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# **CONTRACTUAL COMPLIANCE WHEN OFFSHORING TO INDIA: HOW TO ENSURE YOU GET WHAT YOU PAID FOR**

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# I. Introduction

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1. Indian companies becoming strategic partners
2. Key advantage remains pricing
3. Advantage negated if service provider failure to meet contractual obligations
4. The contract as a tool to ensure compliance

# II. Planning and Preparation

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## 1. Know Your Service Provider's Strengths and Weaknesses

- ❑ In house legal departments of Indian service providers extremely overstretched.
- ❑ Very high labor turnover
- ❑ Thus -- best to automate and document compliance and governance procedures

## 2. Balanced contract

- ❑ Long-term, complex and strategic relationship
- ❑ "winning" the negotiation battle, can lead to losing the compliance "war"

## II. Planning and Preparation (cont.)

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### 3. Prioritize Business Processes

- Identify critical processes and focus special attention on them in the contract
- Back them up with enhanced service levels, stringent penalties and close monitoring

# III. Contractual Drafting

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## 1. Simple and well organized contract

- ❑ Must be understandable by those who implement
- ❑ Thus, should be simple and well organized
- ❑ General economy of the deal & legal terms in the main body and operational details in the annexes

## 2. Governance Structure

- ❑ Build appropriate governance structures into the contract to manage the relationship.
- ❑ Properly staffed committees to manage and monitor different aspects of the services.
- ❑ Fix responsibility for preparing and approving meeting minutes

# III. Contractual Drafting (Contd.)

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## 3. Service Levels

- ❑ Determine Baseline – i.e., level of service customer has been receiving internally or from other vendors
- ❑ Adjustment Phase - Monitor & adjust service levels during initial period
- ❑ Ongoing Phase – benchmarking and audit to keep service levels up to evolving industry standards

## 4. Penalties

- ❑ Prioritize service levels and set penalties in consequence
- ❑ Penalty cap should trigger right to terminate contract

# III. Contractual Drafting (Contd.)

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## 5. Escalation procedures

- ❑ Majority of disputes can be settled by effective escalation procedures
- ❑ Simple and effective process as a pre-requisite to termination
- ❑ First level of escalation - Senior Project Manager  
Second level - senior management

# IV. Contract Management

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## 1. Understand the contract

- ❑ Prepare contract summary detailing the compliance steps and the milestones

## 2. Create a compliance mindset

- ❑ Create incentives to comply with the contract and disincentives for non-compliance
- ❑ Ensure the head of the industry sector is responsible for compliance
- ❑ Organize periodic compliance workshops with senior management participation

## IV. Contract Management (Contd.)

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### 3. Keep Control

- Dedicate sufficient and the right resources to monitor the execution of the project
- Supervise at the operational, day-to-day level
- Supervise at the strategic level
- Periodic audit

### 4. Manage Communication

- Informal communication can have legal significance
- E-mail retention policies and centralized repository

## IV. Contract Management (Contd.)

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### 5. Manage Change

- Change is inevitable and constant
- Need simple and workable process to manage change
- Establish service levels for change management
- Document all decisions

# V. Termination & Dispute Resolution

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## 1. Termination -- Reversibility

- Evaluate impact of termination on the outsourced business process
- Customer in weak position unless has strong reversibility plan
- Prepare a detailed plan early on
- Revise and update the plan regularly

# V. Termination and Dispute Resolution (Contd.)

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## 2. Dispute Resolution- arbitration usually best

### i. Litigation

- ❑ Slow in India – 3 to 6 years
- ❑ Enforcement in India of foreign judicial decision -- only if one of the small list of “Reciprocating Territories”

### ii. Arbitration

- ❑ Quick (1 year) enforcement in India per New York and Geneva Conventions
- ❑ Freedom of choice of venue and rules

# V. Termination and Dispute Resolution (Contd.)

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## 3. Damages

- ❑ Indian courts stingy on damage awards
- ❑ Liquidated damages works if based on genuine estimate of the losses

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Thank you !

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