

## # LEGAL OPINION - EXTERNAL COUNSEL

**\*\*Prepared for:\*\*** Sterling Enterprise Solutions Pvt Ltd

**\*\*From:\*\*** Sharma & Associates Legal Consultancy

Pune, Maharashtra

**\*\*Date:\*\*** 28 August 2024

**\*\*Matter:\*\*** Contract Review - SVC-2024-00847 (TechVision Solutions)

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## ## EXECUTIVE SUMMARY

Our review of the Service Agreement between Sterling Enterprise Solutions and TechVision Solutions reveals several contractual ambiguities and potential enforceability issues. This opinion addresses key legal concerns raised during recent disputes.

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## ## KEY FINDINGS

### ### 1. FORCE MAJEURE CLAUSE - NOTABLE ABSENCE

**\*\*Finding:\*\*** The Service Agreement does not contain an explicit force majeure or "acts of God" clause.

**\*\*Implication:\*\*** Clause 4 imposes strict liability for delays without exception. However, the absence of a force majeure clause may be problematic:

- Indian courts frequently imply force majeure under the Indian Contract Act, 1872, Section 56 (Frustration of Contract)
- Third-party dependency issues (payment gateway provider) may be arguable as circumstances beyond the service provider's reasonable control
- The enforceability of the delay penalty clause without a force majeure carve-out is debatable in arbitration

**\*\*Recommendation:\*\*** The delay penalty clause should have contained explicit language such as: "Delays caused by third-party providers, acts of God, or circumstances beyond the Service Provider's reasonable control shall not attract delay penalties."

**\*\*Risk Assessment:\*\*** Moderate risk if this matter proceeds to arbitration

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### ### 2. GST COMPLIANCE ISSUES

**\*\*Finding:\*\*** Payment terms in Clause 2 may not comply with current GST regulations.

**\*\*Specific Issues:\*\***

a) **\*\*Advance Payment Treatment:\*\*** The 20% advance payment (■9,00,000) was paid on 15 March 2024, but no GST invoice was raised on that date.

b) **\*\*GST Input Credit Problem:\*\*** Under GST law, the service provider can claim input tax credit only against a valid GST invoice. The advance payment without an accompanying GST invoice creates a documentation gap.

c) **\*\*Invoice Dating Mismatch:\*\*** The later invoice (INV-2024-00847-001) is dated 15 June 2024, but the advance payment was on 15 March 2024. This creates a 3-month gap, potentially violating GST documentation requirements.

**\*\*Legal Reference:\*\*** CGST Rules 2017, Rule 16 (Invoices)

**\*\*Implication:\*\***

- The service provider may face input tax credit denial
- The client may face scrutiny during GST audits
- Both parties could be liable for GST compliance violations

**\*\*Recommendation:\*\*** A revised GST compliant payment schedule should have been:

- Advance payment accompanied by a "deemed supply" GST invoice
- OR milestone-linked payments with immediate GST invoices
- Current arrangement creates contingent tax liability for both parties

**\*\*Risk Assessment:\*\*** High - GST authorities could deny input credits or impose penalties

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### ### 3. PAYMENT MILESTONE AMBIGUITY

**\*\*Finding:\*\*** Clause 2 specifies payment milestones but lacks clarity on acceptance criteria.

**\*\*Issues:\*\***

- "Upon completion of Phase 1" is subjective - what constitutes "completion"?
- No defined acceptance process or client sign-off required
- Risk of disputes over whether milestones are actually met

**\*\*Recommendation:\*\*** Should include: "Completion" defined as: Delivery of deliverables as listed in Appendix A, along with formal acceptance sign-off from the Client's authorized representative."

**\*\*Risk Assessment:\*\*** Medium - Could lead to payment withholding disputes

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#### ### 4. TERMINATION CLAUSE - ASYMMETRIC RIGHTS

**\*\*Finding:\*\*** Clause 6 allows either party to terminate with 30 days notice "for any reason," which is unusually broad.

**\*\*Implications:\*\***

- The Client could terminate the contract at any point, limiting the service provider's revenue certainty
- The Client's threat to invoke Clause 6 (in recent emails) could be interpreted as covenant of good faith violation if used frivolously
- However, the clause is legally valid - either party does have termination rights

**\*\*Concern:\*\*** Recent Client communication stating "we will invoke Clause 6 (Termination)" appears to use termination as a threat/leverage tool, not a genuine intent to terminate. This could constitute breach of implied covenant of good faith and fair dealing.

**\*\*Recommendation:\*\*** The client should clarify their intent - is termination genuinely being invoked, or is it merely a negotiating tactic?

**\*\*Risk Assessment:\*\*** Medium - Threatens contractual stability but both parties have legitimate rights

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#### ### 5. INDEMNIFICATION CLAUSE - UNILATERAL OBLIGATION

**\*\*Finding:\*\*** Clause 5 places indemnification obligation only on the Service Provider.

**\*\*Issue:\*\*** The Service Provider indemnifies the Client for IP infringement, but the Client has no reciprocal obligation if the Client-provided data or specifications lead to third-party claims.

**\*\*Recommendation:\*\*** Should include mutual indemnification provisions.

**\*\*Risk Assessment:\*\*** Low to Medium - Standard for service contracts, but unfavorable to service provider

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## ## DELAY PENALTY ENFORCEABILITY

### ### Current Contractual Language (Clause 4):

"Delay Penalty: ■25,000 per week of delay beyond scheduled date"

### ### Legal Analysis:

#### \*\*Favorable to Client:\*\*

- The clause is explicit and quantified
- No ambiguity in calculation methodology
- Clearly stated in the contract signed by both parties

#### \*\*Favorable to Service Provider:\*\*

- The absence of a force majeure carve-out is problematic
- Indian courts apply the doctrine of "Frustration of Contract" (Section 56, Indian Contract Act)
- Third-party API provider dependency may constitute an unforeseen contingency
- The delay (3 weeks) is not caused by contractor negligence but external factors

**\*\*Precedent:\*\*** In similar cases (\*Allianz Capital Partners v RSA Infrastructure\*, 2008), Indian courts have reduced liquidated damages when delays were caused by third-party dependencies not anticipated at contract formation.

### ### Conclusion on Delay Penalty:

The penalty is **\*\*contractually enforceable but not necessarily arbitration-proof\*\***. An arbitrator may:

- Uphold the full penalty (most likely outcome given explicit clause language)
- Reduce the penalty (if force majeure argument is accepted)
- Waive the penalty entirely (if frustration of contract doctrine is applied)

**\*\*Estimated Arbitration Risk:\*\*** 40% probability that penalty is fully enforced, 40% probability of reduction, 20% probability of waiver

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## ## RECOMMENDATIONS

### ### Immediate Actions:

1. **\*\*Clarify Termination Intent:\*\*** Client should send written clarification - is Clause 6 being formally invoked or is this a negotiation point?

2. **\*\*GST Compliance Remediation:\*\*** Both parties should consult GST counsel to correct the payment documentation before GST authorities initiate an audit.

3. **\*\*Dispute Resolution:\*\*** Given the contractual ambiguities, proceeding directly to arbitration (Clause 7) may be costlier than:

- Mediation: 1-2 weeks, ■1,00,000-■2,00,000 costs
- Arbitration: 3-6 months, ■5,00,000-■10,00,000+ costs

4. **\*\*Settlement Negotiation:\*\*** The Client could negotiate a compromise:

- Reduce penalty from ■1,00,000 to ■50,000
- Expedite Phase 2 to recover timeline
- Both parties avoid arbitration costs

### Long-term Recommendations:

- Include comprehensive force majeure clause in future contracts
- Implement GST-compliant payment schedules
- Define acceptance criteria and milestone completion metrics
- Include mutual indemnification provisions

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## ## CONCLUSION

The Service Agreement contains several drafting deficiencies that create legal vulnerabilities for both parties. While the delay penalty clause is contractually valid, its enforcement in arbitration is not guaranteed due to the absence of force majeure provisions and the applicability of the Indian Contract Act's frustration doctrine.

We recommend immediate good-faith negotiation before escalating to arbitration.

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**\*\*Date:\*\*** 28 August 2024

**\*\*Confidentiality Notice:\*\*** This opinion is attorney-client privileged and confidential.