

Chapter 18: Legal Contract Arrangement

The contract is the key point in the outsourcing arrangement that can make the difference between a smooth-running partnership and an expensive nightmare that winds up gracing the cover of every global business newspaper.

The contract arrangement is usually completed in detail once the vendor selection is complete. It is legally binding and defines the agreement to provide or purchase a service between both parties at both a legal and practical level.

Outlining the basic role of a contract, offshore outsourcing experts, Michael F. Corbett and Associates, note: "Providing a framework for the outsourcing relationship, the contract is intended to memorialise the arrangement and arrange for the negotiation process. This formal commitment becomes the basis for moving forward, as well as setting specific legal purposes."¹

The outsourcing lifecycle begins with the vendor selection and is confirmed by the creation and agreement of a contract. What is often forgotten, in the noise of contract signing celebrations, is that this is a long term agreement. The contract needs to specify how the service will be delivered and also manage the process of regular renegotiation or termination. This overall strategic view of the contract as an agreement for the creation, management and eventual termination of the outsourcing relationship, is the healthiest approach to crafting a working document that will not constrict the relationship.

Independent outsourcing advisors Gartner believe that the two parties need to commit to the new relationship more in the style of a marriage than a transaction. Gartner advises: "When negotiating the contract, it's tempting to believe that every concession by the provider is a win for the buyer. The more wins, the better. Wrong."² Gartner believe that a client hammering out the lowest cost deal from a supplier will end up paying for their lack of relationship skills further down the line.

The outsourcing contract negotiation is not straightforward and can be extremely complex when everything from cross-border legal issues and intellectual property to transition details are thrown into the process. This chapter aims to serve as a reminder of the key considerations for the offshore outsourcing contract and a primer on the potential pitfalls.

Key Considerations

Indian Location

One of the most important things to remember about India is that it is a remote and very different country. The legal system may resemble Britain, but the law and process of law is different.

When I asked Rob Aalders, author of *The IT Outsourcing Guide*, about the key considerations of the contract process he said: "This can be a really tricky issue. I think the most important thing to do is engage a local [Indian] high-powered law firm to consult with your usual domestic firm. They need to agree on the processes of law, the cultural management of legal disputes and the time issue regarding bringing a case to court in India."³ On this last point he added: "It is essential that the reality and probability of realising contractual damages and repatriating them are well understood. The key area is not so much the contract per se, but the context and cultural framework in which it has to be realised."

Kurt Vandenberg is a Partner at financial services consulting firm Capco, with global responsibility for Capco's offshore delivery activities. When I asked him about offshore contract issues specific to India he warned about telecoms legislation. Vandenberg said: "Telecoms legislation is quite tricky in India. Telecoms costs can be quite high depending on how you handle voice and data traffic. The handling of voice and data is subject to some arcane laws."⁴

It is therefore important to appoint local Indian counsel, even in addition to your regular legal team. Local counsel can brief your own advisors on local laws and regulations specific to the outsourcing contract being prepared with your supplier.

Pre-Contract Steps

It is important to step back just before creating the contract, to ensure that the information expected of the vendor selection process has all been collected and is satisfactory. Angus Finnegan is a partner at law firm Osborne Clarke. In a presentation to the UK National Outsourcing Association, he listed the following actions as essential steps prior to entering the contract negotiation process⁵:

- Request for Information and Invitation to Tender should not form part of the contract.
- Viability study.
- Customer 'housekeeping'.
- Supplier due diligence.
- Identifying relevant assets.
- Third party contract review.
- Identify affected employees.