

# Serbia

Bojović & Partners

Vuk Drašković



Uroš Popović



## 1 Regulatory Framework

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

There are no national laws in Serbia specifically regulating 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 the 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

According to the Law on Banks (*Official Gazette of the Republic of Serbia no. 107/2005, 91/2010, and 14/2015*), certain activities may be conducted only by a bank (e.g. taking deposits, granting credit facilities, etc.). Having in mind this legal requirement, one may reasonably conclude that a bank cannot outsource these activities to a third party.

#### IT transactions

There are no specific requirements pertaining to an IT transaction.

#### Telecommunications transactions

There are no specific requirements pertaining to a telecommunications transaction.

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

Certain industry sectors are subject to specific requirements with regards to licences, approvals and authorisations (e.g. energy, aviation, insurance, etc.). In the case of an outsourcing transaction in such sector, these requirements must 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?

There is no requirement for an outsourcing transaction to be governed by Serbian law. The parties are generally free to select the law governing their commercial transactions. In the case that there are specific legal requirements which pertain to the 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

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

#### Indirect outsourcing

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

#### Multi outsourcing

Under this structure, the customer outsources a number of separate activities to different suppliers.

#### Joint venture outsourcing

Outsourcing is 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. On the other hand, even in the case of a private commercial transaction, the customer may organise a procurement process for the purpose of making the best choice.

This process, including its stages 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?

Serbian law 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?

Serbian law is silent pertaining to the notice period required to terminate an outsourcing contract. The notice period is 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 is predictable), 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 commonly used in relation to costs in the transactions of this kind 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. In that respect, movable properties 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. Assets are leased on the basis of 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 a 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?

There are no specific post-completion requirements.

### 6.4 How is the transfer registered?

The transfer of real estate, including land, is registered in the Real Estate Cadastre. On the other hand, the transfer of movable properties is 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?

According to the Labour Law (*Official Gazette of the Republic of Serbia no. 24/2005, 61/2005, 54/2009, 32/2013, and 75/2014*), 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 will conduct 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 change of employer based on the Labour Law, i.e. transfer by operation of law, the new employer is obliged to take the respective employees along with their existing employment agreement. The new employer must also apply the previous employer's 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?

In the case of change of employer, the previous employer is obliged to thoroughly and truthfully inform the new employer of the rights and obligations from the general employment-related enactments and the employment agreements to be transferred.

### 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 due to 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 the employee who refuses the transfer to the new employer in the event 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 response to this offer, and the legal consequences in 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 related 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 is the Law on Personal Data Protection (*Official Gazette of the Republic of Serbia, no. 97/2008, 104/2009, 68/2012, and 107/2012*). What should be noted is the fact that Serbian 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 grounds 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, i.e. the respective information must be provided to persons whose data will be collected and processed (the identity of the data controller, the purpose of collecting and processing, etc.).

If the actual purpose of processing corresponds to one of the purposes of processing which represent exceptions under the law, the consent for such processing would not be necessary (e.g. in order to protect or exercise vitally important interests of the data subject or another person, for the purpose of compliance with legal obligations, etc.).

In practice, when it comes to employer-employee relationships, the recommendation is to always obtain written consent from the employee for any processing which is not covered by law or by an exception, and to include the statement of consent in 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 the processing of their data by signing 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 of any personal data collection and processing. The notification procedure is conducted before the Data Protection Authority and must be conducted at least 15 days prior to the intended processing of personal data.

Further, the Law sets forth requirements with regards to the export of data. Namely, it should be noted that exporting personal data from Serbia to any country which is not party to the European Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, is regulated in a rather strict manner – such exports must be pre-approved by the Data Protection Authority regardless of whether individual written consent for processing and export has been obtained from the data subject.

When it comes to the processing of sensitive data, i.e. data pertaining to nationality, race, gender, language, religion, political party affiliation, union membership, health, receiving of social assistance, status as a victim of violence, conviction for a criminal offence and sexual life, the Law on Personal Data Protection prescribes the following requirement – such data may be processed solely based on the freely given consent of the data subject, except when the law does not allow processing even with consent. This type of data must be marked as special and protected by adequate measures of protection.

Lastly, the Law on Personal Data Protection prescribes requirements in relation to data controllers' obligation to ensure exercising of certain rights of data subjects, such as the right to access the data and the right to copy the data.

## 9 Tax Issues

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

There is no specific tax regime for outsourcing transactions. If the outsourcing includes 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 a rate of 20%. 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 are described above. It should also be noted that outsourcing has an 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 15 minutes. The service levels and the service credits scheme are usually 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?

In the case that 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?

Additional protections depend on the parties' agreement. The typical 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?

Warranties and indemnities that are included in an outsourcing contract are various and are usually granted by both parties, the supplier and the customer. These warranties and indemnities include confirmation on capacity to enter into the outsourcing contract, quality of the services to be provided, assurance pertaining to the particular type of services, indemnity in the case of damage due to the supplier's actions, indemnity for the supplier in the 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 main type of insurance which should be considered in an outsourcing transaction is the professional liability insurance of the supplier. 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?

According to 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. Hence, 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 can 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?

Despite the freedom of contract granted by the Serbian legislation, this freedom is limited by the compulsory rules, public order and good customs. The termination clause is also subject to this limitation. 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 protected by the provisions of Serbian 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 usually 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?

Trade secrets are protected by the Law on Protection of Business Secret (*Official Gazette of the Republic of Serbia no. 72/2011*). This piece of legislation defines the term ‘business secret’ rather broadly: know-how, trade secrets and other business critical confidential information are generally eligible to be considered as business secrets. 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?

No implied rights 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 contract.

### 15 Liability

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

Under Serbian 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 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 main method of dispute resolution is litigation before the court. This general conclusion also refers to outsourcing transactions. In some cases, the parties agree on alternative dispute resolution mechanisms. Arbitration is often stipulated in 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 Serbian legislation regulating contracts and torts, parties are obliged to adhere to the principle of diligence and honesty. This good faith principle applies to all contractual relations, including outsourcing transactions.

**Vuk Drašković**

Bojović & Partners  
 Cika Ljubina street no. 16  
 11000 Belgrade  
 Serbia

Tel: +381 11 7850 336  
 Email: [vuk.draskovic@bojovicpartners.com](mailto:vuk.draskovic@bojovicpartners.com)  
 URL: [www.bojovicpartners.com](http://www.bojovicpartners.com)

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.

Vuk earned his LL.B. from the University of Belgrade, Faculty of Law. Vuk successfully attended the International Mergers & Acquisitions Practice module at the UK University of Law.

Vuk is a member of the Serbian Bar Association. Vuk is an active member of the Legal Committee and the HR Committee of the Foreign Investors Council.

Vuk has been a recommended lawyer in most prominent legal directories, such as *Chambers & Partners* and *Legal 500*.

**Uroš Popović**

Bojović & Partners  
 Cika Ljubina street no. 16  
 11000 Belgrade  
 Serbia

Tel: +381 11 7850 336  
 Email: [uros.popovic@bojovicpartners.com](mailto:uros.popovic@bojovicpartners.com)  
 URL: [www.bojovicpartners.com](http://www.bojovicpartners.com)

Uroš Popović has extensive experience in corporate and commercial law in Serbia and Montenegro. He has developed his expertise in competition law, data privacy, intellectual property, telecommunications, media and technology, dispute resolution, energy and infrastructure, M&A, food and beverage, and retail matters.

Prior to cofounding Bojovic&Partners, Uroš worked as a Senior Associate at a leading Serbian law firm and in the legal practice of PWC, dealing predominantly with competition, corporate, and data privacy matters.

Besides a BA(Hons) in Political Science and Economics from Rutgers University, Uroš earned a Masters in IR and a JD from Boston University, as well as a Masters in Law from Belgrade University of Law.

Uroš is a member of the Serbian Bar Association and the New York Bar Association.

Uroš has been a recommended lawyer in most prominent legal directories such as *Chambers & Partners* and *Legal 500*.

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