Structuring offshore and multi-jurisdictional outsourcing contracts

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Outsourcing is increasingly used to help consolidate and streamline global businesses, either as part of routine administrative streamlining or after corporate mergers, acquisitions or divestments. By outsourcing common business processes and IT systems on a multi-jurisdictional basis, businesses can achieve a high degree of global standardisation. An outsourcing arrangement must include and provide for local variations, while ensuring that these operate within the confines of the global deal. Multinational companies use a variety of outsourcing arrangements to achieve this aim.

This chapter examines the principal contractual structures that global organisations use in multi-jurisdictional outsourcings to ensure standardisation, while allowing local variations to the extent necessary. In addition, it seeks to explain how the standard model that characterises typical outsourcing structures can be expanded to cope with the requirements of multi-jurisdictional outsourcing transactions.

The chapter considers these issues by concentrating on the following:

- The main distinguishing feature of multi-jurisdictional out-sourcings.
- The range of contractual options available to the customer and supplier when setting up a multi-jurisdictional outsourcing.
- In-depth analyses of the contractual models, including:
  - single contract models (Option 1);
  - master contracts (Option 2);
  - individual service contracts (Option 3).
- The different models commonly used for offshorings.
- Practical considerations that should be taken into account when structuring an outsourcing contract, including:
  - key commercial terms;
  - technical considerations;
  - tax;
  - exit arrangements;
  - corporate activity;
  - internal control and contract management.

This chapter concludes by briefly summarising the main issues relating to outsourcing contracts.

MAIN DISTINGUISHING FEATURE OF MULTI-JURISDICTIONAL OUTSOURCINGS

The standard model that characterises the following typical outsourcing structures is usually a linear arrangement (that is, A contracts with B):

- On-shore outsourcing (that is, outsourcing to a supplier within the same jurisdiction).
- Offshore outsourcing (that is, outsourcing to a supplier in another jurisdiction).
- Near-shore outsourcing (that is, outsourcing to a supplier in another nearby jurisdiction).

Generally, there is a single customer entity and a single supplier entity. That supplier can act as prime contractor for several subcontractors. However, at the most basic contracting level, there is still a single customer and supplier relationship.

Multi-jurisdictional outsourcing occurs where the outsourcing takes place over a number of jurisdictions, outsourcing the services in one jurisdiction to a local supplier or, in some cases, to a hub or shared services centre. The key distinguishing feature of multi-jurisdictional outsourcing arrangements is the complex network of the contractual and service delivery relationships. Although there may be a central, dominant contractual relationship between the parent customer and parent supplier, the contractual model must cover both this relationship and the local legal relationships. This applies even where multiple subcontracts introduce the potential for a web of subsidiary contractual relationships (see below, Option 2 – master terms).

THE RANGE OF CONTRACTUAL OPTIONS AVAILABLE

Choosing the right structure requires a careful balancing of competing needs. Central to this issue is the need to balance the degree and desire for centralised control of the outsourcing arrangement against requirements for local implementation on a
country-by-country basis. The success or failure of multi-jurisdictional outsourcing projects often depends on how successfully the parties impose control on the network of relationships that they create.

The arrangement should control certain key risks centrally, including:

- **Costs.** This is particularly relevant if the customer is negotiating a global price. The more fragmented the arrangement, the harder it is to control rising costs.

- **Performance.** A global business requires the same high standard of performance across its global entities. The reputation of a global business should be protected wherever a threat arises.

- **Legal and commercial risk.** This is particularly relevant for key terms such as:
  - limiting liability;
  - assigning the contracts and step-in rights (see below, **Option 1 – single contract model: Step-in rights**);
  - indemnities and warranties;
  - scope of intellectual property (IP) licences and ownership.

The customer and supplier can choose from a range of options, depending on their most important requirements (see box, **Range of options**).

The option that is appropriate for a multi-jurisdictional outsourcing is best considered by reference to an example. One example is where the customer is a US company with subsidiaries in a number of European and Asian countries. The proposed supplier is also US-based, with existing (or proposed) subsidiaries in all or a substantial number of these locations. The question arises as to how the parties should contract for services to be provided in the US, Europe and Asia.

At one end of the range, the US-based parent companies of the customer and the supplier enter into a single central contract under which the dominant contractual relationship remains between the parents. Within that framework, the customer’s subsidiaries benefit from the services and the supplier internally subcontracts (by whatever means) the provision of local services to its country-specific affiliates. However, there is no direct relationship between local customer and supplier affiliates in each jurisdiction (see below, **Option 1 – single contract model**).

At the other end of the range, each local customer agrees individual contracts with the supplier centrally and/or the appropriate local supplier entity (see below, **Option 3 - individual service contracts with optional contract management services**).

In the middle of the range is the master or framework agreement, which is also known as an umbrella arrangement (see below, **Option 2 - master terms**). A single contract between the customer and the supplier at the parent company level controls the individual contracts between local subsidiaries.

**OPTION 1 - SINGLE CONTRACT MODEL**

In this arrangement, the customer and supplier parent company enter into a single contract, which governs the entire global arrangement (see box, **Single contract model**).

The single contract structure is suitable where:

- The services, statement of work, service level agreements (SLAs) and other terms are fairly uniform and centrally provided or managed.

- Ensuring a very high degree of consistency of terms and the SLAs is of particular concern to the customer and local variation is minimal.

However, there are a number of issues that are difficult to deal with in this structure (see below).
Local variations

Each area usually produces specific provisions and carve-outs from the main contractual terms. The contract should deal with these issues in annexes or schedules on a country-by-country basis. The variations can include:

- Different local health and safety laws or regulatory requirements.
- Different mandatory provisions of local law (some jurisdictions may have different standards on what types of liability can or cannot be excluded).
- Variations in the service delivered in each jurisdiction (for example, to cope with differences in service hours).

The customer must ensure that the requirements of the subsidiaries in each jurisdiction are reflected in the single contract arrangement. This requires extensive due diligence, and a high level of co-operation and project management both during and after negotiations to allow the terms of the contract enough flexibility to change with local conditions.

However, local variations are remote from the central contract negotiations and ongoing contract management, and dealing with significant local variations under the single contract structure can be difficult.

Enforcement against customer’s subsidiaries – indemnities and third-party beneficiary rights

The customer is responsible for enforcing contractual provisions on behalf of its subsidiaries. This can cause difficulties even where the internal governance structures are sufficiently well structured to allow relevant information and data to flow to those responsible for the contract’s central administration. For example:

- Under English law privity of contract principles, where a breach of contract results in actual losses for the local entity but not for the parent company, the parent company in a single service contract structure is unlikely to be able to claim damages because it did not suffer them itself.
- Consequential economic losses of group companies are likely to be expressly excluded under the negotiated limitation of liability clauses.
- The subsidiary cannot bring a legal action against the supplier for recovery of its losses as it is not a party to the contract.

To deal with these issues, the following can be included in the main contract:

- **Indemnities in respect of affiliate losses.** The supplier promises to indemnify the customer for losses suffered by its affiliates. However, this approach is not without problems. An award of damages to the customer for losses incurred by one of its subsidiaries may be taxable under the principle set out in *Zim Properties Ltd v Procter* [1958] STC 90; 58 TC 371. This provides that the right to sue is an asset for capital gains tax purposes and the receipt of damages results in the disposal of that asset and is subject to tax. There are some exceptions to this rule (for example, where a payment is made under an indemnity or warranty in a sale and purchase agreement) (*HM Revenue & Customs Extra-Statutory Concession D33*). However, damages received by the customer do not fall within any of these exceptions. This problem can be dealt with contractually by ensuring that there is a gross-up clause in the contract, which increases the damages (or indemnities) by the anticipated tax payable.

- **Third-party beneficiary rights.** These are in favour of the customer’s subsidiaries against the supplier for some or all of the contractual provisions benefiting the customer. The way this is done depends on the law that governs the overall relationship.

The supplier must consult with its insurance providers to assess the impact that third-party rights have on the premiums for professional indemnity insurance. It should obtain local advice on enforcing these rights and ensure that they are worded appropriately. In addition, the parent company can reserve a right of veto against its subsidiaries.
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step-in rights. if the supplier has a right to assign subcontracts, the customer may want to retain certain step-in rights or rights of veto over assignments, particularly if the incoming entity is not a member of the group of companies (see below, step-in rights).

enforcement against supplier’s subsidiaries — collateral warranties

the customer does not have direct contractual relationships with each of the supplier’s subsidiaries in the various jurisdictions (and neither do its own locally-based affiliates or subsidiaries). therefore, some or all of the supplier’s subcontractors may need to provide collateral warranties to the customer (and, in some cases, its subsidiaries).

a collateral warranty is a unilateral undertaking by the relevant local supplier in favour of the customer, promising to perform the services set out in its subcontract. it offers the customer a means of enforcing a subcontract to which it is not a party, in much the same way as a third-party rights clause (see above, enforcement against customer’s subsidiaries: indemnities and third party beneficiary rights), but with the advantage that it can be made clearly assignable.

flowing down supplier obligations

the greatest advantage to the customer of the single service contract arrangement is that the supplier is responsible to the customer for all aspects of performance, whether these are subcontracted to its own subsidiaries or third-party specialist providers.

the supplier usually requires that these obligations flow through the contract to the various supplier affiliates in the relevant jurisdictions through subcontract arrangements. however, these need not necessarily be true arm’s length subcontracts.

the customer should consider the degree of control that it requires over these subcontracts. to increase control, it can:

- attach pre-agreed subcontracts to the main agreement.
- set out minimum subcontractual requirements in the main contract. this can be achieved by either:
  - pre-agreeing the wording, such as in a template contract;
  - specifying the main contract terms or principles that must flow down.
- require the customer to approve subcontracts (usually, such consent is not to be unreasonably withheld).

which of these mechanisms are used depends on the degree of control that the customer in fact wishes to exert. they can be applied to either all subcontractors, or to material subcontractors only. a material subcontractor can be defined in various ways in the contract. it may be a subcontractor that:

- earns a certain percentage of the contract charges.
- controls key assets or has operational responsibility for particular strategic services.

step-in rights

in any arrangement involving multiple subsidiary contracts, the customer should consider retaining the following step-in rights if the customer’s business operations are at risk of being compromised:

- taking services back in-house.
- requiring services to be transferred to a third-party provider.

the parties will, however, need to address whether step-in rights are operable in practice (or are no more than a “paper” remedy and inoperable in practice), which depends on the nature of the services being provided.

shell companies

the customer should ensure that the supplier’s parent company is sufficiently funded and not simply an empty shell, and that it can and will exercise actual control over its’ subsidiaries performance.

option 2 - master terms

in this arrangement (see box, master contract), the customer and supplier enter into master terms (also known as framework or umbrella terms), which set out:

- universally applicable terms and conditions.
- principal services.
- key commercial principles, for example, relating to pricing and liability.

the master terms also include a form of template local subsidiary agreement and may possibly even attach material subsidiary agreements in their final signature form. however, the main contractual relationships are ultimately between jurisdiction-specific entities.

this form of contract is popular with customers seeking to:

- take advantage of their bulk purchasing power by agreeing a discount in the master terms.
- retain overriding centralised control over the administration of the contracts and the relationship with the supplier.
- keep local flexibility restricted by allowing variations of the contract, where necessary, under centralised supervision.
- give local subsidiaries a degree of independence and direct rights and remedies against the supplier.
A number of issues are of particular importance to this form of contracting (see below).

**Local flexibility**

The key structural advantage of this arrangement is that it allows a certain degree of local flexibility. Each local entity can negotiate its own contract under the master terms. This may be required where the scope of services changes slightly from jurisdiction to jurisdiction or where the performance of the contract concerns any one or more local factors, including:

- Local laws and regulations (particularly in the fields of regulated industries, data protection, contract enforcement, transfer of monies, insolvency, IP and employment).
- Local tax considerations (see below, Practical considerations: Tax considerations).
- Local costs of labour and materials, which may prove cheaper to the customer than applying a global pricing model (although the supplier will seek to balance this against the customer’s bulk purchasing status).
- Reduced scope of work or a variation to the SLAs to account for local business requirements.

The local subsidiary agreements therefore cover both specialist requirements under national law and also jurisdiction-specific commercial terms. Each local subsidiary can agree its own:

- Scope of services selected from the master terms.
- Individual transaction/migration arrangements.
- Exit plan.

The master terms between the customer and the supplier are incorporated by reference in the local contract, to the extent that they are not varied at the local level.

**Escalation and governance**

One of the greatest risks of the framework arrangement is the fragmentation of the central relationship of the parties into local arrangements. To avoid this, the master terms and subsidiary agreements must set out strict governance and escalation procedures to ensure that subsidiaries do not engage in disputes without reference to and obtaining the approval of their parent companies. In addition, any change of control provisions contained in the subsidiary agreements must include escalation procedures to the global level to prevent any local variations from undermining the master terms.

**OPTION 3 - INDIVIDUAL SERVICE CONTRACTS WITH OPTIONAL CONTRACT MANAGEMENT SERVICES**

The customer’s subsidiaries each contract with a supplier’s parent company and/or specialist entities (see box, Individual contracts and contract management). The main difference to Option 2 is that the parties do not agree master terms, although a reduced memorandum of understanding or heads of terms can be agreed as a basic platform from which to engage in individual negotiations.

This model is appropriate where the supplier proposes to use material subcontractors or a joint venture partner to either:

- Service a location in which it would otherwise not have a presence.
- Provide for specialist requirements (such as software development or support and maintenance).

The customer (or customer subsidiary) can insist on having a direct contract in place with the specialist suppliers. The arrangement can also be useful where the services have very little in common, but the supplier is bidding on a global price.

In addition, if the risk is shared between suppliers that are each specialists in their fields (and are competing for further work assignments), this can reduce overdependence on a single entity.

**Fragmentation risks**

A problem with using this model is that all the contracts should be negotiated up-front and at the same time, to take advantage of bulk purchasing power. This can involve difficult multi-party negotiations and requires tight control over concessions made and the application of underlying commercial principles. In practice, it is likely that some contracts will be signed at a later stage,
Failure to monitor and tightly control the parallel negotiations can result in the contractual arrangements fragmenting and there being confusion over the extent of concessions offered to the other party. The customer should also be aware of the impact the contractual structure has on the liability taken on by the supplier and the customer’s remedies. This is of particular concern where the liability limits are divided on a country-by-country basis, which may not take account of overriding global losses.

**Drafting of statements of work**

Complications can arise if the statements of work (that is, the detailed documents describing the scope of services to be provided) are not rigorously drafted. In particular, there must be no gaps in the provision of services. The following questions should be asked:

- Are all principal services adequately reflected?
- Must the various subcontractors co-operate with each other, and identify and close gaps in service?
- If the services overlap, do the statements cover both the subcontractors involved?

**Contract management**

The parties can appoint a contract manager to assist in the management of contractual relations. The supplier can offer these services; however, this introduces the risk of potential bias. It may be preferable to invite a third-party consultant to assist in the negotiations, and ultimately the management and monitoring of the portfolio of local contracts.

The contract manager’s role is to control the provision of services and performance, in addition to the cost model, on behalf of the customer. This arrangement reflects the reality that the customer often no longer has the internal resources and budget during the term of the outsourcing arrangement to effectively manage a global contract structure. However, the third-party contract manager is not responsible for losses arising under the outsourcing services and is simply performing another business function of the customer. Therefore, the scope of the services and standard of performance of the contract manager must be strictly defined.

**OFFSHORING MODELS**

Multi-jurisdictional outsourcing may include elements of the following traditional offshore or near-shore sourcing models:

- **Captive model.** This is where the wholly-owned subsidiary is set up in the offshore location, with the help of the supplier acting as a consultant. The customer generally benefits from direct operational control and potential tax breaks, including, as a result of the recent European Court of Justice decision in *Marks & Spencer plc v Halsey (Case C-446/03)*, group relief between the UK parent and EU resident subsidiaries.

  However, there are potentially higher up-front costs and there is a limited degree to which risk can be passed to the supplier.

- **Build operate transfer (BOT).** In this arrangement, the supplier agrees to build the facility, operate it for a limited period, and finally transfer the up-and-running facility back to the customer. Suppliers often prefer this model because of the higher margins achieved. There are also advantages for the customer, including a lower risk in relation to the eventual operation of the facilities. However, BOTs are relatively expensive.

- **Joint venture.** The customer and the offshore supplier can choose to enter into a joint venture contract or even jointly set up a joint venture company. Benefits for the customer
include a greater degree of control over the operations, and an immediate gain of local knowledge and reputation. However, setting up and maintaining a joint venture company, or even the contract itself, are potentially complicated and this arrangement is often inefficient. A further drawback to joint venture arrangements is the limited risk that can be passed to the supplier.

- **Direct sourcing.** In this classic model, the supplier takes over the operation of the services including the transfer of contracts, assets and staff. The set-up costs for the supplier are relatively low and the customer instantly benefits from local know-how. Exit arrangements are relatively simply structured. The main risks for the customer are a lesser degree of control over the operations on the offshore location and potential problems in enforcing its rights against the supplier.

In its request for proposal (RFP), the customer can invite suppliers to propose a suitable structure for the outsourcing.

**PRACTICAL CONSIDERATIONS**

The nature of outsourcing arrangements has been changing to accommodate the increasingly complex nature of service providing. One kind of service is business process outsourcing (BPO), which can touch on many aspects of a business, and arises globally. For example, a BPO human resources (HR) outsourcing can also include an element of IT (in processing payroll or administering online HR management tools). There are very few truly global suppliers who can provide for all aspects of an international BPO transaction. Increasingly, suppliers look to external specialist suppliers or set up their own specialist supplier subsidiaries to work offshore in providing specialist services, thereby taking advantage of lower labour costs. Multiple sourcing arrangements introduce more complexities.

Whichever solution is chosen, the overriding objective of any outsourcing (whether on-shore, offshore or multi-jurisdictional) is contained of one or more of the following aims:

- **Value for money.**
- **Share of risk and reward/partnering** (for example, through bonus incentives and discount penalties linked to service performance).
- **Access to innovation.**
- **Increased speed to market** (for example, of innovative business processes or customer services).
- **Improved service quality.**
- **Facilitating global harmonisation.**

In a multi-jurisdictional, potentially multi-party, arrangement the parties need to carefully consider how these aims are preserved in possibly long-term and complex arrangements.

Agreeing on the most suitable structure can be a lengthy and complicated process. Usually, it involves various local parent companies, one overriding global parent company and potential local subsidiaries and affiliates. Each of those parties can then bring a variety of other companies to the negotiations, which will have their own priorities.

The objectives of each group of companies can also vary. A parent may not want each affiliate within its own group to be able to bring claims against the other party to the contract. Equally, a parent may not want to face claims from the other party's affiliates. Requiring the other party's parent company to bring a legal action on behalf of its subsidiaries or in other ways internally moderate the bringing of individual claims can reduce the risk of multiple actions. Alternatively, the way that the other party exercises its remedies can be subject to alternative dispute resolution procedures, which include escalation to the parent company before any direct action can be brought against the other party.

The following practical issues are considered in greater detail below:

- **Key commercial terms.**
- **Technical considerations.**
- **Tax considerations.**
- **Exit arrangements.**
- **Corporate activity.**
- **Internal contract and contract management.**

**Key commercial terms**

From a commercial and legal perspective, the deal structure must achieve a number of aims:

- It must be flexible enough to cover future reorganisations and divestments as well as acquisitions of each company and to allow the contract to adjust to political, economic, legal or regulatory changes in the relevant locations.
- The contract(s) must be enforceable and properly reflect and assign the rights and obligations to each party. In practice, English law often governs the global contract.
- It needs to provide for adequate remedies against a party in breach. The enforcement of remedies can be indirect through governance (that is, using the parent company to exert pressure on its subsidiaries and affiliates and linking this with indemnity provisions). Alternatively, third-party rights or collateral warranties can provide direct contractual routes for the aggrieved party against the party in breach. The deal structure must also ensure that losses are recoverable against the company with the greatest resources or are otherwise insured against (see above, Option 1 – single contract model: Enforcement against customer's subsidiaries – indemnities and third-party beneficiary rights).
- It must include appropriate limitations of liability against the losses.
Technical considerations

An IT infrastructure that supports the provision of the services is often a key factor in the RFP. An ideal, one-size-fits-all technical solution or architecture (including systems infrastructure and applications) can be difficult to achieve in multi-jurisdictional deals. The structure must reflect whether delivery of the technical solution takes place on a local basis or is delivered remotely. In any event, the following must be considered:

- What other back-up arrangements are in place (for example, second site disaster recovery or data back-up)?
- Will the supplier maintain and operate the IT solution for 24 hours a day, seven days a week?
- Will IT helpdesk services be available to users during working hours in each territory?

Tax considerations

Offshore and multi-jurisdictional outsourcings raise a number of complex tax issues. It is important to identify the relevant issues early in the planning stage and structure the transaction to remove or reduce any problems. The tax issues (and their relative importance) vary according to each individual transaction (for example, whether the customer is a financial institution, whether it can be argued that there are no profits attributable to the permanent establishment. A careful review of the relevant double taxation treaty is necessary to confirm whether there is a problem and if so whether this can be avoided, for example, by using the independent agent exemption found in most treaties, or whether it can be argued that there are no profits attributable to the permanent establishment. Some tax authorities (for example, India) are known to take a strict line on this issue and seek to tax the customer on profits, that arise from the permanent establishment. Care should therefore be taken to structure the transaction to minimise this risk.

- Transfer of assets. The classic model of direct sourcing usually involves the customer transferring assets to the supplier. The transfer of assets is a disposal by the customer (or the relevant transferee in the group) for tax purposes, which can, depending on the nature of the asset, give rise to a liability for capital gains tax, a charge under the relevant intangible assets rules (in the UK for example, under Schedule 29 of the Finance Act 2002) or a capital allowances balancing charge. A detailed analysis of the assets to be transferred to the supplier should be undertaken to determine if some or all of these tax charges can be avoided (for example, through utilisation of losses or surrender of losses through group relief).

- Permanent establishment. The outsourcing of services offshore can result in the customer becoming liable to pay tax in the jurisdiction where the supplier is resident on the basis of the taxable profits attributable to the permanent establishment. A careful review of the relevant double taxation treaty is necessary to confirm whether there is a problem and if so whether this can be avoided, for example, by using the independent agent exemption found in most treaties, or whether it can be argued that there are no profits attributable to the permanent establishment. Some tax authorities (for example, India) are known to take a strict line on this issue and seek to tax the customer on profits, that arise from the permanent establishment. Care should therefore be taken to structure the transaction to minimise this risk.

- Value added tax (VAT). VAT can be a major issue in outsourcing transactions, particularly for customers in the financial services sector (or any other business engaged in making exempt supplies). Once a service has been outsourced, this can result in a taxable supply for VAT purposes. As companies in the financial services sector are generally unable to recover the VAT they pay, it can be a real cost. There are a number of techniques used to reduce this problem, for example, carefully structuring the transaction so that the services supplied to the customer are themselves exempt.

The position becomes more complex in the context of multi-jurisdictional outsourcings, particularly where there is only one contract between the customer and the supplier, and the customer is regarded as making an onward supply to its foreign subsidiaries. This can lead to complex VAT issues and will, unless appropriate care is taken, mean that the VAT is irrecoverable.

- Transfer pricing. Transfer pricing rules require associated companies to charge an arm’s length price for the supply of goods and services. This can become an issue in outsourcing transactions where the customer pays a global price to the supplier for all services to be provided around the group. The customer must ensure that there is a re-charge made to its subsidiaries and this is on an arm’s length basis to comply with transfer pricing legislation.

Exit arrangements

Exit arrangements are particularly complicated and can involve several transition plans. The later these are agreed following signature, the worse the customer’s position. Ideally, the signed documentation will include exit arrangements that take account of the multiple jurisdictions involved.

Corporate activity

The customer should reserve sufficient flexibility to allow for divestiture and acquisition activity within its customer group. It may be necessary to move business in or out of the outsourcing arrangements at future dates, without incurring prohibitive termination costs and following pre-agreed exit arrangements. In particular, the services should continue for a minimum handover period. Such a transition can be to either:

- The in-house function of the customer or a newly-controlled business.
- An existing or new supplier.

Internal control and contract management

Each side must achieve a high degree of local buy-in from its subsidiary companies in various jurisdictions. This means that the goals, objectives and dependencies of the global project are fully understood by local managers and supported by the negotiation teams. This is important as:

- Each local subsidiary can resist the global price if in fact it does not compare favourably to the local market.
- There may be local disaffection with the idea of an outsourcing arrangement and with exchange rate impact on the global pricing.
Internal management costs of multiple and/or complex arrangements can be considerably higher than the usual estimated 5% of the outsourcing budget. The customer must ensure not only that sufficient funds are set aside but also that the internal management procedures used during the negotiations continue beyond signature to allow the customer to benefit from past experience. In particular, the customer must consider whether it retains sufficient know-how following transfer of staff to the supplier to complete the following tasks:

- **Monitoring performance of the contract (whether, for example, for service delivery or for costs).** This can include commissioning benchmarking and audit reports.

- **Administering change of control procedures.** In particular, change of control mechanisms must not be undermined by local variations in the contractual arrangements. The entire global arrangement needs to be centrally-controlled, but with sufficient local flexibility to allow for efficient local implementation.

- **Managing the customer’s internal business community on a global basis.** The reporting and escalation paths, and project management tools need to be:
  - rigorously applied;
  - very clear and understood by all parties concerned.

- **Building a relationship with the supplier(s).** Multi-jurisdictional outsourcing arrangements have problems in managing the relationship between the parties in such a complex arrangement. The customer must satisfy itself it has sufficient internal capacity to manage the ongoing relationship.

All these tasks will consume resources and a single country-by-country manager may not be sufficient.

A good governance structure is of overriding importance. It must enable effective global oversight, supported by good data and processes, such as the filing of minutes and reports in a globally-accessible database, and tracking the status of activities.

**STRUCTURING OUTSOURCING CONTRACTS – A SUMMARY**

Multi-jurisdictional outsourcings involving multiple corporate entities are rare. They are, however, sometimes inevitable given market globalisation and an overriding incentive for any customer is a consistent level of service achieved across all jurisdictions. Very few suppliers will meet this global reach requirement in practice. Therefore, suppliers often suggest partnering arrangements with other third-party suppliers. The level at which third-party suppliers are introduced will vary, and the customer may sometimes find itself contracting:

- As a joint venture.
- With several suppliers at the framework level.
- By including the various specialist suppliers as subcontractors to the key supplier.

The single contract model favours a single supplier group of companies.

Finally, it must be borne in mind that multi-sourcing arrangements can give rise to very specific other legal risks. These are beyond the scope of this chapter, but can include:

- Data protection issues.
- Liability issues (including indemnities and remedies).
- Transferring employees offshore.

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