Legal Processing Outsourcing: Is the lack of a regulatory framework one of the challenges facing the LPO industry in India?

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Outsourcing, as had been substantially understood was formally identified as a business strategy in 1989 and is generally defined as "an arrangement whereby a company carves out certain services that it has been providing internally and retains a third party to provide these services." The significant aspect is, outsourcing refers to sending work to a more efficient and cost-effective location, but the outsourced work has no legal relationship to the jurisdiction where the work is sent.

Eminent scholars have broadly separated the forms of legal outsourcing basically into three models, i.e. outsourcing of legal work to subsidiaries, direct hiring of foreign law firms, and third party vendors known as legal process outsourcers (LPO's). India takes in more legal outsourcing business than any other nation in the world. Without question, the most obvious reason for this is the cheap price for legal work in India. Salaries for successful Indian attorneys are significantly lower than of an entry-level American attorney. Research reports show that many Indian attorneys only charge $20 an hour for legal research. On the contrary, the price of legal research by a junior associate at an American law firm is often around $200 an hour. Thus in terms of money saved by corporations and jobs shipped to India, the numbers behind outsourcing are staggering. Studies have shown that for every $1 of cost on services that American companies outsource to India, a value of at least $1.14 is created for the economy.

Further the global time framework also helps India to a great extent in the procurement of Legal work from the outsourcers. The time in India is fourteen hours different from New York and eleven from Los Angeles, thus a round-the-clock legal assistance is possible. Thus, in theory an attorney in New York can send a research assignment to his Indian LPO unit when he is leaving his office at 6:30 in the evening and then probably have an emailed memorandum of law waiting in his Inbox at 7:00 A.M. the next morning. Furthermore, like the United States, India too has a common law legal system based in British legal tradition, which is an added boon.

Outsourcing legal work to India began in 1995, when the 34-lawyer, Dallas-based litigation firm of Bickel & Brewer opened an office in Hyderabad. However, even just a few years ago, outsourcing legal work to India was a dirty little secret, as most of the law firms did it,
but only a handful admitted to it. However, outsourcing legal work to India is no longer a novelty, but a necessity and for Legal Process Outsourcing (LPO) providers in India, it is the dawn of a prosperous era.

In spite of the Legal Outsourcing Industry being highly cost effective, it has from its very inception been a highly controversial business practice. Numerous state and federal bills had been proposed to curb the outsourcing of legal jobs, many of which raised concerns over constitutionality and compliance with international trade agreements. In 2008, presidential candidate Christopher Dodd formulated the "Dodd Amendment," which was a multi-pronged anti-outsourcing measure that, amongst other things, prohibited the outsourcing of federal contract work unless the president decided that the contract was in the best interest of national security. However the benefits to law firms and corporations of sending legal work overseas have outweighed these potential regulatory propositions.

Yet, this heyday of the industry which is predicted to generate around one billion dollars annually for India by the year 2015 may turn bleak if the primary issues of concern affecting the LPO industry at present which primarily includes ethical issues, distaste with the idea of outsourcing, risk of poor work quality, and protectionist legislation are not adequately addressed. Similar to the standardised outsourcing agreements, even the legal outsourcing relationships are governed by an outsourcing agreement which addresses and specifies the scope of services to be provided, the service levels which are ideally the benchmarks of the contract, the length of the contract, the choice of laws, and the privacy and data protection issues.

While not unethical by nature, LPO’s opens the door for potential ethical violations under American Bar Association rules among which client confidentiality is a major concern. A very crucial risk in legal outsourcing is the specter of protectionist legislation. The political backlash against outsourcing created a firestorm in American Congress and state legislative halls as much of the anti-outsourcing legislations have failed, and the protectionist legislative movement is less active than in its heyday of early 2004. With regard to ethical considerations, the issue of whether lawyers must disclose the sending of private information overseas to comply with ethical rules is rather murky. Almost all of the privacy legislation allows companies to send personal information overseas, so long as the customer consents. The ABA has nonetheless declined to provide a "blueprint" for the provision of competent legal services, and the firms are left to speculate as to how best to handle emerging outsourcing issues. Thus, there
is a serious and dangerous lack of emphasis on legal ethics and confidentiality in the Indian legal system.\textsuperscript{25}

Withal, the LPO’s understand the seriousness of the privacy issue which can be illustrated by citing the practice undertaken by Atlas LPO unit, which has already taken steps to reduce the privacy risk by offering to change names and readily identifiable information on legal documents before sending them to India.\textsuperscript{26}

In the wake of this blooming industry, if its efflorescence has to conserved for a greater period, the need of the hour is a spectrum of regulatory framework policies have to be formulated by increasingly savvy LPOs\textsuperscript{27} in consonance with the legislative policies of India which would prevent or at least minimize the risks facing the LPO industry in India today.

Firstly, an inherent difficulty which calls for a regulation with respect to outsourcing legal work is deciding upon an appropriate Service Level. A Service Level Agreement (SLA) is difficult to frame for complex legal work as these agreements specify for liquidated damages in the event of failure to meet a certain benchmark, which can also be construed as a penalty and thus would unenforceable if it is too harsh. A proper regulation of the Service Level Agreement is the key to a successful legal outsourcing industry for India.

Secondly, as the wave of legal outsourcing is swelling, the issue of information piracy and data security in India has come under greater scrutiny. The absence of appropriate statutory measures in India is becoming of greater concern to investors, corporations, the legislature, and the public in outsourcing nations. India has been constantly urged to enact an adequate data protection regime which dictates the appropriate parameters for the collection, storage and use of personal data by private and government entities. Given the international focus on India's data protection scheme, it is merely a matter of time before India enacts data protection laws. The seminal issue that remains however is that once the data protection laws are in place, whether the laws will be enforced in such a manner as to provide any meaningful protection to data as India’s existing enforcement regime in legal system is pitifully deficient, marred by interminable delays in moving matters through the existing court system. Thus, India will be unable to provide adequate protection to data unless a regulatory framework is enforced to address the court delays, and procedures established for expediently prosecuting data protection breaches and compensating those harmed. A critical aspect of the European Union Directive 95/46/EC\textsuperscript{28} is its focus on Data transfer to third countries or regions outside the European Union which is
permitted only if the recipient nation provides an ‘adequate level of protection’. With respect to the current Indian system of data protection, it can be best described as a web, many protections are offered through various sources and the web traps, but gaps and holes remain.

The third primary issue which calls for a regulatory framework is the subject of confidentiality. Though the ABA’s Ethics Opinion does give both general and specific confidentiality recommendations, there are certain fundamental aspects of the Indian legal system that still raise serious confidentiality concerns even after appropriate LPO provider vetting. The Indian government though aware of customers concerns regarding misappropriation of confidential information, has to now make strides to heighten security protection of data and client information. It has to take steps to introduce data protection legislation in a bid to ensure that European and U.S. companies looking to outsource legal services overseas will consider India as their optimal choice.

Further, in relation to the Indian Contract Act, which governs the contract between the service providers and the company seeking to contract out its service requirement, there is a need to give special attention in relation to outsourcing contracts to clauses relating to confidentiality, non-compete, exclusivity, liability, exit and termination as India has a written Contract Act and all agreements are subject to the statute.

Another important issue of consideration which calls for a regulatory framework is the issue of enforcement of non-compete provisions. India has stringent laws against restrictive trade practices and thus enforceability of stand-alone non-compete provisions on termination of a contract are questionable. Section 27 of the Indian Contract Act 1872 stipulates that an agreement which restrains anyone from carrying on a lawful profession, trade or business is void to that extent. The reasoning behind this section is that agreements in restraint of trade are unfair, as they impose an undue restriction on the personal freedom of a contracting party. However, the test of ‘reasonableness’, has inserted some ‘grey areas’ which can be invoked to enforce an apparently lawful restraint. A Supreme Court ruling in the case of Niranjan Shankar Golikan had held that ‘A covenant in restraint of trade must be reasonable in reference to the parties concerned and reasonable in reference to the interest of the pubic, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed and at the same time it is in no way injurious to the public’. Thus agreements which prohibit employees from engaging in a business similar to or in competition with that of the employer beyond the term of employment
are invalid. The same principle is extended to non-compete agreements between companies, except franchise agreements. However, in the wake of this booming LPO industry, the compulsions of competition and the changing rules of the game have become necessary.

Further, the issue of ‘Exit and Termination’ calls for a regulatory framework in India. The laws relating to this does not set out clearly and exhaustively all steps to be taken in case of termination, thereby not providing a clear or unambiguous exit process. Thus it becomes important for the contracts to contain due consideration in respect of termination clauses, in particular to notice periods and means of notice.

Furthermore, a very dicey area which demands immediate regulatory measures to be undertaken is the arena of Intellectual Property. Offshore outsourcing deals often give rise to vexatious IP rights-related issues and legal outsourcing is no different. Contracts end up in long-drawn-out disputes between the parties. Ordinarily IP rights imply formulation, usage and subsequent commercial exploitation of original creative labour. There is an inevitable sharing of IP, between the service provider in India and the outsourcer either for the purpose of value addition or simply as a resource for performing the particular service. This sharing of IP takes place across two jurisdictions that do not have a similar IP rights protection regime. Disparities in IP rights laws in India and the customer jurisdiction are commonplace. Hence it becomes essential for the benefitting country, i.e. India to specifically lay out its IP Laws which if not exactly similar are in compliance with the IP protection of the Outsourcing country. Moreover, IP rights issues in outsourcing transactions have often emerged as thorny areas when debating the merits or demerits of outsourcing. In fact, these arguments are perhaps the most potent weapon for those who are against offshore outsourcing of legal work as India featured in the priority watch list published by the US State Department for inadequate protection of IP rights. Nonetheless, when compared to countries like China, Mexico and Russia, India seems to have a better IP rights regime. However, incidents such as the infamous Jolly Technologies source code theft\textsuperscript{35} or the Geometric Software case\textsuperscript{36} have heightened suspicions and given one more reason for the protectionist lobby in the West to continue its outcry against outsourcing.

Labour is another issue of concern which demands a regulation in legal outsourcing deals. India has fairly stringent labour laws. The Industrial Disputes Act lays down various rules and regulations regulating the conditions of employment of a certain category of workmen. The Act, however, does not apply to employees engaged in managerial or administrative work or
employed in a supervisory capacity and drawing wages exceeding a stipulated amount. In the case of employees engaged in legal outsourcing most would fall under the exception provided above by virtue of the nature of their employment and salary levels. Thus it requires a carefully considered and well drafted law with notice, termination and non-compete provisions to ensure these are enforceable within the Indian parameters.

The taxation policies need a regulatory framework too in the eve of the thriving Legal outsourcing industry. Tax considerations must be carefully considered. Though detailed transfer pricing regulations have been introduced in India since 2001, by way of amendments to the Income Tax Act 1961 which regulate international transactions between two or more associated enterprises, either or both of which are non-residents and where transactions must be on an arm's length basis, however these a need for a clearer outlook of the law. There are situations where the foreign customer may be deemed to have a ‘permanent establishment’ in India, in which case certain profits would be taxable in India, while on the contrary, the Central Board for Direct Taxes (CBDT) had officially clarified that the non-resident entity of the foreign company will not be liable to tax in India. Hence, there is a need to provide a concrete structure regarding the taxation policies with respect to the Legal Process Outsourcing Industry.

The be all and end all essence which has to be kept in mind is to gain as much as possible from the heyday of this booming industry because the growth trend cannot be expected to last forever and the industry would eventually reach a stablisation point, whereupon the market will begin its consolidation resulting in the current supernormal profits to cease.

From creating china walls to restricted physical and data access, port blocking software and periodic security audits, vendors have to escalate confidentiality to international levels of standardization such as ISO 27001 in order to attract more and more progressive business into India.

At the moment the legal outsourcing is fast moving up the value chain. The value proposition in outsourcing back-end support operations to an offshore vendor and allowing in house personnel to focus on core functions has been recognized and capitalized by multiple corporations and law firms the world over. More and more organizations are beginning to show interest and experiment with legal process outsourcing. Quick to cash in on this growing buzz are multiple outsourcing outfits being set up every day across various cities in India.
Moreover, from low end back-office functions the sector has scaled up to new areas involving specialist skills. Lexadigm a well established LPO in India recently drafted its first brief for a U.S. Supreme Court case, involving the application to a tax dispute of the Fifth Amendment's due process clause.\textsuperscript{37} Though the brief was ultimately filed by an American law firm, as if the draft had been written by one of its own associates, the message here is crystal clear; outsourcing all kinds of legal work to India is the next big thing.

The rapid development of LPO sector indicates that the inherent challenges are being met very rapidly. Every authoritative report, including a recent report by Nasscom-Evalueserve, predicts a huge increase in outsourcing of legal work. Estimates of the current addressable market potential for legal services outsourcable from the United States alone are pegged at US $34 billion. Forrester Research projects that up to 79,000 legal jobs in the United States will be outsourced by 2015. With continued advances in telecommunication and technology, reliance on an offshore workforce is likely to become the norm rather than the exception for the legal sector.

To close, if the policy considerations in respect to the regulatory framework are adequately adhered to, the future of the Indian Legal Outsourcing Industry is very bright in the times to come.

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\textsuperscript{3} Bharat Vagadia, OUTSOURCING TO INDIA - A LEGAL HANDBOOK 1 (2007).
\textsuperscript{4} Ronald D. Rotunda & John S. Dzienkowski, LEGAL ETHICS: A LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY p. 5.3-2 n.6 (2009-2010).
\textsuperscript{7} John W. Anderson, THE VIRTUAL LAW FIRM, 23 Del. Law. 36, 37.
\textsuperscript{13} Pankaj Parmami, LEGAL PROCESS OUTSOURCING INDUSTRY - AN ANALYSIS, The Chartered Accountant, at p. 760, 762.
\textsuperscript{14} Julie Kay, INDIA WORK GROWS, WITH GLITCHES, Nat'l Law Journal., April 9, 2008.
ValueNotes, OFFSHORING LEGAL SERVICES TO INDIA, http://www.valuenotes.biz/bpo/legaloutsourcing.asp.
Bharat Vagadia, OUTSOURCING TO INDIA - A LEGAL HANDBOOK 1 (2007).
Ibid.
Ibid.
Laura D’Allaird, "THE INDIAN LAWYER": LEGAL EDUCATION IN INDIA AND PROTECTING THE DUTY OF CONFIDENTIALITY WHILE OUTSOURCING, PROF. LAW.
Any meaningful analysis of adequate protection must comprise the two basic elements: the content of the rules applicable and the means for ensuring their effective application. Council Directive
ABA Formal Op. Supra n. 41, Consideration also should be given to the legal landscape of the nation to which the services are being outsourced, particularly the extent that personal property, including documents, may be susceptible to seizure in judicial or administrative proceedings notwithstanding claims of client confidentiality.
 Depending on the sensitivity of the information being provided to the service provider, the lawyer should consider investigating the security of the provider’s premises, computer network, and perhaps even its recycling and refuse disposal procedures. In some instances, it may be prudent to pay a personal visit to the intermediary’s facility, regardless of its location or the difficulty of travel, to get a firsthand sense of its operation and the professionalism of the lawyers and nonlawyers it is procuring.
Daniel Brook, MADE IN INDIA: ARE YOUR LAWYERS IN NEW YORK OR NEW DELHI?, Legal Affairs, http://www.legalaffairs.org/issues/May-June-2005/scene brook may jun05.msp.