



outsource

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The International Comparative Legal Guide to:

## Outsourcing 2018

**3rd Edition**

A practical cross-border insight into outsourcing

Published by Global Legal Group, with contributions from:

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59 Tanner Street  
London SE1 3PL, UK  
Tel: +44 20 7367 0720  
Fax: +44 20 7407 5255  
Email: info@glgroup.co.uk  
URL: www.glgroup.co.uk

GLG Cover Design  
F&F Studio Design

GLG Cover Image Source  
iStockphoto

Printed by  
Ashford Colour Press Ltd  
August 2018

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ISBN 978-1-912509-26-3  
ISSN 2397-6896

Strategic Partners



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# Ukraine

Oleg Zhukhevych



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## Advance Partners

### 1 Regulatory Framework

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

Ukrainian law does not contain a legal definition of “outsourcing” or “outsourcing transaction”. For now the outsourcing transactions are governed by civil and commercial laws, for instance, the Civil Code of Ukraine and the Commercial Code of Ukraine with due regard of other laws such as taxation legislation, employment, data protection legislation and others, depending on the industry sector.

#### 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?

The public sector transactions are subject to requirements prescribed by active public procurement legislation. For instance, the Law of Ukraine on Public Procurement prescribes requirements related to public procurement procedure, tender documentation, including the contracts for supply of related goods and/or services, requirements to companies that act as participants of procurement procedures, etc.

As for the business process transactions, there are no specific regulatory requirements prescribed with regard thereto.

The laws prescribe specific regulatory and legal requirements regarding IT and telecommunications transactions. For instance, the telecommunication service providers and operators should be included in the state registry of telecommunication service providers and operators. Further, providing of fixed-line telephony services, mobile phone services, operations and maintenance of telecommunications systems, on-air broadcasting and radio broadcasting systems, as well as wire broadcasting systems, are subject to state licensing.

The financial services transactions are also subject to state control and regulation. Under Ukrainian legislation, the financial services are mainly provided by companies that comply with requirements prescribed for financial institutions, and are included in the state registry of financial institutions. The laws prescribe a number of requirements as to the formation, activities and personnel of the financial institutions and other companies eligible to provide financial services.

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

The legal and regulatory requirements for outsourcing transactions depend upon the type of industry sector, the type and scope of outsourced works/services and the outsourcing structure.

The outsourcing activities normally require compliance with quite a few legal and regulatory requirements prescribed by the tax, employment, contract, intellectual property, unfair competition, administrative law and other legislative acts.

The most common regulatory requirements concern the obtaining of state permits and licences. For instance, services in the field of education, public transportation, medical and pharmaceutical services, touristic, financial and insurance services, services related to exploitation of mineral resources and others, are subject to state regulatory control and licensing.

#### 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?

The Law of Ukraine on International Private Law prescribes the possibility for the parties to make a choice of applicable law. In case of non-selection of the applicable law by the parties of a transaction, the law which has the closest connection to the contractual relationship should apply. Ukrainian legislation prescribes a set of rules that help the parties to determine the law that has the closest connection to contractual relations. In certain types of disputes, the Law prescribes exclusive Ukrainian jurisdiction and application of Ukrainian law. It is noteworthy that the foreign law may not be applied if such contradicts the “*ordre public*” or in case of intentional circumvention of the applicable law by the contracting parties.

### 2 Legal Structure

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

The most common types of legal structure for an outsourcing transaction are the service agreement or the contractor agreement. In certain cases, the outsourcing transactions may be an integral part of other legal structures (e.g. master franchise) or otherwise legal structures may overlap, depending on the type and scope of outsourced works/services.

### 3 Procurement Process

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

The public procurement system prescribes a number of rules related to the process of selecting a supplier. For procurements in the private sector, the company that selects the supplier may determine the rules and/or conditions in the request for proposal. Certain procurement procedure rules may also be prescribed by the relevant trading platform.

### 4 Term of an Outsourcing Agreement

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

Ukrainian legislation does not impose any minimum and/or maximum term for an outsourcing contract.

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

There are no legal requirements prescribed by local legislation with regard to the length of a notice period. The contracting parties can determine the length of a notice period at their own discretion.

### 5 Charging

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

The most common charging methods used in outsourcing transactions include the input-based methods (i.e., a specific fee per working place, per server, etc.) and the output-based methods (i.e., a specific fee per hour of work, a fee per specific operation, call, etc.). It is also a common practice to determine a specific contractual budget paid by the customer irrespective of whether more or less works were performed/services were rendered during the contract validity term.

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

The outsourcing transactions may also include the terms related to reimbursement of expenses related to the contract performance (such as external agent fees and other contractors'/service providers' expenses).

Further, the amount paid to the contractor/service provider is subject to a local taxation including the VAT and/or the corporate profit tax/personal income tax. The parties may stipulate in the contract whether the tax amount shall be deducted from the contractual budget/fees or whether the customer should additionally compensate it.

With regards to bank service charges and currency converting charges, the contracting parties may agree to share them, or if not, for one of the parties to bear the costs, subject to the contract conditions.

### 6 Transfer of Assets

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

The agreement on transfer, lease or license of the assets shall be concluded in written form.

According to the laws of Ukraine the transfer, lease or license of the assets is subject to consent of the asset owner. Similarly, any sublease or sublicense of assets is possible upon the consent of the assets owner.

The transfer of land or other immovable properties requires notary certification.

Notary certification is also required for the lease agreement of immovable property if the term of validity of such lease is three years or longer.

In case of transfer of assets that are subject to a valid license or lease agreement, the respective license or a lease agreement shall remain valid while the landlord/licensor obligations are transferred to the new assets owner.

There are formal requirements with regards to the transferring and/or leasing of intellectual property rights. For instance, a transfer of IP rights to trademarks, industrial designs, inventions and utility models is subject to mandatory state registration.

The state registration of the licensing of IP rights and the state registration of the transfer of copyright is voluntary and can be performed at the parties' discretion.

#### 6.2 What are the formalities for the transfer of land?

The laws of Ukraine prescribe for restrictions regarding the transfer of specific categories of lands such as lands belonging to state research institutions, lands of a state water fund, state forestry lands, lands of cultural heritage and some others.

Further, the transfer of agricultural lands is prohibited until January 2019 (the decision to restrict the transfer of agricultural lands was imposed by the Ukrainian Parliament and the validity of such decision is being extended on a regular basis).

Certain restrictions apply with regards to transactions involving transferring land to non-residents. The non-residents of Ukraine have the right to purchase/otherwise acquire the title to land only with regard to certain categories of lands and upon the acquisition or building of immovable property located thereon.

According to the Land Code of Ukraine, the land becomes an object of civil rights and can be transferred upon registration of a land plot in the state land registry, the siting of land plot borders and state registration of property rights to a plot of land as immovable property. Notary certification of agreements on the land transfer is also required under the Civil Code of Ukraine.

#### 6.3 What post-completion matters must be attended to?

As explained above, the transfer of immovable property and the transfer of IP rights to trademarks, industrial designs, inventions and utility models, requires state registration.

#### 6.4 How is the transfer registered?

The transfer of land and of real estate shall be registered with the state register of property rights to immovable property.

The transfer of intellectual property rights requires state registration for trademarks, utility models, inventions and industrial designs. The transfer of IP rights to copyrighted works is voluntary.

## 7 Employment Law

### 7.1 When are employees transferred by operation of law?

Ukrainian legislation does not prescribe the terms of employees' transfer by operation of law. In general, if a customer hires the supplier's employees on a permanent basis, the employment agreements between the employees and the supplier should be terminated. Civil and labour legislation provides for the following legal structures allowing the customers to use the suppliers' staff:

- the labour legislation permits for a full-time employee to become involved in part-time employment or a contractor or service providing agreement, provided that both the main and other employer/contractor agree thereto. In such a way, the supplier's employees can be hired by the customer under the temporary contractor or service providing agreement or as part-time employees; and
- staff can be provided by a specialised agency under an agreement concluded with the customer (in such a case the staff are not actually hired by the customer, who has contractual relations with the agency only).

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

As explained in question 7.1, Ukrainian legislation does not prescribe the terms of employees' transfer by operation of law.

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

As explained in question 7.1, Ukrainian legislation does not prescribe the terms of employees' transfer by operation of law.

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

As explained above, if the employee is hired by the outsourcing customer on a permanent basis, the relations between the employee and the customer company are not based on an outsourcing agreement as such and are regulated by the active labour legislation and conditions of a work contract concluded between the customer and the employee. Thus, an employee's dismissal would be grounded on the conditions of a work contract with due regard to the requirements of labour legislation.

In case the employee acts on the basis of a contract concluded between the customer and the outsourcing supplier company, there is no right for the outsourcing customer to dismiss the employee (at the same time, the outsourcing contract may prescribe the customer's right to request a change of personnel in certain circumstances).

In case the employee concludes a temporary contractor or service agreement with the outsourcing customer, the pre-term termination of such a contract may be possible on conditions as prescribed therein, subject to mandatory provisions of the civil law.

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

As explained in question 7.1, Ukrainian legislation does not prescribe the terms of employees' transfer by operation of law.

### 7.6 Are there any pensions considerations?

The right to receive pension and requirements related thereto are prescribed in pension legislation. The amount of pension depends, *inter alia*, upon the total employment history and the amount of salaries gained in the course of work under work contracts and/or contractor agreements. Ukrainian legislation does not prescribe the possibility for the contracting parties to establish specific conditions or considerations with regards to pensions.

### 7.7 Are there any offshore outsourcing considerations?

This is not applicable. As explained in question 7.1, Ukrainian legislation does not prescribe the terms of employees' transfer by operation of law.

## 8 Data Protection Issues and Information Security

### 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? Are there independent legal and/or regulatory requirements concerning information security?

According to the Law of Ukraine on the Protection of Personal Data, any operations involving personal data including its collection, registration, storage, adaptation, updates, use, dissemination and others, are considered as *personal data processing* which is allowed subject to express consent of the personal data subject. Such consent must be provided in writing or another form that confirms the subject's express consent thereto. The aim of personal data processing should also be expressly confirmed by the data subject.

In compliance with the noted legal act the parties to an outsourcing agreement should: prescribe their mutual data protection obligations; and determine technical and organisational measures that should be taken in order to protect the personal data, the scope of data processing, liability and other related issues.

Based on the legislative requirements, personal data should be protected as confidential information, except for information related to the performance of a person's obligations as a state authority official or the execution of other official powers. The parties to an outsourcing agreement have to make sure that their employees and all third parties that gain access to personal data fulfil personal data protection requirements prescribed by the laws and by the agreement.

Cross-border data transfers are subject to express consent of the data subject. They are allowed strictly for the purpose confirmed by the data subject. Ukrainian legislation also prescribes that cross-border data transfers are eligible if national laws of the related states provide for the personal data protection mechanism and control.

## 9 Tax Issues

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

The tax issues in outsourcing depend on the selected legal structure of an outsourcing agreement. As explained in Section 2 above, the most common legal structures include contractor agreements and service agreements. Further, the taxation depends on the industry sector, the type of supplier (i.e. legal entity or private entrepreneur) and the taxation system selected by the supplier.

In general, the profits gained by the outsourced Ukrainian supplier may be subject to VAT at 20% (7% is prescribed for a list of certain medical supplies. Certain operations with certain goods/services can be exempted from VAT) and corporate profit tax at 18%.

The simplified taxation system provides the possibility of payment of 5% single tax on profit (or 3% single tax on profit + VAT), with no additional taxes.

In the case of a transfer of assets to the supplier, certain additional taxes may apply (depending on the type of assets and legal structure of their transfer, i.e. whether it is assignment or lease, etc.).

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

As explained in question 9.1, the tax legislation prescribes exemption from VAT with regard to certain operations, depending on the types of outsourced goods/services, the territory in which the outsourced goods/services are consumed (inside/outside Ukraine) and the taxation system selected by the Ukrainian supplier.

Further, if the supplier is obliged to pay VAT, the customer may deduct the paid VAT amount from its VAT tax base.

### 9.3 What other tax issues may arise?

In case of a transfer of assets to the supplier, the assets would be subject to VAT and corporate profit tax.

In certain cases, the stamp duties may be required with regard to certain actions within the outsourcing cooperation, such as certification of the documents (e.g. notary certification) and other actions.

Additionally, the currency control regulations are noteworthy. Ukrainian legislation allows settlement under export/import contracts between a resident and a non-resident to be made in local or foreign currency. If settlement is performed in a foreign currency, a payment to a Ukrainian resident under an export contract must be made within 180 days upon export of the goods/services. Goods prepaid by a Ukrainian resident under an import contract must be imported and cleared within a 180-day term from the date of prepayment.

## 10 Service Levels

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

There are a number of standards adopted at national level with regards to certain types of goods, products, equipment and services. The parties to an outsourcing contract can refer to the active

standards in the text of agreement. However, the adopted standards mainly concern specific goods, products and services that are not outsourced (e.g. drinking water, specific types of vehicles, etc.).

Therefore, the actual required service level is mainly determined by the standards and measures established by the contracting parties and prescribed in the text of the outsourcing agreement.

Ukrainian legislation does not prescribe any mandatory requirements with regards to service credits. The parties, at their discretion, can determine such conditions and include the related provisions to an outsourcing contract.

## 11 Customer Remedies

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

The Civil Code of Ukraine prescribes that breach of the contract falls into the category of non-performance or non-proper performance of the contractual obligations.

In such a case, the following remedies are available:

- Early termination of the contract.
- Amendment of the contract's essential conditions.
- Damages (amount thereof should be confirmed by the claiming party after presenting sufficient evidence and calculations).
- Penalties.

The party is liable for breach of contractual obligations unless it can prove that the breach is caused by circumstances that are out of the party's control.

Additional remedies are available for certain types of contracts (i.e. purchase contracts, lease contracts, contractor or service agreements, etc.). For example, in case of failure to comply with prescribed service level requirements under the contractor agreement, the customer can:

- take the necessary measures to eliminate the defects, at the expense of supplier;
- request free of charge defect correction by the supplier; or
- request a reduction of the contract price.

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

The parties may prescribe additional measures for ensuring the proper performance of the contract obligations by the supplier or else additional protection of the customer's interests. Such measures may include:

- bank and other guarantees or suretyship of the supplier;
- insurance of the supplier's professional liability, liability of the supplier's managing personnel and/or product liability (if available for the required types of services/works/products); and
- additional financial remedies prescribed for non-proper performance, non-timely performance, failure to comply with prescribed service level conditions, etc.

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

The typical warranties and indemnities may include the following:

- Compliance of the works/services/products with the legal requirements and/or national and international standards.

- Non-infringement of third party's IP rights in the course of creation and use of intellectual property covered by the outsourcing contract.
- Absence of any third-party claims or rights, arrests, or other pending proceedings with regard to outsourced products or assets transferred/leased/otherwise used in the course of the performance of the contract.

## 12 Insurance

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

The mandatory insurance types include pension and accident insurance of the employees, insurance of high-risk capacities and high-risk cargo services.

The types of insurance that can be voluntarily applied by the parties to an outsourcing contract include:

- professional liability insurance (applies to legal services, architect services, medical services, expert and evaluation services, services in the tourism field and others);
- liability insurance of directors and other officers; and
- product liability insurance (applies to product quality/service level of certain types of works/services).

## 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 Civil Code of Ukraine, early termination of contractual obligations, unless such is caused by the other party's non-performance of substantial contract obligations, is acceptable upon the parties' mutual consent. The unilateral withdrawal from the contract is not permitted.

The law also prescribes the possibility of early contract termination in case of "substantial change of circumstances". In this case, the terminating party must prove the substantial change in circumstances and that such change could not have been predicted at the date of contract conclusion. It should also be confirmed that as a result of such circumstances the contract performance no longer corresponds with the party's interests.

The parties have the right to prescribe additional conditions for early contract termination, such as unilateral termination (subject to a prescribed procedure and due notification to the other party) and termination upon certain conditions.

### 13.2 Can the parties exclude or agree additional termination rights?

The parties can agree upon additional termination rights.

The termination rights prescribed in the contract may not contradict the mandatory provisions of civil legislation. Otherwise, they shall be deemed void.

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

The conditions of an outsourcing contract may not contradict the mandatory requirements prescribed by the civil legislation, including the general rules that apply to all civil obligations and the specific rules that apply with regard to each specific type of contract (i.e., contractor, service contract, lease, purchase contract, etc.).

## 14 Intellectual Property

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

Intellectual property rights of each party are protected to the extent that is provided for by statutory law. Prior to entering into the outsourcing relationship, one or both parties may possess intellectual property relevant to the transaction, i.e. pre-existing intellectual property. Typically, the pre-existing intellectual property will continue to be owned by the party who created it. If the supplier needs the right to use intellectual property rights of the customer, a right to use the subject of such intellectual property rights is granted to the supplier. Such licence may be limited by an appropriate field of use, scope of rights, territory, term, etc.

In addition, the issues that need to be addressed concerning new intellectual property created during the contractual outsourcing relationship are:

- Will the intellectual property created by a party vest in that party?
- Will it be jointly owned or will the parties agree to allocate ownership in some other manner?

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

Ukrainian law provides protection of commercial (trade) secrets, know-how and confidential information. The law provides that the measures for protection of commercial (trade) secrets and of confidential information shall be established by the owner of the secret or information. Thus, protection is granted only in case corresponding measures are established and enforced.

According to Ukrainian law, know-how is a set of unpatented technical, technological, commercial and other knowledge, practical skills and production experience necessary for the organisation of a particular type of production. Special legislation on the protection of know-how has not been adopted yet.

A commercial secret is a piece of information which is treated as secret in case it is, in whole or in part and in the aggregate of its components, unknown and not easily accessed by persons who usually deal with the type of information it belongs to and which, due to this, has a commercial value and has been subject to measures adequate to the existing circumstances to preserve its secrecy, undertaken by the person who legally controls this information. Information of a technical, organisational, commercial, industrial or other nature can be a commercial secret, except for that which cannot be attributed to a commercial secret pursuant to the law.

The affected person may protect its violated rights by means of an administrative, criminal or civil procedure.

### 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?

Generally, licences granted within the framework of outsourcing relationships are assumed to terminate together with the outsourcing agreement. However, the customer can expressly grant a post-termination licence to the supplier.

### 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?

Usually the customer has no right to use the supplier's know-how post-termination. However, such a right can be granted to the customer under the contract.

## 15 Liability

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

Under the principle of freedom of contract, the parties can include clauses excluding or limiting their liability, provided that they do not violate the general principles of Ukrainian law.

Ukrainian laws prescribe that clauses excluding or limiting the manufacturer's or seller's liability are prohibited.

In addition, Ukrainian laws allow a choice of foreign law. Therefore, in cases where it is necessary to limit or exclude liability, it is recommended to choose a foreign law as the governing law of the outsourcing contract. General rules of Ukrainian law will otherwise apply in the case of breach of any contractual provisions (that is, the breach of any terms defined in the contract can give rise to termination, damages, fines and so on). This will vary depending on the type of provisions and the liability for the breach, as defined by law or the contract.

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

Generally, the parties are free to agree a cap on the liability. In some cases, the court is entitled to review the cap established if it considers it unreasonable.

However, liability in relation to contracts with individuals and adhesion contracts can be limited in certain cases only.

Liability for tort cannot be capped, unless such possibility is directly provided for by law.

## 16 Dispute Resolution

### 16.1 What are the main methods of dispute resolution used?

Generally, outsourcing contracts contain provisions on the parties' intention to settle any dispute arising from the outsourcing contract amicably, by means of negotiations or with the assistance of a mediator. The parties can, however, stop the negotiation process at any time and submit the dispute to the court.

Litigation remains the prevailing method of dispute resolution in Ukraine, though arbitration is also frequently used. As per Ukrainian law, any disputes arising between Ukrainian legal entities are resolved by Ukrainian courts (commercial courts), unless otherwise specified in the contract. The Commercial Procedure Code of Ukraine prescribes that foreign parties can sue and be sued in Ukraine in the same way as residents, unless otherwise is specifically provided by law.

Cross-border commercial disputes, with few exceptions, may be referred to either local or foreign commercial arbitration. The parties of a cross-border outsourcing contract are advised to select the forum and determine it in the contract. In case of the absence of a forum clause in the contract, the party may encounter difficulties while applying to the court of the desired jurisdiction if the procedural legislation does not expressly prescribe the authority of the relevant court to consider such a type of a dispute.

Additionally it should be mentioned that Ukrainian legislation prescribes exclusive Ukrainian jurisdiction with regard to certain types of disputes (such as disputes related to immovable property located in Ukraine and others).

## 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?

The Civil Code of Ukraine establishes good faith, reasonableness and fairness as the overriding principles to be applied to all types of relationships. Therefore, an obligation to act in good faith covers all commercial relations, including the outsourcing transactions. In this regard, both the customer and the supplier are subject to act in good faith and fairly.

Notwithstanding the law does not provide for any objective test of fairness or reasonableness, national courts of Ukraine establish criteria of implementing the respective principles on a case-by-case basis.





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Elena has over 12 years' legal experience in dispute resolution and litigation, a proven record track of successful actions before the state enforcement agencies, as well as a high level of expertise in strategic counselling.

The key areas of Elena's expertise are intellectual property law, competition law, private international law and commercial law.

Elena was admitted as an Attorney at Law in Ukraine in 2012.



Advance Partners is a Ukrainian law firm practising in intellectual property, competition law, corporate and commercial law, as well as data protection and dispute resolution.

Our team of attorneys provides a whole range of legal services to local and international clients including multinational corporations, privately-owned companies, startups and individuals.

Advance Partners team works in a fast-developing region that requires deep local knowledge and experience.

By combining proficiency with a strong international network, our firm is well-placed to handle complex cross-border matters with a high degree of speed and flexibility.

## Other titles in the ICLG series include:

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- Anti-Money Laundering
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- Corporate Tax
- Cybersecurity
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- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Family Law
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- Insurance & Reinsurance
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