractor/subcontractor established in the Labour Code, with respect to the amounts that the contractor/subcontractor owes to its employees for breach of labour and social security obligations. In addition, the customer company may claim from the contractor/subcontractor any payment that it is obliged to make to the contractor/subcontractor's employees for breaches in which it incurs in labour and/or social security obligations with its employees.

4.4 Implied Terms

There are no implied terms in Chile relevant to outsourcing contracts under the contractor/subcontractor regime.

There are minimum legal provisions that an outsourcing contract must have under the regime of Temporary Services Company, as explained in **3.1 Standard Supplier Customer Model**.

5. HR

5.1 Rules Governing Employee Transfers

In Chile, it is not possible to make voluntary employee transfers. The current employment relationship must be terminated and a new one has to be established. Therefore, this may not be done unless the employee consents to it and, in that case, the employer should terminate the employment contract and pay the corresponding statutory or contractual indemnity.

5.2 Trade Union or Workers Council Consultation

It is not required to consult a trade union or a workers' council for the employer to determine whether or not to outsource a process or service. It is understood that this decision is part of the power of direction and command exercised by the employer.

5.3 Market Practice on Employee Transfers

In Chile, it is not possible to make voluntary or contractual employee transfers unless the employee consents to it and, in that case, the employer should terminate the employment contract and pay the corresponding indemnity and the new employer should start a new employment relationship. In order to avoid paying compensation for a termination of contract, it is common for an employee to be transferred to a new employer by signing a like-for-like employment agreement, which would entitle the employee to no severance indemnity, and have the new employer recognise the same seniority rights that the employee held with the original employer.

6. Asset Transfer

6.1 Asset Transfer Terms

There are no special terms that apply to asset transfer in outsourcing agreements.

As a general rule of protection for employees, the Labour Code provides specific guidelines in the case of total or partial modifications to the company's ownership, which are protected under the labour continuity principle (Article 4 of the Labour Code). This labour continuity operates as an automatic implementation of the law and means that ownership changes do not affect the employee's rights and obligations arising from individual or collective contracts, which will remain in force with the new employer. Hence, if the customer company purchases assets from the outsourcing company, this principle of labour continuity would apply in most cases. It is necessary to consider that this is more feasible in the contractor/subcontractor regime, given that the regime of transitory services companies has relevant legal restrictions. Notwithstanding this, it will always be necessary to confirm the application of this principle to the specific case in hand, analysing the special characteristics of each ownership modification.

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