

- Law firms need to be brought in as early as possible in the process. A common mistake is bringing legal counsel once a vendor was selected, solely for the purpose of drafting a contract. Bringing outside legal counsel at the stage of RFP/ process definition can greatly reduce negotiating time. It allows to reach a common understanding from early on and prevents going back to square one at an advanced negotiating stage.
- In outsourcing transactions buyer is at a disadvantage in dealing with an experienced vendor that has done many such transactions. As BP outsourcing is a relatively immature field, buyers should leverage the experience of legal firms that have advised on a number of outsourcing transactions and know the critical risks involved.
- Complex global BPO transactions require local legal expertise in each of the countries involved.
- Privacy is an area of great concern, especially when a transaction involves many jurisdictions and personal data about current and former employees is being transferred.
- Intellectual Property issues require careful consideration, especially when a transaction involves a significant transfer of assets and people to a provider.
- It is important to pull together a team of legal experts with experience in different areas, including employment law, intellectual property, etc, and work closely with in-house legal experts to minimize costs while mitigating risks.
- In a comprehensive outsourcing transaction power is being transferred to a vendor, including knowledge capital, people, assets etc. That includes the very capability to take it back in-house should the relationship go sour. Thus, it is the outside attorney's job to build in sufficient flexibility in a contract.
- Any long-term transaction should have a built-in exit clause and a renegotiation provision.

**Bierce & Kenerson, P.C.** is an international law firm providing legal advisory and transactional support to clients in business, technology and finance. The firm provides the personal attention of experienced business lawyers serving clients ranging from Fortune 100 corporations to emerging technology and growth companies, not-for-profit organizations and governmental bodies. Bierce & Kenerson practice "sourcing law" or "outsourcing law" to facilitate clients' pursuit of many strategic goals. The firm has experience in many industries and many types of transactions, as well as international business process outsourcing. This includes renegotiations as well as regular transactions. The focus is on the "round-trip" and on "portability," as well as on the usual "quality of service"

commitments and project management structures. An outsourcing relationship has the potential for unlocking capital investment for new strategic initiatives, synergy, global reach, cost savings, productivity enhancement, greater profitability and flexibility, quicker response times, speed to market and predictability in service levels and financial commitments.

**Brobeck** is a global presence firm with offices strategically located in the hotbeds of innovation across the U.S., in London, Oxford, and Munich, and a law firm network around the world. The firm is experienced in evaluating, structuring, negotiating and managing everything from sole-sourced transactions to the most complex competitively bid multinational transactions. Brobeck provides a comprehensive team of experts to advise on all relevant aspects of transaction. Assistance is provided with all steps of the transaction and continuing long after the outsourcing agreements have been signed, renegotiated or terminated.

According to David Hudanish, a partner at the firm,

“Because of the difficulty and costs associated with getting out of a contract, customers would be well advised to have outside consultants and legal counsel.”

“We have a diligence questionnaire for data collection, to make sure client gathers all data necessary from legal standpoint in the beginning of the process”.

**Brown Raysman Millstein Felder & Steiner LLP** has built on its international reputation as a leader in the area of technology and intellectual property law to emerge in the new millennium as a renowned general practice law firm. Today, the focus of the firm extends from technology and intellectual property law to corporate finance, securities, mergers and acquisitions, commercial litigation, real estate, bankruptcy, media, life sciences, health care, trusts and estates, and employment law. The firm advises clients through an integrated network of offices located in New York, Los Angeles, Hartford, Morristown and Toronto. Brown Raysman is one of a handful of law firms internationally known for its outsourcing practice. As a leader in the structuring and implementation of outsourcing transactions, it has negotiated and completed outsourcing deals worth tens of billions of dollars. The attorneys advise both vendors and users on how to structure outsourcing alliances, identify strategic objectives, and evaluate the benefits of specific transactions. They draft and negotiate all the necessary agreements and subsidiary schedules and are known as dealmakers from both sides of the transaction. In representing outsourcing customers, the firm uses a flexible approach depending on the depth of experience of the client, and its use of knowledgeable consultants. If a client has a sourcing strategy that routinely includes outsourcing, lawyers provide legal counsel on structuring and managing those long-term alliances. If outsourcing is new to the client or its personnel, the firm’s attorneys often lead the negotiations and deliver important added value in helping the parties reach a business accord. The firm has represented hundreds of outsourcing customers in deals against experienced providers, such as IBM and EDS, as well as providers new to the business.

According to Julian Millstein,

“I believe the value of going with a single provider is overrated. If a company has the capability to manage one relationship, it should be able to manage several relationships. One of the benefits is that it keeps providers on toes.”

“Shorter deals may not need to be renegotiated. However, if a deal is over 3 years old in length, it needs to have an early exit clause.”

“More flexibility to exit provides more leverage to find a creative solution should a problem arise. Anticipation of exit strategy should be a critical part of negotiation.”

“Sometimes a year after a contract is signed attorneys remain the only people on the two sides of the deal that participated in negotiation. I believe a contract is a living document that needs to be amended and updated as part of relationship management. Thus, we encourage our clients to transfer knowledge on an ongoing basis. ”

“My advice to all customers: make sure you understand your own financial information.”

**Mayer, Brown, Rowe & Maw** is ranked the tenth largest law firm internationally, with 1,300 lawyers and gross revenues of \$573 million. The firm has offices in the seven U.S. cities: New York, Chicago, Charlotte, Houston, Los Angeles, Palo Alto, and Washington, D.C.; and offices in six European cities: Brussels, Cologne, Frankfurt, London, Manchester, and Paris. The firm also has an “independent correspondent relationship” with a law firm in Mexico City. The outsourcing advisory group includes 50 outsourcing-focused lawyers (30 in the US and 20 in Europe), 21 of whom are partners in the outsourcing practice. Mayer, Brown, Rowe & Maw has been operating as a law firm for more than 100 years and began representing clients in outsourcing transactions in the end of 1980s. Outsourcing practice is extensively involved in all types of outsourcing transactions, including the outsourcing of business processes and functions, information technology services and support, application development and maintenance, telecommunications services, network management and support, e-commerce transaction processing and support, help desk services and support, and leasing/procurement. The outsourcing practice has handled over \$25 billion of outsourcing deals in 2002. The most recent of these transactions to close is the \$4.5 billion outsourcing agreement between Bank of America and EDS, which was signed on December 12, 2002 .

According to Paul Roy, from Chicago Office,

“The value of outside advice is in understanding business risks, processes and maintaining flexibility”.

“One of our roles, that is very important for vendors, is that we keep customers realistic about internal costs and capabilities.”

“Many outsourcing deals fail because the dysfunctional group to be outsourced is the one that should execute”.

“Because of the risk profile of outsourcing transactions there is a need for a web of risk mitigation techniques, ways to align incentives, maintain control over vendor’s power, and maintain level of service with competitive market prices.”

“We always try to structure in payment withholding option during the dispute resolution process. At the same time vendors can’t withhold service. If the amount goes above a certain limit, moneys go into an escrow account”.

“Today outsourcing provides an enormous opportunity for cost saving, so there is no need to wait”.

“It is very important to stay close to contract in relationship management. Outside counsel is invaluable in helping to spot the right moment to renegotiate the contract”.

**Milbank Tweed** was founded in 1866. Today Milbank has offices in London, Tokyo, Singapore and Hong Kong, in addition to NY, DC and Los Angeles in the US. Sophisticated technology is used to connect and integrate attorneys in the international and domestic offices, turning Milbank into a truly interactive global law firm. Global Technology Group has a vibrant and diverse practice encompassing all aspects of the rapidly changing technology marketplace. Recognized as the leaders in information technology and business process outsourcing, Milbank has played a significant role in virtually all of the largest and most complex international and domestic outsourcing transactions completed to date. The firm’s attorneys have not only developed transaction structures that have been widely replicated in the industry, but have authored leading treatises on IT outsourcing, BP outsourcing, data processing and computer law. Clients range from Silicon Valley and Silicon Alley start-ups, to rapidly expanding companies, to some of the largest media, telecommunications and technology multinationals and technologically advanced global financial institutions. In order to effectively and efficiently represent our clients and address their rapidly changing needs, attorneys in the Global Technology Group work closely with attorneys in other practice groups, especially with regard to tax, employment, regulatory and real estate issues. In addition, many of the attorneys have backgrounds in M&A, Corporate Finance, Litigation and Intellectual Property.

John Halvey:

“ HR is a horizontal look at the organization, touching every part of it, so it is harder to frame the scope of work and services involved, harder to get buy in and determine allocation of responsibility and decide what is retained.”

“Part of our role is to keep expectations based on a market perspective so that the customer understands how the market would react to it.”

“Consultants and attorneys will both contribute market knowledge and influence the transaction in different ways. Earlier in the deal the consultants are more influential. The lawyers take a greater role when it comes to terms and conditions.”

“Many solutions need to be changed. As more and more processes are outsourced, there will also be more standartization of HR processes, and the early outsourcing deals will pull through the industry their own solution patterns that will set a template for companies and vendors alike.”

## **Shaw Pittman**

The firm was founded in 1954. The opening of Shaw Pittman's London Office in 1998 confirmed a global focus that has characterized the firm since its inception. From aviation to structured finance to telecommunications, every practice has substantial international elements, whether through inbound representation of non-US interests, representation of multinational enterprises, or assistance to clients outside the US. Shaw Pittman is knowledgeable about emerging BPO vendors, their product offerings, and methods used to price transactions. Attorneys understand that scope of work descriptions and service-level arrangements must focus on the ultimate service being provided and not necessarily on the intermediate IT-related steps involved in the business process. BPO is a less mature product offering than IT outsourcing; thus, there is a need to ensure that outside advisors retained by customers have actual hands-on experience, understand market conditions and can bring this experience to bear.

Robert Zahler:

“Need to have an honest dialogue between supplier and customer on why certain things can not be done, and lawyers should be there to facilitate it.”

“We’re in favor of actively using purchasing and strategy departments, the problem arises when they begin dictating the process. Working as one team is the key.”

“Today there is a large well-established body of best practices in outsourcing. There is no need to reinvent the wheel”.

Jose:

“Our ground rule for the Global Sourcing team is not to hesitate to offer differing views to a client”.

“Our approach brings the benefits of legal representation when needed without the need for a retainer”.

“The difference between IT and BP outsourcing is in that the former focuses on inputs, while the latter on output – service delivered – which changes the way deals are priced.”

“The problem with providers today is that the sales / marketing team walks away when the deal is signed, which leads to frustration while building a new relationship with the delivery team”.

**Stikeman Elliott** is a 440-lawyer firm with an international reputation for sophisticated practice in all areas of business law, most notably banking, corporate finance, M&A and related fields, including related litigation at all levels of Canadian courts. Founded in 1952, the firm is widely regarded as a benchmark in the Toronto and Montreal markets and has become a major presence in corporate practice in Calgary, Vancouver and Ottawa. The firm’s international practice began in 1969 in London and has since expanded to New York, Hong Kong and Sydney. Because its offices are fully integrated — the firm has grown through internal expansion, not mergers — all Stikeman Elliott clients benefit from the full range of its national and international expertise. The firm regularly represents a broad range of domestic and international clients, including major Canadian and foreign corporations, financial institutions, pension funds, governments and

governmental agencies. It is recognized as a leader in both common law and Quebec civil law and offers its full spectrum of services in English and French.

Alison Youngman:

“It is very important to consult counsel during the annual review process. One of the problems with relationship management is that the managing team is not the one that signed the deal and may not know how the agreement was arrived at. In that case the outside counsel provides an authoritative opinion on what the deal was.”

“I look at outsourcing as a joint venture, not a service agreement. Partners should decide together what needs to be done for the deal to survive for 10 years to come. Negotiation is the first step in team building”.

“One of the problems with procurement driving the outsourcing negotiation is that their mindset is on lowering price through volume discount. However, outsourcing is a joint venture that needs to have a relationship management piece. Outside counsel with structuring knowledge may provide that.”

**Tarlo-Lyons** is a midsize London-based UK firm specializing in on-shore and off-shore IT, BP and HR outsourcing. Having developed one of the largest teams of dedicated technology lawyers in the UK, the firm believes in leveraging the expertise and talent it has assembled to provide real benefits for clients. It has experience of advising both service companies and customers, deep knowledge of the legal risks from both sides and can help clients to rationalise these. Tarlo-lyons attorneys are often called in to advise on the renegotiation of or exit from existing agreements. Attorneys counsel both suppliers and users and have experience working with financial services companies, utilities, telecoms and government. Clients range from international banks and financial institutions to retailers and property management companies, as well as outsourcing service companies.

“In the European Union outsourcing is seen by the authorities as a disguised workforce restructuring with corresponding social costs. There are strict rules that regulate restructuring and downsizing, so we’re expecting a new prohibitive legislation on outsourcing as well, especially in what concerns pensions and workers rights.”

“There is a growing appetite for outsourcing transactions in Europe, as CFOs are seeing the money saving potential and an opportunity for achieving greater efficiency.”

Established over 100 years ago, **O’Melveny & Myers** is currently the 18<sup>th</sup> largest legal firm in the US, with over 800 attorneys working in 14 offices in the US, Europe and Asia. The firm has recently decided to expand its practice to introduce capabilities in IT and BP outsourcing. There are currently some 15 experienced attorneys dedicated to representing clients in outsourcing transactions.

According to Bill Peters,

“Outside help is needed to drive the process, to overcome the internal hurdles and work with internal team. The more people inside the company are involved, the bigger are the chances for success.”

“We always recommend clients to engage an independent consultant to help think through the issues from a different point of view. “

“It is sometimes difficult to draw a 100% distinction between legal and business advice. There is an overlap between the two.”

“Company structure, level of regulation and other parameters differ with industry and affect how outsourcing transaction should be structured.”

“There is a trend now to involve auditors upfront and get their advice at the structuring phase, rather than just obtaining a seal of approval afterwards”.