

INTERROGATING OUTSOURCING LEGAL SERVICES IN INDIA IN LENS OF COMMON LAW VS. CIVIL LAW

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Abstract

This paper is based on critical analysis of available sources list data & literature. Legal Services Outsourcing is an emerging trend in field of Legal profession. Hence Legal Services Outsourcing (LSO) is the practice of procuring legal services from an external provider. First and foremost this paper tries to explore the Legal service outsourcing as emerging trends in Legal profession in Indian context. It also aspire to interrogate the procedural ways of Legal service outsourcing under limited liability partnership (LLP) along-with Para-legal services under Legal Process Outsourcing(LPOs). Limited Liability Partnership" (LLP) in India has been enacted by the Parliament of India recently (Limited Liability Partnership (LLP) Act of 2008). Moreover it tries to attempt the forthcoming challenges in the Legal service outsourcing in Indian context; hence in Indian law legal framework is based upon both legislation and common law. Legislation is also known as statutory law while common law is termed sometimes as case law. Legislation and common law are two very different legal systems. But in the present scenario convergence of both can easily be seen and felt as India is having both of them in its system. Common law, also known as case law, is law developed by judges through decisions of courts and similar tribunals. Furthermore it tries to interrogate and compare common law with civil law, in relation to contemporary scenario, trends, potential and challenges to Legal Outsourcing of Services in India. Lastly analysis and conclusion has been drawn on the basis of entire discussions in the paper.

Introduction

‘Outsourcing’ is defined generally as “sending work traditionally handled inside a company or firm to an outside contractor for performance.”¹ It refers to the business practice of taking a

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¹ Aaron R. Harmon, *The ethics of legal process outsourcing—is the Practice of law a “noble profession”, or is it just another business*, 8 NORTH CAROLINA JOURNAL OF LAW & TECHNOLOGY, 48, 42-68 (2007).

specific function previously performed in-house and having another company perform the operation. ‘Outsourcing is by no means a new phenomenon, but due to advances in information technology, outsourcing has grown far more popular in recent years.’²

The Webster’s dictionary meaning of outsourcing is: “Paying another company to provide services which a company might otherwise have employed its own staff to perform, e.g. software development”. In a layman’s language outsourcing basically refers to the process of one entity involving another entity to do a part of its usual work load. It involves the transfer of a variety of activities starting from management functions to day-to-day execution of an entire business function to an external service provider. ‘The client organization and the supplier enter into a contract that defines the transferred services. Under the agreement the supplier acquires the means of production in the form of a transfer of people, assets and other resources from the client. The client agrees to procure the services from the supplier for the term of the contract. Business segments typically outsourced include information technology, human resources, facilities and real estate management, and accounting.’³

‘Offshore Outsourcing: Offshore outsourcing, or “off shoring”, refers to outsourcing to firms in foreign countries, often to take advantage of labour arbitrage.’⁴

Legal Process Outsourcing is the industry in which in-house legal departments or organizations outsource legal work from areas where it is costly to perform, such as the United States or Europe to areas where it can be performed at a significantly decreased cost. As the outsourced firm is based in another country, hence sometimes it known as legal off-shoring.

History of legal process outsourcing or offshore outsourcing

Offshore outsourcing is not a new phenomenon. Companies have been referring work to foreign third parties for many years. ‘Off-shoring in its most modern incarnation first surfaced in the 1970s, and evolved over the course of the 1980s.’⁵

² http://www.gaebler.com/Outsourcing-Pay_roll.htm, retrieved on 04/03/16 11:00 hrs.

³ http://indialawjournal.com/volume3/issue_4/article_by_megha_vipula.html.

⁴ <http://www.cio.com/article/2442089/offshoring/the-hidden-costs-of-offshore-outsourcing.html> retrieved on 04/03/16 11:00 hrs.

⁵ Rob Handfield, *A brief history of outsourcing*, May 31, 2006, <http://scm.ncsu.edu/public/facts/facs060531.html>.

In early 80's, hiring law firms for legal services and requirements was the norm. Bigger law firms had better infrastructure and a huge employee base; these firms were a one stop solution for legal service requirements and hence enjoyed monopoly in the market.

In America work done by para legals, office assistants, and even attorneys is being outsourced to India, and other nations, where business costs are less expensive and the finished product is usually equivalent to what would be produced in the United States.⁶

The first known outsourcing of American legal work occurred in the early 1990s, when Bickel & Brewer, a relatively small Dallas⁷ firm, started an Indian subsidiary to perform basic office tasks. 'Since then the process has become far more specialized. Scholars separate forms of legal outsourcing into three models: outsourcing of legal work to subsidiaries, direct hiring of foreign law firms, and third party vendors known as legal process outsourcers (LPOs).⁸

'While the Indian subcontinent is not the only destination to which law firms outsource work,⁹ and some work goes to domestic providers in areas of the United States where business operation costs are lower, 'India takes in more legal outsourcing business than any other nation.'¹⁰

The legal industry across the globe is gradually turning towards outsourcing for gaining efficiencies and staying profitable in a highly competitive marketplace. Recognition of the fact that legal companies need to focus on their core competencies and leave back office processes to the hands of competent outsourcers is creating a compelling case for outsourcing out non-core processes. A further rationale for the outsourcing is to facilitate at the same time the in-house counsel of the foreign law firms to concentrate on core legal issues. The availability of outsourcing ventures with world-class resources and expertise is also boosting the growth of outsourcing by legal entities. Legal Process Outsourcing is a lucrative route to reduce cost and increase efficiency by outsourcing legal works to India.

⁶ Lee A. Patterson, *Outsourcing of legal services: a brief survey of the practice and the minimal impact of protectionist legislation*, 7:2, RICHMOND JOURNAL OF GLOBAL LAW & BUSINESS, 177, 177-204 (2008).

⁷ Bickel & Brewer had thirty-three attorneys as of April 13, 2008. Bickel-Brewer.com, Attorneys, <http://www.bickelbrewer.com/index.php?id=attorneys>.

⁸ *Supra* note 6.

⁹ Operations Center, <http://www.orrick.conVoffices/goc/>

¹⁰ <http://www.mayitpleasethecourt.com/journal.asp?blogid=1520>.

Hence it is a process by which in-house legal departments, law firms and other organizations outsource legal work from geographic areas where it is costly to perform, such as the US or Europe, to those where it can be performed at a significantly decreased cost, primarily India. 'The main reasons for outsourcing legal work have been cost savings, convenience and efficiency. With regard to India, there are a number of economic, geographic, historical, legal, linguistic and political advantages to be reaped such as generous tax breaks, time differences, a well-educated and trained English-speaking workforce and a common law system similar to what is practised in the US and UK.'¹¹The process of LPO in India usually involved establishing a communication link with the law firms and attorneys in the US and the UK. 'In early 2005 a company called Lexadigm was hired by an American law firm to draft a brief for a U.S. Supreme Court case. The case was complex and resource intensive and centered on applying the Fifth Amendment's due process clause to a tax dispute. The brief will ultimately be filed by the American law firm, which will be able to review and use part, some, or none of Lexadigm's work in the final product. The outcome is the same as if one of the firm's associates had drafted the brief; except in this case the lawyers were operating out of India." This is the new trend that is called "Legal Process Outsourcing (LPO)".¹²

Law profession in India

'India has the world's second largest legal profession with more than 600,000 lawyers. The predominant service providers are individual lawyers, small or family based firms.

Most of the firms are involved in the issues of domestic law and majority work under country's adversarial litigation system. The conception of legal services as a 'noble profession' rather than services resulted in formulation of stringent and restrictive regulatory machinery. These regulations have been justified on the grounds of public policy and 'dignity of profession'. The judiciary has reinforced these principles, which can be reflected in words of Justice Krishna Iyer, when he noted, Law is not a trade, not briefs, not merchandise, and so the heaven of commercial competition should not vulgarize the legal profession. However over the years courts have recognized 'Legal Service' as a 'service' rendered to the consumers and have held that lawyers are accountable to the clients in the cases of deficiency of services. In

¹¹ <http://www.livemint.com/Opinion/RfcsRjJHs66v3VdPyG4yZI/LPO-A-complicated-career-alternative-for-lawyers.html>.

¹² http://indialawjournal.com/volume3/issue_4/article_by_megha_vipula.html.

the case of *Srinath v. Union of India*¹³ Madras High Court held that, in view of Sec. 3 of Consumer Protection Act, 1986. Consumer Redressal Forums have jurisdiction to deal with claims against advocates. Sec. 2 (U) of Competition Act, 2002 defines the term 'Service' along the lines of Consumer Protection Act, 1986. Thus it may be concluded that legal services are becoming subject of trade related laws where consumerism and market forces should be given adequate space'.¹⁴

Legal profession in contemporary context

'Way back in 1996, Richard Susskind in his book 'The Future of Law' noted that changes in technology will fundamentally, irreversibly and comprehensively change legal practice, the administration of justice, and the way in which non-lawyers handle their legal and quasi-legal affairs.

"Law is today both a business and a profession."Private law practice is squarely in the midst of this change, as technology and numerous other factors are challenging the initiative and creativity of lawyers. The good news is that the legal profession is adapting quickly and innovatively, creating new patterns of practice, developing detours around regulatory rules that might stifle growth and competition, finding resourceful methods of handling the increasing costs of practice and overheads, and adopting new tools of management as competition from professional service firms increases'.¹⁵

'Legal practice is being transformed every day by economic realities in today's global marketplace. It deserves serious academic study so that students, consumers, policymakers and members of the profession themselves can better understand its role in our economy and society, and so that needed improvements can be made thoughtfully'¹⁶

Legislative framework of legal service outsourcing

'The Legal Process Outsourcing involves activities like legal research, document drafting like standard contracts, agreements, letters to the clients, patent applications etc., legal billing activities like preparation of invoices, collation of time sheets (arranging the amount of a professional's time spent on each job into a standard order) etc., intellectual property research-

¹³ A.I.R. 1996 Mad. 427.

¹⁴ <http://www.legalserviceindia.com/articles/lprof.html>

¹⁵ http://indialawjournal.com/volume1/issue_1/article_by_Hemant_Batra.html.

¹⁶ *Id.*

substantive and administrative, paralegal services, administrative and secretarial activities like following up with clients, etc. As far as the LPO industry is concerned, although it can be said that India is the biggest and most common country to receive legal outsourced work, other countries like the Philippines, Australia, China, and South Korea are also in the market of offshore LPO.¹⁷

'World Trade Organization (WTO) is the successor of the General Agreement of Tariffs and Trade (GATT), which ruled the world between 1960 and 1993 both co-existed between 1994 and 1995, when WTO came into existence. Services are brought for the first time under multilateral trading system under the Uruguay Round Agreements launching WTO. Earlier the GATT System confined only to goods trade. The inclusion of services under the WTO in 1995 is a reflection of growing share of services in national economics world over. It is upon indication that trade in services is set to play an important role in the economic development of countries in future. The 'developed' west Economies are specializing in knowledge based service and this GATT entered the WTO agenda in 1995. It is among the WTO's most important and the first and only set of multilateral rules concerning International Trade in services. It was negotiated by the Governments themselves and set the framework agreement containing general rules and disciplines and the national schedules, which list basic commitments on behalf of individual countries.'¹⁸

Indian Partnership Act, 1932

The Indian Partnership Act was enacted in 1932 and it came into force on 1st day of October, 1932. The present Act superseded the earlier law relating to Partnership, which was contained in Chapter XI of the Indian Contract Act, 1872. The Act is not exhaustive. It purports to define and amend the law relating to Partnership. A Partnership arises from a contract, and therefore, such a contract is governed not only by the provisions of the Partnership Act in that regard, but also by the general law of contract in such matters, where the Partnership Act does not specifically make any provision. It has been expressly provided in the Partnership Act that unrepealed provisions of the Indian Contract Act, 1872, save in so far as they are inconsistent with the express provisions of this act, shall continue to apply. Thus, the rules relating to offer and acceptance, consideration, free consent, legality of object, etc, as contained in the Indian Contract

¹⁷ http://indialawjournal.com/volume3/issue_4/article_by_megha_vipula.html.

¹⁸ <http://www.legalserviceindia.com/articles/lprof.htm>.

Act are applicable to a contract of Partnership also. On the other hand, regarding the position of minor, since there is specific provision contained in Section 30 of the Indian Partnership Act, the minor's position is governed by the provision of the Partnership Act.

Limited Liability Partnership (LLP)

'The concept of limited liability partnership had evolved in the aftermath of the collapse of real estate and energy prices in Texas in the 1980s. This collapse led to a large wave of bank and savings and loan failures. Because the amount recoverable from the banks was small, efforts were made to recover assets from the lawyers and accountants that had advised the banks in the early-1980s. State statutes passed in 1991 were a response to numerous lawsuits filed by government agencies and individual citizens against small investment companies. The Limited Liability Partnership (LLP) Act, 2008 is largely based on the Singapore LLP Act and also includes features of the UK LLP Act. According to the concept paper on limited liability partnership prepared by the Government of India in 2005, in view of the increasing role of the service sector in Indian economy, a need was felt for introduction of a new corporate entity—Limited Liability Partnership, that would combine the characteristics of corporate and non corporate entities. Limited Liability Partnership (LLP) is a corporate business vehicle that enables professional expertise and entrepreneurial initiative to combine and operate in flexible, innovative and efficient manner, providing benefits of limited liability while allowing its members the flexibility for organizing their internal structure as a partnership'.¹⁹

A law to allow "Limited Liability Partnership" (LLP) in India has been enacted by the Parliament of India recently. (Limited Liability Partnership (LLP) Act of 2008). LLP is an alternative corporate business entity that provides the benefits of limited liability of a company but allows its members the flexibility of organizing their internal management on the basis of a mutually-arrived agreement, as is the case in a partnership firm. This format would be quite useful for small and medium enterprises in general and for the enterprises in services sector in particular, including professionals and knowledge based enterprises. As proposed in the Bill, LLP shall be a body corporate and a legal entity separate from its partners. It will have perpetual succession. While the LLP will be a separate legal entity, liable to the full extent of its assets,

¹⁹ <http://www.legalservicesindia.com/article/article/partners-under-limited-liability-partnership-act-2008-395-1.html>.

the liability of the partners would be limited to their agreed contribution in the LLP. Further, no partner would be liable on account of the independent or unauthorized actions of other partners, thus allowing individual partners to be shielded from joint liability created by another partner's wrongful business decisions or misconduct.

Procedure of legal service outsourcing & other para-legal services under Legal Process Outsourcing (LPOs) under Limited Liability Partnership (LLP)

'There are different forms of business organization prevalent in India and the world with ownership, control, liability membership, and capital distinguishing them from each other. One chooses a form of business organization depending upon the nature of business, duration of business, size of operation, level of control required, capital structure and its requirement, participation of non promoter group, government regulation and control, distribution of profit, risk management and management structure. LLP is an alternative corporate business form that gives the benefit of limited liability of a company and the flexibility of a partnership. The LLP is a separate legal entity, is liable to the full extent of its assets but liability of the partners is limited to their agreed contribution in the LLP. It has perpetual succession and a common seal and can sue and be sued in its own name. It can continue in existence, irrespective of the changes in the constitution of partners. It is capable of entering into contracts and holding property in its own name. Further, no partner is liable on account of the independent or un-authorized actions of other partners, thus individual partners are shielded from joint liability created by another partner's wrongful business decisions or misconduct. It is organized and operates on the basis of an agreement, without imposing detailed legal and procedural requirement of a joint stock company. The mutual rights and duties of the partners within a LLP are governed by this agreement. Thus, since LLP contains elements of both 'a corporate structure' as well as 'a partnership firm structure' LLP is called a hybrid between a company and a partnership'²⁰

Forthcoming challenges in legal service outsourcing in Indian context

'However, India is also a member of the World Trade Organization (WTO), which is working toward removing the barriers to trade in

²⁰ <http://www.legalservicesindia.com/article/article/analysis-of-limited-liability-partnership-act-470-1.html>.

legal services and has enforcement powers that could potentially limit the scope of national policy. While the Indian government so far has not been eager to support the global regulation of lawyers, it is likely to be affected by these developments. At the same time, India's ambitions in other areas of global governance have increased, creating a demand for legal capacity building and strategizing to redesign global institutions. As globalization progresses, the regulatory performance of both Indian and global institutions will be tied to efforts to make those involved in governance more accountable. Since globalization produces vast inequalities, this process will give Indian lawyers the opportunity – and perhaps the responsibility – to address the social costs of globalization and advocate for its losers'.²¹

'Foreign law firms began showing interest in expanding to India in the early 1990s shortly after liberalization. Three firms (Ashurst, Chadbourne & Parke and White & Case) were granted liaison licenses, which allowed them to set up offices in India for liaison reasons, such as information gathering and dissemination. However, in 1995, the Lawyers Collective, a Mumbai-based public interest organization specializing in human rights advocacy, legal aid and litigation brought a lawsuit against these firms in the Bombay High Court, claiming that the firms exceeded the terms of their licenses and provided consultancy legal services through their offices. The lawsuit alleged that the presence of foreign lawyers in India was a violation of domestic law'.²²

'The Advocates Act of 1961 upon which the Bombay High Court based its ruling regulates all legal practice in India. The Act prohibits anyone other than an Indian citizen from practicing law in the country, even if the foreign lawyer in question has a degree from an Indian law school and confines his or her work to issues relating to their "home country" law'.²³ 'As such, it makes the

²¹ http://www.saarclaw.org/experttalkfile/1022_ToPostIndiaPdf.pdf.

²² Lawyers Collective v. Bar Council of India and Others, W.P. No. 1526, 1995 A.I.R. (Bombay); see *discussion in* Krishnan 2010 and Vena 2011.

²³ As per section 29 of the Advocates Act, 'advocates' are the only recognized class of persons entitled to practice law in India. The Advocates Act in Section 24 provides that only an Indian Citizen has the right to practice and be enrolled as an advocate in India. Foreign lawyers are not permitted to practice in India, but there are some exceptions: a national of a foreign country may be admitted as an advocate, if citizens of India are permitted to practice law in that other country; and, foreign law firms can represent their clients during arbitration proceedings.

Indian regulatory regime one of the most restrictive in the world for foreign lawyers'.²⁴

'Foreign law firms are now facing another legal challenge in India. In March 2010, a practicing advocate named A.K. Balaji filed suit in the Madras High Court against nearly thirty foreign law firms, including such global powerhouses as Allen & Overy, Clifford Chance, Linklaters and Freshfields Bruckhaus Deringer, as well as against Integreon, one of India's most prominent LPO providers. The lawsuit claims that all of these entities are illegally practicing law in India and seeks to ban them from engaging in both litigation and corporate transactional work'.²⁵

'As India continues to face increasing pressure from the forces of economic globalization, two of the central challenges in the future development of the Indian legal services market will be allowing for the evolution of domestic law firms and clarifying the legality of foreign law firms presence. The most recent case against foreign lawyers further complicates the situation by claiming that foreign law firms illegally practice in India under the guise of legal process outsourcing, which is a major growth area in India's service exports'.²⁶

Potentials in outsourcing legal services in India

'India, like all emerging economies, has an important stake in how globalization will affect the deep social and economic problems the country faces. It is "characterized by obscene wealth in the hands of a few billionaires existing side by side with appalling poverty where more than 78 percent of the population lives on less than twenty rupees (or forty-five cents) per day (Bhushan 2009)." Neo-liberal policies are often criticized for increasing corporate political power and working against socio-economic and environmental rights, especially against the interests of impoverished members of society. As advocates for both the instruments of globalization and for those who are affected by its processes, lawyers inevitably play an important role in addressing the social costs of globalization. While domestic regulatory institutions transform, greater

²⁴ In Brazil and China foreign firms can open offices and offer advice on international law, but they cannot provide legal representation in local courts (except for Hong Kong where foreign lawyers can take local bar exams). Japan and Singapore go even further: in Japan, foreign firms can set up partnerships employing Japanese lawyers, and Singapore allows certain foreign firms to practice domestic law in some areas if they have locally-qualified lawyers.

²⁵ http://www.saarc law.org/experttalkfile/1022_ToPostIndiaPdf.pdf.

²⁶ *Id.*

integration of the legal services markets raises additional questions about regulating cross-border legal practice,²⁷

Analysis & conclusion

‘The advantage of outsourcing legal processes to India is that being a common law country, it can easily relate to the processes of the other common law country that prove to be the key outsources of legal processes’.²⁸ ‘India has huge potential in legal outsourcing, with the number of jobs in the field increasing to 79,000 by 2015. India offers the following advantages:

- The common law system
- Lawyers trained in the English language
- Legal Education in the English language
- Tradition of independent judiciary
- Freedom of Press
- Liberty to enter into contracts²⁹

But when it's come to countries having other than common law will not be able to outsource their work because it will arise a condition of Conflict of laws, also called private international law, the existence worldwide, and within individual countries, of different legal traditions, different specific rules of private law, and different systems of private law, all of which are administered by court systems similarly subject to different rules and traditions of procedure. The “law of the conflict of laws” pertains to the resolution of problems resulting from such diversity of courts and law. Hence each country's legal system reflects its society's values. As a result, national laws and the structure of domestic judicial systems vary considerably from country to country. Nevertheless, many kinds of legal situations or events, such as marriage, decedents' estates, torts, and business transactions, often are not confined to a single country or even to a single jurisdiction within a country.

‘Countries with a common-law tradition and those employing civil law. In contract law, for example, civil law has no direct counterpart to the common-law requirement that a promise be supported by “consideration”—i.e., by a bargained-for exchange—in order to be binding. Similarly, the systems differ with respect to formalities that may be required for a contract (e.g., writing). Even within the broad groups of common law and civil law, national

²⁷ http://indialawjournal.com/volume3/issue_4/article_by_megha_vipula.html.

²⁸ *Id.*

²⁹ <http://www.legalsupportglobal.com/faq.html>.

legal systems diverge, sometimes substantially. Thus, English substantive law often differs materially from American law, though the two common-law countries share a common tradition and basic methodology. Similarly, civil-law countries differ in many respects in the solutions they provide for specific legal problems, depending on whether they belong to the Nordic, Germanic, or Roman-Franco legal family. In German law, for example, the Commercial Code prescribes a subjective approach toward defining a merchant: it depends on the person and the purpose and manner of his actions. The French Code de Commerce adopts an objective approach: it is the particular transaction that determines which party in a transaction is the merchant. Older Swedish law focused on the definition of a merchant (*köpmän*); newer legislative provisions employ more comprehensive concepts of those engaged in commerce (*näringsidkare*). Differences also surround the question of whether a good-faith purchaser can acquire title to goods that have been stolen. The legal systems of some countries (e.g., Italy and many former Soviet-bloc countries) do permit this, while those of other countries (e.g., Germany and Portugal) do not. Others (e.g., France and the Netherlands) attempt to strike a balance between the interests of the parties—for example, by allowing the original owner to recover the goods but requiring him to compensate the good-faith purchaser in some manner. Other differences in legal and extralegal norms may also give rise to problems of conflict of laws'.³⁰

Following a detailed discussion about the lacunae present in the Legal Process Outsourcing sector, the question that arises is that of the consequences of the absence of a civil law the possibilities of tackling forthcoming problems in off-shoring works other than countries having common law.



³⁰ <http://www.britannica.com/topic/conflict-of-laws>.