

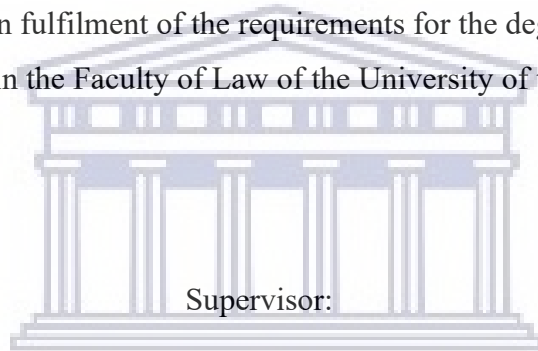
THE IMPACT OF LEGAL PROCESS OUTSOURCING IN SOUTH AFRICA

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Thesis submitted in fulfilment of the requirements for the degree of Doctor of
Philosophy (Law) in the Faculty of Law of the University of the Western Cape



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DECLARATION

I declare that '*The Impact of Legal Process Outsourcing in South Africa*' is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Student name and signature

Supervisor's name and signature

Date



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DEDICATION

I dedicate this work to my mom and dad, who have always encouraged me and motivated me to strive for my best. I thank them for their unwavering love, support, and firm belief in me throughout my life. I would not have achieved all that I have without them.

This research would not have started without my sister, who was instrumental in lighting the necessary enthusiasm I needed to partake and commit to this journey. I thank both her and my brother in law immensely for their support.

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THE IMPACT OF LEGAL PROCESS OUTSOURCING IN SOUTH AFRICA

KEYWORDS

South Africa

Legal Process Outsourcing

Regulatory Framework

Ethical Practice

Legal Framework

Legal Services

Outsourcing United Kingdom

Legal Outsourcing

Professional Responsibility

Practice of Law



ABSTRACT

THE IMPACT OF LEGAL PROCESS OUTSOURCING IN SOUTH AFRICA

Legal Process Outsourcing (LPO), the act of sending legal work to an offshore destination or onshore to another location within the same country by a law firm or legal department to a legal outsourcing company, has steadily grown to become a billion dollar industry, transforming the legal landscape from the traditional law firm set up and firmly entrenching itself as a valued accessory to any law firm vying for success. The integration of the LPO business model arguably offers lower labour costs, 24-hour service delivery and direct access to a pool of professional lawyers specialising in a multitude of disciplines.

South Africa has been coveted as a top outsourcing destination mostly as a result of its extensive language capabilities, as well as the similarities it has with the legal structure, regulatory and legislative framework of for example the United Kingdom. The number of top tier international law firms opening physical offices in the country and establishing alliances with local law firms in recent years, has aided in exposing the business opportunities and potential available in South Africa's legal sector. This research will explore the impact the LPO industry has had on the regulatory framework in South Africa, offering a comparative analysis, which will look into the rules and guidelines currently governing the legal systems of South Africa, the United Kingdom and India, being the largest LPO destination.

With the growth of the LPO market, an increasing array of questions pertaining to the role of ethics and professional responsibility have emerged amongst the legal fraternity. The most common being safeguarding client confidentiality, data protection, the unauthorised practice of law, the duty to disclose the outsourcing relationship to the client, avoiding conflicts of interest and billing the client appropriately for the legal services being performed offshore. It is surprising that despite these concerns, which form the core duty owed to clients by any legal professional in practice, not much action has been taken by the professional bodies and authorities in introducing a regulatory framework for the LPO industry. Presently, South African national law does not regulate outsourcing businesses. The situation is more or less the same in the United Kingdom and India. Assumedly having such a

framework would assist in curbing the ethical implications brought on by LPO. This thesis aims to critically discuss the impact outsourcing has had on the legal and ethical codes underpinning the legal profession, with particular focus on whether the introduction of a regulatory framework will provide a solution to the challenges these codes raise. This research will further argue that the lack of a regulatory framework may allow for the rise in ethical issues thus contravening the practice of law. While LPOs have taken certain self-regulatory steps to reduce ethical concerns more synergy will be required between both the countries outsourcing their legal work and countries providing the outsourcing services so as to establish a regulatory framework aimed at reducing further infractions. Lastly, this research will aim to provide recommendations to a proposed regulatory framework for South Africa's LPO sector.



ABBREVIATIONS

ABA	American Bar Association
BPESA	Business Process Enabling South Africa
EEA	European Economic Area
EU	European Union
GATS	General Agreement on Trade in Services
GDPR	General Data Protection Regulation (GDPR) (EU) 2016/679
IT	Information Technology
IP	Intellectual Property
LPA	Legal Practice Act 28 of 2014
LPO	Legal Process Outsourcing
LPS	Legal Process Services
POPI	Protection of Personal Information Act 4 of 2013
SADC	Southern African Development Community
UK	United Kingdom
US	United States of America




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CHAPTER ONE

INTRODUCTION

1.1 Background to the study

The Legal Process Outsourcing (LPO) industry has become a popular alternative business model utilised by both legal firms and legal departments as a means to combatting the advent of technology, tough economic times, evolving client needs and the development of globalisation.¹ Since its commencement, the LPO industry has grown by leaps and bounds, with a projected estimated global value reaching between US\$30 to US\$40 billion by the year 2024² and is expected to continually grow at an alarming rate of between 26% to 60% annually³, with a multitude of legal services being outsourced to various destinations around the globe. However, the growth of the LPO industry is hampered by the alleged breach of ethical codes, rising security concerns and the question of whether LPO's instigate and promote an unauthorised practice of law. This begs the question of whether a regulatory framework exists to counteract the challenges posed by this business model. Currently, in South Africa legal outsourcing businesses are not regulated, the same stance exists in other LPO destinations, as for example the United Kingdom (UK) and India. This research will aim to investigate the impact legal process outsourcing has had on the legal profession in the first part and secondly discuss whether having a regulatory framework in place will alleviate the rising ethical and legal concerns borne from the implementation of this business model.

¹ Singh D *The Outsourcing of Legal Services: Trends, Challenges & Potential* (2015) 2.

² Grand View Research 'Legal Process Outsourcing (LPO) Market Worth \$27.19 Billion By 2024' available at <http://www.grandviewresearch.com/press-release/global-legal-process-outsourcing-lpo-market> (accessed 24 October 2017) and Global Market Insights, Inc. 'Legal Process Outsourcing (LPO) Market Size By Service (Contract Drafting, Compliance Assistance, E-Discovery, Review & Management, Patent Support, Litigation Support), By Location (Offshore, Onshore), Industry Analysis Report, Regional Outlook (U.S., Canada, Germany, UK, Italy, France, Spain, Poland, Czech Republic, China, India, Japan, South Korea, Australia, Philippines, Brazil, Mexico, South Africa), Growth Potential, Price Trends, Competitive Market Share & Forecast, 2017 – 2024' available at <https://www.gminsights.com/industry-analysis/legal-process-outsourcing-lpo-market-size> (accessed 24 October 2017).

³ Lacity MC, Burgess A and Willcocks L *The rise of Legal Services Outsourcing: Risk and Opportunity* (2015) London: Bloomsbury 1.

By definition LPO is the process by which specific legal services are outsourced to an offshore destination or onshore to another location within the same country.⁴ The differences between the two are:

- (i) Offshore outsourcing is a low cost destination on another continent, where the standard hourly rates of legal professionals are much lower than the hourly rates of lawyers⁵ in the originating countries who outsource the work.
- (ii) Onshore outsourcing is the more cautious approach taken by law firms who wish to take a tentative step in joining the outsourcing circle. This concept is more prevalent in the United States of America (US) due to their strict data protection laws, which limit what can be outsourced.⁶ Therefore work is outsourced to other offices within the same jurisdiction / continent.

The research focus will primarily be on the outsourcing of legal work to offshore destinations as this is where most of the ethical challenges associated with the LPO business model originate.

To ensure continual business growth and remain competitive, the legal industry has had to streamline its work processes to maintain efficiency and rethink the delivery of legal services as a means of supporting cost saving measures. It is for this reason that the introduction of the LPO business model became popular. It arguably offered access to qualified experienced lawyers at cheaper hourly rates undertaking to perform legal work 24-hours a day.⁷ This practice is not a new concept and can be traced back to the 1990's; where the outsourcing of legal services was reserved solely for back office type work.⁸ Lawyers have been known to outsource work whether to their peers with specialist knowledge in a specific field or across borders when the work pertains to foreign law. The driving attraction for law firms and legal

⁴ Misra S 'An onshore-offshore LPO delivery model for Europe' available at http://www.newgalex.com/wp-content/uploads/2015/02/An_onshore-offshore_LPO_delivery_model_for_Europe-Sarvarth-Misra.pdf (accessed 06 September 2017).

⁵ In South Africa, prior to the Legal Practice Act 28 of 2014, persons trained in law were called attorneys and advocates. They are now recognised as legal practitioners. In the United Kingdom, persons trained in law are called either solicitors or barristers, whereas in India, all those trained in law are called advocates. Therefore, in this thesis, the term 'Lawyer(s)' shall be used to include all persons trained in law.

⁶ Pfeifer WL Jr. 'Privacy and Legal Outsourcing' (2012) 29 *GPSolo* 30 34

⁷ Kane S 'Top Advantages of Outsourcing' available at <https://www.thebalance.com/top-advantages-of-outsourcing-2164339> (accessed 25 September 2017).

⁸ Misra S 'An onshore-offshore LPO delivery model for Europe' available at http://www.newgalex.com/wp-content/uploads/2015/02/An_onshore-offshore_LPO_delivery_model_for_Europe-Sarvarth-Misra.pdf (accessed 06 September 2017).

departments incorporating the LPO model is simply to save money and remain efficient. Thereby permitting the implementation of labour arbitrage to assist in reducing their overall cost structures.

The LPO industry has catapulted the legal profession from the traditional model of law firm practices to ensuring the globalisation of the legal profession and entrenching itself further as a much needed commodity to any law business vying to succeed while reducing its overall operative costs. LPO destinations are widespread and can be found in India, China, the US, Europe, UK, Australia, Canada, Philippines and South Africa.⁹

There are numerous advantages to outsourcing legal work. The more obvious being access to legal professionals with specific areas of expertise, providing professional efficiency with timely output at a competitive rate. LPO's assist law firms in reducing their operational and general overhead costs, while maintaining client approval and satisfaction, as well as enabling the more experienced lawyers to concentrate their efforts on higher valued complex cases.¹⁰ Arguably, due to the nature and type of work being outsourced, minimal training is required irrespective of the jurisdiction and differing time zones, ensuring that work is being carried out around the clock. Another benefit to legal outsourcing derives from the fact that law firms are saved from depleting their capital reserves on the purchase of the required technology, software and infrastructure necessary to provide efficiency in the delivery of the legal services, as provided by LPOs.¹¹

However, despite these pluses, outsourcing of legal work raises significant ethical challenges that may act as potential hurdles for both law firms and their clients who wish to use the LPO model to promote and grow their business. It is of paramount importance to note that due to the sensitivity of the information lawyers are privy to and the services they provide, lawyers are strictly bound by a set code of professional

⁹ The Global Legal Post *Legal Process Outsourcing Handbook 2012-2013* (2012) FutureLex.

¹⁰ LexisNexis 'Legal Process Outsourcing: Success Reliant on Ethics and Quality' available at <https://www.lexisnexis.com/communities/corporatecounselnewsletter/b/newsletter/archive/2011/03/20/legal-process-outsourcing-success-reliant-on-ethics-and-quality.aspx> (accessed 20 November 2017).

¹¹ LexisNexis 'Legal Process Outsourcing: Success Reliant on Ethics and Quality' available at <https://www.lexisnexis.com/communities/corporatecounselnewsletter/b/newsletter/archive/2011/03/20/legal-process-outsourcing-success-reliant-on-ethics-and-quality.aspx> (accessed 20 November 2017).

ethics. These codes establish rules of conduct, which dictate how legal professionals are to fulfill their responsibilities and professional duties to their clients, one another and the courts, while maintaining an element of integrity and respect for the legal profession. Therefore, conducting legal work in a manner, which challenges the ethical principles of the legal profession, would require serious consideration by all key players within the legal sector.

The majority of articles that have been written on LPOs and which specifically address the ethical concerns arising from the outsourcing of legal work, stem from the jurisdiction of the US.¹² Their statutory and regulatory bodies have been proactive in voicing both their concerns on outsourcing and providing practice notes¹³ on reducing the risks associated with this type of business model.¹⁴ Ross, the global head for legal process outsourcing at Integreon - one of the leading outsourcing providers with multiple delivery centres around the world, presented a paper on the trends and legal issues of legal outsourcing in 2017.¹⁵ He stated that there is a general consensus amongst the law societies and bar councils in the US, where it has been recognised and accepted that practicing lawyers¹⁶ may outsource certain legal work offshore.¹⁷ The latter is admissible providing the lawyer remains primarily responsible for the performance of the legal services being outsourced so as to remain compliant with the relevant State Bar Act and Rules of Professional Conduct.¹⁸ Ross' paper discussed the major ethical issues surrounding LPOs as well as the possible solutions to reducing the risk they pose, as directed by the American Bar Association (ABA) Model Rules of Professional Conduct on outsourcing as incorporated in August 2012. Although the ethical implications will be discussed in greater detail during the course of this

¹² Harmon AR 'The Ethics of Legal Process Outsourcing-Is the practice of Law a "Noble Profession" or Is it Just Another Business?' available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1887197 (accessed 20 November 2017).

¹³ Practice notes are resources that have been kept up to date by the relevant legal authority and which provide a clear explanation on the law and its practical implications / guidelines for the lawyer.

¹⁴ Harmon AR 'The Ethics of Legal Process Outsourcing-Is the practice of Law a "Noble Profession" or Is it Just Another Business?' available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1887197 (accessed 20 November 2017).

¹⁵ Ross M 'Ethics of Legal Outsourcing White Paper' available at <https://www.llrx.com/2010/02/ethics-of-legal-outsourcing-white-paper/> (accessed 20 November 2017).

¹⁶ See Chapter 4 (A Comparative Analysis of the Legal Systems of the United Kingdom and India) footnote 105.

¹⁷ Ross M 'Ethics of Legal Outsourcing White Paper' available at <https://www.llrx.com/2010/02/ethics-of-legal-outsourcing-white-paper/> (accessed 20 November 2017).

¹⁸ Ross M 'Ethics of Legal Outsourcing White Paper' available at <https://www.llrx.com/2010/02/ethics-of-legal-outsourcing-white-paper/> (accessed 20 November 2017).

research,¹⁹ for the purposes of this section, only a summary view will be given. Therefore, the key ethical concerns affecting law firms and legal departments outsourcing work offshore are:²⁰

- (i) The unauthorised practice of law - simply translated this means the practice of law by individuals who are not qualified to practice law, for example foreign / non-lawyers, in the jurisdiction outsourcing the work. Essentially, the purpose behind this legal concern is to afford the public protection from receiving legal advice by unqualified persons. Ross' paper recommended that attorneys review their professional liability insurance to determine whether they are adequately covered for work performed by foreign / non-lawyers;
- (ii) The duty by the lawyer to ensure they competently represent their client - the lawyers outsourcing the work should effectively ensure that the work product as delivered by the LPO provider meets applicable industry standards as provided by the relevant law society and / or bar council;
- (iii) Duty to disclose the outsourcing relationship to the client – it has been recommended that the consent of the client needs to be obtained where confidential information is expected to be divulged and / or exchanged with the LPO provider;
- (iv) Confidentiality and data protection - the outsourcing lawyer is required to ensure that the LPO provider has sufficient and adequate security mechanisms in place to safeguard all confidential data from being unnecessarily divulged, while it is being made available to the LPO provider offshore;
- (v) Billing of outsourcing services - lawyers are to bill their clients appropriately for the outsourced work (for instance it would be unethical for the outsourcing lawyer to charge the client an excessive fee for the legal work that is being performed offshore by the LPO provider for a fraction of the standard lawyer fee); and
- (vi) Avoiding conflicts of interest - codes of professional conduct stipulates that lawyers are to take precautionary methods to limit any conflicts of interest to their clients matter. It is thus the outsourcing lawyers responsibility to verify

¹⁹ The ethical implications of outsourcing legal work will be discussed in detail in Chapter 5 (Ethical Principles and the Practice of Law).

²⁰ Ross M 'Ethics of Legal Outsourcing' available at https://m.acc.com/chapters/sfbay/upload/2-Session1_INTEGREON.pdf (accessed 17 November 2017).

with the offshore LPO provider the existence of any potential conflicts that may be associated with their clients matter.²¹

From the above, it can be surmised that the onus of responsibility rests on the lawyer / law firm outsourcing the legal work offshore. In the outsourcing relationship, the duty to remain compliant with the lawyer's professional obligations rests solely on their shoulders.

Teso, the Director of Operation of CPA Global, another leading LPO provider, shares Ross' key position, being that professional bodies have globally accepted the implementation of the LPO business model into the legal profession and the applicable authorities have provided a list of precautionary requirements to tackle ethical concerns.²² He further reiterates that a lawyer considering outsourcing work is expected to perform proper due diligence of the LPO provider as a means to measuring the competency of the foreign lawyer.²³ Therefore it can be deduced that each law firm or legal department wishing to engage in outsourcing their legal work will be expected to carry out their own due diligence assessment, which roughly translates to there being a variety of standards being used by the legal professionals in addressing the ethical challenges LPOs give rise to. With no set standard to measure against, the question therefore arises, how can the lawyers be convinced that their chosen method of verification will reduce the risks associated with LPOs? Surely, having a guideline depicting what would be considered best practice when outsourcing legal services would assist lawyers and LPO providers in eliminating / reducing ethical concerns and thereby promoting an acceptable standard as pertains to the quality of legal work being performed offshore?²⁴

²¹ Ross M 'Ethics of Legal Outsourcing' available at https://m.acc.com/chapters/sfbay/upload/2-Session1_INTEGREON.pdf (accessed 17 November 2017).

²² Teso J 'Ethical Considerations When Using a Legal Process Outsourcing Provider' available at <https://www.lexisnexis.com/legalnewsroom/legal-business/b/the-legal-business-community-blog/archive/2011/08/23/ethical-considerations-when-using-a-legal-process-outsourcing-provider.aspx?Redirected=true> (accessed 08 November 2017).

²³ Teso J 'Ethical Considerations When Using a Legal Process Outsourcing Provider' available at <https://www.lexisnexis.com/legalnewsroom/legal-business/b/the-legal-business-community-blog/archive/2011/08/23/ethical-considerations-when-using-a-legal-process-outsourcing-provider.aspx?Redirected=true> (accessed 08 November 2017).

²⁴ LexisNexis 'Legal Process Outsourcing: Success Reliant on Ethics and Quality' available at <https://www.lexisnexis.com/communities/corporatecounselnewsletter/b/newsletter/archive/2011/03/20/legal-process-outsourcing-success-reliant-on-ethics-and-quality.aspx> (accessed 20 November 2017).

In short, when it comes to resolving the ethical challenges of outsourcing, it has been suggested that the outsourcing lawyers are to assess the LPO providers' security measures from a practical, legislative and technological stance, while providing training and supervision to the foreign / non-lawyer using a reasonable effort.²⁵ What is to be considered 'reasonable' is a debatable concept, which would warrant a separate research paper in itself.

Additionally, other recommended solutions which have been provided for reducing the ethical challenges of outsourcing, centre around the supervision and adequate training of the foreign / non-lawyer, which would be conducted by the outsourcing party so as to ensure compliance with existing ethical codes.²⁶ Daly and Silver supported a similar approach, where they place the majority of responsibility on maintaining compliance with ethical duties, with the lawyer outsourcing their work.²⁷ They state that lawyers are under the duty to investigate the integrity and competence of the LPO provider prior to contracting with them and outsourcing legal work.²⁸ However, there are a number of academics who have challenged the former viewpoint, stating that professional bodies should become more involved in reducing the ethical and legal risks of LPOs as they are an alternative business model used increasingly by legal professionals across the globe and are thus here to stay.²⁹ Other solutions to reduce the ethical risks of outsourcing include the regulation of Service Level Agreements³⁰ and the involvement of governmental bodies and / or applicable authorities in taking the initiative to implement and improve data protection

²⁵ McLawsen G 'The Back Office in Bangalore: Clarifying the Ethics of Legal Process Outsourcing' (2017) *Bender's Immigration Bulletin* 713.

²⁶ Ross M 'Ethics of Legal Outsourcing' available at https://m.acc.com/chapters/sfbay/upload/2-Session1_INTEGREON.pdf (accessed 17 November 2017).

²⁷ Daly MC and Silver C 'Flattening the World of Legal Services? The Ethical and Liability Minefields of Offshoring Legal Law-Related Services' (2007) 38 *Georgetown Journal of International Law* 440 447.

²⁸ Daly MC and Silver C 'Flattening the World of Legal Services? The Ethical and Liability Minefields of Offshoring Legal Law-Related Services' (2007) 38 *Georgetown Journal of International Law* 440 447.

²⁹ Harmon AR 'The Ethics of Legal Process Outsourcing-Is the practice of Law a "Noble Profession" or Is it Just Another Business?' available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1887197 (accessed 20 November 2017).

³⁰ Service Level Agreements are contracts entered into by two or more parties where one is the service provider and the other is the client. These types of agreements are outcome-based in that they define the level of service expected from a service provider. From an LPO perspective, this agreement would outline the expectations and objectives of the outsourcing lawyer, how the LPO provider would accomplish these objectives within a stipulated timeframe and would provide set targets to measure the performance of the LPO provider.

legislation so as to enhance the security of data and thus avoid possible breaches / infringements of client confidentiality.³¹

Although the arguments made above are valid, no mention is made of the duties owed by the LPO provider at the offshore destination, who are governed by local laws and regulations. Therefore, the question arises, what responsibilities do they have towards the outsourcing lawyer and the client in general? How accountable and to what degree will the LPO provider be for the legal work being rendered and what level of responsibility should they meet to maintain compliance with ethical codes of practice in the outsourcer's jurisdiction? These questions will be explored further in Chapter 3 (Legal Process Outsourcing in South Africa) and Chapter 4 (A Comparative Analysis of the Legal Systems of the United Kingdom and India).

Once a law firm contracts with an LPO provider, a required level of training and supervision will be necessary to maintain expected industry standards, this brings us to the question of quality control. As legal work is shifted offshore, how effective is the training and supervision measures taken by the outsourcer, when conducted from a distance or through direct interaction with the outsourcing lawyer over the course of just a few days? How will the outsourcer ensure the quality of the work product is maintained during the course of the performance of the legal services offshore?

Research conducted, promotes the idea of the outsourcer and the LPO provider working together in a collaborative approach as a means to increasing the chances of success of the relationship, as opposed to using a disaggregation model, where the LPO provider is effectively solely responsible to complete the mandated legal work while upholding legal principles of practice.³² The LPO business model allows for the provision of legal services across borders. With the diversification of the legal profession, it is an obvious assumption that there will be a rise in ethical implications. It is therefore necessary to have a standard set of rules and regulations to combat this, 'to obtain a more holistic monitoring of the Legal Outsourcing activities there has to

³¹ Sarshar M 'Legal Process Outsourcing: Is the Lack of a Regulatory Framework one of the Challenges facing the LPO industry in India?' available at <https://works.bepress.com/mubashshir/1/> (accessed 21 November 2017).

³² Robertson CB 'A Collaborative Model of Offshore Legal Outsourcing' available at <http://ssrn.com/abstract=1705505> (accessed 20 November 2017).

be either a regulatory or a statutory instrumenting such that unethical and undesirable actions could be remedied and regulated.’³³

At present, only the American Bar Association in the US, the Offices of the Legal Services Commissioner in Australia and the Law Society in the UK³⁴ have issued practice notes on the outsourcing of legal services. These practice notes have been geared towards directing lawyers and legal professionals on the proper vetting of LPOs prior to outsourcing; testing the quality of the LPO work; obtaining client consent prior to sharing confidential information; conducting due diligence processes as regards data security, privacy and supervision; and the importance of entering into a contractual relationship with the legal outsourcing provider.³⁵

There are a plethora of articles written on the ethical concerns LPOs introduce, all raising similar issues as those detailed above.³⁶ By contrast little information can be found on establishing whether there is a need for a regulatory framework for the LPO industry as a means to combatting ethical issues. Having no regulatory framework arguably raises the potential for the ethical implications brought about by outsourcing to outgrow the benefits of the LPO business model.³⁷ Interestingly, the handful of articles that could be found discussing the lack of a regulatory framework for the outsourcing industry, were focused on the jurisdiction of India. Although the UK has published practical notes for outsourcing no initiative or discussion for having an established regulation focused on outsourcing legal work offshore has been researched or investigated extensively.

By way of reminder, the main challenges brought on by outsourcing legal work include: the adequate protection of data, safeguarding confidential information, determining whether the work performed by offshore legal professionals constitute the unauthorised practice of law, avoiding conflicts of interest, the manner in which

³³ Upadhyay P ‘Is Legal Process Outsourcing an Ethical Practice’ (2016) *Legal Service India*.

³⁴ Solicitors Regulation Authority Code of Conduct 2011 version 19.

³⁵ A more detailed discussion of the purpose of practice notes versus having a regulation for the LPO industry can be found in Chapter 6 (The Need to Regulate Legal Process Outsourcing).

³⁶ A few examples of articles written on the ethical concerns of LPO can be found in the bibliography.

³⁷ Buva MD and Sebastian T ‘Is there a need of regulatory framework in LPO: Challenges before India’ available at http://www.supremecourtcases.com/index2.php?option=com_content&itemid=5&do_pdf=1&id=20671 (accessed 21 November 2017).

the client is to be billed for services performed offshore and whether the training and supervision of the offshore personnel is sufficient in relation to the complexity of the work being carried out. The objective of this research is to explore these specific issues and aims to discover whether these challenges lean towards compromising the ethical standards encompassed and protected by the legal profession.

Ultimately, this research will address the gap in the literature with the aim of investigating whether introducing a regulatory framework for lawyers, law societies, bar councils and national authorities contemplating outsourcing will effectively promote professional responsibility while minimising ethical concerns, and thereby providing a unique contribution to this area of law.

The development of legal process outsourcing in South Africa will form the central focus of this thesis. In addition, this research will conduct a comparative analysis, looking at the legal systems as well as the rules and guidelines governing both the LPO industry and the right to practice law in the UK and India, as compared to the LPO industry in South Africa. The UK was chosen as a comparative due to the legislative and regulatory similarities it shares with South Africa. Whereas, India is commonly known as the biggest legal outsourcing destination and thus merits mention.

The core attribute of the legal industry is that it operates as an autonomous and self-regulatory industry. This age old profession has always been controlled by duly qualified lawyers, where prescribed laws, authorities and regulations dictate who can be a lawyer, where they can practice law, the duties and responsibilities expected of them towards their clients and what type of services can be offered.³⁸ It is therefore surprising that as the LPO industry continues to multiply in size giving rise to key ethical concerns within the legal fraternity, which challenge the fundamentals protected by the legal industry, no regulatory framework exists to counteract the implications brought on by the existence of LPOs. It is assumed that by having a regulatory structure in place, it will assist in protecting the commitments taken by all legal professionals to safeguard and maintain the laws, oaths and regulations they are

³⁸ Singh D *The Outsourcing of Legal Services: Trends, Challenges & Potential* (2015) ch 1.

bound by. This thesis will further explore whether introducing a regulatory framework will provide a solution to reducing the ethical issues brought on by outsourcing legal work and will aim to provide recommendations for a framework for the LPO industry in South Africa.

1.2 Significance of the research

The accelerated growth of the LPO industry brings with it the ability to provide services to clients in a cost effective manner, but, it also gives rise to ethical concerns which impact greatly on the standards being advocated by the legal fraternity. Core ethical concerns which form the backbone to any legal practitioner's work are being challenged, as mentioned previously, these include the breach of confidentiality, safeguarding data protection laws, the unauthorised practice of law in foreign offshore jurisdictions, the duty to disclose information and avoiding conflicts of interest which could potentially jeopardise a client's matter. Unfortunately, although the LPO market has been in existence for a number of years, little research has been undertaken to resolve the conundrum brought about by a greatly favoured business model seen as the solution to the impact globalisation has had on both legal firms and legal departments versus the ethical implications arising from its growth and the lack of a regulatory framework to counter these concerns. Allowing this dilemma to continue would negatively influence the legal profession, being that the potential breach of the fiduciary duty owed to clients by legal professionals would steadily increase and there being no available regulation to measure accountability for the work being outsourced would indirectly cause the confidence in the legal profession to become questionable and impaired.

This research outlines the importance of preserving and championing ethical standards in the delivery of legal services. Being a lawyer is synonymous with rendering legal services in an ethically compliant manner.³⁹ Pursuing a career in law and practicing as a lawyer has predominantly been viewed as an honourable and

³⁹ MacFarlane P 'The importance of Ethics and the Application of Ethical Principles to the Legal Profession' (2002) 6 *Journal of South Pacific Law*.

respected profession for many years.⁴⁰ A profession where lawyers are expected to maintain a high standard of ethical prowess towards both their clients and the court.⁴¹ Being able to call oneself a lawyer requires at a minimum strong dedication, skill, meeting statutory admission requirements which include having a recognised law degree, attendance at law school, and taking the applicable bar or side bar exams. These prerequisites are imposed by law societies, bar council's and relevant government authorities around the globe, making the legal profession a self-regulated entity.⁴² These aforementioned authorities ensure that a set standard of moral and ethical practices are implemented in every day legal work acting as a buffer to protect the interest of clients and sustaining the administration of justice. Each legal professional is entrusted to uphold the fundamental values on which the profession is based. These values are enshrined and commonly referred to as the code of ethics or rules of practice.⁴³

Legal ethics can be broadly defined as:

‘[...] Principles and values, which together with rules of conduct and laws, regulate a profession, such as the legal profession. They act as an important guide to ensure right and proper conduct in the daily practise of the law. Areas covered by ethical standards include:

- Independence, honesty and integrity.
- The lawyer and client relationship, in particular, the duties owed by the lawyer to his or her client. This includes matters such as client care, conflict of interest, confidentiality, dealing with client money, and fees.
- The lawyer as an advocate, in particular, a lawyer's duties to the court.
- Competence, which encompasses academic qualifications and training, and meeting other practising requirements such as holding a valid practising certificate or licence.
- A lawyer's duties to persons other than a client.
- A lawyer's duties to other lawyers.

⁴⁰ Glendon MA, Geoffrey S, Alford WP et al ‘Legal Profession’ <https://www.britannica.com/topic/legal-profession> (accessed 11 September 2017).

⁴¹ Horizon Institute ‘Ethics for Lawyers’ available at <http://www.thehorizoninstitute.org/usr/library/documents/main/booklet-on-ethics-for-lawyers.pdf> (accessed 6 November 2017).

⁴² Doble K ‘The Ethical Role of Lawyers’ <https://www.tei.org.za/index.php/resources/articles/ethics-opinions/7206-the-ethical-role-of-lawyers> (accessed 6 November 2017).

⁴³ MacFarlane P ‘The importance of Ethics and the Application of Ethical Principles to the Legal Profession’ (2002) 6 *Journal of South Pacific Law*.

- Advertising of legal services.
- Human rights and access to justice.’⁴⁴

The above definition illustrates how the role of ethics infiltrates and influences every aspect of a lawyer’s day-to-day practice, thereby acting as a mechanism that regulates the profession and safeguards its integrity.

Generally, laws are developed to maintain the ethical doctrines observed by society.⁴⁵ Lawyers are part of a privileged class who are trained and entrusted with the knowledge and skill required to provide services to clients for commercial gain.⁴⁶ Being in such a position harbours a great responsibility which lawyers and their peers are expected to uphold in protecting the interests of the public at large. Maintaining this element in the profession garners public trustworthiness for the legal system and the legal fraternity. Having an ethical code is vitally important in ensuring that lawyers set a standard and are held accountable to their clients for the services they deliver, thereby keeping society in a state of justice, fairness and equity.⁴⁷ Any violation of ethical standards would have grave repercussions on both the public and the legal system, with the public taking it upon themselves to use alternative methods to resolving conflicts which would give rise to public discontent, the law falling into disrepute and public confidence being undermined together with the downward spiral of the reputation of lawyers as a whole.⁴⁸ Additionally, the continual impact of breaching both ethical and legal principles may arguably lead to an increase in professional misconduct / negligence claims and disciplinary action against offending lawyers and their respective law firm or company.⁴⁹

⁴⁴ Horizon Institute ‘Ethics for Lawyers’ available at <http://www.thehorizoninstitute.org/usr/library/documents/main/booklet-on-ethics-for-lawyers.pdf> (accessed 6 November 2017).

⁴⁵ Doble K ‘The Ethical Role of Lawyers’ <https://www.tei.org.za/index.php/resources/articles/ethics-opinions/7206-the-ethical-role-of-lawyers> (accessed 6 November 2017).

⁴⁶ MacFarlane P ‘The importance of Ethics and the Application of Ethical Principles to the Legal Profession’ (2002) 6 *Journal of South Pacific Law*.

⁴⁷ MacFarlane P ‘The importance of Ethics and the Application of Ethical Principles to the Legal Profession’ (2002) 6 *Journal of South Pacific Law*.

⁴⁸ MacFarlane P ‘The importance of Ethics and the Application of Ethical Principles to the Legal Profession’ (2002) 6 *Journal of South Pacific Law*.

⁴⁹ Singh D *The Outsourcing of Legal Services: Trends, Challenges & Potential* (2015) ch 4.

A probable solution to eliminating or reducing the ethical and legal challenges posed by LPOs can be found in the establishment of a regulatory framework. There are no established regulatory frameworks for the outsourcing industry. The lack of a regulatory framework for the legal outsourcing industry further exacerbates the rising ethical violations in that there is no stipulated standardisation of the legal services being provided and therefore the quality of these services are questionable.⁵⁰ This research will investigate whether having a regulatory framework for the LPO industry will assist in eliminating these ethical concerns and thereby provide a set benchmark, to be complied with by both the outsourcer and the legal outsourcing company, as a means to gauging the quality of the legal services being meted out to potential clients and safeguarding the obligations and duties entrusted to lawyers by their clients.

Justification of Research

South Africa has become one of the most favoured offshore destinations for companies and law firms situated in the UK, USA, Europe and Australia.⁵¹ Its language capabilities, advantageous time zone, similar legal system and wide selection of qualified legal professionals make it an attractive option. But just like the UK and India, South African national law has no regulatory framework in place for its budding LPO market and this leads to the outsourcing company being left to its own devices in attempting to find solutions to possible ethical threats. One of the ways LPOs have attempted to combat these challenges has been by contracting into Service Level Agreements⁵² with the outsourcer, thereby accepting to be largely responsible and accountable for the services being furnished.⁵³ However, the question arises, should responsibility for the delivery of legal services not be equally shared? Or

⁵⁰ Megha and Vipula 'Legal Process Outsourcing: Is the lack of a regulatory framework one of the challenges facing the LPO industry in India?' available at http://www.indialawjournal.org/archives/volume3/issue_4/article_by_megha_vipula.html (accessed 22 February 2018).

⁵¹ English R 'Destination SA: A preferred legal outsourcing destination.' (2014) 119 *De Rebus* 35.

⁵² Service Level Agreements are contracts entered into by two or more parties where one is the service provider and the other is the client. These types of agreements are outcome-based in that they define the level of service expected from a service provider. From an LPO perspective, this agreement would outline the expectations and objectives of the outsourcing lawyer, how the LPO provider would accomplish these objectives within a stipulated timeframe and would provide set targets to measure the performance of the LPO provider.

⁵³ Bembridge A, Parker M, Ballin J et al 'Outsourcing: South Africa Overview' available at [https://uk.practicallaw.thomsonreuters.com/7-505-4428?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/7-505-4428?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1) (accessed 9 November 2017).

surely, the lawyer who initially has the mandate with the client owes the duty to exercise a higher level of competence and care in representing their interests, irrespective of how the lawyer chooses to delegate the work?

To recap, although the legal profession is a self-regulated body, not much application has been found in establishing a regulatory framework for the outsourcing of legal services. This translates to there being arguably a lesser degree of accountability for the performance of the legal services which instigate and give rise to both ethical and legal concerns underpinning the LPO industry, leaving the legal outsourcing market to continue to gain momentum and earn its billion dollar market value while cracks continue to shadow the legal professional's code of conduct when outsourcing legal work.

All applicable authorities in the legal field are under an obligation to enforce the provisions contained in legislation so as to safeguard codes of practice. Having a regulatory framework will support this latter endeavour and clarify the expected standard required to preserve the code of ethics / code of practice and in so doing will promote other legal outsourcing companies to establish themselves in South Africa without contemplating over the possible ramifications involved in breaching such a code or negotiating business in the dark. Having access to such a framework could further assist in addressing issues pertaining to the level of education and qualification expected of the offshore lawyers doing the work; the role of supervision conducted by the end client and the outsourcing company; the level of training required prior to the commencement of any legal work; accepted methods of retaining client confidentiality; being accountable for the performance of the services; and the transfer or security of data to name but a few.⁵⁴

Regulations on the whole are significant tools used to promote accountability, truth and the protection of rights, addressing violations with established policies that nurture uniformity in the standards required to foster a high calibre of professional

⁵⁴ Megha and Vipula 'Legal Process Outsourcing: Is the lack of a regulatory framework one of the challenges facing the LPO industry in India?' available at http://www.indialawjournal.org/archives/volume3/issue_4/article_by_megha_vipula.html (accessed 22 February 2018).

conduct. Therefore it would be significant to investigate whether having such a framework in place for the LPO industry would counteract the ethical issues it raises.

1.3 Research question

The importance of ethical conduct and professional responsibility are core values, which form an integral part of being a reputable legal practitioner. These values ensure that an element of accountability is present for all legal services rendered to the public. The growing need for the implementation of the LPO business model must be balanced with adequate guidance on compliance with ethical duties and obligations. This thesis seeks to investigate the challenges borne from the growth of legal outsourcing in relation to whether these challenges lean towards compromising the ethical standards encompassed and protected by the legal profession, in particular within South Africa. The main question it seeks to resolve is:

Should South Africa introduce a regulatory framework for its Legal Process Outsourcing industry?

In addressing this question the research will in the first part aim to assess the implementation of the LPO business model within the legal sector, as well as investigate the growth of this industry from a global perspective and within South Africa. The research will explore the rise of legal outsourcing, which was once viewed as a trend but has now become a significant business consideration being implemented and considered by law firms and legal departments in their drive to be successful. The focus will be to illustrate the growing need by the legal sector for the use of the LPO business model, and whether such growth translates to the increase in the number of ethical infractions taking place.

A comparative analysis of the legal systems of South Africa, the UK and India will be conducted so as to highlight the rules and guidelines currently governing their legal systems in relation to LPOs. The objective of this analysis will be to illustrate the steps taken by some authorities in stemming the ethical concerns arising from LPO practices.

This research will also aim to analyse the ethical and legal challenges originating from the growing LPO market, with focus on the ethical principles supported by the practice of legal professionals and how the violations of these codes of practice need to be addressed with a view to answering the question and determining whether having a regulatory framework would solve the ethical issues LPOs raise? The research will further assess legislative frameworks to determine whether there is a need to institute a regulatory framework.

A further question needing exploration is whether not having a regulatory framework will promote the rise of the ethical challenges arising from the implementation of the LPO business model? While having a regulatory framework will play an important part in holding legal professionals accountable for the legal work they choose to outsource, it faces both practical and conceptual challenges that deserve exploration and feasible recommendations, the latter of which is the objective of this research.

1.4 Research methodology

The research undertaken in this thesis draws heavily on the literature review of both primary and secondary sources of information. Primary sources include legislation, case law, policies, official documentation and government notices. Secondary sources consist of materials found on the internet, journal publications and books written on the subject matter.

This research analyses and evaluates the concept and growth of the LPO industry, with particular focus on the business model it utilises to deliver legal services. Thereafter, a literature review was conducted on the position of the LPO market in South Africa, investigating the challenges it faces and analysing the legal framework of the country by looking into the position of national legislation in imposing statutory duties and set guidelines in the practice of law.

Although this research is not an extensive comparative analysis, I have compared the legal systems from the jurisdictions of the UK and India against South Africa, as case studies to substantiate the research. As mentioned earlier, the main justification for comparing South Africa with the UK stems from the similarities it shares with its

legal structure, regulatory and legislative framework. India is recognised as the biggest offshore outsourcing destination and for this fact alone it merits mention. There are extensive articles and books written on the rise, success and challenges of LPO in India, which should garner consideration and examination. This comparison will be helpful in establishing the role the parties engaged in using the LPO business model have, looking at both the outsourcer's point of view and the legal outsourcing provider's perspective. Reviews of legislation giving effect to the authorisation to practice law, data protection and privacy laws in these countries were scrutinised so as to further understand and clarify the successes and challenges posed by LPOs.

A thorough examination of the academic commentary available on the ethical concerns brought on by the introduction and implementation of LPO business model was assessed. This will tie in with a review of relevant Acts, codes of ethics and professional conduct so as to discover the consequences these infringements have had or will have on the legal sector.

The proposed method of addressing the research question was analytical with a comparative aspect. Being that no regulatory framework currently exists for the LPO industry in any onshore or offshore destination, the research outcome involved focusing on both the available literature and legislative frameworks to determine whether there is indeed a need to institute a regulatory framework and the effectiveness of having such a framework in place. Investigation was also carried out to approach the severity and repercussions associated with not having a regulatory framework for the LPO sector. The latter was addressed by determining whether there is accessible case law or written recordings, to illustrate infractions caused by violations of ethical codes as a result of outsourcing legal work, leading to professional misconduct / negligence claims and disciplinary actions.

1.5 Chapter outline

Chapter 1 - Introduction

This chapter introduces the research question. It accomplishes this by providing a detailed background to the research illustrating the importance of undertaking

research in this field of study. The chapter further outlines the main problem areas and what it aims to achieve in conducting this research.

Chapter 2 – The Growth and Development of Legal Process Outsourcing

This chapter will study the concept of LPO, examining its growth over recent years, the estimated future growth of the industry and the business model it utilises to drive its success. The chapter will further explore the development of the various types of services being outsourced since the inception of the LPO model to date, as well as the advantages and challenges arising from the outsourcing of legal work.

Chapter 3 - Legal Process Outsourcing in South Africa

This study will look at the development and growth of LPO in South Africa. An exploration into the challenges this sector has unveiled will be conducted together with a review of the legal framework in existence in South Africa, focusing particularly on the outsourcing of legal services.

Chapter 4 – A Comparative Analysis of the Legal of the United Kingdom and India

A comparative analysis of the legal systems, legislative and regulative framework of the legal sector in the United Kingdom and India will be analysed as regards the outsourcing of legal services. This chapter will seek to provide clarity on the impact outsourcing legal work has had on data protections laws, privacy laws, and the authority to practice law. A keen insight will be provided on the key successes and challenges LPOs have brought to these countries and whether solutions to combat the ethical concerns have been addressed.

Chapter 5 - Ethical principles and the practice of law

This chapter will seek to highlight and explore the key ethical concerns caused by the outsourcing of legal work to offshore destinations. An extensive discussion into the existing codes of professional conduct and professional competence in South Africa, the United Kingdom and India will also be provided.

Chapter 6 - The Need to Regulate Legal Process Outsourcing

Having established the role of LPOs in South Africa, and similarly with other outsourcing destinations, this chapter will explore and provide recommendations to the research question of whether there is a need to establish a regulatory framework as a means to move towards eradicating what can be considered a violation of professional standards in the legal arena. The availability of relevant case law will also be investigated and examined to showcase the repercussions caused by the lack of any formal guidelines for the LPO industry.

Chapter 7 - Conclusions and Recommendations

This final chapter will seek to tie together all research findings in previous chapters, drawing inferences from the information and providing possible recommendations to a proposed regulatory framework for South Africa's LPO market.



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CHAPTER TWO
THE GROWTH AND DEVELOPMENT OF LEGAL PROCESS
OUTSOURCING

2.1 Introduction

Since its inception in the 1990s, there have been a myriad of articles and books written on the Legal Process Outsourcing (LPO) industry by distinguished researchers, academics and legal professionals.¹ Topics range from the benefits of this business model, to the likelihood of its continual growth to the ethical concerns LPOs raise within the practice of law.² The latter topic becoming the most prevalent theme in recent years.

The purpose of this chapter is to place the LPO industry in a global context, so as to emphasise its phenomenal growth as a business and to demonstrate how its expansion has influenced the legal sector. By establishing this background, it will provide knowledge on the concept of the LPO business model, highlight the service offerings this business provides and the benefits attributed to implementing the LPO model as an integral part of any law firm or legal department's business plan. Thereby illustrating why this option is and has been an attractive advantage for the legal sector. It is with the understanding of how big this industry has grown and continues to do so that the research will aim to decipher whether it is important for the legal fraternity to take heed and introduce a regulatory framework to counteract the ethical challenges arising with the expansion of this type of business operation.

2.2 The evolving legal marketplace

Changing times call for the inevitable adaptation of industries to meet the evolution of business. Similarly so to has the legal sector been forced to change how it has been known to traditionally do business. The practice of law can be traced back to the 7th

¹ See Chapter 1 (Introduction) footnote 35.

² Lacity MC, Burgess A and Willcocks L *The rise of Legal Services Outsourcing: Risk and Opportunity* (2015) London: Bloomsbury 8.

century where the profession of being called a ‘Lawyer’ was recognised as being one with a high level of required acumen, skill and expertise,³ where only the affluent were able to afford this type of professional service.⁴ Traditional law firms consisted of the owners of the law firm running and employing other lawyers, who eventually became partners in the firm. The owners would then amass their wealth through their own efforts as a legal professional and from the lawyers they employed to work for them. This dynamic ensured that the firm’s ability to make and sustain their profitability was leveraged from the junior workforce.⁵ The legal industry has since evolved, becoming more accessible and perceptive in the method it conducts its business and delivers its professional services.

In the performance of the services legal professionals engage in on behalf of their clients, they have been known to outsource the legal work required to be undertaken to either a fellow peer who has specialist knowledge of the subject matter, within the same law firm or legal department; to a sister law firm in another city; or to a low cost provider onshore until eventually moving tentatively offshore.⁶ The outsourcing of legal work is not a new phenomenon in that it is an activity that has been practiced by lawyers for decades.⁷ Lawyers initially started with the outsourcing of back office type work; gradually moving to outsourcing legal work to lawyers in local jurisdictions who were specialists in certain areas of the law; and to introducing the outsourcing of more commoditised legal work across the border to foreign jurisdictions⁸ who offered legal services at a lower cost.⁹ In fact, it can be stated that the outsourcing of legal services has been in existence for as long as the legal

³ George A ‘The Evolution of Lawyers and What the Future Holds’ available at <https://lexicata.com/blog/evolution-lawyers-future/> (accessed 28 February 2018).

⁴ Furlong J ‘The Evolution of the Legal Services Market: Stage 1’ available at <https://www.law21.ca/2012/11/the-evolution-of-the-legal-services-market-stage-1/> (accessed 28 February 2018).

⁵ Susskind R *The End of Lawyers?: Rethinking the nature of Legal Services* (2010) 278 279.

⁶ Schultz, CI ‘Legal Offshoring: A Cost-Benefit Analysis’ (2010) 35 *Journal of Corporation Law* 641.

⁷ Harmon AR ‘The Ethics of Legal Process Outsourcing-Is the practice of Law a “Noble Profession” or Is it Just Another Business?’ available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1887197 (accessed 20 November 2017).

⁸ Misra S ‘An onshore-offshore LPO delivery model for Europe’ available at http://www.newgalaxy.com/wpcontent/uploads/2015/02/An_onshore-offshore_LPO_delivery_model_for_Europe-Sarvarth-Misra.pdf (accessed 06 September 2017).

⁹ Lacity MC, Burgess A and Willcocks L *The rise of Legal Services Outsourcing: Risk and Opportunity* (2015) London: Bloomsbury 1.

profession has been around.¹⁰ It is however only in the last two decades that outsourcing has gained increasing attention and became an integral part of the delivery of legal services.

Over the years, outsourcing legal work has progressed to such an extent that the LPO industry has become the fastest growing leg in the overall outsourcing niche market¹¹¹² and has in essence been a major contributing factor in globalising the legal industry.¹³ India has been celebrated as both the leader and the most favoured LPO destination provider¹⁴ due to the country having an established infrastructure that incorporates the latest in technology development and a large population of educated and English speaking workforce, available at a much lower hourly rate when compared to other LPO offshore locations.¹⁵ The LPO market is reported to be growing at a compound annual growth rate of 28.67% between the years of 2017 and 2021, and had reached its billion-dollar status in 2012 with an average growth rate of 30% per year.¹⁶ According to research conducted by Grand View Research Inc., a business-consulting firm, it is predicted that the LPO industry is set to reach an estimated value of \$27,19 billion by the year 2024.¹⁷ By contrast, another report, Global Market Insights has predicted that the LPO industry will be worth \$40 billion by the year 2024.¹⁸ It may be argued that the financial value and consistent growth of the LPO sector goes to undoubtedly illustrate how popular and dependent both law firms and legal departments have become in employing LPO providers in the

¹⁰ Schultz, CI 'Legal Offshoring: A Cost-Benefit Analysis' (2010) 35 *Journal of Corporation Law* 640.

¹¹ Other outsourcing markets include Business Process Outsourcing, Knowledge Process Outsourcing and Research Process Outsourcing.

¹² theoutsourcing-guide.com 'LPO - Legal Process Outsourcing' in Atterby M (ed) *This Thing Called Outsourcing* 1 ed (2014) 37.

¹³ Deloitte *The Resurgence of Corporate Legal Process Outsourcing: Leveraging a New and Improved Legal Support Business Model* (2017) Deloitte Development LLC.

¹⁴ Borsand S and Gupta A 'Public and Private Sector Legal Process Outsourcing: Moving Toward a Global Model of Legal Expertise Deliverance' (2009) *Pace International Law Review Online Companion* 5.

¹⁵ Schultz CI 'Legal Offshoring: A Cost-Benefit Analysis' (2010) 35 *Journal of Corporation Law* 639 662.

¹⁶ *The Global Legal Post Legal Process Outsourcing Handbook 2012-2013* (2012) FutureLex.

¹⁷ Grand View Research 'Legal Process Outsourcing (LPO) Market Worth \$27.19 Billion By 2024' available at <http://www.grandviewresearch.com/press-release/global-legal-process-outsourcing-lpo-market> (accessed 24 October 2017).

¹⁸ Global Market Insights, Inc 'Legal Process Outsourcing Market to hit \$40bn by 2024: Global Market Insights, Inc. available at <https://globenewswire.com/news-release/2017/05/08/979979/0/en/Legal-Process-Outsourcing-Market-to-hit-40bn-by-2024-Global-Market-Insights-Inc.html> (accessed 06 March 2018).

performance and delivery of legal services and further proves that this business model is firmly entrenched within the legal sector.

At the core of the emergence of the LPO industry, the question that needs to be addressed is: Why did this industry gain such a significant momentum within the legal profession catapulting it to become a multi-billion dollar industry? Especially in light of the fact that the legal sector has always moved and reacted at a slower pace where change is required. Furthermore, lawyers are renown to police their own conduct, the latter being as a result of the legal sector being a self-regulated profession, that preferred to keep work in-house, then to outsource.¹⁹ This question shall be addressed in the following sections under this chapter.

There are various trends that have impacted how the legal sector has evolved and therefore strengthening their need to utilise LPO providers. The most pertinent being: the advancement of technology; globalisation and the changing economy.

2.2.1 Technology

With the advancement of technology came greater access to the worldwide web, the development of software and programs, which enabled sufficient communication between businesses across continents around the globe and the facilitation of sending work offshore. Work was being sent to offshore companies that offered competitive labour costs, a variety of services to choose from and efficient competent manpower to conduct the services.²⁰ Just as technology improved and grew, so did the legal sector need to rethink its traditional business model and become more strategically minded so as to remain competitive within the legal sector, in the manner in which it conveyed its services to clients and potential clients.²¹ Law firms needed to add value to their services and technology offered an alternative, with the progress of

¹⁹ Furlong J 'The Evolution of the Legal Services Market: Stage 1' available at <https://www.law21.ca/2012/11/the-evolution-of-the-legal-services-market-stage-1/> (accessed 28 February 2018).

²⁰ Robertson CB 'A Collaborative Model of Offshore Legal Outsourcing' available at <http://ssrn.com/abstract=1705505> (accessed 20 November 2017).

²¹ Lacity M and Willcocks LP 'Legal Process Outsourcing, In-house Counsels, Law Firms and Providers: Researching Effective Practices' (2013) 19(3) *Web European Journal of Current Legal Issues* 1.

communication tools becoming faster and instantaneous, the latter permitted law firms to move away from being a local business hotspot and expand their business nationally and globally, opening the doors to foreign investors and clientele.²² It can be said that access to legal services and resources became easily available as a direct result of the development of technological systems.²³

The advancement of technology made acquiring information easier, readily available and widespread to all. As a consequence, prospective clients are able to find alternative options to solving their dilemmas; are able to perform their own research of any given issue and are provided with the ability to shop around for a tailor-made solution prior to approaching a lawyer. The latter circumstance has led to the legal sector being forced to respond to these changes by ensuring they implement measures that promote business efficiency and maintain cost-effectiveness in the delivery of the professional services. Being that the implementation of technological systems is a costly affair, law firms searched for alternative solutions, and LPOs provided the solution in that they arguably offered a 50% saving in costs.²⁴ The utilisation of technology is a key component to the success of the LPO market's delivery of services, especially when situated offshore. The use of technology becomes pertinent in everyday communication with clients across borders and maintains processes to accelerate fast turnaround times and retain accuracy of work. LPOs made certain that law firms benefited from the use of technology and in so doing law firms remained competitive and efficient²⁵ while focusing their energies on their clients and the services to be provided to them.²⁶

²² Kaplan A 'White Paper: The Evolution of the Legal Profession' available at https://discoverready.com/wp-content/uploads/DOLA34009_Evolution_v01.pdf (accessed 27 February 2018).

²³ Susskind R *The End of Lawyers?: Rethinking the nature of Legal Services* (2010) 18.

²⁴ Friedmann R 'The Impact of Legal Process Outsourcing (LPO) You Might Not Have Noticed' available at https://www.americanbar.org/content/dam/aba/publications/law_practice_today/the-impact-of-legal-process-outsourcing-you-might-not-have-noticed.authcheckdam.pdf (accessed 28 February 2018).

²⁵ theOutsourcing-guide.com 'LPO - Legal Process Outsourcing' in Atterby M (ed) *This Thing Called Outsourcing* 1 ed (2014) 37.

²⁶ Global Market Insights, Inc 'Legal Process Outsourcing Market to hit \$40bn by 2024: Global Market Insights, Inc. available at <https://globenewswire.com/news-release/2017/05/08/979979/0/en/Legal-Process-Outsourcing-Market-to-hit-40bn-by-2024-Global-Market-Insights-Inc.html> (accessed 06 March 2018).

In a nutshell, with the advent of technology, some types of legal work can be standardised and automated allowing for the outsourcing of repetitive type processes.²⁷ Types of technologies²⁸ include cloud computing (using remote servers to store and manage data), virtual law offices, e-filing (the storage of files and the filing of court documentation electronically), availability and access to an array of data online and knowledge management software (the manner in which information is collected, stored and/or accessed) all of which form part of the service offerings LPO providers extended to their clients. The advancement of technology opened the door to the ability to communicate effectively and do business with offshore companies seamlessly and accurately. By embracing these technological changes, law firms were able to package their services more productively and attractively to their clients, thereby gaining a competitive advantage and reaffirming their position in the business environment while sustaining the longevity of their business. Therefore, LPO providers provided law firms and legal departments with the ability to incorporate technology, using it in innovative ways to improve upon the services they render to their clients.

2.2.2 Globalisation

Technology effectively made the world a smaller yet more accessible place, allowing for law firms to take on a more global presence. Clients also became globally active in their business dealings and sought legal professionals who had international exposure. Technology permitted businesses to adopt an international flavor and enabled them to start operating on an international scale. With globalisation of the legal industry, the LPO industry emerged.²⁹

Client expectations also transformed with technology and globalisation. Clients expected law firms to offer more services, faster turnaround times and competitive

²⁷ Saunders P ‘Developing Legal Talent: Stepping into the Future Law Firm’ available at <https://www2.deloitte.com/uk/en/pages/audit/articles/developing-legal-talent.html> (accessed 22 March 2018).

²⁸ Groot B ‘New Trends Facing Lawyers’ available at <https://www-mylexisnexis-co-za.ezproxy.uwc.ac.za/Index.aspx> (accessed 19 March 2018).

²⁹ Groot B ‘New Trends Facing Lawyers’ available at <https://www-mylexisnexis-co-za.ezproxy.uwc.ac.za/Index.aspx> (accessed 19 March 2018).

pricing.³⁰ LPO providers met the demands of the law firm's clients who wanted to pay less for legal services especially for repetitive type work and process-based work.³¹ The increase in competition levels and the growth of in-house legal departments within the legal sector also meant that lawyers working in law firms were under increasing pressure to differentiate themselves from other law firms so as to win over clients and gain the advantage.³² Moreover, law firms were obliged to find an alternative way of offering quality work while maintaining or reducing their operational costs. The demand for legal services increased as a result of there being a need to make it more accessible together with clients searching for value in the legal services they were being provided.³³ By implementing the LPO business model, which was seen as a tool to meet these pressures while remaining competent, law firms increased their level of productivity thereby contributing to the rise in client satisfaction.³⁴ The latter situation translated to there being more business recommendations and client referrals for the lawyer and the law firm.

The effect of globalisation on the legal sector can be seen in the manner in which the conduct of business has changed from previous eras. Globalisation of the legal industry saw a move from the traditional billable hour to there being an outcome based fee arrangement.³⁵ Additionally, globalisation of the legal sector had the effect of there being an increase in the use of temporary and contract lawyers in law firms who wanted to maintain their low operational costs.³⁶ LPO providers offered these law firms and legal departments with rapid scalability options and direct access to a

³⁰ Susskind R *The End of Lawyers?: Rethinking the nature of Legal Services* (2010) 27.

³¹ Jubb J 'Bringing it Home: What the Decline of Offshore LPOs Means for Law Firms' available at <http://insight.thomsonreuters.com.au/posts/offshore-lpos-decline> (accessed 28 February 2018).

³² Dzienkowski JS 'The Future of Big Law: Alternative Legal Service Providers to Corporate Clients' (2014) 82 *Fordham Law Review* 2996.

³³ Kaplan A 'White Paper: The Evolution of the Legal Profession' available at https://discoverready.com/wp-content/uploads/DOLA34009_Evolution_v01.pdf (accessed 27 February 2018).

³⁴ Friedmann R 'The Impact of Legal Process Outsourcing (LPO) You Might Not Have Noticed' available at https://www.americanbar.org/content/dam/aba/publications/law_practice_today/the-impact-of-legal-process-outsourcing-you-might-not-have-noticed.authcheckdam.pdf (accessed 28 February 2018).

³⁵ Das O 'Legal Process Outsourcing: Transforming the Legal Landscape' available at http://www.legalservicesboard.org.uk/what_we_do/Research/research_events/pdf/orijit_das_presentati_on.pdf (accessed 28 February 2018).

³⁶ Robertson CB 'A Collaborative Model of Offshore Legal Outsourcing' available at <http://ssrn.com/abstract=1705505> (accessed 20 November 2017).

pool of qualified legal professionals who had an array of experiences and expertise to meet their client's needs.³⁷

Therefore, with businesses operating increasingly on an international scale, the legal industry, particularly, law firms, transformed from being a traditional law firm, who remained loyal to the law firm only, and remoulded to become more profit driven, exposing itself to the global market and arising new opportunities.³⁸ In the year 2008, the globalisation trend escalated further, and continued to do so over the next decades as a consequence of the global economy being hit by a financial crisis. The effects of the financial crisis on the legal sector shall be discussed in section 2.2.3 below.

2.2.3 Changing economic trends

The evolution of legal services took place primarily after the 2008 financial crisis referred to as the 'recession'.³⁹ The recession brought about the closure of a number of traditional law firms who were unable to survive the continuous budget cuts, the continual reduction in the staff complement and the decreasing flow of the number of both old and new clientele mandating work to the law firm.⁴⁰ The 2008 economic recession forced law firms and corporations to search for cost effective methods to do legal work⁴¹ while becoming more cost conscious and budget wary.⁴² For the legal sector, with the recession law firms had to embrace new business concepts to ensure their longevity within the legal sector.⁴³ This is where the LPO industry emerged

³⁷ Value Notes Outsourcing Practice 'Legal Process Outsourcing: Crisis Created New Opportunities for LPOS' available at <http://www.valuenotes.biz/insights-publications/publications/legal-process-outsourcing-crisis-creates-new-opportunities-for-lpos/> (accessed 27 February 2018).

³⁸ Kaplan A 'White Paper: The Evolution of the Legal Profession' available at https://discoverready.com/wp-content/uploads/DOLA34009_Evolution_v01.pdf (accessed 27 February 2018).

³⁹ Furlong J 'The Evolution of the Legal Services Market: Stage 1' available at <https://www.law21.ca/2012/11/the-evolution-of-the-legal-services-market-stage-1/> (accessed 28 February 2018).

⁴⁰ Birer G 'LPO Provider a Positive Boost for an Economy in Recession' available at <http://www.slaw.ca/2009/02/21/lpo-provides-a-positive-boost-for-an-economy-in-recession/> (accessed 06 March 2018).

⁴¹ Robertson CB 'A Collaborative Model of Offshore Legal Outsourcing' available at <http://ssrn.com/abstract=1705505> (accessed 20 November 2017).

⁴² Value Notes Outsourcing Practice 'Legal Process Outsourcing: Crisis Created New Opportunities for LPOS' available at <http://www.valuenotes.biz/insights-publications/publications/legal-process-outsourcing-crisis-creates-new-opportunities-for-lpos/> (accessed 27 February 2018).

⁴³ SenGupta R 'In Search of Change: Law Firms Face New Challenges' *Financial Times* 19 October 2010.

strongly as they provided a respite from the external pressures experienced by law firms who were under an obligation to re-evaluate how they render legal services and remain operational. While other sectors saw a decline in business as a result of the depression in the economy, the LPO sector grew by 40% during the recession.⁴⁴

The financial crisis hit the legal industry hard.⁴⁵ Law firms were under strain to provide competitive fee scales, have a global footprint and provide a wider range of services, all at a lower cost. As a result alternative business models were sought, with the LPO model being a welcome option. The LPO business model was the answer to both the law firm and the legal departments demand to overcome and survive the trends forcing the legal sector to remould the manner in which it managed the execution of professional services.

With the recession, client demand, globalisation and the advancement of technology, the legal marketplace had no alternative but to evolve and accept change to the traditional manner in which lawyers operated. LPO provider's took advantage and provided hope to the instability of the legal sector, enabling it to carry on and sustain its business practices while remaining competent and confident in the practice of law.

2.3 The Legal Process Outsourcing business model

The LPO industry has been considered as offering a 'strong value proposition and huge market potential'⁴⁶ offering clients a cost savings of between 30% and 50%.⁴⁷ Widely translated, the LPO business model caters for lower cost legal work at a fraction of the cost a law firm would charge, has the ability to capture value in the performance of the services, thereby lending itself as being an attractive alternative business model. Competition between businesses has been a driving force in the

⁴⁴ Aggarwal A 'Legal Process Outsourcing' available at http://www.country-index.com/articles/article_123.pdf (accessed 27 February 2018).

⁴⁵ Birer G 'LPO Provider a Positive Boost for an Economy in Recession' available at <http://www.slw.ca/2009/02/21/lpo-provides-a-positive-boost-for-an-economy-in-recession/> (accessed 06 March 2018).

⁴⁶ Lacity M and Willcocks LP 'Legal Process Outsourcing, In-house Counsels, Law Firms and Providers: Researching Effective Practices' (2013) 19(3) *Web European Journal of Current Legal Issues* 1.

⁴⁷ Lacity MC, Burgess A and Willcocks L *The rise of Legal Services Outsourcing: Risk and Opportunity* (2015) London: Bloomsbury 4.

progressive use of LPO providers, the latter being seen as a means to spreading their wings and conducting work both nationally and internationally. A contributing factor to the emergence of LPO providers has been its ability to respond to client demands for lower legal fees and assist law firms and legal departments in their fight for survival amidst changing economic trends and the requirement to develop an international influence.⁴⁸

The common thread that has run through the literature as regards to the LPO business model has been its capacity to provide the legal sector and other corporations that make use of its services, monetary savings while boosting productivity levels.⁴⁹ Which begs the question: How does the LPO industry create and deliver value? This question shall be addressed in further detail in section 2.4 (The services) and section 2.5 (The benefits of Legal Process Outsourcing).

Similar to any establishment, the LPO sector has absorbed all the costs associated in setting up its business, from implementing the latest technological systems to having a solid infrastructure and creating a flexible workforce.⁵⁰ With the escalation of globalisation, it can be said that being equipped with up to date technological tools is a surefire way for LPO providers to boost the level of efficiency and accuracy they strive to maintain in delivering their services.

Being in essence service providers, the LPOs intended customer base has largely comprised of law firms and legal departments, but has also extended to other types of companies and sectors, as for example the financial and medical sector.⁵¹

⁴⁸ Lacity M and Willcocks L 'The Outsourcing Unit Working Research Paper Series - Paper 12/5 Legal Process Outsourcing: LPO Provider Landscape' available at http://www.lse.ac.uk/management/research/outsourcingunit/wp-content/uploads/sites/2/2015/04/WP12_5.pdf (accessed 24 March 2018).

⁴⁹ Fennell E 'Legal Process Outsourcing Builds Business' available at <https://www.raconteur.net/business/legal-process-outsourcing-builds-business> (accessed 28 February 2018).

⁵⁰ Friedmann R 'The Impact of Legal Process Outsourcing (LPO) You Might Not Have Noticed' available at https://www.americanbar.org/content/dam/aba/publications/law_practice_today/the-impact-of-legal-process-outsourcing-you-might-not-have-noticed.authcheckdam.pdf (accessed 28 February 2018).

⁵¹ Friedmann R 'The Impact of Legal Process Outsourcing (LPO) You Might Not Have Noticed' available at https://www.americanbar.org/content/dam/aba/publications/law_practice_today/the-impact-of-legal-process-outsourcing-you-might-not-have-noticed.authcheckdam.pdf (accessed 28 February 2018).

The LPO pricing model has been structured in such a way as to be adaptable to the needs and requirements of the outsourcer.⁵² Not only do LPOs charge per hour or per day, their rates stretch further to include per contract, per page and/or per project tariffs.⁵³ The latter all complements the budget allocation the outsourcer has and promotes flexibility of the services LPO providers give and adding to its growth potential.⁵⁴

The legal professionals working in offshore LPOs are easily scalable and their salaries are lower than the average person working in the UK, for instance.⁵⁵ The cost savings offshore LPO providers generate for law firms and companies who engage in their service offerings are significant due to the disparity in the salaries of the lawyers between the outsourcers' country of origin and the foreign lawyers who conduct the legal services.⁵⁶ As a result of the growing number of graduate law students and qualified legal professionals vying for employment, the LPO set-up offshore is seen as an opportunity to gain international experience while earning an income. This lets the LPO provider have access to a pool of qualified professionals, thereby affording them with the choice of up-scaling or downscaling the number of staff they employ at any given time, depending on the requirement of the job at hand. Being scalable creates increased efficiency in the manner in which the LPO provider is able to modify and structure themselves to the needs of their clientele. However, it must be noted that there is a high staff turnover in LPO locations.⁵⁷ The latter is as a result of the LPO staff complement being primarily made up of contract workers.⁵⁸ Therefore

⁵² theOutsourcing-guide.com 'LPO - Legal Process Outsourcing' in Atterby M (ed) *This Thing Called Outsourcing* 1 ed (2014) 37.

⁵³ Lacity M and Willcocks L 'The Outsourcing Unit Working Research Paper Series - Paper 12/5 Legal Process Outsourcing: LPO Provider Landscape' available at http://www.lse.ac.uk/management/research/outsourcingunit/wp-content/uploads/sites/2/2015/04/WP12_5.pdf (accessed 24 March 2018).

⁵⁴ Robertson CB 'A Collaborative Model of Offshore Legal Outsourcing' available at <http://ssrn.com/abstract=1705505> (accessed 20 November 2017).

⁵⁵ Robertson CB 'A Collaborative Model of Offshore Legal Outsourcing' available at <http://ssrn.com/abstract=1705505> (accessed 20 November 2017).

⁵⁶ Robertson CB 'A Collaborative Model of Offshore Legal Outsourcing' available at <http://ssrn.com/abstract=1705505> (accessed 20 November 2017).

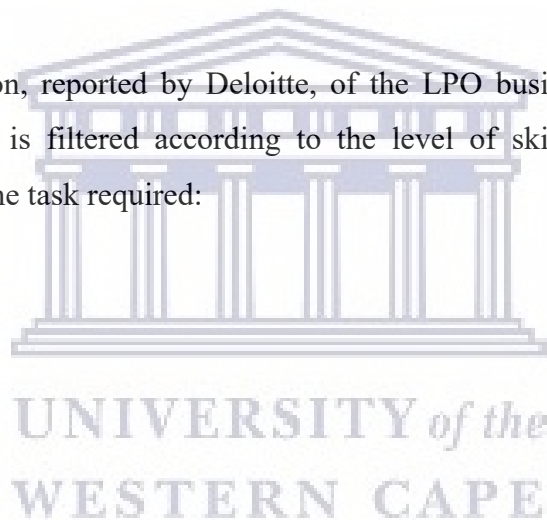
⁵⁷ Lacity M and Willcocks L 'The Outsourcing Unit Working Research Paper Series - Paper 12/5 Legal Process Outsourcing: LPO Provider Landscape' available at http://www.lse.ac.uk/management/research/outsourcingunit/wp-content/uploads/sites/2/2015/04/WP12_5.pdf (accessed 24 March 2018).

⁵⁸ Lacity M and Willcocks LP 'Legal Process Outsourcing, In-house Counsels, Law Firms and Providers: Researching Effective Practices' (2013) 19(3) *Web European Journal of Current Legal Issues*.

with not having job security legal professionals and administrative staff are constantly on the market searching for available permanent work, and should a better opportunity arise, the legal professionals tend to move on.⁵⁹

LPOs assist law firms and legal departments in transforming how they do work. With increasingly complex and high-level cases being left to in-house counsel or the more experienced legal professionals, process-driven and repetitive work is shifted off to the LPO provider, with the aim of keeping costs to a minimum.⁶⁰ As a consequence, law firm clients obtain specialised legal attention and lower fees for lower level type work. Moreover, the LPO industry enables the big law firms to merge creating more expert focused law firms, with partners being able to charge more as they become highly specialised in specific areas of the law.⁶¹

Below is an illustration, reported by Deloitte, of the LPO business model,⁶² which showcases how work is filtered according to the level of skill required, and the allocation of fees for the task required:



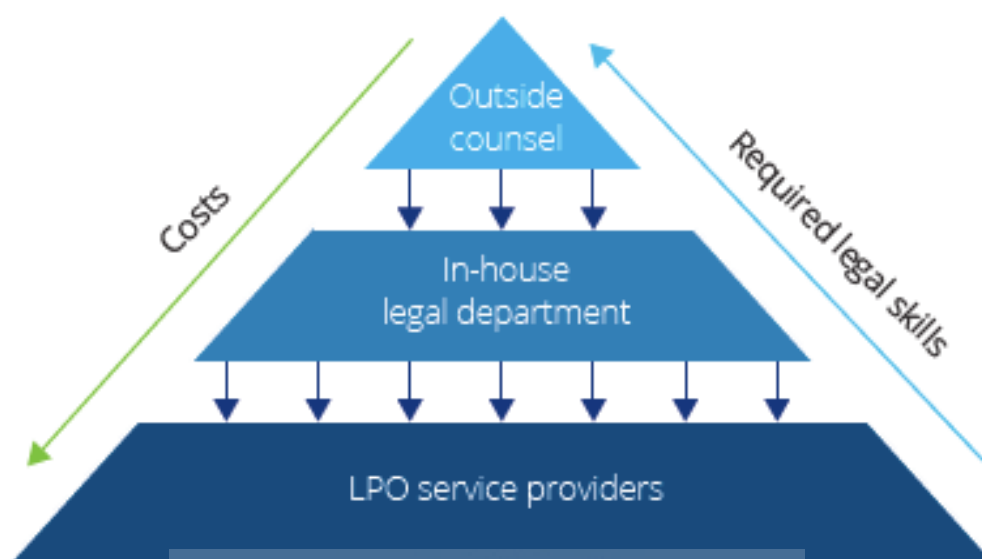
⁵⁹ Lacity M and Willcocks LP 'Legal Process Outsourcing, In-house Counsels, Law Firms and Providers: Researching Effective Practices' (2013) 19(3) *Web European Journal of Current Legal Issues*.

⁶⁰ Lala N and Caplan M 'The Corporate Legal Process Outsourcing Business Model' available at <http://web1.beta.insidecounsel.com/2011/09/21/the-corporate-legal-process-outsourcing-business-m> (accessed 28 February 2018).

⁶¹ Susskind R *The End of Lawyers?: Rethinking the nature of Legal Services* (2010) 278 279.

⁶² Deloitte *The Resurgence of Corporate Legal Process Outsourcing: Leveraging a New and Improved Legal Support Business Model* (2017) Deloitte Development LLC.

The LPO Business Model:



Source: Deloitte *The Resurgence of Corporate Legal Process Outsourcing: Leveraging a New and Improved Legal Support Business Model* (2017) Deloitte Development LLC.

From the above diagram, it can be noted that the less specialised work / skills is either delegated to the in-house legal department or the LPO provider, reserving more complex matters for outside counsel, all the while keeping in mind the financial implications of the work to be performed. Therefore, the manner in which the choice to outsource work is decided is based on a sliding scale of the level of expertise required to conduct and deliver the legal task versus the cost of performing such work.

But is the LPO industry just about cost savings? It can be reasoned that implementing the LPO business model is not merely a decision based on monetary savings but also a choice that is based on the benefit of the technological systems in place, which facilitate the performance of legal tasks in an efficient manner, by qualified legal professionals, irrespective of their location.⁶³ Furthermore, LPO providers implement

⁶³ Borsand S and Gupta A 'Public and Private Sector Legal Process Outsourcing: Moving Toward a Global Model of Legal Expertise Deliverance' (2009) *Pace International Law Review Online Companion* 2.

strong infrastructure, seamless processes, flexibility and labour arbitrage.⁶⁴ Thereby making it an attractive delivery model for the performance of legal services.

Although India has been hailed as the biggest LPO provider to date, other offshore locations include the Philippines, Australia, China, South Korea and South Africa.⁶⁵ The research will focus on the LPO industry in South Africa, which has become a coveted outsourcing destination as a result of its language capabilities and the similarities it shares with the legal system of the UK, for example. These countries are low cost locations with good infrastructures in place, a stable economy and are able to integrate with law firms or legal departments around the world due to the similarities in their legal systems.⁶⁶

By implementing the LPO business model companies stand to gain an advantage to their business dealings. The latter was highlighted in a report published by Deloitte:

‘In summary, by utilizing LPO for appropriate legal tasks, a corporate legal department may be able to:

- Reduce the size of its internal group
- Reallocate high-level resources to more complex tasks
- Absorb some of the work typically performed by outside counsel
- Access subject-matter specialists in common legal fields (such as e-discovery) in which the company lacks an in-house capability
- Facilitate a 24/7 (“follow the sun”) work model by utilizing both onshore and offshore resources
- Benefit from preferential pricing due to the evolving legal outsourcing market
- Monitor and maintain performance by enforcing SLAs based on measurable criteria
- Reassess its current sourcing and procurement initiatives with outside law firms

⁶⁴ Fennell E ‘Legal Process Outsourcing Builds Business’ available at <https://www.raconteur.net/business/legal-process-outsourcing-builds-business> (accessed 28 February 2018).

⁶⁵ Borsand S and Gupta A ‘Public and Private Sector Legal Process Outsourcing: Moving Toward a Global Model of Legal Expertise Deliverance’ (2009) *Pace International Law Review Online Companion* 5 6.

⁶⁶ Borsand S and Gupta A ‘Public and Private Sector Legal Process Outsourcing: Moving Toward a Global Model of Legal Expertise Deliverance’ (2009) *Pace International Law Review Online Companion* 6.

- Develop a shared services approach to in-house legal functions. The potential bottom-line benefit: The ability to carry out necessary legal activities at a lower cost — without sacrificing quality.⁶⁷

The above further signifies how integral the LPO business model is to the law firm and/or legal department's business success. Where in traditional law firms work was mainly kept between the lawyers, by contrast the legal sector has evolved to not only meet client demands but to work wiser and more efficiently to be able to stay abreast of changing times. Thereby, propelling it to greater success.

Ross summarised the LPO business model succinctly in his following statement:

'LPO represents an operating model built on best practices, with process efficiency, quality control and enabling technology at its core.'⁶⁸

The LPO business model allows for it to be flexible, fashioning itself to the needs and requirements of its law firm clients. By being adaptable, the LPO provider draws clients in with its willingness to work within the constraints of their budget and the time frame given for any given project.

2.4 The services

To understand the value that LPO providers bring to the table, it is important to appreciate the array of services they offer to their clientele. Originally, the services offered by LPO providers were limited to document review, research, transcription, and administrative type work.⁶⁹ However, by the year 2010 this list had expanded to

⁶⁷ Deloitte *The Resurgence of Corporate Legal Process Outsourcing: Leveraging a New and Improved Legal Support Business Model* (2017) Deloitte Development LLC.

⁶⁸ Ross M 'Redefining the Law Firm Delivery Model' available at <http://archive.outsourcemag.com/redefining-the-law-firm-delivery-model/> (accessed 27 March 2018).

⁶⁹ Fischer BJ 'Outsourcing Legal Services, In-Sourcing Ethical Issues: An Examination of the Ethical Considerations Arising from the Practice of Outsourcing Legal Services Abroad' (2010) 16 *Southwestern Journal of International Law* 457.

include commoditised legal work, drafting of pleadings, review of contracts, legal briefs, mergers and acquisitions and generally higher level legal work.⁷⁰

The top specialist areas of law that LPOs offer services in are namely litigation; intellectual property; corporate affairs; compliance; procurement; employment; property; resourcing; consulting; and information technology (IT) and business process services.⁷¹ Lacity and Willcocks' undertook research to examine the LPO industry as a business solution, their paper established the overall services offered by a selection of LPO providers around the world, which was reviewed in detail to generate a picture of how LPOs have evolved and adapted to the needs of law firms and legal departments. The most common legal services, referred to as 'Towers'⁷² amongst the LPO sector has been defined as including the following type of work:

'Seven towers support traditional legal activities:

Tower 1. *Litigation Services*—discovery, document, and case management services

Tower 2. *Intellectual Property Services*—patents, trademarks, and domain name services

Tower 3. *Corporate Services*—mergers & acquisitions, transaction agreements, and corporate financing services

Tower 4. *Compliance Services*—regulatory and company policy compliance services

Tower 5. *Services Procurement*—contracts, service agreements, and outsourcing services

Tower 6. *Employment Services*—employment contracts, disputes, immigration and injury services

Tower 7. *Property Services*—purchase, lease, rent, or sale of physical property

Three towers provide supporting services:

⁷⁰ Fennell E 'Legal Process Outsourcing Builds Business' available at <https://www.raconteur.net/business/legal-process-outsourcing-builds-business> (accessed 28 February 2018).

⁷¹ Lacity M and Willcocks L 'The Outsourcing Unit Working Research Paper Series - Paper 12/5 Legal Process Outsourcing: LPO Provider Landscape' available at http://www.lse.ac.uk/management/research/outsourcingunit/wp-content/uploads/sites/2/2015/04/WP12_5.pdf (accessed 24 March 2018).

⁷² Lacity M and Willcocks L 'The Outsourcing Unit Working Research Paper Series - Paper 12/5 Legal Process Outsourcing: LPO Provider Landscape' available at http://www.lse.ac.uk/management/research/outsourcingunit/wp-content/uploads/sites/2/2015/04/WP12_5.pdf (accessed 24 March 2018).

Tower 8. *Resourcing*—staff augmentation, including administrative, paralegal, and legal staffing

Tower 9. *Consulting Services*—high-level consulting on strategy, transformation, policy, and procedures

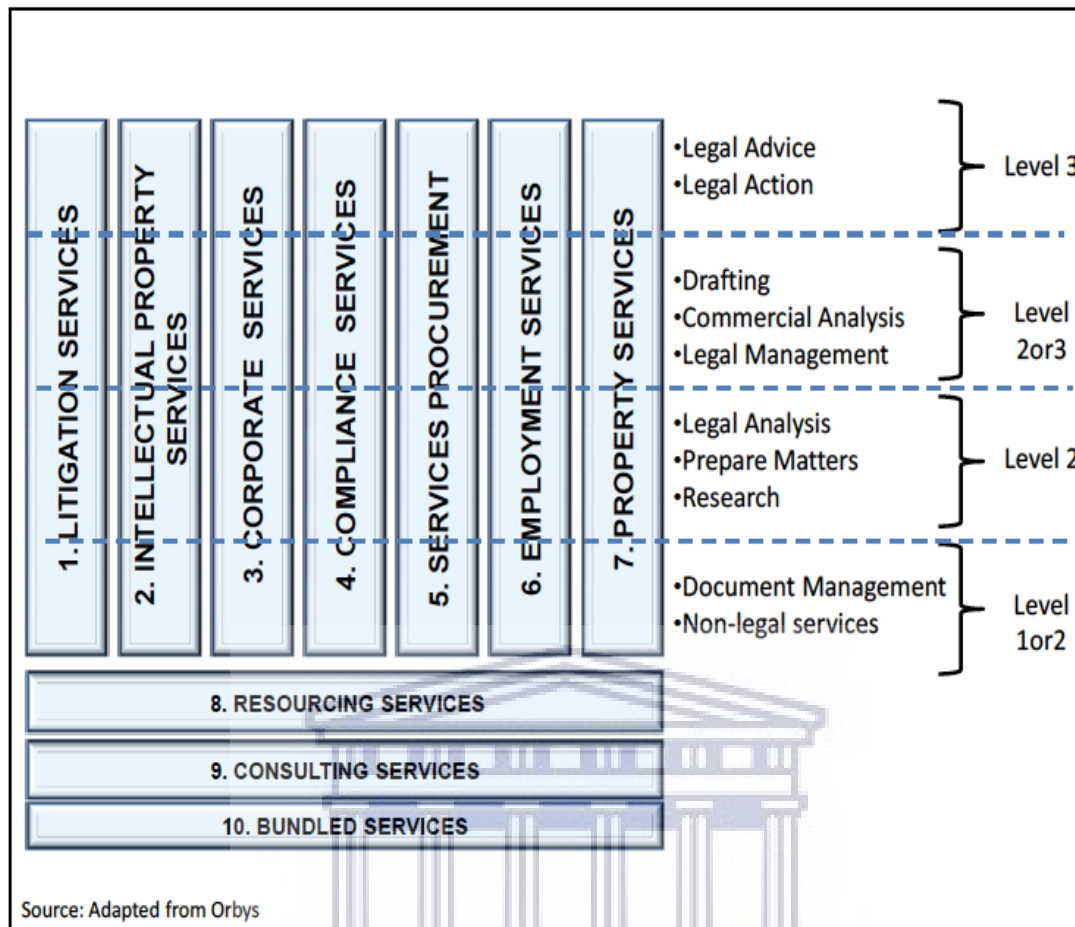
Tower 10. *Bundled services*—information technology, business process, and knowledge process services that complement or support LPO services⁷³

It is apparent and can be deduced from the above selection that the LPO services provide for repetitive low level work (for example transcriptions, collections, and claims) to mid-level (for example e-discovery, claims management and contract management) and high-level more complex legal work (for example due diligence, compliance, litigation, specialised contract review and drafting).⁷⁴ Outsourcers are spoilt for choice in that the LPOs are able to accommodate all facets of law that a law firm or legal department may want to or is practicing in or that is their specialist area of business. This provides them with the opportunity to delegate a variety of work in an attempt to keep costs to a minimum.

The legal services mentioned above were further divided by Lacity and Willcocks into the level of skill and the standard of qualifications that would be required by the person doing the work, to ensure the efficient performance of such work:

⁷³ Lacity M and Willcocks L ‘The Outsourcing Unit Working Research Paper Series - Paper 12/5 Legal Process Outsourcing: LPO Provider Landscape’ available at http://www.lse.ac.uk/management/research/outsourcingunit/wp-content/uploads/sites/2/2015/04/WP12_5.pdf (accessed 24 March 2018).

⁷⁴ Hebrard C ‘Offshoring South Africa 2015: Legal Process Outsourcing’ available at http://www.lssa.org.za/upload/documents/LPO_BPeSA_Event_Presentation_2015_LPO.pdf (accessed 28 February 2018).



Source: Lacity M and Willcocks L 'The Outsourcing Unit Working Research Paper Series - Paper 12/5 Legal Process Outsourcing: LPO Provider Landscape'.⁷⁵

Each level depicts the set skill and qualifications that would be required by the administrative staff member or the qualified lawyer undertaking the performance of the services at the LPO location:

Level 1 would be work performed by people who are qualified to perform non-legal services and document management services. Level 2 requires the person to have legal knowledge and therefore be appropriately qualified to perform legal reviews, drafting, analysis and management type services. Level 3 requires the person to have a legal qualification and the experience as it encompasses more high-level type work. Depending on the complexity of the given work, the LPO and the outsourcer would decide which level suited the work type best.

⁷⁵ Lacity M and Willcocks L 'The Outsourcing Unit Working Research Paper Series - Paper 12/5 Legal Process Outsourcing: LPO Provider Landscape' available at http://www.lse.ac.uk/management/research/outsourcingunit/wp-content/uploads/sites/2/2015/04/WP12_5.pdf (accessed 24 March 2018).

Therefore, the fees charged by the LPO provider for such services depended upon the level of skill and the qualifications held by the person completing the task, thus making their pricing model flexible and accommodating to the cost-effective measures the outsourcer continually tries to maintain in their everyday work.

In their report, Global Market Insights has forecasted that e-discovery and Intellectual Property related services, which are level 1 and level 2-type work, will increase as law firms and legal departments push to reduce costs further. In addition, as the trend moves towards using artificial intelligence for example: computer software and programs (collectively technology), increasingly to cut down on time spent performing certain work, and ensuring work efficiency augments.⁷⁶ Artificial intelligence allows for technology to be used to automate certain functions and complete tasks that are repetitive human would normally do.⁷⁷ It has further transformed the legal landscape by allowing more time to be spent on higher value matters.⁷⁸ A few examples of legal work that have been performed with the assistance of technology include: document review, legal research, due diligence, and contract review and management.⁷⁹

LPOs offer a broad spectrum of legal services to the outsourcer who is willing to make use of their value proposition. Having variable pricing models together with relevant technological systems makes this business an attractive option that assists both law firms and legal departments in keeping their monetary spend to a minimum while ensuring that legal work is performed efficiently, supports client demand and preserves client satisfaction.

⁷⁶ Global Market Insights, Inc. 'Legal Process Outsourcing (LPO) Market Size By Service (Contract Drafting, Compliance Assistance, E-Discovery, Review & Management, Patent Support, Litigation Support), By Location (Offshore, Onshore), Industry Analysis Report, Regional Outlook (U.S., Canada, Germany, UK, Italy, France, Spain, Poland, Czech Republic, China, India, Japan, South Korea, Australia, Philippines, Brazil, Mexico, South Africa), Growth Potential, Price Trends, Competitive Market Share & Forecast, 2017 – 2024' available at <https://www.gminsights.com/industry-analysis/legal-process-outsourcing-lpo-market-size> (accessed 24 October 2017).

⁷⁷ Garcia D 'Preparing for Artificial Intelligence in the Legal Profession' available at <https://www.lexisnexis.com/lexis-practice-advisor/the-journal/b/lpa/posts/preparing-for-artificial-intelligence-in-the-legal-profession> (accessed 17 March 2019).

⁷⁸ Marr B 'How AI And Machine Learning Are Transforming Law Firms And The Legal Sector' available at <https://www.forbes.com/sites/bernardmarr/2018/05/23/how-ai-and-machine-learning-are-transforming-law-firms-and-the-legal-sector/#1cf6885232c3> (accessed 17 March 2018).

⁷⁹ Marr B 'How AI And Machine Learning Are Transforming Law Firms And The Legal Sector' available at <https://www.forbes.com/sites/bernardmarr/2018/05/23/how-ai-and-machine-learning-are-transforming-law-firms-and-the-legal-sector/#1cf6885232c3> (accessed 17 March 2018).

2.5 The benefits of Legal Process Outsourcing

The LPO sector has become a lucrative business. The acclaimed status they have gained is due to a number of factors, which have promoted its growth within the legal sector and other businesses globally. Although LPO providers are renowned for the cost saving incentives they provide to their clients, there are also non-financial benefits, which require mention.

2.5.1 Financial benefits

To remain viable in the legal industry as a business, lawyers are forced to consider options that will enable them to reduce their overhead expenditure while remaining within the competitive market stream.⁸⁰ It has been estimated that by implementing the LPO business model, law firms can potentially save between 60% to 90% of their estimated job spend, depending on the type of work being outsourced.⁸¹ This is in comparison to another report, which approximates the possible savings to be between 20% to 60% in general for businesses using LPOs.⁸² Regardless of whether the percentage amount is 20%, 60% or 90%, the financial benefit of outsourcing is clearly obvious, making it a solution, worthy of being investigated especially as it brings great profit to the outsourcer.

The LPO pricing model is a negotiable element where the choice of either a fixed fee or an hourly fee arrangement can be agreed between the outsourcer and the LPO provider.⁸³ This further adds to monetary savings for the law firm or legal department. Moreover, as LPO providers are located in countries that generally tend to have lower

⁸⁰ Fischer BJ 'Outsourcing Legal Services, In-Sourcing Ethical Issues: An Examination of the Ethical Considerations Arising from the Practice of Outsourcing Legal Services Abroad' (2010) 16 *Southwestern Journal of International Law* 458.

⁸¹ Schultz CI 'Legal Offshoring: A Cost-Benefit Analysis' (2010) 35 *Journal of Corporation Law* 647.

⁸² Fischer BJ 'Outsourcing Legal Services, In-Sourcing Ethical Issues: An Examination of the Ethical Considerations Arising from the Practice of Outsourcing Legal Services Abroad' (2010) 16 *Southwestern Journal of International Law* 459.

⁸³ Schultz CI 'Legal Offshoring: A Cost-Benefit Analysis' (2010) 35 *Journal of Corporation Law* 648 649.

operational costs such as for example, office rental, equipment and utilities; this provides LPOs with room to discuss mutually beneficial fee deals with their clients.⁸⁴

Using LPOs further provide law firms with the advantage of making certain roles such as the secretarial or junior lawyer positions, redundant, thereby increasing the level of savings they are able to make.⁸⁵ Therefore, the budget that would usually be allocated for recruitment, training and the remuneration package for a particular job becomes negligible,⁸⁶ allowing for the intended use of these funds to be utilised in other areas of the business.

All the above-mentioned cost saving measures provide the perfect incentive for any business fighting for survival in a very competitive field such as the legal sector, where every rand saved can be put towards other methods to develop business further.

2.5.2 Non-Financial benefits

Besides saving the outsourcer money, by shifting work offshore and moving the management of certain job profiles to the LPOs, firms are able to allocate valuable time and resources to perform more higher level legal work, thereby providing them with the opportunity to charge higher hourly rates; it allows them to concentrate on their core service offerings; and building stronger business connections.⁸⁷ In addition, lawyers at the firm are able to devote time to performing pro bono work and create plans to enhance client retention and development.⁸⁸

LPOs tend to employ various calibers of personnel, from administrative staff to paralegals to duly qualified lawyers who are well versed in both local and

⁸⁴ Fischer BJ 'Outsourcing Legal Services, In-Sourcing Ethical Issues: An Examination of the Ethical Considerations Arising from the Practice of Outsourcing Legal Services Abroad' (2010) 16 *Southwestern Journal of International Law* 459.

⁸⁵ Schultz CI 'Legal Offshoring: A Cost-Benefit Analysis' (2010) 35 *Journal of Corporation Law* 649.

⁸⁶ Schultz CI 'Legal Offshoring: A Cost-Benefit Analysis' (2010) 35 *Journal of Corporation Law* 650.

⁸⁷ Fischer BJ 'Outsourcing Legal Services, In-Sourcing Ethical Issues: An Examination of the Ethical Considerations Arising from the Practice of Outsourcing Legal Services Abroad' (2010) 16 *Southwestern Journal of International Law* 459.

⁸⁸ Harmon AR 'The Ethics of Legal Process Outsourcing-Is the practice of Law a "Noble Profession" or Is it Just Another Business?' available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1887197 (accessed 20 November 2017).

international laws.⁸⁹ The outsourcer is given access to these legal professionals who are competent in an array of disciplines.⁹⁰ The advantage to having the latter is that smaller firms are able to compete with larger firms in that they are now able to offer services in areas they would not have ordinarily been able to, thereby putting small firms on equal footing with the larger firms.⁹¹

Having this varied team, allows LPOs to be able to offer their services 24 hours 7 days a week,⁹² and arguably provides scalable manpower teams that can be put together quickly to undertake any project the outsourcer requires. It is also as a consequence of the different time zones between the LPO location and the outsourcer that work can be completed faster and at a fraction of the cost.⁹³ However, it must be noted that having a big disparity in the time frames will possibly diminish the propensity of the outsourcer to supervise the work being performed by the LPO provider in that there is less ability or time to partake in effective communication.⁹⁴ Opinions regarding the outsourcer's supervisory responsibility in sending work offshore remain inconsistent.⁹⁵ Furthermore, the question of whether the skills and qualifications of the LPO team are adequate to perform the task required by the outsourcer is of concern.

Lawyers are known to have and keep numerous boxes of files and stacks of paperwork. The correct storage of these confidential items is key to any law firm's business operation. LPOs adopt the latest in technology to enable them to deliver efficiently on the services they advertise. As a result of the LPO provider having

⁸⁹ Hodge N 'Legal Process Outsourcing' (2010) 6 *The In-House Perspective* 12.

⁹⁰ Fischer BJ 'Outsourcing Legal Services, In-Sourcing Ethical Issues: An Examination of the Ethical Considerations Arising from the Practice of Outsourcing Legal Services Abroad' (2010) 16 *Southwestern Journal of International Law* 460.

⁹¹ Fischer BJ 'Outsourcing Legal Services, In-Sourcing Ethical Issues: An Examination of the Ethical Considerations Arising from the Practice of Outsourcing Legal Services Abroad' (2010) 16 *Southwestern Journal of International Law* 460.

⁹² Schultz CI 'Legal Offshoring: A Cost-Benefit Analysis' (2010) 35 *Journal of Corporation Law* 651.

⁹³ Harmon AR 'The Ethics of Legal Process Outsourcing-Is the practice of Law a "Noble Profession" or Is it Just Another Business?' available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1887197 (accessed 20 November 2017).

⁹⁴ Fischer BJ 'Outsourcing Legal Services, In-Sourcing Ethical Issues: An Examination of the Ethical Considerations Arising from the Practice of Outsourcing Legal Services Abroad' (2010) 16 *Southwestern Journal of International Law* 460.

⁹⁵ Tuft ML 'Supervising Offshore Outsourcing of Legal Services in a Global Environment: Re-examining Current Ethical Standards' available at http://www.heinonline.org.ezproxy.uwc.ac.za/HOL/Page?handle=hein.journals/aklr43&div=29&start_page=825&collection=journals&set_as_cursor=0&men_tab=srchresults (accessed 06 March 2018).

implemented applicable technological systems and software, law firms are able to scan and send these documents to be stored offshore,⁹⁶ thereby eliminating the cost of off-site storage offices and installing adequate security to safeguard the confidential information.

Other benefits to outsourcing include the similarities of the legal systems between the outsourcer and the LPO provider location.⁹⁷ Most LPO providers are located in countries whose legal systems are founded on British common law, with educated and fluent English speaking personnel,⁹⁸ India and UK being examples, these all cater to making this business model undeniably attractive. However, the question arises, does having similar legal systems equate with the legal professionals, based in offshore LPO locations, having the required knowledge and experience to practice law of another country without being duly qualified under the laws of that country? This question will be explored further in Chapter 3 (Legal Process Outsourcing in South Africa) and Chapter 4 (A Comparative Analysis of the Legal Systems of the United Kingdom and India).

LPO providers have taken a proactive approach in trying to reduce the risks posed by outsourcing legal work. They have done this by implementing internationally recognised certifications, as for example, Six Sigma, ISO 27001 and ISO 9001;⁹⁹ providing specific training for staff prior to the commencement of any project; strengthening their Service Level Agreements with the outsourcer by developing key metrics to assess the quality of the legal work being performed; educating the public on the benefits of LPOs and offering a hybrid solution that allows for offices to be

⁹⁶ Schultz CI 'Legal Offshoring: A Cost-Benefit Analysis' (2010) 35 *Journal of Corporation Law* 650.

⁹⁷ Fischer BJ 'Outsourcing Legal Services, In-Sourcing Ethical Issues: An Examination of the Ethical Considerations Arising from the Practice of Outsourcing Legal Services Abroad' (2010) 16 *Southwestern Journal of International Law* 460.

⁹⁸ Fischer BJ 'Outsourcing Legal Services, In-Sourcing Ethical Issues: An Examination of the Ethical Considerations Arising from the Practice of Outsourcing Legal Services Abroad' (2010) 16 *Southwestern Journal of International Law* 460.

⁹⁹ Six Sigma is a certification course that has been designed to improve business processes through the use of statistical analysis. ISO 270001 is an information security standard that assists a business in ascertaining their level of risk. ISO 9001 is a quality management system that assists businesses to assess whether the products and services they provide meets with international customer and regulatory standards.

opened close to the outsourcer as a means to counteract the resistance to offshoring legal work.¹⁰⁰

In addition, both LPO providers and avid LPO supporters have published recommendations, outlining the suggested steps law firms should take when deciding whether to outsource their legal work or not, and to assist in reducing the ethical risks associated with this delivery model. They are namely:

- ‘Investigate the background of the lawyers, non-lawyers and service provider, and conduct reference checks;
- Interview the principal lawyers involved in your matters and assess their educational background;
- Ascertain the LPO’s hiring practices to evaluate the quality and character of the employees likely to have access to client information;
- Investigate the security of the provider’s premises and computer network;
- Conduct a site visit;
- Assess the country to which services are being outsourced for its legal training, judicial system, legal landscape, disciplinary system and core ethical principles;
- Disclose the outsourcing relationship to the client and obtain informed consent.’¹⁰¹

All the above recommendations further support the continual growth and popularity of the LPO business model.

In a study conducted amongst law firms, it was determined that 71% of top tier law firms and 42% of mid-tier law firms reported that their clients have increasingly requested that they make use of LPOs.¹⁰² This emphasises the acceptance of this delivery model being integrated with law firms and corporations as a solution to effective service delivery. Overall, the LPO business benefits the outsourcer with its capability to tailor their services to meet client demands and their aptness to be

¹⁰⁰ Deloitte *The Resurgence of Corporate Legal Process Outsourcing: Leveraging a New and Improved Legal Support Business Model* (2017) Deloitte Development LLC.

¹⁰¹ Langdon-Down G ‘Offshoring legal Work: Do Lawyers risk outsourcing themselves?’ available at <https://www.lawgazette.co.uk/analysis/offshoring-legal-work-do-lawyers-risk-outsourcing-themselves-48550.article> (accessed 27 March 2018).

¹⁰² Jubb J ‘The Highs and Lows of Legal Outsourcing’ available at <http://insight.thomsonreuters.com.au/posts/legal-outsourcing> (accessed 27 March 2018).

flexible¹⁰³ facilitating the process so as to permit law firms and legal departments to send overflow work to be completed offshore at a lower fee while gaining supplementary value added advantages.¹⁰⁴

Therefore, to summarise, prior studies have identified many benefits for outsourcing legal work. These benefits include the overall savings on operational costs involved in running a law firm or legal department, access to a talented pool of qualified legal professionals who are specialists in certain elements of the law, and the ability to have faster turnaround times on delivering work to clients as a result of LPO providers operating 24-hours a day.¹⁰⁵ All these advantages gear towards meeting client demands thus providing law firms with the ability to scale their staff complement when the need arises.¹⁰⁶ However, with every plus there is a negative. With its continual growth, questions regarding whether the LPO industry is a legal or ethical practice has increasingly been debated amongst respective law societies, bar councils and legal professionals. More recently, these authorities have veered towards agreeing that although LPOs are not an unethical practice per se, they do produce ethical challenges that contravene and are considered violations of ruling codes of professional conduct.¹⁰⁷ The next section will explore the risks raised by outsourcing legal services.

2.6 The risks of Legal Process Outsourcing

In spite of the fact that there are many advantages to implementing the LPO business model, it is equally important to highlight some of the risks and concerns it poses.

Although the LPO industry is synonymous with bringing huge cost saving potential to both law firms and legal departments, the legal and ethical issues it raises need to be

¹⁰³ Kane S 'Top Advantages of Outsourcing' available at <https://www.thebalance.com/top-advantages-of-outsourcing-2164339> (accessed 25 September 2017).

¹⁰⁴ Harmon AR 'The Ethics of Legal Process Outsourcing-Is the practice of Law a "Noble Profession" or Is it Just Another Business?' available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1887197 (accessed 20 November 2017).

¹⁰⁵ Kane S 'Top Advantages of Outsourcing' available at <https://www.thebalance.com/top-advantages-of-outsourcing-2164339> (accessed 25 September 2017).

¹⁰⁶ Kane S 'Top Advantages of Outsourcing' available at <https://www.thebalance.com/top-advantages-of-outsourcing-2164339> (accessed 25 September 2017).

¹⁰⁷ McLawsen G 'The Back Office in Bangalore: Clarifying the Ethics of Legal Process Outsourcing' (2017) *Bender's Immigration Bulletin* 705.

addressed. Lawyers and applicable authorities and councils need to pay closer attention to the ethical and legal obligations being challenged by the use of LPO facilities. Despite the evolution of the legal sector, legal professionals are still required to maintain their ethical duties and comply with applicable regulations. It is considered ethical for lawyers to outsource their legal work providing they ultimately take responsibility for the performance and delivery of the services performed by the LPO provider offshore.¹⁰⁸ However, ethical concerns such as security and confidentiality; data protection, the permitted authorisation to practice law in a given country; conflict of interest and the differences in the legal systems and regulatory policies of the outsourcer and the outsourcing provider location, will challenge its growth.

Mitigating the challenges borne from outsourcing can be problematic if not addressed. It must be stressed that lawyers have a duty to adhere to their ethical obligations irrespective of whether the work is being outsourced or not.¹⁰⁹

The key is to balance and maximise the benefits LPO brings to law firm and corporations while reducing the risks this business model raises. While LPOs reduce overall costs, are agile, efficient in the processes they utilise, if implemented incorrectly, it may also raise quality control issues as regards the legal work that is being performed by the staff of the LPO provider.¹¹⁰ Reducing exposure to legal risk is the top priority of any law firm or legal department. If the business relationship between the outsourcer and the outsourcing provider is managed wrong it can be detrimental to the firm, its clients and potentially the reputation of the legal profession.

Although, the previously mentioned benefits of adopting the LPO business model supports the law firms in making a decision on whether to outsource to a particular LPO provider or not, the question which this poses is whether it is feasible for an

¹⁰⁸ Podolny R 'Who is Afraid of Outsourcing? A Pragmatic Approach to a Revolutionary Development' (2012) 40(2) *The Advocates' Quarterly* 177.

¹⁰⁹ Dobie K 'The Ethical Role of Lawyers' available at <https://www.tei.org.za/index.php/resources/articles/ethics-opinions/7206-the-ethical-role-of-lawyers> (accessed 13 August 2018).

¹¹⁰ Podolny R 'Who is Afraid of Outsourcing? A Pragmatic Approach to a Revolutionary Development' (2012) 40(2) *The Advocates' Quarterly* 178.

outsourcer who is more often situated on the other side of the world from the LPO provider, able to perform background checks, interviews and assessments to determine whether the LPO provider meets an internal standard from such a great distance? Carrying out the above steps also requires sufficient time to be spent on each recommendation, which may be problematic if time is of the essence in a given project. Moreover, if the law firm wishing to outsource carries out site visits, it would only be a temporary measure and a short stay in the LPO location, in which to ascertain the adequacy of the LPO provider. But, this raises the following question, would all this be enough to reduce the ethical and legal infractions arising from the use of LPOs? There needs to be a seamless relationship between the outsourcer and the LPO provider, thereby ensuring accountability, compliance and reducing the level of risk. Furthermore, having a set standard to apply by all concerned parties would further settle potential risks thereby maintaining the obligations a legal professional has towards their profession and safeguarding the reputation of the legal fraternity. Therefore, the question arises, would having a regulation for the LPO sector be the key to developing this relationship whilst protecting the duties and responsibilities owed by every lawyer to their profession and their clients? This question will be further explored in Chapter 6 (The Need to Regulate Legal Process Outsourcing).

2.7 Conclusion

This chapter set about illustrating the phenomenal growth and development the LPO industry has seen over the years, while highlighting its future expected expansion and the advantages it provides to both law firms and legal departments making use of this type of business model. This was done by looking at how the legal marketplace has transformed over time as a result of technology, globalisation and economic trends; as well as exploring the business model the LPO is based upon. The latter provided insight into the value this industry brings to the legal sector in the services it provides. All of which assisted in supporting the growth of the LPO industry.

It is comprehensible that LPOs are able to increase both the productivity levels and the sustainability of law firms through the services they offer. This is apparent from the growth this industry has experienced and is a good indication of their successes. Undoubtedly the LPO sector is here to stay. Cost saving is a term that has

increasingly become synonymous with the LPO business model, together with providing access to a pool of talented professionals, a reduction in the turnaround times for the delivery of legal services, scalability, 24-hour access and flexibility.

However, while the LPO industry provides a multitude of benefits to the legal sector, it is just as important to be mindful of the risks arising as a result of implementing this business model. Risks which if not addressed can lead to having a negative effect on the legal fraternity. Furthermore, with the continual growth the LPO industry is experiencing, simultaneously so do the risks it exposes to legal professionals escalate.

In summary, this chapter has provided the global position of the LPO industry and the reasons for its success. My next chapter will now observe the position of the LPO industry in South Africa.



CHAPTER THREE

LEGAL PROCESS OUTSOURCING IN SOUTH AFRICA

3.1 Introduction

The global position of the Legal Process Outsourcing (LPO) industry was discussed in Chapter 2 (The Growth and Development of Legal Process Outsourcing). The type of business model, array of service offerings, benefits and the continual growth of the LPO business was established so as to provide a general overview of this sector.¹ The details provided all aimed at illustrating the favourable status the legal fraternity holds the LPO industry in. The latter being regarded as a mechanism that assists both law firms and legal departments in reducing their monetary spend, expanding upon the legal services offered to their clientele, implementing quicker turnaround times and restructuring their work to include more higher value matters. All these benefits supported the law firms and legal departments commitment to thrive in a competitive business arena and sustain their ability to be profitable.

This chapter will focus on the LPO industry in South Africa, with the aim of indicating the growth of this sector and deconstructing why South Africa has been viewed as a preferred offshore LPO destination. The legislative and regulatory framework of the country as regards the LPO sector will also be explored so as to depict South Africa's position on the outsourcing of legal services, bringing light to the possible challenges that may surface as an offshore LPO destination. By establishing the stance of the LPO industry in South Africa and the potential risks that may arise, the question of whether a regulatory framework should be introduced to counteract the challenges posed by this business model can be addressed in part.

¹ See Chapter Two (The Growth and Development of Legal Process Outsourcing), section 2.2 (The evolving marketplace), section 2.3 (The Legal Process Outsourcing business model), section 2.4 (The services) and section 2.5 (The benefits of Legal process Outsourcing).

3.2 The position of Legal Process Outsourcing in South Africa

Globalisation, technological advancement and the global financial crisis have all contributed to re-shaping the manner in which legal work is being performed.² The legal sector has had to embrace these changes in order to survive in the business world. Thereby, moving away from the traditional model of delivering legal services to paving the way for other countries, for example, South Africa, to assist foreign law firms and legal departments with the rendering of their legal work. The aim of LPO providers is to provide the solution to streamlining legal services in a manner, which would save law firms and their clients' time and money while maintaining high standards of quality.³

South Africa is commonly recognised as an outsourcing destination / LPO provider as opposed to being labeled as the outsourcer who is effectively the originating law firm or legal department sending legal work offshore.⁴ LPO providers in South Africa predominantly operate in the major cities of Cape Town, Durban and Johannesburg.⁵ The spread of these LPO provider companies across the country is estimated as being: 55% of LPO providers being based in Cape Town, 5% being based in Durban and 40% being based in Johannesburg.⁶

The LPO providers in South Africa offer a range of legal services to the outsourcer, from administrative level to mid-level to high-level legal work.⁷ A broad view of the categories of legal work performed by skilled legal professionals at the LPO centres in South Africa are listed below:

² See Chapter 2 (The Growth and Development of Legal Process Outsourcing) section 2.2 (The evolving legal marketplace).

³ Lacity M and Willcocks LP 'Rethinking Legal Services in the face of Globalisation and Technology Innovation: the case of Radiant Law' (2016) 6 *Journal of Information Technology Teaching Cases* 16.

⁴ English R 'Destination SA: A preferred legal outsourcing destination' (2014) 119 *De Rebus* 34.

⁵ Hebrard C 'Offshoring South Africa 2015: Legal Process Outsourcing' available at http://www.lssa.org.za/upload/documents/LPO_BPeSA_Event_Presentation_2015_LPO.pdf (accessed 28 February 2018).

⁶ Hebrard C 'Offshoring South Africa 2015: Legal Process Outsourcing' available at http://www.lssa.org.za/upload/documents/LPO_BPeSA_Event_Presentation_2015_LPO.pdf (accessed 28 February 2018).

⁷ Manyathi-Jele N 'LPO Report Launched' available at <http://www.fidfund.co.za/wp-content/uploads/2017/10/September-2015-Outsourcing-by-legal-practitioners.pdf> (accessed 21 June 2018).

‘Specialist services outsourced to South Africa include –

- due diligence analysis of contracts in mergers and acquisitions;
- debt recovery;
- land registry searches;
- legal research;
- document drafting;
- letters to third parties;
- patent applications;
- legal billing activities, including preparation of invoices, collation of time sheets;
- intellectual property protection;
- commercial contract management and risk reporting;
- paralegal work, including litigation document review and producing chronologies;
- document production;
- marketing administration;
- finance administration; and
- design and creative services.⁸

From the above non-exhaustive list of legal services performed by South African outsourcing providers, it is apparent that they deliver upon a wide range of legal work to the outsourcer, ensuring that the needs of the law firms and legal departments making use of their services are catered for.

From a business perspective, the overall rationale behind outsourcing has been to reduce operational costs. South Africa’s LPO sector emerged as a consequence of the success of the country’s Business Process Outsourcing (BPO)⁹ sector, which is well established and recognised by several international companies around the world.¹⁰ LPOs in South Africa exist both in the domestic markets and in the offshore markets.¹¹ The domestic market pertains to foreign law firms joining forces with local

⁸ English R and Jackson M ‘A Closer look at Legal Process Outsourcing in South Africa’ available at <https://www-mylexisnexis-co-za.ezproxy.uwc.ac.za/Index.aspx#> (accessed 25 May 2018).

⁹ Business Process Outsourcing is the outsourcing of certain business functions to a third party provider offshore or onshore. Examples of business services that are outsourced include accounting, information technology services, payment processing and human resources, to list a few.

¹⁰ Consult C *Legal Process Services South Africa Report* (2015) Business Process Enabling South Africa (BPESA) 23.

¹¹ *Genesis Analysis of the Business Process Services Sector* (2015) Genesis Analytics (Pty) Ltd 31.

law firms. In South Africa's legal sector, there are a number of alliances made between top tier international law firms and South African law firms, which have promoted the entry of businesses into South Africa for the purposes of investing, doing business or to outsource safely.¹² A few examples of these law firms are: Norton Rose Fulbright, Linklaters, and Webber Wentzel.¹³ Having these law firms conduct their business on South African shores and partake in doing business with other local businesses promotes, provides comfort and reinforces the foreign outsourcers' decision to send legal work offshore to South Africa. For the purposes of this thesis, specific attention to the offshore market opportunities in South Africa will be explored. Being that the LPO market operates on an international scale, the reasoning behind the latter focus is to highlight why South Africa is viewed as a preferred outsourcing destination by the outsourcer and the advantages the country provides to the outsourcer.

Surprisingly, the job opportunities available in LPO provider companies is not well known within the South African legal sector nor is it seen as an option to take by either law graduates or amongst qualified legal professionals, towards their career path in law.¹⁴ The latter is mainly due to the South African LPO market being in its infancy stage and as a direct result legal professionals are unaware of the existence of LPO providers and secondly, there is a lack of marketing targeted towards this specific sector.¹⁵

However, despite the LPO market being deemed a relatively new sector in South Africa, the country has amassed a number of accolades in this realm, which have brought it to the attention of local government bodies and also goes to illustrate the extent to which South Africa is seen as a preferred LPO offshore destination. The United Kingdom (UK) National Outsourcing Association and the European Outsourcing Association have both awarded South Africa as the best 'Offshoring Destination 2012'.¹⁶ In addition, South Africa has been recognised as one of the top

¹² Consult *C Legal Process Services South Africa Report* (2015) Business Process Enabling South Africa (BPESA) 23.

¹³ Consult *C Legal Process Services South Africa Report* (2015) Business Process Enabling South Africa (BPESA) 23.

¹⁴ *Genesis Analysis of the Business Process Services Sector* (2015) Genesis Analytics (Pty) Ltd 38.

¹⁵ *Genesis Analysis of the Business Process Services Sector* (2015) Genesis Analytics (Pty) Ltd 38.

¹⁶ English R 'Destination SA: A preferred legal outsourcing destination' (2014) 119 *De Rebus* 34.

four LPO providers around the globe.¹⁷ In research conducted by the London School of Economics on outsourced locations, South Africa ranked in at second place after India.¹⁸ In 2015, the major cities of Johannesburg, Cape Town and Durban were ranked as the 21st, 57th and 100th, respectively, in Tholons Top 100 Outsourcing Destinations report.¹⁹ Furthermore, in their 2015 report, which analysed the Business Process Services sector, Genesis Analytics estimated that the LPO industry in South Africa would experience a conservative 15% to 20% growth in the foreseeable future.²⁰ Therefore, although the LPO sector in South Africa is seen as being in its early stages, it has made a name for itself in this short time and is estimated to continue to expand. Thereby, propelling government bodies to take note and to conduct further analyses into how South Africa can provide the competitive edge within the LPO sector to ensure growth and sustenance.²¹

With all the above-mentioned achievements under its belt, the question that needs to be asked is: Why is South Africa coveted as a preferred LPO offshore destination? The following section will examine the reasons why.

3.3 South Africa - a preferred Legal Outsourcing offshore destination

South Africa, similar to other offshore destination countries (for example: India), has its unique qualities and characteristics that make it an attractive country to do business with. Although South Africa only has a handful of LPO service providers located in the major cities, as a country it has showcased the opportunities it presents to foreign companies willing to do business on its shores.²² The LPO industry has been welcomed by both the government and South African businesses, and seen as a means to elevate the economy's knowledge based services.²³ The previous Trade and Industry Minister, Rob Davies states:

¹⁷ Genesis *Analysis of the Business Process Services Sector* (2015) Genesis Analytics (Pty) Ltd 39.

¹⁸ Davies R 'SA growing as legal outsourcing host' *Business Report* 12 October 2014.

¹⁹ Super User 'Three South African Cities Positioned as Prime Outsourcing Hubs' *Cape Business News* 16 May 2016.

²⁰ Genesis *Analysis of the Business Process Services Sector* (2015) Genesis Analytics (Pty) Ltd 39.

²¹ Consult C *Legal Process Services South Africa Report* (2015) Business Process Enabling South Africa (BPESA) 33.

²² English R and Jackson M 'A Closer look at Legal Process Outsourcing in South Africa' available at <https://www-mylexisnexis-co-za.ezproxy.uwc.ac.za/Index.aspx#> (accessed 25 May 2018).

²³ Davies R 'SA growing as legal outsourcing host' *Business Report* 12 October 2014.

‘There are a number of factors that make South Africa a leading outsourcing location, some of which have only recently crystallised in concert with broader developments in the international legal market place.

The most important attribute remains the country’s legal talent.

The product of a top-tier educational system and carefully monitored professional legal community, the country’s lawyers have the legal training, English legal writing skills and English language skills to function as seamless offshore extensions of their client base operating out of a range of source markets.

As legal outsourcing has gained acceptance, legal organisations now require offshore destinations that can handle complex, one-on-one, live communications that require an articulate and culturally in-touch lawyer.

That is precisely the kind of support a South African lawyer comfortably provides.’²⁴

The above clearly highlights the efficiency and quality of work the South African legal market provides to the outsourcer. South African trained lawyers are viewed as having the linguistic capabilities and the professional know-how to tackle the more complex type of legal work being outsourced. Furthermore, the above acknowledges the acceptance of the LPO industry by legal fraternities.

In its efforts to promote South Africa as the ideal LPO destination, the government is providing the motivation for businesses to open their offices in the country by offering cost reduction opportunities and support.²⁵ As regards LPOs specifically, the South African government has provided LPO providers with incentive grants, which assists them in reducing their overall operating costs by a reasonable percentage, namely, between 11% and 12%.²⁶ The incentives are calculated on the number of jobs

²⁴ Davies R ‘SA growing as legal outsourcing host’ *Business Report* 12 October 2014.

²⁵ Sedutla M ‘South Africa - The Ideal Legal Process Outsourcing Destination?’ available at <https://www-mylexisnexis-co-za.ezproxy.uwc.ac.za/Index.aspx#> (accessed 25 May 2018).

²⁶ Davies R ‘SA growing as legal outsourcing host’ *Business Report* 12 October 2014.

the LPO provider creates for locals in South Africa.²⁷ Therefore the more jobs created for locals the higher the cost saving for the LPO provider.

The most prevalent reasons LPO providers have provided for choosing South Africa as an offshore destination falls within three main categories: the global positioning / location of the country, South Africa's solid infrastructure and the quality and quantity of skills available.

3.3.1 Location

South Africa is located on the southern tip of the African continent. The geographic location of South Africa makes it an accessible country, in that there are daily flights to and from South Africa to other countries around the world on a regular basis. Also, South Africa has a compatible time zone, being either a few hours ahead or behind the outsourcer. In the case of the UK, South Africa is only an hour or two ahead.²⁸ Where the time difference is greater, it translates to work being conducted during South African working hours while the outsourcer sleeps. When the outsourcer starts their workday, they will have the completed outsourced legal work waiting for them in their inbox, available for their review and comment. This ensures that work is being performed and delivered 24 hours a day irrespective of the time zones.

South Africa shares a cultural affinity with the UK, United States of America (US), Australia and the New Zealand markets.²⁹ The afore-mentioned countries predominantly act in their capacity as an outsourcer, sending legal work to LPO offshore destinations. Being that South Africa is located geographically closer to most of the countries outsourcing legal work, South Africa's position on the map brings comfort to the outsourcer who is sending confidential information offshore, as it is more reachable to them as an offshore destination.³⁰

²⁷ Davies R 'SA growing as legal outsourcing host' *Business Report* 12 October 2014.

²⁸ *Genesis Analysis of the Business Process Services Sector* (2015) Genesis Analytics (Pty) Ltd 37.

²⁹ Manyathi-Jele N 'LPO Report Launched' available at <http://www.fidfund.co.za/wp-content/uploads/2017/10/September-2015-Outsourcing-by-legal-practitioners.pdf> (accessed 21 June 2018).

³⁰ Consult *C Legal Process Services South Africa Report* (2015) Business Process Enabling South Africa (BPESA) 20.

Another key advantage to outsourcing to South Africa is its linguistic capabilities. South Africa has 13 official languages with the majority of the South African population being able to speak and write fluent English with a neutral accent.³¹ This is especially beneficial when conversing with the outsourcer, their clients and any other parties on behalf of the outsourcer, in that it provides a semblance of proximity and similarity with the outsourcer's culture.

The UK is South Africa's principal outsourcer.³² The country shares cultural similarities with the UK, for instance they have similar religious beliefs, partake in the same national sports and South Africa was at one point in history, an English colony.³³ The UK lawyers therefore view South Africa as an extension of themselves and this brings added comfort and piece of mind to the outsourcer when sending legal work offshore. Having these shared interests and history supports the outsourcer's decision in electing South Africa as a favoured LPO offshore destination as it creates a precedent of having successfully partaken in business transactions with South Africa. Therefore eliminating the fear of the unknown, when outsourcing legal services to an offshore destination.

The above is further complimented by South Africa having a favourable exchange rate, allowing for effective business opportunities to thrive in the current economical climate as well as ensuring a superior quality of life for foreigners living in the country.³⁴

³¹ Fortuin L 'Compelling Reasons your Company should Consider South Africa as an Alternative to India and Philippines as an Offshoring Destination' available at <https://www.linkedin.com/pulse/compelling-reasons-your-company-should-consider-south-lorna-fortuin> (accessed 25 May 2018).

³² Genesis *Analysis of the Business Process Services Sector* (2015) Genesis Analytics (Pty) Ltd 37.

³³ Weimer M and Vines A 'UK - South Africa Relations and the Bilateral Forum' available at https://www.chathamhouse.org/sites/default/files/19481_sa-uk_links.pdf (accessed 05 September 2018).

³⁴ Fortuin L 'Compelling Reasons your Company should Consider South Africa as an Alternative to India and Philippines as an Offshoring Destination' available at <https://www.linkedin.com/pulse/compelling-reasons-your-company-should-consider-south-lorna-fortuin> (accessed 25 May 2018).

3.3.2 Infrastructure

South Africa boasts a strong infrastructure (for example: electricity, transport, healthcare and utility systems) that is continually being maintained and improved upon;³⁵ a stable democracy and is known as the leader in the information, communication and telecommunications sector in the Southern African Development Community (SADC) region.³⁶ Having a robust communications system is especially significant to the LPO provider who relies heavily on technology to perform legal work efficiently and with a speedy turnaround time. Overall, in terms of infrastructure, South Africa provides a 20% to 30% cost saving for LPO providers who have made the decision to set up business in the country.³⁷

3.3.3 Skills

There is a vast pool of qualified legal professionals in South Africa. In the Business Process Enabling South Africa's (BPESA) 2015 report on LPO services available in South Africa, it was estimated that there are approximately 7000 law students graduating annually and 20 500 registered practicing lawyers.³⁸ Of the total law graduates only 3000 will be accepted into law firms to pursue their law career further.³⁹ By contrast, according to the Law Society of South Africa, there are approximately 7000 students who register for a law degree and only 3800 of these applicants graduate annually. Of the law graduates, only 2000 will enter formal legal practice.⁴⁰ The Law Society of South Africa states that their figures do not take into account the number of paralegals in South Africa as well as people who are skilled in the disciplines of management, finance and administration. Therefore, the figures could be much higher than indicated.

³⁵ Sedutla M 'South Africa - The Ideal Legal Process Outsourcing Destination?' available at <https://www-mylexisnexis-co-za.ezproxy.uwc.ac.za/Index.aspx#> (accessed 25 May 2018).

³⁶ Consult *C Legal Process Services South Africa Report* (2015) Business Process Enabling South Africa (BPESA) 5.

³⁷ Consult *C Legal Process Services South Africa Report* (2015) Business Process Enabling South Africa (BPESA) 24.

³⁸ Myburgh Attorneys 'Legal Process Outsourcing Gaining Momentum' *Financial Mail* 18 September 2013.

³⁹ Myburgh Attorneys 'Legal Process Outsourcing Gaining Momentum' *Financial Mail* 18 September 2013.

⁴⁰ *Genesis Analysis of the Business Process Services Sector* (2015) Genesis Analytics (Pty) Ltd 35.

Despite, the differences in the figures provided by both bodies, they demonstrate that there is ultimately an oversupply and abundance of legal professionals in South Africa, who are suitably qualified and ready to perform legal work. LPO companies provide this pool of talented legal professionals with the perfect opportunity to hone their legal skills while accumulating international exposure and the opportunity to work with top law firms and companies around the world.

Outsourcing countries are of the opinion that the legal education provided in South Africa is considered to be of a high standard.⁴¹ The reasoning behind the latter stems from the fact that English law influences South Africa's common law system.⁴² South Africa houses some of the top universities and has a quality secondary education system.⁴³ Legal professionals obtaining their qualification in the country can boast that they are in fact similar to those in the UK and other commonwealth countries.⁴⁴ The latter is as a consequence of South Africa having a similar legal system to that of the UK⁴⁵ and Australia⁴⁶.⁴⁷ In fact, South Africa's legislative and regulatory framework is built on UK's jurisprudence.⁴⁸ This similarity provides the outsourcer with added comfort and gives the legal professionals working in the LPO provider companies in South Africa, the advantage of being able to perform low-level to higher-level legal work on an international scale.⁴⁹

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⁴¹ Cattaneo O, Engman M, Sáez S et al *International Trade in Services: New Trends and Opportunities for Developing Countries* (2010) 79.

⁴² Department of Justice 'History and Background' available at <http://www.justice.gov.za/sca/historysca.htm> (accessed 05 September 2018).

⁴³ Collier S 'Top Law Schools in 2017' available at <https://www.topuniversities.com/university-rankings-articles/university-subject-rankings/top-law-schools-2017> (accessed 05 September 2018).

⁴⁴ Department of Justice 'History and Background' available at <http://www.justice.gov.za/sca/historysca.htm> (accessed 05 September 2018).

⁴⁵ Schreiner The Hon. OD 'The Contribution of English Law to South African Law; and The Rule of Law in South Africa' available at https://socialsciences.exeter.ac.uk/media/universityofexeter/schoolofhumanitiesandsocialsciences/law/pdfs/The_Contribution_of_English_Law_to_South_African_Law.pdf (accessed 05 September 2018).

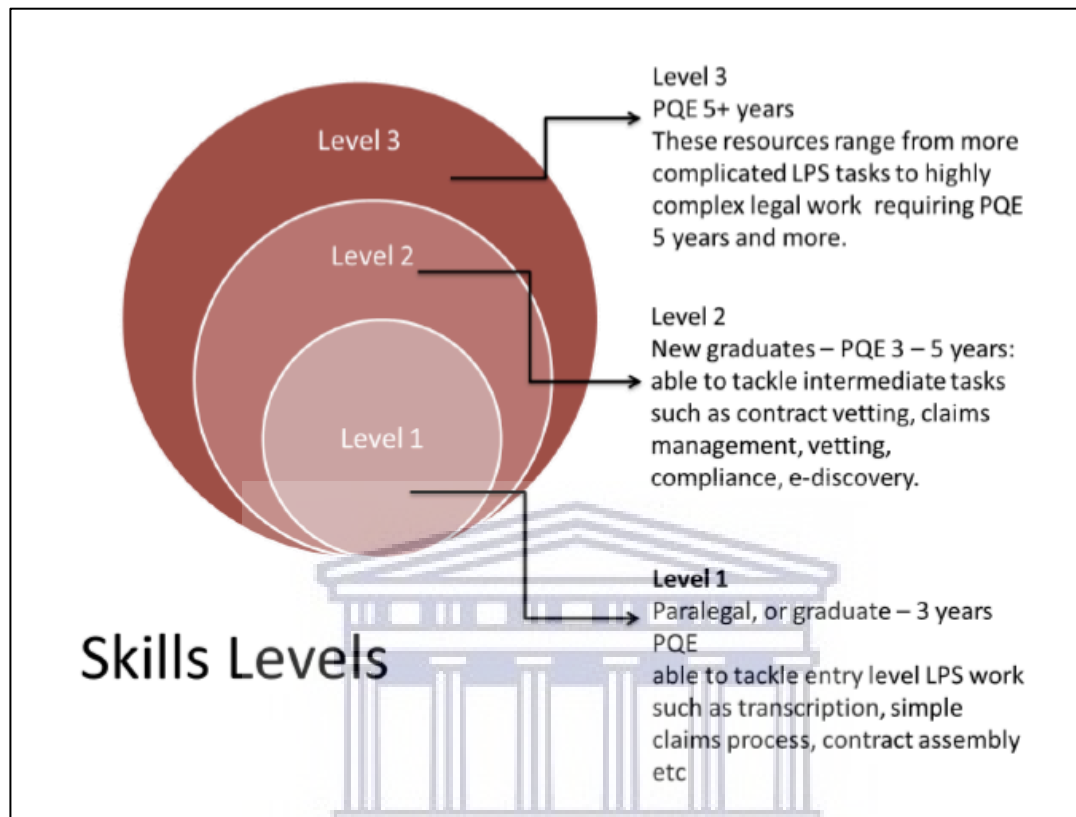
⁴⁶ Both South Africa and Australia's common law systems are based on English law.

⁴⁷ University of Ottawa 'World Legal Systems' available at <https://web.archive.org/web/20061106165657/http://www.droitcivil.uottawa.ca/world-legal-systems/eng-monde.php> (accessed 05 September 2018).

⁴⁸ Thomas PJ, Stoop BC and Van Der Merwe CG 'The Historical Foundations of South African Private Law' (2016) Chapter 5.

⁴⁹ *Genesis Analysis of the Business Process Services Sector* (2015) Genesis Analytics (Pty) Ltd 36.

The diagram below showcases the variety of skill levels available in South Africa to the outsourcer:⁵⁰



Source: Consult C *Legal Process Services South Africa Report* (2015) Business Process Enabling South Africa (BPESA) 29.

The diagram illustrates the three levels of skilled legal professionals available in South Africa, along with the type of legal services they would be able to provide to the outsourcer. This further demonstrates the array of services and the quality of skills readily available in the country. The above three skill levels can be compared to align with Lacity and Willcocks analysis of the three skill levels and qualifications that would be required by persons working in the LPO sector.⁵¹ Whereby level 1 is reserved for work performed by graduate lawyers partaking in basic legal work; level 2 required that mid-level legal work be performed by junior lawyers with between 3 to 5 years of practical experience; and level 3 focused on more complex type work to be performed by lawyers who had a minimum of 5 years experience in practicing law.

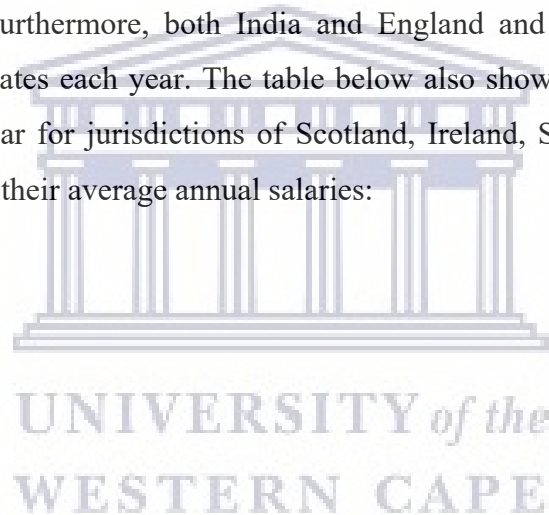
⁵⁰ The term ‘LPS’ in the diagram refers to Legal Process Services, which is another name used to refer to Legal Process Outsourcing.

⁵¹ See Chapter 2 (The Growth and Development of the Legal Process Outsourcing), section 2.4 (The Services).

Therefore, the skill levels available in South Africa can be said to align with Lacity and Willcocks analysis of the skill levels and qualifications on offer in LPOs.

The salary bands of legal professionals in South Africa provides an added benefit to both the outsourcer and the LPO service provider, in that they are comparatively lower than the salaries of UK lawyers, for example.⁵² This makes South Africa a favoured destination in particular for UK based clients.⁵³ It is estimated that South Africa LPO providers offer UK law firms a cost savings of between 30%⁵⁴ and 40 to 45%.⁵⁵

By comparison and as is apparent from the table below, while India offers the lowest cost regards the affordability of legal skills as compared to South Africa, the UK has the overall highest. Furthermore, both India and England and Wales have a high number of legal graduates each year. The table below also showcases the number of legal graduates per year for jurisdictions of Scotland, Ireland, South Africa and the Philippines, as well as their average annual salaries:



⁵² Cattaneo O, Engman M, Sáez S et al *International Trade in Services: New Trends and Opportunities for Developing Countries* (2010) 79.

⁵³ Lacity M and Willcocks LP 'Rethinking Legal Services in the face of Globalisation and Technology Innovation: the case of Radiant Law' (2016) 6 *Journal of Information Technology Teaching Cases* 16.

⁵⁴ Myburgh Attorneys 'Legal Process Outsourcing Gaining Momentum' *Financial Mail* 18 September 2013.

⁵⁵ Super User 'Three South African Cities Positioned as Prime Outsourcing Hubs' *Cape Business News* 16 May 2016.

Location	Number of Legal graduates	Approximate yearly cost of Graduate
England and Wales	18 000	R680 000
Scotland	3100	R612, 000
Ireland	3500	R510, 000
South Africa	3800	R204,000
India	80 000	R170, 000
Philippines	5000	R136, 000

Source: Channel Consult

Source: Genesis *Analysis of the Business Process Services Sector* (2015) Genesis Analytics (Pty) Ltd 36.

Outsourcers aim to achieve low cost savings while maintaining the same level of skill in performing legal services.⁵⁶ South Africa provides this advantage, while being competitive in pricing structures with India and the Philippines, South Africa offers value in the quality of skills the country offers to the outsourcer, making it a fitting choice. What is interesting to note, is that South Africa is 50% cheaper in their cost of labour than England and Wales, Scotland and Ireland.⁵⁷ Making it an attractive option for outsourcers in the UK. While India offers cheaper legal skills than South Africa, by comparison, South Africa offers lower risk as it shares similar legal systems to that of the outsourcer.⁵⁸

⁵⁶ Genesis *Analysis of the Business Process Services Sector* (2015) Genesis Analytics (Pty) Ltd 35.

⁵⁷ Genesis *Analysis of the Business Process Services Sector* (2015) Genesis Analytics (Pty) Ltd 35.

⁵⁸ Schreiner The Hon. OD 'The Contribution of English Law to South African Law; and The Rule of Law in South Africa' available at https://socialsciences.exeter.ac.uk/media/universityofexeter/schoolofhumanitiesandsocialsciences/law/pdfs/The_Contribution_of_English_Law_to_South_African_Law.pdf (accessed 05 September 2018).

The maximum cost⁵⁹ of the available skills for each category of experienced legal professionals across various jurisdictions is depicted in the table below:

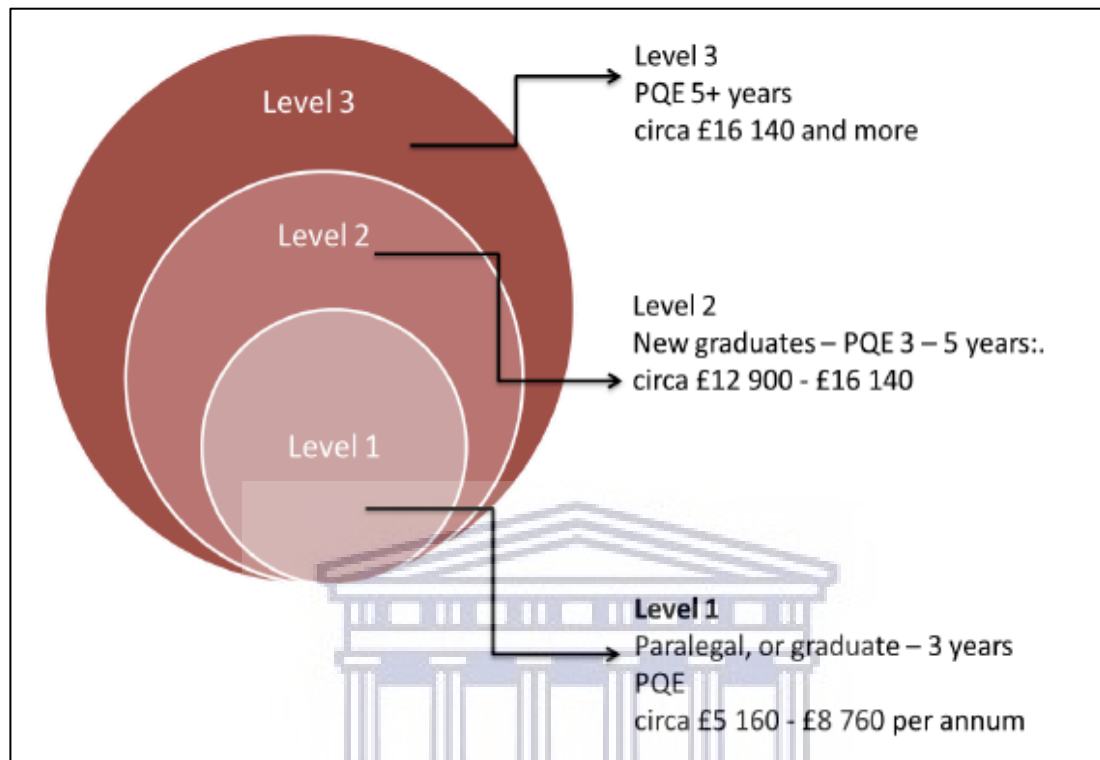
Country	New Graduate	3 years Post Qualification Experience (PQE)	5 years Post Qualification Experience (PQE)
SA	£12 000	£25 000	£34 000 £46 000
India	£8 600	£12 900	£19 400
Philippines	£6 800	£8 700	\$17 000
UK (London)	£56 000	£75 300	£88 300
Australia (top tier)	£41 500	£53 200	£75 200

Source: Consult C *Legal Process Services South Africa Report* (2015) Business Process Enabling South Africa (BPESA) 30.

Firstly, it should be pointed out that the above table looks mainly at the maximum salaries paid to law graduates and qualified lawyers but does not take into account the salaries of paralegals. When analysing the above figures, it once again becomes clear that India and the Philippines provides the lowest costs of labour as LPO offshore destinations than South Africa. Moreover, the cost of labour in the outsourcers' jurisdiction, the UK and Australia, are both substantially higher than the LPO providers. In spite of the latter, South Africa is still an affordable option.

⁵⁹ The figures in the table relate to the maximum salaries of legal professionals in the year 2015.

The table below provides a more realistic overview of the salaries⁶⁰ earned by legal professionals in South Africa:



Source: Consult C *Legal Process Services South Africa Report* (2015) Business Process Enabling South Africa (BPESA) 31.

The diagram above reinforces the fact that the cost of skills across the three available levels in South Africa is still lower than the outsourcer originator but competitively in line with the low cost LPO providers based in India and the Philippines.

In summary, South Africa is a preferred LPO offshore destination as it creates value through its linguistic capabilities; availability and affordability of duly qualified legal professionals; similar legal and regulatory framework; complementary time zone and cultural affinity. South Africa as a provider of LPO services is focused more on increasing the value of the legal services being performed versus the volume.⁶¹ Thereby providing the dual benefit of quality of work and cost savings to the outsourcer.

⁶⁰ Salaries earned by legal professions in South Africa in the year 2015.

⁶¹ Consult C *Legal Process Services South Africa Report* (2015) Business Process Enabling South Africa (BPESA) 11.

Having established why South Africa is a preferred offshore destination for the outsourcer, the legal and regulatory framework as regards outsourcing will now be explored so as to garner South Africa's position on the outsourcing legal services.

3.4 South Africa's legal and regulatory framework

South African law does not currently regulate the outsourcing of legal services.⁶² Similar to other jurisdictions, there are set legal requirements that impact foreign companies or individuals who wish to open a business in South Africa, and which they are obligated to be compliant with.⁶³ The latter however depends upon the type of industry that is outsourcing⁶⁴ (for example financial services industry, information technology industry, mining industry, to list but a few) and the type of company to be formed (for example public or private company, personal liability company, partnership, business trust, sole proprietorship or branch of an external foreign company).

As previously mentioned in Chapter 1 (Introduction), there currently are no laws or regulations that pertain specifically to the LPO industry. The LPO service providers are therefore compelled to adhere to the domestic laws and regulations of the country when it comes to the aspects of running their business.⁶⁵ For instance, complying with current taxation laws, labour regulations and registering the business, to name a few. But when it comes to the outsourcing of legal services, lawyers / the outsourcer are left to ascertain what the best approach would be in their dealings with the LPO providers. While the LPO provider has to determine the required standards that would complement their clients' needs while complying with foreign laws and regulations and balancing this with applicable local laws.

⁶² Bembridge A, Parker M, Ballin J et al 'Outsourcing: South Africa Overview' available at [https://uk.practicallaw.thomsonreuters.com/7-505-4428?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/7-505-4428?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1) (accessed 9 November 2017).

⁶³ Western Cape Government 'Starting your own Small Business?' available at <https://www.westerncape.gov.za/red-tape-reduction/files/atoms/files/Starting%20your%20own%20small%20business%20guide.pdf> (accessed 05 September 2018).

⁶⁴ See Chapter 2 (The Growth and Development of Legal Process Outsourcing) section 2.2 (The evolving legal marketplace) footnote 11.

⁶⁵ Bhagattjee P 'The Ins and Outs of Outsourcing' available at <https://www.cliffedekkerhofmeyr.com/en/news/press-releases/2015/tmt/the-ins-and-outs-of-outsourcing.html> (accessed 25 May 2018).

The specific legislative and regulatory frameworks that this research will explore as they pertain to the outsourcing of legal services are:

- the Legal Practice Act 28 of 2014 (LPA),
- Rule 33 of the Rules of the Attorneys' Profession,
- the Constitution of the Republic of South Africa, 1996 and
- the Protection of Personal Information Act 4 of 2013 (POPI).

Only the above legislation will be reviewed as they are the principal rules and Acts which govern the practice of legal professionals in South Africa.

3.4.1 The Legal Practice Act 28 of 2014

The South African legal profession is regulated by the LPA.⁶⁶ Five months have elapsed since many provisions of the LPA came into effect on 1 November 2018. It is hoped that all those affected by the Act (within the profession and the consumers of legal services) have now read this seminal piece of legislation and the corresponding regulations. These rules regulate the practice of law by attorneys, advocates and candidate legal practitioners (collectively referred to as 'legal practitioners' under the LPA) to ensure the accessibility and accountability of legal professionals to the public. The LPA also aims to standardise both the minimum qualifications and training required by any person wishing to enter the legal market.⁶⁷ Section 36 of the LPA stipulates that there is a code of conduct by which all practicing legal practitioners, candidate legal practitioners and juristic entities must observe. Failure to do so will amount to a case of misconduct with the appropriate disciplinary measures being taken, as laid out in the Act.⁶⁸ There is however, no section or clause in the LPA that would apply specifically to the outsourcing of legal services, neither is the authority of local legal practitioners to practice law of foreign jurisdictions addressed.

⁶⁶ Law Society UK 'A New Regulatory Framework for the Legal Profession in South Africa' available at <http://communities.lawsociety.org.uk/international/regions/africa-and-the-middle-east/south-africa/a-new-regulatory-framework-for-the-legal-profession-in-south-africa/5059917.fullarticle> (accessed 25 May 2018).

⁶⁷ Law Society UK 'A New Regulatory Framework for the Legal Profession in South Africa' available at <http://communities.lawsociety.org.uk/international/regions/africa-and-the-middle-east/south-africa/a-new-regulatory-framework-for-the-legal-profession-in-south-africa/5059917.fullarticle> (accessed 25 May 2018).

⁶⁸ Legal Practice Act 28 of 2014 section 36(2).

In addition, there are no proposed bills before parliament, in respect of legal outsourcing transactions.⁶⁹

The specifics of the code of conduct legal professionals must adhere to are set out under section 97(1)(b) of the LPA. Part VII of the code of conduct applies to legal practitioners not in private practice but who are employed for the purpose of providing various legal services for a salary. Being that the legal practitioners working in LPO service centres are not in private practice for example working in law firms or on their own as solo legal practitioners, this section would therefore apply to them. Part VII of the code of conduct names legal practitioners who are not working in private practice by the term ‘corporate counsel’. In a broad context, under this section, the legal practitioners are duty-bound to act in an ethical and professional capacity and must commit to ensuring that there is no conflict of interest in the duties they perform. Section 67 of the code of conduct specifically states:

‘67.2 Corporate counsel must at all times act in an ethical manner and should, without limiting the general nature of this duty, adhere to the following standards of conduct:

- 67.2.1 act in a fair, honest and transparent manner, and with dignity and integrity;
- 67.2.2 remain impartial and objective, and avoid subordination or undue influence of their judgment by others;
- 67.2.3 give effect to legal and ethical values and requirements, and treat any gap or deficiency in a law, regulation, standard or code in an ethical and responsible manner;
- 67.2.4 not engage in any act of dishonesty, corruption or bribery;
- 67.2.5 make disclosure to any relevant party any personal, business or financial interest in his or her employer or its business or in any stakeholder so as to avoid any perceived, real or potential conflict of interest;
- 67.2.6 not knowingly misrepresent or permit misrepresentation of any fact;
- 67.2.7 provide opinions, decisions, advice, legal services or recommendations that are honest and objective.

⁶⁹ Parliament of South Africa *Bills Before Parliament* (2018)

67.3 Corporate counsel must, when providing legal services or advice to his or her employer, be free from any conflict of interest, financial interest or self interest in discharging his or her duty to the employer. Without limiting the generality of this duty, a corporate counsel must –

67.3.1 be and appear to be free of any undue influence or self-interest, direct or indirect, which may be regarded as being incompatible with his or her integrity or objectivity;

67.3.2 assess every situation for possible conflict of interest or financial interest, and be alert to the possibility of conflicts of interest;

67.3.3 immediately declare any conflict of interest or financial interest in a matter, and must recuse himself or herself from any involvement in the matter;

67.3.4 be aware of and discourage potential relationships which could give rise to the possibility or appearance of a conflict of interest;

67.3.5 not accept any gift, benefit, consideration or compensation that may compromise or may be perceived as compromising his or her independence or judgment.

67.4 Corporate counsel must at all times act in a professional manner. Without limiting the generality of this duty corporate counsel must –

67.4.1 act with such a degree of skill, care, attention and diligence as may reasonably be expected from a corporate counsel;

67.4.2 communicate in an open and transparent manner with his or her employer and with third parties, and not intentionally mislead his or her employer or any third party;

67.4.3 make objective and impartial decisions based on thorough research and on an assessment of the facts and the context of the matter;

67.4.4 exercise independent and professional judgment in all dealings with his or her employer and with third parties;

67.4.5 remain reasonably abreast of legal developments, applicable laws, regulations, legal theory and the common law, particularly where they apply to his or her employer and the industry within which he or she operates;

67.4.6 comply with and observe the letter and the spirit of the law, and in particular those relevant to his or her employer or to the industry in which

- he or she operates, including internal binding and non-binding codes, principles and standards of conduct;
- 67.4.7 observe and protect confidentiality and privacy of all information made available to him or her and received during the course of performing his or her duties, unless there is a legal obligation to disclose that information;
- 67.4.8 generally act in a manner consistent with the good reputation of legal practitioners and of the legal profession, and refrain from conduct which may harm the public, the legal profession or legal practitioners or which may bring the legal profession or legal practitioners into disrepute.⁷⁰

In reference to the above quoted text, legal practitioners who work for an employer are tasked with acting in an ethical and professional manner, while remaining transparent on potential conflicts that could jeopardise the legal services they provide on behalf of their employer. They are to act with honesty, remain objective and disclose any pertinent information to the relevant parties in order to maintain their ethical duties. Moreover, when providing legal services they are to comport themselves with integrity and they are to report upon, assess and monitor any potential conflicts of interest. The legal practitioner must at all times remain professional in the performance of their duties. This entails: communicating effectively, attending to the performance of the legal services with the level of skill required of someone in their position, protecting confidential information, remaining up to date on new developments in the law and the industry they work in, as well as ensuring that they uphold the reputation of the legal profession in a positive manner at all times.

Although the legal practitioners working in LPOs are not deemed to be practicing lawyers⁷¹ per se, they are however, held under the same principal of ethics and professionalism as practicing lawyers are expected to observe in South Africa. They are to uphold a high level of integrity, honesty and transparency in carrying out their duties with their employer. There is also a duty for the legal practitioner to keep all confidential information in their possession safe from disclosure and only divulge the information should the law require them to do so. The latter is especially significant to

⁷⁰ Code of Conduct section 97(1)(b) Part VII of the Legal Practice Act 28 of 2014.

⁷¹ See Chapter 4 (A Comparative Analysis of the Legal Systems of the United Kingdom and India) footnote 105.

offshore LPO providers who are privy to receiving privileged and sensitive information from the outsourcer. Overall, the codes of conduct non-practicing legal practitioners working in the LPO industry need comply with are in essence the same as those imposed upon practicing lawyers⁷² in South Africa. Therefore, by introducing a regulation for this sector, it would ensure adherence to ethical standards and also ensure that both practicing and non-practicing legal practitioners comply with the same standards of practice. Having a regulation for the outsourcing industry would effectively ensure that the performances of legal services are standardised and any possible conflicts are managed in the best interests of the client.

3.4.2 Rule 33 of the Rules of the Attorneys' Profession

Prior to the enactment of the LPA, different rules applied to legal practitioners (attorneys and advocates) practicing in South Africa.⁷³ The General Council of the Bar of South Africa, which applied to advocates, had its own uniform rules of professional conduct, but the rules did not address the outsourcing of legal services. By comparison, Rule 33 of the Rules of the Attorneys' Profession⁷⁴ which came into effect on the 01st March 2016, made reference to the subcontracting of legal work to third parties:

‘Contracting of legal work to third parties

- 33.1 Where a member subcontracts legal work, which in the normal course would or could have been performed by the member personally, to a third party service provider, the consent of the client must first have been obtained. Such consent must be informed consent, and in particular, the client must have been informed as to whether any confidential information will be made available to the service provider.

⁷² See Chapter 4 (A Comparative Analysis of the Legal Systems of the United Kingdom and India) footnote 105.

⁷³ The General Council of the Bar of South Africa's uniform rules of professional conduct and the Rules of the Attorneys' Profession have been replaced by the provisions of the Legal Practice Act 28 of 2014.

⁷⁴ Section 74(4) Attorneys' Act 53 of 1979.

- 33.2 Unless otherwise agreed to the contrary in writing the member should take reasonable steps to ensure that the instructions given to the service provider are properly carried out. Although the member will not be required to maintain a day-to-day supervision of the work done, the member must exercise an independent judgment on the quality of the work.
- 33.3 Where the service provider is not a practising practitioner or a practising advocate or a firm which is subject to the rules of ethics and professional conduct of the society, the member must conclude a written confidentiality agreement with the service provider providing for reasonable safeguards to protect the confidentiality of any client information.
- 33.4 The member should endeavour to ensure that the service provider does not have a conflict of interest relative to the member's client by obtaining a written assurance to that effect from the service provider. This rule does not apply to the outsourcing of copying services, file storage services or information technology and communication services which are used in the provision of legal services but it does apply to expert forensic services which are provided in relation to information and communication technologies.
- 33.5 The member should take reasonable steps to ensure that the client's privilege, if any, in the information disclosed to the service provider is maintained.
- 33.6 Where the service provider is not a practising attorney or a firm subject to the rules of ethics and professional conduct of the society, or is not a practising advocate, the member should take reasonable steps to ensure that the service provider understands and complies with the rules of professional conduct.
- 33.7 A member who outsources legal work may not receive any undisclosed allowance on the fees payable to the outsource service provider save for outsources traditionally permitted between correspondent practitioners. Any discount on fees must, unless otherwise agreed in writing with the client, accrue for the benefit of the client.
- 33.8 The member shall not be entitled to add a premium to the amount paid to the service provider and must seek to recover that amount from the client as a disbursement only. However, the member shall be entitled to charge a reasonable

fee for work actually performed by him in instructing the service provider and in reviewing the service provider's work.

- 33.9 Where a member subscribes on a regular basis to the services of a third party service provider irrespective of the requirements of a specific client (including, but not limited to, a commercial subscription to an internet-based intellectual property search facility) the member shall be entitled to charge a reasonable fee to the client for the use of those services in attending to any matter on behalf of the client.⁷⁵

In a nutshell, Rule 33 of the Rules for Attorneys' Profession was amenable to legal work being subcontracted out to third parties provided the following criteria is met: client consent is obtained; proper supervision of the legal work being performed is to be carried out to ensure the quality of the work product; non-practicing legal professionals and companies are to enter into confidentiality agreements to safeguard the confidential information being shared between parties; ensure that no conflict of interest exists; client privilege should be protected; professional codes of conduct must be maintained; and lawyers are to adhere to the application of fees as prescribed in the rules. Rule 33.7 in particular makes reference to the fees an outsourcer is not permitted to charge or take when outsourcing. It is apparent from this section that the rules would apply to the outsourcer originator as opposed to the LPO provider.

However, although the provisions of the LPA have replaced these rules, the question that arises is, are the rules still relevant to the outsourcing legal work? Moreover, being that the outsourcer is effectively subcontracting / outsourcing legal work to South Africa, would they be expected to comply with both their jurisdiction rules and that of South Africa as regards outsourcing? Which laws would take precedent - the foreign jurisdiction or the domestic laws and regulations? These will need to be determined in light of the fact that there are no regulations for the outsourcing of legal services.

What is clear is that although the rules under Rule 33 and are no longer applied to legal practitioners admitted to practice in South Africa and who outsource work to

⁷⁵ Rule 33 of the Rules of the Attorneys' Profession.

third parties, as they were repealed by the LPA, this section provides guidance on maintaining key ethical codes of conduct. This includes codes pertaining to obtaining client consent; supervision of the legal work, client confidentiality, avoiding conflicts of interest, billing appropriately and compliance with professional conduct rules. Interestingly, the latter are all the main ethical concerns that have been challenged and raised by LPOs.⁷⁶ It is important to note that although, the outsourcer would not be required to adhere to the terms of Rule 33, they would have to comply with the rules imposed by the jurisdiction for which they are licensed to practice law.

The LPO provider based in South Africa are thus under an obligation to comply with domestic laws and regulations as far as business transactions are concerned. The legal practitioners they employ to perform the required legal services are to comply and adhere with the LPA and its code of conduct in the performance of their duties. Moreover, they are to maintain a high standard of ethical conduct towards the clients they serve on behalf of the outsourcer, especially in light of the exchange of confidential information between the parties.⁷⁷

3.4.3 Constitution of the Republic of South Africa, 1996

The Constitution of South Africa is the supreme law of the country, which enshrines the Bill of Rights, thereby protecting the rights of all people in the country. Any law or conduct, which is deemed to be inconsistent with the Constitution of South Africa, is considered invalid. The relevant section of the Constitution of South Africa in respect of outsourcing legal work, is section 14 which protects the right to privacy, Section 14 states:

‘Everyone has the right to privacy, which includes the right not to have—

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; or

⁷⁶ The ethical challenges posed by the practice of outsourcing legal work offshore will be explored in greater detail in Chapter 5 (Ethical Principles and the Practice of Law).

⁷⁷ Gibson K ‘Ethics in action in the Legal Profession’ available at <http://www.strausdaly.co.za/2017/04/03/ethics-action-legal-profession/> (accessed 11 September 2017).

(d) the privacy of their communications infringed.’

In light of the above, section 14(d) relates to ensuring that information divulged by a person, for example the client, is kept private and free from infringement. Therefore, in the outsourcing scenario, the outsourcer is to ensure that information provided by the client is kept confidential and secure so that there is no risk of unwarranted exposure.

3.4.4 Protection of Personal Information (POPI) Act 4 of 2013

In South Africa, the common law provisions such as section 14 of the Constitution of South Africa (right to privacy) and POPI, both regulate the processing, storing and protection of data.⁷⁸ POPI is essentially South Africa’s data protection Act. Under chapter 3 of POPI, the responsible party, for example the LPO provider, needs to ensure that all data collected, stored and processed is in compliance with the Act. The LPO provider must also certify that all applicable security measures are in place to safeguard the confidential information shared with them by the outsourcer.⁷⁹ Section 72 of POPI deals with the transfer of data across-borders. The latter will only be permitted in certain circumstances. Primarily data will only be allowed to transfer across the border where the country where the information will be processed or the recipient of the information are subject to similar rules as those imposed in POPI.⁸⁰ Where no such legislation exists, the parties involved in the exchange of data will have to enter into a data protection agreement.⁸¹

⁷⁸ Bembridge A, Parker M, Ballin J et al ‘Outsourcing: South Africa Overview’ available at [https://uk.practicallaw.thomsonreuters.com/7-505-4428?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/7-505-4428?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1) (accessed 9 November 2017).

⁷⁹ Bembridge A, Parker M, Ballin J et al ‘Outsourcing: South Africa Overview’ available at [https://uk.practicallaw.thomsonreuters.com/7-505-4428?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/7-505-4428?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1) (accessed 9 November 2017).

⁸⁰ Michalsons ‘Data Privacy or Data Protection in South Africa’ available at <https://www.michalsons.com/blog/data-privacy-in-south-africa/150> (accessed 09 July 2018).

⁸¹ Michalsons ‘Data Privacy or Data Protection in South Africa’ available at <https://www.michalsons.com/blog/data-privacy-in-south-africa/150> (accessed 09 July 2018).

POPI is based primarily on UK's Data Protection Act⁸² and the European Union data protection laws.⁸³ However, it is important to note that although POPI has been signed into law, it has not yet come into full effect and no commencement date has been confirmed or forecasted yet.⁸⁴ This leaves the outsourcer outsourcing work to South Africa in a vulnerable state. Once POPI is implemented it will bring South Africa's data protection legislation on par with international standards. In the interim, LPO providers are left to decide on the applicable measures to take to safeguard the confidential information entrusted to them. LPO providers must also work closely together with the outsourcer to establish the best method to protect the data while maintaining compliance with the foreign jurisdictions legislation as regards the protection of data.

It is recommended that data protection provisions be included in the outsourcing agreements entered into between the LPO provider and the outsourcer originator.⁸⁵ The outsourcing provider must ensure that the best practices as per international standards of data protection and the minimum standards required by local laws are adhered to.⁸⁶ Where there is an absence of data protection provisions or an inadequacy of existing data protection provisions in the offshore LPO destination, the service provider is expected to comply with the outsourcers' countries data protection policies and procedures.⁸⁷ This places a great responsibility on both the LPO provider and the outsourcer to establish the best practice to follow in the outsourcing of legal services offshore. Which arguably translates to there being free reign to decide what

⁸² Van Zyl L 'POPI in a Nutshell' available at <http://dommisseattorneys.co.za/blog/pop-i-nutshell/> (accessed 17 March 2019).

⁸³ Bembridge A, Parker M, Ballin J et al 'Outsourcing: South Africa Overview' available at [https://uk.practicallaw.thomsonreuters.com/7-505-4428?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/7-505-4428?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1) (accessed 9 November 2017).

⁸⁴ Michalsons 'Data Privacy or Data Protection in South Africa' available at <https://www.michalsons.com/blog/data-privacy-in-south-africa/150> (accessed 09 July 2018).

⁸⁵ Bembridge A, Parker M, Ballin J et al 'Outsourcing: South Africa Overview' available at [https://uk.practicallaw.thomsonreuters.com/7-505-4428?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/7-505-4428?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1) (accessed 9 November 2017).

⁸⁶ Bembridge A, Parker M, Ballin J et al 'Outsourcing: South Africa Overview' available at [https://uk.practicallaw.thomsonreuters.com/7-505-4428?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/7-505-4428?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1) (accessed 9 November 2017).

⁸⁷ Bembridge A, Parker M, Ballin J et al 'Outsourcing: South Africa Overview' available at [https://uk.practicallaw.thomsonreuters.com/7-505-4428?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/7-505-4428?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1) (accessed 9 November 2017).

works best when outsourcing legal work and therefore the emergence of various degrees of standards being met to achieve the delivery of the legal services. A consequence of not having a uniform standard would be that it could lead to the elevation of risk and an increase in possible ethical challenges thereby compromising the legal sector's reputation and integrity.

In summary, in South Africa the existing legislative and regulatory frameworks as regards outsourcing legal services are namely: the LPA; Rule 33 of the Rules of the Attorneys' Profession, the Constitution of the Republic of South Africa and POPI. The LPA caters for work conducted by legal practitioners who are not in private practice but who provide legal services to an employer for payment. The LPO business model would therefore fall under the scope of this section since the legal practitioner working on site at the LPO provider's premises are performing legal services under their employ for an agreed fee. By comparison, Rule 33 of the Rules of the Attorneys' Profession addresses the professional duties attorneys in South Africa are to uphold when contracting legal work to third parties. The rules place emphasis on obtaining client consent, ensuring confidential material is kept secure, minimising conflicts of interest, and invoicing the client reasonably for services rendered by the third party provider. The latter are enshrined and form part of the professional standard lawyers owe to their client and the legal profession. They are also elements that have been suggested to combat the ethical concerns raised by LPOs.⁸⁸ However, it must be kept in mind that the provisions of the LPA replaced these rules. Therefore, introducing a regulation for the outsourcing industry in South Africa would provide great value to legal professionals working in LPOs. Section 14 of the Constitution of South Africa addresses the safekeeping of a client's private communications so as to avoid any infringements. While POPI, South Africa's data protection regulation will admittedly provide direction on data protection measures, but it has as yet to be implemented fully.

The aim of the research is to investigate whether South Africa should introduce a regulatory framework for its LPO industry? In light of the above, it is apparent that

⁸⁸ The ethical concerns arising from the practice of outsourcing legal services offshore will be discussed in detail in Chapter 5 (Ethical Principles and the Practice of Law).

the available legislative and regulatory frameworks are insufficient, as they do not directly address the implications of outsourcing legal services.

3.5 The challenges of Legal Process Outsourcing for South Africa

The lack of regulation within the legal sector as regards the LPO industry, has given rise to certain challenges. South Africa recognises that the LPO industry poses a unique challenge as it is shadowed by the increase in the level of liability and risk, especially as the legal services revolves around client privilege and compliance.⁸⁹ The outsourcing of legal work requires careful management to avoid exposure to risk and the possibility of confidential information being leaked.⁹⁰

The main challenges that exist in light of the LPA, Rule 33 of the Rules of the Attorneys' Profession and the Constitution of South Africa are that these frameworks do not adequately or directly address the outsourcing relationship. Although, section 67 of the LPA provides guidance that can be extrapolated and applied to the outsourcing relationship it is not specifically catered for the outsourcing of legal work but for South African legal practitioners who work for an employer. Therefore, non-lawyers will not fall under the ambit of this section.

By comparison, Rule 33 of the Rules of the Attorneys' Profession addresses the main ethical concerns (for example: client consent, client confidentiality, conflicts of interest and billing appropriately) that pose a threat to the legal profession when contracting with a third party. These rules can be applied to LPOs as in essence the outsourcer is subcontracting legal work to a third party, being the LPO provider. This section places an obligation on the outsourcing lawyer to adhere to set requirements when outsourcing legal services. However, this section was subsequently repealed by the LPA and is therefore no longer applied and/or relevant.

⁸⁹ Consult *C Legal Process Services South Africa Report (2015) Business Process Enabling South Africa (BPESA)* 6.

⁹⁰ Financial Forensic Investigations Unit of the Attorneys Fidelity Fund 'Outsourcing by Legal Practitioners' available at <https://www-mylexisnexis-co-za.ezproxy.uwc.ac.za/Index.aspx#> (accessed 25 May 2018).

Section 14 of the Constitution of South Africa similarly provides for limited guidance as it only states that communication is to be kept private to avoid any infringements. This is a fairly general perspective, with no other explanation being provided as regards to the manner in which the information should be secured so as to avoid any disclosure.

For the LPO provider, complying with the laws of the country as regards opening a business would not be an issue. However, with the performance and delivery of legal services, where confidential information is exchanged, and knowledge is entrusted to the LPO provider, what implication would it have where the laws and regulations of the LPO offshore destination is either contradictory to the outsourcer originators jurisdiction or non-existent?

Without a doubt, the implementation of the POPI Act will assist in creating and increasing the confidence of the outsourcer who is concerned with the shipping of data offshore. But until it is fully implemented, the inadequacy of sufficient data protection legislation will remain a concern for the outsourcer. During 2018, it has been estimated that South Africa has experienced a minimum of four significant data breaches⁹¹ within a ten-month period that has had dire consequences for the businesses involved.⁹² Current legislation does not place an obligation on businesses to disclose breaches to any authority or to the individuals affected by the said breach.⁹³ The latter places the client in a vulnerable position as the possibility of sensitive and personal data being leaked is risky. Furthermore, the outsourcer is responsible for upholding the relationship with their client; this includes protecting confidential information from being disclosed. Having no accountability for breaching data rules would therefore be detrimental to the outsourcer as in essence

⁹¹ The four major data breaches in South Africa include*:

- (i) Liberty Holdings a financial services company had its emails hacked into;
- (ii) ViewFines, an online traffic fine website, had the personal details of 943 000 South African drivers were compromised;
- (iii) Jigsaw Holdings, a company which included several real estate agencies, had the personal data of 60 million South Africans leaked as it was stored on an easily accessible web server; and
- (iv) Ster-Kinekor, a movie theatre chain, had a data breach affecting 7 million South Africans.

*Niselow T 'Five Massive Data Breaches Affecting South Africans' *Fin24* 19 June 2018.

⁹² Fynn M 'Data Breaches: What is Required?' available at <https://www.golegal.co.za/data-privacy-laws/> (accessed 07 August 2018).

⁹³ Fynn M 'Data Breaches: What is Required?' available at <https://www.golegal.co.za/data-privacy-laws/> (accessed 07 August 2018).

they would be responsible for the breach of the professional code of conduct owed to the client.

Both the LPO provider and the outsourcer are left to their own devices to establish which best practice approach is suitable for the delivery of the legal services from an offshore destination. The following quote clearly establishes where the responsibility of the work product lies:

‘There’s no prohibition against offshoring legal services. However, from an ethical standpoint, whatever occurs, the lawyer remains responsible for the quality of that work.’⁹⁴

Therefore, ultimately, the outsourcer originator is responsible for the quality of the work performed by the LPO provider employee. This is as a result of the lawyer who is outsourcing the work being under a duty to maintain compliance with the professional conduct rules established by their relevant professional body. To achieve quality work, the outsourcer will have to implement supervisory measures. But, the question arises, how would this work with the outsourcer and the LPO provider being geographically located on different continents? Would the use of technology and communication software be a sufficient tool to conduct checks on the performance of the legal services? Further research would be required in this regard.

For the legal practitioners working in LPO centres, under the laws of the country they are compelled to be duly qualified and to conduct the performance of their duties in a manner, which is complimentary and in line with the code of conduct established by the legal fraternity in South Africa. However, these legal practitioners may not be licensed to practice in the outsourcer’s jurisdiction and therefore supervision is paramount to maintaining the quality of work product. Interestingly, a lawyer who practices in a state / country for which they are not licensed to practice, are subject to being penalised. But when the lawyer practices as an employee of an LPO provider,

⁹⁴ Podolny R ‘Who is Afraid of Outsourcing? A Pragmatic Approach to a Revolutionary Development’ (2012) 40(2) *The Advocates’ Quarterly* 177.

there is no repercussion and neither is this viewed as an unauthorised practice of law.⁹⁵

It needs to be stated that the professional bodies in the legal sector do support the LPO industry and welcome it as a valuable asset but they also recognise the risks that it raises.⁹⁶

‘Professional bodies can serve an important role as supporters of professional preparation and development. They frequently set the standards for qualification and licensing requirements, interact with law schools to ensure that curricula reflect the current demand of the legal profession, offer access to continuing education, and facilitate the exchange of ideas on issues of importance to the profession. They also set and enforce standards of professional practice and ethics. In addition, professional bodies often represent the interests of the profession in dealings with the government. They manage relationships with foreign and international counterparts and are involved in the negotiation of mutual recognition agreements.’⁹⁷

In light of the above abstract which demonstrates the significant role professional bodies have in the legal sector, and while outsourcing remains unregulated, there are a few professional bodies, for example the American Bar Association, Australia and UK law societies, who have taken to issuing guidance notes in an attempt to combat and decrease the ethical issues raised by the LPO industry.⁹⁸ However, due to the similar legislative and regulatory framework South Africa shares with the UK, and as the UK is the principal outsourcer of legal services to South Africa, the practice notes issued by the UK law society will be explored in further detail in Chapter 5 (Ethical Principles and the Practice of Law) so as to derive the manner in which the UK has addressed the ethical concerns raised by outsourcing legal work.

⁹⁵ Podolny R ‘Who is Afraid of Outsourcing? A Pragmatic Approach to a Revolutionary Development’ (2012) 40(2) *The Advocates’ Quarterly* 179.

⁹⁶ Podolny R ‘Who is Afraid of Outsourcing? A Pragmatic Approach to a Revolutionary Development’ (2012) 40(2) *The Advocates’ Quarterly* 173.

⁹⁷ Cattaneo O, Engman M, Sáez S et al *International Trade in Services: New Trends and Opportunities for Developing Countries* (2010) 82.

⁹⁸ Podolny R ‘Who is Afraid of Outsourcing? A Pragmatic Approach to a Revolutionary Development’ (2012) 40(2) *The Advocates’ Quarterly* 172.

It is important to note and stress once more that while the LPO industry continues to grow so do the risks. Lawyers have a duty to comply with ethical obligations when it comes to the performance of legal services. Therefore, are having only a handful of professional bodies taking the initiative to provide recommendations to reduce ethical risks, although a good start is it enough?

The LPO industry gives rise to the following ethical challenges: the aiding of unauthorised practice of law; the need to maintain quality control; ensuring there are no conflicts of interest; protecting client confidentiality and privilege; obtaining client consent and the need to obtain clarity on billing.⁹⁹ These are all core elements that a lawyer is expected to uphold and protect when entering the legal profession and form a vital part of their code of ethics. Any challenges posed thus require stringent attention and focus.

In the absence of regulation, lawyers are forced to adopt best practice methods in outsourcing legal services offshore to LPO providers. As a consequence, where a conflict or problem arises with the offshore destination, there is sometimes an absence of remedies for the outsourcer.¹⁰⁰ The outsourcer will therefore have to rely on the contractual agreement with the LPO service provider to obtain a solution or look to the courts for assistance. In this respect, a regulation for data protection and a code of conduct for LPO providers and the outsourcer would be advantageous for both parties.¹⁰¹ Moreover, having a solid contract between the outsourcer and the LPO provider, which would effectively document the agreement between the parties, relevant performance indicators and a dispute resolution method to address any concerns while protecting both parties will certainly assist in providing possible solutions to problematic situations or occurrences. But the question remains, will this be enough?

⁹⁹ Podolny R 'Who is Afraid of Outsourcing? A Pragmatic Approach to a Revolutionary Development' (2012) 40(2) *The Advocates' Quarterly* 178.

¹⁰⁰ Podolny R 'Who is Afraid of Outsourcing? A Pragmatic Approach to a Revolutionary Development' (2012) 40(2) *The Advocates' Quarterly* 189.

¹⁰¹ Hebrard C 'Offshoring South Africa 2015: Legal Process Outsourcing' available at http://www.lssa.org.za/upload/documents/LPO_BPeSA_Event_Presentation_2015_LPO.pdf (accessed 28 February 2018).

Due to the unavailability of guidance notes from local law societies as regards LPO providers in South Africa and the lack of legislation to provide clarity on the position of outsourcing legal services, having a regulatory structure which addresses obtaining client consent when outsourcing, supervision of the outsourced services, ensuring client confidentiality, avoiding conflicts of interest and appropriate billing measures, would establish that a high standard exists for the legal profession, thus promoting development, growth and adaptation to international standards.¹⁰²

With the challenges being raised as a result of outsourcing legal work offshore and with the constant growth of the LPO industry, it is apparent that a regulatory framework for the LPO industry will be of great importance to address the ethical concerns affecting this industry.

3.6 Conclusion

Although South Africa's LPO industry has been characterised as being in its early development stages, it nonetheless has in a short time been identified as a preferred offshore LPO destination. South Africa's prime geographical location; availability and affordability of talented legal professionals; similar legislative and regulatory framework; robust infrastructure; convenient time zone; and cultural affinity with the outsourcer have all advocated for its commendable position in the LPO industry.

The largest offshore LPO destination, namely India, is known as providing the most cost savings when it comes to the outsourcing of legal services. South Africa on the other hand, is working towards providing the competitive edge and being recognised as a value driven destination as opposed to a cost-saving destination.

Currently, South African law, more specifically, the LPA, Rule 33 of the Rules of the Attorneys' Profession, the Constitution of the Republic of South Africa and POPI, do not regulate the outsourcing of legal services. Neither does the LPA, the Constitution of the Republic of South Africa or POPI provide guidelines in this respect. The LPO provider and outsourcer originator are therefore forced to adopt best practice

¹⁰² Cattaneo O, Engman M, Sáez S et al *International Trade in Services: New Trends and Opportunities for Developing Countries* (2010) 82.

methodology when performing legal work. Similar to other jurisdictions South African legal practitioners employed at LPO service providers are duty-bound to comply with their professional bodies code of conduct. However, when it comes to the outsourcing of legal services and sending confidential legal work offshore, the inadequacy of the existing domestic data protection legislation does raise concerns. Therefore, only once POPI is fully implemented will it bring an element of comfort to the outsourcer.

The growth of the LPO industry is largely due to the value and cost-savings it provides to the outsourcer. However, the challenges it evokes requires attention so as to ensure ethical compliance is maintained in the legal sector at all times, as well as protecting the client's rights. Guidance / practice notes from the law society are insufficient to address these challenges as will be demonstrated in Chapter 4 (A Comparative Analysis of the Legal Systems of the United Kingdom and India). Having a regulation for the LPO sector would be better suited as it would ensure the standardisation of the performance of legal work offshore while maintaining the best interests of all concerned parties. Furthermore, the purpose of having a regulation is to ensure that the performance of the legal services would be done in the public's best interests.

In brief, this chapter discussed the position of the LPO industry in South Africa. In the next chapter, a comparative analysis will be carried out, looking into the rules and guidelines governing the legal systems of the UK and India as regards the LPO sector. The objective of this analysis will also be to illustrate how the ethical concerns arising from LPO practices have been addressed.

CHAPTER FOUR

A COMPARATIVE ANALYSIS OF THE LEGAL SYSTEMS OF THE UNITED KINGDOM AND INDIA

4.1 Introduction

The position of the Legal Process Outsourcing (LPO) industry in South Africa was established in the previous chapter. The main reasons for the popularity of South Africa as an offshore outsourcing haven was provided as being its accessibility as relates to its geographic location on the global map, the country's robust infrastructure, and both the availability and affordability of the vast pool of duly qualified legal professionals in the country.¹ Bringing light to why South Africa is recognised as a preferred offshore destination amongst outsourcers and foreign owned LPO providers wanting to establish a business presence in the country.

Taking into consideration that South Africa does not currently regulate the LPO industry, the specific legislative and regulatory framework² as regards to the outsourcing of legal services was also explored. It was found that although legal professionals working in the LPO sector are not considered as legal practitioners (attorneys and advocates), they are nonetheless responsible in maintaining compliance with the same codes of conduct as practicing lawyers³ in South Africa. However, complying with the code of professional conduct can sometimes prove to be an arduous task when the available frameworks as they stand are insufficient in that they do not specifically cater for the outsourcing of legal work.⁴ Accordingly, legal professionals must adapt their observance of the current codes to the work they render at the LPO business.

¹ See Chapter 3 (Legal Process Outsourcing in South Africa) section 3.3 (South Africa – a preferred Legal Outsourcing offshore destination).

² The legislative and regulatory frameworks explored in Chapter 3 (Legal Process Outsourcing in South Africa) section 3.4 (South Africa's legal and regulatory framework) included: the Legal Practice Act 28 of 2014 (LPA), Rule 33 of the Rules of the Attorneys' Profession, the Constitution of the Republic of South Africa, 1996 and the Protection of Personal Information Act 4 of 2013 (POPI).

³ See Chapter 4 (A Comparative Analysis of the Legal Systems of the United Kingdom and India) footnote 105.

⁴ See Chapter 3 (Legal Process Outsourcing in South Africa) section 3.4 (South Africa's legal and regulatory framework).

The lack of regulation for the LPO industry within the legal sector in South Africa has therefore given rise to certain challenges. Although direction can be extracted from relevant acts and applied to the outsourcing relationship, available legislative frameworks do not directly address the outsourcing relationship.⁵ More specifically clarity is required on: the manner in which confidential information is to be exchanged in the performance and delivery of the outsourced legal services; the inadequacy of existing data protection legislation in South Africa means that no accountability measures are placed on the LPO provider for data breaches; both the outsourcer and the LPO provider are left to establish best practice methods when it comes to governing their outsourcing alliance; whether client consent should be obtained when outsourcing legal work; the manner in which supervision of the performance of the legal services is to be conducted (currently, the onus of responsibility for the quality of work remains with the outsourcing lawyer who is tasked with supervising the performance of the legal services from another continent); avoiding conflicts of interest and the appropriate billing method.⁶

Furthermore, as a consequence of the lack of regulation and targeted guidance for the LPO industry, there is also an absence of applicable remedies for conflicts arising between the parties in the outsourcing relationship. Presently, the contractual agreement⁷ entered into between the outsourcer and LPO provider is relied upon to resolve disagreements. The latter is not always feasible in providing a solution or provides limited avenues to resolve conflicts, nor are rulings attained in the local jurisdiction enforceable within the foreign jurisdiction.

It is important to emphasise that the growth of the LPO industry has raised questions as regards the lawyer's adherence to the role of ethics and professional responsibility within this sector.⁸ Lawyers have a responsibility to observe their ethical obligations when it comes to the performance of legal services. These ethical duties are contained

⁵ See Chapter 3 (Legal Process Outsourcing in South Africa) section 3.4 (South Africa's legal and regulatory framework).

⁶ See Chapter 3 (Legal Process Outsourcing in South Africa) section 3.5 (The challenges of Legal Process Outsourcing in South Africa).

⁷ See Chapter 1 (Introduction) section 1.1 (Background to the study).

⁸ The roles of ethics in the practice of law will be further discussed in Chapter 5 (Ethical Principles and the practice of Law) section 5.2 (The role and importance of ethics in the practice of law).

in professional codes of conduct and compliance with the codes is mandatory upon all lawyers practicing law. The latter obligation ensures that legal professionals are kept accountable to their clients / public for the work they perform and that the reputation of the legal profession is portrayed in a positive manner. Codes of conduct and ethical duties ensure that a standard exists by which legal services can be measured against and monitored. The key ethical concerns raised by the outsourcing of legal services include: the unauthorised practice of law;⁹ ensuring client confidentiality; adhering to the duty to disclose the outsourcing relationship to the client; avoiding and checking for conflicts of interest; and billing the client appropriately for the services being rendered offshore.¹⁰

The purpose of this chapter is to offer a comparative analysis, exploring the rules and guidelines currently governing the legal systems of the United Kingdom (UK) as the outsourcer and India as an outsourcing provider, in relation to the LPO industry. Like South Africa, both the UK and India do not have any regulation for the LPO industry. But, where, the legal sector in South Africa and India have remained silent on providing direction on the outsourcing of legal work, the UK legal fraternity has issued practice notes to assist in guiding law firms and legal departments who make use of this business model.

Additionally, the UK was specifically chosen as a comparative country due to it sharing a similar legislative and regulatory framework with South Africa. Moreover, the UK as the outsourcer originator, predominately nominates South Africa as its favoured offshore destination when making the decision to outsource legal work. By contrast, India is renown for being an LPO provider, and has positioned itself as being the largest offshore destination of legal services within the LPO sector, globally. India has also been involved in the business of performing outsourced legal services longer than other LPO provider countries, being a popular offshore destination particularly with law firms based in the United States of America (US).

⁹ The unauthorised practice of law refers to a lawyer who is qualified to practice law in a particular country but may not be deemed to be qualified to practice law in another jurisdiction.

¹⁰ Each of these elements will be discussed in greater detail in Chapter 5 (Ethical Principles and the Practice of Law).

The aim of this comparative analysis is therefore to present the position of the LPO sector in the UK and India in comparison to the LPO industry in South Africa; highlight the legal framework for the legal sector in both countries as regards outsourcing legal services; provide an insight into the challenges and successes experienced by these countries within the LPO industry and the manner in which the key ethical concerns arising from this practice have been addressed. In exploring the afore-mentioned aspects, the research question of whether a regulatory framework should be introduced for South Africa's LPO industry or whether following the steps taken and lessons learnt by other jurisdictions will be sufficient to counteract the ethical concerns of LPOs, will be investigated further.

4.2 Position of Legal Process Outsourcing

Within the context of the LPO industry, the UK is mainly referred to as the outsourcer originator for example: the lawyer or firm who makes the decision to send certain legal functions offshore, thereby instructing the LPO provider in the performance of the required services. India is classified as an LPO offshore destination for example: the provider of legal services. The exploration into the status of the LPO industry in both these countries will present a better understanding of the dynamics of outsourcing legal services offshore, from both the perspective of the outsourcer originator and the LPO provider.

Next, the position of the LPO industry in the UK will be analysed where after; the status of this industry in India will be explored.

4.2.1 The United Kingdom

The effects of globalisation, the negative trends transforming the economy and the increasing dependence on technology to facilitate the rendering of legal services has caused the legal landscape to expand to meet client demands and business needs.¹¹ This has compelled the legal fraternity in the UK to take heed and adapt to how both law firms and legal departments have conventionally delivered legal services, in

¹¹ Passmore C 'The Solicitors Regulation Authority: Looking to the Future' (2016) 19(1) *Taylor and Francis Group* 150.

search of alternative methods of conducting the business of law.¹² The former has directly contributed to the development of what the Solicitors Regulation Authority¹³ refers to as alternative business structures for example: unregulated businesses that provide legal services at a fraction of the cost as compared to the fees of a solicitor or barrister working in a law firm.¹⁴ More specifically, the emergence of LPOs is one such alternative business structure that has diversified the manner in which legal services have traditionally been rendered to the public.¹⁵ To counteract the increasing competitive pressure, UK law firms and legal departments have therefore had to find alternative ways of offering legal services, the LPO model being one such option.¹⁶

The UK has the largest legal market size in comparison to other European countries and contributes to seven per cent of the global legal services market.¹⁷ The value of the legal market in the UK is estimated at £40.1 billion.¹⁸ In 2015, there were approximately 133 837 practicing solicitors, 15 716 practicing barristers and 13 000 legal professionals providing legal services.¹⁹ In 2016, the Solicitors Regulation Authority confirmed that they regulated an estimated 160 000 solicitors and 10 000 businesses, to the value of £25 billion, making the Solicitors Regulation Authority the biggest regulator of legal services in England and Wales.²⁰

However, despite the availability of legal professionals in the UK, it was found that 63 per cent of the UK population believe that the cost of legal services are high and

¹² PWC 'The Law Firm of the Future' available at <https://www.pwc.co.uk/industries/business-services/law-firms/survey/law-firm-of-the-future.html> (accessed 01 August 2018).

¹³ The regulation authority responsible for regulating the professional conduct of solicitors in England and Wales.

¹⁴ Passmore C 'The Solicitors Regulation Authority: Looking to the Future' (2016) 19(1) *Taylor and Francis Group* 146.

¹⁵ Goodman J 'How to: Outsource Legal Work' available at <https://www.lawgazette.co.uk/practice/how-to-outsource-legal-work/5036958.article> (accessed 16 July 2018.)

¹⁶ Passmore C 'The Solicitors Regulation Authority: Looking to the Future' (2016) 19(1) *Taylor and Francis Group* 145.

¹⁷ Solicitors Regulation Authority *Research and Analysis: The Changing Legal Services Market* (2016) Solicitors Regulation Authority 8.

¹⁸ Solicitors Regulation Authority *Research and Analysis: The Changing Legal Services Market* (2016) Solicitors Regulation Authority 9.

¹⁹ Solicitors Regulation Authority *Research and Analysis: The Changing Legal Services Market* (2016) Solicitors Regulation Authority 9.

²⁰ Passmore C 'The Solicitors Regulation Authority: Looking to the Future' (2016) 19(1) *Taylor and Francis Group* 146.

thus not affordable or accessible to the average lay person.²¹ Therefore, the pricing of legal work was the main factor contributing to the clients search for alternative providers of legal services.²² LPOs were seen as the solution to making legal services more accessible to the public²³ as well as providing law firms with the opportunity to expand upon the services that they offered their clients.²⁴

An example of a UK law firm who took the initiative to outsource legal work to South Africa so as to provide affordable legal services to their clients was the law firm called Pinsent Masons. The aforementioned law company was the first international law firm based in the UK, to offshore legal work to South Africa.²⁵ The law firm is ranked amongst the top 100 hundred law firms in the world by turnover.²⁶ The law firm reportedly made a cost savings of 50 per cent in offshoring their legal services to South Africa.²⁷ When asked the reason for the former decision, the firm's response was simple; 'same work and the same quality, but at a lower cost.'²⁸

The quote illustrates the main rationale in deciding to outsource revolved around the quality of the work achieved by the LPO provider as well as the cost savings benefit for the law firm.

²¹ Passmore C 'The Solicitors Regulation Authority: Looking to the Future' (2016) 19(1) *Taylor and Francis Group* 147.

²² Passmore C 'The Solicitors Regulation Authority: Looking to the Future' (2016) 19(1) *Taylor and Francis Group* 147.

²³ Passmore C 'The Solicitors Regulation Authority: Looking to the Future' (2016) 19(1) *Taylor and Francis Group* 148.

²⁴ The Law Society *Legal Process Outsourcing: What You Should Know* (2011) Law Society UK 3.

²⁵ McLeod-Roberts L and Berris J 'Pinsents - First Firm to Offshore Work of Qualified UK Lawyers' available at

<http://content.ebscohost.com.ezproxy.uwc.ac.za/ContentServer.asp?T=P&P=AN&K=43164713&S=R&D=a9h&EbscoContent=dGJyMMvl7ESeqLY4v9f3OLCmr1CeprNSsq%2B4S66WxWXS&ContentCus-tomer=dGJyMPGvtU2vqrJMuePfgeyx44Dt6fIA> (accessed 28 May 2018).

²⁶ McLeod-Roberts L and Berris J 'Pinsents - First Firm to Offshore Work of Qualified UK Lawyers' available at

<http://content.ebscohost.com.ezproxy.uwc.ac.za/ContentServer.asp?T=P&P=AN&K=43164713&S=R&D=a9h&EbscoContent=dGJyMMvl7ESeqLY4v9f3OLCmr1CeprNSsq%2B4S66WxWXS&ContentCus-tomer=dGJyMPGvtU2vqrJMuePfgeyx44Dt6fIA> (accessed 28 May 2018).

²⁷ McLeod-Roberts L and Berris J 'Pinsents - First Firm to Offshore Work of Qualified UK Lawyers' available at

<http://content.ebscohost.com.ezproxy.uwc.ac.za/ContentServer.asp?T=P&P=AN&K=43164713&S=R&D=a9h&EbscoContent=dGJyMMvl7ESeqLY4v9f3OLCmr1CeprNSsq%2B4S66WxWXS&ContentCus-tomer=dGJyMPGvtU2vqrJMuePfgeyx44Dt6fIA> (accessed 28 May 2018).

²⁸ McLeod-Roberts L and Berris J 'Pinsents - First Firm to Offshore Work of Qualified UK Lawyers' available at

<http://content.ebscohost.com.ezproxy.uwc.ac.za/ContentServer.asp?T=P&P=AN&K=43164713&S=R&D=a9h&EbscoContent=dGJyMMvl7ESeqLY4v9f3OLCmr1CeprNSsq%2B4S66WxWXS&ContentCus-tomer=dGJyMPGvtU2vqrJMuePfgeyx44Dt6fIA> (accessed 28 May 2018).

Kissak, who was the previous Head of Litigation for Pinsent Masons, elaborated further on the firm's decision to support the offshoring of legal services to South Africa:

'The benefits of outsourcing include providing a better financial deal for clients, and a greater level of reviewing expertise from a team with English as a first language and a two-hour time difference. The potential pitfalls are the same as in any investment abroad, including risks of poor infrastructure support, civil unrest and political or regulatory uncertainty.

Quality is built through consistent use of the same provider and collaboration in building the most suitable systems has been a significant contributor to a successful relationships.²⁹

The above quote illustrates that monetary savings for the client, the linguistic capabilities of the country, the complimentary time zone and effective communication with the LPO provider are all qualities that cater towards ensuring a compatible relationship exists between the outsourcer and the offshore destination.

With the entrance of a reputable law firm choosing to outsource legal services offshore, this paved the way for other law firms and corporate legal departments to tentatively test the outsourcing experience. A few examples of law firms partaking in the outsourcing direction include: Norton Rose Fulbright, Linklaters, Hogan Lovells, Eversheds and Webber Wentzel.³⁰ Add the fact that UK businesses have been investing in South Africa for years, the former and latter provides a safe haven and brings comfort to the novice outsourcer willing to offshore their legal work.³¹ In May 2010, the British law firm, CMS Cameron McKenna contracted with Integreon, one of the biggest LPO providers, for an estimated contract value of \$850 million. The

²⁹ The Law Society *Legal Process Outsourcing: What You Should Know* (2011) Law Society UK 8.

³⁰ Consult *C Legal Process Services South Africa Report* (2015) Business Process Enabling South Africa (BPESA) 23.

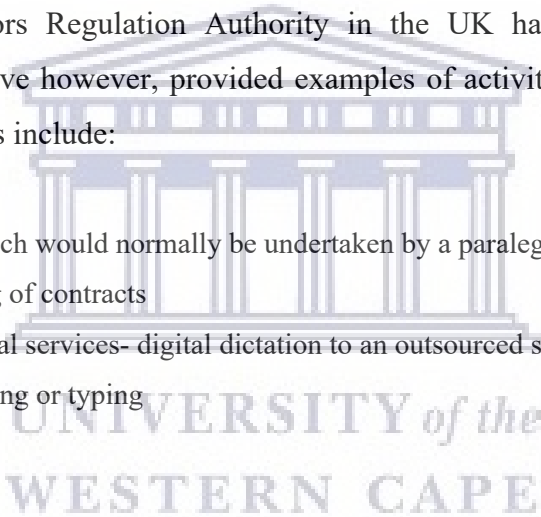
³¹ Consult *C Legal Process Services South Africa Report* (2015) Business Process Enabling South Africa (BPESA) 23.

latter business venture made it one of the biggest LPO deals since the inception of this business model.³²

UK businesses also outsource legal work to other LPO offshore destinations, India being one such country. In 2010, it was estimated that one-fifth of the legal work being outsourced to India derived from the UK.³³

A non-exhaustive list of legal services that have been outsourced by UK laws firms and legal departments include:³⁴ litigation support, due diligence, document review projects, legal research, contract drafting, compliance assistance, e-discovery and patent support.³⁵

Although, the Solicitors Regulation Authority in the UK has not defined what outsourcing is, they have however, provided examples of activities capable of being outsourced.³⁶ Examples include:

- 
- ‘activities which would normally be undertaken by a paralegal
 - initial drafting of contracts
 - legal secretarial services- digital dictation to an outsourced secretarial service for word-processing or typing
 - proofreading
 - research
 - document review
 - Companies House filing
 - due diligence, for example in connection with the purchase of a company
 - Information Technology functions which support the delivery of legal activities
 - business process outsourcing³⁷

The Solicitors Regulation Authority is clear that while they are supportive of the LPO

³² The Economist ‘The Growth of Legal Outsourcing: Passage to India’ *The Economist* 24 June 2010.

³³ The Law Society *Legal Process Outsourcing: What You Should Know* (2011) Law Society UK 5.

³⁴ See Chapter 2 (The Growth and Development of Legal Process Outsourcing), section 2.4 (The services) for a detailed summary of the services offered by LPO providers.

³⁵ The Law Society *Legal Process Outsourcing: What You Should Know* (2011) Law Society UK 5.

³⁶ The Law Society ‘Outsourcing’ available at <https://www.lawsociety.org.uk/support-services/advice/practice-notes/outsourcing/> (accessed 31 July 2018).

³⁷ The Law Society ‘Outsourcing’ available at <https://www.lawsociety.org.uk/support-services/advice/practice-notes/outsourcing/> (accessed 31 July 2018).

model as an alternative business structure, in-house counsel and solicitors are still expected to maintain and comply with the body's principles of practice and code of conduct when using third parties to carry out legal work.³⁸ Thereby reinforcing where the onus of responsibility rests when outsourcing legal work.

In 2011, in an effort to support both the law firms and legal departments decision to outsource, the UK Law Society, provided recommendations for practicing solicitors, barristers, in-house counsel and other legal professionals to consider prior to making the decision to outsource their legal work:

1. Be clear on what the introduction of LPO is intended to achieve for your business. Beyond reducing costs, what other benefits in improving quality, increasing efficiency, portfolio management are you expecting LPO to bring?
2. Consider the impact on your business. Is there sufficient buy-in internally from partners and/or senior management? What will be the impact on other staff - will it free them up to do other work or will you potentially need to reduce your staffing levels – if so, how will that impact on morale? Will outsourcing 'fit' with the culture and values of your business? Will the impact on your clients be positive, neutral or negative?
3. Could staff augmentation on specific projects or BPO³⁹ provide the efficiencies you need instead of LPO?
4. Identify the technologies, processes, expertise and governance structure in order to identify the best vendor to meet your objectives;
5. It will be essential that you conduct in-depth due diligence on potential LPO vendors to ensure that they meet your key risk management targets, including client confidentiality, data protection and potential conflicts of interest, and that they understand SRA (Solicitors Regulation Authority) regulatory requirements. How will you carry out that due diligence and if you need advice on this process where will that come from?
6. The contract will need to cover key issues such as allocation of liability; termination rights and obligations; roles of personnel; framework for managing client concerns; business continuity plans; quality supervision and governance

³⁸ The Law Society *Legal Process Outsourcing: What You Should Know* (2011) Law Society UK 10.

³⁹ Business Process Outsourcing is contracting / outsourcing a particular business function to a third party service provider.

structure;⁴⁰

From the above recommendations it is clear that the UK Law Society aimed to assist law firms and legal departments in transitioning smoothly from the traditional law firm model to outsourcing legal services. Lawyers are expected to conduct a needs analysis to decipher the overall benefit outsourcing would bring to their business; assess the consequences outsourcing would have on their business structure; decide whether hiring temporary contract lawyers on specific projects would best suit situations where an increased number of staff is required to fulfil the job; conduct extensive due diligence exercises when choosing an LPO provider so as to ensure that it is complimentary to their business; and include the proposed specific clauses in the services contract governing the relationship of the law firm and LPO provider.⁴¹

Although, these recommendations provide a good starting point for the novice outsourcer, in making an informed decision as to whether outsourcing is the right business model for them, not much direction is provided on the acceptable minimum standards the outsourcer should look for and an LPO provider should meet to be considered an eligible candidate. The law firm or legal department is left to gage what standards would best suit their business requirements and are also left to decide who they are to contact should they have questions. This leaves the door open for several standards being introduced. The former clearly demonstrates that the UK Law Society has taken a yardstick approach where they have offered several points to be considered when outsourcing legal services but do not provide the distinct accepted standards. The overall aim of the UK Law Society is to make certain that legal professionals conduct their businesses in a manner, which is conducive to Solicitors Regulation Authority regulatory requirements while giving the professional the freedom to choose the best approach for their practice.

Notwithstanding the fact that the Law Society stressed that the above recommendations were not to be viewed as legal advice, the Law Society wanted to provide clarity to its members that its's aim was to provide the legal fraternity with the ability to make an informed decision and smoothly transition from a traditional

⁴⁰ The Law Society *Legal Process Outsourcing: What You Should Know* (2011) Law Society UK 10.

⁴¹ The Law Society *Legal Process Outsourcing: What You Should Know* (2011) Law Society UK 10.

model of delivering legal services to opting to outsource, while mitigating potential risk.⁴²

The position of the LPO sector in the UK is an openly accepted accessory to any business vying to remain competitive within the legal market and is supported by the main regulatory bodies who work together with the legal fraternity to ensure professional compliance is upheld while access to justice and legal services is offered to the public in a cost effective manner.

4.2.2 India

The outsourcing of legal services to India is assumed to have started between the years of 1995⁴³ and 2004.⁴⁴ Of all the offshore LPO provider countries for example: Australia, South Africa and the Philippines, India receives the most outsourced legal work.⁴⁵ This is largely due to the monetary savings the country affords the outsourcer.⁴⁶ The latter being a result of the Indian work force generally having a low salary and there being a large pool of available legal professionals.⁴⁷ There are an estimated 1.2 million lawyers in India and it has been estimated that India's legal market value is worth \$800 million, with a projection of reaching over \$1 billion in 2018.⁴⁸ By contrast, the LPO industry in India has been estimated to reach \$4 billion in 2015,⁴⁹ making an estimated \$250 million in revenue each year.⁵⁰ India has been ranked as having the second largest legal profession in the world⁵¹ following behind

⁴² The Law Society *Legal Process Outsourcing: What You Should Know* (2011) Law Society UK 3.

⁴³ Hanson A 'Legal Process Outsourcing to India: So Hot Right Now' (2009) 62 *Southern Methodist University Law Review* 1892.

⁴⁴ Iyer SP 'Legal Process Outsourcing (LPO) - Continuance, Functioning and Challenges' available at http://www.indialawjournal.org/archives/volume6/issue_1/article6.html (accessed 14 November 2018).

⁴⁵ Singh V 'Interrogating Outsourcing Legal Services in India in Lens of Common Law vs. Civil Law' (2016) 7 *Bharati Law Review* 119.

⁴⁶ Hanson A 'Legal Process Outsourcing to India: So Hot Right Now' (2009) 62 *Southern Methodist University Law Review* 1891.

⁴⁷ Hanson A 'Legal Process Outsourcing to India: So Hot Right Now' (2009) 62 *Southern Methodist University Law Review* 1891.

⁴⁸ Wilkins DB, Khanna VS and Trubek DM *The Indian Legal Profession in the Age of Globalization: The Rise of the Corporate Sector and its Impact on Lawyers and Society* (2017) 363.

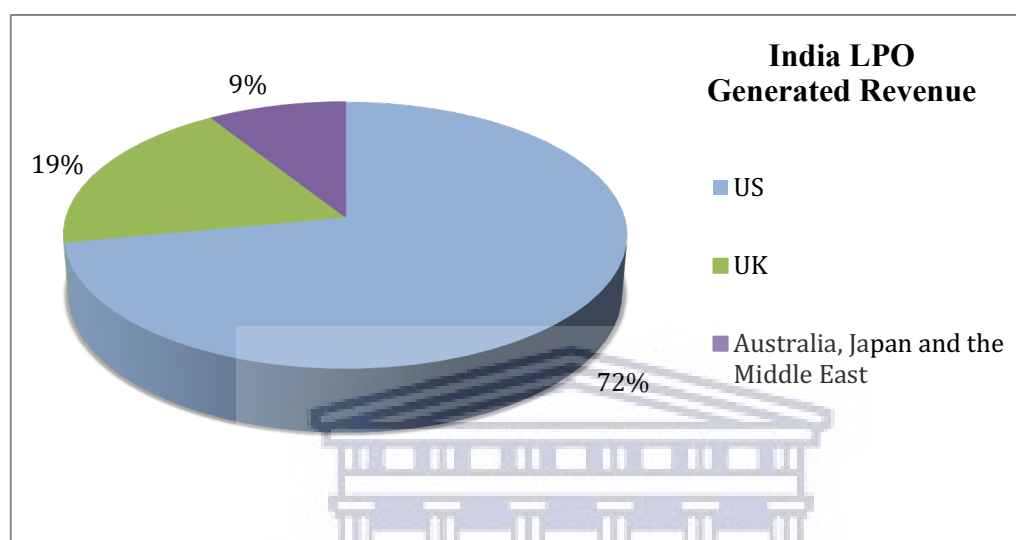
⁴⁹ Hanson A 'Legal Process Outsourcing to India: So Hot Right Now' (2009) 62 *Southern Methodist University Law Review* 1889.

⁵⁰ Hanson A 'Legal Process Outsourcing to India: So Hot Right Now' (2009) 62 *Southern Methodist University Law Review* 1893.

⁵¹ Singh V 'Interrogating Outsourcing Legal Services in India in Lens of Common Law vs. Civil Law' (2016) 7 *Bharati Law Review* 117.

the US, who holds the first place.⁵² The latter is not surprising but expected, when one considers the population size of India.

The revenue generated from the LPO industry in India derives in large from the following countries:



Source: Kuruvilla S and Noronha E 'From Pyramids to Diamonds: Legal Process Offshoring, Employment Systems, and Labor Markets for Lawyers in the United States and India' (2016) 69 ILR Review 366.

The above illustration provides that the majority of LPO business in India comes from the US, followed second by the UK and the remainder being spread between Australia, Japan and the Middle East.⁵³ This points to India being the favourable LPO provider for law firms and companies based in the US. The US was not used as a comparator in this analysis due to it not having a similar legislative and regulatory framework to South Africa. Moreover, as illustrated in Chapter 3 (Legal Process Outsourcing in South Africa), the UK is the primary country that outsources its legal services to South Africa and has set up business transactions / presence in the country.

⁵² The Economist 'Guilty as Charged - American Lawyers' *The Economist* 2 February 2013.

⁵³ Kuruvilla S and Noronha E 'From Pyramids to Diamonds: Legal Process Offshoring, Employment Systems, and Labor Markets for Lawyers in the United States and India' (2016) 69 *Industrial Labor Relations Review* 366.

In 2005, there were 50 LPO provider companies in India, this figure increased to 140 LPO providers by the year 2010.⁵⁴ There is clearly a great demand for this type of business model amongst the legal sector and clearly India is a favourite offshore LPO destination.

The advantages of outsourcing legal services to India include: a complementary time difference that enables work to be performed round the clock,⁵⁵ tax incentives provided by the Indian government to foreign businesses, English speaking legal professionals, an educated work force, and similar laws to that of the UK and US.⁵⁶ In fact, India's Constitution was adopted from UK common law.⁵⁷ India also provides a cost saving potential of between 20 to 60 percent to the outsourcer.⁵⁸ This is mostly a consequence of India's average salary for practicing lawyers being much lower than their counterparts in the US, for example.⁵⁹ The outsourcing hourly cost to India is as low as \$10 per hour.⁶⁰

With the advent of globalisation and therefore the emergence of the LPO sector in India, this sector has not only benefited the country from a financial perspective but has also provided the legal professionals in India with the opportunity and experience to work with international law firms and companies practicing a wide range of disciplines.⁶¹

⁵⁴ The Economist 'The Growth of Legal Outsourcing: Passage to India' *The Economist* 24 June 2010.

⁵⁵ Fischer BJ 'Outsourcing Legal Services, In-Sourcing Ethical Issues: An Examination of the Ethical Considerations Arising from the Practice of Outsourcing Legal Services Abroad' (2010) 16 *Southwestern Journal of International Law* 458.

⁵⁶ Singh V 'Interrogating Outsourcing Legal Services in India in Lens of Common Law vs. Civil Law' (2016) 7 *Bharati Law Review* 117.

⁵⁷ Iyer SP 'Legal Process Outsourcing (LPO) - Continuance, Functioning and Challenges' available at http://www.indialawjournal.org/archives/volume6/issue_1/article6.html (accessed 14 November 2018).

⁵⁸ Fischer BJ 'Outsourcing Legal Services, In-Sourcing Ethical Issues: An Examination of the Ethical Considerations Arising from the Practice of Outsourcing Legal Services Abroad' (2010) 16 *Southwestern Journal of International Law* 459.

⁵⁹ Global Market Insights, Inc. 'Legal Process Outsourcing (LPO) Market Size By Service (Contract Drafting, Compliance Assistance, E-Discovery, Review & Management, Patent Support, Litigation Support), By Location (Offshore, Onshore), Industry Analysis Report, Regional Outlook (U.S., Canada, Germany, UK, Italy, France, Spain, Poland, Czech Republic, China, India, Japan, South Korea, Australia, Philippines, Brazil, Mexico, South Africa), Growth Potential, Price Trends, Competitive Market Share & Forecast, 2017 – 2024' available at <https://www.gminsights.com/industry-analysis/legal-process-outsourcing-lpo-market-size> (accessed 24 October 2017).

⁶⁰ Grand View Research 'Legal Process Outsourcing (LPO) Market Worth \$27.19 Billion By 2024' available at <http://www.grandviewresearch.com/press-release/global-legal-process-outsourcing-lpo-market> (accessed 24 October 2017).

⁶¹ Gupta A and Sengupta S 'Impact of Globalization on Legal Profession in India - A Critical Analysis' (2011) 10 *Korea University Law Review* 71.

Of India's qualified pool of legal professionals (for example: 1.2. million) there were approximately 32 000⁶² to 80 000 Indians who were employed in the legal industry in 2015.⁶³ In addition, there are 80 000 law graduates each year.⁶⁴ This high rate of an educated work force translates to the Indian LPO provider being able to offer the outsourcer the benefit of being scalable on project type work, at any given time.⁶⁵

The type of legal work being sent offshore to India ranges from low level for example: administrative tasks; to litigation support⁶⁶ for example: legal transcription, document review, due diligence and discovery; to higher level work, for example: e-discovery management, contract management, intellectual property rights (patents, trademarks and copyright support) and legal research, to name a few.⁶⁷ The legal work being sent to India is comparable and similar to the activities / services⁶⁸ that the Solicitors Regulation Authority in the UK, has permitted to be outsourced to offshore destinations.

The LPO sector is indeed a lucrative business in India. Its success is largely due to the high costs of legal services in the outsourcer's country and the effect the economic recession has had on businesses globally.⁶⁹ With globalisation came the increasing demand for cost-effective legal services for both the client and the law firm. Being able to meet the outsourcer's budget and the accessibility of having qualified legal professionals, allowed India to make its mark. This is similar to South Africa, in that

⁶² Owen MG 'Legal Outsourcing to India: The Demise of New Lawyers and Junior Associates' (2008) 21 *Global Business & Development Law Journal* 182.

⁶³ Kuruvilla S and Noronha E 'From Pyramids to Diamonds: Legal Process Offshoring, Employment Systems, and Labor Markets for Lawyers in the United States and India' (2016) 69 *Industrial Labor Relations Review* 366.

⁶⁴ Kuruvilla S and Noronha E 'From Pyramids to Diamonds: Legal Process Offshoring, Employment Systems, and Labor Markets for Lawyers in the United States and India' (2016) 69 *Industrial Labor Relations Review* 369.

⁶⁵ Fischer BJ 'Outsourcing Legal Services, In-Sourcing Ethical Issues: An Examination of the Ethical Considerations Arising from the Practice of Outsourcing Legal Services Abroad' (2010) 16 *Southwestern Journal of International Law* 459.

⁶⁶ Kuruvilla S and Noronha E 'From Pyramids to Diamonds: Legal Process Offshoring, Employment Systems, and Labor Markets for Lawyers in the United States and India' (2016) 69 *Industrial Labor Relations Review* 367.

⁶⁷ Iyer SP 'Legal Process Outsourcing (LPO) - Continuance, Functioning and Challenges' available at http://www.indialawjournal.org/archives/volume6/issue_1/article6.html (accessed 14 November 2018).

⁶⁸ See Chapter 4 (A Comparative Analysis of the Legal Systems of the United Kingdom and India) section 4.2.1 (The United Kingdom).

⁶⁹ Iyer SP 'Legal Process Outsourcing (LPO) - Continuance, Functioning and Challenges' available at http://www.indialawjournal.org/archives/volume6/issue_1/article6.html (accessed 14 November 2018).

the cost savings it affords the outsourcer as well as access to a large pool of legal professionals has made the country a preferred offshore destination.

4.3 Legislative and regulatory framework in the United Kingdom

Similar to South Africa, the outsourcing of legal services is not regulated in the UK,⁷⁰ other than by advice offered by the Solicitor's Regulation Authority. However this industry is an accepted and welcomed business model within the UK's legal sector.

The next section will analyse the legal system of the UK, as specifically regards the outsourcing of legal services to ascertain whether they are sufficient in addressing the outsourcing relationship.

The legal profession in the UK is split into two categories, solicitors and barristers. In comparison, prior to the Legal Practice Act (LPA),⁷¹ in South Africa, lawyers were categorised as either attorneys or advocates, now they are referred to as legal practitioners. Upon the completion of mandatory training and obtaining the required qualifications, legal professionals fall under the regulation of an applicable authority that provides guidance on the professional standards they are to meet. Solicitors are members of the Law Society and are regulated by the Solicitors Regulation Authority. Barristers are members of one of the four bar councils (for example: Grays Inn, Lincolns Inn, Middle Temple and Inner Temple) and are governed by the Bar Standards Board.

The Legal Services Act 2007 is the legislative framework that regulates the provision of certain legal activities performed by legal professionals in the legal sector in England and Wales. Under the Act only authorised individuals and businesses (for example: solicitors, barristers, legal executives, patent attorneys, licensed conveyancers, trademark attorneys, cost lawyers, notaries and chartered

⁷⁰ Shooter S and Hunter V 'Outsourcing 2018 United Kingdom' available at <https://iclg.com/practice-areas/outsourcing-laws-and-regulations/united-kingdom> (accessed 02 August 2018).

⁷¹ Legal Practice Act 28 of 2014.

accountants)⁷² may provide reserved activities. Clause 12 of the Act defines a reserved legal activity as being:

‘(1) In this Act “reserved legal activity” means—

- (a) the exercise of a right of audience;
- (b) the conduct of litigation;
- (c) reserved instrument activities;
- (d) probate activities;
- (e) notarial activities;
- (f) the administration of oaths.

(3) In this Act “legal activity” means—

- (a) an activity which is a reserved legal activity within the meaning of this Act as originally enacted, and
- (b) any other activity which consists of one or both of the following—
 - (i) the provision of legal advice or assistance in connection with the application of the law or with any form of resolution of legal disputes;
 - (ii) the provision of representation in connection with any matter concerning the application of the law or any form of resolution of legal disputes.

(4) But “legal activity” does not include any activity of a judicial or quasi-judicial nature (including acting as a mediator).’

From the above, it is apparent that an unauthorised person⁷³ or business may not perform the listed reserved activities. These can only be performed by solicitors and barristers and other authorised professionals. Therefore, it can be stated that the outsourcer may not outsource these specific services and the LPO providers may not partake in the performance of these types of legal services unless express authorisation has been sought and approved from the Legal Services Board. Under clause 14 of the Legal Services Act it is a criminal offence for a person to perform a reserved legal activity, if found guilty they face either prison time of between one to two years or a fine or both.

⁷² Rab S ‘Regulation of the Legal Profession in the UK (England and Wales): Overview’ available at [https://uk.practicallaw.thomsonreuters.com/7-633-7078?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](https://uk.practicallaw.thomsonreuters.com/7-633-7078?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1) (accessed 02 August 2018).

⁷³ Clause 18 of the Legal Services Act 2007, defines who authorised persons are.

The Solicitors Regulation Authority is cognisant of the changing legal services market.⁷⁴ As such, it constantly reviews its codes and policies to ensure that a flexible and outcome based approach are taken to accommodate the different forms in which legal services are rendered. The Solicitors Regulation Authority recognises that there are three different categories of providers of legal services, these are:

- ‘authorised and regulated by an approved regulator under the Legal Services Act 2007 (LSA) to provide legal activities;
- that conduct specific legal activities that attract other forms of legal regulation such as immigration, insolvency and claims management;
- that provide legal activities outside of any form of legal services regulation.’⁷⁵

From the above extract it can be ascertained that the first category applies to practicing solicitors, barristers and legal professionals, as the aforementioned are regulated by the Legal Services Act in their provision of the legal services. The second categories of providers are specific bodies that regulate specialised services. For example, providers of immigration services are regulated by the UK’s Office of the Immigration Service Commissioner. The third category is for providers who provide legal services and are not regulated by any applicable body. Therefore, being that LPO providers are not regulated by any authority and do provide legal services, they would fall under this third category.

Although, supportive of the LPO business model, the Solicitors Regulation Authority clearly states that firms or lawyers wishing to outsource ‘may not abrogate responsibility for compliance with regulatory requirements.’⁷⁶

Simply put, the outsourcing lawyer cannot abscond from their responsibilities as practicing lawyers⁷⁷ and must ensure that they comply with the requirements of their profession as set by the applicable body that they are registered with. Thereby, the

⁷⁴ Solicitors Regulation Authority *Research and Analysis: The Changing Legal Services Market* (2016) Solicitors Regulation Authority 4.

⁷⁵ Solicitors Regulation Authority *Research and Analysis: The Changing Legal Services Market* (2016) Solicitors Regulation Authority 5.

⁷⁶ The Law Society *Legal Process Outsourcing: What You Should Know* (2011) Law Society UK 10.

⁷⁷ See Chapter 4 (A Comparative Analysis of the Legal Systems of the United Kingdom and India) footnote 105.

outsourcer is under an obligation to ensure that they maintain compliance with the codes of conduct as stipulated by the applicable regulatory bodies that govern the practice of law, while outsourcing legal work.

The Solicitors Regulation Authority Handbook sets out the ten mandatory principles that members of the legal fraternity and law firms must abide by to ensure ethical and professional standards are maintained. Of the ten principles, the UK Law Society has stated the following three principles as being applicable to the outsourcing of legal services:⁷⁸

- ‘5. provide a proper standard of service to your clients;
7. comply with your legal and regulatory obligations and deal with your regulators and ombudsmen in an open, timely and co-operative manner;
8. run your business or carry out your role in the business effectively and in accordance with proper governance and sound financial and risk management principles;⁷⁹

In outsourcing legal services offshore, the outsourcer is to maintain and comply with their ethical duties as provided by the relevant bodies that they are members of and therefore regulated by. Consequently, the outsourcer is responsible in providing the standard professional service to their client that upholds these duties while offshoring legal work. They are to comply with their obligations as professional lawyers, and as stipulated in codes of practice, to ensure that communications with applicable regulators are delivered timeously and in a transparent manner. The outsourcer is also to make certain that proper business management is conducted efficiently and in line with standard norms when outsourcing so as to minimize potential risks.

The Solicitors Regulation Authority Handbook also includes the required code of conduct expected from practicing legal professionals.⁸⁰ The following provisions are applicable to outsourcing:⁸¹

⁷⁸ The Law Society *Legal Process Outsourcing: What You Should Know* (2011) Law Society UK 10.

⁷⁹ The Law Society *Legal Process Outsourcing: What You Should Know* (2011) Law Society UK 10.

⁸⁰ The Law Society *Legal Process Outsourcing: What You Should Know* (2011) Law Society UK 10.

⁸¹ The Law Society *Legal Process Outsourcing: What You Should Know* (2011) Law Society UK 10.

‘Chapter 4 on confidentiality and disclosure
Chapter 7 on Management of your business’⁸²

One of the key ethical concerns raised by offshoring legal services is ensuring client confidentiality. Under chapter 4 of the code of conduct 2011, the solicitor or law firm outsourcing is obligated to ensure that their client’s affairs are kept confidential, effective safeguards or put into place to mitigate any risks and should disclosure be required, they are expected to obtain their client’s consent.⁸³ Specifically as regards outsourcing, chapter 4 states:

‘you only outsource services when you are satisfied that the provider has taken all appropriate steps to ensure that your clients' confidential information will be protected’⁸⁴

The onus therefore rests on the outsourcer to confirm that the LPO provider protects their client’s confidential information in an appropriate manner. They need confirm that adequate security measures are in place to effectively reduce the risk of disclosure of confidential information and obtain client consent when disclosure is necessary. The latter places the client in the advantageous position of being cognisant of how their affairs are being performed and the added confidence that their confidential information being sent offshore is in safe hands. However, in ascertaining that client confidential information is indeed protected from unnecessary or unwanted disclosure, what would be considered the ‘appropriate steps’? No clarity has been provided in the latter regard.

However, in respect of maintaining client confidentiality, the General Data Protection Regulation (GDPR) is a regulation governing the protection of data and privacy for all individuals within the European Union (EU) and the European Economic Area (EEA). This regulation is especially important to the UK, due to the fact that the UK is currently a member of the EU, this regulation therefore is part of UK law. However, it should be noted that should the UK follow through with its plan to exit

⁸² The Law Society *Legal Process Outsourcing: What You Should Know* (2011) Law Society UK 10.

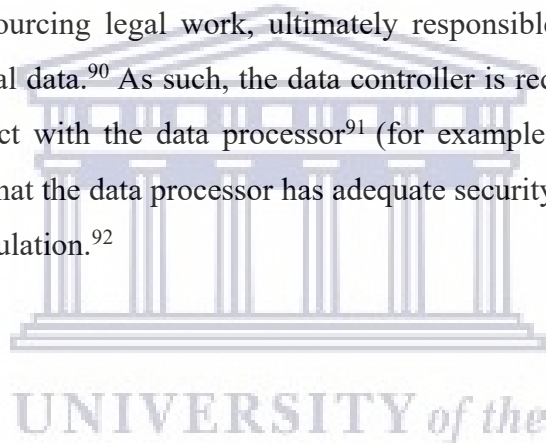
⁸³ Law Centres Network ‘The Solicitors Regulation Authority Code of Conduct’ available at <https://www.lawcentres.org.uk/asset/download/268> (accessed 02 August 2018).

⁸⁴ Law Centres Network ‘The Solicitors Regulation Authority Code of Conduct’ available at <https://www.lawcentres.org.uk/asset/download/268> (accessed 02 August 2018).

the EU (referred to as Brexit), the applicability of the GDPR on UK law might change.⁸⁵

The GDPR regulation came into effect on the 25 May 2018, replacing the previous EU Data Protection Directive, 1995 and the UK Data Protection Act, 1998.⁸⁶ The UK as a member of the EU, has the responsibility of complying with its terms. Moreover, under the European Communities Act, 1972, EU law reigns supreme over UK law.⁸⁷ Therefore, the UK must adhere to this regulation and implement it accordingly.

The GDPR regulation provides the rules on the processing, security and movement of personal data⁸⁸ and sets firmer legal obligations on both the data controller and the data processor.⁸⁹ The GDPR makes the data controller for example: the law firm or legal department outsourcing legal work, ultimately responsible for the processing and security of personal data.⁹⁰ As such, the data controller is required to enter into a legally binding contract with the data processor⁹¹ (for example: the LPO provider) and they must ensure that the data processor has adequate security measures to remain compliant with the regulation.⁹²



⁸⁵ Millman R 'How the Biggest Economic Change to the UK affects EU Data Protection Laws' available at <http://www.itpro.co.uk/policy-legislation/31772/gdpr-and-brexit-how-will-one-affect-the-other> (accessed 16 October 2018).

⁸⁶ Delon-Bouquet S and Zetony DA 'Complying with the EU General Data Protection Regulation (GDPR): Cross Border Transfers of Information' available at <https://www.bryancave.com/images/content/1/0/v2/103150/gdpr-5-1-2018.pdf> (accessed 23 July 2018).

⁸⁷ Norton Rose Fulbright 'Brexit - UK and EU Legal Framework' available at <http://www.nortonrosefulbright.com/knowledge/publications/136975/brexit-uk-and-eu-legal-framework> (accessed 16 October 2018).

⁸⁸ Nanda S and Pandit Z 'GDPR: Why does a Law enacted in Europe affect Business in India?' available at <https://economictimes.indiatimes.com/small-biz/startups/newsbuzz/gdpr-why-does-a-law-enacted-in-europe-affect-businesses-in-india/articleshow/64365950.cms> (accessed 17 July 2018.)

⁸⁹ Flynn B 'The General Data Protection Regulation: Key Implications for UK Outsourcing' available at <https://www.stevens-bolton.com/site/insights/articles/gdpr-key-implications-for-uk-outsourcing> (accessed 24 May 2018).

⁹⁰ Dunlop A and Nimscheck U 'Data Protection in Outsourcing Transactions: the UK Experience' available at [https://uk.practicallaw.thomsonreuters.com/5-506-1203?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](https://uk.practicallaw.thomsonreuters.com/5-506-1203?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1) (accessed 17 July 2018).

⁹¹ Article 23 and 28 of the General Data Protection Regulation (GDPR) (EU) 2016/679.

⁹² Dunlop A and Nimscheck U 'Data Protection in Outsourcing Transactions: the UK Experience' available at [https://uk.practicallaw.thomsonreuters.com/5-506-1203?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](https://uk.practicallaw.thomsonreuters.com/5-506-1203?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1) (accessed 17 July 2018).

Another key ethical concern of legal outsourcing is the unauthorised practice of law⁹³ by foreign lawyers. To reduce the risk that this poses, the outsourcing lawyer needs to implement supervisory measures over the performance of the legal services by the LPO provider. Chapter 7 is primarily focused on the supervision and management of the law firm or legal department. Making it the responsibility of the management of the business to ensure that the business runs effectively. The provisions that apply specifically to outsourcing are:

- ‘O(7.9) - you do not outsource reserved legal activities to a person who is not authorised to conduct such activities;
- O(7.10) - subject to Outcome 7.9, where you outsource legal activities or any operational functions that are critical to the delivery of any legal activities, you ensure such outsourcing:
 - (a) does not adversely affect your ability to comply with, or the SRA’s (Solicitors Regulation Authority) ability to monitor your compliance with, your obligations in the Handbook;
 - (b) is subject to contractual arrangements that enable the SRA (Solicitors Regulation Authority) or its agent to obtain information from, inspect the records (including electronic records) of, or enter the premises of, the third party, in relation to the outsourced activities or functions;
 - (c) does not alter your obligations towards your clients; and
 - (d) does not cause you to breach the conditions with which you must comply in order to be authorised and to remain so.’⁹⁴

The outsourcer cannot outsource reserved legal activities, as these are services that are to be solely performed by the practicing solicitor and barrister. In outsourcing unreserved legal activities, the outsourcing lawyer is to remain compliant with the Solicitors Regulation Authority rules, enter into a written contract with the LPO provider that would govern the outsourcing relationship, and enable the relevant authority to inspect records pertaining to the outsourced work or to visit the offices of the LPO provider. Furthermore, the outsourcer is to maintain their client relationship

⁹³ The unauthorised practice of law refers to a lawyer who is qualified to practice law in a particular country but may not be deemed to be qualified to practice law in another jurisdiction.

⁹⁴ Law Centres Network ‘ The Solicitors Regulation Authority Code of Conduct’ available at <https://www.lawcentres.org.uk/asset/download/268> (accessed 02 August 2018).

by staying true to their professional obligations and not partake in any action that would breach their status as practicing / authorised legal professionals.

In summary, although national law does not regulate outsourcing transactions, provision has been made by the Solicitors Regulation Authority to assist the outsourcer in making the decision to outsource and providing recommendations to maintain compliance with their duties as practicing lawyers.⁹⁵ Moreover, the outsourcer is directed on the legal services they may outsource and the legal work, which should remain, reserved for those that have the authority to practice. But is this enough? The Solicitors Regulation Authority provides the outsourcer with the freedom to decide how and where to outsource legal services, and purports that by assessing risk and following good practice principles, which conform to the bodies' codes of conduct, the outsourcer can offshore legal work. But how effective is supervisory measures from afar?

The concerns that arise when outsourcing include: How practical is it for the relevant body to conduct site visits at the LPO provider as a means of monitoring compliance with professional codes? What is considered the standard security requirement for keeping confidential information locked down? How will the Solicitors Regulation Authority become aware of any breaches that occurred offshore? Particularly, when the absence of a regulation means that the parties to the outsourcing relationship must look to their contractual agreement to resolve any disagreements or disputes internally. The success of resolving any dispute would therefore depend upon the drafting skills and foresight of the person drawing up the contract.

To recap, the UK legislative and regulatory framework has addressed the business of outsourcing in part, by ensuring that legal professionals registered to practice law remain compliant with the codes of practice as stipulated by the relevant bodies. Particular focus has been placed on maintaining client confidentiality, supervision of the performance of the legal services, the legal services that are capable of being outsourced and obtaining client consent when outsourcing. However, the focus of the

⁹⁵ See Chapter 4 (A Comparative Analysis of the Legal Systems of the United Kingdom and India) footnote 105.

legislature has been to minimise risk by following good practice and provides no direction on applicable standards when outsourcing.

4.4 Legislative and regulatory framework in India

When it comes to outsourcing legal services, both South Africa and India are recognised as outsourcing providers. Similarly, outsourced legal services are not regulated in India,⁹⁶ there are however, certain domestic laws that may apply, these include Indian contract laws, information technology laws, tax laws, intellectual property laws, the Property Act, labour laws, the Company Act, and registrations with applicable authorities such as the telecommunications department in India⁹⁷ The applicability of the aforementioned laws will depend in large on the type of transaction taking place and the business sector it involves. For the purposes of this research, which explores the outsourcing of legal services, only the laws pertaining to the legal sector will be reviewed.

It should be noted that being that the legal work being performed in India is based on foreign law, it is arguable whether the above-mentioned laws will have any effect in the foreign jurisdiction. However, they may come into play when it comes with the running of the LPO provider's day-to-day business. In the latter regard, the LPO provider will have to comply with local laws and regulations.

The Bar Council of India regulates the legal profession. The Advocates Act, 1961, sets out the qualifications, training, professional conduct and rights to practice law in India.⁹⁸ Once duly qualified as per the Act,⁹⁹ only advocates are entitled to litigate and render legal services to the Indian public.¹⁰⁰ Chapter IV of the Act provides clarity on all persons who have the right to practice law. Section 24(1)(a) of the Advocates Act

⁹⁶ Chengappa U 'Outsourcing 2018 India' available at <https://iclg.com/practice-areas/outourcing-laws-and-regulations/india> (accessed 02 August 2018).

⁹⁷ Chengappa U 'Outsourcing 2018 India' available at <https://iclg.com/practice-areas/outourcing-laws-and-regulations/india> (accessed 02 August 2018).

⁹⁸ Wilkins DB, Khanna VS, Trubek DM *The Indian Legal Profession in the Age of Globalization: The Rise of the Corporate Sector and its Impact on Lawyers and Society* (2017) 364.

⁹⁹ The Advocates act 1961, section 24.

¹⁰⁰ The Advocates act 1961, section 29 and 33.

clearly states that only citizens of India may practice law in India.¹⁰¹ In light of the former, the question that arises is does the work being performed by the Indian citizens working in LPOs amount to the practice of law in India?

The Bar Council of India and the Advocates Act established India's code of conduct for legal professionals.¹⁰² Persons wanting to partake in the legal profession in India, once qualified will be called advocates. This is unlike in the UK whereby legal professionals can either qualify as a solicitor or a barrister. The latter of which is equivalent to being an attorney and advocate in South Africa, now referred to as legal practitioners under the LPA. The aim of the code of conduct in India is to promote professional ethics and compliance with the rules of practice for registered lawyers.¹⁰³ Despite references to the amount of attention LPO providers have garnered in India and the expected growth of this industry, there is no code on the outsourcing legal work in India.¹⁰⁴ However, lawyers working at LPOs are expected to comply with the Bar Council of India Rules. This position is similar to that of South Africa, in that the legal practitioners working at LPO offices, although not deemed to be practicing¹⁰⁵ lawyers, must comply with the law societies codes of conduct and the bar council rules, respectively. The same can be said about UK qualified solicitors and barristers, who are likewise expected to comply with the applicable professional codes of practice.

The Bar Council of India provides that advocates in India are to comply with the following:

‘According to the BCI (Bar Council of India) Rules, an advocate is prohibited from abusing or taking advantage of the confidence reposed in him by his client. With respect to conflicts of interest, it requires an advocate to “make all such full and frank disclosures to his client relating to his connection with the parties and any interest in or

¹⁰¹ Singh V ‘Interrogating Outsourcing Legal Services in India in Lens of Common Law vs. Civil Law’ (2016) 7 *Bharati Law Review* 122.

¹⁰² Myadvo ‘Code of Conduct for Lawyers in India’ available at <https://www.myadvo.in/blog/code-of-conduct-for-lawyers-in-india/> (accessed 02 August 2018).

¹⁰³ Myadvo ‘Code of Conduct for Lawyers in India’ available at <https://www.myadvo.in/blog/code-of-conduct-for-lawyers-in-india/> (accessed 02 August 2018).

¹⁰⁴ Bar Council of India ‘About the Profession’ available at <http://www.barcouncilofindia.org/about/about-the-legal-profession/> (accessed 02 August 2018).

¹⁰⁵ Practicing lawyers refers to persons who have trained in law, are employed by a law firm and make court appearances and/or litigate in court i.e. they hold an active practicing certificate.

about the controversy as are likely to affect his client’s judgment in either engaging him or continuing the engagement.”¹⁰⁶

Advocates performing the legal services in LPO centres have an obligation to conform with rules of conduct as regards the practice of law in India, specifically with maintaining client confidentiality and remaining transparent with potential conflicts of interest. The latter is similar to the stance taken by the UK legal fraternity, which provides that when outsourcing, the outsourcer is to ensure adequate security measures are in place to protect client confidentiality and relevant steps are implemented to avoid any conflicts of interest.¹⁰⁷ However, in India, being an LPO provider, they are not in direct contact with the client, the outsourcer is. Therefore, the question arises how applicable are these rules to the LPO provider? It can be argued that what can be gleaned from the Bar Council of India Rules, is that the LPO provider is to protect the outsourcer’s interests by having a robust system to deflect unwanted disclosures of confidential information and they should have a procedure in place that checks for conflicts of interests, and therefore provide their client – the outsourcer, with this assurance. But what would the basic required standards be in this respect?

LPO providers that set up business in India need to comply with domestic laws as regards the business but foreign lawyers are not permitted to practice law in the country. Only Indian qualified legal practitioners are permitted to do so. Section 24 and 47 of the Advocates Act states:

‘24. Persons who may be admitted as advocates on a State roll.— (1) Subject to the provisions of this Act, and the rules made thereunder, a person shall be qualified to be admitted as an advocate on a State roll, if he fulfills the following conditions, namely:—

(a) he is a citizen of India:

¹⁰⁶ Advani PR and Naskar D ‘From Professional Responsibility to the “Business of Law”’: Regulating the Ethical Implications of Legal Process Outsourcing’ (2012) 5 *National University of Juridical Sciences Law Review* 156.

¹⁰⁷ See Chapter 4 (A Comparative Analysis of the Legal Systems of the United Kingdom and India) section 4.3 (Legislative and regulatory framework in the United Kingdom).

Provided that subject to the other provisions contained in this Act, a national of any other country may be admitted as an advocate on a State roll, if citizens of India, duly qualified, are permitted to practise law in that other country;’

‘47. Reciprocity.—(1) Where any country, specified by the Central Government in this behalf by notification in the Official Gazette, prevents citizens of India from practising the profession of law or subjects them to unfair discrimination in that country, no subject of any such country shall be entitled to practise the profession of law in India.’¹⁰⁸

Therefore, foreign lawyers are permitted to practice law in India only if a duly qualified Indian citizen is allowed to practice law in their country.¹⁰⁹ The foreign lawyers are also banned from engaging in litigation type work as well as corporate transactional work.¹¹⁰ The Advocates Act therefore ensures that businesses would be required to hire only local lawyers to perform legal work. However, with the advent of globalisation, increasing debate surrounding the entry of foreign lawyers and law firms to practice in India has circulated amongst the government and legal fraternity.¹¹¹ Although the legal fraternity in India appreciates that the legal profession has evolved, it thrives to protect the nobility of the profession:

‘The greatness, dignity and honor of the legal profession lie in the code of its ethics governing the relations of the lawyers between themselves and with others in their professional matters and dealings.’¹¹²

Notwithstanding the lack of regulation or restrictions on the Indian lawyer providing legal services based on foreign law for a law firm or legal department on another continent, the Bar Council of India supports the position that the foreign lawyer or a foreign company may not render legal services in the country.¹¹³ The LPO provider

¹⁰⁸ The Advocates act 1961, section 24(a) and 47(1).

¹⁰⁹ Wilkins DB, Khanna VS, Trubek DM *The Indian Legal Profession in the Age of Globalization: The Rise of the Corporate Sector and its Impact on Lawyers and Society* (2017) 364.

¹¹⁰ Singh V ‘Interrogating Outsourcing Legal Services in India in Lens of Common Law vs. Civil Law’ (2016) 7 *Bharati Law Review* 122.

¹¹¹ Gupta A and Sengupta S ‘Impact of Globalization on Legal Profession in India - A Critical Analysis’ (2011) 10 *Korea University Law Review* 71.

¹¹² Gupta A and Sengupta S ‘Impact of Globalization on Legal Profession in India - A Critical Analysis’ (2011) 10 *Korea University Law Review* 78.

¹¹³ PTI ‘Foreign Lawyers, Firms cannot Practice Law in India: Supreme Court’ *The Times of India* 13 March 2018.

must work within this framework to avoid being non-compliant with domestic laws as regards the practice of law.

In summary, the legislative framework in India applies specifically and only to citizens of India wanting to practice law in the country and remains silent on whether qualified legal practitioners working in LPO centres are authorised to practice foreign law. Despite clause 47 of the Advocates Act, which supports a reciprocal relationship in practicing law, foreign lawyers and law firms are not permitted to practice law in India. Being that India is recognised as the biggest offshore LPO destination offering great cost incentives to the outsourcer and the LPO sector's growth projection is promising to continue to attract foreign outsourcers, it is surprising that the legislative framework of the country has not drafted specific regulations, which address the legal outsourcing industry specifically.

In India, the legislative and regulatory framework is silent on providing direction for the outsourcing industry. The main objective of the legal sector has been to protect the practice of law in the country. Both the practicing lawyer¹¹⁴ and the lawyer working for the LPO provider are to maintain adherence to the Bar Council of India Rules. These include, maintaining client confidentiality and checking for conflicts of interest. Are these frameworks sufficient to address the outsourcing relationship?

4.5 Challenges arising from Legal Process Outsourcing in the UK and India

Concurrently, with the list of advantages outsourcing provides, such as cost savings and access to a pool of legal professionals, so too are there challenges that have been posed by the practice of outsourcing legal services for both the outsourcer originator and the LPO provider. These challenges include: the unauthorised practice of law; ensuring client information is kept confidential; avoiding conflicts of interest; the duty to disclose the outsourcing relationship to the client and billing the client appropriately for the services being rendered offshore.

¹¹⁴ See Chapter 4 (A Comparative Analysis of the Legal Systems of the United Kingdom and India) footnote 105.

While some solutions have been implemented to counteract rising issues, there are still questions surrounding outsourcing legal work. Solutions introduced from the outsourcer's perspective are that some relevant law societies, namely the UK, Australia and US, have provided their recommendations to outsourcing legal services. Although compliance with these recommendations is not mandatory on the lawyer, they do provide a stepping-stone for the novice outsourcer delving into the outsourcing arena for the first time. The LPO provider, on the other hand, has taken a proactive approach and responded to the afore-mentioned challenges by implementing internationally recognised certifications, as for example, Six Sigma, ISO 27001 and ISO 9001¹¹⁵ to counteract issues pertaining to the protection of confidential information sent offshore; provided training for their staff to prepare them for the performance of legal services pertaining to foreign law; strengthening their service contracts with the outsourcer and LPO providers have taken to issuing their own recommendations¹¹⁶ to enable law firms and legal departments to make an informed decision when outsourcing.

It is important to note that due to the lack of regulation for the LPO industry, each party to the outsourcing relationship has taken a different approach to addressing the challenges they encounter in using the LPO business model to render legal services. This section will explore the manner in which the UK, primarily recognised as the outsourcer in the outsourcing relationship, and India, primarily recognised as the outsourcing provider, has responded to the challenges raised by the outsourcing of legal work.

4.5.1 United Kingdom

Aside from issuing practice notes on outsourcing legal services, that address client confidentiality, obtaining client consent when outsourcing and supervising the performance of the legal services that have been outsourced, the UK has tightened its data protection legislation. For the outsourcer, sending legal work to an offshore

¹¹⁵ See Chapter Two (The Growth and Development of Legal Process Outsourcing) footnote 99.

¹¹⁶ See Chapter 2 (The Growth and Development of Legal Process Outsourcing) section 2.5.2 (Non-financial benefits) for a list of the recommendations offered by the LPO provider to the potential outsourcer.

outsourcing destination poses a greater risk to ensuring information being shared is adequately protected from disclosure. The outsourcer needs to confirm that the LPO provider has the necessary mechanisms in place to safeguard the security of the data being transferred and / or shared across the border.¹¹⁷ This challenge is especially important, as the outsourcer owes a duty to their clientele to ensure the safety and security of the confidential information imparted and entrusted to them. The latter is one of the professional codes of conduct as stipulated by the UK Law Society's practice notes on outsourcing, and which the outsourcer is obligated to comply with when providing legal services.

Client confidentiality and data protection

Any business operating outside the EU, and is controlling or processing the personal data of an EU individual is required to comply with the GDPR.¹¹⁸ Therefore by association, the LPO provider will be expected to conform and abide by the rules of this regulation when performing the legal services for the outsourcer in the UK.¹¹⁹

The key changes for the outsourcing industry in respect of the GDPR are listed below, together with the applicable sections from the regulation.¹²⁰ In reference to the below, in the outsourcing relationship, the data controller would be categorised as the outsourcer and the data processor would be categorised as the LPO provider:

(i) Fines for non-compliance: article 83(3) of the GDPR states:

'If a controller or processor intentionally or negligently, for the same or linked processing operations, infringes several provisions of this Regulation, the total amount

¹¹⁷ Adair M 'Legal Issues in Offshore Outsourcing of Services' available at <http://markadair.net/legal-issues-in-offshore-outsourcing-of-services/> (accessed 17 July 2018).

¹¹⁸ Nanda S and Pandit Z 'GDPR: Why does a Law enacted in Europe affect Business in India?' available at <https://economictimes.indiatimes.com/small-biz/startups/newsbuzz/gdpr-why-does-a-law-enacted-in-europe-affect-businesses-in-india/articleshow/64365950.cms> (accessed 17 July 2018.)

¹¹⁹ Arden A 'How Will the GDPR Affect Offshoring?' available at <https://www.hrsolutions-uk.com/will-gdpr-affect-offshoring/> (accessed 17 July 2018).

¹²⁰ Flynn B 'The General Data Protection Regulation: Key Implications for UK Outsourcing' available at <https://www.stevens-bolton.com/site/insights/articles/gdpr-key-implications-for-uk-outsourcing> (accessed 24 may 2018).

of the administrative fine shall not exceed the amount specified for the gravest infringement.¹²¹

Under the previous data protection legislation, UK Data Protection Act, 1998 only the data controller would be imposed with a fine for not complying with the specifics of the regulation. Under the GDPR, the data processor is now also susceptible to receiving fines for non-compliance with the regulation.

(ii) Appointment of data protection officer: paragraph (97) of the GDPR stipulates that:

‘(97) Where the processing is carried out by a public authority, except for courts or independent judicial authorities when acting in their judicial capacity, where, in the private sector, processing is carried out by a controller whose core activities consist of processing operations that require regular and systematic monitoring of the data subjects on a large scale, or where the core activities of the controller or the processor consist of processing on a large scale of special categories of personal data and data relating to criminal convictions and offences, a person with expert knowledge of data protection law and practices should assist the controller or processor to monitor internal compliance with this Regulation. In the private sector, the core activities of a controller relate to its primary activities and do not relate to the processing of personal data as ancillary activities. The necessary level of expert knowledge should be determined in particular according to the data processing operations carried out and the protection required for the personal data processed by the controller or the processor. Such data protection officers, whether or not they are an employee of the controller, should be in a position to perform their duties and tasks in an independent manner.’¹²²

Businesses dealing with large scale personal data must appoint a data protection officer with intricate knowledge of data protection laws. This applies to both the data controller and the data processor in particular if they partake in large-scale projects that require the processing of personal information. The data protection officer must be allowed to perform their duties independently.

¹²¹ General Data Protection Regulation (GDPR) (EU) 2016/679, Article 83(3).

¹²² General Data Protection Regulation (GDPR) (EU) 2016/679, Paragraph (97).

(iii) Notification of breach: article 33(1) and 33(2) of the GDPR provides:

‘1. In the case of a personal data breach, the controller shall without undue delay and, where feasible, not later than 72 hours after having become aware of it, notify the personal data breach to the supervisory authority competent in accordance with Article 55, unless the personal data breach is unlikely to result in a risk to the rights and freedoms of natural persons. Where the notification to the supervisory authority is not made within 72 hours, it shall be accompanied by reasons for the delay.

2. The processor shall notify the controller without undue delay after becoming aware of a personal data breach.’¹²³

Notifications concerning the breach of personal information must be disclosed within a set time frame. This applies to both the data controller and the data processor. Specifically, the data controller must notify all breaches concerning personal data to the regulator as well as the individuals concerned, without delay or within 72 hours after becoming aware of said breach. The data processor is to notify the data controller of any breach immediately upon becoming privy to said breach.

(iv) Non-compliance with regulations: article 83(6) of the GDPR states:

‘6. Non-compliance with an order by the supervisory authority as referred to in Article 58(2) shall, in accordance with paragraph 2 of this Article, be subject to administrative fines up to 20 000 000 EUR, or in the case of an undertaking, up to 4 % of the total worldwide annual turnover of the preceding financial year, whichever is higher.’¹²⁴

Outsourcing providers will now become susceptible to being fined. The penalty for serious breaches under the GDPR for non-compliance is €20 million or four percent of the global annual turnover of the company, whichever is greater. This is significantly higher than the previous data protection regulation whereby the maximum fine imposed for non-compliance in the UK was stated as being £500 000.

¹²³ General Data Protection Regulation (GDPR) (EU) 2016/679, Article 33(1) and 33(2).

¹²⁴ General Data Protection Regulation (GDPR) (EU) 2016/679, Article 83(6).

- (v) Implementation of internal policies and procedures: paragraph (78) of the GDPR stipulates that:

'(78) The protection of the rights and freedoms of natural persons with regard to the processing of personal data require that appropriate technical and organisational measures be taken to ensure that the requirements of this Regulation are met. In order to be able to demonstrate compliance with this Regulation, the controller should adopt internal policies and implement measures which meet in particular the principles of data protection by design and data protection by default. Such measures could consist, inter alia, of minimising the processing of personal data, pseudonymising personal data as soon as possible, transparency with regard to the functions and processing of personal data, enabling the data subject to monitor the data processing, enabling the controller to create and improve security features. When developing, designing, selecting and using applications, services and products that are based on the processing of personal data or process personal data to fulfil their task, producers of the products, services and applications should be encouraged to take into account the right to data protection when developing and designing such products, services and applications and, with due regard to the state of the art, to make sure that controllers and processors are able to fulfil their data protection obligations. The principles of data protection by design and by default should also be taken into consideration in the context of public tenders.'¹²⁵

Data controllers under GDPR will be required to implement internal compliance procedures and policies which illustrate their observance of the requirements of the GDPR. These policies and procedures will need to be amended when and if needs be.

- (vi) Keep records: article 30 of the GDPR relates to maintaining records of processing activities:

'(1) Each controller and, where applicable, the controller's representative, shall maintain a record of processing activities under its responsibility.[...]

(2) processing activities carried out on behalf of a controller [...]

¹²⁵ General Data Protection Regulation (GDPR) (EU) 2016/679, Paragraph (78).

(4) The controller or the processor and, where applicable, the controller's or the processor's representative, shall make record available to the supervisory authority on request.

(5) The obligations referred to in paragraphs 1 and 2 shall not apply to an enterprise or an organisation employing fewer than 250 persons unless the processing it carries out is likely to result in a risk to the rights and freedoms of data subjects, the processing is not occasional, or the processing includes special categories of data as referred to in Article 9(1) or personal data relating to criminal convictions and offences referred to in Article 10.¹²⁶

Data controllers and data processors will have to keep records of all their data processing activities, which can be reviewed by the regulator. This requirement will apply to businesses who have more than 250 employees unless the data processing activity imposes a risk to the rights of the client, is not a normal occurrence within the businesses activities, pertains to criminal records or includes special categories of information.

(vii) Risk assessment: paragraph (84) of the GDPR states that:

‘(84) In order to enhance compliance with this Regulation where processing operations are likely to result in a high risk to the rights and freedoms of natural persons, the controller should be responsible for the carrying-out of a data protection impact assessment to evaluate, in particular, the origin, nature, particularity and severity of that risk. The outcome of the assessment should be taken into account when determining the appropriate measures to be taken in order to demonstrate that the processing of personal data complies with this Regulation. Where a data-protection impact assessment indicates that processing operations involve a high risk which the controller cannot mitigate by appropriate measures in terms of available technology and costs of implementation, a consultation of the supervisory authority should take place prior to the processing.’¹²⁷

Data controllers are to conduct risk assessments, referred to as data impact assessments under the GDPR when deciding to process personal data on high risk

¹²⁶ General Data Protection Regulation (GDPR) (EU) 2016/679, Article 30.

¹²⁷ General Data Protection Regulation (GDPR) (EU) 2016/679, Paragraph (84).

matters. The data controller will also be required to liaise with the regulator prior to starting on the processing or if the assessment indicates that processing the data would be of a high risk. The results ascertained from the risk assessment is to be taken into consideration when deciding on the applicable steps to take to process the data.

(viii) Sub-contractor / third party: article 6(1)(f) of the GDPR, states:

‘1. Processing shall be lawful only if and to the extent that at least one of the following applies:

(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.’¹²⁸

Should a data processor choose to use the services of a sub-contractor, it must be deemed a necessity and the data processor will be held liable to the data controller for the performance of the sub-contractors they utilise in performing the legal services. Prior consent to sub-contracting any of the processing of data must be obtained from the data controller. It should be noted that the sub-contractor if based outside the EU will also have to comply with GDPR requirements of processing data.

Businesses have been provided with two years from the 25 May 2018, in which to implement the rules specified under the GDPR so as to ensure compliance.¹²⁹

It is important to note that the GDPR only affects outsourcers, like the UK, who are part of the EU and the offshore country to which they are outsourcing the performance of the legal services. Therefore, should an LPO provider, such as South Africa, be undertaking legal work for a non-EU country, the South African outsourcing provider would not be under any obligation to abide by this data protection regulation.

¹²⁸ General Data Protection Regulation (GDPR) (EU) 2016/679, Article 6(1)(f).

¹²⁹ Flynn B ‘ The General Data Protection Regulation: Key Implications for UK Outsourcing’ available at <https://www.stevens-bolton.com/site/insights/articles/gdpr-key-implications-for-uk-outsourcing> (accessed 24 may 2018).

The GDPR effectively provides a framework for protecting data and ensuring that the client's details are kept confidential, imposing strict compliance on the parties involved in the processing of data. Thereby regulating the manner in which personal data is managed and secured. The onus of responsibility as regards to compliance with the regulation is shared between both the outsourcer as data controller and the LPO provider as the data processor. However, this regulation only applies if the personal data that is being shared and processed belongs to an EU national.

4.5.2 India

Legal experts and the media in India, both recognise the challenges brought on by LPOs as regards professional conduct, ethics and maintaining client confidentiality when outsourcing legal services.¹³⁰ They suggest that due consideration be given to the following duties when outsourcing legal services:¹³¹

- (i) Client attorney confidentiality: an attorney has the duty to keep client information secure. Therefore, is sharing the client information with a non-lawyer or the LPO provider a breach of the client-attorney confidentiality agreement?
- (ii) Outsourcing legal work to a foreign lawyer: traditionally attorneys have been delegating the performance of certain legal work to other legal professionals. The latter is a permissible practice as long as the attorney duly supervises and remains responsible for the work product. Or is this practice considered the unauthorised practice of law?
- (iii) The duty to supervise the legal work being outsourced: the outsourcing attorney needs to ensure that they conduct adequate supervisory measures over the work being performed by the foreign lawyer. The latter includes reviewing the work from start to finish. The latter is necessary to ensure that the attorney remains compliant with their responsibilities as provided by the relevant authorities they retain membership with.
- (iv) The duty to secure the clients confidences: the attorney has the responsibility of obtaining the client's prior consent when disclosure of their information is to be

¹³⁰ Gupta A and Sengupta S 'Impact of Globalization on Legal Profession in India - A Critical Analysis' (2011) 10 *Korea University Law Review* 87.

¹³¹ Gupta A and Sengupta S 'Impact of Globalization on Legal Profession in India - A Critical Analysis' (2011) 10 *Korea University Law Review* 87 89.

made. This includes informing the client of confidentiality laws in the offshore outsourcing LPO destination country.

- (v) The duty to check for conflicts of interest: the outsourcer must obtain confirmation from the LPO provider that there are prior engagements / matters that they have provided legal services that would have an adverse effect on the interests of their client.
- (vi) The duty to bill responsibly: when outsourcing legal services, the attorney is to bill the client for the performance of support work and not as the legal fees due to an attorney.
- (vii) The duty to obtain the client's consent prior to outsourcing: the attorney is to notify the client and obtain their acceptance, should they outsource certain work on behalf of the client; and
- (viii) Taking responsibility of the work product: the attorney will remain responsible for the work delivered and performed by the LPO provider and foreign lawyer. They must therefore ensure that the work meets acceptable standards.

The above-mentioned duties are the key elements making up the ethical duties expected from lawyers in the legal profession in the delivery of legal services in India. What is ascertained from the above is that these considerations cater for the responsibilities owed by the outsourcer to their client. The duties outlined above are comparable to the duties expected from the outsourcer in the UK. In both countries, the outsourcer is tasked with safeguarding client confidentiality; supervising the performance of the work; obtaining client consent prior to outsourcing; confirming that no conflicts of interest exist; the outsourcer remains responsible of the work irrespective if it is outsourced to the LPO provider; and the client is billed for the services in proportion to the task being performed offshore.

Outsourcing to India has raised specific concerns relating to the adequacy of the training of the legal professionals performing the legal work and the impact this has on the quality of work being performed by the Indian lawyer, as well as the privacy of confidential information and the safety concerns around the protections of data.¹³²

¹³² Hanson A 'Legal Process Outsourcing to India: So Hot Right Now' (2009) 62 *Southern Methodist University Law Review* 1890.

Training and quality of work

As regards the practice of law in India, unless Indian citizens are permitted to practice law in a foreign jurisdiction, foreign lawyers cannot practice law in India or provide legal services.¹³³ This has brought about a number of court cases against foreign law firms based in India. The litigation against these firms is a consequence of claims that they are illegally practicing law in India under the pretext of offering LPO services.¹³⁴ An example of such a matter, was a case, namely *Balaji v. Government of India, W.P.*,¹³⁵ brought before the Indian courts in March 2010, in which a practicing Indian advocate filed a suit against 30 foreign law firms (a few examples of the law firms are: Allen & Overy, Clifford Chance, Linklaters and Integreon, being the biggest LPO providers) for illegally practicing law in India, thereby contravening their domestic law.¹³⁶ The courts held that foreign law firms and lawyers were not permitted to practice law in India but they could visit India on a temporary basis to provide legal advice to their Indian clients on foreign law.¹³⁷ Having this restriction protects the LPO sector in India, as it ensures that only Indian lawyers and business professionals will manage the company in India. Therefore the Indian authorities have taken the approach to protect and safeguard entry in to the legal profession in India. Although foreign investment is welcomed into the country, as these LPO providers bring a substantial financial benefit to the country, they are however barred from certain activities. The latter is comparable to the UK, in that only certain legal activities / services as provided by the Solicitors Regulation Authority may be outsourced.¹³⁸

The quality of legal work performed by Indian lawyers has been considered as a challenge amongst their US client base.¹³⁹ The latter is mainly as a result of the varying standards in both the qualification and training methods available to legal

¹³³ See Chapter 4 (A Comparative Analysis of the Legal Systems of the United Kingdom and India), section 4.4 (Legislative and regulatory framework in India).

¹³⁴ Singh V 'Interrogating Outsourcing Legal Services in India in Lens of Common Law vs. Civil Law' (2016) 7 *Bharati Law Review* 123.

¹³⁵ *Balaji v. Government of India, W.P.* No. 5614 of 2010 (Madras H.C. February 21, 2012) (India).

¹³⁶ Singh V 'Interrogating Outsourcing Legal Services in India in Lens of Common Law vs. Civil Law' (2016) 7 *Bharati Law Review* 123.

¹³⁷ Goel AK 'Bar Council of India vs A.K. Balaji on 13 March 2018' available at <https://indiankanoon.org/doc/132041574/> (accessed 07 August 2018).

¹³⁸ See section 4.2.1 (The United Kingdom) above.

¹³⁹ Hanson A 'Legal Process Outsourcing to India: So Hot Right Now' (2009) 62 *Southern Methodist University Law Review* 1898.

professionals partaking a legal career in India.¹⁴⁰ The poor quality of the legal education in India has been described as follows:

‘the limited rigour of legal training in Indian law schools and easy credentialing of the profession made law the most accessible ‘professional’ degree that a student could acquire...In sum, too many law schools with poor-quality teaching and facilities resulted in the mass production of low-quality legal personnel, many of whom do not work as lawyers.’¹⁴¹

The above demonstrates the quality of legal services an outsourcer may expect from the legal professionals working in LPOs. The variations in the standard of training and qualifications make for a fluctuating level of quality of work. The element of close monitoring procedures and supervision by the outsourcer therefore becomes a must. But how practical is the act of supervising legal work, when the work is being performed offshore?

Confidential information

Indian LPO providers tend to have a high staff turnover, as employees leave for better work opportunities.¹⁴² This raises the concern that the LPO employee that is leaving may also be taking with them confidential information acquired through working in the LPO center, for the purpose of selling the information to the highest bidder.¹⁴³ The latter highlights the necessity of having stringent non-disclosure agreements and data protection policies.

When outsourcing to India, conserving confidentiality is a great concern to outsourcers, especially as the quality of the countries ethical standards is in doubt.¹⁴⁴

¹⁴⁰ Hanson A ‘Legal Process Outsourcing to India: So Hot Right Now’ (2009) 62 *Southern Methodist University Law Review* 1899.

¹⁴¹ Kuruvilla S and Noronha E ‘From Pyramids to Diamonds: Legal Process Offshoring, Employment Systems, and Labor Markets for Lawyers in the United States and India’ (2016) 69 *Industrial Labor Relations Review* 370.

¹⁴² Hanson A ‘Legal Process Outsourcing to India: So Hot Right Now’ (2009) 62 *Southern Methodist University Law Review* 1906.

¹⁴³ Hanson A ‘Legal Process Outsourcing to India: So Hot Right Now’ (2009) 62 *Southern Methodist University Law Review* 1906.

¹⁴⁴ Hanson A ‘Legal Process Outsourcing to India: So Hot Right Now’ (2009) 62 *Southern Methodist University Law Review* 1905.

An example of case¹⁴⁵ that was brought before the courts in the US as result over concerns for confidential information was the 2008 case of *Newman McIntosh & Hennessey v George W Bush, LPO Acumen Legal Services (India) Pct. Ltd and Acumen Solutions, LLC (Columbia District Court, December 5, 2008)*.¹⁴⁶ This case was brought before the courts against an Indian based LPO provider named Acumen Legal Services by the US law firm Newman, McIntosh & Hennessey.¹⁴⁷ The law firm was concerned over the security of the confidential information being outsourced, and therefore asked the court to determine: (i) whether outsourcing compromised constitutional rights, (ii) if client consent was required prior to sending work offshore and (iii) whether law firms should disclose the use of LPO support to perform legal services.¹⁴⁸ However, before the court could take a decision, the law firm decided to stop court proceedings and voluntarily took the necessary steps to dismiss the case. Although no court¹⁴⁹ has made a ruling on the privacy and confidentiality concerns raised by outsourcing legal work, LPO providers in India are confident that the latter is not an issue as they have take appropriate measures to secure information.¹⁵⁰

Data protection

Currently, there is an absence of an operational data protection legislation in India.¹⁵¹ However, rules pertaining to data privacy can be found in the country's Information Technology Rules, 2011 and the Information Technology Act, 2000, which are tailored towards the country's Information Technology business sector. The aforementioned legislations provides that Indian companies that handle personal information must:

¹⁴⁵ Further cases involving the outsourcer and the LPO providers shall be explored in Chapter 6 (The Need to Regulate Legal Process Outsourcing).

¹⁴⁶ *Newman McIntosh & Hennessey v George W Bush, LPO Acumen Legal Services (India) Pct. Ltd and Acumen Solutions, LLC* No 1:08-cv-00787-CKK (Columbia District Court, December 5, 2008).

¹⁴⁷ Hanson A 'Legal Process Outsourcing to India: So Hot Right Now' (2009) 62 *Southern Methodist University Law Review* 1905.

¹⁴⁸ Hanson A 'Legal Process Outsourcing to India: So Hot Right Now' (2009) 62 *Southern Methodist University Law Review* 1905.

¹⁴⁹ Further cases involving the outsourcer and the LPO providers shall be explored in Chapter 6 (The Need to Regulate Legal Process Outsourcing).

¹⁵⁰ Hanson A 'Legal Process Outsourcing to India: So Hot Right Now' (2009) 62 *Southern Methodist University Law Review* 1905.

¹⁵¹ Wankhede A 'Data Protection in India and the EU: Insights in Recent Trends and Issues in the Protection of Personal Data' (2016) 1 *European Data Protection Law Review* 70.

- ‘(a) have a privacy policy which specifies how personal information will be dealt with;
- (b) obtain consent from the provider of sensitive personal data regarding the collection and usage of the information;
- (c) disclose (i) the fact that the information is being collected. (iii) the purpose of collection, (iii) the intended recipient of the information, and (iv) the name and address of any agency collecting the information and retaining the information;
- (d) ensure that the information cannot be retained for longer than is required having regard to the purpose of collection;
- (e) securely store such information using reasonable security practices; and
- (f) ensure that such information is only transferred to another person or entity (whether in India or outside India) that has a similar level of security.’¹⁵²

As mentioned previously, the above considerations apply to information technology sector and refer mainly to Indian companies who deal with personal information. The company in India is required to implement a privacy policy, obtain consent from the client prior to collecting their personal information, provide the reasons why the personal information is being collected, keep the information for only for its intended purpose, adequately store the personal data and ensure that should the information be required to be disclosed outside of India, the offshore country has the same level of security as India so as to safeguard the unwanted disclosure of the personal information.

It is however comparable to the data protection regulation in the UK, namely the GDPR, in that similar principles as regard data processing is followed. However, this legislation is not intended for the outsourcing of legal services but for the Information Technology sector. It is rather directed at the company based in India, who is processing and storing personal data in India. Although these rules can be moulded to apply to the LPO industry, the LPO provider is on the whole left to ascertain the standard and level of security that would be required to curtail any data protection infringements or breaches.

¹⁵² Chengappa U ‘Outsourcing 2018 India’ available at <https://iclg.com/practice-areas/outsourcing-laws-and-regulations/india> (accessed 02 August 2018).

Due to the lack of data protection legislation pertaining to the LPO industry in India, the questions that arises is: are the measures implemented by LPO providers to secure data received from the outsourcer, adequate in reducing possible data breaches? There are some outsourcers who have resolved this challenge by having the Indian LPO work directly off of their servers so as to ensure the security of the data being shared.¹⁵³ But for many outsourcers, the lack of data protection legislation remains a major risk.¹⁵⁴

Under the European Union data protection laws, companies cannot transfer personal data to countries that do not have similar data protection provisions.¹⁵⁵ This would therefore exclude India as an offshoring destination choice, unless India implemented applicable security measures as guided under the GDPR. The Indian government has responded to the implementation of the GDPR by stating that they are in the process of drafting applicable legislation to bring laws surrounding data protection up to speed, as their current legislation, the Information Technology Act of 2000, is inadequate to meet the outsourcing sector's needs.¹⁵⁶ By upgrading their data protection laws, India aims to attract more foreign companies wishing to outsource to the country.¹⁵⁷ But, it remains unclear exactly when India will implement its data protection bill.¹⁵⁸ The latter is a similar stance to that in South Africa, whereby it is unknown when the country's Protection of Personal Information (POPI) regulation will come into effect.

Additional challenges

Other challenges when outsourcing to India include: the political corruption errant in the country; the language barrier (for example: lack of fluency and understanding of

¹⁵³ Hanson A 'Legal Process Outsourcing to India: So Hot Right Now' (2009) 62 *Southern Methodist University Law Review* 1907.

¹⁵⁴ Wankhede A 'Data Protection in India and the EU: Insights in Recent Trends and Issues in the Protection of Personal Data' (2016) 1 *European Data Protection Law Review* 78.

¹⁵⁵ Pounder C 'Data Protection and Offshoring to India' available at <https://www.out-law.com/page-5013> (accessed 17 July 2018).

¹⁵⁶ Pounder C 'Data Protection and Offshoring to India' available at <https://www.out-law.com/page-5013> (accessed 17 July 2018).

¹⁵⁷ Pounder C 'Data Protection and Offshoring to India' available at <https://www.out-law.com/page-5013> (accessed 17 July 2018).

¹⁵⁸ Arden A 'How Will the GDPR Affect Offshoring?' available at <https://www.hrsolutions-uk.com/will-gdpr-affect-offshoring/> (accessed 17 July 2018).

the English language); cultural differences; poor infrastructure and the costly trips to India being that the country is geographically further away in distance from the outsourcer.¹⁵⁹

Furthermore, as a consequence of the Indian court system having a substantial backlog of court cases still waiting to be heard and judgments being handed down are unpredictable as they are plagued by bribery and corruption, problems arising between the outsourcer and the LPO provider in India is best dealt with by alternative dispute resolution.¹⁶⁰ However, should decisions made by the arbitrator be contrary to domestic law, the Supreme Court in India has the authority to have the award set aside.¹⁶¹ There is therefore minimal recourse for the outsourcer against the LPO provider for any disputes.

Therefore, in summary, the considerable cost savings that LPOs based in India provide cannot be overlooked. But there is an obvious need for guidance to be provided to create a standard quality of work, maintain client confidentiality, and more clarity is required on the measures to be taken to secure data when outsourcing legal services as raised by this business model.

4.6 Steps taken to reduce ethical challenges

The legal profession is cognisant of the ethical challenges arising from offshoring legal work. While some legal fraternities have preferred to remain mute on the subject, others have taken a proactive approach in assisting the outsourcer to make an informed decision on the offshoring of legal work.

From the previous section, some examples of the main ethical challenges brought about by outsourcing legal work include: the unauthorised practice of law, supervisory responsibilities, client confidentiality, the lack of data protection regulations, avoiding conflicts of interest and the duty to disclose the outsourcing relationship to the client. This section will review the actions taken by the authorities

¹⁵⁹ Hanson A 'Legal Process Outsourcing to India: So Hot Right Now' (2009) 62 *Southern Methodist University Law Review* 1892.

¹⁶⁰ Hanson A 'Legal Process Outsourcing to India: So Hot Right Now' (2009) 62 *Southern Methodist University Law Review* 1902.

¹⁶¹ Hanson A 'Legal Process Outsourcing to India: So Hot Right Now' (2009) 62 *Southern Methodist University Law Review* 1902.

in the UK to negate these ethical concerns. The reason being that the UK, Australia and the US are the only countries that have taken the initiative, unlike India and South Africa, to issue practice notes specifically for the outsourcing of legal services. Although these notes are purely recommendations for the lawyer wanting to outsource legal work, and their compliance is not mandatory upon the lawyer, they do offer some guidance in this respect. Whereas, both the legislative and regulatory frameworks in South Africa and India are insufficient in that they do not directly address the outsourcing relationship.

Ross, an avid advocate of outsourcing, has recommended the following top tips to be considered when outsourcing legal services:

- ‘Conduct reference checks.
- Investigate the background of the lawyers, non-lawyers and service provider.
- Interview the principal lawyers involved in your matters and assess their educational background.
- Inquire into the LPOs hiring practices to evaluate the quality and character of the employees likely to have access to client information.
- Investigate the security of the provider’s premises and computer network.
- Conduct a site visit.
- Assess the country to which services are being outsourced for its legal training, judicial system, legal landscape, disciplinary system and core ethical principles.
- Disclose the outsourcing relationship to the client and obtain informed consent.’¹⁶²

The above demonstrates that the outsourcer is expected to conduct a thorough due diligence exercise when choosing an LPO provider, so as to ascertain their eligibility in performing the required legal services. The outsourcer should also gather applicable information on the offshore country so as to be conscious of its legislative and regulatory framework and its ethical code of conduct within the legal sector. The

¹⁶² Ross M ‘Ethics of Legal Outsourcing White Paper’ available at <https://www.llrx.com/2010/02/ethics-of-legal-outsourcing-white-paper/> (accessed 20 November 2017).

manner in which the outsourcer is to assess the credibility and efficiency of the LPO provider, however, is not specified.

The legal sector in the UK is one of the few authorities¹⁶³ that have established what would be good practice for UK lawyers wanting to outsource their legal functions.¹⁶⁴ These practice notes, as they are referred to, aim to provide guidance to the lawyers and are not intended to establish any rules on outsourcing or to provide legal advice.¹⁶⁵ In fact the Solicitors Regulation Authority have not imposed any obligations to comply on the solicitors or barristers and they are thus left to determine whether they want to use these notes to guide their decision or not.¹⁶⁶ The Solicitors Regulation Authority practice notes on outsourcing specifically provides guidance on the risk outsourcing poses, these are:¹⁶⁷

- (i) The loss of confidentiality - solicitors are recommended to obtain their client's consent prior to outsourcing the legal work, to enter into confidentiality agreements with the LPO provider and to audit the processes the LPO provider has in place to safeguard confidential information;
- (ii) Management of the outsourcer's business – the law firm is responsible for managing and supervising the practice and are ultimately responsible for all work that is outsourced;
- (iii) Risk assessment – solicitors are to continually assess the risks involved in outsourcing legal work. Possible risks the outsourcer is expected to mitigate are: ensuring compliance with the Solicitors Regulation Authority Handbook; ensuring outsourcing is in the client's interests; protection of confidential information to avoid disclosure to third parties; establishing a process to check for conflicts of interest; ensuring similar standards of quality of work; risk to the outsourcer's business should the LPO provider fail to deliver; carry out due diligence on the LPO provider to confirm compliance with Solicitors Regulation

¹⁶³ The American Bar Council and the Offices of the Legal Services Commissioner in Australia have both published guidance notes on outsourcing to assist law firms and lawyers wanting to outsource their legal services offshore.

¹⁶⁴ See Chapter 4 (A Comparative Analysis of the Legal Systems of the United Kingdom and India) section 4.3 (Legislative and regulatory framework in the United Kingdom).

¹⁶⁵ Law Society UK 'Outsourcing' available at <https://www.lawsociety.org.uk/support-services/practice-notes/outsourcing/> (accessed 07 August 2018).

¹⁶⁶ Law Society UK 'Outsourcing' available at <https://www.lawsociety.org.uk/support-services/advice/practice-notes/outsourcing/> (accessed 07 August 2018).

¹⁶⁷ Law Society UK 'Outsourcing' available at <https://www.lawsociety.org.uk/support-services/advice/practice-notes/outsourcing/> (accessed 07 August 2018).

Authority obligations; and other regulatory risks such as data protection and bribery.¹⁶⁸

The above concerns are comparable to the concerns highlighted by the legal fraternity in India under section 4.5.2. Whereby it was held that when outsourcing, particular attention should be heeded to maintaining client confidences; the outsourcer is to implement adequate supervisory methods over the work being performed by the LPO provider; the outsourcer is ultimately responsible for the work product; legal professionals are to remain compliant with professional codes of conduct; client consent should be obtained when outsourcing; and checking for conflicts of interest. This demonstrates that the challenges in the UK and India are primarily similar in that both countries recognise the same risk factors when outsourcing. However, the main difference being that the UK predominantly takes on the role of the outsourcer, while India is an LPO provider. In addition, India does not permit foreign lawyers to practice in the country, thereby safeguarding the legal profession for Indian nationals only.

Once the law firm or solicitor has identified the risks involved in outsourcing, the Solicitors Regulation Authority in the UK recommends that the following questions be answered:

- ‘What activities, either legal activities or operational functions, do you want to outsource and why?’
- Which outsource provider are you intending to use and how will this arrangement work?
- How will you monitor the quality of the outsourced work? Whom will the work be undertaken by and what is the level of expertise of those who undertake it?
- How will you monitor compliance with the Handbook, including compliance with client care, confidentiality, conflict of interest, and equality and diversity requirements?
- How will you highlight any relevant working relationships you may have with third party suppliers and ensure that your policies are aligned with data protection laws in both the United Kingdom and the European Union?’¹⁶⁹

¹⁶⁸ Law Society UK ‘Outsourcing’ available at <https://www.lawsociety.org.uk/support-services/advice/practice-notes/outsourcing/> (accessed 07 August 2018).

By answering the above questions the outsourcer will be in a better position to decide on whether outsourcing the legal work is recommendable to their business and whether it will afford them to maintain compliance with Solicitors Regulation Authority rules of practice. So while outsourcing is an accepted model for delivering legal services, lawyers must not forget they are still ruled by regulation and must make certain that they protect their professional duties as imposed by the governing authorities within the legal fraternity, at all times.

The Solicitors Regulation Authority in the UK recognises that the LPO practice will bring regulatory challenges but with effective risk management lawyers should be able to meet the requirements for good practice of law.¹⁷⁰ It can be argued that the Solicitors Regulation Authority prefers to take a more sheltered position in not providing set rules on outsourcing, which is particularly surprising as the profession of law is steeped in regulation and known as a self-regulated body. By contrast, it can also be said that the Solicitors Regulation Authority is providing lawyers with the opportunity to have greater freedom in how legal services are being delivered to their clients. Thereby opening the doors to other business models, which would give great access to justice by all. Providing, however, that the outsourcer safeguards their client's interests and takes responsibility of the outsourcing relationship, they will be deemed compliant.

The Solicitors Regulation Authority provides that:

'Regulation can help protect the public and support the rule of law and the proper administration of justice by ensuring those providing legal services meet professional standards.'¹⁷¹

'Regulation of legal services must be modern and reflective of how the market is changing.'¹⁷²

¹⁶⁹ Law Society UK 'Outsourcing' available at <https://www.lawsociety.org.uk/support-services/advice/practice-notes/outsourcing/> (accessed 07 August 2018).

¹⁷⁰ The Law Society *Legal Process Outsourcing: What You Should Know* (2011) 10.

¹⁷¹ Solicitors Regulation Authority *Research and Analysis: The Changing Legal Services Market* (2016) 4.

Clearly, the Solicitors Regulation Authority has chosen to take a proactive approach thereby adapting the practice of law to the changes occurring within the legal sector. The Solicitors Regulation Authority has moved away from being a regulation-based authority, demanding strict compliance with the rules to being more outcomes based.¹⁷³ By being outcomes based, the Solicitors Regulation Authority sets out the targets solicitors are expected to meet to retain professional conduct and allows the solicitor with the freedom to decide how to deliver the legal services while maintaining ethical compliance.¹⁷⁴ It can be said that the Solicitors Regulation Authority is attempting to achieve a balance between compliance with regulations governing the legal system of the country and adjusting those regulations to represent the current trends that are remoulding the traditional manner in which legal services were performed.

As previously mentioned, LPOs are characterised as alternative business structures and are not regulated under the Legal Services Act or by the Solicitors Regulation Authority.¹⁷⁵ To demonstrate their acceptance of this type of business model, the Solicitors Regulation Authority provides:

‘But we should remember that the growth of the alternative legal market is not in the control of the SRA (Solicitors Regulation Authority) alone: the only decisions we can make in this regard are whether solicitors should be allowed to take part in that market and what regulation such participation should attract. We are reforming our approach to regulation and rewriting the rules. A simplified and more liberal approach will provide greater freedom for solicitors to practice across the whole legal market and use their professionalism and skills to underpin better, affordable access to services.’

¹⁷² Solicitors Regulation Authority *Research and Analysis: The Changing Legal Services Market* (2016) 30.

¹⁷³ Clyde&Co ‘The Growth of Outcomes-based Regulation? Transatlantic developments’ available at <https://www.clydeco.com/uploads/Files/cc009923-the-growth-of-outcomes-based-regulation-20-04-16.pdf> (accessed 08 August 2018).

¹⁷⁴ Clyde&Co ‘The Growth of Outcomes-based Regulation? Transatlantic developments’ available at <https://www.clydeco.com/uploads/Files/cc009923-the-growth-of-outcomes-based-regulation-20-04-16.pdf> (accessed 08 August 2018).

¹⁷⁵ Solicitors Regulation Authority *Research and Analysis: The Changing Legal Services Market* (2016) 4.

The aim of the Solicitors Regulation Authority, from the above quote, is to ensure that the provision of legal services is accessible to the public and LPOs are seen as the solution to making this happen.

There is a need to adapt to change in the profession as a means to preserve the professionalism of the practice of law so that the quality of legal services is retained.¹⁷⁶ Changes in the legal profession are bound to bring about challenges, which cannot be swept under the carpet but will require attention and solutions. While the UK law society has voiced their support of outsourcing and taken a step further to introduce practice notes, is this sufficient to address the ethical concerns raised by LPOs?

4.7 Conclusion

This chapter set out to provide a comparative analysis between the LPO industries in the UK and India as compared to South Africa. The main similarity shared by these countries is the fact that national law does not regulate the outsourcing of legal services. While domestic law does impose requirements of practicing lawyers,¹⁷⁷ the decision to outsource is a grey area, which although an accepted business model no legal standpoint has been taken to rectify the ethical implications of outsourcing.

In the UK the responsibility of the relationship between the outsourcer and the LPO provider rests mostly with the outsourcer. The outsourcer as a member of the legal fraternity is compelled to work within the rules of the practice of law and maintain a supervisory role from a distance. India on the other hand, provides vast advantages to the outsourcer but it does not allow entry by foreign legal practitioners into their legal sector. In fact, there have been court cases where the issues of the authority of foreign LPOs to provide legal services in India have been questioned.¹⁷⁸ The South African legal fraternity shares the same position as India. Under the LPA, qualified South African legal practitioners who are members of the legal body are to comply with the

¹⁷⁶ Sieberson SC, Fayad A and Cintron-Arroyo C 'Changing Times in the Legal Profession - A Survey of Practicing Lawyers' (2017) 50 *Creighton Law Review* 454.

¹⁷⁷ See Chapter 4 (A Comparative Analysis of the Legal Systems of the United Kingdom and India) footnote 105.

¹⁷⁸ These court cases and other relevant court cases as pertains to the outsourcing industry will be discussed in greater detail in Chapter 6 (The Need to Regulate Legal Process Outsourcing).

LPA code of conduct and relevant rules when practicing law in the country. However, foreign lawyers may only practice should they be one of the designated countries listed under the legislative framework of the country, there is however, no barrier to South African qualified lawyers offering legal services or performing legal services based on foreign law.

One of the greatest challenges to inflict the UK outsourcer was the security of confidential information when moved offshore. With the implementation of GDPR, clear guidance was provided on the sharing and processing of data, where strict compliance by both the outsourcer and the LPO provider are mandatory, as non-compliance carries hefty penalties. Like South Africa, India has not yet enacted its data protection bill. The outsourcer, if not an EU national and therefore protected by the GDPR, will be left in a vulnerable position when it comes to data protection breaches. South Africa and India, unlike the UK, are not compelled to notify any authority or the person concerned, of any breach of data. Their regulations pertaining to data protection are more 'relaxed' as compared to the UK.

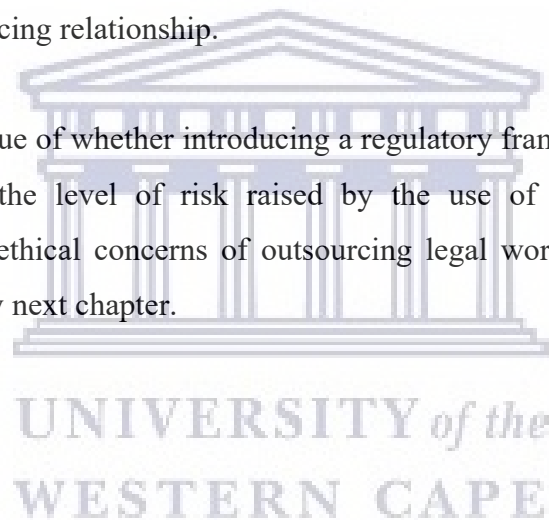
When it comes to the quality of work exported out of South Africa, foreign practitioners and LPOs based in the country are favoured over India, where the quality of their legal qualifications and training are in doubt. This preference is primarily a consequence of the language capabilities, high educational level and the similar legal system South Africa shares with the UK and other outsourcer originators.

Where some authorities have remained silent on the ethical concerns of outsourcing on the legal sector, the Solicitors Regulation Authority in the UK, has produced practice notes on outsourcing which is a step forward in both recognising the ethical concerns of outsourcing and attempting to mitigate the risks it poses. But it must be noted that these practice notes are not legal advice nor do they impose an obligatory duty on the lawyer wanting to outsource, to follow. Thus this raises the concern of whether these guidelines, as provided by relevant professional bodies, are sufficient to ensure that the legal work being outsourced is performed in a manner, which is compliant with a legal professional's ethical duties? Or should specific guidance be given on the required training and qualification of the legal professional performing

the services; the appropriate contractual obligations of both parties of the outsourcing relationship, detailing the expected outcome, service and targets to be achieved; or the standard obligations and responsibilities of both parties when outsourcing legal work? Or would a regulatory framework be the key to addressing all the ethical concerns raised? Stipulating the standard rules to be followed to ensure professional conduct and public interests are upheld?

What is clear is that both the outsourcer and LPO provider need to build upon a collaborative approach to ensure a successful business relationship when outsourcing. The key challenge to both parties is mitigating the amount of risk caused by the use of the LPO business model. Especially where there is a lack of regulation for the LPO industry and current legislative and regulatory frameworks are insufficient in addressing the outsourcing relationship.

Before tackling the issue of whether introducing a regulatory framework would be the answer to lessening the level of risk raised by the use of the LPOs, a better understanding of the ethical concerns of outsourcing legal work is required. I will discuss the latter in my next chapter.



CHAPTER FIVE

ETHICAL PRINCIPLES AND THE PRACTICE OF LAW

5.1 Introduction

Legal Process Outsourcing (LPO) has been instrumental in modernising the manner in which legal services are performed by the legal sector and it has become apparent that this business model has become a permanent fixture within the legal sector. The substantial growth in this sector proves that the legal fraternity has accepted it as a cost-effective mechanism, used to provide legal services efficiently, and has the added advantage of supplying both law firms and legal departments with the benefit of providing access to a variety of legal professionals with specialised legal knowledge. Although outsourcing legal work is not considered an unethical practice.¹ It does however raise ethical concerns within the practice of law, which merit discussion and investigation.

Furthermore, as discussed in Chapter 4 (A Comparative Analysis of the Legal Systems of the United Kingdom and India), there currently is no regulatory framework for the LPO industry in the world. The outsourcer originator and the LPO provider are left to establish best practice in the circumstances. Although, a select few legal bodies, namely the American Bar Association in the United States of America (US), the Law Society in the United Kingdom (UK) and the Offices of the Legal Services Commissioner in Australia recognise the ethical concerns of outsourcing and have responded by issuing practice notes for this industry. These notes are geared more towards providing the lawyer wanting to outsource legal services with the recommended steps to take when partaking on the outsourcing journey, while maintaining compliance with the codes of professional conduct imposed by applicable legal authorities so as to mitigate the risk outsourcing poses. However, it was found that compliance with the practice notes is not obligatory on the outsourcing lawyer and no specific guidance was provided to establish the required standards both parties

¹ Patterson LA III 'Outsourcing of Legal Services: A Brief Survey of the practice and the Minimal Impact of Protectionist Legislation' (2008) 7 *Richmond Journal of Global Law & Business* 187.

of the outsourcing relationship should meet to ensure that public interests and the reputation of the legal fraternity is upheld when outsourcing legal services.

Being that national law in South Africa does not regulate the outsourcing of legal services, a comparative analysis was conducted to explore the legislative and regulatory frameworks of South Africa, the UK and India, in regards to the LPO sector. The purpose of the comparison was to ascertain whether existing laws and regulations were sufficient to respond to the ethical concerns raised by the outsourcing of legal work.

The main ethical concerns brought about by outsourcing legal work include the unauthorised practice of law; ensuring client confidentiality; adhering to the duty to disclose; avoiding conflicts of interest and billing the client appropriately for the outsourced services. It was found that the legislative and regulatory frameworks in both South Africa² and India³ were insufficient, as they did not directly address the outsourcing of legal services. By contrast, in the UK, the practice notes on outsourcing provided a starting point for the novice lawyer wanting to send work offshore, it however was catered more towards being a reminder of the ethical duties imposed on lawyers, tended to focus more on administrative to low-level legal support work and did not provide an outline of the specifications of acceptable standards parties to the outsourcing relationship should comply with to alleviate the challenges of sending the performance of legal work offshore.⁴

It is therefore important to discuss these ethical concerns brought about by outsourcing, in view of its staggering billion-dollar growth, the lack of regulation for this industry and as a means of mitigating the level of risk posed by the LPO industry.

The overall purpose of this chapter is to investigate the current ethical concerns raised by LPOs and explore existing country specific guidelines and laws of primarily the UK, India and South Africa in relation to these concerns. This chapter will therefore

² See Chapter 3 (Legal Process Outsourcing in South Africa) section 3.4 (South Africa's legal and regulatory framework).

³ See Chapter 4 (A Comparative Analysis of the Legal Systems of the United Kingdom and India) section 4.4 (Legislative and regulatory framework in India).

⁴ See Chapter 4 (A Comparative Analysis of the Legal Systems of the United Kingdom and India) section 4.3 (Legislative and regulatory framework in the United Kingdom).

highlight the importance of ethics for lawyers; explore each of the main ethical concerns: unauthorised practice of law; ensuring client confidentiality; adhering to the duty to disclose; avoiding conflicts of interest and billing the client appropriately for the outsourced services raised by LPOs in detail; the consequences of breaching ethical rules; and the steps taken by some authorities in reducing ethical violations, brought about by outsourcing legal services offshore.

5.2 The role and importance of ethics in the practice of law

The profession of law can be traced back to the 17th Century, whereby a person who practiced law was considered as a person who uses their specialist knowledge of the law for the interest of another.⁵ This type of relationship lends itself to being one based on trust between the professional and the client.⁶ To protect the confidences a client places with their lawyer, legal bodies established ethical codes, which placed a mandatory duty on the lawyer to observe.⁷ The emergence of ethical duties can be attributed to when the traditional lawyer working in a law firm commenced practicing law, having to nurture and develop his or her client relationships in a manner which would compliment the legal professions' respected position in society.⁸ Even though the legal sector has since evolved, mainly as a result of the advent of globalisation and the improvement in technological systems, the practice of law has slowly adapted and responded to these changes,⁹ but the role of ethics continues to be an integral aspect influencing a lawyer's daily practice of law.

Ethics in the legal context, can be defined as principles which govern what is considered as the right / correct conduct by a legal professional in their day-to-day

⁵ Dobie K 'The Ethical Role of Lawyers' available at <https://www.tei.org.za/index.php/resources/articles/ethics-opinions/7206-the-ethical-role-of-lawyers> (accessed 13 August 2018).

⁶ Dobie K 'The Ethical Role of Lawyers' available at <https://www.tei.org.za/index.php/resources/articles/ethics-opinions/7206-the-ethical-role-of-lawyers> (accessed 13 August 2018).

⁷ Dobie K 'The Ethical Role of Lawyers' available at <https://www.tei.org.za/index.php/resources/articles/ethics-opinions/7206-the-ethical-role-of-lawyers> (accessed 13 August 2018).

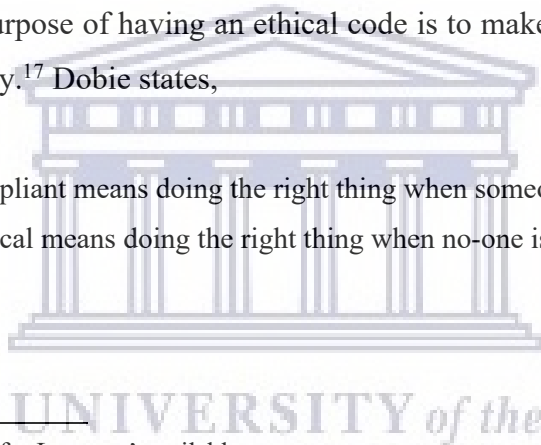
⁸ Bennett SC 'The Ethics of Legal Outsourcing' (2009) 36(4) *Northern Kentucky Law Review* 490.

⁹ Bennett SC 'The Ethics of Legal Outsourcing' (2009) 36(4) *Northern Kentucky Law Review* 490.

practice of law.¹⁰ Lawyers are required to meet ethical standards that ensure that they have a sound moral compass when practicing law so as to protect public interest.¹¹ Ethics is simply put permissible behavior.¹² Applicable authorities, legislation and international standards for the legal profession develop the ethical standards by which lawyers are obligated to comply with.¹³ These standards play a vital role in the legal profession, to the extent that ethical obligations and lawyering can be said to go hand in hand with each other.¹⁴ In fact, laws are drafted in support of ethical principles, which are in turn used to guide society.¹⁵

Lawyers must practice law in an ethically compliant manner, whereupon the code of ethics is the set of rules, which are used to measure and regulate what is deemed acceptable behavior and conduct of the legal professional in delivering legal services to their client.¹⁶ The purpose of having an ethical code is to make certain that lawyers practice law responsibly.¹⁷ Dobie states,

‘being legally compliant means doing the right thing when someone is watching, whereas being ethical means doing the right thing when no-one is watching.’¹⁸



¹⁰ Horizon Institute ‘Ethics for Lawyers’ available at <http://www.thehorizoninstitute.org/usr/library/documents/main/booklet-on-ethics-for-lawyers.pdf> (accessed 06 November 2017).

¹¹ Dobie K ‘The Ethical Role of Lawyers’ available at <https://www.tei.org.za/index.php/resources/articles/ethics-opinions/7206-the-ethical-role-of-lawyers> (accessed 13 August 2018).

¹² Maine JA ‘Importance of Ethics and Morality in Today’s Legal World’ (2000) 29 *Stetson Law Review* 1079.

¹³ Horizon Institute ‘Ethics for Lawyers’ available at <http://www.thehorizoninstitute.org/usr/library/documents/main/booklet-on-ethics-for-lawyers.pdf> (accessed 06 November 2017).

¹⁴ Harmon AR ‘The Ethics of Legal Process Outsourcing-Is the practice of Law a “Noble Profession” or Is it Just Another Business?’ available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1887197 (accessed 20 November 2017).

¹⁵ Dobie K ‘The Ethical Role of Lawyers’ available at <https://www.tei.org.za/index.php/resources/articles/ethics-opinions/7206-the-ethical-role-of-lawyers> (accessed 13 August 2018).

¹⁶ Ham JI ‘Ethical Consideration relating to Outsourcing of Legal Services by Law Firms to Foreign Service Providers: Perspectives from the United States’ (2008) 27 *Penn State International Law Review* 323.

¹⁷ Burns RP ‘The Purposes of Legal Ethics and the Primacy of Practice’ (1998) 39 *William & Mary Law Review* 327.

¹⁸ Dobie K ‘The Ethical Role of Lawyers’ available at <https://www.tei.org.za/index.php/resources/articles/ethics-opinions/7206-the-ethical-role-of-lawyers> (accessed 13 August 2018).

In short, to practice law, a lawyer is required to comply with specific qualifications and training as set by applicable bodies. However, when in practice, the services they provide to their clients are governed by set standards that protect the clients from receiving below par work, promotes public interest and ensures the lawyer is accountable for the work they deliver.

A lawyer has the duty to provide legal services within the standards set by applicable professional codes of conduct, to ensure that they uphold the reputation of the legal profession while practicing law.¹⁹ Legal professionals working within the legal industry have a responsibility not only towards their clients, but also to the legal system, society and the respective legal authorities they are members of.²⁰ They are expected to maintain these high standards of professional responsibility while striving to protect the rule of law in all affairs that they partake in.²¹ Therefore to practice ethically, a lawyer must act honestly and with integrity in their business dealings and in their personal lives.²²

The advancement in technological systems²³ and changes to client demands as pertains to access and the costs of legal services, as well as the emergence of competitive markets forced the legal sector to adapt and change.²⁴ As a consequence it is of paramount importance that the commitment to the observance of ethical guidelines be strongly maintained.²⁵ The main reasons why it is significant for

¹⁹ Horizon Institute 'Ethics for Lawyers' available at <http://www.thehorizoninstitute.org/usr/library/documents/main/booklet-on-ethics-for-lawyers.pdf> (accessed 06 November 2017).

²⁰ Heineman BW Jr, Lee WF and Wilkins DB 'Lawyers as Professionals and as Citizens: Key Roles and Responsibilities in the 21st Century' available at https://clp.law.harvard.edu/assets/Professionalism-Project-Essay_11.20.14.pdf (accessed 26 August 2018).

²¹ Horizon Institute 'Ethics for Lawyers' available at <http://www.thehorizoninstitute.org/usr/library/documents/main/booklet-on-ethics-for-lawyers.pdf> (accessed 06 November 2017).

²² Gibson K 'Ethics in action in the Legal Profession' available at <http://www.straussdaly.co.za/2017/04/03/ethics-action-legal-profession/> (accessed 11 September 2017).

²³ See Chapter 2 (The Growth and Development of the Legal Process Outsourcing), section 2.2 (The evolving legal marketplace).

²⁴ Gibson K 'Ethics in action in the Legal Profession' available at <http://www.straussdaly.co.za/2017/04/03/ethics-action-legal-profession/> (accessed 11 September 2017).

²⁵ Gibson K 'Ethics in action in the Legal Profession' available at <http://www.straussdaly.co.za/2017/04/03/ethics-action-legal-profession/> (accessed 11 September 2017).

members of the legal profession to preserve and comply with the set standard of ethical conduct include the following:²⁶

- (i) Lawyers have a duty to promote fairness and access to justice. Failure to do so in an ethical manner could result in public upheaval and disrepute of the legal system leading to an overall lack of confidence in the law.²⁷
- (ii) Maintaining the reputation of the legal profession harbours confidence in the judicial system.²⁸
- (iii) Lawyers have a responsibility towards the court and therefore have a duty to provide and promote justice to persons making use of the legal system.²⁹
- (iv) Being that a lawyer's job is to represent their client's interests for financial gain, it is imperative that they do so in an ethically compliant manner.³⁰
- (v) Having ethical rules translates to the lawyer being held accountable for the services they render. Non-compliance could therefore lead to disciplinary procedures being taken against the unethical lawyer, which in more severe cases, could result in losing their right to practice law.³¹

It is clear from the above points that ethical rules are significant to have since they place emphasis on the fiduciary obligations lawyers have towards their clients, the courts and the administration of justice. Next the specific ethical rules pertaining to the legal profession in the UK, India and South Africa will be discussed.

²⁶ Horizon Institute 'Ethics for Lawyers' available at <http://www.thehorizoninstitute.org/usr/library/documents/main/booklet-on-ethics-for-lawyers.pdf> (accessed 06 November 2017).

²⁷ Horizon Institute 'Ethics for Lawyers' available at <http://www.thehorizoninstitute.org/usr/library/documents/main/booklet-on-ethics-for-lawyers.pdf> (accessed 06 November 2017).

²⁸ Horizon Institute 'Ethics for Lawyers' available at <http://www.thehorizoninstitute.org/usr/library/documents/main/booklet-on-ethics-for-lawyers.pdf> (accessed 06 November 2017).

²⁹ MacFarlane P 'The importance of Ethics and the Application of Ethical Principles to the Legal Profession' (2002) 6 *Journal of South Pacific Law*.

³⁰ MacFarlane P 'The importance of Ethics and the Application of Ethical Principles to the Legal Profession' (2002) 6 *Journal of South Pacific Law*.

³¹ Horizon Institute 'Ethics for Lawyers' available at <http://www.thehorizoninstitute.org/usr/library/documents/main/booklet-on-ethics-for-lawyers.pdf> (accessed 06 November 2017).

5.2.1 Ethical rules for lawyers

Legal authorities such as relevant law societies and bar councils are responsible for establishing the ethical standards by which legal professionals are to adhere to. This section will consider the ethical rules in the UK, India and South Africa, the aforementioned countries being the chosen comparatives in Chapter 4 (A Comparative Analysis of the Legal Systems of the United Kingdom and India).³²

United Kingdom

The Solicitors Regulation Authority in the UK,³³ published the key ethical duties and responsibilities expected from practicing solicitors in the country:

'Ethics involves making a commitment to acting with integrity and honesty in accordance with widely recognised moral principles.

Ethics will guide a professional towards an appropriate way to behave in relation to moral dilemmas that arise in practice.

Ethics is based on the principles of serving the interests of consumers of legal services and of acting in the interests of the administration of justice, in which, in the event of a conflict, acting in the interests of the administration of justice prevails.³⁴

In reference to the above, to be considered an ethical lawyer, UK legal professionals are to comport him or herself by being truthful beings with a solid moral basis; to conduct themselves in a professional fashion when faced with a moral issue; and to ensure that the interests of their clients and justice prevail over possible disagreements.

India

The Bar Council of India has prescribed the code of conduct³⁵ for member lawyers practicing in India, and which govern the legal profession. In India, lawyers are

³² Chapter 4 (A Comparative Analysis of the Legal Systems of the United Kingdom and India).

³³ Chapter 4 (A Comparative Analysis of the Legal Systems of the United Kingdom and India) section 4.3 (Legislative and regulatory framework in the United Kingdom).

³⁴ The Law Society 'Ethics' available at <http://www.lawsociety.org.uk/support-services/ethics/> (accessed 26 August 2018).

referred to as advocates only, unlike in the UK (solicitors and barristers) and South Africa (legal practitioners).

Similar to the UK and South Africa, Indian lawyers have a duty towards the court, the client, their opponent and fellow lawyers.³⁶ The codes of ethics for Indian advocates set out the rules that govern their professional conduct while in the performance of their duties. These rules are:

‘A lawyer who has the legitimate certificate to practice in India has to accept briefs from their client in order to stand for them in the court.

A lawyer cannot pull out of a case without a reasonable and serious cause.

If the lawyer is deponent in a case himself, then they cannot represent a client in court for that particular case.

A lawyer has to be truthful and open to their client and declare all details of the case even if those details may cause harm to the client’s case in coming future.

A lawyer has to always protect and defend the well being of his client. It is an ethical responsibility of a lawyer to put his client’s interest before anyone else’s.

It is unethical for a lawyer to hide or conceal any material evidence or information if that may lead to the unfair sentencing of a person who is innocent.

A lawyer must not start or enrage litigation.

Confidentiality of exchanged information is a necessity in a client-advocate relationship, be it in the form of e-mail, letter or any other exchange of communication.

A lawyer cannot release any such sensitive information to a third party.

As a moral responsibility, a lawyer has to maintain trust and confidence of their client and must not ill-treat or abuse any information shared for any other purposes than representing the client.

As an ethical responsibility, a lawyer has to act only on the orders of their client or any person authorized by him.

A lawyer cannot misuse or mis-arrange any of client’s funds without informing them, like converting them into loans or any other wrongful means

If a lawyer is representing a client or any of the parties in a suit, then he can’t participate in selling or auctioning the property as a buyer.

³⁵ India’s code of conduct is incorporated into the Advocates Act, 1961.

³⁶ Sharma M ‘Code of Conduct for Lawyers in India’ available at <https://www.myadvo.in/blog/code-of-conduct-for-lawyers-in-india/> (accessed 24 October 2018).

A lawyer has to be accountable to his client for any amount of money delivered by the client i.e. details of the money spent, records of information gathered by that money, etc.

If a lawyer is representing one of the parties in a legal proceeding, he cannot represent any other parties in that suit.

Any personal liability of the lawyer should not be adjusted by the client's fees.³⁷

As is evident from the above, the Indian advocate as an officer of the court has to comply with the code of ethics to promote the best interests of both their client and the courts. In respect of the courts, the Indian advocate must be duly qualified to litigate, cannot stand down from a case unless they have just cause for doing so, must not instigate litigation proceedings unnecessarily and they cannot represent clients where there is a conflict of interest. The duties the advocate owes to the client in India specifically are: to be truthful, to represent the client to the best of their abilities, to protect confidential information from being disclosed, to act only in accordance with their client's demands and not to misappropriate their client's funds. In particular, from an ethical standpoint, the advocate must protect their client's interests to safeguard the trust and confidences the client shares with the advocate and the advocate can only act with the consent of their client. Under Indian law, should the advocate fail to comply with their ethical duties, they can be sued for professional misconduct by either the court system or the client.³⁸

South Africa

Similar to the UK, the Constitution of South Africa³⁹ and the South African Code of Conduct for legal professionals all advocate to supporting the provision of services in an ethical manner. More specifically, section 3.3.3 of the Legal Practice Act⁴⁰ states:

³⁷ Sharma M 'Code of Conduct for Lawyers in India' available at <https://www.myadvo.in/blog/code-of-conduct-for-lawyers-in-india/> (accessed 24 October 2018).

³⁸ Sharma M 'Code of Conduct for Lawyers in India' available at <https://www.myadvo.in/blog/code-of-conduct-for-lawyers-in-india/> (accessed 24 October 2018).

³⁹ The Constitution of the Republic of South Africa, 1996, Chapter 10.

⁴⁰ Legal Practice Act 28 of 2014.

‘[Legal practitioners, candidate legal practitioners and juristic entities shall] treat the interests of their clients as paramount, provided that their conduct shall be subject always to:

- 3.3.1 their duty to the court;
- 3.3.2 the interests of justice;
- 3.3.3 the observation of the law; and
- 3.3.4 the maintenance of the ethical standards prescribes by this code, any other code of ethics applicable to them and any ethical standards generally recognized by the profession.’⁴¹

Legal practitioners in South Africa, similar to the legal profession in India, have a duty towards the court, the administration of justice, to uphold the law and to comply with their ethical obligations.

In addition to the abovementioned duties, an essential element of being admitted as a legal practitioner in South Africa is the criteria that the person must be a ‘fit and proper’ person.⁴²

‘It is commonly accepted that in order to be "fit and proper" a person must show integrity, reliability and honesty, as these are the characteristics which could affect the relationship between a lawyer and a client or a lawyer and the public.’⁴³

A legal practitioner in South Africa must comport themselves towards their client and the public in a manner which shows them to be persons of honour, sincerity and truthfulness. By emulating these characteristics, the lawyer is then qualified to be a ‘fit and proper’ person to conduct and execute legal work.

Therefore, the key to being recognised as a professional in the legal sector in South Africa is to practice law with honesty and integrity, while upholding the legal

⁴¹ Code of Conduct section 3 Part II of the Legal Practice Act 28 of 2014.

⁴² Slabbert M ‘The Requirement of Being a “Fit and Proper” person for the Legal Profession’ available at <https://www.ajol.info/index.php/pelj/article/viewFile/68750/56820> (accessed 08 November 2017).

⁴³ Slabbert M ‘The Requirement of Being a “Fit and Proper” person for the Legal Profession’ available at <https://www.ajol.info/index.php/pelj/article/viewFile/68750/56820> (accessed 08 November 2017).

profession's code of conduct. This translates to the person acting in an ethical manner befitting a legal professional while simultaneously promoting the legal profession.⁴⁴

Therefore, from the above comparisons of the ethical duties of legal professionals in the UK, India and South Africa, it is apparent that having an ethical code is a crucial component in the practice of law, whereby enforcing a code of conduct promotes the credibility of the practicing lawyer⁴⁵ and the legal system. In turn, this safeguards the client's interest⁴⁶ and ensures that the lawyer is held accountable for the services they provide to the client. In a nutshell, every legal professional providing a legal service owes an ethical duty to his or her client, the courts and the administration of justice.⁴⁷

Imposing rules on lawyers to make certain that the delivery of legal services is performed in an ethical way, assists in affirming the positive opinion the public holds on the lawyer rendering the services and goes to substantiating whether the lawyer is seen as a professional lawyer.⁴⁸ From the perspective of the public, the perception they have on the legal sector as a whole is formed either through their personal interactions with the law and lawyers; opinions garnered from fellow peers and / or the subsequent publicised conduct of lawyers in general.⁴⁹ Conclusively, good reputations manifest into positive perceptions of the law and the legal profession.

To summarise, the role of ethics in the practice of law is an essential element of legal practice, irrespective of the jurisdiction in which the lawyer practices within or is a member of. The legal fraternity is grounded in ethical principles. These rules govern all aspects of their professional lives and provide guidance on what is considered as the right and proper conduct in the practice of law. Ethical rules set the standard every legal professional is governed by in the practice of law as well as persons working in

⁴⁴ Slabbert M 'The Requirement of Being a "Fit and Proper" person for the Legal Profession' available at <https://www.ajol.info/index.php/pelj/article/viewFile/68750/56820> (accessed 08 November 2017).

⁴⁵ See Chapter 4 (A Comparative Analysis of the Legal Systems of the United Kingdom and India) footnote 105.

⁴⁶ Slabbert M 'The Requirement of Being a "Fit and Proper" person for the Legal Profession' available at <https://www.ajol.info/index.php/pelj/article/viewFile/68750/56820> (accessed 08 November 2017).

⁴⁷ Bussell J 'Comparison of the Application of Ethical Duties of Foreign Legal Process Outsourcing' (2014) 27 *The Georgetown Journal of Legal Ethics* 438.

⁴⁸ Maine JA 'Importance of Ethics and Morality in Today's Legal World' (2000) 29 *Stetson Law Review* 1075.

⁴⁹ Maine JA 'Importance of Ethics and Morality in Today's Legal World' (2000) 29 *Stetson Law Review* 1075.

the legal sector, and holds them accountable to the services they deliver to their clients. All persons working in the legal profession therefore have a paramount duty towards their clients, the court and towards the administration of justice.

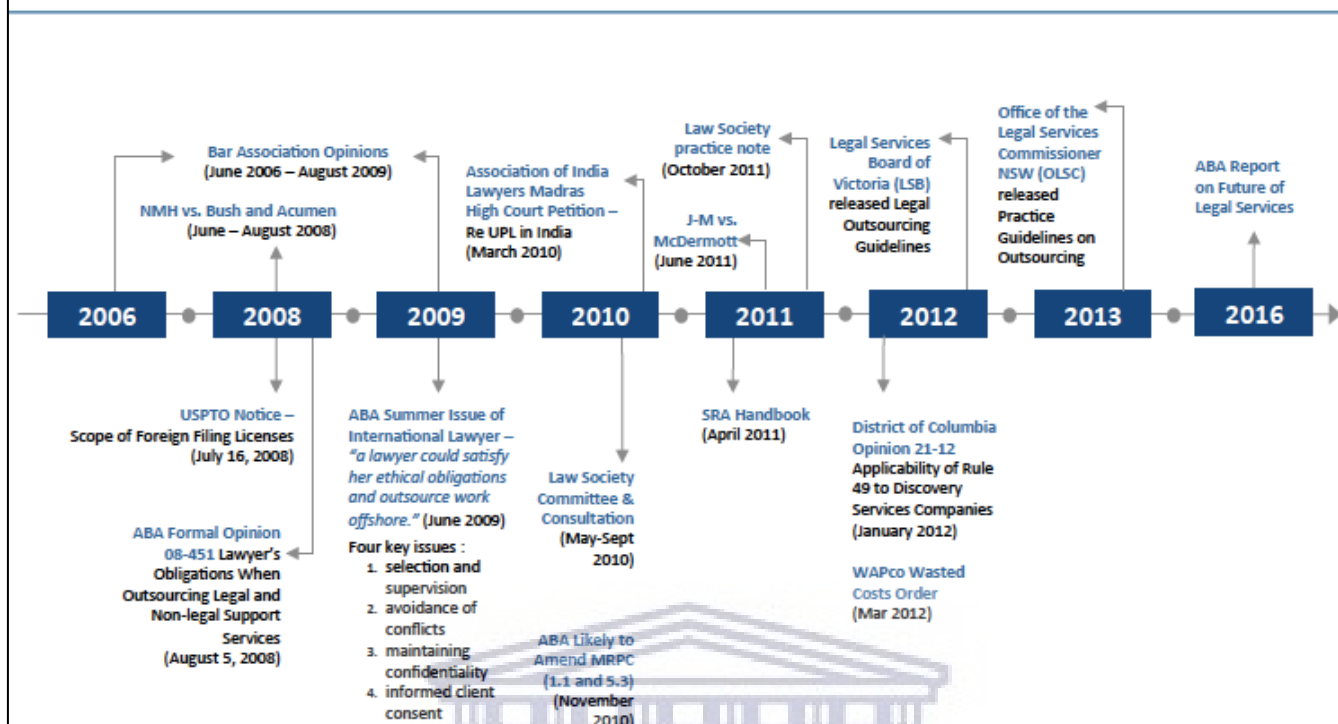
It is understandable from the above that ethical conduct encompasses the daily practice of law. But, despite its importance in supporting the reputation of lawyers, upholding the law and compounding the confidence the public have in the legal system, the LPO business model poses certain challenges to what is deemed standard ethical conduct rules for the legal profession. The next section will explore the ethical concerns, which have arisen as a consequence of the LPO business model.

5.3 Key ethical concerns raised by Legal Process Outsourcing

As previously mentioned, the purpose of having a code of conduct is to elaborate upon the host of duties that are considered to be the acceptable behavior and conduct expected by all persons working in the legal sector. The compliance of these duties is mandatory on all legal professionals. Although, the LPO industry is no longer viewed as a passing trend but a permanent fixture in the legal market, sending legal work offshore, has raised a number of concerns pertaining to the ethical duties of both the outsourcer and the LPO provider.

The diagram below, illustrates the progression of the LPO industry between the years 2006 to 2016, in comparison with the actions being taken by applicable authorities in Australia, India, UK and the United States of America (US), to combat the ethical challenges surrounding the practice of outsourcing legal work:

Legal Outsourcing Ethics Timeline of Events



Source: Ross M 'Ethics of Legal Outsourcing' available at https://m.acc.com/chapters/sfbay/upload/2-Session1_INTEGREON.pdf (accessed 17 November 2017).

The diagram demonstrates the gradual move particularly by Australia, the UK and the US legal fraternities towards addressing the ethical concerns of outsourcing by introducing their respective guidelines, opinions and practice notes on LPO. It is important to note that prior to 2006, regulatory bodies of the legal profession were silent on the implications posed by outsourcing, allowing the LPO market to gain momentum and to mature before submitting their views on the obligations of a lawyer when outsourcing legal services.⁵⁰ By 2010, the LPO sector had been examined to a greater extent by the relevant bodies, resulting in practice notes on outsourcing being issued to assist the outsourcer in making an informed decision when sending legal work offshore.⁵¹ The American Bar Association in the US was the first legal body to release practice notes on outsourcing in 2008 with the aim of assisting lawyers to comply with their ethical obligations while simultaneously confirming their

⁵⁰ Ross M 'Ethics of Legal Outsourcing' available at https://m.acc.com/chapters/sfbay/upload/2-Session1_INTEGREON.pdf (accessed 17 November 2017).

⁵¹ Ross M 'Ethics of Legal Outsourcing' available at https://m.acc.com/chapters/sfbay/upload/2-Session1_INTEGREON.pdf (accessed 17 November 2017).

acceptance of this business model.⁵² But not all state bar councils in the US have provided their position and/or opinion on the outsourcing of legal work to offshore destinations.⁵³ However, the legal fraternity in New York has provided their opinion on LPOs:

‘A New York lawyer may ethically outsource legal support services overseas to a non-lawyer, if the New York lawyer (a) rigorously supervises the non-lawyer, so as to avoid aiding the non-lawyer in the unauthorized practice of law and to ensure that the non-lawyer’s work contributes to the lawyer’s competent representation of the client; (b) preserves the client’s confidences and secrets when outsourcing; (c) avoids conflicts of interest when outsourcing; (d) bills for outsourcing appropriately; and (e) when necessary, obtains advance client consent to outsourcing.’⁵⁴

The above clearly establishes the main ethical considerations a US lawyer should have when choosing to outsource legal services. The lawyer is permitted to outsource work to a non lawyer⁵⁵ providing they implement supervisory measures over them, protect the client’s confidential information, avoid conflicts of interest, adequately bill the client for the services performed offshore and obtain the client’s prior consent when needs be. This is a similar approach to that taken by the UK law society.

As discussed in Chapter 4 (A Comparative Analysis of the Legal Systems of the United Kingdom and India), the UK law society also published their guidance notes on outsourcing in 2011. It is key to keep in mind that the practice notes provided by UK’s applicable law societies to their members, were drafted solely for the purpose of providing guidance and were not to be considered as legal advise.⁵⁶ In addition, the practice notes were drafted in reference to the outsourcing of administrative and legal support work, and do not cater for the mid to high-level type legal services being

⁵² Ross M ‘Ethics of Legal Outsourcing White Paper’ available at <https://www.llrx.com/2010/02/ethics-of-legal-outsourcing-white-paper/> (accessed 20 November 2017).

⁵³ Ross M ‘Ethics of Legal Outsourcing’ available at https://m.acc.com/chapters/sfbay/upload/2-Session1_INTEGREON.pdf (accessed 17 November 2017).

⁵⁴ Ross M ‘Ethics of Legal Outsourcing’ available at https://m.acc.com/chapters/sfbay/upload/2-Session1_INTEGREON.pdf (accessed 17 November 2017).

⁵⁵ The term non-lawyer is used by the US bar associations to refer to the foreign lawyer who may be authorised to practice in their country but are not authorised to practice law in the US.

⁵⁶ Solicitors Regulation Authority Code of Conduct 2011 version 19.

outsourced.⁵⁷ Therefore, it can be argued that these practice notes on the outsourcing of legal work posed no strict obligation on the lawyer to follow, being that they were mainly recommendations provided by the applicable law societies. Furthermore, these guidance notes left the lawyer in the dark when it comes to outsourcing the more complex type of legal work. The regulatory bodies being more focused on ensuring that the legal professionals observed their core responsibilities as lawyers. By contrast, both the legal authorities in South Africa and India have not released any formal opinion or guidance for the legal outsourcing sector. Although an accepted business model, the foreign outsourcer, the local LPO providers and local legal professionals are left to decipher and implement best practice methods when offering this service.

The next section will review the main ethical concerns of outsourcing legal work offshore within the jurisdictions of the UK, India and South Africa. These include: the unauthorised practice of law; ensuring client confidentiality; adhering to the duty to disclose; avoiding conflicts of interest and billing appropriately.

5.3.1 Unauthorised practice of law in the United Kingdom, India and South Africa

The unauthorised practice of law refers to a lawyer who is qualified to practice law in a particular country but may not be deemed to be qualified to practice law in another jurisdiction. In context, the legal work the outsourcer sends offshore, is performed by the legal professionals working for the LPO provider, who despite being aptly qualified to practice law in the outsourcing destination country, the LPO legal professional is not duly qualified to practice law in the outsourcer's country.⁵⁸ It is therefore characterised as the unauthorised practice of law.

⁵⁷ Ross M 'Ethics of Legal Outsourcing' available at https://m.acc.com/chapters/sfbay/upload/2-Session1_INTEGREON.pdf (accessed 17 November 2017).

⁵⁸ Ross M 'Ethics of Legal Outsourcing' available at https://m.acc.com/chapters/sfbay/upload/2-Session1_INTEGREON.pdf (accessed 17 November 2017).

It should be pointed out that what is considered, as the practice of law in one jurisdiction may not necessarily be the case in another.⁵⁹ The Solicitors Regulation Authority in the UK elaborates further on this latter point:

‘A number of jurisdictions simply prohibit without defining the practice of law by non-lawyers. Others take a circular approach: the practice of law is what lawyers do. Some list conduct that is illustrative, such as legal advice, legal representation, and preparation of legal instruments, and then conclude with some amorphous catch-all provision, such as ‘any action taken for others in any matter connected with the law.’⁶⁰

Therefore, what is considered as ‘the practice of law’ is dependent on the definition given to it by the applicable governing legal bodies in a given jurisdiction.⁶¹ As countries have different laws, it is evident that there will be no uniformity in the definition. Moreover, there will also be a distinction as regards the type of legal services the outsourcer can send offshore.⁶²

Lawyers working in LPOs are primarily not licensed to practice law in the outsourcers’ country.⁶³ As a consequence of the latter, authorities within the legal sector consider the performance of legal work by a foreign lawyer as the unauthorised practice of law, and consider supervision by the outsourcing lawyer as a significant aspect when considering to offshore legal work.⁶⁴ Supervision includes monitoring the progress of the work sent offshore, by the outsourcer, to ensure that the LPO provider understands the outsourcer’s instructions, and reviewing the end product to

⁵⁹ Corken E ‘Ethical Implications of the Liberalization of the Legal Industry in Modern Business Discovery and How the Increased Use of Non-Attorneys and Non-Attorney Owned Suppliers impacts Legal Ethics’ (2016-2017) 10 *John Marshall Law Journal* 66.

⁶⁰ Corken E ‘Ethical Implications of the Liberalization of the Legal Industry in Modern Business Discovery and How the Increased Use of Non-Attorneys and Non-Attorney Owned Suppliers impacts Legal Ethics’ (2016-2017) 10 *John Marshall Law Journal* 66.

⁶¹ Corken E ‘Ethical Implications of the Liberalization of the Legal Industry in Modern Business Discovery and How the Increased Use of Non-Attorneys and Non-Attorney Owned Suppliers impacts Legal Ethics’ (2016-2017) 10 *John Marshall Law Journal* 66.

⁶² For example, the UK Legal Services Act, 2007, imposes a restriction on practicing solicitors, who are not permitted to outsource legal services that have been characterised as being ‘reserved legal activities’ under the Act.

⁶³ Harmon AR ‘The Ethics of Legal Process Outsourcing-Is the practice of Law a “Noble Profession” or Is it Just Another Business?’ available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1887197 (accessed 20 November 2017).

⁶⁴ Harmon AR ‘The Ethics of Legal Process Outsourcing-Is the practice of Law a “Noble Profession” or Is it Just Another Business?’ available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1887197 (accessed 20 November 2017).

ascertain whether it meets the required standard quality of work.⁶⁵ However, there are authorities that perceive that the quality of work becomes questionable when supervising work offshore.⁶⁶ The reason being the ability to train the offshore professionals from a distance:

‘[The] law firm should establish practices and procedures for the supervision of offshore legal support that are sufficiently adaptable to the specific offshore entity and compensate for the physical separation, time zone differences, and any differences in legal systems and legal education and training. This requires the law firm to become sufficiently familiar with the professional training of the foreign professionals, attend to training the foreign professionals in relevant legal and ethical rules, and establish regular communication practices to ensure that the foreign professional has reasonable access to supervising lawyers in the local law firm.’⁶⁷

The above quotation recognises the difference in the legal training and qualifications of the LPO staff as well as illustrating the level of commitment and time that will be required to not only train up the LPO staff but also to build a relationship that allows for effective communication between the parties, through all stages of the performance of the legal work. Communication will ensure that the LPO provider understands what is required of them and the expectations of the outsourcer in executing the services.⁶⁸ However, no guidance has been provided on what is considered as the appropriate manner in which to supervise offshore personnel. The outsourcer must then ascertain the best ‘practices and procedures for the supervision’ on a project-by-project basis.

⁶⁵ Harmon AR ‘The Ethics of Legal Process Outsourcing-Is the practice of Law a “Noble Profession” or Is it Just Another Business?’ available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1887197 (accessed 20 November 2017).

⁶⁶ Fischer BJ ‘Outsourcing Legal Services, In-Sourcing Ethical Issues: An Examination of the Ethical Considerations Arising from the Practice of Outsourcing Legal Services Abroad’ (2010) 16 *Southwestern Journal of International Law* 467.

⁶⁷ McLawsen G ‘The Back Office in Bangalore: Clarifying the Ethics of Legal Process Outsourcing’ (2017) *Bender’s Immigration Bulletin* 711.

⁶⁸ Harmon AR ‘The Ethics of Legal Process Outsourcing-Is the practice of Law a “Noble Profession” or Is it Just Another Business?’ available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1887197 (accessed 20 November 2017).

The American Bar Association (ABA) makes the former point clearly, when indicating that:

‘There is nothing unethical about a lawyer outsourcing legal and nonlegal services, provided the outsourcing lawyer renders legal services to the client with the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.’⁶⁹

Clearly, there is a standard expected from the foreign lawyer performing the services. It will be for the outsourcer to confirm that the professional performing the work at the LPO offshore location has the required skills. The question therefore arises, do law firms partaking in the outsourcing exercise; verify the qualifications and training of each of the LPO staff performing the legal work? Or is this requirement taken for granted and left to the LPO provider to confirm in general?

The below is a checklist pertaining to the recommended checks the outsourcer in the US should implement to ensure the quality of work being performed offshore:

‘A lawyer should obtain reliable information about various aspects of the company's operations, including:

- (a) the identities of the principal owners and their qualifications;
- (b) staff expertise and qualifications;
- (c) length of time in business;
- (d) policies and procedures, including policies on the handling of client confidential information;
- (e) information technology and security systems;
- (f) lawsuits and claims pending or previously asserted against the company;
- (g) credit history;
- (h) sample work product; and
- (i) stateside and local references.’⁷⁰

⁶⁹ McLawsen G ‘The Back Office in Bangalore: Clarifying the Ethics of Legal Process Outsourcing’ (2017) *Bender’s Immigration Bulletin* 705.

⁷⁰ Ham JI ‘Ethical Consideration relating to Outsourcing of Legal Services by Law Firms to Foreign Service Providers: Perspectives from the United States’ (2008) 27 *Penn State International Law Review* 331.

Checking qualifications, experiences, references and work product are proposed methods of checking for the quality of work the outsourcer is to expect from both the LPO provider and their staff. It would also be fruitful to ascertain the quality assurance procedures the LPO provider has implemented in the workplace so as to maintain the quality of work being performed. In addition, to determining whether the quality assurance procedures available at the LPO meet the outsourcer's standards.

In light of the above, it can be argued that by implementing adequate supervision methods, serious ethical concerns will not be raised.⁷¹ However, the question arises, does supervision require face-to-face contact?⁷² Or is training LPO staff over Skype or other electronic communication tools the best alternative that garners the same results? Or is flying over to the offshore destination on a regular basis feasible for the outsourcer? Furthermore, how 'adequate' can the supervisory methods be when the outsourcer is based on the other side of the globe? When time differences between the parties can play against having effective communication with the LPO provider?⁷³ Also, what standard of work is expected when the differences in the legal systems and training of legal professionals vary from one country to another?

By way of answer, traditionally, the partners or persons with authority in the law firms have the power to supervise the lawyers working for them to ensure that their conduct met professional standards as set by their regulatory bodies.⁷⁴ As supervising lawyers they therefore have the responsibility to make certain that the other lawyers complied with applicable ethical rules of practice.⁷⁵

⁷¹ Harmon AR 'The Ethics of Legal Process Outsourcing-Is the practice of Law a "Noble Profession" or Is it Just Another Business?' available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1887197 (accessed 20 November 2017).

⁷² McLawsen G 'The Back Office in Bangalore: Clarifying the Ethics of Legal Process Outsourcing' (2017) *Bender's Immigration Bulletin* 709.

⁷³ Differences in time zones, although also considered an advantage of LPOs, in that while the outsourcer sleeps, work is being performed and delivered to their inbox when their work day starts, it can also be a disadvantage. Should changes be necessary to the work product, the LPO workday could have ended or another legal professional may have to be assigned to effect changes. Where time constraint may not allow for adequate training of that professional.

⁷⁴ Tuft ML 'Supervising Offshore Outsourcing of Legal Services in a Global Environment: Re-examining Current Ethical Standards' available at http://www.heinonline.org.ezproxy.uwc.ac.za/HOL/Page?handle=hein.journals/aklr43&div=29&start_page=825&collection=journals&set_as_cursor=0&men_tab=srchresults (accessed 06 March 2018).

⁷⁵ Tuft ML 'Supervising Offshore Outsourcing of Legal Services in a Global Environment: Re-examining Current Ethical Standards' available at http://www.heinonline.org.ezproxy.uwc.ac.za/HOL/Page?handle=hein.journals/aklr43&div=29&start_page=825&collection=journals&set_as_cursor=0&men_tab=srchresults (accessed 06 March 2018).

Likewise, the outsourcing lawyer has a fiduciary duty towards their client and must therefore ensure compliance with ethical rules irrespective of the legal services being offshored.⁷⁶ The following sub-section will look at the provisions available in the UK, India and South Africa as regards the standpoint on ethical concern of outsourcing being considered the unauthorised practice of law.

United Kingdom

The Solicitors Regulation Authority permits solicitors in the UK to outsource legal services provided they remain firm in their ethical obligations.⁷⁷ Rule 5 of the Code of Conduct for solicitors in the UK addresses the issue of the unauthorised practice of law:

‘8. If certain work is to be done by unqualified staff it may only be done at the direction and/or under the supervision of persons who are allowed by law to do that work themselves.

And,

9. Under the rule... practitioners are responsible for the acts and omissions of all staff, admitted and unadmitted alike. The duty to supervise staff covers not only persons engaged under a contract of service, but also those engaged under a contract for services to carry out work on behalf of the firm, e.g. consultants, locums and outdoor clerks.’⁷⁸

What is gleaned from the above extract, is that the outsourcer is ultimately responsible for the work being outsourced and must ensure that they adhere to their duties as regards the rules of professional conduct, stipulated by their relevant law societies, bar councils and any other applicable authority.⁷⁹ The lawyer outsourcing the work is held responsible for schooling the foreign lawyer and non-lawyer on the

⁷⁶ Bussell J ‘Comparison of the Application of Ethical Duties of Foreign Legal Process Outsourcing’ (2014) 27 *The Georgetown Journal of Legal Ethics* 439.

⁷⁷ Ross M ‘Legal Process Outsourcing: Ethics and Compliance’ (2011) 11 *Legal Information Management* 98.

⁷⁸ Ross M ‘Ethics of Legal Outsourcing White Paper’ available at <https://www.llrx.com/2010/02/ethics-of-legal-outsourcing-white-paper/> (accessed 20 November 2017).

⁷⁹ Ross M ‘Ethics of Legal Outsourcing’ available at https://m.acc.com/chapters/sfbay/upload/2-Session1_INTEGREON.pdf (accessed 17 November 2017).

ethical aspects of their performing the legal services and to ensure compliance with the rules they must abide by.⁸⁰ The outsourcer must therefore apply reasonable efforts to make certain that the legal work being performed by the LPO provider is compatible or aligns with their professional obligations as licensed lawyers in their country.⁸¹ They are as a consequence required to adopt the work performed by the LPO provider as their own.⁸² However, an array of questions arise as to the practicality of the latter: Would it not be advantageous for the outsourcing lawyer to have clear guidance of the accepted supervisory measures to be implemented when outsourcing offshore, so as to avoid the unauthorised practice of law and ensure the quality of work?⁸³ Furthermore, does time permit the outsourcer to provide training on ethical compliance, so as to meet their respected duties as lawyers on time sensitive matters sent offshore?⁸⁴ In addition, LPOs are known to have a high staff turnover,⁸⁵ therefore how realistic and practical would training these legal professionals be?

India

India is primarily referred to as an LPO provider in the outsourcing relationship. India's legal profession is governed by the Advocates Act, 1961 and regulated by the Bar Council of India.⁸⁶ Once an Indian lawyer has completed their vocation, they may practice as advocates. However, under their current laws, only Indian nationals are permitted to render legal services to the Indian population and only citizens of India

⁸⁰ Kadzik AM 'The Current Trend to Outsource Legal Work Abroad and the Ethical Issues Related to Such Practices' (2006) 19 *Georgetown Journal of Legal Ethics* 736.

⁸¹ Perlman AM 'Towards the Law of Legal Services' (2015) 37 *Cardozo Law Review* 66.

⁸² Tuft ML 'Supervising Offshore Outsourcing of Legal Services in a Global Environment: Re-examining Current Ethical Standards' available at http://www.heinonline.org.ezproxy.uwc.ac.za/HOL/Page?handle=hein.journals/aklr43&div=29&start_page=825&collection=journals&set_as_cursor=0&men_tab=srchresults (accessed 06 March 2018).

⁸³ D'Angelo C 'Overseas Legal Outsourcing and the American Legal Profession: Friend or Flattener' (2008) 14 *Texas Wesleyan Law Review* 180.

⁸⁴ Work sent offshore by the outsourcer generally demands a short turnaround time from the LPO provider.

⁸⁵ Lacity M and Willcocks L 'The Outsourcing Unit Working Research Paper Series - Paper 12/5 Legal Process

Outsourcing: LPO Provider Landscape' available at http://www.lse.ac.uk/management/research/outsourcingunit/wpcontent/uploads/sites/2/2015/04/WP12_5.pdf (accessed 24 March 2018).

⁸⁶ See Chapter 4 (A Comparative Analysis of the Legal Systems of the United Kingdom and India) section 4.4 (Legislative and regulatory framework in India).

may practice law in India.⁸⁷ Foreign lawyers are therefore not permitted to practice law in India.⁸⁸ By contrast, the legal professionals working in the LPO businesses are allowed to provide legal services to the foreign outsourcer as long as they conform to the rules of conduct stipulated by the Bar Council of India.

As pertains to the outsourcing of legal work, legal experts in India are of the opinion that a local lawyer may outsource legal services to a foreign lawyer or non-lawyer providing the outsourcing lawyer adequately supervises the foreign lawyer and remains responsible for the end product.⁸⁹ This is a similar view shared by the legal authorities in the UK.

South Africa

Although South Africa's legislative and regulatory framework does not directly address the outsourcing relationship, their national law shares a similar view to that of the UK and India. Rule 33.2 of the Rules of the Attorneys' Profession,⁹⁰ provides that a lawyer who subcontracts work has a duty to implement supervisory measures to ensure that the legal services being performed meet the required standard as regards quality of work. However, it should be pointed out that as from November 2018, the Legal Practice Act 28 of 2014 (LPA) has since replaced this section and the LPA does not make provision for outsourcing or subcontracting work.

The legal professionals working for the LPO provider based in South Africa, are not considered as practicing lawyers,⁹¹ they are however required to comply with the LPA and its code of conduct in the performance of their duties. This is the same stance as in India.⁹²

⁸⁷ Singh V 'Interrogating Outsourcing Legal Services in India in Lens of Common Law vs. Civil Law' (2016) 7 Bharati Law Review 122.

⁸⁸ Wilkins DB, Khanna VS, Trubek DM *The Indian Legal Profession in the Age of Globalization: The Rise of the Corporate Sector and its Impact on Lawyers and Society* (2017) 364.

⁸⁹ Gupta A and Sengupta S 'Impact of Globalization on Legal Profession in India - A Critical Analysis' (2011) 10 *Korea University Law Review* 87.

⁹⁰ Section 74(4) Attorneys' Act 53 of 1979.

⁹¹ See Chapter 4 (A Comparative Analysis of the Legal Systems of the United Kingdom and India) footnote 105.

⁹² See Chapter 4 (A Comparative Analysis of the Legal Systems of the United Kingdom and India) section 4.4 (Legislative and regulatory framework in India).

In summary, the performance of legal services by legal professionals who are not qualified to practice law in the outsourcer's jurisdiction are taking part in the unauthorised practice of law when performing legal work in the LPO offshore destination country. The legal fraternity in the UK and India have recognised this concern and responded that the outsourcing lawyer is to ensure that proper supervision is conducted over the foreign lawyer. Although South Africa has no formal opinion in this regard, it can however be ascertained from previous repealed law, that they supported the same view taken by the UK and India.

Challenges to conducting supervision when legal services are performed offshore include time zone differences, language fluency (for example: the level of understanding of the English language by the LPO provider and their staff complement), the differences in training and legal qualifications, and resources (the cost of planning a trip and flying across to the LPO provider to supervise work can be expensive).⁹³ An additional challenge is the differences in law, what is effectively considered as the practice of law varies from jurisdiction to jurisdiction.⁹⁴ For example, supervision for legal work being performed in India is a concern, as the laws of the country do not permit foreign lawyers such as the outsourcer, to practice law in the country.⁹⁵ The outsourcer in this circumstance would need to rely on reports from the LPO provider as regards progress of the legal work being performed and the occasional quick trip to India.

Ignoring the implications of the unauthorised practice of law, allows the LPO operation to continue being unregulated.⁹⁶ It needs to be considered whether it would be better suited to being integrated into a regulation governing the profession? Conversely, would having a regulation effectively reduce the ethical infractions raised

⁹³ Fischer BJ 'Outsourcing Legal Services, In-Sourcing Ethical Issues: An Examination of the Ethical Considerations Arising from the Practice of Outsourcing Legal Services Abroad' (2010) 16 *Southwestern Journal of International Law* 469.

⁹⁴ Tuft ML 'Supervising Offshore Outsourcing of Legal Services in a Global Environment: Re-examining Current Ethical Standards' available at http://www.heinonline.org.ezproxy.uwc.ac.za/HOL/Page?handle=hein.journals/aklr43&div=29&start_page=825&collection=journals&set_as_cursor=0&men_tab=srchresults (accessed 06 March 2018).

⁹⁵ Bussell J 'Comparison of the Application of Ethical Duties of Foreign Legal Process Outsourcing' (2014) 27 *The Georgetown Journal of Legal Ethics* 448.

⁹⁶ Corken E 'Ethical Implications of the Liberalization of the Legal Industry in Modern Business Discovery and How the Increased Use of Non-Attorneys and Non-Attorney Owned Suppliers impacts Legal Ethics' (2016-2017) 10 *John Marshall Law Journal* 70.

by offshoring legal work? These are questions, which require further exploration and which will be address in Chapter 6 (The Need to Regulate Legal Process Outsourcing).

To avoid compromising the duties imposed by governing bodies for practicing lawyers,⁹⁷ supervision is seen as the solution to the unauthorised practice of law. Supervision allows for the outsourcer to maintain a certain level of competence and control over the legal work being performed by the LPO provider. However, how effective is the act of supervision by the outsourcer who is based on the other side of the world?

5.3.2 Client confidentiality in the United Kingdom, India and South Africa

Lawyers have an ethical duty to keep the affairs of their client confidential.⁹⁸ This duty extends to all employees of the lawyer as well as persons assisting the lawyer or any third party.⁹⁹ By its very nature, the legal profession is in contact with and privy to confidential information, made available to them through the interactions with their clients and client affairs.

‘A lawyer's duty of confidentiality is a "fundamental principal that contributes to the trust that is the hallmark of the client-lawyer relationship."¹⁰⁰

It is therefore of paramount importance that lawyers ensure the security of the information divulged or shared to them by their clients when outsourcing.¹⁰¹ The protection of the latter becomes a concern when confidential information is shared

⁹⁷ See Chapter 4 (A Comparative Analysis of the Legal Systems of the United Kingdom and India) footnote 105.

⁹⁸ Horizon Institute ‘Ethics for Lawyers’ available at <http://www.thehorizoninstitute.org/usr/library/documents/main/booklet-on-ethics-for-lawyers.pdf> (accessed 06 November 2017).

⁹⁹ Horizon Institute ‘Ethics for Lawyers’ available at <http://www.thehorizoninstitute.org/usr/library/documents/main/booklet-on-ethics-for-lawyers.pdf> (accessed 06 November 2017).

¹⁰⁰ Fischer BJ ‘Outsourcing Legal Services, In-Sourcing Ethical Issues: An Examination of the Ethical Considerations Arising from the Practice of Outsourcing Legal Services Abroad’ (2010) 16 *Southwestern Journal of International Law* 461.

¹⁰¹ Fischer BJ ‘Outsourcing Legal Services, In-Sourcing Ethical Issues: An Examination of the Ethical Considerations Arising from the Practice of Outsourcing Legal Services Abroad’ (2010) 16 *Southwestern Journal of International Law* 461.

offshore, especially where the LPO destination's data protection protocols / regulations are not in line with the outsourcer originators local laws. The ethical concern of securing confidential information is the legal fraternities primary concern when outsourcing.¹⁰²

As LPO providers are not authorised to practice law in the outsourcer originator's country, they are therefore not bound by professional conduct rules pertaining to confidential information. As a consequence, the outsourcer is suggested to restrict the information to be shared so as to limit potential disclosure.¹⁰³ It has been recommended that the outsourcer and LPO provider should enter into confidentiality agreements¹⁰⁴ to support the protection of confidential information being shipped offshore.¹⁰⁵ Having a contract between the parties, which clearly state the LPO provider's commitment to protecting client confidentiality and what would be considered a breach of confidential information.¹⁰⁶ The agreement is to cover all aspects of the relationship and bind the LPO staff members as well.¹⁰⁷ The latter will assist in ensuring that all persons performing the legal services keep all client information confidential.¹⁰⁸

Another measure that has been taken by the outsourcer to protect the confidential information of their clients is to establish that the LPO provider has applicable certificates from independent auditing bodies.¹⁰⁹ This ensures that the LPO provider

¹⁰² Ross M 'Ethics of Legal Outsourcing' available at https://m.acc.com/chapters/sfbay/upload/2-Session1_INTEGREON.pdf (accessed 17 November 2017).

¹⁰³ Harmon AR 'The Ethics of Legal Process Outsourcing-Is the practice of Law a "Noble Profession" or Is it Just Another Business?' available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1887197 (accessed 20 November 2017).

¹⁰⁴ Confidentiality agreements are also known as non-disclosure agreements. Their purpose is to establish a legal contract between the parties, to ensure that the parties to the contract take all precautionary measures in maintaining and safeguarding the secrecy of the confidential information.

¹⁰⁵ Ross M 'Ethics of Legal Outsourcing' available at https://m.acc.com/chapters/sfbay/upload/2-Session1_INTEGREON.pdf (accessed 17 November 2017).

¹⁰⁶ Harmon AR 'The Ethics of Legal Process Outsourcing-Is the practice of Law a "Noble Profession" or Is it Just Another Business?' available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1887197 (accessed 20 November 2017).

¹⁰⁷ Ross M 'Ethics of Legal Outsourcing' available at https://m.acc.com/chapters/sfbay/upload/2-Session1_INTEGREON.pdf (accessed 17 November 2017).

¹⁰⁸ Kadzik AM 'The Current Trend to Outsource Legal Work Abroad and the Ethical Issues Related to Such Practices' (2006) 19 *Georgetown Journal of Legal Ethics* 735.

¹⁰⁹ Ross M 'Ethics of Legal Outsourcing' available at https://m.acc.com/chapters/sfbay/upload/2-Session1_INTEGREON.pdf (accessed 17 November 2017).

must comply with outsourcer's data protection requirements to prevent accidental disclosure or loss.¹¹⁰

In the below extract, Ross outlines the security measures the outsourcing provider can take to secure the confidential data being sent to them:

Physical On-Site Security and Workstation Measures	Data Transfer Security
<ul style="list-style-type: none">◆ ID required to enter premises, closed-circuit security cameras◆ Biometric and key card access requirements◆ Personal communications or data recording devices are not permitted◆ All removable drives are disabled from the domain controller◆ Users only entitled to use their own specific log-in details◆ Hard-to-guess and frequently changed passwords◆ Printing is disabled without prior authorization and clearance◆ All incoming and outgoing mails are monitored on exchange server. Attachments are filtered	<ul style="list-style-type: none">◆ Secured VPN tunnel (3DES encrypted) for server connectivity◆ Clients access our secure FTP server with a confidential login◆ Login information is changed routinely on a monthly basis◆ Disaster recovery & backup arrangements. Backups performed at regular intervals throughout day◆ Encrypted backup data stored on secondary servers offsite to protect against hard driver failure◆ Continuous backup power is delivered to each server to protect against outages◆ Backup facility with full security and systems located within five miles of current facility

Source: Ross M 'Ethics of Legal Outsourcing' available at https://m.acc.com/chapters/sfbay/upload/2-Session1_INTEGREON.pdf (accessed 17 November 2017).

The above list points to actions that can be taken by the LPO provider in securing confidential information while providing comfort to the outsourcer who is sending the data offshore. There are LPOs that have implemented a variety of monitoring and mechanical controls to secure confidential information, for example: fingerprint access, removing usb ports on their computers to avoid the copying of data and not

¹¹⁰ Ross M 'Ethics of Legal Outsourcing' available at https://m.acc.com/chapters/sfbay/upload/2-Session1_INTEGREON.pdf (accessed 17 November 2017).

permitting the use of cellphones in secure areas.¹¹¹ It is left to the outsourcer to verify the policies and procedures the LPO provider has in place in this respect.

However, there are certain risks, which arise when sending confidential information offshore and merit mention. Being that LPO providers tend to have a revolving staff complement, hiring contract lawyers can expose and increase the level of risk of disclosure of the client's interests.¹¹² For instance, the legal professional leaving the employ of the LPO provider, who is privy to the details of the confidential information, may take reckless actions such as sharing this information, which could lead to the breach of the confidential information.¹¹³

Furthermore, although the legal sector in the LPO provider country will have its own ethical code on protecting client confidentiality, what constitutes confidential information and the subsequent protection of the information may vary from country to country.¹¹⁴ Especially as the outsourcer's data protection laws may not be comparable to the laws in the offshore destination. Next, an overview of the data protection laws in the UK, India and South Africa will be explored.¹¹⁵

United Kingdom

The General Data Protection Regulation (GDPR) is the UK's data protection legislation, which does not permit the transfer of data to countries outside the European Economic Area (EEA) unless the country has similar data protection laws.¹¹⁶ Therefore an outsourcer in the UK will find it hard pressed to send confidential data offshore to countries whose data protection legislation is either non-

¹¹¹ Robertson CB 'A Collaborative Model of Offshore Legal Outsourcing' available at <http://ssrn.com/abstract=1705505> (accessed 20 November 2017).

¹¹² Robertson CB 'A Collaborative Model of Offshore Legal Outsourcing' available at <http://ssrn.com/abstract=1705505> (accessed 20 November 2017).

¹¹³ Kenny C and Gordon T 'Outsourcing Issues for Legal Practice' (2012) *Law Society Journal* 73.

¹¹⁴ Fischer BJ 'Outsourcing Legal Services, In-Sourcing Ethical Issues: An Examination of the Ethical Considerations Arising from the Practice of Outsourcing Legal Services Abroad' (2010) 16 *Southwestern Journal of International Law* 462.

¹¹⁵ Chapter 3 (Legal Process Outsourcing in South Africa) section 3.4.4 (Protection of Personal Information Act 4 of 2013) explores the data protection laws in South Africa. Chapter 4 (A Comparative Analysis of the Legal Systems of the United Kingdom and India) section 4.5 (Challenges arising from Legal Process Outsourcing in the UK and India) explores the data protection laws in the UK and India.

¹¹⁶ Ross M 'Ethics of Legal Outsourcing White Paper' available at <https://www.llrx.com/2010/02/ethics-of-legal-outsourcing-white-paper/> (accessed 20 November 2017).

existent or has not come into effect. Although the GDPR suggests measures the outsourcer may implement in the latter respect, this would nonetheless place both the outsourcer and their client in a vulnerable position.¹¹⁷

India

Currently, India has no data protection legislation as regards to the outsourcing of legal services. The LPO provider must therefore work with the outsourcer to ascertain what the best security measures and standards would be required to avoid any possible data breaches or unwanted disclosures of confidential information. There are outsourcers who have negated this concern by having the LPO provider based in India, work directly off of their secure servers, thereby providing limited access on a needs be basis.¹¹⁸

The GDPR provides that companies may not transfer personal data to other countries that do not have a similar data protection provision.¹¹⁹ The latter would therefore exclude India, unless India updates and implements applicable security measures as provided under the regulation.

South Africa

The Protection of personal Information Act 4 of 2013 (POPI) is South Africa's data protection Act. Under POPI, data may only be transferred across the border where the country where the confidential information is being processed has similar rules to those imposed by POPI.¹²⁰ Where no data protection rules exist, the parties will have to contract into a data protection agreement to govern how the data will be collected,

¹¹⁷ Fischer BJ 'Outsourcing Legal Services, In-Sourcing Ethical Issues: An Examination of the Ethical Considerations Arising from the Practice of Outsourcing Legal Services Abroad' (2010) 16 *Southwestern Journal of International Law* 462.

¹¹⁸ Wankhede A 'Data Protection in India and the EU: Insights in Recent Trends and Issues in the Protection of Personal Data' (2016) 1 *European Data Protection Law Review* 78.

¹¹⁹ Pounder C 'Data Protection and Offshoring to India' available at <https://www.out-law.com/page-5013> (accessed 17 July 2018).

¹²⁰ Michalsons 'Data Privacy or Data Protection in South Africa' available at <https://www.michalsons.com/blog/dataprivacy-in-south-africa/150> (accessed 09 July 2018).

processed and stored.¹²¹ This provision is similar to the GDPR in the UK. However, POPI has not yet come into full effect in South Africa and neither is it known when this will be.¹²²

Therefore, the outsourcer who is based in the UK will have to confirm that the LPO provider based in India and South Africa, have the required security measures in place to conform to the standards set in their data protection legislation, prior to outsourcing legal services.

There are also external threats, which could lead to the breach of confidential information for example: where hackers could attack the LPO providers systems.¹²³ Although implementing appropriate software can solve this, it is not always foolproof.¹²⁴ The LPO provider and the outsourcer are therefore bound to stay abreast of latest technologies and implement appropriate security measures to cater for such eventualities.

Lawyers have a duty to ensure that the confidential information belonging to their client is kept secure and protected from disclosure or loss. The Solicitors Regulation Authority advises solicitors that:

‘...you only outsource services when you are satisfied that the provider has taken all appropriate steps to ensure that your clients’ confidential information will be protected...’¹²⁵

The general consensus of law societies has been to ensure that client confidentiality is secured always. However, what is meant by the term ‘all appropriate steps’ has not been elaborated or established. The LPO industry has taken measures to provide comfort to the outsourcer in sending their data offshore. There are outsourcers who have also taken the initiative by providing the LPO providers access to work off their

¹²¹ Michalsons ‘Data Privacy or Data Protection in South Africa’ available at <https://www.michalsons.com/blog/dataprivacy-in-south-africa/150> (accessed 09 July 2018).

¹²² Michalsons ‘Data Privacy or Data Protection in South Africa’ available at <https://www.michalsons.com/blog/dataprivacy-in-south-africa/150> (accessed 09 July 2018).

¹²³ Kenny C and Gordon T ‘Outsourcing Issues for Legal Practice’ (2012) *Law Society Journal* 73.

¹²⁴ Kenny C and Gordon T ‘Outsourcing Issues for Legal Practice’ (2012) *Law Society Journal* 73.

¹²⁵ Ross M ‘Ethics of Legal Outsourcing’ available at https://m.acc.com/chapters/sfbay/upload/2-Session1_INTEGREON.pdf (accessed 17 November 2017).

systems, thereby safeguarding and restricting exposure. Furthermore, recent developments in data protection legislation in the outsourcer originator's country have limited and provided direction on securing data. But the latter is only applicable to countries they do business with. Therefore, the importance of protecting confidential data rests on the outsourcer who must conduct a thorough analysis of the LPO provider business to ascertain its procedures and policies prior and during the outsourcing relationship.

5.3.3 Duty to disclose in the United Kingdom, India and South Africa

Lawyers are ethically permitted to disclose information on or relating to their client's case to other lawyers in the firm or to fellow colleagues.¹²⁶ The duty to disclose pertains to the responsibility the outsourcing lawyer has towards their client, prior to sharing the confidential information of the client.

The question that arises is whether the outsourcer has the duty to disclose the nature of the outsourcing relationship with their client?¹²⁷ The UK law society supports the latter and has provided that the decision by the lawyer to outsource legal work should be disclosed to the client and the client's consent should be garnered so as to comply with their responsibility of maintaining client confidentiality.¹²⁸ Therefore, in the UK, confidential information cannot be sent offshore without the client's affirmation to do so.¹²⁹ The legal experts in India share the view of the UK law society by maintaining that the lawyer has the responsibility of obtaining the client's consent prior to disclosing the client's information and has the duty of informing the client of the laws surrounding confidentiality in the offshore outsourcing LPO destination country.¹³⁰ In

¹²⁶ Harmon AR 'The Ethics of Legal Process Outsourcing-Is the practice of Law a "Noble Profession" or Is it Just Another Business?' available at

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1887197 (accessed 20 November 2017).

¹²⁷ Ross M 'Ethics of Legal Outsourcing' available at https://m.acc.com/chapters/sfbay/upload/2-Session1_INTEGREON.pdf (accessed 17 November 2017).

¹²⁸ Ross M 'Ethics of Legal Outsourcing' available at https://m.acc.com/chapters/sfbay/upload/2-Session1_INTEGREON.pdf (accessed 17 November 2017).

¹²⁹ Bussell J 'Comparison of the Application of Ethical Duties of Foreign Legal Process Outsourcing' (2014) 27 *The Georgetown Journal of Legal Ethics* 443.

¹³⁰ Gupta A and Sengupta S 'Impact of Globalization on Legal Profession in India - A Critical Analysis' (2011) 10

Korea University Law Review 88.

South Africa, Rule 33.1 of the Rules of the Attorneys' Profession¹³¹ provides that informed consent must be obtained from the client prior to the outsourcer outsourcing the legal work, especially if confidential information is to be made available to the service provider. However as stated in the previous section the aforementioned rules have since been repealed by the Legal Practice Act 28 of 2014 (LPA). Under section 67.4.7 of the LPA, it states that a lawyer who is not in private practice but is employed for the purpose of providing legal services to an employer for a salary (this would refer to the legal professional working for the LPO provider) is required to protect the confidentiality of all information and only disclose such information if there is a legal obligation to do so. Obtaining client consent prior to disclosing client confidences is not mentioned under the LPA. Therefore, where the UK and India provide that client consent should be obtained by the outsourcer prior to the sharing of information when outsourcing, the position in South Africa is silent on this aspect and only maintain that the LPO provider may disclose information if they have a legal duty to disclose.

When it comes to the outsourcing of legal services, there is a divide in opinions as regards whether client consent should be obtained when outsourcing. While there are law societies that support the view¹³² that when offshoring legal work client consent should be obtained,¹³³ there are some legal fraternities¹³⁴ that believe it is normal for lawyers to request their personnel or other parties to assist in performing the legal services, and who they duly supervise, accordingly, consent would not be required.¹³⁵ Therefore, client consent would only be requested when necessary.¹³⁶

In summary, the duty to disclose the outsourcing relationship is one that is dependent upon the code of ethics the outsourcer has the responsibility to observe. But,

¹³¹ Section 74(4) Attorneys' Act 53 of 1979.

¹³² The law societies of the United Kingdom and Australia support obtaining client consent when outsourcing.

¹³³ Harmon AR 'The Ethics of Legal Process Outsourcing-Is the practice of Law a "Noble Profession" or Is it Just Another Business?' available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1887197 (accessed 20 November 2017).

¹³⁴ This is a grey area amongst the American law societies. Where some bodies believe outsourcing can occur without client consent so long as the confidential information is not disclosed.

¹³⁵ Harmon AR 'The Ethics of Legal Process Outsourcing-Is the practice of Law a "Noble Profession" or Is it Just Another Business?' available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1887197 (accessed 20 November 2017).

¹³⁶ Ross M 'Ethics of Legal Outsourcing White Paper' available at <https://www.llrx.com/2010/02/ethics-of-legal-outsourcing-white-paper/> (accessed 20 November 2017).

irrespective of the law society a lawyer is a member of and the rules they must follow, consent may not always be acquired. For instance, when the delivery and performance of the legal services offshore is seen as an extension of the rights the lawyer has, to retain the assistance of necessary professionals to assist him or her, in protecting their clients interests and ensuring that the client gets competent representation. It must also be kept in mind that where the outsourcer may select to offshore legal work, this may not be an option that sits favorably with the client, who may have concerns about sending or sharing their private / sensitive data offshore. Therefore, should client consent be mandatory when outsourcing?

5.3.4 Conflict of interest in the United Kingdom, India and South Africa

Lawyers are under an ethical duty to check for any conflicts of interests prior to accepting a client's mandate. The term conflict of interest refers to where a lawyer cannot represent a new client who they had previously litigated or worked against on behalf of a previous client. Accepting to work for the new client could adversely affect both the new and the previous client. Simply, a lawyer is not permitted to represent both parties in the same case.¹³⁷

The view in the UK, India and South Africa as regards avoiding conflicts of interest when outsourcing is as follows:

United Kingdom

Although the UK law society has presented practice notes on outsourcing for their member solicitors, these notes do not address the ethical concern of how the outsourcer is to verify that no conflicts of interest exist with the LPO provider. The outsourcer must therefore look to chapter 3 of the Solicitors Code of Conduct, which states that the solicitor must have systems in place to enable them to check for any conflicts of interest.¹³⁸ More specifically, the codes of conduct state:

¹³⁷ D'Angelo C 'Overseas Legal Outsourcing and the American Legal Profession: Friend or Flattener' (2008) 14 *Texas Wesleyan Law Review* 177.

¹³⁸ Solicitors Regulation Authority 'SRA Handbook Conflicts of Interest' available at <https://www.sra.org.uk/solicitors/handbook/code/part2/rule3/content.page> (accessed 25 October 2018).

'your systems and controls for identifying own interest conflicts are appropriate to the size and complexity of the firm and the nature of the work undertaken, and enable you to assess all the relevant circumstances, including whether your ability as an individual, or that of anyone within your firm, to act in the best interests of the client(s), is impaired by:

- (a) any financial interest;
- (b) a personal relationship;
- (c) the appointment of you, or a member of your firm or family, to public office;
- (d) commercial relationships; or
- (e) your employment;¹³⁹

From the above, the outsourcer must have a system for checking potential conflicts of interest. The system must be appropriate to the work the solicitor is performing so as to enable proper assessment of the circumstances and provide for whether the solicitor is able to act in the best interest of their client which would not be affected by any financial gain, personal relationship, appointment, commercial engagement or their employment. The above guidance however, is not directed at the outsourcing relationship. Although the solicitor may use these principles, they will still need to adapt them when outsourcing legal work. The outsourcer must therefore assess what the best system would be to check for conflicts of interest.

India

Legal experts in India are of the view that it is the duty of the outsourcer to confirm with the LPO provider that they have checked for any conflicts of interest, prior to outsourcing legal work.¹⁴⁰ This includes the LPO provider confirming that the legal professional performing the legal services has not taken part in any activities that would not be in the interests of their client.¹⁴¹

¹³⁹ Solicitors Regulation Authority 'SRA Handbook Conflicts of Interest' available at <https://www.sra.org.uk/solicitors/handbook/code/part2/rule3/content.page> (accessed 25 October 2018).

¹⁴⁰ Gupta A and Sengupta S 'Impact of Globalization on Legal Profession in India - A Critical Analysis' (2011) 10 *Korea University Law Review* 88.

¹⁴¹ Gupta A and Sengupta S 'Impact of Globalization on Legal Profession in India - A Critical Analysis' (2011) 10 *Korea University Law Review* 88.

South Africa

Section 3.5 of the code of conduct for the law profession in South Africa states:

‘[Legal Practitioners, candidate legal practitioners and juristic entities shall -] refrain from doing anything in a manner prohibited by law or by the code of conduct of the profession which places or could place them in a position in which a client’s interests conflict with their own or those of other clients.’¹⁴²

Section 67.3 of the code specifically elaborates on the duty to avoid conflicts of interest. It places emphasis on the duty of legal professionals¹⁴³ not working in private practice (for example: law firms) but who work for an employer to be mindful of conflicts of interests. Therefore, the lawyer working for the LPO provider would be required to comply with the following provision:

‘67.3 Corporate counsel must, when providing legal services or advice to his or her employer, be free from any conflict of interest, financial interest or self interest in discharging his or her duty to the employer. Without limiting the generality of this duty, a corporate counsel must –

- 67.3.1 be and appear to be free of any undue influence or self-interest, direct or indirect, which may be regarded as being incompatible with his or her integrity or objectivity;
- 67.3.2 assess every situation for possible conflict of interest or financial interest, and be alert to the possibility of conflicts of interest;
- 67.3.3 immediately declare any conflict of interest or financial interest in a matter, and must recuse himself or herself from any involvement in the matter;
- 67.3.4 be aware of and discourage potential relationships which could give rise to the possibility or appearance of a conflict of interest;

¹⁴² Code of Conduct section 97(1)(b) Part VII of the Legal Practice Act 28 of 2014.

¹⁴³ Referred to as ‘Corporate Counsel’ under the Code of Conduct section 97(1)(b) Part VII of the Legal Practice Act 28 of 2014.

67.3.5 not accept any gift, benefit, consideration or compensation that may compromise or may be perceived as compromising his or her independence or judgment.’¹⁴⁴

Duly qualified South African lawyers working for LPO providers in the country are therefore under a duty to be cognisant of potential conflicts of interests in the legal services they provide to the outsourcer, as well as report such infringements.

In India and South Africa, the outsourcer is required to verify that the LPO provider has checked for conflicts of interest prior to accepting to perform their legal work being that they cannot represent a client where conflicts exists with a current or previous client.¹⁴⁵ Likewise, the legal professionals working at the LPO provider’s business cannot work on both sides of a case.¹⁴⁶ The latter would jeopardies the judicial procedure and the outcome of the case. The outsourcing provider should therefore have conflict checking procedures,¹⁴⁷ whereby records are maintained and could be cross-referenced.¹⁴⁸ The UK on the other hand, advocates that the lawyer is to ensure that there is an appropriate conflicts of interest system in place; this does not however refer to the outsourcing sector.

Generally LPO employees tend to move around between the different LPO providers, seeking better opportunities.¹⁴⁹ Therefore, the questions that arises is how will conflicts of interests in this respect be minimised? Furthermore, it remains unclear what tools or mechanisms LPO providers use to check for conflicts of interest.¹⁵⁰

¹⁴⁴ Code of Conduct section 97(1)(b) Part VII of the Legal Practice Act 28 of 2014.

¹⁴⁵ Bussell J ‘Comparison of the Application of Ethical Duties of Foreign Legal Process Outsourcing’ (2014) 27 *The Georgetown Journal of Legal Ethics* 440.

¹⁴⁶ Harmon AR ‘The Ethics of Legal Process Outsourcing-Is the practice of Law a “Noble Profession” or Is it Just Another Business?’ available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1887197 (accessed 20 November 2017).

¹⁴⁷ Ross M ‘Ethics of Legal Outsourcing’ available at https://m.acc.com/chapters/sfbay/upload/2-Session1_INTEGREON.pdf (accessed 17 November 2017).

¹⁴⁸ Harmon AR ‘The Ethics of Legal Process Outsourcing-Is the practice of Law a “Noble Profession” or Is it Just Another Business?’ available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1887197 (accessed 20 November 2017).

¹⁴⁹ Harmon AR ‘The Ethics of Legal Process Outsourcing-Is the practice of Law a “Noble Profession” or Is it Just Another Business?’ available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1887197 (accessed 20 November 2017).

¹⁵⁰ Kenny C and Gordon T ‘Outsourcing Issues for Legal Practice’ (2012) *Law Society Journal* 73.

5.3.5 Billing for outsourced work in the United Kingdom, India and South Africa

There is no question that LPO's provide cost savings for the outsourcer. Applicable law societies place a duty on lawyers to charge an appropriate fee for the rendering of legal services to their clients.¹⁵¹ In outsourcing matters, the outsourcer must therefore bill the client reasonably, and not overcharge the client for outsourcing legal work, which technically is being performed at a much lower cost offshore.¹⁵² Only charging the client for the direct cost of work being outsourced and any reasonable portion of overhead cost has been the recommended approach when invoicing a client.¹⁵³

In short,

'Depending on the rules of the law firm's jurisdiction, a law firm may cover the cost of the outsourcing itself, incorporate the cost into its overhead; pass the cost directly to the client; mark up the cost and pass it on to the client; or charge a flat fee.'¹⁵⁴

When it comes to charging for outsourced work, the lawyer is left to decide on the manner in which to bill for services being rendered in this respect. The general view is that as long as the fees being charged are reasonable, they are accepted.¹⁵⁵ Reasonable costs are deemed to include, the cost of the legal services, as well as the appropriate cost for supervision and overheads.¹⁵⁶

The legal fraternity in the UK does not directly address what the appropriate billing method for outsourced legal services should be, in their practice notes on outsourcing.

¹⁵¹ Ross M 'Ethics of Legal Outsourcing' available at https://m.acc.com/chapters/sfbay/upload/2-Session1_INTEGREON.pdf (accessed 17 November 2017).

¹⁵² Harmon AR 'The Ethics of Legal Process Outsourcing-Is the practice of Law a "Noble Profession" or Is it Just Another Business?' available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1887197 (accessed 20 November 2017).

¹⁵³ Bussell J 'Comparison of the Application of Ethical Duties of Foreign Legal Process Outsourcing' (2014) 27 *The Georgetown Journal of Legal Ethics* 446.

¹⁵⁴ Ham JI 'Ethical Consideration relating to Outsourcing of Legal Services by Law Firms to Foreign Service Providers: Perspectives from the United States' (2008) 27 *Penn State International Law Review* 340.

¹⁵⁵ Ham JI 'Ethical Consideration relating to Outsourcing of Legal Services by Law Firms to Foreign Service Providers: Perspectives from the United States' (2008) 27 *Penn State International Law Review* 340.

¹⁵⁶ Ross M 'Ethics of Legal Outsourcing' available at https://m.acc.com/chapters/sfbay/upload/2-Session1_INTEGREON.pdf (accessed 17 November 2017).

By contrast, the legal experts in India provide that the outsourcer is to bill the client for support services and not the legal fees associated with work performed by an attorney. The repealed Rule 33.7 of the Rules of the Attorneys' Profession¹⁵⁷ in South Africa supported the view taken by India, in that the outsourcer could not receive a commission on the fees paid to the LPO provider when outsourcing. The fees generated by the outsourcer should be the standard fees permitted between correspondent legal practitioners. Furthermore, any discounts on fees when outsourcing were for the interest of the client.

Therefore, what is considered to be the appropriate method to bill for outsourced services has not been established.¹⁵⁸ However, there is debate on whether a lawyer can charge a reasonable mark-up for the outsourced services?¹⁵⁹ The debate seems to be whether outsourcing services should be charged as an expense or as part of the legal fees.¹⁶⁰ What is regarded as 'reasonable' has been left to the outsourcer to decide.¹⁶¹

In summary, it is important to keep in mind that notes provided on billing in the outsourcing relationship stem from the American Bar Association, other law societies have remained silent on this topic. It is therefore assumed that the outsourcer makes the decision of how outsourced services will be billed to the client. As long as it is reasonable, the fee is accepted. Therefore, should further clarity be provided on what would be deemed reasonable billing for outsourcing services' to ensure compliance with ethical duties?

5.4 The consequences of breaching ethical codes

To understand the significance of complying with ethical codes of conduct it is equally important to recognise the implications of breaching these codes in the legal

¹⁵⁷ Section 74(4) Attorneys' Act 53 of 1979.

¹⁵⁸ Ross M 'Ethics of Legal Outsourcing' available at https://m.acc.com/chapters/sfbay/upload/2-Session1_INTEGREON.pdf (accessed 17 November 2017).

¹⁵⁹ Ross M 'Ethics of Legal Outsourcing White Paper' available at <https://www.llrx.com/2010/02/ethics-of-legal-outsourcing-white-paper/> (accessed 20 November 2017).

¹⁶⁰ Ross M 'Ethics of Legal Outsourcing' available at https://m.acc.com/chapters/sfbay/upload/2-Session1_INTEGREON.pdf (accessed 17 November 2017).

¹⁶¹ Ross M 'Ethics of Legal Outsourcing White Paper' available at <https://www.llrx.com/2010/02/ethics-of-legal-outsourcing-white-paper/> (accessed 20 November 2017).

profession. Lawyers are expected to act in an ethical manner befitting a legal professional. Rarely will the outsourcer face sanctions by their bar council or law society for outsourcing as long as the interests of their clients are protected.¹⁶² The consequences of not being ethically compliant range from being removed from the roll of practicing lawyers¹⁶³ to being found guilty of misconduct¹⁶⁴ to being fined or given a warning¹⁶⁵ by the relevant authority. The sentence to be imposed is dependent on the type and the severity of the breach.

Should a contract exist between the outsourcer and the LPO provider, that expresses the terms that govern their relationship and provides remedies for any potential breaches, the outsourcer is ultimately held responsible for the work product, irrespective of whose fault the breach was caused by.¹⁶⁶ As a result of the latter, it has been recommended that outsourcing lawyers should verify and confirm with their malpractice insurance policies to ascertain whether it covers for outsourcing legal work offshore and the outsourcer should conduct a risk analysis on the LPO provider prior to outsourcing.¹⁶⁷

Section 65(5) of the Solicitors Act 1974, UK, restricts law firms from limiting their liability to their clients. This means that solicitors are accountable to their clients for any breach of duties and may be held responsible to the fullest extent the law permits. Accordingly, when a UK qualified lawyer embarks upon outsourcing; specific allocation of liability is pertinent in the outsourcing relationship with the LPO provider, so as to ensure that each party is made fully aware of their responsibilities

¹⁶² Daly MC & Silver C 'Flattening the World of Legal Services? The Ethical and Liability Minefields of Offshoring Legal Law-Related Services' (2007) 38 *Georgetown Journal of International Law* 429 430.

¹⁶³ Slabbert M 'The Requirement of Being a "Fit and Proper" person for the Legal Profession' available at <https://www.ajol.info/index.php/pej/article/viewFile/68750/56820> (accessed 08 November 2017).

¹⁶⁴ Whittle B 'Code of Conduct for the Future Profession Published' available at <http://www.derebus.org.za/code-conduct-future-profession-published/> (accessed 13 August 2018).

¹⁶⁵ Section 44D of the Solicitors Act 1974, UK.

¹⁶⁶ Harmon AR 'The Ethics of Legal Process Outsourcing-Is the practice of Law a "Noble Profession" or Is it Just Another Business?' available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1887197 (accessed 20 November 2017).

¹⁶⁷ Ham JI 'Ethical Consideration relating to Outsourcing of Legal Services by Law Firms to Foreign Service Providers: Perspectives from the United States' (2008) 27 *Penn State International Law Review* 342.

under the contract of work.¹⁶⁸ The legal authorities in both India¹⁶⁹ and South Africa¹⁷⁰ support this position, whereby; the outsourcer is ultimately responsible for the quality of work being performed at the LPO offshore destination. Any breach or infringement would therefore be for the account of the outsourcer.

Therefore, lawyers lose their credibility as professionals if ethical rules are breached.¹⁷¹ These standards of behavior and conduct are to be upheld irrespective of the outsourcing provider the professional chooses to enter into a contract with. Failure to comply can result in severe punishment to the outsourcer. The outsourcer must also take the necessary measures to make certain that the LPO provider does not breach any of the ethical duties that the outsourcer owes to their legal fraternity. Fundamentally, the outsourcer is held responsible for all the stages and outcomes of the outsourcing relationship.

In summary, the manner in which the key ethical concerns raised by the LPO industry have been addressed by the outsourcer jurisdiction and the LPO provider destination vary from country to country. Although there are some similarities it is apparent that no uniformity exists in the legal fraternities approach to the ethical challenges of the unauthorised practice of law; ensuring client confidentiality; adhering to the duty to disclose; avoiding conflicts of interest and billing the client appropriately for the outsourced services. The compliance of ethical duties under professional codes of conduct is mandatory on practicing lawyers.¹⁷² Where any breach can lead to claims of misconduct, negligence or in more serious cases, the disbarment of the legal professional. With no regulatory framework in existence for the LPO industry, what steps have been taken to reduce these ethical concerns?

¹⁶⁸ Ross M 'Ethics of Legal Outsourcing' available at https://m.acc.com/chapters/sfbay/upload/2-Session1_INTEGREON.pdf (accessed 17 November 2017).

¹⁶⁹ See Chapter 4 (A Comparative Analysis of the Legal Systems of the United Kingdom and India) section 4.3 (Legislative and regulatory framework in India).

¹⁷⁰ See Chapter 3 (Legal Process Outsourcing in South Africa) section 3.4 (South Africa's legal and regulatory framework).

¹⁷¹ Maine JA 'Importance of Ethics and Morality in Today's Legal World' (2000) 29 *Stetson Law Review* 1091.

¹⁷² See Chapter 4 (A Comparative Analysis of the Legal Systems of the United Kingdom and India) footnote 105.

5.5 Steps taken to reduce ethical violations

Consistency between policies and actions are required to support ethical codes.¹⁷³ The outsourcer must abide by the rules of professional conduct to ensure a satisfactory outsourcing relationship. However, it bears notice that practice notes on outsourcing do not necessarily address solutions to ethical issues. They rather provide recommendations to assist the lawyer in complying with their ethical responsibilities.

‘Without express rules, legal practitioners will have little guidance or incentive to implement measures necessary to avoid the ethical consequences of LPO’¹⁷⁴

The above clearly provides that the availability of specific advice on outsourcing would advance the protection of ethical codes. Whereby the outsourcer would be able to make an informed decision as to the course of action they should take to eliminate any ethical infractions.

To diminish ethical concerns, legal authorities recommend that the outsourcer conduct a thorough due diligence exercise on its preferred outsourcing company provider prior to retaining their services.¹⁷⁵ Interestingly, the majority of advice concerning or addressing the ethics of outsourcing stems from LPO providers who obviously want to ensure the sustainability of their business.¹⁷⁶ The following detailed steps have been suggested for the outsourcer when choosing an LPO provider in India. It must be noted that the below extract is directed towards US lawyers who are thinking of outsourcing legal services. But these steps can be adapted to any outsourcer across the globe.

‘Choosing an LPO

- Review background information about the LPO provider (such as industry

¹⁷³ Trevino LK, Weaver GR, Gibson DG et al ‘Managing Ethics and Legal Compliance: What Works and What Hurts’ (1999) 40(2) *California Management Review* 131.

¹⁷⁴ Fischer BJ ‘Outsourcing Legal Services, In-Sourcing Ethical Issues: An Examination of the Ethical Considerations Arising from the Practice of Outsourcing Legal Services Abroad’ (2010) 16 *Southwestern Journal of International Law* 476.

¹⁷⁵ Ross M ‘Ethics of Legal Outsourcing’ available at https://m.acc.com/chapters/sfbay/upload/2-Session1_INTEGREON.pdf (accessed 17 November 2017).

¹⁷⁶ Ham JI ‘Ethical Consideration relating to Outsourcing of Legal Services by Law Firms to Foreign Service Providers: Perspectives from the United States’ (2008) 27 *Penn State International Law Review* 324.

reputation).

- Consider selecting the LPO with the assistance of an intermediary with expertise in vetting such providers.
- Review a sample of work product, or require the LPO produce a sample using dummy information.
- Consider the length of time that the LPO has been in business and the stability of its business structure.
- Consider a site visit to assess compliance with the best practices discussed in this section.

Contracting with the LPO

- The law firm and LPO should enter into a written service agreement.
- Require choice of law and forum provisions requiring disputes be governed by U.S. law and litigated in U.S. courts.
- Require the LPO maintain a conflicts database with the information customarily collected for such databases within U.S. firms.
- Require adherence to the best practices set forth in the remainder of this section.

Technological compliance

- Client data should be encrypted in transit and at rest.
- Technology used by the LPO to store client information should adhere to the same standards required if the law firm itself were using the technology.
- To the greatest extent possible, retain control of client data on your firm's own secure cloud-based storage solution. Ideally, client data should be stored on LPO-owned storage only to the extent needed to actively work on a matter (for example, a temporary copy of a USCIS form saved on a local computer while a worker is drafting the document).
- Work stations should be firewalled to prevent unauthorized data transmission.
- Require that all locally-controlled data be destroyed at the conclusion of a project or task.

Procedural standards for client security

- Implement a written confidentiality policy to which LPO staff must adhere, consistent with Model Rule 1.6. Require that the LPO backup the policy with disciplinary sanctions for violations.
- The facility should be secured with limited access, ideally with biometric and photo

identity screening at entrances.

- LPO staff should not be permitted to take electronic devices to their work station.
- The facility should adhere to a disposal protocol for all paper documents, including shredding all documents with client information.

Screen the LPO's staff

- Review the resume of the LPO staff assessing educational backgrounds.
- Require that the LPO conduct reference checks and investigate the background of its staff.
- Interview the LPO staff involved to ascertain their fit for the contemplated work.
- Interview supervisors to be involved on the project.
- Review ethical standards with individuals who will perform work and incorporate the ethical standards into the terms of the contract with the firm.

Workflow procedures and supervision

- Require the LPO run and document a conflict check prior to beginning work on a client matter. Any possible conflict hit should be reported to the U.S. firm for review and judgment call. The LPO should not be permitted to engage in the work if currently – or has previously – performed work for an adverse party.
- Require that LPO staff be disciplined or terminated for improper conduct.
- Develop a written “office manual” for the LPO, specifying in detail how work is to be performed for the firm.
- Specify a primary supervisory point of contact at the LPO facility.
- Have clear task assignments to LPO, so it is clear precisely what work is being delegated.
- The closer delegated work comes to the practice of law, the higher degree of supervision is required.
- Consider adopting a cloud-based team communication tool such as Slack. [Slack provides “channels” for team members to exchange messages on topical subjects.
- A particular LPO staff member should be given access to only the client data specifically needed to complete a task.
- Consider scheduling weekly “standup” meetings with the LPO’s supervisor to discuss workflow management.
- No work product from the LPO is used without independent review from the U.S. lawyer.

Disclosure to clients

- Explain use of an LPO in the law firm's client engagement letter.
- Explain the nature of tasks that will be outsourced.
- The engagement letter should include – or reference– sufficient detail to secure the client's informed consent to disclosing information to the LPO.
- Consider providing a link to a web page where the client can learn more about the specifics of the firm's LPO.
- For immigration firms performing work for a flat rate, the firm need not adjust its rates after choosing to delegate some case work to an LPO.¹⁷⁷

The purpose of these steps is to provide the outsourcer with best practice methods when outsourcing legal services. More specifically the recommendations provide:

- (i) Choosing an LPO – the outsourcer is prompted to gather as much information as possible on the LPO provider prior to contracting to work with them. This includes reviewing their work product or conducting a test with them to ascertain their level and quality of work. A site visit is also recommended.
- (ii) Contracting with the LPO – the outsourcer and LPO provider should enter into an agreement, which would govern their relationship as well as provide for the legal authority that should be approached when disputes and issues arise.
- (iii) Technological compliance – the LPO provider should have the same standards the law firm would have to store confidential information. The outsourcer is guided to work off a cloud-based system that allows for secure storage of the necessary data to be shared with the LPO provider only and have the applicable firewalls in place to prevent the possibility of the data being disclosed. Moreover, upon the completion of work, the outsourcer must require the LPO provider to destroy all confidential information in their possession or which they have access to.
- (iv) Procedural standards for client security – to ensure that the client information is adequately protected, the outsourcer should implement a confidentiality policy whereby all staff at the LPO provider business should uphold. The premises of the LPO must implement applicable security measures to control access. The

¹⁷⁷ McLawsen G 'The Back Office in Bangalore: Clarifying the Ethics of Legal Process Outsourcing' (2017) *Bender's Immigration Bulletin* 722 723.

use of electronic devices should not be permitted at workstations and proper disposal management of all documentation is advised.

- (v) Screen the LPO staff – the educational background of LPO staff needs to be verified through reference checking, conducting interviews and investigation. Moreover, the outsourcer should review the ethical standards of the LPO staff and incorporate them as part of the terms of contract with the LPO provider.
- (vi) Workflow procedures and supervision – the outsourcer should require the LPO provider to conduct a conflict of interest check prior to starting any outsourced legal work. LPO staff are to be adequately disciplined and proper procedures should be in place to specify how work is to be performed by the LPO provider on behalf of the outsourcer. Outsourced work that is usually considered to be work that is undertaken by a practicing lawyer¹⁷⁸ will require supervision. Moreover, the outsourcer must review the work product of the LPO staff member. Open channels of communication should be established between the LPO provider and the outsourcer.
- (vii) Disclosure to clients – the outsourcer is to explain the outsourcing relationship to the client including the scope of work that is to be outsourced. Client consent should be secured to enable the outsourcer to disclose the client's confidential information to the LPO provider. Lastly, fees should not be altered where an outsourcer chooses to outsource work to an LPO for a flat rate.

In summary, the steps from above extract cover the aspects of conducting due diligence exercise on the LPO provider, quality of work verification, securing confidential data, the screening of LPO staff, conflict of interest checks, supervision and the manner in which the disclosure to client should be made.

In reference to section 5.3 (Key ethical concerns of raised by Legal Process Outsourcing), which discussed the key ethical concerns of the unauthorised practice of law, ensuring client confidentiality, adhering to the duty to disclose, avoiding conflicts of interest and billing the client appropriately for outsourced work, as raised by LPOs and the above extract, it can be deduced that the unauthorised practice of law is circumvented by the implementation of supervisory methods and the outsourcer

¹⁷⁸ See Chapter 4 (A Comparative Analysis of the Legal Systems of the United Kingdom and India) footnote 105.

reviewing the work product. This ensures that the outsourcer is ultimately responsible for the legal services they are providing to the client irrespective of it being outsourced.

Administering applicable technological tools that would secure the client information and prevent unauthorised disclosures ensures client confidentiality. In addition, the LPO staff member is made to enter into and comply with confidentiality agreements / policies whereby disciplinary sanctions will be imposed for any violations. Client consent must be obtained prior to outsourcing the legal services to be performed for the client. The outsourcer is also tasked with requiring the LPO provider to conduct conflict checks prior to outsourcing the work, to ascertain that the client's best interests will be met. Lastly, fixed fees agreed with the client should not be adjusted as the work is being, thereby ensuring that the outsourcer bills the client appropriately for the outsourced legal services. The aforementioned steps, therefore, work towards minimising the ethical concerns outsourcing raises.

The direction given in choosing an LPO provider is indeed helpful, however, the question that arises is whether there should be a proper structure with basic standards in place to address the outsourcing relationship, so as to limit ethical violations, which could have an adverse effect on lawyers and the legal profession?¹⁷⁹ The ethical rules do not adequately address the provision of legal services by the offshore provider.¹⁸⁰ Practice notes cater more for certain jurisdictions and are only addressing low-level legal work being outsourced. Amending existing policies and practices will not be sufficient when foreign providers have a different legal system.¹⁸¹

The question therefore arises, how will unethical actions in outsourcing be remedied / addressed? This question will be addressed in Chapter 6 (The Need to Regulate legal Process Outsourcing).

¹⁷⁹ Ham JI 'Ethical Consideration relating to Outsourcing of Legal Services by Law Firms to Foreign Service Providers: Perspectives from the United States' (2008) 27 *Penn State International Law Review* 323.

¹⁸⁰ Ham JI 'Ethical Consideration relating to Outsourcing of Legal Services by Law Firms to Foreign Service Providers: Perspectives from the United States' (2008) 27 *Penn State International Law Review* 324.

¹⁸¹ Daly MC & Silver C 'Flattening the World of Legal Services? The Ethical and Liability Minefields of Offshoring Legal Law-Related Services' (2007) 38 *Georgetown Journal of International Law* 435.

5.6 Conclusion

The focus of this chapter was to explore the ethical challenges posed by outsourcing legal services. The LPO industry is a global phenomenon that has become a common practice amongst the legal sector. The profession of law by its very nature is expected to represent a high ethical standard. Lawyers are tasked with providing legal services to the public and are entrusted to do so professionally. A code of ethics provides the framework by which legal services may be rendered by a lawyer to their clients in a manner, which would ensure that the work being carried out is in the public's interest, upholds professional standards, and maintains the dignity of the legal profession. Legal professionals are obligated to comply with the code of ethics imposed on them by their applicable law societies and bar councils. Failure to observe these rules may lead to harsh consequences.

The key ethical challenges are avoiding the unauthorised practice of law, maintaining client confidentiality, the duty to disclose the outsourcing relationship to the client, ensure that no conflicts of interest exist, and to bill the client appropriately. Regardless of jurisdiction, ethical rules exist and impact upon both the outsourcer and the LPO provider. Although there is limited guidance on the ethical duties of lawyers outsourcing legal work, the general consensus appears to be that as long as there is adequate supervision, signed confidentiality agreements between the parties, client consent, and the client is billed reasonably, this is assumed to be sufficient to combat the ethical concerns of LPO. However, is it acceptable that ethical risks are just managed?

A plethora of information can be found on the key ethical concerns raised by offshoring legal services. However, little or no discussion has been raised on mitigating these risks. Albeit, the American Bar Association in the US, the Law Society in the UK and the Offices of the Legal Services Commissioner in Australia have produced practice notes to guide lawyers wanting to outsource legal services and LPO providers have provided their recommendations on reducing ethical violations. But these practice notes are primarily for the outsourcing of low-level legal work. The LPO provider, on the other hand, has taken the initiative to ensure that it remains a

viable business by implementing measures to allay the concerns of the outsourcer, while legal authorities take tentative steps forward.

No regulations for the outsourcing industry currently exist. LPOs can therefore be said to be a self regulated business, whereby the parties to the outsourcing arrangement decide how the relationship will be governed and where only the contracts they have with the outsourcer dictate the standard quality required. Thereby allowing for fluctuations in the standards of the legal services being implemented, from one outsourcing relationship to another.

The questions that remain are: why is the LPO industry, which is a billion dollar business, not regulated? Are fiduciary duties (as regards outsourcing) being pushed aside so that financial profits can be maximised? Is the legal profession compromising on ethics in favour of promoting business? Or are legal fraternities bidding their time and analysing the progress of the LPO industry before taking further action? These questions will be explored further in Chapter 6 (The Need to Regulate Legal Process Outsourcing). However, what is clear is that the role of ethics is significant in the day-to-day practice of a lawyer. It holds the lawyer accountable for the services they render to their clients and promotes the administration of justice.

Therefore, the next chapter will explore whether having a regulatory framework would minimise the challenges outsourcing poses to a lawyer's ethical duties, or whether having practice notes to guide the outsourcer is sufficient, with focus on relevant cases that have arisen within the LPO industry.

CHAPTER SIX

THE NEED TO REGULATE LEGAL PROCESS OUTSOURCING

6.1 Introduction

The Legal Process Outsourcing (LPO) industry is recognised as an integral part of the services offerings a law firm or legal department can offer to their clients as a means of reducing costs while remaining efficient. However, this industry has been plagued with questions pertaining to the ethical duties a practicing legal professional has when outsourcing. Ethics¹ are the responsibilities lawyers and legal professionals have towards society, the courts and the layperson. These codes are used to gage the standards of acceptable behaviour and conduct in the services lawyers provide to their clients and keep the lawyer accountable for the legal services they perform for their client. Ethical concerns cannot be overlooked, as they are a reflection of the positive reputation the legal sector tries to uphold and aid in promoting public confidence in the judiciary system of the country. It is therefore vital that the legal fraternity, the outsourcing lawyer and the LPO provider address these ethical considerations. The need for the legal services offered by the LPO sector must be balanced with adequate guidance that mitigates the exposure to ethical risks.

The ethical implications of outsourcing legal work were explored in detail in Chapter 5 (Ethical Principles and the Practice Of Law). The main ethical concerns that have arisen in sending legal work offshore are: the unauthorised practice of law, this pertains to foreign legal professionals performing legal work even though they are not licensed to practice law in the outsourcer's jurisdiction; ensuring that client confidentiality is maintained when offshoring data; avoiding conflicts of interest; deciphering whether there exists a duty to disclose the outsourcing relationship to the client; and the appropriate manner in which the outsourcer is to bill the client for the outsourced services.²

¹ See Chapter 5 (Ethical Principles and the Practice of Law), section 5.2 (The role and importance of ethics in the practice of law).

² Chapter 5 (Ethical Principles and the Practice of Law), section 5.3 (Key ethical concerns raised by Legal Process Outsourcing).

As a result of the latter, there have been only a few select bodies (for example: the American Bar Association in the United States of America (US), the Law Society in the United Kingdom (UK) and the Offices of the Legal Services Commissioner in Australia) that have responded to the rising ethical challenges, by issuing practice notes on outsourcing. These notes guide the outsourcing lawyer in remaining compliant with their duties as contained in the relevant code of professional conduct, while sending work offshore. It was found that the outsourcer is ultimately responsible for the work product when outsourcing.

As such, they are to implement adequate supervisory methods to oversee the legal services being performed by the foreign lawyer, to review the quality of work so that it meets acceptable standards and ensure that the foreign lawyer assists the outsourcer in meeting with their ethical duties as practicing lawyers.³ However the questions arises, how adequate is the process of supervision when the outsourcer is based on another continent? Are the available communication tools such as Skype and video calls sufficient to meet this requirement? These are questions that require further research.

Sending confidential information offshore poses a risk of disclosure; as a consequence the outsourcer is to verify that the LPO provider has taken the necessary security precautions to safeguard the information being shared. But, the standard to be complied with as regards security is for the outsourcer and LPO provider to ascertain. When it comes to the disclosure of the client's confidences, the opinion on whether the outsourcer should obtain the client's consent prior to sending or sharing their confidential information with the LPO provider is divided. By obtaining client's consent it has been argued that this ensures that the client is educated on the risk of outsourcing and provides the client with all necessary information to make an informed decision. However, by contrast, it is believed that the outsourcer usually delegates a portion of the client's work to other legal professionals without having to obtain the client's consent, and as such the client understands this as a normal practice of lawyering.

³ See Chapter 4 (A Comparative Analysis of the Legal Systems of the United Kingdom and India) footnote 105.

To avoid conflicts of interest arising when outsourcing, it has been recommended that the outsourcer checks with the LPO provider and obtain their confirmation that no such conflicts exist. But it remains unclear what conflict checking systems the LPO provider has in place.

Lastly, by outsourcing legal work, the outsourcer is obtaining a cost savings, which should be attributed to the client and not for the lawyer to make a profit from. However, the manner in which outsourcing legal services is to be billed has been left to the outsourcer to decipher. With the general view, being that as long as the fees being charged to the client are reasonable, they will be accepted. But, the question arises, what would be considered reasonable in the circumstances? The latter requires further research.

Therefore, although the practice notes provide the outsourcer with limited guidance to managing the ethical risk raised by outsourcing legal services, there is little information provided by legal bodies on the standards that should be used to measure the outsourcing relationship. The outsourcer and LPO provider are subsequently left to establish what these standards should be, on a case by cases basis.

From a global perspective, both bar councils and law societies support the LPO industry as an ethical practice.⁴ They are also cognisant of the ethical concerns that have arisen as a consequence of outsourcing legal work offshore. However, in spite of the immense growth the LPO industry has seen over the last two decades, and the ethical challenges it imposes, minimal effort has been made by the legal sector in any particular country, towards establishing a regulatory framework for this industry. To date, no regulatory framework exists for the legal outsourcing industry.

The overall focus of this chapter will be to explore whether a regulatory framework would be a solution to minimising and addressing the challenges outsourcing poses to the lawyer's ethical duties. An understanding of the purpose of having a regulatory framework versus the intended purpose of practice notes will be explored. Followed by an analysis of the advantages and difficulties of introducing a regulation for the

⁴ See Chapter 2 (The Growth and Development of Legal Process Outsourcing).

outsourcing industry and the key aspects of being left as a self-regulated body. Finally an exploration into the relevant case law, which has arisen within this sector when offshoring legal work will be discussed and explored.

6.2 The purpose of a regulatory framework

A regulatory framework can simply be defined as consisting of a set of rules that are legally binding upon a select group of professionals. The latter rules are to be incorporated and are compulsory upon the professional in their day-to-day conduct of business within the sector they work in / belong to. In the legal sector, regulations provide the basis whereupon uniformity in the standard of service can be achieved by respecting the terms of the regulation. The practicing lawyer⁵ is required to comply with these conditions to ensure a quality service⁶ is delivered to the client thereby holding the lawyer accountable for the performance of that service. Where a quality service pertains to the competence of the lawyer and the ethical characteristics they embody when performing legal work for the client.⁷

Generally, the government and applicable regulatory bodies decide which legal services would need regulating.⁸ Before consideration is paid to drafting a regulatory framework, the following position is taken into account:

‘A decision to regulate a market (in this case the legal services market) arises from the decision that leaving the activity unchecked could lead to undesirable consequences and that the benefits that will flow from regulation will outweigh the costs of that regulation. Because any regulatory system will involve the application of rules giving guidance as to acceptable standards of conduct within the area being regulated, it can lead to an increase in trust and confidence in institutions and the sector generally. And

⁵ See Chapter 4 (A Comparative Analysis of the Legal Systems of the United Kingdom and India) footnote 105.

⁶ Megha and Vipula ‘Legal Process Outsourcing: Is the lack of a regulatory framework one of the challenges facing the LPO industry in India?’ available at http://www.indialawjournal.org/archives/volume3/issue_4/article_by_megha_vipula.html (accessed 22 February 2018).

⁷ Hadfield GK and Rhode DL ‘How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering’ (2016) 67 *Hastings Law Journal* 1197.

⁸ Clementi D Sir ‘Review of the Regulatory Framework for Legal Services in England and Wales - A Consultation Paper’ available at http://webarchive.nationalarchives.gov.uk/+http://www.legal-services-review.org.uk/content/consult/consult_reviewpaper.pdf (accessed 10 September 2018).

allied to the issue of trust and confidence, regulation can also lead to greater certainty of outcome for both consumers and providers. But beyond simply engendering confidence in the market, regulation has an important role to play in protecting the consumer, ensuring there are no unjustifiable restrictions on competition, that appropriate standards of education, training and conduct are maintained, and that there are appropriate redress mechanisms.⁹

From the above citation, the creation of a regulatory framework comes into play when leaving the sector to self-regulate itself would lead to an escalation of negative repercussions flowing from that sector; a regulation is therefore seen as the solution to minimising risk. As regards the LPO industry it has been left to self-regulate itself. The overriding question is therefore whether the growth of the LPO industry and its unregulated status, will increase in direct proportion to the level of risk and the challenges it poses to the ethical practice of law when outsourcing legal work offshore? Simply put, will the expansion of this industry merit a regulatory framework to counteract ethical concerns? In reference to the above quote, the importance of having a regulatory framework is to create trust and confidences in the legal sector through the provision of rules that govern conduct, training, educational requirements and promote the interest of the public. Moreover, regulations are used to protect the client from unfair practices; encourage healthy competition and makes solutions available to the client should the legal professional's duties towards the client fall below par.

The legal system in a country provides the structure by which rules are made in the interest of society and whereupon applicable sanctions are imposed where deemed acceptable standards of quality have been diminished.¹⁰ In the legal sector, there are five main outcomes that regulations are commonly known to achieve:

- '(i) Entry standards and training: setting minimum standards of entry qualifications, usually linked to educational achievement, for candidates wishing to become qualified. It also encompasses matters such as continuing professional

⁹ Clementi D Sir 'Review of the Regulatory Framework for Legal Services in England and Wales - A Consultation Paper' available at http://webarchive.nationalarchives.gov.uk/+/http://www.legal-services-review.org.uk/content/consult/consult_reviewpaper.pdf (accessed 10 September 2018).

¹⁰ McEwin I 'Regulation of the Legal Profession' available at www.ghostdigest.com/resources/16154 (accessed 17 September 2018).

development.

- (ii) Rule making: formulation of rules by which members are expected to work and to adhere.
- (iii) Monitoring and Enforcement: checking the way in which members carry out their work, in the light of the prescribed rules, and enforcing compliance if rules are broken.
- (iv) Complaints: systems for consumers to bring complaints about providers who have served them poorly, focused on redress to the consumer.
- (v) Discipline: powers to discipline members where that person is, for example, professionally negligent, or in breach of the professional rules, focusing on action against that individual.¹¹

Therefore, it is apparent that regulations encompass all areas of a lawyer's work, from the standards they are to achieve in order to practice law, to the formulation of relevant rules to govern their professional duties, mandatory compliance with codes of conduct, being held accountable for the services they provide and the procedure by which complaints against them can be addressed. As regards the latter, having a complaints procedure allows the client to have access to remedies for the receipt of inadequate services by a legal professional. Whereupon, a decision can be made by the relevant regulatory body, as to the applicable disciplinary measures to be imposed on the offending lawyer in reference to the given circumstances and facts of the complaint.

When drafting regulations for the legal sector, the regulator / drafter is tasked with safeguarding the below-mentioned goals:¹²

- (i) Maintaining the rule of law – the rules of law are the principles that govern the country. Their purpose is to create fairness, transparency and the treatment of all people equally, thereby protecting their human rights. This ensures that the provision of legal services is delivered in an efficient and effective manner that conforms to specific accepted standards for the legal industry.

¹¹ Clementi D Sir 'Review of the Regulatory Framework for Legal Services in England and Wales - A Consultation Paper' available at http://webarchive.nationalarchives.gov.uk/+/http://www.legal-services-review.org.uk/content/consult/consult_reviewpaper.pdf (accessed 10 September 2018).

¹² Clementi D Sir 'Review of the Regulatory Framework for Legal Services in England and Wales - A Consultation Paper' available at http://webarchive.nationalarchives.gov.uk/+/http://www.legal-services-review.org.uk/content/consult/consult_reviewpaper.pdf (accessed 10 September 2018).

- (ii) Access to justice – to ensure that all persons have access to the courts, to legal representation and are able to seek remedies for unacceptable quality of work under the legal system.
- (iii) To protect the interests of the client – the client should be given the choice to decide whether to provide their consent on matters that pose an element of risk to them. As such the regulator is tasked with dually informing the client on the standards of service and simultaneously protecting their best interests.
- (iv) Create a healthy atmosphere – creating an atmosphere that promotes healthy competition within the legal services industry so that it is not strictly monopolised by duly qualified lawyers. This allows for alternative business models to serve the public and perform legal work, which traditionally was only executed by lawyers. Having more service providers of legal services increases the public’s access to justice, making it more readily available and affordable. It also promotes greater access to justice for the public.
- (v) Create a strong legal profession – setting applicable standards of entry into the profession as regards education, training and conduct. This ensures that skilled and trained legal professionals perform the legal services, which in turn protects the interests of the public. All of which increases the level of trust and confidence the public has in the legal sector.
- (vi) Promoting rights – lawyers have a professional duty to educate their clients on their rights as well as enlightening them on the consequences of the decisions they make.
- (vii) Ensure that practicing lawyers¹³ (a) act independently in the interest of justice; (b) act with integrity and honesty towards the client, courts and other legal professionals; (c) act in the best interests of the client except where it would be deemed unlawful to do so; and (d) keep their client’s affairs confidential, taking the necessary steps to minimise disclosure. These factors form part of the ethical duties owed by lawyers to their clients and sets the standard of conduct that they are required to meet.

In reference to the above, it can be held that the purpose of having a regulatory framework is to provide the public with greater access to justice while promoting the

¹³ See Chapter 4 (A Comparative Analysis of the Legal Systems of the United Kingdom and India) footnote 105.

interests of the public by holding legal professionals accountable for the services they perform, especially as regards their ethical responsibilities. This ensures that there is clarity on the expected roles of all concerned parties, which will in turn augment the level of transparency and accountability in the performance and delivery of the legal services to the client.¹⁴

Conversely, it is worth noting that without the implementation or existence of a regulatory framework, the public would be unable to evaluate the legal services they are being provided with.¹⁵

‘the very theory of lawyer regulation is founded on the notion that clients cannot themselves evaluate the quality of the professional they hire, and so the market cannot ensure a base level of quality — regulation must do that.’¹⁶

Without having a regulation in place, there would be no standards in which to measure what would be deemed acceptable quality of work versus unacceptable quality of work. A lack of regulation would therefore lead to undermining the judicial system and compromising public interest. Consequently, bringing the reputation of the legal profession into disrepute.

Regulations enforce the laws of the country, providing specific guidance on the ‘how’ aspect of rendering legal services. In other words, they elaborate upon on the actions the legal professional is to take to remain compliant with professional codes while protecting and uplifting the client’s best interests.

Clearly, regulations play an important role in protecting the client’s interests for the legal services rendered to them by lawyers. In the offshoring of legal work, this would be the actionable steps the outsourcer is to incorporate into the outsourcing relationship with the LPO provider, so that the legal professionals are able to maintain

¹⁴ Clementi D Sir ‘Review of the Regulatory Framework for Legal Services in England and Wales - A Consultation Paper’ available at http://webarchive.nationalarchives.gov.uk/+http://www.legal-services-review.org.uk/content/consult/consult_reviewpaper.pdf (accessed 10 September 2018).

¹⁵ McEwin I ‘Regulation of the Legal Profession’ available at www.ghostdigest.com/resources/16154 (accessed 17 September 2018).

¹⁶ Robertson CB ‘Regulating Electronic Legal Support Across State and National Boundaries’ (2014) 47 *Akron Law Review* 47.

their compliance with professional conduct rules while serving the best interests of the client.

In summary, the motivation behind having a regulatory framework in the legal sector is to ensure that applicable standards exist to measure the quality of work being performed on behalf of the client as well as the qualifications and training of the legal professional that is to render the legal services. The common thread running through both the outcomes and goals of having a regulation is to promote and protect the best interests of the client. The latter translates to achieving greater accessibility to justice while upholding the best interests of the public. Being that there is no regulation for the outsourcing industry, what benefit do practice notes provide to the client and the lawyer? This will be discussed in the next section.

6.3 The purpose of practice notes for outsourcing

When outsourcing, the lawyer must comply with their respective professional codes of conduct, which will encompass the ethical duties they owe to their clients and which they are to maintain in the delivery of the legal services.¹⁷ ¹⁸These professional codes of conduct are created by applicable legal bodies of which lawyers are members. As a result of the expansion of the LPO market and its acceptance by the legal profession, it is important that the ethical considerations of legal outsourcing be addressed.¹⁹ In outsourcing legal services, the legal fraternity has taken the stance to introduce practice notes for this industry as opposed to implementing a regulatory framework.²⁰ These notes act as guidelines for the outsourcer and are not to be considered as the provision of legal advice by the relevant law society.²¹ It can be construed that these guidelines are therefore not mandatory on the outsourcer. As long

¹⁷ Council of Bars and Law Societies of Europe ‘CCBE Guidelines on Legal Outsourcing’ available at https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_Guides_recommendations/EN_DEON_20100624_Guidelines_on_legal_outsourcing.pdf (accessed 11 September 2018).

¹⁸ See Chapter 5 (Ethical Principles and the Practice of Law), section 5.2 (The role and importance of ethics in the practice of law).

¹⁹ Advani PR and Naskar D ‘From Professional Responsibility to the “Business of Law”’: Regulating the Ethical Implications of Legal Process Outsourcing’ (2012) 5 *National University of Juridical Sciences Law Review* 158.

²⁰ See Chapter 5 (Ethical Principles and the Practice of Law).

²¹ Law Society UK ‘Outsourcing’ available at <https://www.lawsociety.org.uk/support-services/advice/practicenotes/outsourcing/> (accessed 07 August 2018).

as the outsourcer continues to remain compliant with codes of practice which encompass their ethical duties when lawyering, they are permitted to outsource legal work.

Practice notes on outsourcing have been published by a select few regulatory bodies²² but only in the outsourcer's jurisdiction. The intention of the practice notes has been to provide the outsourcing lawyer with the recommended position as regards their ethical duties, when outsourcing legal services. Thereby placing emphasis on the importance of complying with ethical duties as imposed by professional codes of conduct for the lawyer. By way of example, in the UK, the introduction of the practice notes is seen as the law societies way of reminding solicitors and law firms of their ethical responsibilities as practicing lawyers²³ as well as the risks involved when outsourcing legal services offshore.²⁴ Moreover, these practice notes hold the outsourcer entirely responsible for the outsourcing relationship including the work product and is focused primarily on the outsourcing of administrative to low-level legal services.²⁵ More complex type work is therefore not provided for under the law society's practices notes in the UK.

Practice notes are therefore reminders to the lawyers that they remain professionally responsible for the legal work being outsourced. The practice notes cater solely for the legal professional and not the LPO provider. This brings to light, certain gaps present in the practice notes provided to the outsourcing lawyer. For instance, the notes do not elaborate on the specific actions or standards the outsourcer should take to meet their ethical duties when offshoring legal work.²⁶ The notes do not suggest how the outsourcer is to measure whether the LPO provider understands and accepts

²² Namely the American Bar Association in the United States of America (US), the Law Society in the United Kingdom (UK) and the Offices of the Legal Services Commissioner in Australia.

²³ See Chapter 4 (A Comparative Analysis of the Legal Systems of the United Kingdom and India) footnote 105.

²⁴ Cohen MA 'Law is a Professional and an Industry - It should be Regulated that Way' available at <https://www.forbes.com/sites/markcohen1/2018/03/29/law-is-a-profession-and-an-industry-it-should-be-regulated-that-way/#3c82ca826598> (accessed 11 September 2018).

²⁵ Ross M 'Ethics of Legal Outsourcing' available at https://m.acc.com/chapters/sfbay/upload/2-Session1_INTEGREON.pdf (accessed 17 November 2017).

²⁶ Advani PR and Naskar D 'From Professional Responsibility to the "Business of Law": Regulating the Ethical Implications of Legal Process Outsourcing' (2012) 5 *National University of Juridical Sciences Law Review* 158.

their responsibilities as regards confidential information, for example.²⁷ Furthermore, the practice notes do not provide clarity on which rules of law would be binding on the LPO provider.²⁸ Should the LPO provider observe the rules of legal practice for their home country or the outsourcer's country?

'The difficulty arises due to the "absence of any regulatory guidelines either from destinations where the legal work emanates from or at locations where it is executed." This implies that any regulatory mechanism should take into account compliance from both locations. This would also ensure that in spite of the fact that the outsourcing lawyer may have to bear complete responsibility, the LPO firm (outsourced lawyer) would also have to abide by the ethical guidelines, and further, it could possibly eliminate discrepancies in the ethical standards by which both sets of lawyers are bound.'²⁹

From the above, it is clear that due to the lack of a regulatory framework in the outsourcer's jurisdiction and the LPO provider destination country, the optimal solution would be to achieve a framework that would encompass both the outsourcer and the LPO provider's ethical duties while outsourcing. Thereby making not only the outsourcer responsible for the legal services being performed, but also apply some level of responsibility on the LPO provider as well. This would work towards establishing a set standard as regards the ethical standards expected from the parties to an outsourcing relationship. But would this be possible in practice? When there are two or more legal systems involved in the outsourcing relationship? If the LPO provider follows their country's rules of legal practice there will surely be a disparity in the standards of acceptable conduct, being that each country has different legal systems.³⁰ Arguably, any infringement or breach may then be subjected to a more lenient type penalty in the LPO provider's jurisdiction, as compared to the

²⁷ Law Society UK 'Law Society Practice Note on Outsourcing Explained' available at <https://www.dictatenow.net/news/law-society-practice-note-outsourcing-explained> (accessed 10 September 2018).

²⁸ Advani PR and Naskar D 'From Professional Responsibility to the "Business of Law": Regulating the Ethical Implications of Legal Process Outsourcing' (2012) 5 *National University of Juridical Sciences Law Review* 158.

²⁹ Advani PR and Naskar D 'From Professional Responsibility to the "Business of Law": Regulating the Ethical Implications of Legal Process Outsourcing' (2012) 5 *National University of Juridical Sciences Law Review* 160.

³⁰ Patel S 'Is Legal Outsourcing up to the Bar? A Reevaluation of Current Legal Outsourcing Regulation' (2010) 35 *The Journal of the Legal Profession* 88.

outsourcer's, this could potentially lead to the outsourcer taking a more relaxed approach when meeting their ethical duties.³¹ Alternatively, local laws may supersede and cause any rulings held under the outsourcer's country to be unenforceable.³²

It is important to note that offshore LPO destination countries have no such policy or practice notes in place.³³ LPO providers have therefore taken to introducing self-regulatory steps. These include: implementing onsite security measures; training programs for LPO staff members; hiring both qualified local and foreign lawyers; implementing quality control procedures; entering into non-disclosure agreements which address any confidentiality issues the outsourcer may have; and introducing mechanisms for checking conflicts of interest.³⁴ Although the aforementioned controls will definitely aid in curbing some elements of ethical infractions, are they enough? Despite the practical steps taken by LPO providers to reduce ethical fractions and to allay any concerns the outsourcer may have, the choice to comply rests with the parties in the outsourcing relationship. Whose aim will arguably be primarily to strike a business deal that is mutually beneficial to the parties.³⁵ It is therefore enough for the outsourcer and the LPO provider that they are meeting basic codes of ethic to maintain their obligations with the law society and bar council. These legal bodies also accept the same position.

Therefore, practice notes for outsourcing have the purpose of acting as reminders to the outsourcing lawyers, of their duty to comply with the ethical practice of law. These guidelines do not provide any guidance on how this will be achieved and are not enforceable. This has left the outsourcer to implement best practice measures to ensure the client is protected during the transaction of outsourcing legal work.

³¹ Advani PR and Naskar D 'From Professional Responsibility to the "Business of Law": Regulating the Ethical Implications of Legal Process Outsourcing' (2012) 5 *National University of Juridical Sciences Law Review* 158.

³² Patel S 'Is Legal Outsourcing up to the Bar? A Reevaluation of Current Legal Outsourcing Regulation' (2010) 35 *The Journal of the Legal Profession* 87.

³³ Advani PR and Naskar D 'From Professional Responsibility to the "Business of Law": Regulating the Ethical Implications of Legal Process Outsourcing' (2012) 5 *National University of Juridical Sciences Law Review* 146.

³⁴ Advani PR and Naskar D 'From Professional Responsibility to the "Business of Law": Regulating the Ethical Implications of Legal Process Outsourcing' (2012) 5 *National University of Juridical Sciences Law Review* 158 159.

³⁵ Advani PR and Naskar D 'From Professional Responsibility to the "Business of Law": Regulating the Ethical Implications of Legal Process Outsourcing' (2012) 5 *National University of Juridical Sciences Law Review* 159.

Moreover, due to a lack of a regulatory framework, the LPO provider has improvised by becoming a self-regulatory body, exercising the measures they deem fit to gain the confidence of the outsourcer while promoting business. But are the client's interests adequately protected in this type of arrangement? In light of the above, the question remains, is a regulatory framework the key to reducing ethical concerns brought on by outsourcing offshore?

6.4 The advantages and difficulties of introducing a regulatory framework for the legal outsourcing industry

As previously stated, currently no regulatory framework for the outsourcing industry exists in either the outsourcer's country or in the LPO providers'.³⁶ The legal sector has evolved and has moved away from the traditional business model of rendering legal services.³⁷ As a consequence of globalisation, technological advancement and economic trends,³⁸ it is recommended that the legal sector adapt to changes occurring in the business sphere and to client demand³⁹ 'Pressure on regulators to adapt to changes in legal profession'⁴⁰

The legal profession has had to heed these changes and take appropriate action. Due to the changing legal environment, it is important that regulation be flexible so as to accommodate the diverse legal market.⁴¹ The next section will review the advantages and disadvantages of introducing a regulatory framework for the legal outsourcing industry.

³⁶ Buva MD and Sebastian T 'Is there a need of regulatory framework in LPO: Challenges before India' available at http://www.supremecourtcases.com/index2.php?option=com_content&itemid=5&do_pdf=1&id=2067 (accessed 21 November 2017).

³⁷ See Chapter 2 (The Growth and Development of Legal Process Outsourcing), section 2.2 (The evolving legal marketplace).

³⁸ See Chapter 2 (The Growth and Development of Legal Process Outsourcing), section 2.2 (The evolving legal marketplace).

³⁹ Holcombe JK 'Solutions for Regulating Offshore Outsourcing in the Services Sector: Using the Law, Market, International Mechanisms, and Collective Organisation as Building Blocks' (2005) *University of Pennsylvania Journal of Labor and Employment Law* 606.

⁴⁰ Terry LS, Mark S and Gordon T 'Trends and Challenges in Lawyer Regulation: The Impact of Globalization and Technology' (2012) 80 *Fordham Law Review* 2684.

⁴¹ Clementi D Sir 'Review of the Regulatory Framework for Legal Services in England and Wales - A Consultation Paper' available at http://webarchive.nationalarchives.gov.uk/http://www.legal-services-review.org.uk/content/consult/consult_reviewpaper.pdf (accessed 10 September 2018).

6.4.1 The advantages of introducing a regulatory framework for the outsourcing industry

An advantage of regulating the outsourcing of legal services is that it would promote access to justice, increase innovation within the legal sector and champion the interests of the public.⁴² The LPO industry is a billion dollar industry, which has been accepted by the legal fraternities worldwide and has obviously had an impression on the different ways in which legal services can be offered to the client cost-effectively. This has made access to justice more possible and affordable to the public.

Regulation the LPO industry would also ensure that the client of the legal services receives a quality service that meets the high standards set for the legal professional.⁴³ Regulation would promote ethical behavior and ensure that the provision of the services are provided competently, in the client's interest thereby increasing public confidence in the legal sector.⁴⁴ As LPO providers have gradually moved their service offerings from low-level type work to more complex tasks,⁴⁵ it is assumed that the exposure to risks also increases.⁴⁶ It is therefore paramount that solutions be sought to address the ethical concerns raised by the offshoring of legal services as opposed to leaving them unanswered.⁴⁷

Regulation have been deemed as a necessity in the legal outsourcing industry due to the fact that this industry is concerned primarily with knowledge transfer / outsourcing.⁴⁸ However in practice, regulating the LPO industry will be an arduous

⁴² Hadfield GK and Rhode DL 'How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering' (2016) 67 *Hastings Law Journal* 1192.

⁴³ Hadfield GK and Rhode DL 'How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering' (2016) 67 *Hastings Law Journal* 1199.

⁴⁴ Hadfield GK and Rhode DL 'How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering' (2016) 67 *Hastings Law Journal* 1199.

⁴⁵ See Chapter 2 (The Growth and Development of Legal Process Outsourcing), section 2.4 (The services) for a detailed summary of the services offered by LPO providers.

⁴⁶ Arambulo JA 'O Where O Where has my Legal Job Gone: Examining the Realities of Offshoring Legal Work and Why States Can Regulate the Practice Despite Congress' Broad Power under the Foreign Commerce Clause' (2008) 38 *Southwestern Law Review* 201.

⁴⁷ Holcombe JK 'Solutions for Regulating Offshore Outsourcing in the Services Sector: Using the Law, Market, International Mechanisms, and Collective Organisation as Building Blocks' (2005) *University of Pennsylvania Journal of Labor and Employment Law* 606.

⁴⁸ Megha and Vipula 'Legal Process Outsourcing: Is the lack of a regulatory framework one of the challenges facing the LPO industry in India?' available at http://www.indialawjournal.org/archives/volume3/issue_4/article_by_megha_vipula.html (accessed 22 February 2018).

task due to the transfer of legal work across international borders by international parties operating within different legal systems, in the outsourcing relationship.⁴⁹ Some authors have stated that it is an impossible task.⁵⁰ While others have suggested that international harmonisation can be achieved by the coming together of countries to agree on applicable standards to outsourcing, and to sign a treaty to that effect.⁵¹ A good example of the latter would be the General Agreement on Trade in Services (GATS), which came into effect in 1995 and operated under the World Trade Organisation.⁵² This treaty is the first legally enforceable multilateral agreement that provides the framework by which services within the business; communication; construction; engineering; distribution; education; media, environment; financial; health; tourism, travel; and transport sectors, to list a few, can trade across borders.⁵³ GATS allows member countries to decide which services can be allowed inside their country within a specific sector and which services foreign businesses cannot partake in.⁵⁴ However, there is no obligation on the member countries to implement the rules under this treaty. Therefore, member countries have the freedom to decide whether to commit to trading in certain services or not.

The implementation of standards would promote cooperation amongst countries and assist in improving domestic law.⁵⁵ Although this may prove effective in practice implementing a regulation which is 'one size fits all' may prove both difficult to achieve and a costly affair.⁵⁶

⁴⁹ Advani PR and Naskar D 'From Professional Responsibility to the "Business of Law": Regulating the Ethical Implications of Legal Process Outsourcing' (2012) 5 *National University of Juridical Sciences Law Review* 159.

⁵⁰ Robertson CB 'Regulating Electronic Legal Support Across State and National Boundaries' (2014) 47 *Akron Law Review* 45.

⁵¹ Advani PR and Naskar D 'From Professional Responsibility to the "Business of Law": Regulating the Ethical Implications of Legal Process Outsourcing' (2012) 5 *National University of Juridical Sciences Law Review* 160 161.

⁵² Gupta A and Sengupta S 'Impact of Globalization on Legal Profession in India - A Critical Analysis' (2011) 10 *Korea University Law Review* 80.

⁵³ Gupta A and Sengupta S 'Impact of Globalization on Legal Profession in India - A Critical Analysis' (2011) 10 *Korea University Law Review* 80.

⁵⁴ Gupta A and Sengupta S 'Impact of Globalization on Legal Profession in India - A Critical Analysis' (2011) 10 *Korea University Law Review* 71.

⁵⁵ Holcombe JK 'Solutions for Regulating Offshore Outsourcing in the Services Sector: Using the Law, Market, International Mechanisms, and Collective Organisation as Building Blocks' (2005) *University of Pennsylvania Journal of Labor and Employment Law* 610.

⁵⁶ Ryan E 'Outsourcing Work to Non-Lawyers Discouraged' available at <https://www.lawyersweekly.com.au/corporate-counsel/20476-outsourcing-work-to-non-lawyers-discouraged> (accessed 13 September 2018).

In his assessment of the legal services sector in England and Wales, Clementi provides:

‘Whether a service should be regulated or unregulated may be weighed by the advantages and disadvantages of regulation. Some points to be considered are:-

- provision of information: regulated services may help bridge the asymmetry of information in cases where there is an informed provider and uninformed consumer;
- improved quality: the service may be of poor quality if not regulated;
- a level playing field: its absence may drive people out of business because of the burden of regulatory cost and distortions in competition. A level playing field would require that the regulatory burden falls evenly on persons who provide the services, whether they are qualified or not;
- cost: in principle, regulation protects the consumer against failure but regulation is a cost. That cost is likely to be passed on to the end consumer of the service provided;
- choice: the difficulty for the consumer lies in making an informed choice, knowing what level of service, in terms of value and quality, he might obtain and whether or not he is protected in any way against a failure in that service. Regulated services should offer greater protection to the consumer, for which they may choose to pay;
- access: consumer friendly services, run as commercial concerns, may provide easier and cheaper access to justice to some consumers than might the conventional high street solicitor’s firm;
- a competitive market: regulation may be seen as an unnecessary restriction in the provision of services in the market place.’⁵⁷

From the above citation, the following advantages to having a regulation for the outsourcing of legal services can be discerned: (i) a regulation would keep the outsourcer, LPO provider and client informed of their roles and actions to be taken in the outsourcing relationship; (ii) highlight the standard of quality to be achieved by all concerned parties to the outsourcing transaction; (iii) promote healthy competition which would equally distribute the responsibilities owed by both the outsourcer and the LPO provider; (iv) a regulation would ensure that client consent is obtained and protect the client’s interest for the services they are delivered; and (v) LPO providers

⁵⁷ Clementi D Sir ‘Review of the Regulatory Framework for Legal Services in England and Wales - A Consultation Paper’ available at http://webarchive.nationalarchives.gov.uk/+http://www.legal-services-review.org.uk/content/consult/consult_reviewpaper.pdf (accessed 10 September 2018).

afford the client with the option of having an affordable alternative to the performance of legal services.

Therefore, although having a regulation for the outsourcing industry provides its benefits and this is clear from the billion dollar status attributed to the LPO industry, it is simultaneously clear that bringing countries together to find a common ground is both a labour and time intensive exercise. The cost implications of which must be borne by each country, in their search for a regulatory framework that achieves a balance between foreign law and domestic law.

6.4.2 The difficulties of introducing a regulatory framework for the legal outsourcing industry

On the other side of the spectrum, there are authors who have a more somber approach to regulating the outsourcing industry. They believe that although it could be possible, having an international organisation to assist countries in solving ethical challenges remains years away if not longer.⁵⁸ This is a direct consequence of the legal profession being known to be slow in taking action, when responding to the changing legal market.⁵⁹

The difficulty arises especially from the differing regulatory and legislative frameworks the outsourcer and offshore LPO destination countries practice. Although common law provides that there are some similarities between the different legal systems, the standards, which apply in each country, may be deemed unacceptable by legal authorities in a particular country. As regards the cost implications of implementing a regulatory framework, it has been held that:

‘The regulation of the legal profession leads to costs. They arise from restricted entry into the practice of law, barriers to innovation such as inhibiting the development of multidisciplinary professional firms and the formation of international law firms,

⁵⁸ Robertson CB ‘Regulating Electronic Legal Support Across State and National Boundaries’ (2014) 47 *Akron Law Review* 45.

⁵⁹ Hadfield GK and Rhode DL ‘How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering’ (2016) 67 *Hastings Law Journal* 1195.

restrictions on the use of organisational forms other than sole traders and partnerships, and administration and compliance costs.’⁶⁰

From the above citation, regulating the legal profession is established as being costly due to the restrictions imposed by the legal bodies as regards to the qualification and training a layperson should undertake to be considered capable of delivering legal services. Moreover, there may be restrictions imposed by a legal authority that bars the formation of different types of business models. Adapting these restrictions to a regulation on legal outsourcing would be costly from an administrative and compliance point of view.

Clementi, states that the difficulty in introducing a regulatory framework would be: (i) the cost of implementing a regulation would be borne by the client; and (ii) the implementation of a regulation may restrict or stagnate the growth of the legal marketplace.⁶¹

To create a regulatory framework that would be applicable to both parties in the outsourcing relationship, despite their respective legislative and regulatory frameworks, the following would have to be kept in focus:

‘Regulatory frameworks should not be overly restrictive, where it makes it difficult for both local and foreign services providers.’⁶²

Therefore, a regulatory framework that is flexible and which would appropriately and fairly distribute the duties and responsibilities of both local and foreign parties to the outsourcing relationship would be optimal. But again, the question arises, how practical is it to achieve this stance? Although it may not be impossible, it would require a lot of further research and exploration, which in itself can be costly. However, it is clear that rules to guide lawyers on outsourcing offshore are required

⁶⁰ McEwin I ‘Regulation of the Legal Profession’ available at www.ghostdigest.com/resources/16154 (accessed 17 September 2018).

⁶¹ Clementi D Sir ‘Review of the Regulatory Framework for Legal Services in England and Wales - A Consultation Paper’ available at http://webarchive.nationalarchives.gov.uk/+/http://www.legal-services-review.org.uk/content/consult/consult_reviewpaper.pdf (accessed 10 September 2018).

⁶² Cattaneo O, Engman M, Sáez S et al *International Trade in Services: New Trends and Opportunities for Developing Countries* (2010) 80.

so as to provide clarity on how the outsourcer and the LPO provider are to act in the outsourcing relationship, the standards they would be required to comply with and what their individual responsibilities would entail when outsourcing and performing legal services.⁶³

Should a regulatory framework for the outsourcing industry be established, it would be:

‘Good practice to periodically review local regulatory frameworks to ensure it evolves to present needs of service providers, professionals and consumers.’⁶⁴

It is therefore of equal importance that any regulatory framework be monitored at regular time intervals so as to assess its effectiveness in the current legal market. This would ensure that client demands are satisfied; access to justice is maintained and the professional duties of legal professionals are upheld at all times. Again, the review of such a framework will carry both a labour and cost implication.

In summary, having a regulation for the outsourcing industry will confront the ethical challenges imposed by this industry by ensuring compliance and providing clear rules on the responsibilities of all parties involved in the outsourcing relationship. But one must appreciate that formulating a regulation, which would satisfy the different legal systems of the outsourcer jurisdiction, and the LPO provider destination will prove both difficult and costly. However, it can be argued that as the LPO industry is worth billions, implementing a regulation would greatly benefit this sector and outweigh the cost of implementing the regulation.

As an alternative to a global outsourcing regulation, it could be recommended that the LPO provider country draft its country specific regulatory framework that would keep both parties accountable for their actions when outsourcing, protect the interests of the client and find a medium that would compliment both domestic and foreign law

⁶³ Arambulo JA ‘O Where O Where has my Legal Job Gone: Examining the Realities of Offshoring Legal Work and Why States Can Regulate the Practice Despite Congress’ Broad Power under the Foreign Commerce Clause’ (2008) 38 *Southwestern Law Review* 219.

⁶⁴ Cattaneo O, Engman M, Sáez S et al *International Trade in Services: New Trends and Opportunities for Developing Countries* (2010) 82.

provisions. It is recommended that more research be conducted in this respect. The next section will explore the benefits of being a self-regulated body.

6.5 The key aspects of self-regulation

Due to the absence of a regulation for the LPO industry, practice notes on outsourcing were issued by relevant law societies and regulatory bodies as a means to reminding lawyers of their core ethical duties. As a consequence, the lack of a regulation has meant that the LPO industry has had to self-regulate itself. This is similar to the legal sector, which traditionally, is known to be a self-regulated body.⁶⁵

‘Self-regulation starts with entering the profession, and continues through education and training. The control of the standards of entry is where the process begins, the setting of ethical standards, enforcing the standards through conduct, then handling consumer complaints.’⁶⁶

In effect, the legal profession stipulates the steps / rules one must comply with to become a duly qualified lawyer; the degree of skill the lawyer is to apply when performing legal services; the manner in which the lawyer is to comport themselves so as to uphold their professional roles; and how client complaints are addressed for services that are deemed lacking in quality. In short, the relevant regulatory bodies in the legal sector regulate all aspects of lawyering.

Historically, the legal fraternity has generally followed a prescriptive type regulation.⁶⁷ As illustrated above, this type of regulation provides the legal professional with the rules regarding training, qualification and the manner in which qualified lawyers are to conduct business to deliver a quality service.⁶⁸ Violations of

⁶⁵ Terry LS, Mark S and Gordon T ‘Trends and Challenges in Lawyer Regulation: The Impact of Globalization and Technology’ (2012) 80 *Fordham Law Review* 2668.

⁶⁶ Clementi D Sir ‘Review of the Regulatory Framework for Legal Services in England and Wales - A Consultation Paper’ available at http://webarchive.nationalarchives.gov.uk/+http://www.legal-services-review.org.uk/content/consult/consult_reviewpaper.pdf (accessed 10 September 2018).

⁶⁷ Hadfield GK and Rhode DL ‘How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering’ (2016) 67 *Hastings Law Journal* 1201.

⁶⁸ Hadfield GK and Rhode DL ‘How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering’ (2016) 67 *Hastings Law Journal* 1201.

the rules would lead to the imposition of fines or sanctions.⁶⁹ The primary aims of these specific standards of conduct are to promote the public's confidence in the delivery of the legal services.⁷⁰

6.6 Outcomes based regulation

There are law sectors that have taken tentative steps to move from a self-regulation model to implement an outcome-based regulation. The UK law society is one such regulatory body.⁷¹ The Solicitors Regulation Authority (SRA) in the UK regulates the business aspect of the legal industry, while the law society regulates the practice of law.⁷² The SRA focuses on risk and how to reduce the risk through an outcome based approach.⁷³ The UK has therefore moved from regulating the legal sector to assessing risk so as to focus on the legal services that are being provided as well as the ethical duties of the lawyers.⁷⁴ As regards the legal services, the UK law society has selected specific reserved activities⁷⁵ of legal work that can only be carried out by licensed lawyers. This leaves the unreserved activities to be performed by alternative providers such as the LPO provider.⁷⁶

The focus of an outcome-based type of regulation is on the results the legal professional is to obtain and not on how they are to achieve this aim.⁷⁷ Performance is therefore measured by either the law society conducting an audit or attention is paid

⁶⁹ Hadfield GK and Rhode DL 'How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering' (2016) 67 *Hastings Law Journal* 1201.

⁷⁰ Decker C and Yarrow G *Understanding the Economic Rationale for Legal Services Regulation* (2010) 35.

⁷¹ Clyde&Co 'The Growth of Outcomes-based Regulation? Transatlantic developments' available at <https://www.clydeco.com/uploads/Files/cc009923-the-growth-of-outcomes-based-regulation-20-04-16.pdf> (accessed 08 August 2018).

⁷² Cohen MA 'Law is a Professional and an Industry - It should be Regulated that Way' available at <https://www.forbes.com/sites/markcohen1/2018/03/29/law-is-a-profession-and-an-industry-it-should-be-regulated-that-way/#3c82ca826598> (accessed 11 September 2018).

⁷³ Hadfield GK and Rhode DL 'How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering' (2016) 67 *Hastings Law Journal* 1211.

⁷⁴ McMorrow JA 'UK Alternative Business Structures for Legal Practice: Emerging Models and Lessons from the US' (2016) 47 *Georgetown Journal of International Law* 677.

⁷⁵ See Chapter 4 (A Comparative Analysis of the Legal Systems of the United Kingdom and India) section 4.3 (Legislative and regulatory framework in the United Kingdom) for the explanation on the list of reserved legal activities.

⁷⁶ Hadfield GK and Rhode DL 'How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering' (2016) 67 *Hastings Law Journal* 1206.

⁷⁷ Hadfield GK and Rhode DL 'How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering' (2016) 67 *Hastings Law Journal* 1201.

to consumer complaints as the tool to measure and establish whether the lawyer achieved the set outcomes prescribed in the regulation.⁷⁸ But how is the law society to audit the LPO provider who is in another country and continent? How will results be monitored if the client is not informed of the outsourcing relationship and their rights under such an arrangement?

The UK's Legal Services Act 2007, stipulates that the objectives of their outcomes based regulation are as follows:

- (a) protecting and promoting the public interest;
- (b) supporting the constitutional principle of the rules of law;
- (c) improving access to justice;
- (d) protecting and promoting the interests of consumers;
- (e) promoting competition in the provision of regulated services . . . ;
- (f) encouraging an independent, strong, diverse and effective legal profession;
- (g) increasing public understanding of the citizen's legal rights and duties;
- (h) promoting and maintaining adherence to the professional principles.

The professional principles mentioned in (h) are set out in the Act:

- (a) that authorised persons should act with independence and integrity,
- (b) that authorised persons should maintain proper standards of work,
- (c) that authorised persons should act in the best interests of clients,
- (d) that persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorised persons should comply with their duty to the court to act with independence in the interests of justice, and
- (e) that the affairs of clients should be kept confidential.⁷⁹

The above extract is similar to the goals of implementing a regulation.⁸⁰ This includes protecting public interest; promoting access to justice; sustaining a healthy competitive environment, maintaining ethical duties and includes welcoming

⁷⁸ Hadfield GK and Rhode DL 'How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering' (2016) 67 *Hastings Law Journal* 1201.

⁷⁹ Hadfield GK and Rhode DL 'How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering' (2016) 67 *Hastings Law Journal* 1205.

⁸⁰ As discussed in section 6.2 (The purpose of a regulatory framework).

alternative business models into the legal profession. Both prescriptive and outcome-based regulations have the same goal – to ensure the quality of service meted out to the client.⁸¹

What is evident from the above is that the outcome-based approach is more tailored towards the standard operation of law firms and lawyering in general. It is therefore not specific to the needs of the outsourcing industry and does not provide the tools for the outsourcer to measure ethical compliance.

The practice notes on outsourcing are supported by some academics that believe that the opinions released by the relevant legal bodies, on outsourcing are sufficient to counteract ethical concerns.⁸² Miller confirms that:

‘The benefits of legal outsourcing far outweigh the ethical issues accompanying the outsourcing of legal work overseas.’⁸³

From the above quote, the benefits attributed to the outsourcer when sending legal work offshore are considered to be sufficient in that they minimise the ethical concerns raised by this business model. The overriding benefit⁸⁴ of outsourcing has been its cost savings potential for the outsourcer and the client. Additionally, some authors are of the opinion that as the outsourcer is held ultimately responsible for the legal work being performed by the foreign lawyer, the quality remains unaffected.⁸⁵ Interestingly, the quality of the work carried out by the staff of LPO providers has been questioned and seen as one of the major challenges of outsourcing.⁸⁶ The latter being a result of the variations of what is deemed acceptable standards of quality by

⁸¹ Hadfield GK and Rhode DL ‘How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering’ (2016) 67 *Hastings Law Journal* 1201.

⁸² Advani PR and Naskar D ‘From Professional Responsibility to the “Business of Law”’: Regulating the Ethical Implications of Legal Process Outsourcing’ (2012) 5 *National University of Juridical Sciences Law Review* 158.

⁸³ Miller B ‘The Ethical Implications of Legal Outsourcing’ (2008) 32 *The Journal of the Legal Profession* 272.

⁸⁴ See Chapter 2 (The Growth and Development of Legal Process Outsourcing) section 2.5 (The benefits of Legal Process Outsourcing) for additional benefits of outsourcing legal work.

⁸⁵ Miller B ‘The Ethical Implications of Legal Outsourcing’ (2008) 32 *The Journal of the Legal Profession* 272.

⁸⁶ Megha and Vipula ‘Legal Process Outsourcing: Is the lack of a regulatory framework one of the challenges facing the LPO industry in India?’ available at http://www.indialawjournal.org/archives/volume3/issue_4/article_by_megha_vipula.html (accessed 22 February 2018).

the outsourcer's and the LPO provider's legislative bodies. Moreover, would holding the outsourcer entirely responsible for the outsourcing relationship and compliance with applicable ethical duties as lawyers eventually lead to the stagnation of offshoring?⁸⁷

Regulatory bodies provide that an adequate supervision mechanism is the key to ensuring quality of work and the unauthorised practice of law.⁸⁸ Whereby attorney supervision is seen as the solution to the ethical concerns of LPO. Harmon challenges this view, stating that professional bodies should become more involved in reducing the ethical risks of LPOs as they are a business model that is here to stay.⁸⁹ Therefore is the introduction of practice notes on outsourcing sufficient to meet the ethical challenges of outsourcing? Or should more involvement be initiated by the legal sector?

It is important to note that current regulation is tied to where the lawyer practices law, their geographical location.⁹⁰ Practice notes would therefore only apply to the lawyers practicing within the jurisdiction of the regulatory body that provided them and not to the LPO provider. However, the LPO provider may generally accept to comply with the outsourcer's responsibilities so as to obtain their business.

6.7 Regional framework

The Council of Bars and Law Societies of Europe provides an overview of the challenges associated with the outsourcing industry and provides guidance in this respect:

- 'a. Legal outsourcing is different to other methods of using the help of regulated or

⁸⁷ Advani PR and Naskar D 'From Professional Responsibility to the "Business of Law": Regulating the Ethical Implications of Legal Process Outsourcing' (2012) 5 *National University of Juridical Sciences Law Review* 158.

⁸⁸ See Chapter 5 (Ethical Principles and the Practice of Law), section 5.3.1 (Unauthorised practice of law).

⁸⁹ Harmon AR 'The Ethics of Legal Process Outsourcing-Is the practice of Law a "Noble Profession" or Is it Just Another Business?' available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1887197 (accessed 20 November 2017).

⁹⁰ Terry LS, Mark S and Gordon T 'Trends and Challenges in Lawyer Regulation: The Impact of Globalization and Technology' (2012) 80 *Fordham Law Review* 2680.

non-regulated professionals, and outsourcing lawyers need not only a definition, but some explanation as well, as to when special outsourcing rules should be applied.

- b. There is a more inherent risk in legal outsourcing than in the more traditional form of sharing work with other regulated legal professionals, and outsourcing lawyers need guidance to avoid it.
- c. Regulatory regimes are different, and lawyers should be clear whether legal outsourcing is permitted under the applicable regimes of the outsourcing lawyer and the service provider, and what kind of caution should be applied when choosing the activity to be outsourced.
- d. Lawyers and their bars have a specific interest in protecting the core values of the legal profession in the case of legal outsourcing, in particular with regard to confidentiality and avoiding conflict of interest.
- e. The protection of the outsourcing lawyer requires the application of specific measures e.g. before undertaking legal outsourcing, it is advisable that the outsourcing lawyer verifies with the external legal service provider that the core values of the legal profession remain protected; the outsourcing lawyer should be made aware of the importance of such measures; and it would also be useful to provide the outsourcing lawyer with a “due diligence” template checklist.
- f. Loyalty towards clients is of paramount importance also in legal outsourcing, and outsourcing lawyers need to be advised how to obtain the consent of the client, and how to keep the client fully informed, and to make the whole outsourcing process fully transparent.
- g. The use of legal outsourcing does not reduce the responsibility of the outsourcing lawyer, and outsourcing lawyers need guidance in selecting a service provider and supervising the service provider’s activities.
- h. The increased risk profile of legal outsourcing requires more attention from the bars concerned, and outsourcing lawyers should be advised as to what records should be kept to enable the bar to monitor legal outsourcing activities.
- i. The different risk profile of legal outsourcing requires a review of the professional indemnity insurance requirement for outsourcing lawyers.⁹¹

⁹¹ Council of Bars and Law Societies of Europe ‘CCBE Guidelines on Legal Outsourcing’ available at https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_Guides_recommendations/EN_DEON_20100624_Guidelines_on_legal_outsourcing.pdf (accessed 11 September 2018).

The Council of Bars accepts that the LPO industry is different from the traditional business model of practicing law and as such proper rules should be established to this effect. More specifically, measures should be introduced to counteract the risks associated with this business model while providing clear guidance on how duties and responsibilities should be measured. Furthermore, guidance should be given on the type of legal work that can be outsourced and ethical responsibilities should garner special attention. The Council of Bars also urges that lawyers conduct a due diligence exercise to establish the authenticity of the LPO provider and its ability to safeguard core ethical duties. Client consent must be obtained and the outsourcing lawyer must ensure that the client is kept informed of the outsourcing transaction. The outsourcing lawyer is ultimately responsible for the outsourced legal work and as such they must supervise the performance of the legal work by the LPO provider. The Council of Bars advocates for more attention to be spent on this industry and for the bar or law councils to provide the methods of reporting that would enable these bodies to monitor the outsourcing of legal work. Furthermore, lawyers should review their insurance policies to ensure that it covers the outsourcing of legal services. In a nutshell, the Council of Bars and Law Societies of Europe supports the view that guidance notes are necessary to guide the outsourcing lawyer in the use of this business model. However, being that practice notes act as reminders of ethical compliance for the lawyer, the question that arises is, would a regulation that is tailored to the LPO industry be more suitable?

Practice notes are meant to remind the outsourcer to maintain their ethical duties and they do not therefore inform the client of their rights or the methods of recourse that is available to them in the outsourcing transaction. Schultz reminds that:

‘Clients need to be aware of the legal implications of offshoring, including the possibility of a breach of confidentiality and a waiver of attorney-client privilege. Supervising attorneys need to be aware of their ethical and legal obligations, and should protect themselves, their clients, and their firms or businesses accordingly. State and local bar associations should draft their own opinions and consider putting pressure on the offshoring industry in order to provide standards and to protect both U.S. clients and attorneys.’⁹²

⁹² Schultz CI ‘Legal Offshoring: A Cost-Benefit Analysis’ (2010) 35 *Journal of Corporation Law* 661.

Although the above is directed at US practicing lawyers,⁹³ the same position would apply in other jurisdictions. Client consent and adequate direction on how the outsourcing lawyer is to meet their ethical and legal duties would greatly enhance the LPO industry and go towards mitigating ethical risks. As stated earlier,⁹⁴ practice notes do not provide guidance on how the outsourcer is to meet their ethical duties when outsourcing. More clarity is required on the measures parties to the outsourcing relationship should take to uphold their respective duties and enforce applicable standards. In light of the latter, the question that arises is: why has the legal sector not reacted with a regulation for the LPO industry, which has grown to be a billion dollar industry?

The possible reasons why the legal fraternities may impede the regulation of new business models for the provision of legal services include the following:

- (i) The traditional method of lawyering relied on protecting the profession so as to bar any competition from alternative providers.⁹⁵ The legal sector was therefore safeguarding the profession from outside interference.
- (ii) To prevent the increase in unauthorised practices of law which would promote unethical behavior.⁹⁶

The legal sector prefers to protect the profession from alternative providers that may give rise to unethical conduct, by taking a precautionary approach. Therefore, regulatory bodies are relaxed in their reaction towards regulating the outsourcing industry as they attempt to balance the need to promote access to justice versus the consequences of taking the wrong decision when addressing the modernisation of the legal sector and the performance of the legal services.⁹⁷ But, the question arises; does being precautionary unwittingly leave the floodgates open for further infractions? When would be the right time to regulate the LPO industry, especially when its expansion in

⁹³ See Chapter 4 (A Comparative Analysis of the Legal Systems of the United Kingdom and India) footnote 105.

⁹⁴ See section 6.3 (The purpose of practice notes for outsourcing).

⁹⁵ Hadfield GK and Rhode DL 'How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering' (2016) 67 *Hastings Law Journal* 1194.

⁹⁶ Hadfield GK and Rhode DL 'How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering' (2016) 67 *Hastings Law Journal* 1195.

⁹⁷ Hadfield GK and Rhode DL 'How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering' (2016) 67 *Hastings Law Journal* 1195.

the type of service offerings it provides could lead to an increase in ethical risks? Although further research would be required in this regard, section 6.8 will look at the challenges that have arisen through exploring relevant jurisprudence.

To sum things up, self-regulation provides both parties in the outsourcing relationship with the flexibility to adapt to the changes in the legal market as and when they see fit. As self-regulatory bodies, both the legal sector and the LPO industry have put in place recommendations that would ensure ethical responsibilities are kept in the forefront of the outsourcing relationship. Practice notes have been introduced for the outsourcer and the LPO provider has introduced security measures⁹⁸ and applicable contracts to alleviate ethical infractions while promoting business. With each party following best practice in lieu of the absence of a regulatory framework, how are issues or conflicts between the outsourcer and LPO provider managed? The next section will explore and review available cases involving the outsourcer and the LPO provider.

6.8 Relevant jurisprudence

Due to there being a lack of regulation for the legal outsourcing industry, the parties to the outsourcing relationship have had to incorporate certain measures to counteract possible disagreements. In the outsourcing business model, conflicts and disagreements can either be managed internally between the parties; by the parties entering into arbitration proceedings; or by the parties instituting a claim in court. If the latter, the governing jurisdiction over the legal services is a factor that should be agreed and established by the parties at the start of their outsourcing relationship. It is, however, more likely that arbitration proceedings will be utilised as the preferred dispute resolution of the parties in the outsourcing contract, over litigating in court.⁹⁹ The main reasoning behind the latter is the differing legal systems practiced by the outsourcer and the LPO provider, as well as the cost implications of taking a matter to

⁹⁸ See Chapter 5 (Ethical Principles and the Practice of Law) section 5.3.2 (Client confidentiality) and 5.5 (Steps taken to reduce ethical violations) for the steps taken by LPO providers to minimise risk.

⁹⁹ Brady KF, Kearney M and Seymour T 'Legal Malpractice and eDiscovery: Understanding the Unique Challenges and Managing the Increasing Risks' available at <http://www.redgravellp.com/sites/default/files/Bloomberg-BNA-Legal-Malpractice-and-eDiscovery-Article.pdf> (accessed 10 September 2018).

court. Moreover, it must be kept in mind that the enforcement of foreign judgments are not always enforceable in local jurisdictions.¹⁰⁰

Cases revolving around breach of the outsourcing contract are primarily dealt with in-house between the outsourcer and LPO provider.¹⁰¹ As a consequence there are a limited number of cases that could be found, as cases resolved between the outsourcing parties remain unreported. It is therefore difficult to ascertain the magnitude of claims for damages sought by either party in an outsourcing capacity.¹⁰² There have however, been three particular cases that have made it to the headlines:

Newman McIntosh & Hennessey v George W Bush, LPO Acumen Legal Services (India) Pct. Ltd and Acumen Solutions, LLC (Columbia District Court, December 5, 2008)¹⁰³

The plaintiff in this case, *Newman McIntosh & Hennessey* (NMH) were suing the US government and the LPO provider *Acumen Legal Services (India) Pct. Ltd and Acumen Solutions, LLC*, who was based in India and had a satellite office in the US. The LPO provider was sourced to provide litigation support to the plaintiff.¹⁰⁴ The plaintiff believed that data that was transmitted between the US and India was intercepted by the US government.¹⁰⁵ They believed the latter led to confidential information being at risk of disclosure and that privileged communication between

¹⁰⁰ Buva MD and Sebastian T 'Is there a need of regulatory framework in LPO: Challenges before India' available at http://www.supremecourtcases.com/index2.php?option=com_content&itemid=5&do_pdf=1&id=2067 (accessed 21 November 2017).

¹⁰¹ Buva MD and Sebastian T 'Is there a need of regulatory framework in LPO: Challenges before India' available at http://www.supremecourtcases.com/index2.php?option=com_content&itemid=5&do_pdf=1&id=2067 (accessed 21 November 2017).

¹⁰² Buva MD and Sebastian T 'Is there a need of regulatory framework in LPO: Challenges before India' available at http://www.supremecourtcases.com/index2.php?option=com_content&itemid=5&do_pdf=1&id=2067 (accessed 21 November 2017).

¹⁰³ *Newman McIntosh & Hennessey v George W Bush, LPO Acumen Legal Services (India) Pct. Ltd and Acumen Solutions, LLC* No 1:08-cv-00787-CKK (Columbia District Court, December 5, 2008).

¹⁰⁴ *Newman McIntosh & Hennessey v George W Bush, LPO Acumen Legal Services (India) Pct. Ltd and Acumen Solutions, LLC* No 1:08-cv-00787-CKK (Columbia District Court, December 5, 2008).

¹⁰⁵ *Newman McIntosh & Hennessey v George W Bush, LPO Acumen Legal Services (India) Pct. Ltd and Acumen Solutions, LLC* No 1:08-cv-00787-CKK (Columbia District Court, December 5, 2008).

attorneys as well as attorney-client were at risk of being breached.¹⁰⁶ The purpose of the plaintiff's claim was to stop offshore outsourcing, as NMH was of the opinion that outsourcing was part of an anti-terrorism campaign instituted by the US government.¹⁰⁷

The plaintiff sought a court order to (i) stop US law firms from sending data to foreign LPOs and (ii) stop LPO providers from soliciting business in the US, until they disclosed that the data being transmitted was secure and not susceptible to being intercepted by outside parties.¹⁰⁸

The case was subsequently withdrawn after the plaintiff's request to expand the case into a class action suit was denied by the court.¹⁰⁹ The plaintiff firm was eventually dissolved.¹¹⁰

Although this case was withdrawn, it highlights the importance of having adequate security measures in place to avoid the disclosure of confidential information being offshored.¹¹¹ At the start of the outsourcing relationship it would be recommendable that both parties communicate the level of security they require to omit any possible disclosure of confidential data. Furthermore, it would be advisable for relevant data protection legislation to be taken into account and the available guidance implemented.

¹⁰⁶ *Newman McIntosh & Hennessey v George W Bush, LPO Acumen Legal Services (India) Pct. Ltd and Acumen Solutions, LLC* No 1:08-cv-00787-CKK (Columbia District Court, December 5, 2008).

¹⁰⁷ Lee AJ 'The Legality of State Protectionist Laws against Legal Process Outsourcing' (2013) 11 *Journal on Telecommunications and High Technology Law* 326.

¹⁰⁸ *Newman McIntosh & Hennessey v George W Bush, LPO Acumen Legal Services (India) Pct. Ltd and Acumen Solutions, LLC* No 1:08-cv-00787-CKK (Columbia District Court, December 5, 2008).

¹⁰⁹ Law Without Borders 'Lawsuit Against Legal Process Outsourcing, Newman McIntosh & Hennessey vs. Bush, Is Withdrawn' available at <http://lawwithoutborders.typepad.com/legaloutsourcing/2008/08/anti-outsourcing-lawsuit-newman-mcintosh-hennessey-vs-bush-is-withdrawn.html> (accessed 10 September 2018).

¹¹⁰ Law Without Borders 'Lawsuit Against Legal Process Outsourcing, Newman McIntosh & Hennessey vs. Bush, Is Withdrawn' available at <http://lawwithoutborders.typepad.com/legaloutsourcing/2008/08/anti-outsourcing-lawsuit-newman-mcintosh-hennessey-vs-bush-is-withdrawn.html> (accessed 10 September 2018).

¹¹¹ See Chapter 5 (Ethical Principles and the Practice of Law) section 5.3.2 (Client confidentiality), which provides an overview of the measures taken by parties in the outsourcing relationship, to keep confidential information, secure.

J-M Manufacturing Co Inc v McDermott Will & Emery LLP (California Superior Court, June 2, 2011)¹¹²

This case was a malpractice claim whereby the disclosure of privileged electronic documentation was alleged to be a result of poor supervision by the outsourcing lawyer. The plaintiff *J-M Manufacturing Co Inc* accused the defendant *McDermott Will & Emery LLP* of legal malpractice and breach of their fiduciary duties.¹¹³ This case is of particular interest to LPO providers as it deals with e-discovery, a service offered by the provider.

The defendant, engaged contract attorneys to conduct an e-discovery review to determine which documentation was classified as privileged.¹¹⁴ The contract attorneys categorised the volume of documents into three categories, namely, responsive but privileged; responsive and not privileged; and non-responsive.¹¹⁵

It was alleged that the defendants supervised the work performed by the contract attorneys.¹¹⁶ The supervision method used by the defendant was spot-checking and did not include any further review of the documentation.¹¹⁷ Some 250 000 electronic documents were then submitted to the federal government.¹¹⁸ Unfortunately, the pack provided to the government, contained privileged information, which were subsequently disclosed to a third party in another action involving the plaintiff.¹¹⁹ The

¹¹² *J-M Manufacturing Co Inc v McDermott Will & Emery LLP* No BC462832 (California Superior Court, June 2, 2011).

¹¹³ Brady KF, Kearney M and Seymour T 'Legal Malpractice and eDiscovery: Understanding the Unique Challenges and Managing the Increasing Risks' available at <http://www.redgravellp.com/sites/default/files/Bloomberg-BNA-Legal-Malpractice-and-eDiscovery-Article.pdf> (accessed 10 September 2018).

¹¹⁴ Barnes GH, Bogaert WT, Hettinger LP et al 'Recent Developments affecting Professionals', Officers', and Directors' Liability' (2011) 47(1) *Tort Trial & Insurance Practice Law Journal* 441 442.

¹¹⁵ Barnes GH, Bogaert WT, Hettinger LP et al 'Recent Developments affecting Professionals', Officers', and Directors' Liability' (2011) 47(1) *Tort Trial & Insurance Practice Law Journal* 441 442.

¹¹⁶ Barnes GH, Bogaert WT, Hettinger LP et al 'Recent Developments affecting Professionals', Officers', and Directors' Liability' (2011) 47(1) *Tort Trial & Insurance Practice Law Journal* 441 442.

¹¹⁷ Barnes GH, Bogaert WT, Hettinger LP et al 'Recent Developments affecting Professionals', Officers', and Directors' Liability' (2011) 47(1) *Tort Trial & Insurance Practice Law Journal* 441 442.

¹¹⁸ Barnes GH, Bogaert WT, Hettinger LP et al 'Recent Developments affecting Professionals', Officers', and Directors' Liability' (2011) 47(1) *Tort Trial & Insurance Practice Law Journal* 442.

¹¹⁹ Barnes GH, Bogaert WT, Hettinger LP et al 'Recent Developments affecting Professionals', Officers', and Directors' Liability' (2011) 47(1) *Tort Trial & Insurance Practice Law Journal* 441 442.

third party refused to destroy the privileged documentation citing that the attorney-client privilege was waived when the documents were handed to the government.¹²⁰

The case brings to light the liability of the law firm and the lawyers when outsourcing work, which is to be performed by temporary contract workers.¹²¹ It also highlights the importance of implementing adequate supervisory methods by the outsourcer. The onus of responsibility for outsourced legal services rests solely with the outsourcer. It is therefore the duty of the outsourcer to work closely with LPO providers and contract workers to ensure proper checks are conducted on the legal services to ensure quality of work.¹²²

Geometric Software Solutions Limited

In 2003, an ex-employee working for an offshore LPO provider, Geometric Software Solutions Limited in India,¹²³ was fired from her job. The employee decided to take matters into her own hands and attempted to sell the software code belonging to one of the provider's clients, namely, the University of California San Francisco Medical Center.¹²⁴ She wanted to sell the code to the client's competitor, Solidworks, for \$200 000.¹²⁵ The ex-employee also threatened to release the software online, which included private medical records, unless she was paid monies she claimed was due to her.¹²⁶ It goes without saying that the latter would have a detrimental effect on all concerned parties.

¹²⁰ Ross M 'Ethics of Legal Outsourcing' available at https://m.acc.com/chapters/sfbay/upload/2-Session1_INTEGREON.pdf (accessed 17 November 2017).

¹²¹ Barnes GH, Bogaert WT, Hettinger LP et al 'Recent Developments affecting Professionals', Officers', and Directors' Liability' (2011) 47(1) *Tort Trial & Insurance Practice Law Journal* 442.

¹²² Brady KF, Kearney M and Seymour T 'Legal Malpractice and eDiscovery: Understanding the Unique Challenges and Managing the Increasing Risks' available at <http://www.redgravellp.com/sites/default/files/Bloomberg-BNA-Legal-Malpractice-and-eDiscovery-Article.pdf> (accessed 10 September 2018).

¹²³ Fitzgerald M 'The Risks Associated with Offshoring Software Development' available at <https://www.cio.com/article/2439949/offshoring/the-risks-associated-with-offshoring-software-development.html> (accessed 12 September 2018).

¹²⁴ Fitzgerald M 'The Risks Associated with Offshoring Software Development' available at <https://www.cio.com/article/2439949/offshoring/the-risks-associated-with-offshoring-software-development.html> (accessed 12 September 2018).

¹²⁵ Schultz CI 'Legal Offshoring: A Cost-Benefit Analysis' (2010) 35 *Journal of Corporation Law* 657.

¹²⁶ Schultz CI 'Legal Offshoring: A Cost-Benefit Analysis' (2010) 35 *Journal of Corporation Law* 657.

She was subsequently arrested, making this the first outsourcing related matter as regards intellectual property theft in India.¹²⁷

This case highlights the importance of having onsite security checks and strict measurable mechanisms in place for the staff working at LPOs. Especially as employees working at LPOs are prone to move around for better working opportunities.¹²⁸ Having adequate security is therefore a must. It would also be advisable for LPO providers to enter into non-disclosure agreements¹²⁹ with all their staff as a means of reducing possible infringements.

Overall, a regulation for outsourcing should serve client demand and the rule of law while encouraging client satisfaction and promoting access to justice.¹³⁰ Regulating the LPO industry with so many potential international interests does pose a problem. It is therefore more likely, that the LPO industry will be left to its own devices until a large-scale malpractice or misconduct case arises, or until it makes a bigger financial impact to draw further interest.¹³¹

However, the formulation of an outsourcing code that maintains high standards of professional practice to include its code of ethics for outsourcing, monitoring agencies, standard legal agreements and certification systems would be the ideal.¹³² How feasible and practical is the latter? This would definitely be an area requiring further research.

¹²⁷ Fitzgerald M 'The Risks Associated with Offshoring Software Development' available at <https://www.cio.com/article/2439949/offshoring/the-risks-associated-with-offshoring-software-development.html> (accessed 12 September 2018).

¹²⁸ Harmon AR 'The Ethics of Legal Process Outsourcing-Is the practice of Law a "Noble Profession" or Is it Just Another Business?' available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1887197 (accessed 20 November 2017).

¹²⁹ Non-disclosure agreements are contracts that prevent the parties from sharing any confidential material to third parties unless they are legally required to do so.

¹³⁰ Cohen MA 'Law is a Professional and an Industry - It should be Regulated that Way' available at <https://www.forbes.com/sites/markcohen1/2018/03/29/law-is-a-profession-and-an-industry-it-should-be-regulated-that-way/#3c82ca826598> (accessed 11 September 2018).

¹³¹ Buva MD and Sebastian T 'Is there a need of regulatory framework in LPO: Challenges before India' available at http://www.supremecourtcases.com/index2.php?option=com_content&itemid=5&do_pdf=1&id=20671 (accessed 21 November 2017).

¹³² Holcombe JK 'Solutions for Regulating Offshore Outsourcing in the Services Sector: Using the Law, Market, International Mechanisms, and Collective Organisation as Building Blocks' (2005) *University of Pennsylvania Journal of Labor and Employment Law* 609.

6.9 Conclusion

This chapter explored whether introducing a regulatory framework for the LPO industry would compliment this business model by addressing the ethical challenges it poses. The purpose of a regulation was seen as providing access to justice; protecting the interests of the client; promoting healthy competition within the legal profession; maintaining the rule of law; educating the public on their rights, providing the public with access to appropriate dispute resolution procedures and upholding the ethical duties owed by legal professionals. Although implementing a regulation carries certain cost implications and if too restrictive can be counter-productive, its benefits still outweigh these drawbacks.

As the trend of outsourcing legal services offshore continues to gain momentum, and ethical issues simultaneously continue to be raised, it is important that legal fraternities both understand and provide guidelines to reduce these infractions. To date, the American Bar Association in the US, the Law Society in the UK and the Offices of the Legal Services Commissioner in Australia have produced practice notes to provide practical guidelines / recommendations to lawyers wanting to outsource. However, the aim of these notes have been to act as reminders to lawyers on their core ethical duties. They do not provide clarity on how the outsourcer is to measure its relationship with the LPO provider; or how both parties are to act to remain compliant. Furthermore, no direction has been given on the prevailing laws to govern the outsourcing relationship. Will it be domestic law or foreign law? Rules held in the practice notes are exclusively for lawyers in that jurisdiction. Therefore are practice notes adequate to circumvent liability and mitigate the ethical risks raised by the offshoring of legal services?

Due to the absence of a regulatory framework, both the legal sector and the LPO sector have taken to being self-regulating bodies. With each sector choosing the best practice approach to handle ethical violations. Currently, outsourcing legal work entails complying with the moral, ethical and legal standards applicable to the jurisdiction of either party. It is important to understand what the challenges and risks are when outsourcing. It is equally vital to know whether existing regulations are

adequate. Should a regulation or a clear policy be implemented to standardise LPOs to provide clarity on all aspects of the relationship?

Although only a select few cases involving LPO providers and the outsourcing of legal work were found and thus explored, they demonstrate the lack of guidance in existence in this industry. Regulations tend to favour the client, whereas practice notes favour the duties lawyers owe professionally. A regulation also mainly focuses on the duty that is owed to the client as opposed to the professional status of the person providing the legal services. However, the latter is also taken into consideration when drafting a regulation. More research is required on the type of regulation regime, which would better suit outsourcing.

What is clear is that a collaborative effort by all key players (for example, the government, law societies, lawyers LPO providers, to list a few) is needed. Implementing a regulation that supports the practice of the LPO industry will encourage growth, while addressing the risks caused by the breach of ethical duties. Existing ethical rules should be adapted to meet the demands of the changing legal market. To achieve a balance between ethical compliance to maintain professional conduct rules and client interest versus conducting business cost effectively and promoting business competitiveness.

To conclude, it is recommended that in respect of the changes and risks brought by the LPO industry to the legal profession in recent years, these need to align with global norms and transparency standards, while remaining attractive for the public and law firms wishing to use this business model.

CHAPTER SEVEN

CONCLUSIONS AND RECOMMENDATIONS

7.1 Introduction

The Legal Process Outsourcing (LPO) industry has transformed the legal landscape, becoming a lucrative business model that provides competitive fee structures, uses advanced technology and communication tools, as well as providing access to a pool of qualified legal professionals who perform legal services at an offshore outsourcing destination. However, despite the billion-dollar status of this industry and the many advantages¹ it provides to both law firms and legal departments, outsourcing of legal work raises significant challenges to the ethical codes observed by legal professionals. There have been a plethora of articles written on the ethical concerns brought about by LPOs. But limited information was found on regulating this sector. To date, legal outsourcing businesses remain an unregulated entity.

This research addressed the gap in the literature with the objective of examining whether the ethical challenges raised by outsourcing legal services offshore would be alleviated by the introduction of a regulatory framework for the LPO industry in South Africa. Having no available regulation for this industry means that applicable measures to assess the accountability of the parties to the outsourcing relationship and dispute resolution mechanisms are restricted. Furthermore, what would be deemed as the acceptable standards and quality of the legal services being provided by the offshore personnel would remain un-established.

In order to achieve the aforementioned objective this research provided an overview of the background and emergence of the LPO industry.² The business model it uses to drive its success was explored as well as the various services that are on offer.³ The aim was to demonstrate the huge growth and future expansion of this industry

¹ See the discussion in Chapter 2 (The Growth and Development of Legal Process Outsourcing) section 2.5 (The benefits of Legal Process Outsourcing).

² See the discussion in Chapter 2 (The Growth and Development of Legal Process Outsourcing) section 2.2 (The evolving legal marketplace).

³ See the discussion in Chapter 2 (The Growth and Development of Legal Process Outsourcing) section 2.3 (The Legal Process Outsourcing business model) and section 2.4 (The services).

globally and specifically in South Africa.⁴ The research further explored the adequacy of available legislative and regulatory frameworks as regards to the outsourcing of legal services in the United Kingdom (UK), India and South Africa.⁵ The UK provided the unique perspective of the outsourcer, whereas India and South Africa illustrated the standpoint of the LPO providers. Furthermore, the UK and South Africa share a similar legislative framework and thus provided key insights to how the challenges of outsourcing legal work have been addressed. Chapter 5 (Ethical Principles and the Practice of Law), discussed the key ethical concerns caused by outsourcing legal work to offshore destinations while outlining the importance of preserving and promoting ethical standards in the delivery of legal services so as to address the potential breach of the fiduciary duty owed to clients by legal professionals. Chapter 6 (The Need to Regulate Legal Process Outsourcing) established the importance of having a regulation versus practice notes and examined relevant case law, which demonstrated the negative consequences imposed by the outsourcing of legal work and the lack of remedies available.⁶ It is intended that the suggestions and recommendations made in this thesis will serve as a guide for the ongoing discussion and research as to whether the LPO industry requires a regulatory framework to counteract the ethical concerns raised by this business model.

7.2 Chapter Conclusions

It is apparent that the continual growth and development of the LPO industry is proof of the value it provides and the acceptance it has garnered by the legal fraternity.⁷ Future projections of the expected growth of the LPO industry demonstrate that this sector is here to stay and provides an added indication of its success. Where before the LPO industry offered mainly administrative and legal support services, their service offering has expanded to include a range of legal services from low-level to mid-level to high-level work.⁸ This industry is undoubtedly a cost savings tool and a labour arbitrage gateway. However, synonymous with its expansion is the rising

⁴ See the discussion in Chapter 3 (Legal Process Outsourcing in South Africa).

⁵ See the discussion in Chapter 3 (Legal Process Outsourcing in South Africa) and Chapter 4 (A Comparative Analysis of the Legal Systems of the United Kingdom and India).

⁶ See the discussion in Chapter 6 (The Need to Regulate Legal Process Outsourcing).

⁷ See the discussion in Chapter 2 (The Growth and Development of Legal Process Outsourcing).

⁸ See the discussion in Chapter 2 (The Growth and Development of Legal Process Outsourcing) section 2.4 (The services).

ethical risks LPOs expose the legal profession to. The LPO industry gives rise to the following main ethical challenges: the aiding of unauthorised practice of law; whether the outsourcing relationship should be disclosed to the client, the checking mechanisms used by the LPO provider to verify potential conflicts of interest; the suitable manner in which the client's confidential information should be protected and secured; as well as the need to obtain clarity on the appropriate billing method for the outsourced services.⁹

South Africa is recognised as a favourable offshore LPO provider and although this industry is still in its infancy stage it has nonetheless earned a positive reputation within the industry.¹⁰ The quality of the work performed by legal practitioners, linguistic capabilities and the low salary bands as compared to the UK and the United States of America (US), make the legal market in South Africa a preferred offshore destination.¹¹ However, the outsourcing of legal work is not regulated in the country and it was argued that available legislation, namely the Legal Practice Act 28 of 2014 (LPA), the Constitution of the Republic of South Africa, 1996 and the Protection of Personal Information Act 4 of 2013 (POPI) were inadequate in providing guidance on the appropriate measures to implement within the outsourcing relationship, in that they did not directly address the ethical concerns associated with the outsourcing of legal services or they were found to take a silent stance.¹² By contrast, Rule 33 of the Rules of the Attorneys' Profession addressed the main ethical concerns outsourcing raises.¹³ It provided that prior to outsourcing, client consent should be obtained; proper supervision of the legal work should be carried out by the outsourcing lawyer¹⁴ to ensure the quality of the work product is maintained; non-practising legal practitioners are to enter into confidentiality agreements so as to safeguard the confidential information being shared between parties; the parties to the

⁹ See the discussion in Chapter 2 (The Growth and Development of Legal Process Outsourcing) section 2.6 (The risks of Legal Process Outsourcing).

¹⁰ See the discussion in Chapter 3 (Legal Process Outsourcing in South Africa) section 3.3 (South Africa – a preferred Legal Outsourcing offshore destination).

¹¹ See the discussion in Chapter 3 (Legal Process Outsourcing in South Africa) section 3.3 (South Africa – a preferred Legal Outsourcing offshore destination).

¹² See the discussion in Chapter 3 (Legal Process Outsourcing in South Africa) section 3.4 (South Africa's legal and regulatory framework) and section 3.4 (The challenges of Legal Process Outsourcing for South Africa).

¹³ See the discussion in Chapter 3 (Legal Process Outsourcing in South Africa) section 3.4.2 (Rule 33 of the Rules of the Attorneys' Profession).

¹⁴ See Chapter 1 (Introduction) footnote 5.

outsourcing relationship are to ensure and confirm that no conflict of interest exists; client privilege should be protected; codes of professional conduct are to be maintained and attorneys are to charge the client reasonable fees when outsourcing. Although these Rules provide a good starting point in addressing the main ethical concerns raised by the LPO business model, it was subsequently repealed by the LPA.¹⁵ Therefore, both the LPO provider and the outsourcer are left to determine and establish a best practice approach when partaking in the outsourcing of legal services offshore. Whereby, ultimately the lawyer who is outsourcing the work is held responsible for the quality of the work product and ensuring that the LPO provider complies with their professional codes of conduct. In light of the current position of the outsourcing industry in South Africa, it was therefore suggested whether the introduction of a regulatory framework would be better suited in addressing the ethical challenges.¹⁶ Ensuring that the performance of the legal services offshore would be done in the client's best interests by having specific guidelines that would standardise the LPO business and keep both parties accountable for the legal work.

The comparative analysis of the legal systems of the UK and India drew the following conclusions.¹⁷ Although UK law does also not regulate outsourcing transactions, the law society has provided solicitors with practice notes on outsourcing to mitigate the risks associated with this business model. The practice notes provided the solicitor with a list of the legal services that they would be permitted to outsource to legal professionals not authorised to practice law in the country, as well as those services, which would be solely reserved for practicing solicitors and barristers. The practice notes further reiterated the solicitor's duty to remain compliant with their professional codes of conduct. However, it was argued that the duty to supervise the outsourced work and carrying site visits would be impractical, when the LPO provider is situated on another continent. Moreover, no direction on the applicable standard in which to assess the outsourcing relationship was provided by the law society and the practice notes catered more for low-level type work. The practice notes did also not impose an obligatory duty on the

¹⁵ See the discussion in Chapter 3 (Legal Process Outsourcing in South Africa) section 3.4 (South Africa's legal and regulatory framework).

¹⁶ See the discussion in Chapter 3 (Legal Process Outsourcing in South Africa) section 3.5 (The challenges of Legal Process Outsourcing for South Africa).

¹⁷ See the discussion in Chapter 4 (A Comparative Analysis of the Legal Systems of the United Kingdom and India).

outsourcer to abide by the proposed recommendations, as they were deemed to not constitute legal advice by the law society. Therefore, the outsourcer was required to ascertain what standards would be appropriate to implement when outsourcing so as to achieve compliance.

Similar to South Africa, India has no regulation for the outsourcing sector and its existing legislative and regulatory frameworks was found to be inadequate in that it was silent on the issue of outsourcing and did not cater directly for the outsourcing of legal services. Moreover, foreign lawyers are not permitted to practice law in the country as this practice is reserved solely for the citizens of India. By contrast, there is no bar for Indian advocates working in the LPO centers, from providing legal services that is governed by foreign law. The LPO sector is a highly profit-making industry in India and it is recognised as the biggest LPO provider primarily for the cost incentives it provides to the outsourcer. The LPO provider in India has therefore taken to adapting the outsourcer's recommended standards and codes of practice so as to maintain business relations and profit from the business derived from the outsourcer.

When it comes to maintaining client confidentiality and the security of data, both South Africa and India have inadequate data protection legislation that has not come into effect to date.¹⁸ This leaves the outsourcer in a vulnerable state when considering the manner in which their client's confidential information would be kept secure without the protection of an applicable legislation. By contrast, the General Data Protection Regulation (GDPR) is the UK's data protection regulation and provides clear guidance on the sharing and processing of data across the border.¹⁹ Under the GDPR, both the outsourcer and the LPO provider are held equally accountable for the protection of data, where possible infringements and breaches can lead to severe penalties being imposed on both parties. The GDPR provides further suggestions on the required steps to take when sharing data with a country whose data protection laws are seen as being sub-par. The latter demonstrates the effectiveness of this regulation, in that it can be incorporated by foreign jurisdictions whose data protection legislation

¹⁸ See the discussion in Chapter 4 (A Comparative Analysis of the Legal Systems of the United Kingdom and India) section 4.5 (Challenges arising from Legal Process Outsourcing in the UK and India).

¹⁹ See the discussion in Chapter 4 (A Comparative Analysis of the Legal Systems of the United Kingdom and India) section 4.5 (Challenges arising from Legal Process Outsourcing in the UK and India).

is not as robust. Thereby providing the client with a standard protection as pertains to the sharing and storing of confidential information.

The role of ethics was found to be significant in the practice of law, irrespective of the jurisdiction a lawyer practiced in.²⁰ Ethical rules established the set standard required when performing legal services and hold lawyers accountable for the services they deliver to their clients. It was stated that although legal outsourcing is not an unethical practice, it does however raise ethical concerns. The general consensus to combat ethical challenges have been to implement adequate supervisory methods, taking the appropriate steps as regards to the implementation of adequate security mechanisms to safeguard client confidential information, obtaining client consent prior to outsourcing legal work, checking the LPO providers conflict of interest procedure, and billing the client reasonable for the outsourced legal services.²¹ However, it was argued whether these recommendations were sufficient to respond to ethical concerns or did they merely manage the risks imposed being that no specific standard was prescribed?

In the UK, the purpose of a having a regulation was seen to lean more in favour of protecting the client's interest, upholding the law, providing access to justice and making appropriate dispute resolution procedures available to affected parties.²² By contrast, practice notes introduced by the relevant law societies followed the principle that outsourcing legal services requires that ethical and legal standards as imposed by the applicable legal authority be complied with and maintained. Practice notes therefore upheld the latter by acting more as reminders to lawyers of their core ethical duties and obligations.²³

The research further argued that due to the disparities in the legal systems of the outsourcer and the LPO provider, remedies for contract breach or solutions to disputes

²⁰ See the discussion in Chapter 5 (Ethical Principles and the practice of Law) section 5.2 (The role and importance of ethics in the practice of law).

²¹ See the discussion in Chapter 5 (Ethical Principles and the practice of Law) section 5.3 (Key ethical concerns raised by Legal Process Outsourcing).

²² See the discussion in Chapter 6 (The Need to Regulate Legal Process Outsourcing) section 6.2 (The purpose of a regulatory framework).

²³ See the discussion in Chapter 6 (The Need to Regulate Legal Process Outsourcing) section 6.3 (The purpose of practice notes for outsourcing).

between the parties were limited and contained to the governing law of the contract. Resolving conflicts would therefore be resolved in line with the dispute resolution process outlined in the contract, as instituting legal action in either the outsourcer's jurisdiction or the LPOs would be an expensive exercise.²⁴ Moreover, any orders or judgments made in one country were unlikely to be enforceable in the other. The number of cases that have arisen within the legal outsourcing sector remains unclear. This is as a consequence of disputes being more likely resolved internally between the contracting parties, as instituting court action is a costly affair. Therefore no record or access is made available to the number of claims.²⁵ More research is suggested in this respect.

In summary, no regulations exist for the legal outsourcing industry; LPOs are therefore self-regulated businesses, whereby the parties determine the standards that are to be met. This gives rise to there being an array of standards being utilised and introduced by the outsourcer and the LPO provider. Although the latter affords the outsourcing parties with some measure of flexibility in moulding the standards to meet their needs as regards the performance of the legal services, the question that arises is, how sufficient are these standards in protecting the client's interests? No standardisation of the legal services means that the quality of the legal work being performed by the LPO provider is questionable. A further question that arises is whether the fiduciary duties owed to clients are set aside in favour of the financial profits gained from this business model? Or whether legal bodies are bidding their time, and continually assessing this industry prior to taking any further action?

Despite the lack of a regulation for this industry, LPO providers have reacted proactively and have been primarily responsible in advocating their recommendations and implementing applicable procedures to mitigate the ethical risks of this business practice. The adequacy of these recommendations requires further research.

²⁴ See the discussion in Chapter 6 (The Need to Regulate Legal Process Outsourcing) section 6.4 (The advantages and difficulties of introducing a regulatory framework for the legal outsourcing industry).

²⁵ See the discussion in Chapter 6 (The Need to Regulate Legal Process Outsourcing) section 6.8 (Relevant jurisprudence).

7.2.1 Final conclusions

The LPO provider and the outsourcer have maintained a collaborative approach to support the outsourcing of legal work offshore. The adoptions of best practice principles have produced an array of standards and the introduction of practice notes have leaned towards reminding the outsourcing lawyer of their obligation to comply with professional codes of conduct. Introducing a regulatory framework, although an expensive exercise, will lead to the standardisation of legal services performed by the LPO industry, that would ensure appropriate accountability measures are in place and that the client's best interests are upheld. Although, having a uniform global regulation would be the ultimate goal, in practice, ensuring that each jurisdiction collaborates would require team effort that would be both costly and time-consuming. However, by taking baby steps and introducing a regulation for outsourcing as part of national law, this will assist in establishing clear guidelines for the outsourcing parties. Similarly, having legal authorities provide legal practitioners with the acceptable minimum standards to be achieved when outsourcing legal services will aid in reducing ethical infractions. More research would be needed in this regard.

7.3 Recommendations

Introducing a regulation for the LPO industry in South Africa is recommended as an option and possible solution to counteracting the ethical concerns raised by offshoring legal work. Although the drafting of such a regulation will require the input of all interested parties, namely legal practitioners, legal authorities, governmental bodies, to list a few, the following sample regulatory provision can be expanded upon and implemented in a proposed statute aimed at the LPO industry specifically or as an amendment to the LPA:

Proposed Legal Process Outsourcing (LPO) Regulation:

For the purposes of this regulation, outsourcing of legal services shall pertain to the delegation of both core and support legal services to a third party provider located in an offshore outsourcing LPO destination country.

1. The outsourcing of legal work offshore does not constitute the unauthorised practice of law as long as the outsourcing legal practitioner employs an appropriate degree of supervision over the lawyers employed by the LPO provider located offshore. The outsourcing legal practitioner should become familiar with the educational background and professional training of the LPO employee, set up and proactively take part in the training of the LPO employee as is required, be an active participant in the hiring process with the LPO provider, and establish regular communication routines to ensure access to the outsourcing legal practitioner. The LPO provider should take reasonable steps to ensure that the instructions of the outsourcing legal practitioner are carried out properly and in line with applicable standards as set by relevant codes of professional conduct. The outsourcing legal practitioner is to exercise independent judgment and monitor the quality of the legal work being performed by the LPO employee at regular intervals, from start to finish.
2. Prior to outsourcing legal services, the outsourcing legal practitioner is responsible in obtaining the written consent of the client. The client must be informed in writing of the disclosure of all and any confidential information that will be made available to the LPO provider as well as any applicable client confidentiality laws in the offshore outsourcing LPO destination country.
3. Prior to outsourcing work, the outsourcing legal practitioner should undertake an appropriate due diligence exercise on the LPO provider to determine whether the LPO provider can perform the legal services required and any potential risks can also be identified and managed. The due diligence investigation should include at a minimum, the security mechanisms the LPO provider has on site, the applicable laws in that jurisdiction as pertains to privacy and security, client confidentiality, data protection and potential conflicts of interest.
4. The outsourcing legal practitioner and the LPO provider must enter into a written confidentiality agreement providing for the reasonable and acceptable safeguards required to protect the confidentiality of any client information. At a minimum, the LPO provider shall demonstrate compliance with the Protection of Personal Information Act 4 of 2013, obtain certification for Six Sigma to

improve business processes, ISO 27001 to enable the assessment of risk as pertains to information security and certification in ISO 9001 so as to assess whether the services being provided by the outsourcing provider meet with international customer and regulatory standards. The outsourcing legal practitioner and LPO provider shall assess and include other applicable internationally recognised certifications and / or data protection legislation.

5. The parties to the outsourcing relationship should discuss and enter into a written contractual arrangement to determine the terms and conditions that would apply and govern over their business relationship. The parties should consider at a minimum the manner in which the legal services are to be provided and that they uphold professional conduct obligations; the governing law of the contract; the supervisory arrangements in performing the work and ensuring quality of work; restrictions imposed by the jurisdictions as regards client confidentiality; the storage of files, records and provisions taken against loss; the procedure for checking conflict of interest and the affirmation that no such conflicts exist; regular reporting methods; dispute resolution procedures and available remedies for breach of contract; the security framework of the LPO provider; allocation of liability; terminations rights and obligations; the role and training of the LPO employee; basic qualifications and experience of the LPO employee; business continuity plans; governance structure and applicable insurance requirements.
6. The outsourcing legal practitioner should endeavor to ensure that no conflicts of interest exist by obtaining the written assurance of the LPO provider and proactively familiarising themselves with the procedures utilised by the LPO provider to check for conflicts and the procedures used to monitor work performed for other law firms and / or legal departments. It is recommended that the outsourcing legal practitioner develop a conflict of interest questionnaire to assist them in determining the adequacy of the LPO provider's conflict checking procedures.
7. Both the outsourcing legal practitioner and the LPO provider are to maintain and ensure compliance with professional rules of conduct.

8. A legal practitioner who outsources legal work may not receive any added financial advantage on the fees payable to the LPO provider save for such fees as is permitted between correspondent legal practitioners. Any discount on the fees must be communicated to the client in writing and unless otherwise agreed with the client, will accrue for the benefit of the client. The client shall be billed reasonably for the outsourced services.

Although the above proposed regulation is a draft and would require additional research and input from relevant bodies, it would act as a starting point to mitigate the ethical risks arising in an area that has remained unregulated despite the impact the LPO business model has had on the legal sector globally.



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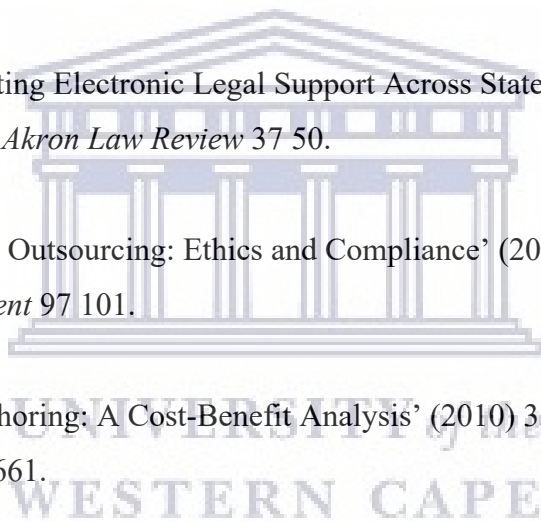
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