

Outsourcing

Contributing editor
Mark Lewis



2016

GETTING THE
DEAL THROUGH

Chile

Oscar Aitken and Daniella Torres

Carey

Market overview

1 What kinds of outsourcing take place in your jurisdiction?

The main kinds of outsourcing that take place in Chile are:

- legal services outsourcing;
- IT outsourcing;
- facilities management outsourcing, such as internal maintenance and repair, cleaning and catering;
- general business services outsourcing, such as security;
- business process outsourcing, such as administration, general finance and accounting, HR functions, customer services, sales, logistics, marketing, debt collection, transportation and storage; and
- outsourcing of activities linked to the main activity of the business, such as waste treatment, desalination plants, operation and maintenance of power plants.

2 Describe the recent history of outsourcing in your jurisdiction. How well established is outsourcing? What is the size of the outsourcing market in your jurisdiction?

Outsourcing has taken place in Chile for decades, yet statistical data shows that it is not in generalised use and that its presence in Chile is lower than in other jurisdictions. In fact, according to the Labour Survey 2011 carried out by the Labour Board, outsourcing was used by only 37.8 per cent of the businesses in Chile in 2011. The survey also shows that the increase in this practice has been slow, increasing by only 7.3 per cent between 2008 and 2011.

Notwithstanding the foregoing, the use of outsourcing has extended to businesses of all sizes and areas, in both the private and public sectors. Outsourcing in Chile is mostly concentrated on businesses classified as large businesses. Over 53 per cent of the large businesses use outsourcing. Outsourcing is mostly used by companies in areas such as social services and health, construction, fishing and agriculture, where 59.2 per cent, 56.9 per cent, 44.9 per cent and 41.5 per cent, respectively, use outsourcing. The minimum use of outsourcing is in education, in which only 28.7 per cent of the businesses outsource.

However, regarding the role of outsourcing in Chile, the increase has been both significant and consistent. In 2011 the outsourcing business in Chile produced around US\$634 million and, according to the General Secretariat of the Presidency, accounted for approximately 12 per cent of all employed personnel in the jurisdiction. In addition, as reported by the National Statistics Institute, out of the 826,000 jobs created in Chile between March 2010 and August 2013, 45.5 per cent corresponds to jobs created by the outsourcing business. According to the employment survey carried out by the National Statistics Institute for April–June 2014, the number of employees employed for direct services (currently corresponding to 82.6 per cent of all employees in Chile) reduced by 0.2 per cent in the last year, while employees hired to render services to third parties increased by 3.3 per cent to 17.4 per cent (10.3 per cent corresponding to outsourced personnel). However, in the first trimester of this year, outsourced employment showed its first decrease for this period since the survey was established in 1996, specifically in the area of financial services.

This increase has been particularly evident in the mining industry, where in 1982 (when the first outsourced employees appeared in the business) there was one outsourced employee for every 187 direct employees. By 2007, this had changed to 2.1 outsourced employees for each direct employee.

Policy

3 Has the government of your jurisdiction adopted policies to encourage the development of the jurisdiction as an outsourcing centre, either for the domestic market or to provide outsourcing services to foreign customers?

No.

4 Are there in your jurisdiction any fiscal or customs incentives, development grants or other government incentives to promote outsourcing operations within your jurisdiction?

There are no such incentives. Further, some governmental development grants applied for by companies using outsourcing are conditional on a prior authorisation by the respective government institution.

Legislation and regulation

5 Is outsourcing as a commercial or operational concept specifically recognised and provided for in your legal system? How?

Outsourcing has little specific legal recognition in Chile and is mostly regulated by general contract law and, to some extent, by labour laws.

The Chilean Civil Code includes specific rules regulating owners' liabilities with subcontractors engaged by main contractors under lump sum or reimbursable cost construction contracts, as will be further detailed below.

Outsourcing is also recognised under Chilean labour law, basically to regulate the labour aspects associated to this practice. This regulation is provided by Law No. 20,123 of 2006, also known as the Subcontracting Act, and is applicable to all kinds of outsourcing to the extent that the requirements stated therein are met. Here, outsourcing is defined from the perspective of the outsourced services, defining them as:

such provided under an employment contract, by an employee for an employer, denominated contractor or subcontractor, when the latter, under a contractual agreement, is in charge of performing works or services, on its own account and risk and through dependant employees, for a third person or entity which is the owner of the works, business or worksite in which the services are rendered or the works performed.

Based on the legal definition and the rulings of the Labour Board on the issue, works or services will constitute outsourcing for labour purposes only to the extent that the following requirements are met:

- the employees render the services to their employer (contractor) under an employment contract;
- the contractor has a contractual relationship with the owner of the worksite or business (principal company) under a contract that stipulates the services to be rendered;
- the rendering of the services is on the account and at the risk of the contractor;
- the services must be rendered through contractor's employees;
- the services must be rendered for a worksite or business owned by the principal company; and
- the services must be continuous or habitual, not responding to specific, extraordinary or occasional needs of the business.

It should be noted that outsourcing under Law No. 20,123 only includes services rendered by contractors through a contractor's employees working under a contractor's directions; it does not include personnel supply. Personnel supply is prohibited under Chilean law unless contracted with entities registered with the Labour Board as transitory service providers and only in the cases and for the terms provided by law. If a business receives habitual services from third-party employees without fulfilling the aforementioned requirements, the principal company may be deemed the employer of the outsourced personnel and, therefore, become directly liable for all the corresponding labour and social security obligations. Additionally, if the labour authorities deem that the service agreement serves as a means to simulate for contracting employees through third parties to avoid the payment of the corresponding obligations, the principal company may be punished with fines between 5 and 100 monthly tax units (UTM). Companies supplying personnel without fulfilling the legal requirements as a transitory service provider may be punished with fines of between 80 and 500 UTM.

Finally, chapter 20-7 of the Compilation of Rules of the Superintendency of Banks and Financial Institutions (chapter 20-7) regulates outsourcing by banking institutions, defining it as the 'execution by an external provider of continuous or occasional services or activities which may normally be performed by the company that outsources the services'.

The regulation applicable to outsourcing under these and other laws and regulations is detailed in question 6.

6 Is there any legislation or regulation that directly prohibits, restricts or otherwise governs outsourcing, whether in (onshore) or outside (offshore) your jurisdiction?

In general, outsourcing may be used by any company for any kind of services, without any time limit or scope restrictions. Notwithstanding the foregoing, the following legislation and regulation directly prohibits, restricts or otherwise governs outsourcing:

- articles 2003 and 2004 of the Chilean Civil Code establish rules concerning owners' liabilities in connection with subcontracts in the construction industry. It provides, in summary, that subcontractors hired by a main contractor for the construction of a building will be entitled to sue the owner of the works in subsidy of the main contractor up to the amount that the owner in turn owes the main contractor;
- Law No. 20,123 of 2006 regulates the labour aspects associated to outsourcing. Under Law No. 20,123, in cases of outsourcing, the principal company has a joint and several liability with the contractor in the event of default by the latter of its labour or social security obligations, or both. This liability may be reduced to a subsidiary one if the principal company controls the fulfilment by its contractors of their labour and social security obligations with the personnel assigned to its services, through the following safeguard measures:
 - requesting from its contractors the certificates of compliance of labour and social security obligations issued by the Labour Board and other authorised entities; and
 - deducting from the payments that the principal company owes to contractors all the amounts owed by the latter and using such funds to pay the unfulfilled labour or social security obligations directly to the employees or respective social security institution.

The same liability and safeguards are applicable to contractors in respect of the employees of its subcontractors. The principal company will have a subsidiary liability (only) in the event of default by the subcontractors of their labour or social security obligations.

Under this same law, the principal company is also bound to adopt all necessary measures to effectively protect the life and health of all employees rendering services in its worksite or business, regardless of who their employer is.

Law No. 16,744 of 1968 establishes an insurance mechanism for work accidents and professional illnesses and also provides health and safety regulations to prevent the latter. Under this law:

- companies hiring services that form part of its business through contractors and subcontractors, must implement a health and safety management system and issue an internal contractor and subcontractor regulation when involving more than 50 employees performing such services, regardless of who their employer is;
- businesses or worksites with more than 25 employees rendering services in the same place, regardless of who their employer is, must establish an on-site safety and hygiene committee; and

- companies employing more than 100 people or having more than 100 people rendering services, directly or through contractors, must establish a risk prevention department. According to the Labour Board and the Social Security Superintendency's interpretation of this law, this obligation may not be outsourced.

Article 381 of the Chilean Labour Code forbids the replacement of employees on strike in certain scenarios. Whenever the employer is not permitted to replace employees on strike, he or she may not do so either directly or through contractors.

Outsourcing by the public sector is subject to a specific regulation on public contracting. Law No. 19,886 on Public Procurement and its specific regulation (Decree No. 250) state that procurement and services agreements with the government may be partially outsourced, but the responsibility will still remain in full with the contracting party. Additionally, there can be no outsourcing when the bidding conditions prohibit it and when the company to which procurement and services agreements are being outsourced is affected by one of the ineligibility causes for contracting with the government. Further, outsourcing by public-sector contractors is generally subject to limits on the percentage of the works or services that may be outsourced and usually requires prior authorisation by the relevant institutions.

Under Law Decree No. 3,607 of 1981, all banking and financial institutions of any nature, public entities, companies that transport valuables, strategic companies and public services to be determined will have to establish their own security guards service and to maintain an internal security structure. These functions may not be outsourced.

7 What are the consequences for breach of the laws directly restricting outsourcing?

The consequences for breach of the laws directly restricting outsourcing are the following:

- under Law No. 20,123, if the principal company does not control the fulfilment by its contractors of their obligations with the personnel assigned to its services, the former will be deemed jointly and severally responsible for any and all unpaid labour and social security obligations. If the principal company fails to take health and safety measures to effectively protect workers, it will be directly liable for any work accidents or professional illnesses suffered by the contractor and subcontractor's employees as a result of such a failure;
- according to a recent ruling of the Chilean Supreme Court, the principal company will be liable if a dismissal of a contractor's employee is ruled null and void (article 162 of the Chilean Labour Code). If the contractor as employer to pay the social security contributions of the employees, and the employee is dismissed and social security contributions remain unpaid at the time of termination, the principal company will be responsible for the outstanding social security contributions and also for the remuneration and other labour benefits contained in the employment contract accrued between the date of the dismissal date and the date of the payment of the unpaid social security contributions. Such sanction had always been considered to be applicable to the direct employer but the Supreme Court has extended such effects to the principal company;
- infringement of the above-mentioned obligations of Law No. 16,744 is punished with fines between one and 24 monthly vital wages from the A scale of the borough of Santiago (approximately between US\$58 and US\$1,400);
- if an employer illegally replaces personnel on strike through outsourcing, such conduct may be deemed an unfair labour practice and be punished with fines of between 10 UTM and 150 UTM;
- the breach would entail the punishment specifically stated in the specific bidding terms and conditions of such contracts. However, it is likely that this infraction, if material, may trigger the termination of the contract or the payment of fines, or both; and
- the breach of the obligation to establish an internal security structure under Law Decree No. 3,607 is punished with fines ranging between five and 100 minimum wages (US\$1,950 and US\$39,000).

8 Describe any sector-specific legislation or regulation that applies to outsourcing operations.

There is sector-specific legislation or regulation that applies to outsourcing operations in Chile in the following areas.

Banking

Under chapter 20-7, institutions may only outsource services authorised therein under the terms and conditions set forth in the same. Such authorised services are:

- data processing services;
- other significant services with prior authorisation of the Superintendency of Banks and Financial Institutions (SBIF); and
- general services that do not require prior authorisation of the SBIF, such as security, janitorial services, repair, maintenance, mailing, payroll and others expressly exempted by the SBIF rules.

Some of the conditions that must be fulfilled while outsourcing services are:

- maintaining a registry of all outsourced services;
- making sure that the hiring and follow-up performance of suppliers is duly audited; and
- making sure that the service provider maintains the confidentiality, integrity and availability of the information of the institution and its clients.

Chapter 20-7 also establishes conditions and qualifications to be complied with by the provider. Outsourcing in jurisdictions that do not have an international investment risk assessment qualification is forbidden. Certain safeguards must be taken for outsourcing with jurisdictions qualified as riskier than Chile.

Infraction may be punished with fines of up to 5,000 Unidades de Fomento (UF), which may be quintupled in the case of reoccurrence. Additionally, the directors, managers or officers responsible for the infraction may also be fined up to 1,000 UF.

Agriculture

Under article 92-bis of the Labour Code, contractors that render services for agriculture, exploitation of lumber and other related activities must be registered in a special registry held by the respective Labour Inspection. Infraction may be punished with fines of between 1 UTM and 60 UTM.

Security

Under Law Decree No. 3,607, individuals or entities intending to hire security services involving armed personnel must file a request to the Ministry of Interior. Infraction is punished with fines of between 25 and 125 minimum wages (US\$9,750 and US\$48,750) or of 125 and 250 minimum wages (US\$48,750 and US\$97,500) in the event of recurrence.

Additionally, entities providing services on matters related to security or training of security guards must have a prior authorisation from the Chilean Police Force. Infraction constitutes a crime and may be punished with fines and imprisonment.

Construction

Under the General Law on Construction and Urbanism, constructors will be responsible for failures in construction, including works performed by subcontractors, notwithstanding the legal actions that the constructor may exercise against its subcontractors.

Mining

Under the Mining Safety Regulation, all mining companies hiring services with third parties must fulfil the following requirements:

- inform the National Geology and Mining Service (NGMS) of all works performed through contractors, updated every six months. Failure will cause the principal company to be deemed as the direct performer of such works or services;
- extend all environmental commitments and obligations to its contractors and subcontractors; and
- obtain information of all accidents occurring in the works of its contractors and subcontractors and inform the NGMS before the 15th of the following month.

Infraction is punished with fines of between 20 UTM and 50 UTM, which may be doubled in the event of reoccurrence.

9 How does competition regulation apply to outsourcing contracts or structures?

Law Decree No. 211 of 1973 (DL 211) establishes the legal framework for antitrust matters in Chile. Article 3 of DL 211 states, generically, that anyone

who carries out or enters into any conduct, act or agreement that hampers or restricts free competition or that tends to produce such effects, will be punished with the measures stated therein. Likewise, it broadly enumerates certain events, acts or agreements that are deemed to affect free competition. However, as the conduct included in DL 211 is merely exemplary, an outsourcing contract (which is not listed therein) could, potentially, be considered an infringement of DL 211 if such a contract does, in fact, restrict or hamper free competition or tend to produce such effects.

In Chile, there are no limits established in the DL 211 or recent case law regarding the terms of these contracts; hence an outsourcing contract could become anti-competitive depending on the specific characteristics of the market in a case-by-case analysis under the rule of reason. For instance, the national economic prosecutor has challenged the terms of the contracts and the existence of automatic renewal clauses that, in its opinion, foreclose the waste disposal market excluding potential competitors. However, the Antitrust Court and the Supreme Court ruled against the national economic prosecutor. Notwithstanding this, and considering that the statute of limitation had passed, no analysis regarding the potential competition effects was carried out by any of the courts.

10 Are there any draft laws or legislative initiatives specific to outsourcing that are being developed or are contemplated?

There are five legislative initiatives specific to outsourcing that are being developed:

- a draft law presented on 31 October 2007, proposing to prohibit the use of outsourcing for the performance of activities deemed dangerous to human health;
- a draft law, presented on 10 November 2010, proposing, among other matters, to restrict outsourcing of activities belonging to the line of business of the principal company and to prohibit outsourcing between related entities;
- a draft law presented on 8 June 2011, proposing to impose on the principal company an obligation to maintain all safety implements to be used by contractor employees in optimum conditions;
- a draft law presented on 23 November 2011, proposing to impose on the principal company the obligation (currently merely a faculty) to request from its contractors the certificates of compliance with labour and social security obligations and, if the contractor does not comply, deducting unfulfilled amounts (from the payments owed to the contractor) and paying them to the corresponding employees or social security institutions; and
- a draft law presented on 4 December 2013, proposing to give the labour courts jurisdiction over all matters regarding work-related accidents and professional illnesses, including employees who render services under the subcontracting regime. It also proposes to make the principal company and the contractor jointly and severally liable for the payment of any severances arising from work-related accidents or professional illnesses. This bill also proposes to make the obligations arising from Law No. 16,744 (as detailed in question 6) apply to all companies that outsource services, regardless of whether or not such services are part of the principal company's line of business.

Contractual considerations

11 What are the typical corporate or quasi-corporate structures or vehicles used to create outsourcing arrangements?

Except for personnel supply contracts, which are not permitted unless under the conditions mentioned in question 5, there are no general limitations to the outsourcing structures that may be agreed by the parties. The typical structures used in Chile are:

- captives;
- hybrid structures, such as build operate transfer (BOT) and operation and maintenance (O&M) vehicles;
- virtual captives;
- carveouts; and
- corporate or contractual joint venture vehicles.

12 What forms of outsourcing contract are usually adopted in your jurisdiction?

The forms of outsourcing contracts usually adopted in Chile are:

- framework agreements plus other contracts;
- master services agreements plus work orders;
- straightforward outsourcing contracts; and

- a combination of any of the above forms of contract combined with one or more of the corporate or quasi-corporate structures listed above.

13 Outline the contractual approaches that are adopted in your jurisdiction to address regulations affecting outsourcing.

Chapter 20-7 establishes requirements regarding the content of outsourcing contracts executed by banks, which includes stipulating clear standards of service, security of information clauses, confidentiality clauses and restrictions on subcontracting.

Additionally, it is common for outsourcing customers in Chile to include indemnity clauses, including damages originated by breach of contract, infraction of applicable law and breach of labour, social security or health and safety obligations.

Data protection

14 Identify the principal data protection legislation applicable to outsourcing operations.

The principal data protection legislation in Chile is Law No. 19,628 of 1999 on Protection of Personal Data (DPA).

15 How do rules on the ownership, location, processing and distribution of data apply to outsourcing in your jurisdiction?

Under the DPA all processing, treatment, storage, disclosure and use of personal data (ie, information regarding identified or identifiable persons) must be authorised either by law or by the data subject via prior, informed and written consent. For this purpose, a general authorisation will not suffice, given that the data subject must be clearly informed of the purpose of the collection, the use to be given to such data and the possibility of disclosing such information to third parties. Moreover, the collected information may only be used within the boundaries of the authorisation and, therefore, any new use of the personal data must be authorised by the data subject. The authorisation may be freely revoked at any time, but with no retroactive effects.

The processing of personal information shall not require the above-mentioned authorisation in the following cases:

- if performed by an entity for its internal use for statistic purposes or, in general, for the benefit of the owner of the information; or
- if the information is obtained from public access sources.

The aforementioned exceptions are not applicable to 'sensitive data', which also includes any information that is part of clinical records.

Additionally, the treatment of commercial, economic, financial and bank information (commercial data) is subject to the following rules:

- the purpose of the treatment of commercial data must be exclusively for commercial and credit risk assessment process;
- commercial data may not be requested when the subject is in a situation of medical emergency, during access to education and during job recruitment;
- treatment by the distributors of commercial data must follow the principles of legitimacy, access and opposition, information, data quality, finality, proportionality, transparency, non-discrimination, limitation in use and security on private data treatment;
- distributors of commercial data must implement a system in order to register every person or entity accessing personal data;
- distributors of commercial data must designate a person in charge of data treatment, in order to allow data subjects to enforce rights granted by the DPA; and
- the publication of renegotiated obligations is forbidden.

The DPA does not regulate the cross-border transfer of personal data, and there are no restrictions to the transfer of personal data to other countries. Therefore, to the extent that the general data processing rules set forth in the DPA are met, the cross-border transfer of personal data is valid and legal. It should be noted that the DPA applies to all personal data collected in Chile and in relation with a data subject who is in Chile, regardless of where the data processing takes place.

The DPA does not set forth any specific standards of security or obligations regarding personal data. However, for the banking industry, chapter 20-7 mentioned above requires some specific security standards to be applied, such as encryption.

Chile has adopted the UNCITRAL model in this matter. Notwithstanding the foregoing, a bill to amend the DPA is being discussed in the Congress. If approved, these modifications may impose similar standards to those used under the Spanish legislation.

Labour and employment

16 What is the relevant labour and employment legislation for outsourcing transactions?

See questions 5, 6, 7 and 8.

Additionally, in July 2014, Law No. 20,760 was published in the Official Gazette (Multiple Employer Act). This law amends the Chilean Labour Code, among others, modifying the concept of 'enterprise' for employment and social security purposes and allowing two or more companies or enterprises to be considered as a sole employer for labour and social security purposes when they have a common labour direction and when other conditions occur, such as the products or services they develop or render are similar or supplementary, or they have a common controller. The declaration of 'sole employer' takes place by judicial ruling.

The Multiple Employer Act is relevant for outsourcing transactions between related entities, as it increases the risks associated with these practices. Under the Multiple Employer Act, crossed services between companies of the same business group may support a claim for the declaration of 'sole employer' between all such entities.

- The declaration of 'sole employer' has several consequences, such as:
- the companies that are declared as a sole employer shall be jointly and severally liable for compliance with the labour and social security obligations arising from the law, the individual contracts and collective instruments;
 - the employees of all the companies considered as the sole employer will be entitled to establish one or more unions, or to maintain their existing unions and to bargain collectively with all the companies as a sole employer, or with each of them individually; and
 - the companies may be subject to fines of between 20 and 300 UTM (which may be doubled or tripled depending on the number of employees of the companies involved) if the court deems that the companies involved have conducted simulation or subterfuge to violate employees' rights.

No rulings have yet been issued under this Act, so how it will be applied by the courts still remains to be seen.

17 In the context of an outsourcing, how does labour and employment law apply to a change in initial or subsequent service providers, or transfers of undertakings or parts of undertakings?

The joint or subsidiary liability of the principal company for unfulfilled labour obligations of its contractors and subcontractors and the direct liability in the case of work accidents and professional illnesses, established by Chilean law and explained above, are limited to the period in which the corresponding employees rendered services for the principal company. Therefore, the change of a service provider ceases any further liability of the principal company regarding the subsequent unfulfilled labour, social security obligations or compensation for subsequent accidents of the employees of the initial provider. Notwithstanding the foregoing, the termination of the outsourcing does not extinguish the principal company's liability, as noted previously, for labour or social security obligations that are unfulfilled or for accidents that have occurred during the rendering of services, all of which are only extinguished according to the corresponding statute of limitations.

On the other hand, the effects of the transfer of an undertaking will have to be determined on a case-by-case basis. Article 4 of the Labour Code provides that the changes in connection to the ownership, possession or holding of an enterprise or part thereof shall not affect the rights and obligations of the employees under their individual or collective employment contracts. To define how labour law applies to transfers of undertakings, how the specific case fits into the scenario regulated by article 4 will have to be defined. If it does not apply, the transfer will have the same labour effects as those described in the paragraph above with regard to the change of providers.

18 Are there any requirements to consult or negotiate with organised labour, works councils or employees regarding an outsourcing?

There are no such requirements. However, in order to prevent future opposition or complaints of unfair practice by the employees or unions, it may be advisable to inform them in advance.

19 Are there any notification or approval requirements that apply to an outsourcing transaction?

Except as noted in question 5 regarding personnel supply, there are no such requirements.

20 What are the legal implications, including penalties, for non-compliance with the labour and employment rules and procedures?

See question 7.

21 What are the key immigration and visa requirements for employees of customers or providers entering your jurisdiction to manage outsourced operations or to receive or provide training?

Foreign nationals require a visa or a special work permit to carry out remunerated activities in Chile. The visas and permits available for these purposes are:

- an employment contract visa, which may be granted to any foreigner who comes to Chile to render services under an employment contract with an employer with legal domicile in Chile. This visa is granted for a maximum term of two years and may be renewed for the same period of time, indefinitely;
- a temporary residence visa, which may be granted to a foreigner who intends to live in Chile and evidences family ties or interests in the country, provided his or her residence is considered useful or advantageous for the country (ie, as an investor, business person, scientist, consultant, etc). It has a maximum term of one year, renewable once. After one year of residence in the country, the holder may request a permanent residence, and after two years of residence under a temporary residence visa, the holder must request permanent residence. The holder of a temporary residence visa may perform any remunerated activity in Chile; and
- a special work permit for tourists, which is granted to foreigners who come to Chile to develop remunerated activities for a brief period of time and has a 30-day duration, renewable until the expiration of the foreigner's tourist card, which is usually granted for 90-day periods. It may only be requested in Chile through the Immigration Department of the Ministry of Interior.

Taxation

22 Outline the taxation rules that apply to the establishment and operation of outsourcing captives or similar establishments in your jurisdiction.

In general terms, the establishment and operation of outsourcing captives or similar establishments in Chile would be subject to the regular tax regime applicable for local companies. There are no special tax rules applicable specifically to outsourcing companies or services. Therefore, from a high-level perspective, the following taxes would apply:

- income tax: first category income tax (corporate tax) is imposed on income derived from investments and certain commercial, industrial, and mining activities. It applies irrespective of whether the enterprise is organised as a legal entity, branch, or permanent establishment. Its current rate is 20 per cent and it is assessed on an accrual basis. Generally, corporate tax is assessed on the net taxable income determined under full accounting records, where income is defined as gross income, minus the costs and expenses required to produce that income; as corporate profits flow from the corporate sphere to the shareholder or partner sphere, the corporate tax previously paid works as a form of advanced tax payment, which is creditable against final income taxes applicable at the shareholders level. The final income taxes are the global complementary tax, which levies income of resident individuals, and the withholding tax, which levies income of non-resident individuals or entities. In the case of profit distributions or dividends paid by a Chilean entity, the withholding tax rate is 35 per cent, with the corporate tax paid on the same profits being creditable against the withholding tax;
- VAT: VAT imposes a 19 per cent tax on the habitual sale of tangible goods, real estate totally or partially built by the seller, imports and the provision of certain types of services. Exports and services payments made abroad, subject to withholding tax, are generally exempt from VAT. Additionally, services qualified as exportation by the Chilean Custom Services are exempt from VAT if they satisfy specific requirements. There is no special VAT regime applicable to outsourcing companies. Therefore, a case-by-case analysis regarding the nature of the services rendered would need to be made in order to determine the applicable VAT regime;
- transfer pricing rules: Chilean transfer pricing rules have been modified with the 2012 tax reform. New article 41 E of the Income Tax Law establishes certain rules regarding transfer pricing in cross-border operations between related parties. The Chilean IRS will be able to challenge prices, values or profitability established in cross-border operations between related parties when they do not conform to market values. An operation will be considered challengeable when it is not in line with what independent parties would have agreed upon in similar operations and circumstances (arm's-length principle). If the taxpayer is audited by the Chilean IRS, it must prove that its operations with related parties were made under normal market conditions. For this purpose, the taxpayer will be able to use a series of accepted methods, such as:

/Carey

Oscar Aitken
Daniella Torres

oaitken@carey.cl
dtorres@carey.cl

Isidora Goyenechea 2800, 43rd floor
Las Condes
Santiago
Chile

Tel: +56 2 2928 2200
Fax: +56 2 2928 2228
www.carey.cl

- the method of a comparable non-controlled price;
- the resale price method;
- the cost plus margin method;
- the profit division method;
- the net margins transactional method; and
- a series of residual methods, if it is not possible to apply one of the previous methods.

23 Outline the indirect taxes in your jurisdiction that apply to the import of offshore outsourcing services by companies within your jurisdiction.

Outsourcing services provided offshore are generally subject to a withholding tax, which is triggered when payments are made from Chile. Such a withholding tax may vary depending on the nature of the services rendered, the general rule being a 35 per cent rate. Services that qualify as professional or technical activities may be subject to a reduced 15 per cent withholding tax rate (20 per cent if parties are related or the service provider resides in a tax haven jurisdiction). If services are subject to withholding tax under article 59 of the Income Tax Law (and such tax is effectively applicable), no VAT would apply to such activity.

Withholding tax applicable to payments made from Chile or services rendered abroad, may be exempt if a tax treaty is in force between Chile and the residence country of the service provider. If services rendered are exempt from withholding tax under a tax treaty article or under a special internal rule, VAT application should be tested only if the specific service is rendered in Chile.

Current issues

24 Identify and give details of any notable cases or administrative or regulatory determinations within the past three years in your jurisdiction that have directly involved outsourcing.

In 2012, several unions representing truck driver assistants working for affiliated subcontractors of Chile's largest bottling company filed a claim asking, among other things, the court to declare that the bottling company and the subcontractors were an economic unit for labour and social security purposes and that the different companies in the holding were involved in a simulation in order to avoid labour and social security obligations. The

employees requested that the court recognise that the employees would not be employed by the corresponding subcontractors but by a holding headed by the bottling company. The court ruled against the employees in March 2014 and subsequent remedies were abandoned.

Considering the enactment of the Multiple Employer Act this year, it is possible that lawsuits of this nature will proliferate, and how this Act will be interpreted and applied in practice is still uncertain.

25 What are the main challenges facing outsourcing within, from or to your jurisdiction?

At present the main challenge for outsourcing in Chile is overcoming political and social pressures that question the effect that outsourcing has had on employees in Chile. Even though this is not a general opinion, there have been recurrent claims that outsourcing has a pernicious effect on employment stability and employee rights, allegedly causing lower salaries in outsourced employment and fragmentation of the work force, which affects the right to create unions and negotiate collectively, among other matters. This has been of particular relevance in the mining sector, where studies on outsourcing have showed that it has had both economic and subjective implications, resulting in employment instability and inequality. In fact, a common phenomenon, particularly important in the mining industry, is that owner-employees have higher salaries and better living and working conditions than those of contractor-employees working at the same site. It is calculated that the salary of a direct employee in the mining industry is 1.6 times higher than that of an outsourced employee.

Additionally, Law No. 20,123 has been criticised as having shortcomings, such as allowing the outsourcing of tasks belonging to the main activity of the business, permitting different employment conditions between direct and outsourced personnel rendering the same services, leaving unsolved unionisation difficulties for outsourced personnel and maintaining a concept of enterprise that does not take into account the existence of economic units between related entities rendering crossed services to each other. This last criticism was in the public eye last year due to the 2012 claim described in question 24. Claims of this sort may probably increase and perhaps have a better chance of success under the new Multiple Employer Act. It is also claimed that the fulfilment of the provisions of Law No. 20,123 is not duly monitored by the labour authority, rendering it ineffective.

There have been several protests in the last few years associated with the labour implications of outsourcing.