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BUSINESS PROCESSES OUTSOURCING: TRICKS AND TIPS FROM THE RUSSIAN LAW PERSPECTIVE

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May 12, 2020

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Agenda

- Business Process Outsourcing: why and how?
- Primer on Russian law issues
- Outsourcing of different functions:
 - HR and Payroll
 - Knowledge Process
 - IT
 - Accounting and Tax
 - Warehousing and Logistics
- Implications of COVID-19

SECTION 1

BUSINESS PROCESS OUTSOURCING: WHY AND HOW?

Commercial Considerations

- Benefits:
 - efficiency (expense reduction and planning, capacity management, focus on core function and quality)
 - applying professional expertise
 - unified approach within a group of companies
- Front-office vs. back-office outsourcing
- Internal vs. external outsourcing
- Outsourcing for groups: consider allocation of costs and administration of the outsourced function

Service Contracts: Primer on Russian Law

- Choice of governing law: foreign law permissible for contracts with a foreign element
- Entering into a service contract:
 - precontractual liability
 - written form of contract
 - general terms and conditions (accession contract)
- Good faith and cooperation by the parties; mutual conditional obligations
- Subcontracting
- Delivery and acceptance of the results

Service Contracts: Liability and Remedies

- Liability:
 - compensation of damages and/or monetary penalty (liquidated damages)
 - compensation of property losses in circumstances other than breach of contract
 - contractual limitation of liability
 - fault of a commercial party is presumed unless it proves force majeure
- Specific remedies in service contracts:
 - contractor: forfeiture or suspension rights in case of payment delay by the customer
 - customer: free-of-charge rectification of defects, payment reduction, or compensation of costs for rectification of defects at customer's own cost
- Specific rules apply to transportation, warehousing, payment processing, research and development (R&D), and certain other services

Service Contracts: Amendment and Termination

- Amending and terminating a service contract:
 - no-cause termination by customer: allowed at any time with compensation of expenses actually incurred by contractor (payroll not covered)
 - no-cause termination by vendor: allowed at any time, subject to compensation of damages to the customer
 - unilateral termination or amendment: termination/amendment fee is allowed in contracts between business entities
- Termination of an obligation due to inability to perform

Service Contracts: Force Majeure Events

- Force Majeure:
 - extraordinary and unavoidable circumstances
 - person suffering from force majeure shall not be liable for breach unless parties agree otherwise (obligations remain effective)
 - parties may agree to other remedies: early termination, right to suspend payments, etc.
- Significant change in circumstances (Art. 451 of the Civil Code):
 - allows a party to terminate or amend contract in court
 - parties can agree to contract this rule out

SECTION 2

HR AND PAYROLL

Russian Labor Law: Regulatory

- Fine line between outstaffing (regulated) and outsourcing (not regulated)
- Limitations on outstaffing arrangements:
 - only accredited entities can provide outstaffing services
 - limitation on time and scope of outstaffed positions
 - guaranteed benefits levels for outstaffed positions need to be taken into account when considering outstaffing
- Service agreements as an alternative:
 - be mindful of requalification risks
 - no reference to customer's internal labor regulations
 - customer may not impose disciplinary penalties on staff of the vendor; instead, build necessary protections into your contracts with the vendor

Russian Labor Law: Paperwork

- Preparing and keeping originals of HR paperwork can be outsourced except for:
 - work-record books
 - military service records
 - wet-ink originals of HR documents
- But: preparation of drafts can be outsourced
- Shared service center approach: viable but burdensome
- Electronic document exchange: COVID-19 boosted developments in this area
- Liability issues:
 - will service provider be liable for sanctions imposed by regulators?
 - does it matter whose fault it is?

Employees' Personal Data

- Russian data-privacy laws approach:
 - no exhaustive list of required local policies
 - separate documents for different types of individuals whose data is processed
- Consents on data transfers of employees' data with third parties:
 - no concept of "intragroup" data transfer: consent required for internal outsourcing
 - transfer of employees' data to any third party requires consent in a special written (blue-ink) form
 - "one purpose – one consent form"
- Data-transfer agreements and data-processing agreements:
 - no statutory form, but contents of agreement is expressly regulated by law
 - foreign governing law allowed

SECTION 3

KNOWLEDGE PROCESS

R&D Outsourcing

- Default rules of Russian Civil Code for intellectual property IP created by contractor:
 - if the IP was specifically commissioned by customer, then customer owns IP rights but contractor retains a nonexclusive royalty-free license to use the IP for its own purposes
 - if contractor created the IP in connection with performance of works, then contractor retains IP rights and customer gets a nonexclusive royalty-free license
- Russian law prohibits assignment of IP rights or grant of an exclusive worldwide perpetual license for **no consideration**, unless you deal with individuals or nonprofits
- Statement of work: do not forget
 - right to make/propose changes
 - cooperation obligations
 - rules on communication

Data Collection and Processing

- Unlike with R&D, no default rules on ownership and use of input data, vendor data, and output data
- What about:
 - mutual “data sharing”?
 - ownership and license rights at end of the term?
- Data-privacy considerations:
 - who is responsible for getting consents?
 - technology security
 - data-breach consequences

SECTION 4

IT

Service Levels and Service Credits

- Service-level agreements are becoming more popular in Russia
- Service credits not mentioned in the Civil Code; court practice on service credits undeveloped
- Different ways to structure service credits under Russian law:
 - penalty (*neustoika*): penalties are, generally, enforceable, but may be reduced by the court
 - reduction of the service fees: may a service fee be reduced to zero?
- Other instruments:
 - Contractual obligation to pay compensation?
 - Obligation to reimburse losses (Art. 406.1 of Civil Code)?

IT Security

- Where is the market on information-security standards in Russia?
- Consider the following special regulations:
 - Critical Information Infrastructure Law: healthcare, science, transport, telecommunications, energy, banking and financial markets, oil and gas, nuclear, military, space, mining, steel, and chemicals
 - Personal Data Law
 - Banking Law
 - State Secret Law
- Vendors beware! You may need a license if you:
 - build or maintain secure IT systems
 - import cryptographic hardware

SECTION 5

ACCOUNTING AND TAX

Key Issues to Remember

- Vendor qualification: higher education, at least 3-5 years' experience in accounting, no pending criminal record for economic offenses
- Subscription agreement model: check what is outside the scope!
- Document exchange and safekeeping:
 - statutory terms for books and records safekeeping
 - availability of hard copies for on-site tax audits
- Payment processing: identify persons holding banking signature rights
- Liability issues:
 - CEO remains personally liable for organization of bookkeeping and accuracy of financial statements
 - allocation of liability through compensation of property losses (Russian semi-equivalent for an indemnity)?

SECTION 6

LOGISTICS

Outsourcing Logistics (3PL)

- Protection of confidential information on customers, order volumes, etc.
 - commercial secrecy regime?
 - integration with business (e.g., a shared CRM) may result in substantial data transfers
- Structure of relations with the 3PL provider in international transportation could be different:
 - agency agreement for customs brokerage
 - expedition services agreement for cargo handling
 - storage agreement, transportation agreement
- Ensuring compliance with vendor's ethics rules: separate covenants in the contract rather than declarations plus indemnity for breach
- Liability for personnel failures: not straightforward

SECTION 7

COVID-19 IMPLICATIONS

Addressing COVID-19: Takeaways

1. Review force majeure provisions in your standard contracts; consider whether a carve-out from force majeure clause for COVID-19 is appropriate
2. Be prepared to review and renegotiate your business-continuity and disaster-recovery plans
3. Some territories will loosen the lockdowns earlier than others; consider whether it is appropriate to allow your vendor more flexibility to ensure service continuity
4. Keep an eye on COVID-19 instigated developments in electronic contracting and remote working rules

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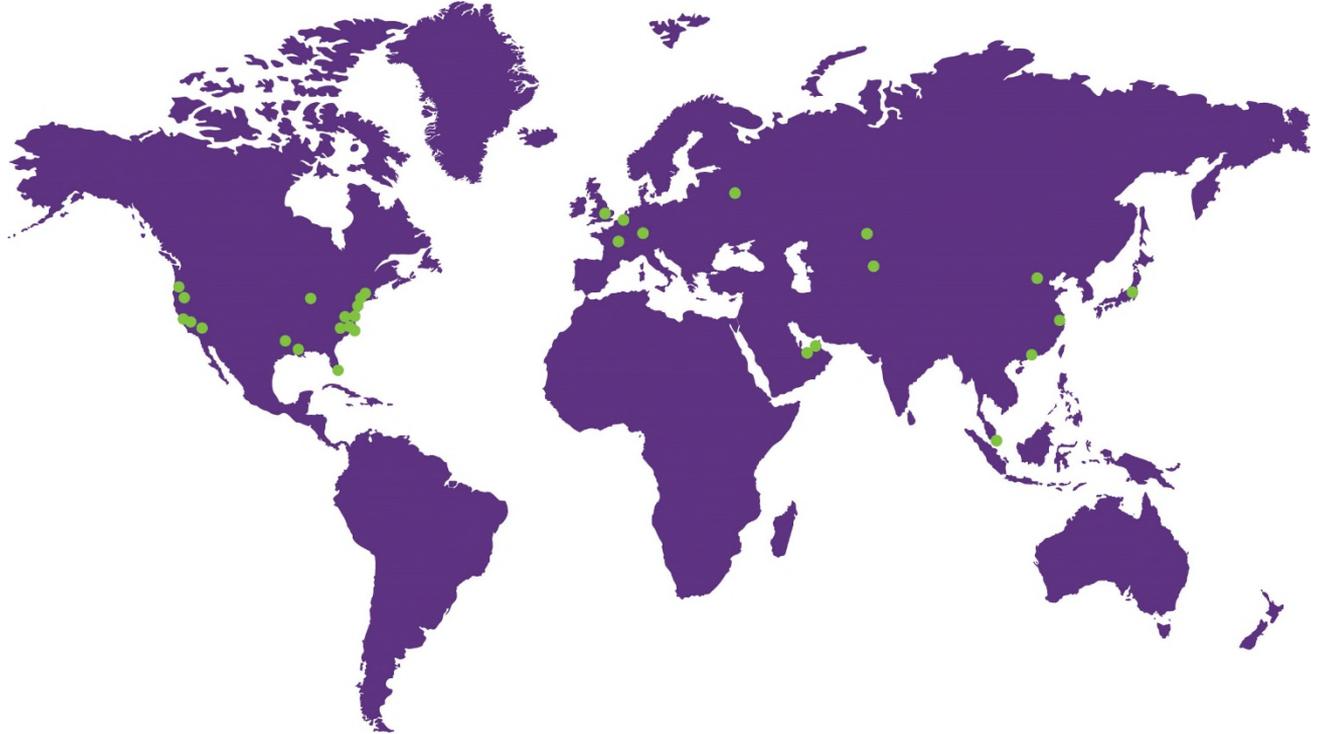
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