

Table of contents

1. Background and snapshot of key issues.....	1
1.1 Context.....	1
1.2 Background.....	1
1.2.1 Organisations outsource for a number of reasons	3
1.2.2 Outsourcing trends	5
1.2.3 India as an outsourcing destination	7
1.2.4 Destination India	10
1.2.5 An overview of outsourcing agreements.....	11
2. Outsourcing fundamentals.....	15
2.1 Purported benefits	15
2.2 Costs and risks of outsourcing	16
2.3 Outsourcing models	17
2.4 Typical outsourcing arrangements	18
2.5 Separation of assets and operations	19
2.5.1 Transfer of assets.....	20
2.5.2 Transfer of staff.....	21
2.5.3 Service Agreement	22
3. Attitudes to outsourcing worldwide.....	23
4. Selecting an outsourcing service provider	25
4.1 Minimising risks through the choice of an appropriate service provider ...	25
4.2 Service provider challenges from a customer perspective	28
4.3 The RFP process	29
5. The Indian judicial system.....	33
5.1 Primary source of law	33
5.2 Secondary source of law	34
5.3 Tribunals.....	35
5.3.1 Customs.....	35
5.3.2 Interpretation	35
6. Critical contract considerations – jurisdiction issues.....	37
6.1 Two systems of law	37
6.2 European legal landscape (Common Law v’s Civil Law)	37

6.2.1 Common law countries	38
6.2.2 Civil law countries	38
6.3 Indian contract law	39
6.4 Jurisdiction to prescribe	42
6.5 Jurisdiction to adjudicate	42
6.6 Jurisdiction to enforce.....	43
6.6.1 Nature and scope of section 13 of the Code of Civil Procedures, 1908.....	44
6.7 Arbitration	46
6.7.1 What is an arbitration agreement?.....	47
6.7.2 Enforcement of foreign arbitral awards.....	49
6.8 Public policy and refusal to enforce foreign judgments / awards	50
6.8.1 How courts apply the public policy limitation in international arbitration.....	50
6.8.2 Application of Indian law in English courts.....	51
7. Allocation of risk into the contract	55
7.1 Types of risks and terms within a contract	55
7.2 Terms of a contract	58
7.2.1 Defining terms.....	59
7.2.2 Intermediate terms.....	59
7.2.3 Implied terms	60
7.2.3.1 Terms implied by custom.....	60
7.2.3.2 Terms implied by the court	60
7.2.3.3 Terms implied by statute.....	60
7.2.4 Typical service provider requests.....	61
7.2.5 Typical customer requests	61
7.3 Disclaimers	62
7.4 Subcontracting provisions	63
7.5 Privity of contract	63
7.6 Insurance requirements	64
7.7 Force Majeure provisions	64
7.8 Disaster Recovery.....	66
7.8.1 Disaster recovery testing	67
7.8.1.1 Provision of disaster recovery services	67
8. Project management.....	69
8.1 Elements of good project management.....	69
8.1.1 Transition management	69
8.1.2 Governance	70
8.1.3 Performance and quality management	70
9. Contract discharge and methods to reduce liability.....	73
9.1 Contract performance	73
9.2 Representations and warranties	75
9.2.1 Consequential damages.....	75

9.2.2 Limits on recovery of actual damages.....	76
9.3 Indemnities	76
9.3.1 Mutual indemnities.....	76
9.3.2 Service provider indemnities.....	77
9.3.3 Customer indemnities.....	77
9.4 Limiting liability.....	78
9.5 European Unfair Contract Terms.....	78
9.5.1 The UK Unfair Contract Terms Act (UCTA) 1977	78
9.5.2 Main provisions of UCTA 1977 relevant to outsourcing contracts... 79	
9.5.2.1 Exemption of liability for negligence.....	79
9.5.2.2 Exemption of liability for breach of contract	79
9.5.2.3 Exemption of implied terms in contracts of sale	79
9.5.3 The requirement of reasonableness	80
10. Pricing	81
10.1 Types of pricing schema.....	81
10.1.1 Incentive pricing.....	82
10.1.2 Payments	83
10.1.3 Contracting for change	83
11. Transition-in and change control.....	85
11.1 Transition-in.....	85
11.2 Change control	86
11.3 Mergers	86
12. Scope of services to be outsourced	89
12.1 Scope of the services contracted.....	89
12.1.1 General scope clauses.....	90
12.1.2 Undisclosed assets.....	90
12.1.3 Outsourced functions.....	90
12.1.3.1 Administration	91
12.1.3.2 Customer service	91
12.1.3.3 Finance.....	91
12.1.3.4 Human resources	92
12.1.3.5 Information technology and information systems.....	92
12.1.3.6 Real Estate	92
12.1.3.7 Logistics.....	92
13. Service Level Agreements.....	93
13.1 Type of Service Level Agreements	93
13.2 Performance standards	94
13.3 Process and quality standards.....	95
13.4 Rules for effective SLAs	96
13.5 Selecting appropriate metrics	97
13.6 Measurement and management	98

13.6.1 Collecting process information.....	99
13.6.2 Reporting.....	100
13.7 Benchmarking	100
13.8 Remedies as part of the SLA.....	101
14. Contract enforcement	105
14.1 Typical remedies for failures to perform obligations	105
14.1.1 Basis for assessment of damages.....	106
14.1.2 Duty to mitigate.....	107
14.1.3 Liquidated damages and penalty clauses.....	107
14.2 Damages available in India	107
14.2.1 General damages	108
14.2.2 Special damages	108
14.2.3 Distinction between general and special damages in contract....	108
14.2.4 Exemplary damages	108
15. Contract termination procedures	111
15.1 The outsourcing lifecycle	111
15.2 Triggers for termination	111
15.3 Effects of termination or expiration / reversion clauses	112
15.3.1 Transition-out services	113
15.4 Dispute resolution mechanisms.....	114
15.5 Escalation procedures.....	114
16. Unenforceable Contract terms under Indian Legal system.....	117
16.1 Sovereignty	117
16.2 Indian statutes cannot be overwritten by any other Law	117
16.3 Non-predation clauses	118
17. The EU Data Protection Directive 97/66/EC and related issues.....	121
17.1 The requirement for data protection.....	121
17.2 Non disclosure agreements / confidentiality	121
17.3 Personal data protection – the eighth principle	122
17.3.1 Concept of legal adequacy	126
17.3.2 Binding corporate rules (BCR).....	128
17.3.3 Residual information	129
17.4 Data transfer in the interests of the data subject.....	130
17.5 The Seventh Principle	131
17.6 The situation in India with respect to data protection	133
17.6.1 Current legislation governing data privacy in India	134
18. Intellectual property rights (IPR)	137
18.1 Intellectual property rights is an integral part of the outsourcing agreement.....	137
18.2 Copyright	141

18.3 The Indian Copyright Act.....	141
18.4 Trade Marks	143
18.4.1 Comparative analysis of patent, copyright and trademark.....	144
18.4.2 Domain names.....	145
18.4.3 E-Commerce.....	145
19. Transferring employees as part of the outsourcing agreement	147
19.1 Concept of Acquired Rights	147
19.2 When does the Acquired Rights Directive and TUPE apply to outsourcing?	148
19.3 Asset based activities	149
19.4 Employment transfers	149
19.5 What obligations and rights pass to the transferor?.....	150
19.6 Negotiating the contract in respect of transfer of employees	150
20. Legal and regulatory risks.....	153
20.1 Categorising legal and regulatory risks	153
20.2 Planning for change.....	153
20.3 Markets in Financial Instruments Directive (MiFID).....	154
21. Specific Indian legal issues of importance	157
21.1 Taxation issues	157
21.2 Employment laws	159
21.2.1 Protection for workmen.....	160
21.2.2 Confidentiality provisions in employment contracts	161
21.2.3 Women’s employment rights.....	162
22. Summary	163
Afterword - the future of outsourcing to India	167
Annex.....	169
1. Sample contract template - Checklist	171
2. Sample contract template - Section 1: Framework contract for outsourcing	173
2.1 Background.....	173
2.2 Definitions	173
2.3 Contract management	173
2.3.1 Contract commencement and duration.....	174
2.3.2 Contract renewal	175
2.3.3 Contract modification (Change Order Process).....	175
2.3.4 Contract validity (merger, take-over, bankruptcy)	176

2.3.5 Contract termination	176
2.3.6 Important factors to include within the contract.....	177
2.3.7 Acceptance procedures.....	178
2.4 Law and place of jurisdiction.....	178
2.5 Transition-in	178
2.5.1 The transition plan	179
2.6 Employees	179
2.6.1 Transferring employees.....	179
2.6.2 Transferred employees	180
2.6.3 Seconded employees	180
2.6.4 Independent contractor agreement	181
2.6.5 Terminated employees	181
2.7 Conflict resolution	181
2.7.1 Escalation procedure	182
2.8 Rights and obligations	182
2.8.1 General and specific obligations and warranties	182
2.8.2 Remedies for failures to perform obligations or meet standards.....	183
2.9 Confidentiality	184
2.10 Data and protection.....	184
2.11 Auditing and security requirements	186
2.11.1 Auditing	186
2.11.2 Security.....	186
2.11.3 Regulatory.....	186
2.11.4 Cost of review	187
2.11.5 Consequences of review	187
2.11.6 Contingency planning for disaster	187
2.11.7 Disaster recovery testing.....	188
2.11.8 Proprietary rights	189
2.12 Pricing / payment procedure	189
2.12.1 Charging principles.....	190
2.13 Indemnities	191
2.14 Damage limitations.....	192
2.15 Third party access	193
2.16 Subcontracting	193
2.16.1 Rights to assign.....	193
2.16.2 Approval of sub-contractors	193
2.17 Insurance.....	194
2.18 Taxes.....	195
2.19 Force Majeure	195
2.19.1 Factors to constitute Force Majeure.....	196
2.19.2 Effect of suspension of service	196

3. Sample contract template - Section 2: Description of services to be outsourced 197

 3.1 Definitions 197

 3.2 Description of the service 197

 3.3 Service level agreement 198

4. Sample Contract Template – schedules 199

References and Resources 201