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IT AND OUTSOURCING

The trend for IT and Outsourcing shows little sign of abating. The sector's continuing growth, both in value and volume, is a direct impact of the economic slowdown as cost saving remains a major incentive to cash-strapped firms.

The financial pressures which led organisations to outsource their IT requirements show no signs of slackening as the global economic downturn continues its decline. Yet as the sector continues to grow, other factors are increasingly influencing the decision to outsource. Access to world-class, cutting edge IT skills, experience and resources is an attractive option for companies who could little afford to keep such services on the in-house payroll; and removing non-core business is considered both time efficient and cost effective.

One interesting feature of this new trend in Outsourcing projects is a greater focus in real savings and efficiency gains; while in the past many companies sought simply to reduce their overhead costs and place certain non-core activities with expert companies, which did not necessarily result in actual overall savings over the contract life; the clients are now much more focused on concrete solutions leading to medium to long-term savings along with competitive and efficiency gains. For the near future, the IT and Outsourcing markets are likely to remain very active, presenting many opportunities to both clients seeking to increase efficiency and control cost and, of course, for contractors that can proactively identify and address the needs of such clients. Taxation and labour matters are still some of the most challenging features to be addressed in outsourcing contracts, especially if the project involves the absorption and/or transfer of workforce and the acquisition of complete business units. Labour and tax succession issues have to be carefully addressed in these cases.

International variations

Knowledge of the IT and Outsourcing industry and its ability to provide out-of-the-box thinking to assist clients in achieving a transaction renders IT and Outsourcing practice teams as valued allies in

the preparation, evolution and closing of any such transaction. In some countries, such as Canada, the global economic slowdown appears to have brought stricter terms of payment, the possibility to negotiate value-adds into contracts, as well as more elaborate governance provisions. Opportunities for commercial leverage towards expansion or restriction of scope of services, renewal period or term of outsourcing agreements are now raised by both suppliers and users, as appropriate, and multi-sourcing possibilities in the Outsourcing arena are also more evident.

As another example, there is no specific law regulating IT Litigation and Contracting in France, other than the intellectual property law issues which might be involved. However, some specific regulations do exist concerning outsourcing agreements, on the transfer of employees whose activity is outsourced, as well as outsourcing by financial and investment companies.

Some of the key issues which could make a sourcing operation successful in France are: (i) having a clear understanding of the client's reasons and the goals pursued in the outsourcing operation; (ii) identifying the client's most important needs such as compliance with the planning, security of materials and data, service level commitments and the applicable penalties or other consequences in case of failure by the service provider to comply with its commitments; (iii) the terms and conditions of evolution of the service in order to respond to clients' new needs; (iv) the reversibility terms and conditions; and (v) the labour law aspects involved by the outsourcing operation.

However, conditions differ all around the world. Some of the laws that would need to be considered by a foreign entity outsourcing and/or off-shoring to India are (i) the foreign exchange management laws which would affect issues relating to provision of guarantees by the vendor, repatriation of liquidated damages etc; (ii) direct tax laws which would affect the exposure to tax liability in India; and (iii) indirect tax laws such as the applicability of service tax and/or VAT, which may affect the cost of procuring services from India. Care needs to be taken that the contracts are properly structured in this regard. Contract law would also become relevant in terms of which provisions may or may not be enforceable under Indian law. Also, information technology laws including provisions related to data protection and privacy may become applicable in certain cases, while antitrust laws may become applicable if the provisions in the outsourcing contract are considered to be unfair or restrictive trade practices, or an abuse of the customer's dominant position.



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ISL is the brand that combines a company operating as legal, IT and business consulting, with a law firm (ISL Studio Legale) specialising in ICT Law.

According to partner Gabriele Faggioli, ISL's business model arises from the fact that the acquisition of technologies and services (ICT sourcing) is a complex task requiring several types of skills – from the purely managerial to the technical – in order

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to arrive at IT specific knowledge. "The high economic impact and intrinsic risk profile, as well as singularity of the contact between client and suppliers in this environment, require the definition of a relational context based on clear rules, both operationally and under the protection of responsibilities of the parties," he noted. "Finally, the potential economic damage due to the failure of the aforementioned relation between company and supplier, along with any problems in obtaining satisfactory compensation for the damage above written, make the contract a less useful tool to exert a protection for it own, and always more useful to pursue a favourable working relationship – with clear elements of accountability to both parties in relation to the obligations assumed by the same parties."

For the reasons above, explained Faggioli, ISL provides a structured and integrated approach whose strength is the union of the legal powers with those of IT systems' management. "Contract negotiation is part of an organic process to develop and negotiate technical and technological aspects of the project, during the whole lifecycle of the sourcing relation. The enforcement of international standards (ITIL v.3 and COBIT) clarify the definition of the contents of the relation as well as the identification of the object of the contract and obligations of the parties."

This holistic approach has led many clients to manage sourcing relationships in an organic and structured way, to seek efficiency and effectiveness resulting from standardisation of contracts and homogenisation of technical content. ISL offers a service that supports the whole introduction of new technologies in the company and / or management of an existing IT system that starts from the preliminary investigation that support the management of the project. The definition of the legal contents, arise from the first design stage and must be pragmatically developed together with the technical contents and then, if deemed necessary, constantly aligned even over the project lifetime.

To sum up, Gabriele Faggioli commented: "To be able to create and share with the other party a fair balance of clauses designed to quarrel well, and others thought not to quarrel ever, is undoubtedly one of the main secrets for the parties – to reach a good contract as well as a satisfactory relation."