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Legal Issues Relating to Outsourcing in India*

PAVAN DUGGAL**

LEGAL ISSUES

- *A large number of legal issues confront the Indian Outsourcing Industry.*
- *Outsourcing supported by a robust legal regime that stands for the protection and preservation of data and information .*
- *Recent Mphasis case- a shining example of the working capacity of the existing legal regime.*
- *Case registered under the Indian Cyberlaw*
- *16 employees arrested, investigations in full force*
- *DPS mms case- arrest of baazee.Com ceo*
- *Liability of network service providers under the indian cyber law*
- *All outsourcing companies are network service providers*

NETWORK SERVICE PROVIDERS

- *Section 79 in Chapter XII of the IT Act, 2000 details the liability of network service providers.*
- *Section 79 gives a definition of “network service provider” to mean an intermediary*

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** Editor’s Note: The following is a reproduction of presentation slides that accompanied the author’s talk. A narrative or prose style text of the presentation was not available. The information contained in the present format is naturally somewhat limited, but it still provides a great deal of valuable information and useful context for the subject.

INTERMEDIARY

- *Any intermediary concerned with the relevant business of providing network service would come within the definition of “network service provider”.*
- *“Network service provider” shall not only include Internet Service Providers but also, all other intermediaries who are in the business of the Indian outsourcing industry.*

LIABILITY

- *No person providing any service as a network service provider shall be liable under this Act, rules or regulations made thereunder for any third party information or data made available by him if he proves that the offence or contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence or contravention.*

THIRD PARTY INFORMATION

- *“Third party information” means any information dealt with by a network service provider in his capacity as an intermediary.*

COMPLIANCE

- *Need to ensure voluntary self-compliance with existing international legal trends relating to outsourcing.*
- *Outsourcing industry in India in a position to convince potential client that it has all necessary means to comply with the legal requirements of the client and of the jurisdiction in which the client is based.*
- *An Indian BPO service provider, since located in India, is duty bound to comply with the various provisions of Indian laws which impact the outsourcing industry.*
- *Various Indian laws impact outsourcing industry in India*

LAWS IMPACTING OUTSOURCING

- *These laws include the following:-*
- *Foreign Exchange Management Act, 2000*

➤ *DOT (Department of Telecommunication) Regulations*

LAWS IMPACTING OUTSOURCING

- *The Information Technology Act, 2000*
- *The Income Tax Act, 1961*
- *The Trade Mark Act, 1999*
- *Ensure compliance with labor laws.*
- *The Copyright Act, 1957*
- *The Patent Act, 1970*
- *The Arbitration and Conciliation Act, 1996*
- *The Code of Civil Procedure, 1908*
- *The Indian Contract Act, 1872*
- *The Information Technology Rules*
- *Other Notification/laws relating to or impacting the BPO sector.*

STARTING POINT—INDIAN CYBERLAW

- *Indian Outsourcing Industry must comply with requirements stipulated by the Indian cyberlaw, namely the Information Technology Act 2000.*

DUE DILIGENCE

- *Indian cyberlaw mandates the Exercise of “All Due Diligence” by the Outsourced Services Providers.*
- *The Indian Information Technology Act, 2000 provides a robust framework governing electronic data or information.*

ELECTRONIC FORMAT

- *Legal requirements of any information or any other matter being in writing or in the typewritten or printed form, shall be deemed to have been satisfied if such information or matter is—*
- *rendered or made available in an electronic form; and*
- *accessible so as to be usable for a subsequent reference.*

DATA IN INDIA

- *The Information Technology Act is the only law in India which defines data including personal data.*
- *Data has been defined in Section 2 (1) (o) of the IT Act, 2000 in the widest possible terms and includes all kinds of personal, banking, financial, confidential health and insurance related data.*
- *Various provisions impact electronic data.*
- *Digital Signatures are legal in India.*
- *The only legal means of authenticating electronic information in India*

DIGITAL SIGNATURES

- *Detailed Digital Signature Regime in India already in place headed by the Controller of Certifying Authorities.*

RETENTION OF INFORMATION IN ELECTRONIC FORMAT

- *Companies can legally retain the said information in the electronic form, if...*
- *the information contained therein remains accessible so as to be usable for a subsequent reference;*
- *The electronic record is retained in the format in which it was originally generated, sent or received or in a format which can be demonstrated to represent accurately the information originally generated, sent or received;*
- *The details which will facilitate the identification of the origin, destination, date and time of dispatch or receipt of such electronic record are available in the electronic record.*

DAMAGES BY WAY OF COMPENSATION

- *Section 43 provides penalty for damage to computer, computer system, etc.*
- *This provision penalizes access without permission to a computer, computer system or computer network.*
- *Penalty of damages by way of compensation to the tune of INR 10 Million.*

- *Also penalized is a person who without permission*
- *downloads, copies or extracts any data or information,*
- *introduces or causes to be introduced any computer contaminant or computer virus,*
- *damages any computer, etc.*
- *Disrupts any computer, etc.*
- *Denies access to any person duly authorized to access*
- *Charges the services availed of by a person to the account of another person by tampering with or manipulating any computer.*

DAMAGE TO COMPUTER SOURCE CODE & DOCUMENTS

- *All grounds for seeking damages*
- *Section 65 makes tampering with computer source, documents an offence which shall be punishable with imprisonment up to three years, or with fine which may extend up to INR Two hundred thousand (Indian Rupees 200,000/-), or with both.*

HACKING

- *Section 66 deals with the offence of Hacking with computer system*
- *Whoever...destroys or deletes or alters any information residing in a computer resource or diminishes its value or utility or affects it injuriously by any means, commits hacking*
- *Punishable with imprisonment up to three years, or with fine which may extend up to INR two hundred thousand (Indian Rupees 200,000/-), or with both.*

GOVERNMENTAL ACTION

- *Group of Legal Experts on Data Protection appointed by the Ministry of Information Technology, Government of India*
- *Government of India has appointed a new initiative to amend the Indian Information Technology Act, 2000.*
- *New provisions on data protection on the anvil.*

CONFIDENTIALITY

- *Confidentiality matter of immense concern.*
- *Need to ensure preservation and protection of the confidentiality of potential client and his business.*
- *Vendors need to take utmost care to ensure that their employees do not breach the confidentiality of the client's data during business processing, while in India.*

PRIVACY IN INDIA

- *There is no comprehensive legislation on privacy in India.*
- *Left to the judiciary to interpret privacy within the realm of existing legislations.*
- *Right to privacy has been upheld by the Supreme Court of India as an integral part of the fundamental right to life under Article 21 of the Constitution of India – available only against State.*
- *SC issues notice to telemarketers in PIL.*

IT ACT & PRIVACY

- *Does not deal with Privacy.*
- *Section 72 talks about Privacy - refers to statutorily authorized persons who, after having secured access to any electronic record, book, register, correspondence, information, document or other material, without the consent of the person concerned, disclose such electronic record, book, register, correspondence, information, document or other material to any other person.*
- *Section 72 – has no bearing on violation of an individual's privacy in cyberspace.*

LIMITING OF LEGAL LIABILITY

- *Legal liability of the client needs to be appropriately limited.*
- *Need for appropriately addressing the said issue in the detailed Outsourcing contract.*

COMPLAINT WITH FOREIGN LAW

- *Service Providers in India comply with foreign laws and industry specific rules, regulations, byelaws and guidelines of the specific country in which the customer operates.*
- *Normally service providers insist on the customer providing them with the list of foreign laws, specific rules, regulations, byelaws and guidelines which would be applicable to the services being outsourced along with actual text of the same.*

FOREIGN LEGISLATIONS COMPLIED WITH

- *Gramm-Leach Bliley Act*
- *Sarbanes Oxley Act*
- *CAN SPAM Act, 2003*
- *Homeland Security Act*
- *USA Patriot Act*
- *Children's Online Privacy Protection Act*

PROTECTING INTELLECTUAL PROPERTY RIGHTS

- *Need to ensure protection of intellectual property rights of the customer, which are transmitted to the service provider for the purposes of performance of outsourcing services.*

CONCLUSION

- *An exciting time ahead for outsourcing to India*
- *Rapid, robust rise of the outsourcing sector has to be supplemented with further legal provisions relating to data protection, confidentiality and other related laws.*
- *In this direction alone lies the key for the future growth of outsourcing to India.*