



OUTSOURCING

Legal Issues and Contracts

Presented by

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■ **Outsourcing**

When company ("Customer") transfers responsibility for an internal business function to an outside service provider ("Supplier" or "Vendor").

Suppliers often purchase assets, license software or hire people that perform the Customer functions.

■ **Offshore Outsourcing / Offshoring**

When a company in a high-wage country outsources to a supplier that will perform the services in large part in a low-wage country.

Often produces dramatic cost savings from the wage differential, despite added telecommunications costs, management challenges and legal risks.

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Outsourcing aids Customers of all sizes

- **Small Scale Outsourcing**

Early stage technology based companies and virtual companies contract out functions that require time and capital or scale to establish. Early stage firms outsource marketing, sales, CFO, as well as HR functions, manufacturing and scale up.

- **Large Scale Outsourcing and Offshoring**

Established companies seek to focus on core competencies, cut costs, enhance profitability and competitiveness in the marketplace. Functions usually fall under Information Technology Outsourcing (ITO) and Business Process Outsourcing (BPO).

■ Information Technology Outsourcing (ITO)

When the outsourced function is almost entirely information technology or telecommunications

- Infrastructure and operations
- Network management
- Business continuity/Disaster recovery
- Application development and maintenance
- Desktop management
- Hosting/Help desk
- Break/fix, installation, moves, adds, changes and other end-user support

■ Business Process Outsourcing (BPO)

When the customer outsources a non-IT business function

- Call center/Order taking
- Order fulfillment
- Repairs and returns processing
- Logistics (i.e., shipping, warehousing, reordering)
- Payroll, employee benefits management and other HR functions
- Check/credit card/payment processing
- Training

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Benefits of Outsourcing

- Focus management's efforts of "core" functions
- Outsource non-value added functions to vendors
- Achieve cost-savings by reduced overhead
- Achieve cost-savings by reduced training
- Achieve cost-savings by economies of scale
- Achieve higher level service from vendor specialization
- Enhance performance from vendor specialization
- Reduce capital expenditures, particularly in outsourcing management and information technology services
- Take advantage of improvements in technology
- Gain access to new technologies and methods

Outsourcing Costs and Risks

- Loss of day-to-day management control of outsourced services
- Dependence on supplier for performance
- Dependence on supplier for strategic information on customer's technology, operational and business options
- Transferring employees and assets to the outsourcing vendor
- Apprehensive of non-affected employees
- Loss of knowledge from displaced workers
- Costs associated with managing the outsourcing vendor
- Potential increased cost since supplier has profit margin
- Reassuming responsibility for the outsourced services on termination of outsourced services

Small Scale Outsourcing Legal Issues for Consultants and Independent Contractors

- Employee Benefits
- Employers' Taxes
- Independent Contractor status
- Services / Project assignments
- Confidentiality
- Ownership of Intellectual Property
Developed or used
- Conflicts of interest

Consultant Contracting Issues

- Specifications
- Deliverables / Reports
- Inventions and other IP
- Warranties
- Infringement liability
- Limitations on liability
- Insurance coverage
- Confidentiality
- Restrictive covenants

Consultant Compensation

- Pricing / Payment Alternatives
- Conserving cash in early stage
- Equity Alternatives
 - Restricted Stock
 - Options/Warranties
 - Phantom Stock
- Expense Reimbursement
- Collection terms
- Back License Rights /other considerations

Large Scale Outsourcing Legal Issues

Offshoring and International Outsourcing

- Transaction structure
- International tax issues-Transfer pricing
- Intellectual Property protection
- Backup/Security
- Dispute resolution
- Termination procedures

Customers' Outsourcing Selection Process

- Request for Information on Suppliers (RFI)
- Supplier company information, qualifications, financial position, references, use of subcontractors
- Confidentiality of process and deliverables
- Request for Proposals (RFP)
 - Outsourcing objectives-Benchmarking
 - Services to be provided-Reporting
 - Pricing
 - Management-Personnel
 - Contract Terms

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Teaming contracts to Bid RFPs and Subcontracts for Outsourcing

- International structure-Transfer pricing
- Subcontractor Agreement
 - Services
 - Warranties/Indemnity
 - IP ownership
 - Confidentiality
 - Restrictive Covenants
 - Termination
 - Governing law enforcement and self-help protection

Master Outsourcing Agreements between Customer and Supplier

- Term of agreement
- Base services
- New technologies, future add-on services
- Projects management
- Conversion from prior services and technologies
- Payment
- Audits

Master Outsourcing Agreements

Services and Benefits

- Operating standards
- Security procedures
- Benchmarking
- Management and control
- Project team
- Key Personnel

Master Outsourcing Agreements

Intellectual Property

- IP Proprietary rights
- Custom software development—
 - Upgrades
 - Documentation
 - Assignment of inventions
 - Transfer of Ownership
 - Confidentiality
 - Future assurances

Master Outsourcing Agreements

Disruptions and Termination

- Disaster recovery
- Force Majeure
- Exit plan
- Termination procedures
- Termination fees
- Dispute resolution
- Transition to successor

Offshore Outsourcing to India

- Offshoring Alternatives including BOT model
- Employee pool and Infrastructure to support outsourcing
- India technology parks and favorable tax regimes
- Intellectual Property Issues
- India BPO and ITO functions

Offshoring to China

- Offshore Outsourcing vs. Offshoring
- Due diligence
- Supplier legal compliance
- Employee issues
- IP registration and filings
- Enforcement challenges
- Proactive IP protection
- Dispute resolution



ABOUT THE PRESENTER

Robert A. Adelson has been a business, tax and contracts attorney since 1977.

He is a partner at Engel & Schultz, LLP, a 7-attorney general practice law firm in Boston's financial district.

Mr. Adelson's clients are:

- *Smaller and Early Stage companies*
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