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Publisher
Rory Smith

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Global Legal Group Ltd.
59 Tanner Street
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Chapter 16

Pakistan

Saifullah Khan

S. U. Khan Associates Corporate & Legal Consultants

Saeed Hasan Khan

1 Regulatory Framework

1.1 Are there any national laws that specifically regulate outsourcing transactions?

There is no specific law governing the outsourcing transactions; all the outsourcing transactions/agreements are subject to the Contract Act, 1872, which applies to all sorts of contracts/agreements.

1.2 Are there any additional legal or regulatory requirements for certain types of outsourcing transactions, for example: a) public sector transactions; b) business process transactions; c) financial services transactions; d) IT transactions; and e) telecommunications transactions?

Public Sector Transactions: No additional requirements, except those related to the observance of the method of procurement as regulated through Federal and Provincial Public Procurement Regulatory Authorities.

Business Process Transactions: No additional requirements.

Financial Services: Financial Institutions (FIs) including Banks, Microfinance Banks and Development Finance Institutions are required to follow the State Bank of Pakistan Guidelines titled "Framework for Risk Management in Outsourcing Arrangement by Financial Institutions". The framework is based on international standards and best practices on the subject. These instructions aim to enhance the proactive environment in FIs on various aspects of the outsourcing including but not limited to governance, risk management, insourcing of services, group outsourcing, outsourcing of foreign branches of banks, information technology outsourcing and collaboration/outsourcing arrangements by FIs with Fintechs (Financial Technologies). Besides, the Framework also encompasses the list of critical functions/activities that cannot be performed by employees of the third party service providers.

IT & Telecommunication Transactions: The providers of certification services concerning electronic transactions are required to have a licence issued and regulated by Electronic Certification Accreditation Council under the Certification Service Providers Accreditation Regulations, 2008.

1.3 Are there any further legal or regulatory requirements for outsourcing transactions in any particular industry sector?

No, there are not.

1.4 Is there a requirement for an outsourcing transaction to be governed by local law? If it is not to be local law, is there any generally accepted norm relating to the choice of governing law?

As there is no specific law related to outsourcing transactions, there is no such requirement to be governed under local law. Generally, when both the parties are local the parties agree between them that their mutual contractual obligations and the contract itself shall be governed under the local laws. However, when any of the party to an outsourcing agreement is a foreigner then the parties mutually decide on this issue, and there are instances of both situations, i.e., governance under local and foreign law, depending upon the predominating circumstances of the transaction.

2 Legal Structure

2.1 What are the most common types of legal structure used for an outsourcing transaction?

Contracting for services with a third party is the most common type of legal structure used for an outsourcing transaction. The contract/agreement lists down all the details and service performance levels, roles and responsibilities of each party; at some instances the schedules are also made part of the agreement.

3 Procurement Process

3.1 What is the most common type of procurement process that is used to select a supplier?

Public Sector: The most common method is quotation but with the limited threshold of PKR 500,000, where quotations are solicited from any three vendors. Any procurement above this threshold is through competitive bidding.

Private Sector: Request for Proposal is the most common type of procurement process among the private sector.

4 Term of an Outsourcing Agreement

4.1 Does national or local law impose any maximum or minimum term for an outsourcing contract?

Not applicable.

4.2 Does national or local law regulate the length of the notice period that is required to terminate an outsourcing contract?

Not applicable.

5 Charging

5.1 What are the most common charging methods used in outsourcing transactions?

The charging methods in outsourcing transactions include lump sump, hourly rate, per person basis, activity/milestone based, number of transactions based, but most common among all is the lump sump basis.

5.2 What other key terms are used in relation to costs in outsourcing transactions?

Other key terms include: timelines for payment, advance/mobilisation advance, matters about out of pocket expenses, penalties, retention money, performance guarantee, and tax cost.

6 Transfer of Assets

6.1 What formalities are required to transfer, lease or license assets on an outsourcing transaction?

In case of immovable asset provisions and requirements of the Transfer of Property Act, 1882 are to be met. In case of movable assets chief provisions are that of the Sale of Goods Act, 1930 and the Contract Act, 1872. Further stamp duty is applicable under the Stamps Act, 1899 at the time of registration of the instrument of transfer/lease/license under the Registration Act, 1908.

6.2 What are the formalities for the transfer of land?

There must be a firm and binding instrument giving rise to the transfer and the same is required to be registered under the Registration Act, 1908 before the concerned districts' Registrar and stamp duty is applicable as per the Stamps Act, 1899.

6.3 What post-completion matters must be attended to?

None, except when so required under any other enactment, for instance with respect to the recording of charge or lien before the financial institution or the Securities and Exchange Commission in case of mortgaged asset.

6.4 How is the transfer registered?

Natural persons (in case of transfer by artificial juridical persons or authorised natural persons) are to appear before the Registrar to register the transfer with the instrument of transfer. Additionally, biometric verification is required at many instances of the parties being natural persons or of natural persons' represented companies.

7 Employment Law

7.1 When are employees transferred by operation of law?

There is no law directly dealing with issues on employees transferred by operation of law. At a few instances of reorganisation/amalgamation of businesses the employees of one entity are transferred to the other, for instance on the conversion of state-owned/state-run entities to public limited companies, the government employees of those public-sector organisations are transferred to the new corporate entity. Examples include employees of the Corporate Law Authority transferred to the Securities and Exchange Commission of Pakistan, employees of the Pakistan Telecommunications Corporation transferred to the Pakistan Telecommunication Company Limited, and employees of the Directorate General of Registration transferred to the National Database and Registration Authority.

7.2 On what terms would a transfer by operation of law take place?

The employees are transferred on the same terms and conditions of employment as exist immediately before the transfer.

7.3 What employee information should the parties provide to each other?

No legal requirement exists to this effect, however for practical purposes all information that enables the transferee entity to know and to comply with the existing terms and conditions of employment are exchanged between the parties.

7.4 Is a customer/supplier allowed to dismiss an employee for a reason connected to the outsourcing?

Dismissal of employees is governed by and large as per the terms of employment and the employer may terminate the employees on the happening of pre-specified events and by following the agreed procedure (for example, serving a notice period).

7.5 Is a supplier allowed to harmonise the employment terms of a transferring employee with those of its existing workforce?

Employment terms may be harmonised, however, the transferring employees must not be put into more cumbersome terms in relation to pre-transfer terms and conditions.

7.6 Are there any pensions considerations?

The transferring employees are entitled to transfer the balance standing in the provident fund scheme with the formal employer to the new employer. In addition, in certain situations, the employer is required to maintain and run either a scheme of gratuity or a scheme of provident fund. Further, in case the number of employees exceeds five in a year, the registration (of employer and employee) and contribution is applicable to Employees' Old-Age Benefit Institutions, which after the specified age disburse pensions to only registered employees.

7.7 Are there any offshore outsourcing considerations?

No, there are not.

8 Data Protection Issues and Information Security

8.1 What are the most material legal or regulatory requirements and issues concerning data security and data protection that may arise on an outsourcing transaction? Are there independent legal and/or regulatory requirements concerning information security?

At present, Pakistan has no law on data protection. Contracting parties used to enter into Non-Disclosure Agreements. There is a felt need to have legislation on this important subject. Breaches and infringement of data is dealt with as well as subject matter of civil and criminal rights and liabilities.

9 Tax Issues

9.1 What are the tax issues on transferring the outsourced business – either on entering into or terminating the contract?

An outsourcing business is subject to tax on a net income basis (income-less expenses), and annual tax filing is applicable with the corporate tax rate of 30%. Mere entering or terminating does not give rise to taxation. The legal entity is taxed and not the transaction.

9.2 Is there any VAT leakage on the supply of services under the outsourcing contract?

VAT is termed as 'Sales Tax on Services' and is applicable in Federal and four Provincial jurisdictions; outsourcing services are subject to sales tax applicability at 13%, 15% and 16% in different jurisdictions.

9.3 What other tax issues may arise?

Receipts under the outsourcing transactions are subject to income tax and sales tax withholding – i.e. payment of taxes before the tax filing is due, and the payer acts as withholding agent on behalf of the government. Tax returns are subject to audit and assessment can be amended by the taxation authorities.

10 Service Levels

10.1 What is the usual approach with regard to service levels and service credits?

There is no law about service standards; therefore, the parties do agree upon their own standards and level of acceptable performances.

11 Customer Remedies

11.1 What remedies are available to the customer under general law if the supplier breaches the contract?

On breach of contract the aggrieved party has these remedies: (i) Recession of the Contract; (ii) Claim for Specific Performance; (iii) Claim for Injunction; and (iv) Claim for Damages.

11.2 What additional protections could be included in the contract documentation to protect the customer?

Covenants like service levels, liquidity damages, liability for service failure, retention money, bar or limitation on assignment and sub-contracting, and copyrights.

11.3 What are the typical warranties and/or indemnities that are included in an outsourcing contract?

Warranties: related to performance standards; ability to perform obligations; suppliers' affirmation to rights in proprietary and licences; and complying with the applicable laws.

Indemnities: The parties usually agree that they shall protect, indemnify and hold harmless each other and their directors, officials, partners, members, employees, trustees, agents, successors and assigns from all liabilities, damages, claims, demands, judgments, losses, costs, expenses, suits, actions or proceedings suffered by or initiated against them arising out of or in connection with the contract. The typical instances of indemnification are: secrecy/data protection; non-compliance with laws; misconduct; fraud; negligence; and infringement of intellectual property.

12 Insurance

12.1 What types of insurance should be considered in order to cover the risks involved in an outsourcing transaction?

Insurance coverage is visible in outsourcing agreements for tangible things like equipment and material, however intangible insurance, such as professional liability insurance, is not customarily seen.

13 Termination

13.1 How can a party to an outsourcing agreement terminate the agreement without giving rise to a claim for damages from the terminated party?

A party to an outsourcing agreement can terminate the agreement not giving rise to a claim for damages from the other party on the happening of events mutually agreed upon in the contract, like wilful/deliberate failure of one party to fulfil its contractual obligations.

13.2 Can the parties exclude or agree additional termination rights?

Parties are free to settle their own terms and conditions with respect to termination.

13.3 Are there any mandatory local laws that might override the termination rights that one might expect to see in an outsourcing contract?

There are no such laws overriding the termination rights, however the contractual stipulations to this aspect should not be prejudicial to the interest of either of the parties.

14 Intellectual Property

14.1 How are the intellectual property rights of each party protected in an outsourcing transaction?

Pakistan has various laws protecting intellectual property rights, such as: Copy Rights Ordinance, 1962; Registered Designs Ordinance, 2000; Registered Layout Design of Integrated Circuits Ordinance, 2000; Patents Ordinance, 2000; Trade Marks Ordinance, 2001 and also an Intellectual Property Tribunal providing protection to the parties. In addition, the parties are at will to negotiate and settle their own terms and conditions to this effect.

14.2 Are know-how, trade secrets and other business critical confidential information protected by local law?

Except for the above-listed laws, the know-how, trade secrets and other business critical confidential information are not protected under local laws, although the parties get shelter under the Contract Act, 1872.

14.3 Are there any implied rights for the supplier to continue to use licensed IP rights post-termination and can these be excluded from the agreement?

There are no implied rights.

14.4 To what extent can the customer gain access to the supplier's know-how post-termination and what use can it make of it?

This is as per mutual contractual obligations.

15 Liability

15.1 To what extent can a party limit or exclude liability under national law?

Under the Contract Act, 1872 parties are open to limit or to exclude liability, for instance regarding damages, etc.

15.2 Are the parties free to agree a financial cap on liability?

Parties are free to agree upon a financial cap on liability, subject to all just and equitable exceptions.

16 Dispute Resolution

16.1 What are the main methods of dispute resolution used?

Out of court settlement of disputes, including through arbitration and negotiation, is the main method of dispute resolution. Although, civil courts also have the jurisdiction to entertain such disputes; however, due to the lengthy and cumbersome process, the parties normally prefer an out-of-court settlement.

17 Good Faith

17.1 Is there any overriding requirement for a customer and supplier to act in good faith and to act fairly according to some objective test of fairness or reasonableness under general law?

There is no law dealing specifically with respect to good faith, however, certain general and fundamental principles do encompass all agreements including outsourcing agreements, like contracts entered into with fraud, coercion or misrepresentation are voidable. In addition, the parties usually mention a clause about good faith in the agreement narrating that parties shall act in good faith with respect to each other's rights under the contract, and to adopt all reasonable measures to ensure the realisation of the objectives of the contract.

Saifullah Khan
S.U. Khan Associates Corporate &
Legal Consultants
First Floor, 92-Razia Sharif Plaza
Fazal-ul-Haq Road
Blue Area, Islamabad
Pakistan

Tel: *+92 51 2344741 & 42*
Email: *saifullah.khan@sukhan.com.pk*
URL: *www.sukhan.com.pk*

Mr. Saifullah Khan, an international trade lawyer, has more than 15 years of practical experience in the areas of international trade policy and law advisory, particularly WTO Laws. He has advised the Ministry of Commerce, Government of Pakistan in amending trade defence laws and rules in the year 2015. He also practises Anti-trust and Competition law. Mr. Khan is also working as Chairman of the Standing Committee on WTO Affairs of the Federation of Pakistan Chambers of Commerce & Industry (FPCCI) for the years 2017 and 2018. He has an extensive and global advisory portfolio in the development of the International Trade Management System, International Trade Agreements and issues relating to para-tariff and non-tariff barriers. Mr. Khan has developed expertise and engaged in the advisory activities in the legal, policy and regulatory framework for e-commerce. He has also represented his clients in negotiations and trade settlements locally and outside Pakistan.

He has served large number of foreign clients in various jurisdictions in addition to large scale public limited companies in Pakistan.

Saeed Hasan Khan
S.U. Khan Associates Corporate &
Legal Consultants
First Floor, 92-Razia Sharif Plaza
Fazal-ul-Haq Road
Blue Area, Islamabad
Pakistan

Tel: *+92 51 2344741 & 42*
Email: *saeed.hasan@sukhan.com.pk*
URL: *www.sukhan.com.pk*

Mr. Saeed Hasan Khan is a seasoned tax practitioner with rich experience in all three-tier taxation services (advisory-compliance-litigation) both in direct and indirect taxes. His key attributes are business development, and effective and efficient service delivery. Legal research and legal drafting is his core competence, while he has excellent law reading capabilities which strengthen his interpretational abilities. He also has good working experience of the Companies Act, 2017 (formerly the Companies Ordinance, 1984) dealing with company incorporation and matters related thereto. He is familiar with various regulatory requirements and registration processes of companies, liaison offices, branch offices, not-for-profit entities, special purpose vehicles and specialised companies governed under specific regulatory regimes. He also has experience in advising clients about foreign exchange regulations. On the litigation side, he represents clients before the original and appellate forum including the alternative dispute settlement mechanism and the ombudsman office.

S.U.Khan Associates
Corporate & Legal Consultants

S.U. Khan Associates is a pioneering and leading firm practising in trade remedy laws with local and international clients. The major service areas include International Trade Consultancy, Anti-Trust Law Consultancy, Sustainability Reporting, International Trade Development, Foreign Investment Advisory Services, International Trade Agreements (FTAs, PTAs and SAFTA) Advisory, International Trade Management, Industry & Market Research, etc. The Firm is also engaged in providing services in the matter of e-Commerce and digitisation of the economy. The Firm also practises in taxation (corporate & VAT), corporate law practices (including sectorial practices) and dispute settlement through alternative means including arbitration. The Firm is also a great contributor towards the dissemination of professional knowledge in various journals and national and international institutions such as the United Nations Conference on Trade and Development and the World Trade Organization.

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glg global legal group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk

www.iclg.com