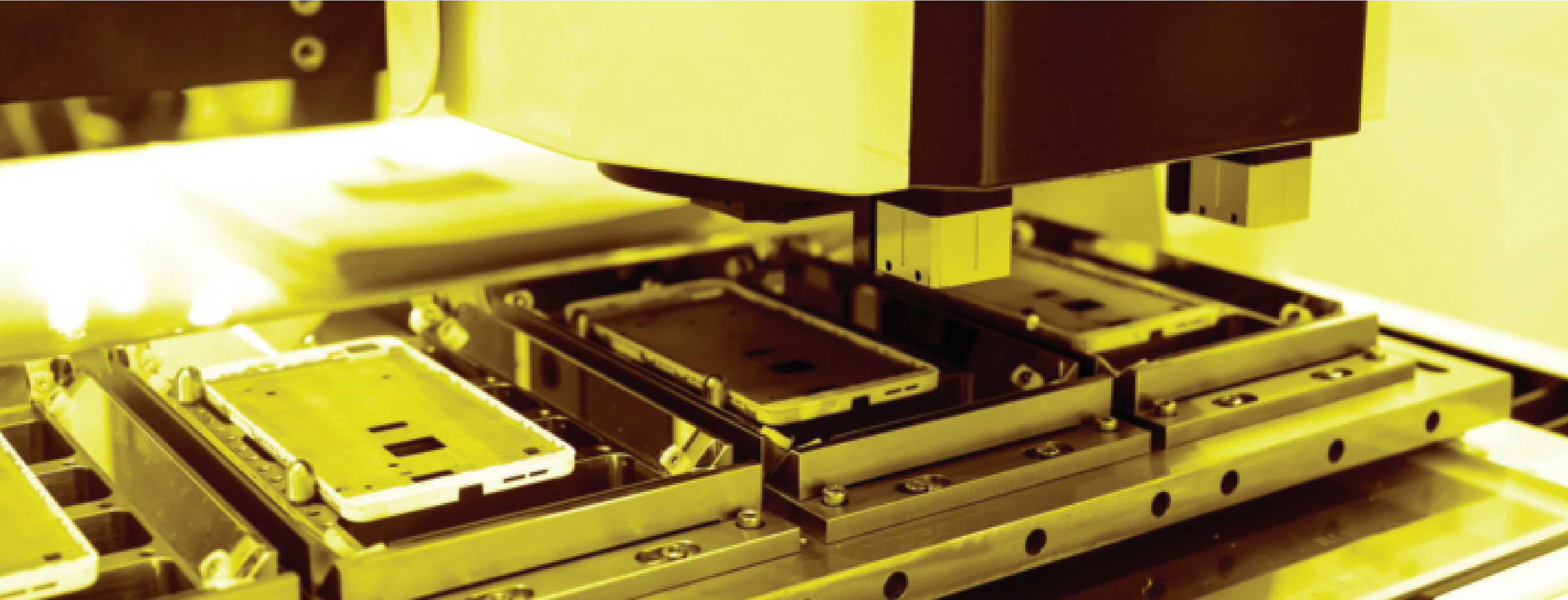

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Outsourcing 2019

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A practical cross-border insight into outsourcing

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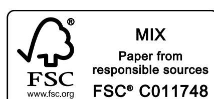

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Structuring a Multi-Jurisdictional Outsourcing Deal

Bird & Bird LLP

Mark Leach

Introduction

In today's globalised economy it is not surprising that many organisations are looking to outsource services and functions across more than one country at a time. Indeed, for many multi-national businesses, the ability to undertake an outsourcing project on an international scale is often a key factor in enabling them to leverage their purchasing power and unlock the potential cost savings and service improvements that outsourcing promises. However, while any outsourcing deal is a complex undertaking, a multi-jurisdictional project brings particular challenges. This article discusses some of those challenges from a legal point of view and looks in particular at how best to structure the contractual arrangements that will need to underpin a deal of this kind.

What is a Multi-jurisdictional Outsourcing?

First of all, however, it may be helpful to clarify what exactly we mean by a multi-jurisdictional outsourcing project. In broad terms, such a project will usually take one of two forms:

- an arrangement whereby services currently being provided in a number of different territories are transferred to a Service Provider as part of the same deal; this will often involve the provision of services by different entities within the Service Provider's group in particular local territories – e.g. services in UK are transferred to the Service Provider's UK subsidiary and services in Germany are transferred to the Service Provider's German subsidiary; or
- a deal whereby services from a number of different territories are transferred to a Service Provider entity located in a single alternative territory; under this kind of arrangement, a customer organisation might, for example, transfer its finance and accounting functions across, say, the Western European region to a shared service centre based in a Central or Eastern European country. The services are then provided remotely from this centre to multiple countries.

The common feature in these arrangements is the Customer's wish to transfer responsibility for its service requirements to a third party service provider in a number of different territories or regions at the same time.

It is helpful to distinguish these kinds of arrangement from the situation where a Customer outsources services from one country to another – a process typically referred to as 'offshoring' and most commonly associated with the outsourcing of certain IT, call centre and business process functions to 'low cost' jurisdictions such as India or China. While these types of deal will sometimes involve the transfer of services across a number of countries at the same time and so bear similarities to the second type of deal mentioned above, they more often simply involve the transfer of a service delivery activity from a single country to another. This article focuses on the challenges involved in structuring the first two types of multi-jurisdictional deal referred to above and does not discuss in detail this kind of single country offshoring.

Key Challenges in Multi-jurisdictional Outsourcing

One of the biggest challenges in building the right contractual structure for a multi-jurisdictional outsourcing project is the need to achieve the right balance between central co-ordination and local variations. For practical reasons, deals will usually be led, negotiated and then managed from a central 'core' jurisdiction. This is essential if a Customer is to be able to negotiate a commercial deal that delivers its business case benefits and is not diluted by myriad local variations. Similarly, in order to manage the transition and 'steady state' delivery of the services on an ongoing basis, a Customer must retain a degree of central oversight and co-ordination.

On the other hand, in most multi-jurisdictional deals the exact service requirements of each in-scope territory are likely to vary from country to country. As a result, certain territories may require a different service description and, in some cases, a different service level regime. Equally, the specifics of the service transition and exit arrangements and the business continuity and disaster recovery arrangements are also likely to vary depending on the way in which services are configured locally and the nature of the Customer's local estate. Similarly, when it comes to managing an outsourcing project, it will not be possible to do everything from the centre – some degree of local management and day-to-day contact between the representatives of the Customer and Service Provider who are on the ground will also be necessary. Critically, there will also be local law considerations to take into account and which may impact on the way in which assets, third party contracts and employees can be transferred and services provided in particular jurisdictions.

Optimum Contract Structures

An optimum contract structure for a multi-jurisdictional outsourcing should ideally reflect the need to achieve this balance. One of the best ways to do this is to adopt a structure which features a master or global services agreement that contains the main over-arching terms of the deal but also serves as a framework under which subsidiary agreements can be called off. These subsidiary agreements (which

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we will refer to in the rest of this article as Territory Agreements) will tend to relate to a particular jurisdiction or a group of closely related jurisdictions and provide a means of dealing with any local variations.

This approach allows the parties to deal in particular with the impact of local legal regimes. While it is advisable to choose the same governing law across both the master services agreements and the Territory Agreements in order to ensure consistency of interpretation and a standardised approach to enforcement, there will be some local laws which will still apply notwithstanding such a choice. These are generally known as mandatory laws and cannot usually be opted out of. It is important to recognise the existence of these local laws as they can impact significantly the implementation of the global deal in a local jurisdiction. On occasion they may mean that a particular element of the deal simply cannot be given effect, but more often they will require the parties to structure things slightly differently or recast a particular provision in order that the parties' intentions be given full effect. The Territory Agreement can provide the ideal vehicle for the parties to do this.

The other key factor in choosing an optimum contract structure is tax. A detailed discussion of the tax issues that may apply in a global outsourcing transaction is beyond the scope of this article, but issues that commonly arise relate to the creation of a permanent establishment, VAT and withholding taxes. It is essential that the parties take local tax advice at an early stage in the process so as to ensure they are aware of the potential impact of any relevant tax rules and to enable a tax efficient structure to be implemented. Again, the use of a Master or Global Services Agreement with Territory Agreements tends to provide maximum flexibility to the parties in this regard.

Master or Global Services Agreement (MSA)

The MSA will usually be the vehicle through which the main commercial terms are agreed and documented. It will set out the objectives of the project and the pricing model and main commercial terms, together with the key customer and service provider contractual protections and the provisions allocating liability and risk between the parties. It will also often include a global service description that will serve as a baseline scope for the services to be provided by the Service Provider across all territories and a set of global service levels.

While some Territory Agreements will often be entered into at the same time as the MSA is signed, there will usually be a need for the cut over of service responsibility to the Service Provider to be phased over time to avoid the risks inherent in a single go live date across multiple territories. As a result, the MSA will typically include a procedure for further Territory Agreements to be called off over time to reflect such a phased cut-over approach and also to provide the flexibility for other territories that are not within the original scope of the project to be added if the Customer's requirements change in the future. The procedure will usually include a template form for the Territory Agreement to follow.

Territory Agreements

The Territory Agreements will typically cover two aspects: (1) the transfer of local assets, third party contracts and employees to the Service Provider at the outset of the project; and (2) the ongoing provision of local services. Sometimes these aspects are dealt with in separate agreements, sometimes in the same agreement.

Transfer of assets, third party contracts and employees

As well as the transfer of responsibility for the provision of services, many outsourcings will also involve the transfer to the Service Provider of certain assets (such as equipment), real estate or third party contracts together with certain employees who are currently predominantly engaged in the provision of the relevant services.

As far as assets are concerned, the Territory Agreement should document which assets are in scope to transfer at the local level and also deal with any local law formalities that may apply in order to achieve an effective transfer. For example, in some jurisdictions a particular form is required for the transfer of tangible assets and the documentation effecting the transfer needs to be notarised. In other jurisdictions, certain rules can be triggered if the transfer constitutes the transfer of the whole or part of a business. Similarly, the legal means by which a contract can be transferred from one person to another also varies by jurisdiction and this needs to be reflected in the Territory Agreement.

The law relating to the transfer of ownership or interests in real estate is also typically complex and jurisdiction-specific and accordingly the transfer of any local property will need to be carefully addressed on a territory-by-territory basis.

The most significant issues usually arise in relation to the transfer of employees. The differences in the application of local law in this area can have a material impact on the way in which a deal must be structured. A key distinction to be aware of is whether a transfer of employees must be effected in the relevant jurisdiction by means of a (freely given) acceptance by an employee of an offer of employment or whether, as is the case under the Acquired Rights Directive in the European Union, the relevant employees are deemed to transfer automatically by operation of law if the business or undertaking that they are working for is effectively transferring to the Service Provider as part of the outsourcing. The answer to this question will clearly affect how the provisions dealing with the transfer of employees are drafted in relation to a particular territory. It is also worth pointing out, however, that even within the European Union there are significant variations in the details of how the Acquired Rights Directive has been implemented in different European countries. As a result, it is not possible to assume an entirely uniform approach can be taken even within the EU area and, as a result, the identification of which employees are in scope to transfer and the associated consultation and other obligations will need to be reviewed on a territory-by-territory basis.

Provision of Services

The Territory Agreement will also govern the ongoing provision of services at a local level following any initial transfer of assets, contracts or employees. In this regard, the Territory Agreement will generally incorporate all the terms of the MSA so that the local provision of services is governed by the over-arching terms and conditions that have been agreed centrally but, as with the transfer of assets, will also include any variations that may be required from the perspective of local mandatory law. Areas where local laws tend to impact on the provision of services typically include the following:

- **Regulatory consents to outsource**: Customers in particular industry sectors, such as financial services for example, are likely to be subject to local regulatory requirements in terms of outsourced activities and these will need to be reflected in the relevant Territory Agreement.
- **Licences/consents to provide service**: linked to the above, the Service Provider may require particular consents and

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licences in order to provide services in certain territories, but not in others.

- **Enforceability of terms and conditions**: it is sometimes the case that particular terms that may have been agreed as part of the 'global' deal in the MSA will not be enforceable in a particular territory. Examples in certain jurisdictions may include certain limitations or exclusions of liability or common warranties that might apply to the provision of services, such as those relating to fitness for purpose or satisfactory quality. In some circumstances, terms may need to be amended or a particular formality followed in order to give effect to the parties' intentions at a local level and in other cases an alternative approach may need to be suggested altogether. The key in each case, however, should be to make only such changes as are necessary to ensure the enforceability of the parties' original intentions or something as close to those original intentions as possible, rather than seeking to re-open commercially agreed points in order to achieve a further advantage.
- **Intellectual property**: the law relating to the ownership, transfer and use of intellectual property tends to vary by jurisdiction and this will be an important area in many technology outsourcings. Potential areas to be aware of include restrictions on the ability to transfer certain IP rights, the implying of certain licences to use by commercial code or local statute and formalities required to achieve an effective transfer of IP ownership (for example, in some jurisdictions this must be done in writing and a specific form of wording is required).
- **Processing of personal data**: where a Service Provider is processing personal data as part of the provision of services, local data protection law will need to be taken into account. In the European Union, this has tended to be another area where the implementation of European Directives has differed from country to country leading to a number of traps for the unwary. In some territories, for example, data protection legislation extends to information about corporate persons and not just individuals and rules governing who is considered to be the data controller in respect of personal data can also vary. Generally speaking, data protection law will require certain provisions to be included in a services contract where a third party outsourcer is processing personal data and the nature of these requirements will need to be checked on a country-by-country basis. In this context, it should be noted that with effect from 25 May 2018, a new General Data Protection Regulation (GDPR) has now come into effect throughout the European Union and will have direct effect without the need for implementing national legislation. This new legislation requires the inclusion of more detailed data processing provisions in outsourcing contracts, including amongst other things obligations to notify of security breaches. It also features a far more onerous enforcement regime, with maximum fines for breaches of the GDPR of up to the greater of 4% of worldwide turnover or €20 million. As a result, liability provisions in relation to data protection issues – at both a local and global level – will need to be considered even more carefully. One by-product of the introduction of the GDPR is likely over time to be a greater degree of uniformity across the EU as regards the content of the required data processing provisions and less regional variations. However, it is too early to be sure that this will be the case and so caution in this regard currently remains the best approach.
- **Transfer of personal data**: a further complication is introduced where personal data is being transferred to or will be accessed from another territory, as is common in many multi-jurisdictional outsourcings. In this scenario, the parties will need to ensure that they comply with the data transfer requirements of the country from which the personal data is being exported – and, again, these can vary from territory to territory. For instance, some territories (in particular those within the European Union) require data transfer measures to be implemented including, potentially, execution of certain *pro-forma* contracts between relevant data exporters and importers. The introduction of the GDPR has not materially changed the data transfer requirements in the EU, although the compliance burden has been reduced somewhat by the removal of the obligation that used to apply in some jurisdictions to notify the local supervisory authority of any data export contracts that were entered into. It should also be borne in mind, however, that breach of the GDPR's data transfer provisions is included in the category of non-compliance issues for which the maximum level of fines can be imposed.

Cyber security: the implementation in a number of countries of specific regulations in relation to cyber security has introduced a further area of local law that needs to be taken into account. In the EU, the introduction of the Network and Information Security Directive (NIS Directive) has placed organisations operating what are deemed to be "essential services" under certain requirements to take appropriate organisational and technical measures to protect against cyber risk and in certain circumstances to notify a regulator of any security breach. The exact criteria defining which organisations are caught by the Directive are determined at a national level but, in broad terms, many companies in the energy, transport, financial services, health and water supply and distribution sectors will be caught. Where these companies are outsourcing IT or network infrastructure related services, then they will be responsible for ensuring the outsourcing contract that their service providers have in place appropriate and proportionate measures to protect against cyber risk. They are also likely to wish to flow down the relevant breach notification obligations that they are subject to and to ensure that the contractual liability regime enables any civil liability that it may incur under the relevant regulations to be 'backed off' to the service provider. In addition to the legal requirements that will apply at a local level, thought also needs to be given to more practical and operational questions.

Service descriptions: it is likely that the Customer's local operations will require certain variations in the nature of the services it requires and hand off points and dependencies may also be different. These kind of technical issues need to be identified at an early stage and, critically, tested to see where a local request reflects a genuine requirement and where it is more of a 'nice to have'. A certain amount of caution is needed in this area if the Customer is not to lose much of the cost and business benefits that a greater degree of standardisation in service provision will provide. However, where local variations are genuinely required, these can be reflected in the relevant Territory Agreements.

Governance: as will have become clear from many of the points made above, it is essential that the Customer organisation implements a governance structure that enables clear and efficient communication between the co-ordinating territory and the other territories which will be benefiting from the deal. This is important both during the RFP and deal negotiation stage and during the implementation and 'steady state' running of the outsourcing. While a full discussion of how best to optimise a governance structure lies beyond the scope of this article, some of the key principles that should be reflected in the context of a multi-jurisdictional deal are as follows:

- a requirement that local subsidiaries or divisions do not engage in disputes without reference to or obtaining the approval of the central co-ordinating entity;
- appropriate provisions in the change control procedures that include escalations to the global level to prevent any local variations undermining the master terms;

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- where issues do arise and the centre agrees that escalation is appropriate, a facility for those issues to be dealt with locally in the first instance and then escalated to the central level if the issue cannot be resolved at the local level; and
- clear reporting lines from local territories to the centre and frameworks which facilitate good quality data and management information being made available in a timely fashion.

To underpin any governance framework, the Customer should ensure that it retains (or recruits) a sufficient number of appropriately skilled personnel to manage the Service Provider – both at the central and local levels. As is often noted, managing a Service Provider and the delivery of services from a third party requires a different skill set form managing the delivery of those services internally and, as with other types of outsourcing project, weaknesses in the retained organisation are a common source of problems in multi-jurisdictional outsourcings.

The Importance of Preparation

In closing, it is worth emphasising that, in order to be aware of the issues that need to be addressed in the Territory Agreements described above, the parties need to undertake timely and thorough local due diligence. As well as taking advice on the impact of existing local laws, attention should also be given to any impending or likely future changes in law that might affect the terms of the deal further down the road. While this may seem obvious, the desire to get a deal done quickly and to minimise internal project costs often creates a pressure to cut corners in this area. However, a failure to appreciate, for example, the longer timeframes required for employee consultations to take place in a particular territory or the requirement to obtain regulator consent to the transfer of personal data can have a significant impact on a deal timetable and the ability for a Customer to realise the projected benefits of a deal within the required timelines and thereby seriously damage the Customer's underlying business case. In a multi-jurisdictional outsourcing, as in much else, good preparation is critical.

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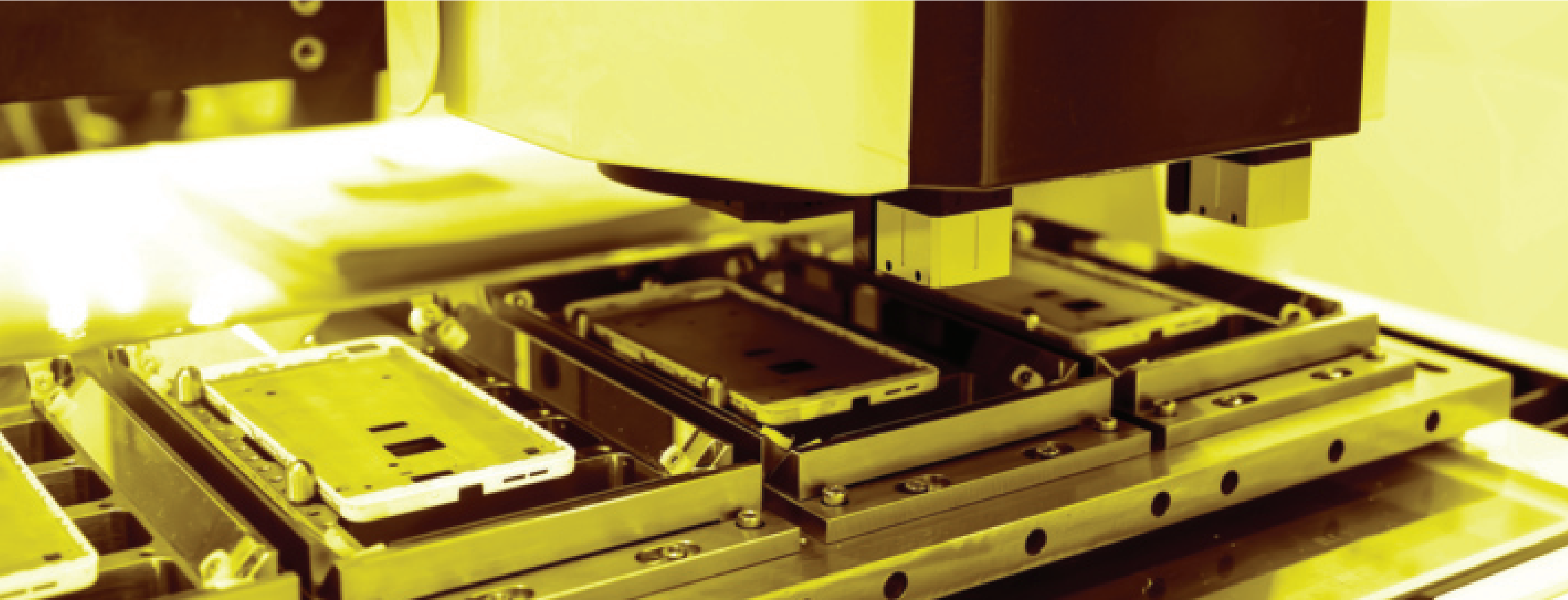

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