

Montenegro

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1 Regulatory Framework

1.1 Are there any national laws that specifically regulate outsourcing transactions?

No national laws in Montenegro specifically regulate outsourcing transactions.

1.2 Are there any additional legal or regulatory requirements for certain types of outsourcing transactions, for example: a) public sector transactions; b) business process transactions; c) financial services transactions; d) IT transactions; and e) telecommunications transactions?

Public sector transactions

Outsourcing transactions in the public sector are subject to public procurement rules. Certain legal requirements, including the tender offer system, generally apply to the outsourcing of the certain activity from the public sector to the private sector.

Business process transactions

There are no specific requirements pertaining to a business process transaction.

Financial services transactions

The Law on Banks (*Official Gazette of Montenegro no. 017/08, 044/10, and 040/11*) stipulates that banking activities are conducted only by banks. Based on this legal requirement, it may reasonably be concluded that a bank cannot outsource these activities to a third party.

IT transactions

There are no specific requirements regarding an IT transaction.

Telecommunications transactions

There are no specific requirements regarding a telecommunications transaction.

1.3 Are there any further legal or regulatory requirements for outsourcing transactions in any particular industry sector?

Some industry sectors are subject to specific requirements pertaining to licences, approvals and authorisations (e.g. insurance, energy, telecommunications, etc.). In the case of an outsourcing transaction in one of these sectors, these requirements ought to be obeyed.

1.4 Is there a requirement for an outsourcing transaction to be governed by local law? If it is not to be local law, is there any generally accepted norm relating to the choice of governing law?

No requirement for an outsourcing transaction to be governed by the Montenegrin law exists. The parties are generally free to select the law governing their commercial transactions. On the other hand, in the case that there are specific legal requirements which pertain to a specific sector, these requirements should be met, irrespective of the choice of law.

2 Legal Structure

2.1 What are the most common types of legal structure used for an outsourcing transaction?

Direct outsourcing

Direct outsourcing is the most common type of legal structure for an outsourcing transaction. Under this structure, the contract regulating outsourcing is concluded directly between the customer and the supplier.

Indirect outsourcing

This structure is similar to direct outsourcing, apart from that the supplier subcontracts another supplier to provide the agreed outsourcing services.

Multi outsourcing

Multi outsourcing means that the customer outsources a number of separate activities to different suppliers.

Joint venture outsourcing

Outsourcing may also be performed through a new joint venture company jointly established between the customer and the supplier.

3 Procurement Process

3.1 What is the most common type of procurement process that is used to select a supplier?

Procurement process is the customer's obligation only in the context of public procurement. Nevertheless, even in the case of a private commercial transaction, the customer may decide to organise a procurement process for the purpose of making the best choice.

This process, including its phases such as due diligence, request for information, tender and negotiations, depends on the customer's business decision.

4 Term of an Outsourcing Agreement

4.1 Does national or local law impose any maximum or minimum term for an outsourcing contract?

The Montenegrin legislation does not impose any maximum or minimum term on an outsourcing transaction. The term depends on the parties' agreement.

4.2 Does national or local law regulate the length of the notice period that is required to terminate an outsourcing contract?

The Montenegrin law is silent pertaining to the notice period required to terminate an outsourcing contract. The notice period is also left to negotiation between the parties.

5 Charging

5.1 What are the most common charging methods used in outsourcing transactions?

The most common charging methods used in outsourcing transactions are fixed price (in cases when the entire volume can be predicted), unit price, and cost plus method (the cost of services plus the agreed margin).

5.2 What other key terms are used in relation to costs in outsourcing transactions?

Some of the key terms frequently used in relation to costs in outsourcing transactions are indexation, different charge variation mechanisms and interest on late payments.

6 Transfer of Assets

6.1 What formalities are required to transfer, lease or license assets on an outsourcing transaction?

Formalities depend on the type of assets, and whether the particular asset is transferred, leased or licensed. As for movable properties, they are transferred on the basis of an agreement and by handing over the properties to the buyer. Immovable properties are transferred based on a certified agreement on transfer and inscription in the Real Estate Cadastre. The assets are leased based on the lease agreement concluded between the lessor and the lessee.

6.2 What are the formalities for the transfer of land?

Land is transferred on the basis of the certified agreement on transfer and inscription in the Real Estate Cadastre. Both items are cumulatively required.

6.3 What post-completion matters must be attended to?

No specific post-completion requirements exist.

6.4 How is the transfer registered?

The transfer of real estate, including land, is registered in the Real Estate Cadastre. As for the transfer of movable properties, they are not subject to registration, except in certain specific cases (e.g. transfer of vehicles).

7 Employment Law

7.1 When are employees transferred by operation of law?

Under the Labour Law (*Official Gazette of the Montenegro no. 049/08, 026/09, 088/09, 026/10, 059/11, 066/12, 031/14, and 053/14*), transfer of employees by operation of law occurs in cases of the company's status change (e.g. demerger, spin off), and change of employer. This piece of legislation does not regulate this institute in detail, and this also refers to outsourcing transactions. On the other hand, if an outsourcing transaction includes demerger or spin off (e.g. the new company conducts the outsourced activities), this situation will be deemed as a change of employer from the perspective of the Labour Law, and the employees will be transferred by operation of law.

7.2 On what terms would a transfer by operation of law take place?

In the case of a change of employer based on the Labour Law, i.e. transfer by operation of law, the new employer must enter into the new employment agreements with the transferring employees within five days from the date of transfer. These employment agreements cannot contain lesser scope of rights compared to the employment agreements with the previous employer, as long as the transferred collective agreement applies. Namely, the employer must also apply the previous employer's collective agreement (a general employment-related enactment) for at least one year from the date of change of employer.

7.3 What employee information should the parties provide to each other?

The Labour Law does not explicitly require that the parties of an outsourcing transaction provide each other with the respective employee information. However, having in mind the obligation of the new employer to conclude the new employment agreements with the transferring employees, the previous employer should provide the new employer with the respective information and documentation in order to enable fulfilment of this obligation by the new employer (e.g. names of the transferring employees, their existing employment agreements, etc.).

7.4 Is a customer/supplier allowed to dismiss an employee for a reason connected to the outsourcing?

The Labour Law does not explicitly regulate dismissals in the context of outsourcing, so the general termination provisions must be consulted. In that respect, if the employee's work post

has become redundant for any reason, including the outsourcing, the employer will be entitled to terminate the redundant employee, in accordance with the procedure stipulated by the Labour Law. Furthermore, the existing employer may terminate an employee who refuses the transfer to the new employer, in the case of change of employer by operation of law.

7.5 Is a supplier allowed to harmonise the employment terms of a transferring employee with those of its existing workforce?

The employment terms of the transferring employees may be amended only on the basis of the general provisions of the Labour Law regulating the change of the agreed employment terms. In that respect, each transferring employee must be approached with the respective annex of his/her employment agreement, and the accompanied offer for conclusion of this annex consisting of the reasons for offering the annex, deadline for the response to this offer, and the legal consequences in the case of refusal of the offer.

7.6 Are there any pensions considerations?

There are no pension considerations.

7.7 Are there any offshore outsourcing considerations?

There are no specific offshore outsourcing considerations pertaining to the employees.

8 Data Protection Issues

8.1 What are the most material legal or regulatory requirements and issues concerning data security and data protection that may arise on an outsourcing transaction?

The main piece of legislation regulating personal data protection in the Republic of Montenegro is the Law on Personal Data Protection (*Official Gazette of Montenegro, no. 79/08, 70/09, 44/12*). Apart from this law, collection and processing of personal data is regulated under other laws with certain specificities which reflect the areas they govern. What should also be noted is the fact that Montenegrin legislation does not prescribe any special rules regulating data security and data protection that may arise from an outsourcing transaction. Having said this, below please find the main requirements prescribed under the Law on Personal Data Protection that apply to each type of personal data processing.

The first requirement refers to valid ground for data collection and processing. Namely, the Law stipulates that personal data may be collected and processed solely on the basis of informed consent, law, or an exception provided under the law.

For consent to be considered as a valid basis for data processing, it must be informed as certain information must be provided to persons whose data will be collected and processed (e.g. the identity of the data controller, the purpose of collecting and further processing of the personal data). If the actual purpose of processing corresponds to one of the purposes of processing which represent exceptions under the Law on Personal Data Protection, the consent for such processing would not be necessary (e.g. in order to protect or exercise vitally important interests of the data subject who is unable to provide his/her own consent, for the purpose of compliance with statutory obligations of data controllers, etc.).

When it comes to the manner of obtaining a valid consent, the Law prescribes that the consent may be given in a written form (this includes the electronic form as well) or orally into the minutes by the respective data subject.

In practice, when it comes to employer-employee relationships, the recommendation is to always obtain written consent of the employee for any processing which is not covered by law or by an exception, and to include the consent statement into the employment agreement, or to enclose it in their employment agreement as a separate document, i.e. annex, so that it may be considered that the employee has given his/her consent to processing by signing of the respective document.

In addition, the Law prescribes that, besides having valid grounds for data collection and processing, every personal data controller must notify the Data Protection Authority on data collections it intends to establish. This obligation does not refer to data controllers which process data based on the law, nor to public registers. The notification procedure is conducted before the Data Protection Authority which performs a prior checking of processing operations likely to present specific risks to the rights of data subjects.

Further, the Law on Personal Data Protection sets forth the requirements with regards to export of personal data. Namely, the export of personal data can be conducted only to a country outside of Montenegro which applies adequate measures of protecting personal data prescribed by the Law on Personal Data Protection, and only based on the prior approval of the Data Protection Authority. When estimating the adequacy of measures, the Data Protection Authority takes into account the specific circumstances in which the procedure of export of personal data is being conducted, along with a number of other circumstances. The approval is not necessary in certain cases such as when export of personal data is regulated by a special law or international agreement that binds Montenegro, or when the data subject has given his or her prior consent to the export of data and is informed on the possible consequences of such export.

When it comes to the processing of sensitive data, i.e. data pertaining to nationality, race, political opinion, religious or philosophical belief, union membership, health or sexual life, the Law on Personal Data Protection prescribes the following requirement – such data may be processed only in certain cases including after obtaining the explicit consent of the respective data subject.

9 Tax Issues

9.1 What are the tax issues on transferring the outsourced business – either on entering into or terminating the contract?

No specific tax regime applies to outsourcing transactions. If outsourcing includes the transfer of assets to the supplier, such transfer is taxable. However, VAT is not payable in the case of the transfer of the entire assets or a part of the assets, provided that the acquirer is a tax payer and continues to perform the same business activities. Other tax obligations may also arise, depending on the type of the transferred asset. Termination of the outsourcing contract may also trigger tax obligations, in the case that the assets are transferred back to the customer.

9.2 Is there any VAT leakage on the supply of services under the outsourcing contract?

Services provided under an outsourcing contract are generally subject to VAT at the rate of 19%. The VAT paid by the customer

is generally deductible. In the case of VAT leakage, it may be addressed via price negotiations with the price increased or decreased depending on which party needs to be compensated for any increased VAT.

9.3 What other tax issues may arise?

The main tax issues related to outsourcing transactions are described above. It should also be noted that outsourcing has the impact on the corporate income tax payable by the customer.

10 Service Levels

10.1 What is the usual approach with regard to service levels and service credits?

The parties usually jointly determine a set of objective, measurable criteria to measure performance and provided services. For example, the criterion can be that telephone calls to a call centre will be answered within the agreed time frame. The service levels and the service credits scheme are commonly dealt with in the outsourcing contract or its addendums.

11 Customer Remedies

11.1 What remedies are available to the customer under general law if the supplier breaches the contract?

If the supplier breaches its contractual obligation, the customer may demand fulfilment of this contractual obligation or may terminate the contract, and is in any case entitled to damages. In the case that fulfilment of the contractual obligation within the agreed deadline is an important part of the contract, the contract is terminated by operation of law in the case that this obligation is not fulfilled within the agreed deadline. If this is not the case, the customer must leave to the supplier an appropriate additional term for fulfilment of this contractual obligation. The contract can be terminated by the customer in the event that the supplier fails to fulfil its contractual obligation even within this additional term for fulfilment. The customer can also ask for an injunction before the court based on the supplier's breach of the contract, in line with the procedural law requirements.

11.2 What additional protections could be included in the contract documentation to protect the customer?

The parties are generally free to agree additional protections. The common additional protections for the customer are supervision of the supplier's performance, corporate guarantee provided by the supplier's founder or other related entity, bank guarantee, contractual penalties, maintaining the respective insurance policy by the supplier, etc.

11.3 What are the typical warranties and/or indemnities that are included in an outsourcing contract?

The warranties and indemnities prescribed by an outsourcing contract are various and regularly granted by both parties, the supplier and the customer. These warranties and indemnities include confirmation on capacity to conclude the outsourcing

contract, quality of the services to be provided, assurance pertaining to the particular type of services, indemnity in case of damage due to the supplier's actions, indemnity for the supplier in case of historic liability relating to the transferred employees and compliance with regulations.

12 Insurance

12.1 What types of insurance should be considered in order to cover the risks involved in an outsourcing transaction?

The professional liability insurance of the supplier is the main type of insurance which should be considered in an outsourcing transaction. This insurance provides an additional assurance to the customer that it would be indemnified in the case of damages related to the services provided by the supplier. Other types of insurance to be considered include property insurance, employee insurance and compulsory vehicle insurance.

13 Termination

13.1 How can a party to an outsourcing agreement terminate the agreement without giving rise to a claim for damages from the terminated party?

Under the general piece of legislation regulating contracts and torts, if one party breaches its contractual obligation, the other party may demand fulfilment of this contractual obligation or may terminate the contract, and is in any case entitled to damages. Therefore, damages can be demanded by the non-breaching party in any event.

13.2 Can the parties exclude or agree additional termination rights?

The contractual parties are entitled to agree termination rights. In that respect, the parties are generally free to determine specific termination rights, which can exclude or extend rights implied by general law.

13.3 Are there any mandatory local laws that might override the termination rights that one might expect to see in an outsourcing contract?

Notwithstanding the freedom of contract granted by the Montenegrin legislation, this freedom is limited by the compulsory rules and society's moral. The termination clause is also subject to this limitation. The termination rights must also be in accordance with this general principle.

14 Intellectual Property

14.1 How are the intellectual property rights of each party protected in an outsourcing transaction?

The intellectual property rights of both parties, i.e. the customer and the supplier, are generally protected by the provisions of the Montenegrin IP legislation. If an intellectual property right is breached in any context, including an outsourcing transaction, the

law provides for general protection. In an outsourcing transaction, the parties commonly regulate the relevant IP-related matters (if any) in the outsourcing contract. This contract usually contains the provisions addressing the respective IP concerns of both parties, including protection.

14.2 Are know-how, trade secrets and other business critical confidential information protected by local law?

The Law on Protection of Unpublished Data (*Official Gazette of Montenegro no. 016/07 and 073/08*) protects various unpublished data which represents a business secret. This piece of legislation defines unpublished data rather broadly, so know-how, trade secrets and other business critical confidential information are generally eligible to be considered as business secret. A court dispute can be initiated against any person breaching a business secret.

14.3 Are there any implied rights for the supplier to continue to use licensed IP rights post-termination and can these be excluded from the agreement?

There are no implied rights that allow the supplier to continue to use licensed IP rights of the customer upon termination of the outsourcing contract.

14.4 To what extent can the customer gain access to the supplier's know-how post-termination and what use can it make of it?

The customer does not have any right to gain access to the supplier's know-how post-termination. It could be prescribed otherwise within the respective outsourcing contact.

15 Liability

15.1 To what extent can a party limit or exclude liability under national law?

Under the Montenegrin law, liability for wilful misconduct and gross negligence cannot be excluded. Only liability for regular negligence may be excluded. However, even a clause on exclusion of regular negligence can be denied by the court if such clause has been agreed due to monopoly or other unequal position favourable for the debtor.

15.2 Are the parties free to agree a financial cap on liability?

The parties are free to agree a financial cap on liability, provided that such cap is not obviously disproportional with the damage and if the law does not prescribe otherwise. Nevertheless, even in the case that such cap has been agreed, the party is entitled to the full compensation, notwithstanding the agreed cap, if the other party acted with wilful misconduct or gross negligence.

16 Dispute Resolution

16.1 What are the main methods of dispute resolution used?

The leading method of dispute resolution is litigation before the court. This is a general conclusion and refers to outsourcing transactions as well. In some cases, the parties agree on alternative dispute resolution mechanisms. Arbitration is often stipulated in the outsourcing contracts.

17 Good Faith

17.1 Is there any overriding requirement for a customer and supplier to act in good faith and to act fairly according to some objective test of fairness or reasonableness under general law?

According to one of the general principles of the Montenegrin general piece of legislation regulating contracts and torts, the parties are obliged to adhere to the principle of diligence and honesty. This good faith principle applies to all contractual relations, including the outsourcing transactions.

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Vuk Drašković has in-depth legal expertise in corporate and commercial law in Serbia and Montenegro. His primary focus is on employment law, regulatory, M&A, natural resources, food and beverage, healthcare and pharmaceuticals, and the public sector.

Prior to the establishment of Bojovic & Partners, Vuk was a partner at a leading law firm in Serbia, where he *inter alia* led the employment practice group and acted as team leader in some of the biggest acquisitions in Serbia.

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