



Outsourcing

in 21 jurisdictions worldwide

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Market overview

1 What kinds of outsourcing take place in your jurisdiction?

With changed business realities in an increasingly globalised world of multinational companies, outsourcing non-core areas (to a skilled vendor) has been recognised as an effective tool to minimise costs. An increasing number of businesses and companies, both domestic and overseas, are outsourcing a diverse range of services.

The outsourcing services rendered in India range from the comparatively low-skilled call centre services (business processing outsourcing (BPO)) to market research and analysis (knowledge processing outsourcing), which involve relatively proficient, capable and skilled workers. Also, finance and accounting outsourcing has recently become widespread, like medical outsourcing. In addition to the above, most business organisations (whether domestic or foreign, large or small) have data entry requirements that are also being outsourced (online data entry and offline data entry).

Besides the above, there is also IT outsourcing (including for software development), which may involve 'till the end' outsourcing (ie, starting from design to development and testing, etc) or outsourcing only some parts of the overall system for development.

It should be noted that IT and BPO outsourcing services are provided to both domestic and international clients.

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

Outsourcing has a long history in India, especially outsourcing of facility management and general business services outsourcing. However, the outsourcing sector became more organised and emerged as one of the strongest sectors in the early 1990s, especially in IT and BPO. The potential of outsourcing was first realised and exploited by some international airline companies, which began outsourcing their back office work to India and, subsequently, IT companies established their captive units in India.

Realising the potential in IT-BPO outsourcing, the government introduced the National Telecom Policy in 1999, which provides for the establishment of IT-BPO outsourcing companies and regulation of the same.

It is reported that for the financial year 2012, IT-BPO industry-aggregate revenues crossed the US\$100 billion mark, providing direct employment to about 2.8 million people and indirectly employing 8.9 million people. As a proportion of national GDP, the IT-BPO sector revenues have grown from 1.2 per cent in the financial year 1998 to an estimated 7.5 per cent in the financial year 2012 and the IT-BPO sector's share of total Indian exports (merchandise plus services) increased from less than 4 per cent in the financial year 1998 to about 25 per cent in the financial year 2012.

Outsourcing in facility management and general business services is still unorganised and as a general practice is governed under the labour and contract labour laws.

Policy

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

The government realised the huge potential in IT-BPO outsourcing in the late 1990s and carved out special provisions for IT-BPO outsourcing in the National Telecom Policy 1999. The Department of Telecommunications, Ministry of Communications and IT (DoT) was entrusted with the task of promoting and regulating the IT-BPO outsourcing. This policy introduction was a landmark step in the Indian outsourcing sector, which helped in the regulation and organised (exponential) growth of the sector and provisioning of required infrastructure to the companies involved in outsourcing activities.

Pursuant to the National Telecom Policy 1999, DoT introduced the 'other service provider' (OSP) category registration for IT-BPO outsourcing companies. The policy was drafted keeping in mind the differences in domestic and international outsourcing activities. This policy is still in place and any company willing to provide outsourcing activities is required to obtain registration from the DoT.

The DoT has broadly classified IT-BPO outsourcing under the following headings:

- international OSP and call centre;
- domestic OSP and call centre; and
- network operating centre.

Any company, after procuring relevant registration, may provide outsourcing services to its clients.

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

The companies involved in outsourcing activities and catering primarily to international and foreign clients are treated on a par with export-oriented units and enjoy the same benefits as provided to any company engaged in export of goods and services.

The companies engaged in IT-BPO outsourcing to international clients are permitted to import and procure telecom equipment without requiring to pay for customs duty. Also, some states provide special incentives to companies operating in the IT-BPO sector. IT-BPO outsourcing is an IT enabled service and therefore, all IT-BPO outsourcing companies can establish their offices and operations in IT parks (special economic zones created for IT companies).

Legislation and regulation

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

As mentioned above, the outsourcing sector is recognised, appreciated and supported by a vigorous legal regime in India that aims at the protection and preservation of data and information.

Apart from DoT-mandated registration under the OSP category (and related guidelines), the Information Technology Act 2000 (the IT Act) applies to and regulates an 'intermediary' and recent amendments provided focus on corporate liability in the event of breach of privacy.

In terms of section 43A, a liability is imposed on corporate entities (which may mean including banks, BPOs, etc) to ensure adoption of reasonable security practices for the protection of sensitive personal information of customers.

Section 43A, compensation for failure to protect data

Where a body corporate, possessing, dealing or handling any sensitive personal data or information in a computer resource which it owns, controls or operates, is negligent in implementing and maintaining reasonable security practices and procedures and thereby causes wrongful loss or wrongful gain to any person, such body corporate shall be liable to pay damages by way of compensation to the person so affected.

Section 72A, punishment for disclosure of information in breach of lawful contract

Same as otherwise provided in this Act or any other law for the time being in force, any person including an intermediary who, while providing services under the terms of lawful contract, has secured access to any material containing personal information about another person, with the intent to cause or knowing that he is likely to cause wrongful loss or wrongful gain discloses, without the consent of the person concerned, or in breach of a lawful contract, such material to any other person, shall be punished with imprisonment for a term which may extend to three years, or with fine which may extend to five lakh rupees, or with both.

The recent amendments in the Information Technology Act 2000 and the coming into force of related rules and regulations in 2011 have introduced and strengthened the concept of data privacy in India for the first time. Before this there were no express provisions for data privacy.

As per the amendments, corporate bodies are now under the obligation to ensure the adoption of reasonable security practices for prevention of misuse of data. Further, with the coming into force of IT (reasonable security practices and procedures and sensitive personal data or information) Rules 2011, the regime governing the outsourcing sector has been made robust.

Further, in terms of section 79 of the IT Act, read with the Information Technology (Intermediaries Guidelines) Rules 2011, an intermediary is exempt from liability for any third-party data or information if it can prove that:

- the function of the intermediary was limited to providing access to a communications system over which information was made available or temporarily stored, etc;
- it did not select or modify the information contained in the transmission;
- the offence or contravention was not conspired, abetted, aided or induced by it; and
- it had exercised all due diligence to prevent the commission of the offence or contravention.

The other laws that affect a company or organisation in the outsourcing sector include the Companies Act, the Income Tax Act 1961, the Foreign Exchange Management Act 2000, the Contract Act 1872, the Trade Marks Act 1999, the Copyright Act 1957, the Patents Act 1970, labour laws, etc.

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

There is no legislation, regulation or direction that directly prohibits or restricts outsourcing in (onshore) or outside (offshore) the jurisdiction, whether for government or private operations.

It should be noted that India itself formally conveyed its disappointment to the United States over the ban imposed by the state of Ohio on offshore outsourcing (involving government funds) from India in 2010. Having said that, it may be noted that in certain sectors and industries (such as financial and insurance) some core services cannot be outsourced (see question 8).

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

There is no restriction on outsourcing.

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

Outsourcing of financial and banking services

The Indian banks and financial institutions regulated and licensed by the Reserve Bank of India (RBI) are required to comply with and adhere to the Guidelines on Managing Risks and Code of Conduct in Outsourcing of Financial Services for banks outsourcing financial services. The said guidelines are put in place so that the banks do not shy away from their obligations to customers.

However, the banks and financial institutions regulated by the RBI are not allowed to outsource core management and banking functions.

Outsourcing of insurance services

The insurance sector in India is regulated by the Insurance Regulatory and Development Authority and the outsourcing of insurance services is regulated by the Guidelines on Outsourcing of Activities by Insurance Companies. The said guidelines define the core and non-core insurance activities and classify activities that can be outsourced.

General business process outsourcing

Any company engaged in business process outsourcing (data and voice) is required to obtain registration from the Department of Telecommunications under the other service provider category. The services may include telebanking, telemedicine or teletrading, customer support, call centres, data processing, etc.

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

It is pertinent to note that the sections pertaining to anti-competitive agreements and prohibitions in section 3 of the Competition Act 2002 (the Competition Act) were notified and brought into effect only on 20 May 2009. Consequently, the enactment and bringing into effect of the substantive section of the Competition Act being a recent development in India, the Competition Commission of India have, until now, not held any outsourcing contracts (especially concerning inter alia restrictive provisions, 'most favoured customers' and 'benchmarking') to be in violation of provisions of the Competition Act.

However, in the case of *Quoprrro Global Services Private Limited v Consular Passport Division, Ministry of External Affairs, Government of India* (MEA) the Competition Commission, while deciding on the alleged issue of improper limitation and restriction on purchase of (outsourced) services, did not find or hold that MEA violated any provisions of the Competition Act.

Also, the exclusionary provisions, if any, under outsourcing contracts may be considered in violation of the Competition Act. In addition, merger control regulations and combination regulations as provided under the Competition Act may also be enforced if it is found that the outsourced entity is practically in control of the other entity and the market turnover can be clearly attributed.

Further, it is arguable that the provisions pertaining to benchmarking, most favoured customer and inter alia other restrictive conditions found in outsourcing contracts are likely to trigger provisions of the Competition Act, if they cause or are likely to cause appreciable adverse effects on competition in India.

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

Realising the surmounting issues of protection of personal data to secure privacy in 2011, a draft privacy legislation called the Right to Privacy Bill 2011, was drafted within the Department of Personnel and Training (DoPT), Ministry of Personnel, Public Grievances and Pensions, government of India, which was made available on the internet along with several file notings (First DoPT Bill).

However, in 2013 a proposed Privacy (Protection) Bill was drafted, which sought to protect privacy by regulating the manner in which personal data is collected, processed, stored, transferred and destroyed – both by private persons for commercial gain and by the state for the purpose of governance, the conditions upon which, and procedure for, interceptions of communications, both voice and data communications, including both data-in-motion and data-at-rest, may be conducted and the authorities permitted to exercise those powers and the manner in which forms of surveillance not amounting to interceptions of communications, including the collection of intelligence from humans, signals, geospatial sources, measurements and signatures and financial sources, may be conducted.

The Centre for Internet and Society, the Federation of Indian Chambers of Commerce and Industry, the Data Security Council of India and Privacy International have been conducting a series of national privacy round table meetings across India since April 2013 to elicit comments on the draft Privacy (Protection) Bill 2013.

Contractual considerations

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

The outsourcing is done under several models varying from the establishment of a company to provide support services to entities in and outside India to setting up a subsidiary (captive) to provide support to parent and group companies. It should be noted that there is no foreign investment restriction in the outsourcing sector.

India has witnessed several changes in structures as adopted by companies in outsourcing. Some established structures (among many) are listed below:

- setting up a private limited company to provide IT-BPO and outsourcing services, which may include a wholly owned subsidiary of a foreign company or a company promoted by Indian investors (without any foreign equity participation);
- joint ventures to provide outsourcing services, which may include joint ventures between foreign and Indian parties;
- setting up of outsourcing centres and IT-BPO under build-own-operate-transfer or build-operate-transfer; and

- arrangements where a company sells a business division performing certain activities to another company and thereafter obtains the same services from the acquirer of the division.

It is pertinent to mention that almost all the outsourcing and IT-BPO services are provided after the incorporation of a company under the Companies Act.

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

The companies operating in India in the outsourcing sector have been customising and modifying outsourcing agreements as per the requirements of the client. Most of the outsourcing agreements have service levels (work orders, statements of work, etc) and quality assurance clauses or agreements. The agreements also have provisions of training of employees by the client's personnel and onsite deputation of any of the client's employees to oversee the operations. Also, provisions are made for the secondment of employees by the service provider and the client.

In the case of BOT or BOOT contracts or agreements, provisions are made for effective and smooth transfer of operations and assets including employees and assignment of client contracts. Also, the agreements have clauses relating to privacy, data protection and transfer of data upon termination of the contract.

Further, it is an established practice to enter into a technology licence agreement of some proprietary technology of the client if getting licensed to the service provider for catering to the requirements and needs of the client.

The companies entering into outsourcing agreements try to provide for terms that may be in compliance with the laws of the countries where the parties are located. Data privacy and protection has been a big concern from companies outsourcing BPO work from the European Union and the United States.

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

As mentioned in question 8, companies engaged in outsourcing activities in the banking and insurance sectors are required to comply with regulations as formulated by regulators in the respective sectors. It is pertinent to mention that in both sectors, the banking or insurance company is prohibited from outsourcing the core business activity for which the licence has been granted (services that are regulated under the licence). The companies are free to outsource certain functions that are ancillary to the core business activity; however, the same are required to be in compliance with the rules and regulations formulated by sector regulators. Further, the companies outsourcing any of the activities are solely responsible for the commission and omission (in respect of the client of the bank or insurance company as the case may be) by the service provider. As a practice, the banking and insurance companies incorporate clauses in the outsourcing agreement in respect of indemnity, recovery, etc, to cover any event of default or breach by the service provider.

Also, as mentioned in question 12, the companies, while entering into outsourcing agreements, have provisions and clauses that clearly and unambiguously deal with service level parameters, work orders, data protection and privacy issues, intellectual property issues, liability provisions, termination rights, post-termination assistance and step-in rights.

Data protection

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

Although the right to privacy of personal information, etc, is generally protected under the aegis of the fundamental rights enshrined under the Constitution of India, the principal data protection legislation applicable to outsourcing operations is the Information Technology Act 2000 (IT Act); and its associated rules and regulations.

As mentioned above, especially with coming into force of IT (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules 2011 (IT Rules) the regime governing the outsourcing sector has been made robust. The IT Rules specifically provided for 'sensitive personal data or information' to consist of information relating to password, financial information such as a bank account or credit card or debit card, physical, physiological and mental health condition, medical record and history, sexual orientation and biometric information.

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

Issues pertaining to the ownership of information and data should be made clear and unambiguously addressed within the terms of the outsourcing contract. For example, if an outsourcer is using services alongside the purchaser's equipment, then the outsourcing agreements ought to cover issues of purchase and return of these inventories during the time the contract is in force and upon termination of the contract.

Further, with increasingly vulnerable and unpredictable cyber-attacks and electronic payment systems, the Reserve Bank of India (RBI), India's Central Bank, has made it imperative that banks introduce certain minimum checks and balances to minimise the effect of such attacks and to arrest and minimise the damage. Therefore, RBI under its notification dated 28 February 2013 on Security and Risk Mitigation Measures for Electronic Payment Transactions, obligated all banks to ensure that all acquiring infrastructure that is operational on internet-protocol-based solutions be made to go through PCI-DSS and PA-DSS certification. This should include acquirers, processors, aggregators and large merchants. The RBI obligations under the above-mentioned notification were made effective from 30 June 2013.

Besides the above, with the amendments to the IT Act (especially the substituted section 69 made effective on 27 October 2009) the central government has been empowered to issue directions to 'intercept, monitor, or decrypt' any information 'generated, transmitted, received, or stored in any computer resource' in the interests of the 'sovereignty or integrity of India, defence of India, security of the state, friendly relations with foreign states, or public order or for preventing incitement to the commission of any cognisable offence relating to above or for investigation of any offence'. Further, the IT (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules 2009 were also enacted to avoid ambiguity within the regulatory regime.

In debatable contradiction to the above, the government in April 2013 rolled out the Central Monitoring System (CMS), which enabled the government to monitor all phone and internet communications in the country. The CMS will be deployed to facilitate direct monitoring of phone calls, text messages and internet use by government agencies, bypassing the service providers.

Further, the issue of processing and movement out of the jurisdiction of certain kinds of data, such as personal or medical data is covered under the IT Rules, which provision for 'sensitive personal data or information' to consist of information relating to password, financial information such as bank account or credit card or debit card, physical, physiological and mental health conditions, medical record and history, sexual orientation and biometric information.

Also, the IT Rules stipulate that disclosure of sensitive personal data or information by a body corporate to a third party shall mandatorily require prior permission of the provider of that information. Moreover, a body corporate may be allowed to transfer sensitive personal data or information to another body corporate (in India or in another country), provided the other body corporate adheres to same level of data protection and such a transfer is necessary for the performance of a contract between the body corporate and the provider of information.

Labour and employment

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

Under the Constitution of India, labour is a subject in the concurrent list where both the central and state governments are competent to enact legislation. As a result, a large number of labour laws have been enacted catering to different aspects of labour namely, occupational health, safety, employment, training of apprentices, fixation, review and revision of minimum wages, mode of payment of wages, payment of compensation to workmen who suffer injuries as a result of accidents or causing death or disability, bonded labour, contract labour, women's labour and child labour, resolution and adjudication of industrial disputes, provision of social security such as provident funds, employees' state insurance, gratuity, provision for payment of bonus, regulating the working conditions of certain specific categories of workmen such as plantation labour, etc.

The legislation is listed below:

- labour laws enacted and enforced by central government:
 - the Employees' State Insurance Act 1948;
 - the Employees' Provident Fund and Miscellaneous Provisions Act 1952;
 - the Cine Workers Welfare (Cess) Act 1981; and
 - the Cine Workers Welfare Fund Act 1981;
- labour laws enacted by central government and enforced by both central and state governments:
 - the Contract Labour (Regulation and Abolition) Act 1970;
 - the Equal Remuneration Act 1976;
 - the Industrial Disputes Act 1947;
 - the Industrial Employment (Standing Orders) Act 1946;
 - the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act 1979;
 - the Maternity Benefit Act 1961;
 - the Minimum Wages Act 1948;
 - the Payment of Bonus Act 1965;
 - the Payment of Gratuity Act 1972;
 - the Payment of Wages Act 1936;
 - the Cine Workers and Cinema Theatre Workers (Regulation of Employment) Act 1981;
 - the Building and Other Construction Workers Cess Act 1996; and
- labour laws enacted by central government and enforced by the state governments:
 - the Employers' Liability Act 1938;
 - the Factories Act 1948;
 - the Personal Injuries (Compensation Insurance) Act 1963;
 - the Weekly Holidays Act 1942; and
 - the Workmen's Compensation Act 1923

Among the above listed legislation, some may affect the outsourcing industry. Also, the states have their own legislation and have issued separate circulars and notifications for safety and security and working hours of employees in the IT-BPO outsourcing industry. Some legislation is discussed below.

Contract Labour (Regulation and Abolition) Act 1970

The Contract Labour (Regulation and Abolition) Act 1970 (the Contract Labour Act) provides for the regulation and abolition of contract labour in various establishments including the outsourcing industry. The term 'establishment' has been defined under the Contract Labour Act as any place where any industry, trade, business, manufacture or occupation is carried on. Under the Contract Labour Act a workman is deemed to be employed as an 'outsourced labourer' in terms of work done in an establishment when he or she is hired by or through a service provider, with or without the knowledge of the principal employer.

Further, the Contract Labour Act defines 'service providers' as persons who undertake to produce a given result for the establishment, other than a mere supply of goods or articles of manufacture to such establishment, through outsourced labour or who supplies outsourced labour for any work of the establishment.

The Contract Labour Act is applicable to:

- establishments employing 20 or more working persons as outsourced labour on any day of the preceding 12 months; and
- service providers employing 20 or more working persons as outsourced labour on any day of the preceding 12 months.

Also as per the provisions of the Contract Labour Act in the event the service provider fails to make payment of wages within the prescribed period or makes short payment, then the principal employer shall be liable for the same.

Also, there is a proposal to amend the Contract Labour Act to ensure that in the case of contract labour performing the same or similar kind of work as the working persons directly appointed by the principal employer, they shall be entitled to the same wage rates, holidays, hours of work and social security provisions. Further, whenever a contract worker is engaged through a contractor, the contract agreement between the principal employer and the contractor shall clearly indicate the wages and contribution towards social security schemes and other benefits to be paid by the contractor to the contracted working person.

The contractor, if contravening any provisions, can be prosecuted under the Contract Labour Act and can be levied a fine. Contravention of any provisions of the Contract Labour Act shall be punishable with imprisonment to the extent of three months or with a fine of up to 1,000 rupees, or with both and, in the case of continuing contravention, with an additional fine of up to 100 rupees per day.

The Minimum Wages Act 1948

The Minimum Wages Act 1948 provides for fixing wage rates for any industry that has at least 1,000 workers. The definition of an 'employee' as per the Minimum Wages Act, 1948 covers in its aspect a working person employed as outsourced labour. Hence the Minimum Wages Act 1948 is applicable to outsourced labour.

The Minimum Wages Act 1948 requires the principal employer to pay wages to outsourced workers. In the state of Maharashtra, the Maharashtra Contract Labour (Regulation and Abolition) Rules 1971 necessitate that the outsourced working person shall not be paid less than the minimum rates of wages fixed under the Minimum Wages Act. Where rates have been fixed by agreement, then the rate of wages payable shall not be less than such rates so fixed. The higher of the two above-mentioned rates shall be considered for the purpose of making payment to outsourced labour.

The Act provides for imprisonment of up to six months or a fine of up to 500 rupees, or both, for contravention or non-compliance.

The Shops and Establishment Act

The Shops and Establishment Act is a state legislation act and each state has framed its own rules for the Act. Its object is to provide statutory obligation and rights to employees and employers in the unauthorised sector of employment, namely, shops and establishments.

The Shops and Establishment Act of different states extends to the whole of the state and within each state, and covers such areas as the state government may designate from time to time.

For example, the Punjab Shops and Commercial Establishments Act 1958, which extends to the whole of the state of Haryana, defines the term 'employee' as covering outsourced labour in its scope, but it does not include a member of the employer's family.

Also, the Punjab Shops and Commercial Establishments Act 1958 lays down the provisions concerning the safety of female employees and directs the establishments registered under the Punjab Shops and Commercial Establishments Act 1958 to provide adequate security and proper transport facility to the female workers during the evening night shift.

The Payment of Bonus Act 1972

Payment of Bonus Act 1972 (Bonus Act) is applicable to every factory and every other establishment in which 20 or more persons are employed on any day during an accounting year.

The definition of 'establishment' under the Bonus Act includes commercial establishments and establishments registered under the Bombay Shops and Establishments Act 1948.

Hence, the manager, managing director or managing agent or any person who has the ultimate control over the affairs of the establishment of a service provider registered under the Bombay Shops and Establishments Act 1948 can be considered as an 'employer' under the Bonus Act.

A service provider is liable to pay bonuses as accrued to working persons who are employed as outsourced labour by him or her subject to the following conditions:

- if the establishment is new it is not liable to pay a bonus for a minimum of five years, if it does not make any profit in the first five accounting years following the year in which it sells goods produced by it or renders services; and
- an employee drawing a salary of more than 10,000 rupees is not entitled to a bonus.

An employee who has worked fewer than 30 working days in the relevant accounting year is not entitled to a bonus. In the event of noncompliance or violation, the Act provides for imprisonment of up to six months or a fine of up to 1,000 rupees or both.

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

In the case of a transfer of a business undertaking, the law effectively enforces a transfer of employees. The Industrial Disputes Act 1947 deals with the situations where an employer transfers a business undertaking and the employees move as a consequence of that transfer. In terms of the provisions of the Industrial Disputes Act, where employees transfer in the case of a transfer of business undertaking, the employer is liable for severance compensation, unless the new employer is able to provide both continuity of employment and similar or better benefits than were available with the original employer.

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

In the case of outsourcing, there is no specific requirement to consult with or notify organised labour, works councils or employees.

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

The companies engaged in the outsourcing sector are required to set up a legal entity. Companies providing IT-BPO outsourcing services are additionally required to obtain OSP registration from the DoT. Also, outsourcing companies are required to obtain registrations from the tax authorities.

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

For the implications of non-compliance, see question 19. It may be noted that almost all the legislation provides for imprisonment and a monetary penalty in the event of non-compliance or violation of the relevant legislation and rules.

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

The employees of customers or providers are required to follow specific visa regulations in order to manage outsourced operations or to receive or provide training. All foreign nationals seeking permission to work in India are required to obtain an employment visa, which can only be obtained from the country of citizenship or domicile of the applicant.

If foreign nationals hold the visa for a period of more than 180 days, they must register with the relevant district foreigners registration officer or regional foreigners registration officer within 14 days of their arrival in India.

Taxation

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

The following are the taxation rules applicable to subsidiaries of foreign companies established to provide offshore services to those companies or their groups.

Direct taxes

Corporate tax

A foreign company can incorporate a wholly owned subsidiary in India subject to foreign investment regulations. Such a company will be treated as an Indian company and a tax resident of India for income-tax purposes. It will be subject to corporate tax on its net income (gross income less deductible expenses) at 33.99 per cent (inclusive of surcharge and education cess).

Advance tax

The corporate tax liability mentioned above is required to be deposited on an advance estimate basis during the tax year (income earning year) by way of four quarterly instalments.

Capital gains

Capital gains tax is payable in the case of a transfer of capital assets like investments, shares, land, plant and machinery, etc.

Dividend distribution tax (DDT)

DDT is payable by domestic companies on the amount of dividend declared, distributed or paid to its shareholders. In terms of the provisions contained under the Income Tax Act, an Indian company distributing profits to its shareholders is required to pay DDT at 16.995 per cent (inclusive of surcharge and education cess). In terms of recent amendments, a holding company will be permitted to reduce dividends received from subsidiaries while computing its DDT liability.

Recipient shareholders do not pay any tax on dividends on which DDT has been paid.

Transfer pricing

Any international transaction between Indian subsidiaries and the offshore parent entities under a related party relationship will be subject to arms'-length pricing (ALP). Accordingly, any income earned by the subsidiary from off-shore related parties or payments made to such entities should be based on ALP. Adequate documentation and a transfer pricing study certified by an accountant should be in place in order to defend the ALP before the income tax authorities.

Recently, the mechanism of advance pricing agreement (APA) has been introduced under the Income Tax Act. APA was also originally conceived for the proposed DTC but has been preponed by insertion into the Income Tax Act. It is an agreement between a taxpayer and a taxing authority on an appropriate transfer pricing methodology for a set of transactions. APA will be valid for a maximum period of five years and will be binding on the taxpayer and income tax commissioner unless there is any change in law or facts that have a bearing on such an APA.

Safe harbour rules in relation to computation of arm's-length prices refer to circumstances in which the income tax authorities shall accept the transfer price declared by the taxpayer. Income tax laws provide the power to introduce safe harbour rules. Recently, the income tax department has notified safe harbours for various industries.

Indirect taxes

Customs duty

Customs duty is payable on import of goods in India. Customs duty is levied in terms of classification of goods under a detailed customs tariff schedule.

Central value added tax (CENVAT)

CENVAT or central excise duty is payable on the manufacture of goods in India. CENVAT is levied in terms of classification of goods under a detailed customs tariff schedule.

Value added tax (VAT)

VAT is payable in India on the local sale of goods within a state in India. For example, the sale of goods by a dealer registered with the state VAT authorities of Maharashtra to another dealer or customer is subject to Maharashtra VAT. Various states in India have their own VAT legislation. Largely, the rates under VAT laws are 0 per cent, 1 per cent, 4 per cent to 6 per cent, 12.5 per cent and 20 per cent.

Central sales tax (CST)

In the event of the sale of goods being concluded in the course of movement of goods from one state to another, CST is payable. A registered dealer will charge CST at 2 per cent on interstate sales made to a dealer registered in another state.

Service tax

Service tax is payable on provisioning of services at 12.36 per cent. It is a levy administered by central government. Generally, the service provider will charge the service tax on the value of services provided and deposit the same with the government after collection from customers. In the case of certain specified services, a service recipient is responsible to comply with service tax obligations. Service tax is applicable on all services except those that are covered under a common or unified negative list.

Goods and service tax (GST)

The Indian government at the centre is working with various state governments in India to introduce GST as early as possible. It is a comprehensive indirect tax levy on sale of goods and provisioning of services and replaces service tax and other indirect tax levies.

As per the existing draft model, one of the two components of GST will be levied by the central government (central GST) and the other by the states (states GST). It is expected to be levied on the import of goods and services but may not apply to the export of services.

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

Service tax is a consumption tax (indirect tax) levied on the provisioning of services collected by the service provider from the service recipient.

The service provider collects service tax on bills raised on the service recipient and deposits it into the government account. However, in some cases, the service recipient is made liable to pay service tax to the government wholly or partially such as in the case of the import of services in India from outside India.

An Indian company importing offshore outsourcing services will pay service tax on such services.

Current issues

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

Some important cases relating to outsourcing and issues relating to outsourcing are highlighted below.

In the landmark case of *Shashank Shekhar Mishra v Ajay Gupta* (CS (OS) No. 1144 of 2011), the Honourable Delhi High Court held:

The right to privacy has been recognised as a valuable right of an individual, which is implicit in his right to life and liberty, which is guaranteed by Article 21 of the Constitution. The right of privacy does encompass and afford protection of personal intimacies of family, marriage, friendship and other matters which are of a private nature. It is a right to be let alone and everyone is entitled to safeguard his privacy irrespective of the kind of life he is leading. No one has a right to peep into the private life of another person without his consent and if he does so, he would be violating the right to privacy of the person concerned and would be liable to pay damages in an action under the law of torts.[...] Monetary or pecuniary compensation is widely recognised as an appropriate and effective remedy for infringement of right to privacy, whether by State or by private individuals.

In the case of *AK Balaji v Union of India*, AK Balaji filed the writ of mandamus (before the High Court of Madras) in order to direct the public authorities to take appropriate action against the foreign law firms or foreign lawyers, who are illegally practising the profession of law in India.

Update and trends

Outsourcing, especially IT-BPO, is under pressure and has been on the decline due to the emergence of other cost effective destinations. The outsourcing sector has been facing problems due to increase in infrastructure and HR costs, HR and labour problems, reservations on outsourcing by European countries and the United States, uncertainty on policy issues and no adequate protection for data and information among others.

As mentioned above, the government of India is looking at the introduction of the Privacy (Protection) Bill, which may help the granting of greater protection to private data.

It has been stated by AK Balaji that the procedure for Indian lawyers to practice in foreign countries is cumbersome and very costly and there are also many restrictions like qualifying tests, previous experience, work permits, etc. However, there are no such procedures contemplated in the Advocates Act 1961 in respect of foreign lawyers who intend to practise law in India.

Further, reference was also made to the case of *Lawyers Collective v Bar Council of India*, which was settled by the Bombay High Court. The fact of the case before the Bombay High Court was that the foreign law firms practising the profession of law in the United States or the United Kingdom sought permission to open their liaison office in India and render legal assistance to another person in all litigious and non-litigious matters.

The Bombay High Court, therefore, held that establishing a liaison office in India by a foreign law firm and rendering liaising activities in all forms cannot be permitted since such activities are opposed to the provisions of the Advocates Act and the Bar Council of India Rules.

However, the issue that falls for consideration in this case is whether a foreign lawyer visiting India for a temporary period to advise his or her client on foreign law can be barred under the provisions of the Advocates Act.

It has been held by the Madras High Court that until the foreign law firms or foreign lawyers fulfil the requirement of the Advocates Act 1961 and the Bar Council of India Rules, they cannot practise the profession of law in India either on the litigation or non-litigation side. However, no bar has been placed on the foreign law firms or foreign lawyers on visiting India on a temporary basis for the purpose of giving legal advice to their clients in India regarding foreign law.

It is further held that foreign lawyers cannot be debarred from coming to India and conducting arbitration proceedings in respect of disputes arising out of a contract relating to international commercial arbitration.



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Besides the above, it has been concluded by the Madras High Court that BPO, outsourcing and legal process outsourcing companies do not come within the purview of the Advocates Act 1961 or the Bar Council of India Rules and therefore outsourcing in the legal profession is not in violation of any law.

In another case, MouthShut.com (India) Pvt, which runs the portal, mouthshut.com, filed a public interest litigation before the Supreme Court of India to challenge the Information Technology (Intermediaries Guidelines) Rules 2011 asking the Supreme Court to declare such rules as illegal, null and void as they are against the right to freedom of speech given by the Indian Constitution. The case is pending before the Supreme Court. However, any order by the Supreme Court may affect operations and obligations cast upon IT-BPO outsourcing companies.

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

In June 2013, the United States Senate passed an immigration bill that has had some negative implications on India's software export industry, which heavily relies on such workers to service clients in the United States. According to a report of JP Morgan Chase & Company, the stricter rules under the US immigration bill could drain about US\$8 billion from India's already struggling outsourcing industry and especially India's economy at large.

Nevertheless, Indian outsourcing experts have said that the flat IT budget, the current uncertain macro environment and the continually changing laws that govern the sector will continue to pose as challenges for the Indian IT-BPO outsourcing industry. However, with technology becoming more critical to corporate industry (both domestic and foreign, including Indian government agencies), 2013 may turn out to be a good year for India's outsourcing industry.



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