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Outsourcing

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Contributed by Al Busaidy, Mansoor Jamal & Co. (AMJ)

Contents

Al Busaidy, Mansoor Jamal & Co. (AMJ) is a full-service law firm of international quality established in Oman over 40 years ago. The Firm is recognised for its involvement in many innovative, 'first of a kind' deals and landmark projects in Oman. The Firm has one of the largest, most diverse practices in Oman comprising eight partners, two special counsels, experienced UK, US and Commonwealth trained solicitors, barristers, Arab law specialists and Omani advocates backed by a strong support team. The three-lawyer team dedicated to the Intellectual Property & Technology practice allows AMJ to advise on a wide array of technology and outsourcing matters.

Authors

Mansoor Malik heads AMJ's Corporate Commercial department. A UK-qualified barrister, Mansoor has more than 30 years' experience of law and practice in Oman in both the contentious and non-contentious fields. He is a recognised expert on Oman's legislative and regulatory frameworks due to his involvement in many of the jurisdiction's most significant transactions over the past four decades. Mansoor is a listed Oman Court of Appeal arbitrator and enjoys rights of audience before Oman's Supreme Court.

Ravinder Singh is a Senior Associate in the commercial team. Ravinder has particular expertise in advising domestic and international clients on intellectual property & technology, media and telecommunications ("TMT") matters. Ravinder's client base includes both government bodies and private sector entities, who he advises on data protection, cybersecurity, ecommerce and corporate matters. He holds a Master of Laws degree from the University of Glasgow and is admitted to practice before the Supreme Court of India and the High Court of Punjab and Haryana. Prior to joining AMJ in 2012, he practised for seven years with a leading law firm in India.

1. Outsourcing Market

1.1 IT Outsourcing
The IT outsourcing industry is developing at a steady pace in Oman and its use is common in sectors including, amongst others, banking and finance, telecommunications, aviation and insurance. Businesses are transferring certain IT, audit, security and training services to specialist third party vendors, allowing businesses to concentrate on their core business and improve efficiency whilst reducing costs at the same time.

1.2 BP Outsourcing
Business Process (BP) outsourcing is a recent concept in Oman. With the slump in oil prices resulting in shrinking oil revenues and large state deficits, Government and privately-owned businesses are increasingly using third party vendors to provide front office, mid office, back office services, contact centre support (voice and multimedia), finance and accounting services and human resource outsourcing. BP outsourcing is prevalent in banking and financial services, insurance, healthcare, telecom, retail, utilities, travel, auto and manufacturing sectors in Oman.

Service providers are aiding business process management services from within the Sultanate of Oman and other countries within the Gulf Cooperation Council (GCC) region. The services offered range from bookkeeping and financial statements compilations to general accounting services.

1.3 New Technology
Over the past five years, outsourcing companies in Oman have started using Cloud hosting and SaaS (software as a service). Office 365 is a good example of SaaS; customers pay a fixed fee for the service and the outsourcer provides hosting and keeps the software up to date.

The use of revolutionary technologies, such as robotics, artificial intelligence (AI), machine-learning, blockchain and the internet of things (IoT), are not widespread.

1.4 Other Key Market Trends
The Ministry of Finance, Sultanate of Oman, plans to outsource a number of Government-provided services to the private sector. As part of this initiative, private sector service providers will be chosen to perform tasks, handle operations or provide services, which were previously provided by the Government. The Ministry of Finance has identified 14 Government-provided services suitable for this initiative. The procurement process will commence once the relevant Government entity has issued a preliminary request for information followed by a detailed request for proposal, with an indicative scope of work.

2. Regulatory and Legal Environment

2.1 Legal and Regulatory Restrictions on Outsourcing

Oman does not have a specific body of legislation that seeks to regulate outsourcing transactions. However, there are a number of general laws that may be directly or indirectly relevant to outsourcing. Any service provider with whom an outsourcing contract is intended to be entered into must be licensed to provide the services when it is engaged, ie, accountants, lawyers, IT consultants, etc.

In Oman, the structure commonly followed for an outsourcing transaction involves a contract between the customer and the service provider that sets out the scope of work, performance standards, terms of payment and other terms and conditions relevant to the transaction. See **2.2 Industry Specific Restrictions** for sector specific restrictions.

2.2 Industry Specific Restrictions

There are provisions under the Oman Labour Law, RD 35/2003, as amended (the “OLL”), which appear to prohibit outsourcing of employees. Article 18 (Bis) of the OLL provides that any person working in Oman must be working for his or her employer and provides, among other things, that an employer shall not permit any of its non-Omani workers to work for any other employer and/or employ a worker authorised to work for another employer. The only manner in which staff can be outsourced is through a contract of services entered into between the customer and the service provider pursuant to which the service provider’s staff agree to undertake the services on the service provider’s behalf.

Regarding outsourcing transactions related to Omani banks and financial institutions licensed by the Central Bank of Oman (“CBO”), Article 70 of the Oman Banking Law, issued by RD 114/2000, as amended (the “OBL”), provides that a licensed bank is prohibited from disclosing any customer information unless such disclosure is required to be made on the instructions of the CBO and in accordance with the laws of Oman. Article 70(c) of the OBL further requires the customer’s consent prior to making any disclosure of the customer’s personal information. Therefore, as a matter of law, customer data is not permitted to be outsourced to a third-party vendors without CBO’s authorisation and the written consent of the customer.

The Code of Conduct for Insurance Business issued by the Capital Market Authority (Circular No. 2/1/2005 dated February 21, 2005 (the “Code of Conduct”)) requires insurers to ensure that any confidential information obtained from the customers will not be used or disclosed except in the normal course of negotiating, maintaining or renewing insurance for that customer, unless they have customer’s express consent; or the disclosure is made due to regulatory obligations or is required by law.

Further, under Resolution No. 113/2009, issued by the Telecommunications Regulatory Authority of Oman (the “TRA”), requires licensed telecom service providers to obtain their customers’ written consent prior to transferring customer data to any of its subsidiaries or a third-party vendor. Pursuant to Article 5 of Resolution No. 113/2009, a TRA licensed entity is not allowed to transfer customer data across borders without the TRA’s approval.

The law regulating the professions of accounting and auditing in Oman, RD 77/1986, as amended (the “Auditing Law”), provides that in the case of auditing companies and foreign auditing firms practicing their activities in Oman, the authorised representative of such firm or company shall submit an undertaking to the Ministry of Commerce and Industry (the “MOCI”) stating that such company or firm shall, inter-alia, maintain and preserve the confidentiality of the professional activities they perform. Article 17 (a) of the Auditing Law provides that auditors shall be prohibited from disclosing confidential information or allowing any person to examine such information unless they are authorised to do so by applicable law.

2.3 Legal or Regulatory Restrictions on Data Processing or Data Security

Currently, there is no specific law in force in the Sultanate of Oman that deals exclusively with privacy and data protection issues. However, the law of Electronic Transactions, promulgated through RD 69/2008, as amended (the “ETL”), does contain certain provisions that deal with issues connected with data protection and transfer of data.

As a general rule, Article 43 of the ETL prohibits “Personal Data Processing” or collecting “personal particulars” without the consent of the individuals to whom the data or “personal particulars” relate to. As an exception to the above, obtaining, disclosing, providing or processing of personal particulars is considered lawful, if, amongst other things, such information is necessary for preventing the commission of a crime or detecting a crime pursuant to an official request by an investigation authority, and if the processing of such particulars is necessary for safeguarding the vital interests of the person with regard to whom such information has been obtained.

Article 45 of the ETL provides that any person who, by virtue of his or her functional assignments that include electronic transactions, controls personal particulars of others shall by a special notice, prior to processing such personal particulars, notify the person about whom such particulars were collected and of procedures to be followed for safeguarding personal particulars. Such procedures shall include determination of the identity of the person in charge of processing of such particulars, the nature thereof, the purpose of processing them, procedures for processing of such particulars, venue for processing of particulars as well as all information necessary for ensuring safe processing of such personal particulars.

Article 49 of the ETL stipulates that if personal data is transferred outside of Oman, the relevant data should be adequately protected. From a practical perspective, before transferring personal data outside Oman, businesses are obliged to obtain the consent of the customers whose personal data is to be transferred, inform relevant customers of the manner and the circumstances under which their personal data will be used and ensure high standards of safety with regard to the storage and processing of personal data outside Oman.

2.4 Penalties for Breach of Such Laws

Failure to comply with Article 18 (Bis) of the OLL is punishable by imprisonment for a period of up to one month and/or a fine of between OMR1,000 and OMR2,000. If the person committing the violation is a non-Omani, he or she shall be expelled from Oman at the expense of the employer and banned from re-entering. An expatriate employee working in Oman for an unauthorised employer may be imprisoned for a period not exceeding one month and/or fined up to OMR800. In addition, his or her work permit may be cancelled, and the employee shall be repatriated to his or her country of origin at the expense of the employer and banned from re-entering Oman.

Any failure to comply with the provisions of the ETL is punishable by imprisonment of up to two years and/or a fine of OMR5,000.

The OBL provides that a licensed bank, its officers, managers and staff may not disclose any information about a client of the licensed bank, unless such disclosure is required by virtue of the laws of Oman on the basis of the CBO's instructions and in accordance with the directives provided by the concerned courts. If a licensed bank is found to have violated the provisions of the OBL, the CBO has the power to suspend and/or to cancel the license issued to the bank or impose any other penalties as may be permitted under the OBL.

An auditing company, if found to have violated the Auditing Law, may be suspended from practicing the profession for a period not exceeding two years or removed from the register of licensed auditors maintained by the MOCI.

2.5 Contractual Protections on Data and Security

Omani law does not require any specific provisions to be included in contracts with third-party service providers, the parties would be at liberty to agree upon the applicable conditions. Outsourcing contracts with suppliers who process personal data on behalf of the customer generally include provisions obliging the suppliers to ensure high standards of safety with regard to the storage and processing of personal data outside Oman. The contracts may provide for warranties concerning the quality of service, confidentiality of customer data, subcontractors, intellectual property of the customer, indemnities for third party claims, bodily injuries, damage to property and provisions relating to liquidated damages.

3. Contract Models

3.1 Standard Supplier Customer Model

There is no standard supplier customer model in Oman. Generally, the customer and the service provider enter into an outsourcing contract pursuant to which the service provider performs certain services and functions that were traditionally performed in-house by the customer. As a matter of Omani Law, particularly in accordance with the Commercial Code, RD 55/90, as amended (the "Code"), and the Civil Transaction Law, RD 29/2013 (the "CTL"), an outsourcing contract may be made either orally or in writing and will be deemed to have come into existence on the making of an offer and its acceptance.

In general, terms and conditions of an outsourcing contract should include the names and addresses of the parties, the nature of the relationship that will be established, a description of the services to be provided, service standards, considerations, mode of payment, duties and obligations of the parties, the term of the contract, limitations on liability, dispute resolution processes, and governance and compliance in line with applicable laws. The parties to the contract must have capacity to undertake their obligations as stipulated in the contract, and the contract must be for a lawful purpose.

3.2 Alternative Contract Models

Alternative contract models for outsourcing, in our view, may include joint ventures or partnerships, agency arrangements and outsourcing through a local intermediary (as opposed to direct outsourcing).

3.3 Captives and Shared Services Centres

Omani government-owned companies have, in the recent past, set up shared service centres or captive entities to perform particular services for all corporate affiliates. We have not seen businesses setting up shared service centres, or seen captive entities being set up offshore. Neither have we witnessed a trend for shared service centres or captive entities being sold to third parties as part of the privatisation/divestment processes.

4. Contract Terms

4.1 Customer Protections

Outsourcing contracts may provide that the customer may recover direct, compensatory damages and, in appropriate cases, seek injunctive relief or other equitable remedies in the event of a breach of contract. Contracts may also provide for a variety of remedies in addition to the recovery of damages, including, but not limited to, rights to terminate the contract if a material breach is not cured within the relevant notice and cure period.

Outsourcing contracts commonly contain a variety of warranties concerning the quality and efficiency of the service, the training, experience and availability of key personnel and other matters. Outsourcing contracts commonly require the service providers to indemnify the customers, their directors, officers and employees from and against any third-party claims, bodily injury or death of individuals and/or damage to tangible property as a direct result of the service provider's breach of the outsourcing contract.

The service providers are also required to procure and provide proof of various kinds of insurance coverage.

4.2 Termination

In a typical outsourcing contract, the parties may terminate the contract for a material default (ie, if a material default is not remedied within the notice and cure period), breach of warranty, insolvency of a party and expiration of the term (or termination by mutual agreement). The service providers' termination rights are commonly restricted to non-payment and customer breach of confidentiality or misappropriation of the service provider's intellectual property. A contract may also be terminated upon occurrence of a force majeure event.

4.3 Liability

As a matter of Omani law, the Omani Courts generally award damages for actual and direct financial losses. Punitive damages and damages for consequential loss, including loss of goodwill or loss of earnings, are not awarded, as a general rule. Pursuant to Articles 176 (2) and 181 of the CTL, an affected party may be able to recover loss of profits but these, in our opinion, will need to be directly attributable to the harmful act. Similarly, whilst we do not think that the loss of goodwill may be recoverable directly, in case of harmful acts resulting in loss or damage to reputation, such loss or damage, as may be substantiated, may be recoverable. The Courts may enquire whether the payment for damages provided for in the agreement is a "penalty", in that it is not in reality an estimate of the loss suffered but in fact excessive and punitive.

If a contract provides for liquidated damages and the losses sustained by the claimant are less than the liquidated damages provided for contractually, the Courts would limit the damages to the actual losses sustained by the claimant. However, if the quantum of losses sustained by the claimant exceeds the stipulated damages, the Courts may award the actual damages suffered. In any event, the claimant would need to demonstrate the losses suffered by it for the Court to award any damages claimed.

4.4 Implied Terms

There are no implied terms relevant to outsourcing contracts under Omani law. The service provider's right to use customer's data and intellectual property ends upon the termination or expiration of the contract.

5. HR

5.1 Rules Governing Employee Transfers

There are no specific provisions under Omani laws which govern employee transfers in the context of outsourcing. In the context of an employee being made available to a customer by the service provider, any such arrangement should not be construed to be a transfer as long as a consultancy/outsourcing contract is put in place between the service provider and the customer setting out the terms of their arrangement. A service provider may place its employees with the customer pursuant to an outsourcing contract which may, on a schedule, identify the employees to be outsourced to the customer, together with their duties and responsibilities, while working for and on behalf of the customer. It must, however, be ensured at all times that the employees placed with the customer are always understood to be employed by and work for the service provider.

5.2 Trade Union or Workers Council Consultation

Trade union or workers council consultation is not required for outsourcing as a matter of law.

5.3 Market Practice on Employee Transfers

A clear distinction is to be drawn between service providers placing their employees with the customer pursuant to an outsourcing contract and the transfer of employees pursuant to the sale of a business, a merger or other transaction. In the case of the former, the concerned employees to be placed with the customer will at all times remain employed by and working for the service provider. In case of transfer of employment pursuant to the OLL as a result of sale of business, merger etc, contracts of employment transfer from the transferring employer to the new employer on the same terms and conditions. Transfers need to be notified to the Omani authorities ie, the MoM. Upon employee transfer, all transferred employee rights, responsibilities, legal obligations and liabilities transfer to the new employer. For any change to the terms and conditions of the transferring employees' employment contract, post transfer, the new employer must gain the employees' consent. There are no legal requirements to inform or consult with employees or representative bodies prior to, during or after the transfer.

The market practice on employee transfers in Oman is that the transferring employer notifies the employees prior to the transfer informing them that:

- with effect from a designated date, their services/employment shall be transferred to a new employer;
- the terms and conditions of their employment would remain the same;
- the new employer shall assume all contractual and statutory obligations previously owed by transferring employer; and
- any untaken leave, entitlements, PASI contributions or end of service gratuity will be transferred to the new employer and, in the case of expatriate employees, employment sponsorship visas would be transferred to the new employer by notifying the MoM and the immigration authority.

Successful completion of the transfer of expatriate employees is conditional on the new employer holding valid labour clearances issued by the MoM entitling the new employer to employ the transferring expatriate employees. In the case of Omani employees, the MoM and the Public Authority for Social Insurance ("PASI") are notified of the transfer so that the transferring employees' registration details can be amended.

Al Busaidy, Mansoor Jamal & Co. (AMJ)

Muscat International Centre
Central Business District
Bait Al Falaj Street
P.O. Box 686, Ruwi
Postal Code 112, Muscat
Sultanate of Oman

AMJ
AL BUSAIDY, MANSOOR JAMAL & CO.
—BARRISTERS & LEGAL CONSULTANTS—

Tel: +968 2482 9200
Fax: +968 2481 2256
Email: mj-co@omantel.net.om
Web: www.amjoman.com

6. Asset Transfer

6.1 Asset Transfer Terms

There are no specific terms which are required to be included in asset transfer agreements in Oman. In accordance with the Code, the parties to a contract, particularly a commercial contract, are free to arrange their own affairs subject to mandatory legislative provisions and matters of public policy and custom.

For the purposes of acquiring tangible assets in Oman, the purchasing entity is required to have a legal presence in Oman. The laws governing the establishment of companies are primarily the Commercial Companies Law of Oman RD 18/2019 ("CCL"), the Commercial Registration issued by RD 3/74, as amended (the "CRL") and the Foreign Capital Investment Law, RD 50/2019, which will come into force on the 2 January 2020 (the "Investment Law").

The most commonly used corporate vehicles for foreign investment in Oman are limited liability companies ("LLCs"). An LLC is formed by at least two, and no more than 50, natural or juristic persons. All the shareholders are required to sign the company's by-laws and produce relevant documentation pertaining to their shareholding for the purposes of registration of the LLC. The LLC is required to lease premises from which it may operate its business in Oman and the lease agreement must be registered with the relevant municipality in which the premises are located.

In an asset purchase, the purchaser will need to be aware of its Omanisation obligations. The Government of Oman has prioritised the need to train and create employment opportunities for Omani employees. At the forefront of this drive has been the "Omanisation" programme, whereby a legal requirement is placed upon employers to employ a certain quota of Omani employees. Certain jobs may now only be undertaken by Omani employees. Expatriates are prevented from entering into certain positions as the MoM has ceased the issuance of new labour clearances in these areas in order for Omanis to fill these roles.

Assignments or other transfers of equipment leases, software licences and other contracts may require consents of the owner of the equipment, the licensor or another third party. Sales of tangible property (particularly land and buildings) are required to be registered with the Ministry of Housing of Oman.