

SHOULD YOUR LEGAL
Department
JOIN THE India
Outsourcing
Craze?

BY ZACHARY J.
BOSSENBROEK AND
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As in-house counsel for Harpar Holdings LLC, a national real estate development and management firm, I often spend my time drafting leases, coordinating refinancing efforts, and conducting due diligence on prospective properties. So, when one of Harpar's companies was hit with a massive lawsuit by the Attorney General's office without any forewarning, I was unprepared to unilaterally handle the matter, to say the least. Fortunately, a team of highly qualified attorneys was standing by to assist me—figuratively speaking, that is, since they were actually located halfway across the globe in India!

The complaint alleged that our company's agents engaged in unfair trade practices by misleading residents into renting residential units based on promises of indefinite rent caps. Although we could not afford to miss a single shred of evidence disproving the alle-

gations, we also wanted to keep our legal fees to a minimum. Our objective was to have the varying leases, promotional materials, and any other correspondence contained in thousands of tenants' files reviewed and condensed into a chart containing a synopsis of all relevant information about each tenant, his or her lease terms, and references to any other documents relating to the alleged fraud. We also wanted this information compiled in a matter of days so that we could begin planning a defense strategy.

Using outside counsel to review all the tenant files and related information would be expensive, and was an undesirable option because of the fact that most of the work would likely be performed by paralegals or inexperienced associates. How was I to obtain high-quality and thorough document review, with a very quick turn around, while keeping my legal fees to a minimum?

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The answer for me was an Indian legal outsourcing firm. In a matter of days, the tenants' files and related documents were scanned and hosted on a secure, web-based server accessible anywhere in the world. In another two days, a host of highly qualified Indian attorneys thoroughly reviewed the tenants' files and summarized them pursuant to my instructions. By the fifth day, these attorneys provided me with a table that synopsized every tenant, the terms of his or her lease, a schedule of rent increases and related calculations, correspondence between our agents and the tenants, and quoted text from these and any other documents specifically relating to the allegations of fraud. With the legally relevant facts in hand, I was able to promptly execute a defense strategy and ultimately settled the case in a matter of months.

WHY OUTSOURCING?

Legal outsourcing involves the delegation by a company to another organization of one or more of its business processes. In theory, outsourcing benefits clients by affording them more final input with lower costs, presumably without any compromise on quality. Because outsourcing providers make investments not on behalf of just one company but on behalf of their many clients, investments are shared, and as a result the risks borne by any single company are

significantly reduced. In contrast, companies that try to do everything themselves may incur vastly higher research, development, marketing, and deployment expenses. Access to an outside provider's lower cost structure, which may be the result of a greater economy of scale or some other advantage based on specialization, is clearly one of the most compelling reasons for outsourcing.

When companies outsource they become more flexible, more dynamic, and better able to adapt themselves to meet changing opportunities. Outsourcing also allows a company to focus on broader business issues, while having operational details assumed by an outside expert. By outsourcing non-core functions, the organization can redirect their personnel into greater value-added activities. Outsourcing enables access to world-class talent and helps the company tap into a network of specialized, focused resources. Company employees whose energies are currently focused internally can now be focused externally—on client development, services, and other big picture items.

Is It Right for You?

Has legal outsourcing really progressed this far, such that it could be the low-cost solution for your next legal nightmare? Though many companies have long participated in outsourcing billing, customer support, technical support, and information technology-related work to countries like India, legal outsourcing as practiced by Harpar's legal department is just now beginning to take root. General Electric Corp.'s famed success in outsourcing legal work to India for the last three years, with resultant cost savings of millions of dollars, undoubtedly represents just the tip of the iceberg in an outsourcing trend that has already transformed many legal departments' IT, customer support, and billing counterparts.

Experts believe that the potential in outsourcing legal work is as large, if not larger, than previously outsourced services. Hildebrand International projects worldwide legal outsourcing will swell to a \$163 billion industry by 2006.¹ U.S. firms alone are expected to outsource over \$600 million in legal research and nearly \$5 billion in litigation support by the year 2006.² Rees Morrison, senior director at Hildebrand International, says that outsourcing of legal work "strikes me as the biggest wave in the last five years in its ability to rework both sides—law firms and law

departments” of the legal services industry.³ Due to the significant wage disparity between Indian attorneys and U.S. attorneys, as well as the large number of English-speaking attorneys entering India’s legal market each year, India is likely to be the primary beneficiary of this trend.

Whether your company can benefit from the legal outsourcing trend will depend on a realistic assessment of your company’s legal needs and whether your company’s legal requirements are capable of being outsourced with minimum oversight and input by your in-house attorneys. It may also depend on your

tolerance for risk and willingness to deal with any cultural challenges that outsourcing involves. In short, any company contemplating whether it should outsource legal work overseas must carefully consider the ramifications of doing so and also understand the alternative outsourcing models available to the corporation. With appropriate oversight by licensed, in-house attorneys, most corporations will likely find that outsourcing specific types of legal projects is an effective way of reducing the corporate legal budget and improving work product quality.

OUTSOURCING MODELS—THIRD-PARTY VS. CAPTIVE

Business process outsourcing (“BPO”) is the delegation of one or more business processes to an external provider that, in turn, owns, administers, and manages the selected process based on defined and measurable performance criteria.¹ The various business processes which are being successfully outsourced to other countries, particularly India, are electronic customer relationship management, supply chain management, back office, payroll, billing, accounting, telemarketing, and call center activities, as well as tele-servicing and product support. Gartner predicts that the worldwide market for BPO will nearly triple from \$106.7 billion in 1999 to \$301 billion this year.²

U.S. companies that choose to outsource to India generally adopt one of two BPO models. The first one is a captive BPO of the U.S. corporation, which is essentially an Indian unit created for the express purpose of servicing the U.S. corporation’s own needs, whether it is customer support, IT work, or research and development. For instance, GE has a captive unit in Gurgaon, India, which services the legal research and compliance needs of two of GE’s subsidiaries. The other model is a third-party BPO, which is an independent service provider that services the operational needs of a number of corporate clients. Third-party BPOs tend to have at least a minimal presence in the U.S. for marketing and customer management purposes.

NOTES

1. Wipro Spectramind, *Why BPO?*, available at http://www.wipro.com/spectramind/why_bpo.htm.
2. Tad Leahy, “The Whole Ball of Wax,” *Business Finance* (Nov. 2001), available at www.businessfinancemag.com/magazine/archives/article.html?articleID=15812.

Yes, but Where? Offshore Legal Outsourcing

Although novel, legal outsourcing is not a new concept. Many domestic companies staffed by U.S. lawyers and paralegals offer legal research and related services to cost-conscious corporations whose legal departments are too busy or understaffed to get a job done. Some of these firms have provided legal services to attorneys for 20 years or more. DuPont has been an especially outspoken advocate of outsourcing a portion of its legal work to such domestic, non-law-firm entities.⁴ Through outsourcing, DuPont has seen the quality of its legal work improve and has saved an estimated \$8.8 million in legal fees in 2002 alone.⁵ Other companies, like Cisco Systems, Inc. and Sun Microsystems, Inc., likewise estimate that outsourcing of legal work has reduced their legal fees by millions of dollars.⁶

Overseas outsourcing has the additional advantage of producing greater cost savings than domestic outsourcing due to wage disparities that exist between some countries. Countries such as India offer large wage differentials across every service sector in comparison to U.S. wages. Annually, the number of U.S. companies outsourcing to India has increased, and the type of work being outsourced is becoming more sophisticated. For example, GE and Intel have recently announced plans to add thousands of research and development positions in their India-based facilities.⁷ Even x-rays of some U.S. patients are now being reviewed by radiologists in India.

The driving force behind outsourcing legal work is the significant cost savings that it generates for the corporation—without any compromise on quality.⁸ Certainly, it’s hard to imagine that GE, Cisco, and other large companies who have jumped on the legal services outsourcing bandwagon would continue their efforts if the quality of outsourced work

were substandard. A study conducted by researchers at the University of California at Berkeley reveals that lawyers and legal assistants working in India on behalf of the U.S. companies earn, on an average, about one-third of what their U.S. counterparts are paid.⁹ The resulting cost savings of this disparity alone could be anywhere between 60 percent and 70 percent. Further, Indian attorneys working in private companies are not likely to expect health insurance coverage, any retirement plans, short- and long-term disability benefits, life insurance, or any long-term care insurance, as part of their benefits package.

Although continents apart, Indian attorneys' legal training is closely aligned with that of attorneys licensed to practice law in the United States. Indian lawyers speak and write in English, and undergo three to five years of post-secondary studies in law and other curricula focused on the Indian common law system. India, like the United States, is a common law jurisdiction rooted in British legal tradition. At all levels of education in the country, including that of Socratic teaching and rigorous legal training, classes are taught in English. Thus, the Indian legal community appears well-equipped and competent to handle U.S. legal work. Robert Ruyak, managing partner of Washington, D.C.'s Howrey Simon Arnold & White, affirms this notion, "I think that the quality or technical capability [of foreign lawyers] may rival or even be better than in the U.S," he states.¹⁰

Not only is using overseas legal outsourcing cost-effective, it is expedient as well. In India, legal work on a project can be performed around the clock, since a 10- to 12-hour time zone differential exists between India and the United States. As such, the turn-around time involved in completing a project may be much

quicker. On the other hand, this time differential can prove to be a disadvantage when a U.S.-based attorney needs to discuss a project with the Indian attorney during the U.S. counsel's work day. Although this time impediment may be surmounted by employing Indian attorneys to work in a night shift, the need for this modified schedule may not be appreciated by many Indian attorneys. For that reason, it is necessary to develop a system for the planned and efficient relay of communication between the U.S. and Indian attorneys, which incorporates this time differential in the event of last minute changes in project requirements.

HOW TO SELECT AN OUTSOURCING DESTINATION

Although India offers a strong destination to outsource legal work, other countries such as Australia, New Zealand, Singapore, or Ireland are additional outsourcing destinations. When selecting an offshoring destination, however, there are a few critical criteria to keep in mind (*see* "Criteria for Selecting an Outsourcing Location"). First, examine the local environment of the outsourcing country: Evaluate its local infrastructure, country risks, foreign direct investment incentives, and time zone attractiveness. Next, consider the worker capability in that country. Worker capability is a product of the qualifications and capabilities of the work force, which takes into consideration whether the legal staff possesses a primary knowledge of the English language, whether they can produce an acceptable quality of work, whether the attorneys demonstrate strong work ethics, and whether using them will achieve a satisfactory cost differential.¹¹ Although much is to be desired in terms of its infrastructure and regulatory environment, India scores well on the worker capabilities.¹²

A well-built communication infrastructure is imperative to a successful offshore outsourcing model to ensure the uninterrupted flow of information across borders. Relocation of services—especially legal services—used to be nearly impossible due to the high telecom costs involved and the sheer logistical difficulties associated with transporting paper documents across large geographical distances. Now, however, extensive use of the internet and technological improvements in coding, storing, and processing data has led to the development of a paperless work environment that is conducive to outsourcing.

CRITERIA FOR SELECTING AN OUTSOURCING LOCATION

- Large wage differential
- Highly qualified workforce
- Common law jurisdiction
- English-speaking
- Advantageous time zone differential
- Good work ethics
- Good communications infrastructure
- Stable government
- Growing economy

In India, for example, the launch of India's first private undersea cable and the privatization of the telecom industry has resulted in an 85 percent drop in telecom rates over the last three years. Greater bandwidth availability makes for easier and unlimited access to online legal databases such as Westlaw and Lexis-Nexis, equipping overseas legal staff in locations such as India with the same legal research capabilities as their counterparts in the United States.

WHAT TO OUTSOURCE

Once you are comfortable with the notion that the quality of your work product is not likely to suffer on account of any inherent inabilities of the outsourced legal team, there are a myriad of projects that your company can effectively outsource. These include:

Quantitative, low-skilled legal tasks:

- indexing and objective coding,
- database creation and maintenance, and
- legal transcription,

Qualitative, skill-intensive legal tasks:

- due diligence reports,
- fifty-state surveys,
- patent and trademark work,
- review of transactional and litigation documents, and
- drafting contracts, research memoranda, pleadings and briefs.

In addition, some of the back-office essential tasks can be outsourced.

Outsourcing is perhaps most cost-effective in the area of litigation support. Because the successful resolution of complex litigation often depends on the effective management of large quantities of related documents and data, outsourcing of litigation support services is becoming increasingly attractive to more companies. This process is made easier by the fact that more and more documents are stored in electronic form and are readily accessible anywhere in the world where there is internet access. In most large cases, it is common for a law firm to image and host all documents related to the case on a web-based, secure server that is accessible from remote locations. Many law firms prefer a paperless discovery and review process in order to make document production, review, coding, redaction, and retrieval a quicker, cheaper, and more reliable process. Such a paperless environment makes offshore outsourcing a feasible alternative, since imaged documents are readily transferable to attorneys in counties which have internet access.

In-house counsel can maximize its use of offshore litigation support services and realize significant cost savings by having attorneys familiar with U.S. law review the documents produced in response to discovery requests, and highlight any documents that tend to support your position in the case (i.e., "hot documents"). These attorneys could also synthesize and/or code each document using the fields that you and/or your outside counsel dictate. The more your outside law firm is willing to work with the third-party legal service provider, the more effective the document review process will be.

In-house attorneys need to educate the company and its board of directors on the merits of outsourcing legal work to low-cost countries. By emphasizing the quality of work produced by outsourced attorneys and backing this assertion up with concrete examples, you can save your company significant sums in legal costs and alleviate your burgeoning workload as well. Importantly, however, you must also appreciate that not all projects can or should be outsourced (*see* "What (not) To Outsource"). For example, if you are seeking a legal opinion and wish to preserve your ability to collect against a lawyer or law firm for advice amounting to malpractice, outsourcing is not an option.

WHAT (NOT) TO OUTSOURCE

GOOD PROJECTS:

- 50-state surveys
- Database creation and maintenance
- Contract drafting
- Drafting pleadings and briefs
- Legal memoranda
- Due diligence reports
- Litigation support
- Patent review

BAD PROJECTS:

- Legal opinions
- Merger and acquisition
- Joint venture agreements
- Project requiring political connections
- Project requiring negotiating savvy

In addition, some projects are too fact-specific to be outsourced. If you have a project which you believe will be mistake-laden unless every minute detail or transaction pertaining to the case/project is communicated to the overseas lawyer, then don't outsource the work. Factually involved projects that involve nettlesome details, such as preparation of merger and acquisition documents, executive compensation agreements, and joint venture agreements, are also poor candidates for outsourcing. By the time all of the required factual information is conveyed to the foreign-based attorney and the overseas counsel overcomes any learning curves associated with the matter, the project could have likely been completed more efficiently in-house or with local counsel. Similarly, legal predicaments that require political connections and/or negotiating savvy of a well-connected domestic attorney or law firm should be kept in-house.

FACTUALLY INVOLVED PROJECTS THAT INVOLVE NETTLESOME DETAILS, SUCH AS PREPARATION OF MERGER AND ACQUISITION DOCUMENTS, EXECUTIVE COMPENSATION AGREEMENTS, AND JOINT VENTURE AGREEMENTS, ARE POOR CANDIDATES FOR OUTSOURCING.

Finally, as you are ultimately responsible for the accuracy of the legal advice and work product provided to your client, you should initially outsource work which is within your scope of expertise or that of your legal department. That way, you can be comfortable reviewing the material and checking it for accuracy before it is relied on by the company. Only after you reach a high level of confidence in the quality of work produced by the outsourced legal team should you consider outsourcing work that is not within your scope of expertise.

RISKS OF OFFSHORE OUTSOURCING

Two of the most often-voiced concerns about outsourcing legal services, particularly offshore, fall

under the heading either of unauthorized practice of law or attorney-client privilege.

Unauthorized Practice of Law

Skeptics of legal outsourcing often charge that it amounts to unauthorized practice of law. These fears, however, are unfounded because the work provided by overseas counsel is subject to constant supervision and oversight by American lawyers. "There is no problem with outsourcing," says Stephen Gillers, a professor at the New York University School of Law and a legal ethics expert, "because even though the lawyer in India is not authorized by an American state to practice law, the review by American lawyers sanitizes the process."¹³ Legal ethicist Geoffrey Hazard, Jr., a professor at the University of Pennsylvania Law School, adds, "If [the Indian attorneys are] acting under the supervision of U.S. lawyers, I wouldn't think it would make much difference where they are."¹⁴ Indeed, much of the regular work of American attorneys is performed by legal secretaries, consultants, paralegals, and even law students under the supervision of licensed attorneys, and rarely do questions of the unauthorized practice of law arise in these contexts.

Even though legal outsourcing may not raise unauthorized practice of law issues, the fact that third-party, legal outsourcing firms are relying upon the in-house attorney's review to "sanitize the process," means that you, the employing counsel, are ultimately responsible for their work product. In fact, legal outsourcing firms are generally very good about disclaiming their responsibility for the work product and representing it as solely for the requesting attorney's benefit and review. This may be fine in cases where you are confident in your ability to gauge the accuracy of the legal outsourcing unit's work, but when you have a project that is outside the scope of your expertise and you will not be able to provide substantive review, you will have to weigh whether you ultimately want to be responsible for that work product. Of course, these same considerations apply when you delegate work to your department's paralegals and other legal assistants.

Confidentiality

Ensuring that foreign lawyers respect and maintain the confidentiality of information they are handling on behalf of your client is another concern. In order to safeguard legal information, investments

must be made in securing computer networks and information systems from hackers. To alleviate concerns related to inadvertent or unintentional disclosure of confidential information, many outsourcing firms require that their employees and contractors sign confidentiality agreements and agree to only pass confidential data over secure network. In addition, the attorney-client privilege applies to communications between the requesting attorney and a legal outsourcing unit in the same way that it applies to communications between an attorney and an accountant, expert witness, insurer, or paralegal where the purpose is to aid the requesting attorney in rendering legal advice.¹⁵ Similarly, the attorney-work product doctrine applies to work product that passes between you and the legal outsourcing unit in preparation for litigation.¹⁶

Although procedures are in place to establish confidential standards, enforcement is another matter. For example, although Indian courts enforce confidentiality agreements and grant injunctions upon adequate proof of breach or a proposed breach, suits for damages may take months in order to reach hearing due to systematic delays in the Indian judicial system. At present, Indian cyber laws only cover unauthorized access and data theft from computers and networks, and provide for a maximum penalty of about \$220,000. They do not have any specific provisions relating to privacy of data.¹⁷ Until a tighter data protection legal regime is in place, foreign cus-

tomers must rely upon contractual obligations to impose obligations for protecting and preserving data. You must decide whether those protections afford your company a sufficient level of comfort.¹⁸

However, breaches of a company's confidentiality policies can occur at any firm, irrespective of where they are located. "We have put in processes to monitor compliance, however, when an employee is motivated to misuse for deliberate personal gain, you cannot prevent this but you can only discover and make an example of it," according to an official at Wipro Spectramind, a large call center in India.¹⁹ Even if strict procedures are followed and employees are bound by confidentiality agreements, there is no way of ensuring that the employee will not commit a breach of trust on confidential matters. As Rita Terdiman, vice president and research director for Gartner,²⁰ points out, "[U.S. companies] have been outsourcing for 20 years and no one was screaming [that] there were security issues." Yet, entrusting confidential and or sensitive information to faceless individuals at a company halfway around the world strikes a nerve with some, particularly in this age of enhanced terror threats and global insecurity. The argument could be made, however, that those fears are misplaced, and that the risks posed by domestic-based employees could be far more serious and potentially devastating than those posed by outsourced foreign legal staff, who presumably have much less of an incentive or opportunity to use or divulge of information likely relating to events occurring half-way around the world.

Personnel Turnovers and Political Risks

Rampant turnover of personnel is another potential risk in using foreign legal outsourcing firms, at least to a corporation's captive outsourcing unit. The last thing you want is to train a group of highly educated attorneys, only to have them be lured away by another firm. For example, about one in three employees in India's BPO (business process outsourcing) industry quit within one year of getting the job.²¹ To be fair, however, India's outsourcing industry is heavily dominated by the call center industry, which is known for high attrition; in the United States, turnover is estimated to be 40 percent or more annually.²² On this point, Wharton management professor Emilio J. Castilla noted in his recent study that "[r]etention may be the single

INDIAN LAW SCHOOL RANKINGS

1. NLSIU, Bangalore
2. Government Law College, Mumbai
3. Faculty of Law, BHU
4. University College of Law, Bangalore
5. Symbiosis College, Pune
6. Faculty of Law, AMU
7. Bangalore Institute of Legal Studies
8. Faculty of Law, Delhi University
9. Faculty of Law, University of Madras
10. ILS Law College, Pune

Source: *India-Today Magazine* (June 2, 2003).

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Explore information related to this topic.

ONLINE:

- Charlie Robinson, *Legal Services Going Offshore—A Critical Trend!*, LAW PRACTICE TODAY, April 2004, available at www.abanet.org/lpm/lpt/articles/nosearch/mgt04041_print.html.
- Jennifer Fried, “Change Of Venue; Cost-conscious general counsel step up their use of offshore lawyers, creating fears of an exodus of U.S. legal jobs,” THE AMERICAN LAWYER, Dec. 2003, available at www.corpcounsel.com/other/3rd_party/offshore.shtml.
- Renee Deger, “Legal-Work Outsourcing Cuts Costs; DuPont’s pitch to in-house counsel: Save millions by sending legal work to companies other than law firms,” NEW JERSEY LAW JOURNAL, Nov. 17, 2003, available at www.corpcounsel.com/other/3rd_party/outourcing.shtml.
- “Offshore outsourcing basics,” E-Business Strategies, available at www.ebstrategy.com/Outsourcing/basics/definition.htm.

General Resources on Outsourcing to India:

- www.outsourcingpipeline.com.
- National Association of Software and Service Companies (NASSCOM), available at www.nasscom.org.
- Wipro Technologies, available at www.wipro.com.
- Knowledge@wharton, available at <http://knowledge.wharton.upenn.edu>.

- Yale Global Online, available at <http://yaleglobal.yale.edu>.
- www.rediff.com/money/index.html (provides links to numerous articles about outsourcing to India).
- Gartner, available at www.gartner.com.
- Indian Brand Equity Foundation, available at www.ibef.org.

ON PAPER:

- Carlton S. Chen, Samuel B. Isaacson and Sonya D. Naar, “Managing Discovery in Large Scale and Pattern Litigation: Use Technology for Efficiency and Cost Effectiveness,” ACC Docket 21, no. 9 (October 2003): 60-74.
- Geanne Rosenberg, “Offshore legal work makes gains,” THE NATIONAL LAW JOURNAL, Vol. 26, No. 30 (March 29, 2004).

If you like the resources listed here, visit ACC’s Virtual LibrarySM on ACCA OnlineSM at www.acca.com/resources/vl.php. Our library is stocked with information provided by ACC members and others. If you have questions or need assistance in accessing this information, please contact Senior Attorney and Legal Resources Manager Karen Palmer at 202.293.4103, ext. 342, or palmer@acca.com. If you have resources, including redacted documents, that you are willing to share, email electronic documents to Managing Attorney Jim Merklinger at merklinger@acca.com.

biggest issue for trained employees, whether they are in entry-level jobs in call centers or even high-tech engineering firms or consulting firms,” and suggested that the solution might lie in getting the current workers to recommend, mentor, and befriend new hires. “If you can manage employees’ social networks, these networks can help you attract the best employees, and later, help you keep these employees.”²⁵ Employee attrition therefore can be mitigated with proper management techniques and the recognition of social networks as a way to spur staff retention and productivity. Admittedly, this may

be more than a corporation looking for a quick and cost-effective solution to a legal crisis is prepared to take on.

There are other risks as well. Geopolitical and political risks inherent in maintaining business relations in another country may make legal outsourcing unattractive to some companies. The location of the outsourced counsel is significant for some clients. In this context, India continues to be less risky than a number of other countries, including China, as a business destination. The Economic Intelligence Unit (EIU), an information service arm of the Economist

group, ranked the risks associated with conducting business with firms in various countries.²⁴ With a score of 39 out of 100 in the risk scale, India received a 'B' risk rating and outranked China (41), Saudi Arabia (41), South Africa (45), Mexico (45), Brazil (48) and Egypt (49), which received 'C' ratings.²⁵ EIU country risk rankings combine measures of political risk (like threat of war) and economic risk (like size of fiscal deficits). They also include measures that affect a country's liquidity and solvency (debt structure and foreign exchange reserves). Some of the operational factors that are considered in determining country risk include security, political stability, government effectiveness, legal and regulatory framework, macroeconomic conditions, financial and tax policy, labor market and infrastructure. Another recent survey conducted by Hill & Associates, a leading independent enterprise security and risk management consultancy firm, also reports that India is a relatively risk-averse business environment.²⁶

THOUGH IN RECENT YEARS A HANDFUL OF ABUSES ALLEGEDLY OCCURRED AT VARIOUS AMERICAN RETAILER PRODUCTION FACILITIES IN THIRD-WORLD COUNTRIES, NO SUCH ABUSES HAVE BEEN REPORTED IN THE BPO INDUSTRY.

YOU CAN, BUT SHOULD YOU? SOCIO-ECONOMIC IMPACT OF OFFSHORE OUTSOURCING

Outsourcing of jobs to India and other overseas locations, especially white collar jobs, has become subject to a fair amount of political backlash in the United States. In fact, Democratic candidate John Kerry has referred to companies which outsource jobs as "Benedict Arnolds," and has proposed a corporate tax plan aimed at discouraging U.S. companies from exporting work overseas.²⁷

This concern may not be well-founded, as many reports show that there is little or no merit to the debate. Law firms and legal departments keen on

reducing costs and on increasing responsiveness realize that outsourcing has become an entrenched business trend which is beneficial for their business and the American economy overall. A study by the National Center for Policy Analysis (NCPA) points out that moves to restrict offshoring would be counterproductive in the long run, increasing the cost of capital and reducing corporations' ability to invest and expand. Says NCPA Senior Fellow Bruce Bartlett, "Restrictions may save a few jobs in the short run, but they will come at the expense of better jobs in the future, jobs that will not be created."²⁸ The analysis showed that over the past 15 years, U.S. corporations reported an 82 percent increase in insourced jobs, compared to a 23 percent increase in outsourced ones.²⁹

The U.S. economy has also benefited from outsourcing in other ways, by seeing an increase in product availability, stronger demand for U.S. jobs, competitive gains for small businesses, and a rising standard of living. According to figures provided by the U.S. Department of Commerce, the United States exported nearly \$54 billion more in services than it imported (including legal services), and this surplus was responsible for the addition of 400,000 jobs in 2003.³⁰

Admittedly, the fear of losing corporate clients may make many law firms feel threatened by the outsourcing trend. As such, corporate counsel could experience a backlash from its outside counsel when it elects to outsource legal assignments to other service providers. In-house counsel need to explain the benefits of using overseas firms to outside counsel, emphasizing the value that foreign outsourced attorneys provide to the overall legal services to the client. Any law firm that is truly putting your company's interests above its own should embrace the concept and be willing to work in conjunction with an outsourcing model. Initially, some law firms may be more willing to cooperate with your outsourcing endeavors than others, depending on how threatened their attorneys feel and how outsourcing is perceived within the firm. If you find you are meeting with continued resistance, consider a face-to-face meeting between you and outside counsel where the economies and efficiencies of using outsourced counsel can be explored.

Past abuses in the manufacturing outsourcing industry fuel criticisms that outsourcing is unethical, exploitative, and contravenes corporate social respon-

sibility policies. According to Jerome Shestack, a former American Bar Association president and head of the litigation department at Wolf, Block, Schorr and Solis-Cohen of Philadelphia, hiring overseas attorneys to perform legal work at “cut rates” raises “ethical questions of whether you’re exploiting people.”³¹ However, those who are familiar with the services outsourcing industry understand that this could not be farther from the truth. Though in recent years a handful of abuses allegedly occurred at various American retailer production facilities in third-world countries, no such abuses have been reported in the BPO industry. To the contrary, in countries like India, the BPO industry has thrived due to the higher wages and better working environments offered relative to the wages and conditions offered by domestic companies

TO THE CONTRARY, IN COUNTRIES LIKE INDIA, THE BPO INDUSTRY HAS THRIVED DUE TO THE HIGHER WAGES AND BETTER WORKING ENVIRONMENTS OFFERED RELATIVE TO THE WAGES AND CONDITIONS OFFERED BY DOMESTIC COMPANIES IN THE SAME SERVICES INDUSTRY.

in the same services industry. This is simply the result of a strong dollar and Euro as compared to the Indian rupee, and has nothing to do with “cut rates” or exploitative treatment of Indian professionals. Those who argue otherwise may be “concerned about the protection of their own turf,” says Susan J. Hackett, senior vice president and general counsel of the Association of Corporate Counsel, who further explains, “it’s cheaper to hire lawyers in India than it is [in the U.S.] and that’s just pure economics.”³²

HOW TO DO IT: OUTSOURCING MODELS

U.S. companies that choose to outsource to India generally adopt one of two business process outsourcing models. The first one is a third-party BPO, in which an independent service provider serves the needs of a number of corporate clients. For corporate

counsel, working with third-party BPO units is very similar to employing law firms to satisfy the company’s legal needs. Like law firms, third-party BPO units have the ability to handle work that corporate counsel is unable to handle due to time or human resource constraints. Utilizing a third-party BPO is likely to reduce the company’s legal fees, as it has for DuPont, and free up corporate counsels’ time to focus on their core competencies, including negotiations and other matters of importance. Sending work to a company that does this specific kind of work every day generates obvious efficiencies. Intellevate, Lexadigm Solutions, Mindcrest, and OfficeTiger are all examples of third-party BPO companies that provide various legal services to corporate legal departments.

Choosing a third-party BPO unit as your outsourcing partner is different and in some cases more difficult than selecting a law firm as your primary outside counsel. The primary difference is that you are not likely to ever meet the foreign attorneys in person or know anything about the attorneys. Though third-party BPO companies may disclose their attorneys’ credentials in generic fashion, they are not likely to disclose specifics for fear of having you or a competitor hire them away. At minimum, however, the BPO unit should specify the attorneys’ education, including whether any received U.S. LL.M.s, which would add to their U.S. legal expertise (*see* “Indian Law School Rankings,” p. 58). One of the most important criteria in your selection process should be the level of review and oversight conducted by the BPO unit’s staff here in the United States. To ensure an effective flow of information between you and the BPO company during your working hours, it is critical that the BPO unit have a U.S. managerial presence that understands your legal issues and can properly relay them to the Indian attorneys. Finally, to guarantee a consistent and high-quality work product, you should look for quality guarantees or request a trial project or two at a reduced rate before committing to a third-party BPO unit.

Setting Up an In-house Unit: The Indian Model

Another outsourcing model available to in-house counsel is to set up one’s own captive in-house legal unit in India, which would service the in-house legal needs of the corporation. General Electric Corp. (GE) has perhaps the most-recognized captive BPO unit. GE has been successfully operating an in-

house legal department in India to take care of legal compliance and research demands for two of its businesses, GE Plastics and GE Consumer Finance, saving millions of dollars which would have otherwise been spent on retaining outside counsel. Suzanne Hawkins, senior counsel at GE has remarked, "There are lots of opportunities to use [foreign] lawyers in place of outside counsel or other lawyers at a lower cost structure."⁵³

THOUGH FORMATION AND SET-UP OF THE OUTSOURCING UNIT ARE IMPORTANT ISSUES FACING A U.S. COMPANY, A MORE SIGNIFICANT HURDLE IS THE ARRAY OF CULTURAL DIFFERENCES THAT A U.S. COMPANY WILL ENCOUNTER WHEN SEEKING TO ESTABLISH AN OPERATIONAL PRESENCE IN INDIA.

Jumpstarting an Indian BPO generally involves the incorporation of a private company as a wholly owned subsidiary of the U.S. parent company, or as part of a joint venture with an Indian partner in compliance with the provisions of the [Indian] Companies Act, 1956. In most cases, a good tax planning consideration is whether the U.S. parent company should form a Mauritius subsidiary which owns the Indian BPO. This is an attractive option because of the existence of a tax treaty between India and the Indian Ocean island of Mauritius. The treaty eliminates capital gains tax if the seller is a certain type of Mauritius entity. Certain income tax benefits may also be available to a U.S. parent company that incorporates an Indian company by way of a Mauritius subsidiary. Some companies may choose to defer the hassle and expense of adding an intermediate Mauritian subsidiary until the Indian BPO has proven viable, at which time a relatively simple stock transfer takes place from the U.S. parent company to the new Mauritian subsidiary.

Location, Location, Location

Ideally, a BPO should be located in a city which has up-to-date public utilities that enable the BPO industry to thrive with minimal concerns over ser-

vice outages and disruptions. In addition, the BPO should have access to reliable high-speed internet connections with sufficient bandwidth to handle the volume of data to be transferred to and from the United States. Most domestic traffic still gets routed through a government-owned corporation, and that makes internet access more expensive than in the United States, especially where back-up services are also required. For example, an Indian office can expect to pay about \$1,000 per month for the same high-speed internet connection that would cost about \$100 per month in the United States. If the selected area is within a Software Technology Park, the BPO unit can, among other benefits, avail itself of certain income tax incentives and exemption from payment of custom duties. Areas such as Gurgaon, a satellite town of New Delhi, the capital of India, are hubs for call centers and other BPOs, including GE, American Express, and Hughes Software Systems. Other areas include the southern cities of Bangalore, which houses the Hewlett Packard and Intel service centers, and Hyderabad, home to Cisco and Microsoft. Some of the office buildings in these high tech zones have reached or even surpassed global standards. The most notable similarity between these cities, however, is the fact that good educational institutions and talent can be found nearby.

Though formation and set-up of the BPO are important issues facing a U.S. company, a more significant hurdle is the array of cultural differences that a U.S. company will encounter when seeking to establish an operational presence in India. The most obvious of the cultural challenges is the unfamiliarity with the local language. However, because India is a former British colony, the medium of instruction at all levels of education, including legal training and practice, is English. Yet, differences in communication styles and power relationships may warrant some attention. For instance, Indians, like most Asians, are more formal in their disposition at the workplace than are their American counterparts. While Western management theories abound with concepts of flattened organizations, individual empowerment and proactive decision-making, Indian management style typically emphasizes the subordination of the role of the individual to the greater demands of the group within which the individual is a member, and the need for respecting order, structure, and hierarchy. Generally speaking, Americans interacting with

Indian counsel will more often be met with speech that is indirect, complex, and subtle in its real meaning. Americans may also have to back off on the more direct, "get-it-done," efficiency-oriented, no-nonsense speech that they are used to using; such a communication style might be considered inappropriate in India. These communication differences are also likely to be reflected in an Indian attorney's writing style, which will be flowery, indirect, and verbose.

Thus, setting up of a captive unit in India involves a risk/reward analysis of such a business operation, including an analysis of whether a third-party BPO could more efficiently accomplish your goals. Economic considerations will likely dictate that small- to medium-sized companies outsource legal work to a third-party BPO rather than set up a captive unit. When considering the economics of setting up a captive unit, you should factor in capital expenditures and the cost of compliance with applicable regulatory policies, including transfer pricing regulations. In addition, time and managerial resources may have to be allotted for learning and dealing appropriately with the cultural differences, norms, and customs of the Indian workplace. Accordingly, a managerial presence is necessary to ensure the smooth functioning of the legal unit in accordance with the demands of its American counterpart. And, like every business venture, savings may be slow to materialize initially. As IBM has learned, wage disparity alone does not translate into immediate savings.³⁴

THE WAVE OF THE FUTURE

In order to stay competitive in a continuously evolving business environment, companies worldwide are outsourcing business operations that can be done more efficiently and inexpensively overseas. Though outsourcing of legal work has been slow to move overseas, it's just a matter of time before outsourcing revolutionizes the legal industry like it has many other service sectors, such as IT, software engineering, and customer support. Forrester Research has projected that by 2015 there will be 489,000 U.S. lawyer jobs moving to lower cost countries like India.³⁵ Further, by some estimates, 20 percent to 50 percent of U.S. legal work could ultimately be moved abroad.³⁶ In light of such projections, it appears that the more

accurate question to consider is not whether your legal department will join the India outsourcing trend, but when? With companies like General Electric Corp. serving as the case in point, in-house legal departments must eventually face the inevitable.

Not all companies will have the resources and patience to start up their own in-house BPO units like General Electric, but many companies stand to benefit from third-party BPOs. By directly utilizing such BPOs, in-house legal departments will spend less time and resources on the mundane, research-intensive projects, creating more time for broader business issues. Likewise, having experienced, well-educated foreign attorneys assist you and your outside counsel prepare for litigation can improve quality and reduce legal fees otherwise incurred for the review time of U.S. paralegals and fresh-from-school associates. Resultant cost savings of 30 percent or more will also make your company more profitable. As DuPont, General Electric, Cisco, and others have found, reduced legal fees as a result of outsourcing can end up contributing millions of dollars to your bottom line. It's certainly enough to make you think twice before counting India out when you assign your next legal project. ■

NOTES

1. Hildebrandt International.
2. *Id.*
3. Geanne Rosenberg, *The National Law Journal*, 'Offshore' legal work makes gains, March 29, 2004.
4. Renee Deger, *Legal-Work Outsourcing Cuts Costs; DuPont's pitch to in-house counsel: Save millions by sending legal work to companies other than law firms*, *NEW JERSEY LAW JOURNAL*, Nov. 17, 2003, available at www.corpcounsel.com/other/3rd_party/outsourcing.shtml.
5. *Id.*
6. *Id.*
7. General Electric, R & D, available at www.ge.com/in/research.html; "Intel plans expansion of R&D centre in India," May 13, 2003, available at www.computerweekly.com/Article121738.htm.
8. See, e.g., Molly McDonough, *IP Goes Overseas*, *ABA JOURNAL E-REPORT*, April 23, 2004.
9. Paul McDougall, "Legal Research And Back-Office Work To Go Offshore Next," *INFORMATION WEEK*, Dec. 9 2003, available at www.informationweek.com/story/showArticle.jhtml?articleID=16600553.
10. *Id.*
11. *Why India offers better ROI*, available at <http://www.ibef.org/Attachment/Outsourcing.pdf>.
12. India continues to be the preferred offshore country

because it boasts an enormously large and well-educated supply base. At present, there are about 90 recognized universities in India providing legal education, with more being considered for recognition. Of the law students who graduate from these institutions every year, only about one-third joins the legal profession. JURIST: *The Legal Education Network*, available at Jurist.law.pitt.edu/world/india/htm#Profession. Even so, the Indian legal community boasts approximately one million members. In addition and more importantly, most companies realize that India offers more attractive return on investment and reduction in costs as compared to higher cost centers such as Australia, New Zealand, Singapore or Ireland.

15. Ellen L. Rosen, *Corporate America Sending More Legal Work to Bombay*, THE NEW YORK TIMES, March 14, 2004, section 10, p. 1.
14. Jennifer Fried, *Change Of Venue; Cost-conscious general counsel step up their use of offshore lawyers, creating fears of an exodus of U.S. legal jobs*, THE AMERICAN LAWYER, Dec. 2003, available at www.corpcounsel.com/other/5rd_party/offshore.shtml.
15. See, e.g., *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961) (extending the attorney-client privilege to accountants when the accountant acts at the direction of the lawyer to provide information for the client). No case specifically addresses whether the privilege applies to communications between an attorney and non-attorney in another country. However, that the non-attorney is located in another country appears irrelevant so long as the non-attorney is acting at the direction of the lawyer to assist the lawyer in rendering legal advice.
16. See, e.g., *United States v. Aldman*, 134 F.3d 1194 (2d Cir. 1998); *United States v. El Paso Co.*, 682 F.2d 530 (5th Cir. 1982), cert. denied, 466 U.S. 944 (1984); *Wal-Mart Stores, Inc. v. Dickinson*, 29 S.W.3d 796 (Ky. 2000) (Attorney work product prepared by a paralegal is protected with equal force by attorney work product rule as is any trial preparation material prepared by an attorney in anticipation of litigation). No case specifically addresses whether the attorney-work product privilege applies to work produced by a non-attorney in another country. However, that the non-attorney is located in another country appears irrelevant so long as the non-attorney is acting at the direction of the lawyer in preparation for litigation.
17. John Rebeiro, *India poised to tighten data protection law*, April 22, 2004, available at www.computerweekly.com/articles/article.asp?liArticleID=130076&liFlavourID=1.
18. However, India is taking steps to tighten its data protection laws. The Indian National Association of Software and Service Companies (NASSCOM) is in the process of drafting legislation to amend India's existing Information Technology Act of 2000 by inserting clauses which are intended to comply with the so-called adequacy norms of the European Union's Data Protection Directive and the Safe Harbor privacy principles of the United States. K.K. Jaswal, Secretary in the Department of Information Technology, says that "[W]e will remove all the lacunae in laws covering the BPO industry, especially regarding data protection, to inspire confidence among investors." *Gov't to soon remove loopholes in laws governing BPO*, PRESS TRUST OF INDIA, July 21, 2004.
19. Rishi Seth, *After the Storm*, June 5, 2004, available at www.dqindia.com/content/industry/bpo/2004/104060501.asp.
20. *Offshore outsourcing: is your data safe?*, available at www.wallstreetandtech.com/showArticle.jhtml?articleID=19201904.
21. *India's latest import: turnover*, June 10, 2004, available at www.workforce.com/section/00/article/23/75/64.html.
22. *Offshore outsourcing basics*, available at www.ebstrategy.com/Outsourcing/basics/definition.htm; *Call Center Outsourcing: Financial Implications*, available at www.outsource2india.com/why_outsource/articles/Call_center_outsourcing.asp.
23. *Call Centers: Using Social Networks to Spur Staff Retention and Productivity*, Knowledge@Wharton, online resource of Wharton School of Business, University of Pennsylvania, April 9, 2003, available at <http://knowledge.wharton.upenn.edu/index.cfm?fa=viewArticle&id=742>.
24. *For investors, India is less risky than China*, THE TIMES OF INDIA, June 14, 2004, available at <http://timesofindia.indiatimes.com/articleshow/736304.cms>.
25. *Id.*
26. R. Raghavendra, *Outsourcing: India a Safe Bet*, August 03, 2004, available at <http://in.rediff.com/money/2004/aug/03bpo.htm>.
27. Christine Hines, *The Gathering Storm*, Corporate Counsel, Vol. 4, Issue 5 (May 2004).
28. *Outsourcing benefits U.S.: think tank*, THE BUSINESS TIMES, July 30, 2004, available at <http://businesstimes.asia1.com.sg/story/0,4567,124060-1091303940,00.html>; see also, *How not to create U.S. prosperity: The backlash over offshoring defies economic sense*, FINANCIAL TIMES, 10, March 6, 2004.
29. *Id.*
30. *Id.*; see also, Michael M. Phillips, *More Work Is Outsourced to U.S. Than Away From It*, Data Show, WALL STREET JOURNAL, A2, March 15, 2004.
31. Geanne Rosenberg, *'Offshore' legal work makes gains*, March 29, 2004.
32. *Id.*
33. Jennifer Fried, *Change Of Venue; Cost-conscious general counsel step up their use of offshore lawyers, creating fears of an exodus of U.S. legal jobs*, THE AMERICAN LAWYER, Dec. 2003.
34. Rich Smith, *A Passage to India*, Jan 26, 2004, available at <http://www.fool.com/news/commentary/2004/commentary040126rs.htm>.
35. Neal St. Anthony, *Outsourcing Hits Legal Services*, STAR TRIBUNE, Jan 16, 2004.
36. Geanne Rosenberg, *'Offshore' legal work makes gains*, Vol. 26, No. 30, March 29, 2004.