

C/M/S/ Hasche Sigle

Rechtsanwälte Steuerberater

Business Process Outsourcing from Germany to India



Business Process Outsourcing from Germany to India

Dr Axel Funk, Partner, CMS Hasche Sigle, Stuttgart

Dr Gregor Zeifang, Rechtsanwalt, CMS Hasche Sigle, Stuttgart

Business Process Outsourcing (BPO) is a phenomenon which is becoming increasingly popular in German business. Whereas at the beginning of the development outsourcing was still very much restricted to a company's information technology, in the meantime more and more other business processes are being outsourced such as call centre services, payroll, purchasing, human resources management, customer care, billing processes, etc. For German companies it is particularly outsourcing to Eastern Europe or above all to India which is interesting because the personnel costs are considerably lower than in Germany.

One main reason for a BPO from Germany to India is thus the expected cost advantage. However, there are also other reasons for a BPO such as rationalisation and increased efficiency of business processes, utilisation of the know-how of well-qualified specialists and the outsourcing company being able to concentrate on its key business true to the motto: Do what you can do best – outsource the rest.

In addition to these opportunities there are, however, certain risks with respect to a BPO from Germany to India. Some of these result from a possible language barrier which is often more relevant in the case of a BPO than in classical IT outsourcing where English is the dominant language. In the case of other business processes such as human resources management, however, this is different since the services outsourced by a German company can often only be provided in German. The cultural differences between India and Germany must also be taken into account and can lead to misunderstandings and friction in connection with the provision of the services. However, the cultural differences are not only revealed when the outsourced services are provided but already when the agreements regarding a BPO are concluded. Here it is not only the clearly differing interests of principal and customer which collide but, with Indian law being marked by common law and German law by continental European law, also two very different legal traditions

In order to give Indian service providers a precise overview of the legal approach of German companies which intend to outsource business processes the following deals with the expectations which German companies have of the negotiations and structure of a BPO agreement.

Modular construction of agreement

German companies are used to a complex construct such as a BPO agreement being modularly constructed. This means that on the one hand a frame agreement is concluded which contains general, comprehensive provisions which concern all contractual components. These include, for example, pro-

visions determining the subject of the agreement, i.e. the business process being outsourced, project organisation, utilisation rights in work results, contractual term and termination, change management, claims for defects, liability, data protection, applicable law, etc. On the basis of the frame agreement a service agreement is usually concluded as an individual agreement which contains, in particular, provisions regarding the duties of the outsourcing provider and cooperation duties of the customer, service level agreements and remuneration. In a further individual agreement there are provisions on transition and transformation, i.e. transfer of assets and agreements with third parties from the customer to the outsourcing provider and, where appropriate, provisions regarding the transfer of personnel.

Applicable law

A German company which wants to outsource its business processes to India will normally attempt to ensure that the agreement is governed by German law by way of a choice of law. A German customer will only accept Indian law in exceptional cases since it is foreign to the customer and – if it is going to outsource the management of the processes – wants at least to be familiar with the legal treatment thereof. Indian outsourcing providers will therefore often need professional advice with regard to German law for negotiations with German customers. A further consequence of the applicability of German law is that agreements are usually much shorter than agreements in the Indian legal circle since many issues are regulated by statute and only need to be illustrated in the agreement if there is an intention to deviate from the statutory provisions.

Claims for defects and liability

From an agreement subject to German law German companies expect to have extensive rights for defects in services of the outsourcing provider such as fee reduction and termination and they expect that the outsourcing provider will be largely liable for any damage caused culpably. The German customer will therefore only rarely accept an extensive restriction of rights for defects and an extensive restriction or even partial exclusion of liability, e.g. for indirect damage and consequential damage, such as lost profit. These liability provisions show particularly clearly the differences between Indian and German legal culture. Here – even if the negotiations are difficult – a sensible compromise between the interests of the parties must be found which can be by way of agreeing certain amounts as upper liability thresholds.

Service level agreements

A further important point is the agreement of service levels and the legal consequences of non-achievement thereof. Here too customer and provider have different expectations which can, however, be defused by way of a flexible contractual structure. For example, the service levels can be restricted to certain key performance indicators or lower service levels can be provided for a transitional phase after commencement of the outsourcing. However, a German company will usually expect clear sanctions to be linked to non-achievement of service levels, in particular a penalty and in the case of serious or repeated breaches a right of termination for good cause. In return, however, a provision can be agreed according to which the outsourcing provider receives a bonus if it exceeds the service levels.

Data protection law

In almost all cases of a BPO personal data of the customer is processed by the outsourcing provider. The personal data can in particular be employee or customer data. The legal requirements of the German Federal Data Protection Act must thus be observed. As a rule what is known as commissioned processing of data is agreed in the case of a BPO. This means that the German customer remains the owner of the data in a legal sense and is responsible for the legality of the data processing by the Indian outsourcing provider. However, the outsourcing provider may only collect, process

and use the personal data in the framework of the instructions of the principal, i.e. the outsourcing company. If the personal data is to be transferred from Germany to India and thus to a non-EU country for the transfer of data to be permissible either the consent of all persons concerned must be obtained – which is usually not practical – or the BPO agreement must take account of the standard contractual clauses for the transfer of personal data to a third country passed by the EU Commission.

Transfer of personnel

Under German law a BPO often constitutes a transfer of business which means that the employment relationships of the employees of the outsourcing customer which are allocated to the outsourced part business are transferred to the outsourcing provider. This legal consequence applies by virtue of law and cannot be contracted out of by the parties to a BPO agreement; however, the details of the applicability of the statutory regulation regarding the transfer of business and its legal consequences in the case of outsourcing abroad are controversial. Even if applicability is assumed each employee affected can object to the transfer of his employment relationship within one month of being informed of the transfer of business. In the case of a BPO from Germany to India where the jobs really will be relocated to India, almost all employees will make such an objection since it will be difficult to get them to move to India to carry out their former activity under an Indian employer. The German outsourcing customer can then usually no longer employ the objecting employees because their activity has been outsourced in the framework of the BPO. In many cases the employees can then be dismissed for operational reasons but this is not always possible.

Summary

The negotiation and structure of a BPO agreement between a German company and an Indian outsourcing provider require a certain amount of time and accommodation by both parties. However, it is worth the effort because this is the only way that a BPO which is attractive financially to both parties can be embedded in a clear and therefore also attractive legal framework.

Visit us at www.cms-hs.com where you can find more information,
or contact us by Email at indiadesk@cms-hs.com.

Berlin

CMS Hasche Sigle
Lennéstraße 7
10785 Berlin
Tel.: +49 (0)30/20360-0
Fax: +49 (0)30/20360-2000
Email: Berlin@cms-hs.com

Düsseldorf

CMS Hasche Sigle
Bankstraße 1
40476 Düsseldorf
Tel.: +49 (0)211/4934-0
Fax: +49 (0)211/49200-97
Email: Duesseldorf@cms-hs.com

Frankfurt / Main

CMS Hasche Sigle
Barckhausstraße 12–16
60325 Frankfurt / Main
Tel.: +49 (0)69/71701-0
Fax: +49 (0)69/71701-40410
Email: Frankfurt@cms-hs.com

Hamburg

CMS Hasche Sigle
Stadthausbrücke 1–3
20355 Hamburg
Tel.: +49 (0)40/37630-0
Fax: +49 (0)40/37630-40600
Email: Hamburg@cms-hs.com

Cologne

CMS Hasche Sigle
Theodor-Heuss-Ring 19–21
50668 Cologne
Tel.: +49 (0)221/7716-0
Fax: +49 (0)221/7716-110
Email: Cologne@cms-hs.com

Leipzig

CMS Hasche Sigle
Augustusplatz 9
04109 Leipzig
Tel.: +49 (0)341/21672-0
Fax: +49 (0)341/21672-33
Email: Leipzig@cms-hs.com

Munich

CMS Hasche Sigle
Brienner Straße 11/V
80333 Munich
Tel.: +49 (0)89/23807-0
Fax: +49 (0)89/23807-110
Email: Munich@cms-hs.com

Stuttgart

CMS Hasche Sigle
Schöttlestraße 8
70597 Stuttgart
Tel.: +49 (0)711/9764-0
Fax: +49 (0)711/9764-900
Email: Stuttgart@cms-hs.com

Chemnitz

CMS Hasche Sigle
Hartmannstraße 7
09111 Chemnitz
Tel.: +49 (0)371/36974-0
Fax: +49 (0)371/36974-21
Email: Chemnitz@cms-hs.com

Dresden

CMS Hasche Sigle
An der Dreikönigskirche 10
01097 Dresden
Tel.: +49 (0)351/82644-0
Fax: +49 (0)351/82647-16
Email: Dresden@cms-hs.com

Belgrade

CMS Reich-Rohrwig Hasche Sigle d.o.o.
Cincar Jankova 3
11000 Belgrade
Tel.: +381 (0)11/3208-900
Fax: +381 (0)11/3038-930
Email: Belgrade@cms-hs.com

Brussels

CMS Hasche Sigle
Avenue Louise 200
1050 Brussels
Tel.: +32 (0)2/6500-420
Fax: +32 (0)2/6500-422
Email: Brussels@cms-hs.com

Moscow

CMS Hasche Sigle GmbH
ul. Ostoschenka, 23
119034 Moscow
Tel.: +7 495/7979070
Fax: +7 495/7979080
Email: Moscow@cms-hs.com

Shanghai

CMS Hasche Sigle
2801–2812 Plaza 66, Tower 2
1366 Nanjing Road West
Shanghai 200040
Tel.: +86 (0)21/6289-6363
Fax: +86 (0)21/6289-0731
Email: Shanghai@cms-hs.com

www.cms-hs.com

CMS Hasche Sigle is one of the leading commercial law firms in Germany. Approximately 480 lawyers are active in all of the important German commercial centres and in offices in Belgrade, Brussels, Moscow and Shanghai for our clients.

CMS Hasche Sigle is a member of CMS, the alliance of major independent European law firms providing businesses with legal and tax services across Europe and beyond. In addition, CMS firms offer access to market-leading services in emerging markets, particularly Central and Eastern Europe and China. Operating in 48 business centres around the world, CMS has over 595 partners, more than 2,000 legal and tax advisers and a total complement of over 4,200 staff.

CMS member firms are: CMS Adonnino Ascoli & Cavasola Scamoni (Italy), CMS Albiñana & Suárez de Lezo (Spain), CMS Bureau Francis Lefebvre (France), CMS Cameron McKenna LLP (UK), CMS DeBacker (Belgium), CMS Derks Star Busmann (the Netherlands), CMS von Erlach Henrici (Switzerland), CMS Hasche Sigle (Germany) and CMS Reich-Rohrwig Hainz (Austria).