

Preface

An oft-heard remark on outsourcing contracts in legal circles was that they are ‘just another contract.’ Perhaps the inspiration for this book was the recognition that, in fact, outsourcing contracts were not simply another contract in which the *lex contractus* was the only determinative body of law. Indeed, the underlying premise of this book is that the legal analysis required for preparation of an outsourcing contract, even between a US client and the overseas subsidiary of an Indian service provider, goes much beyond the law selected as governing the contract. In fact, as the analysis in chapter two will reveal, Indian law prohibits the exclusion of the jurisdiction of Indian courts except in the case of arbitration. Therefore, the ultimate service provider located in India will always have recourse to Indian courts even if the parties have selected foreign law as the law governing the contract. On the other hand, even if the litigation or arbitration takes place overseas, questions arise as to the status in India of injunctive relief obtained overseas. The question also arises as to whether a judgment or arbitral award obtained overseas will be enforceable in India, that is, where the assets of the service provider are located. As the analysis in chapter two reveals, these questions are complicated and, surprisingly, despite India’s adherence to the relevant international conventions, lack of compliance with Indian law can be a basis for an Indian court to refuse to enforce a foreign judgment. Moreover, irrespective of the *lex contractus*, the fact that the services are being provided in India render taxation, employment law, data protection and protection of intellectual property all highly relevant to the contractual relationship. In fact, the rise of the outsourcing industry and the transformation of India into a service economy has forced the law to evolve along with society. The dramatic changes in Indian law in the areas addressed in this book have been curiously paralleling the development of Indian services sector and society itself. The headlines of national dailies are filled with the employment law issues faced by the BPO sector such as whether women should work at night and the problems involved in transporting women workers home at night—a concern which has already reached the consideration of the Supreme Court. New cities such as Gurgaon have been created from the outsourcing boom and existing cities such as Bangalore have been transformed from the once sleepy town into a major metropolis with its attendant problems of violence plaguing the night shifts of the BPO sector. For many years, little attention was paid to protection of privacy rights in data. However, the practice of trading in databases resulting in incessant telemarketing calls to subscribers of mobile phone in India has led one consumer forum to decry this phenomenon in anguish as a social evil perpetrated by an ‘unholy trinity’ of cellular service providers, banks and financial institutions. As discussed in chapter 5, the consumer forum resolutely affirmed the concerned individual’s privacy rights in data and suddenly placed India amongst the ranks of European countries which are truly concerned with protecting personal data from being sold amongst service providers or otherwise misused. In addition to the new protection of privacy rights in data, software

copyright infringement has recently exercised the courts to a degree never seen before. As discussed in chapter 6, Indian case law on software infringement was fairly dormant until 2004 where, in the leading case, the judge mused on whether software, which was not in written form, really was protectable as a literary work. However, in the past few years, in cases filed primarily by Microsoft, case law has emerged in which Indian courts have been willing to impose punitive damages and costs against software infringers to an extent previously not imagined. There is now a real possibility that India will not only be a place where intellectual property rights are respected on the books but also in practice.

At the same time, the eagerness of individual states to encourage investment by IT companies in their jurisdiction has led to widespread exemptions from the law as has never been seen before. As discussed in chapter 5(4) on state level IT policies, entire swathes of exemptions have been carved out for the IT sector from labour laws, stamp duties, VAT and even pollution control laws which have been largely unnoticed. In many states, IT companies are exempt from the restrictions on opening and closing hours, women working at night and mandatory closure days in the labour laws. Leases and sale deeds executed by IT companies have been exempted from purchase of stamp duty and in many cases do not have to obtain the otherwise required clearances from state pollution control boards.

Far from being just another contract, the outsourcing contract has been a vehicle which has led to the transformation of India into a service economy in which many women are working and, consequently, has led to changes in social mores and has affected the social structure in many ways. The development of outsourcing over the first decade of this millennium has in many ways been the story of India itself.

The intent of this book has been to create a work of international standard which brims with analysis and not just rote citation of legislative sections or a statement of Indian law. Indeed, an effort has been made to analyse the interstices of the laws of the several countries relevant to the transaction and focus on the cross-border issues which arise in the context of carrying out processes of one company on the other side of the globe. Therefore, the book focuses on the tricky questions which international practitioners have to grapple with such as multi-jurisdictional transfer of employees, acquisition of rights of employees who are dedicated to a foreign company's account, whether a 'look-in' situation constitutes the transfer of data to a third country, requirements for licensing and assignment of rights to intellectual property developed by service providers and similar issues.

Finally, I would like to put on record my appreciation for the contribution made by Dr Trevor Nagel, Partner Alston & Bird, in reviewing the book and providing invaluable comments.

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APARNA VISWANATHAN