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Inside Outsourcing™



Larry Janis'
interview with:
Adam Sak

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Partner, Global Outsourcing Transactions
Wilson Sonsini Goodrich & Rosati, PC

Wilson Sonsini Goodrich & Rosati's Global Outsourcing Transactions practice provides clients with effective, efficient, and strategic legal counsel that supports each client's commercial and legal objectives. Our attorneys evaluate, structure, negotiate, remediate, and renew all types of information technology outsourcing (ITO) and business process outsourcing (BPO) transactions. Beyond expert legal advice, our attorneys value and balance the commercial goals and risks that motivate client and service provider and strive to find market-based, equitable, and sustainable contractual solutions.

From the Editor.

Welcome to our current issue!

Inside Outsourcing's goal is to provide you with articles of interest and with a forum for the exchange of information in this rapidly evolving industry.

LJ: Having worked for law firms, a provider and an advisory firm, you have a unique perspective on Outsourcing deals. In the time you have been involved in the industry, how has it changed?

AS: The industry is maturing rapidly as the outsourcing solution becomes more diverse and prevalent. This has produced a shift in the relative knowledge and transaction experience between providers and buyers. Providers typically led early outsourcing transactions from a process and contracting perspective. They typically organized all due diligence and data collection activities and provided the base contract forms. With industry maturity, the availability of buyer-side expert resources significantly narrowed the knowledge gap between providers and buyers and created a market where the buyers now drive the data collection and contract streams. As a result, outsourcing transactions are built on buyer requirements rather than provider capabilities, which in turn produces "healthier" contracts. Overall, I think today's transactions are less susceptible to catastrophic failure because of the maturation of the processes, contracts, and buyer capabilities. (continues on next page)



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LJ: Have the buyers of outsourcing become more sophisticated? Explain.

AS: Absolutely. The industry has matured to the point that expert knowledge is readily available in the market. Many buyers today can leverage internal resources with outsourcing experience gained from either prior employment or prior transactions within the buyer's own business. That internal capability is supplemented with a rapidly growing external knowledge market made up most notably of the third party advisory firms and experienced external legal counsel. Today's buyers are in an unprecedented position of equal knowledge with the providers.

LJ: Have the providers changed their approach to constructing deals?

AS: Providers are more conservative today as they are challenged by constricted service delivery bandwidth and margin requirements. These changes are manifested in two areas: client selection and contract risk profile. With provider delivery capacity stretched and expensive sales pursuit costs, deal pursuit teams have stringent internal hurdles for qualifying new client opportunities. To some degree, providers have the luxury of cherry-picking the best and safest client opportunities to pursue. This means that buyers need to present a compelling service and financial business case to providers that demonstrates a commitment to outsourcing based on reliable internal due diligence.

Providers have also matured in their contracting practices--away from "revenue-at-all-costs" to a more responsible "risk-margin" balance. Early outsourcing contracts had more "one-off" terms designed to address unique problems or needs of buyers or to transfer delivery infrastructure to providers. For example, it was not uncommon in early BPO contracts for providers to guarantee financial gainshare on third party spend and then over-commit on the inclusion of third party contractor relationships to be managed as part of the outsourcing solution. The result often was increased revenue (albeit pass-through revenue) but at a financial loss for the provider.

These gambles produced a financial advantage in the short term for clients, but in the long term they are dangerous as they put the provider's business case in jeopardy which can divert the provider's attention away from innovation and service delivery quality.

Today, providers perform risk profiling of contracts which produces a more conservative negotiating style with more uniform contract terms and methodologies. This contracting process maturity ultimately serves the industry well by creating sustainable service delivery relationships for both the buyer and provider. *(continues on next page)*



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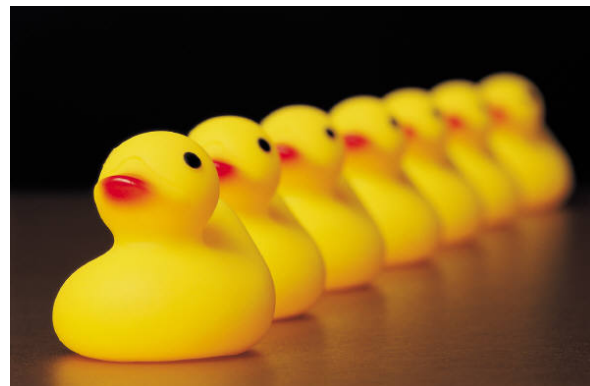
LJ: What do the third party advisory firms (e.g., TPI, Deloitte, EquaTerra) add to the process?

AS: The sourcing advisors are invaluable for their broad industry knowledge, processes, and commercial expertise. Their contributions are generally valued by *both* buyers *and* providers. As I mentioned, providers are more selective in qualifying client pursuits today. From the provider's viewpoint, the presence of an advisory firm demonstrates the buyer's commitment to an outsourcing solution, thereby bolstering the pursuit qualification. The data collection, analysis, and RFP procedural rigor implemented by third party advisors also increases the quality and reliability of RFP data and typically reduce the length of the sales and contracting cycle.

From the buyer's perspective, not only are these firms trusted advisors on the state of the market and provider capabilities, they provide best practices and procedural rigor that organize and maximize the buyer's efforts. The result is that advisory firm-led transactions produce enhanced qualitative and quantitative data and analysis that assist buyers in making the best information-based decisions on outsourcing solutions.

LJ: What are the top five goals your clients are hoping to achieve in outsourcing a function?

AS: Buyers of outsourced services need to balance complex internal and external goals, perceptions, and politics. Outsiders immediately think cost reduction achieved by off-shoring—but that is not what motivates most clients to outsource. More than economic gains, clients typically are drawn to the outsourcing solution to achieve service-related goals: increased service quality, process and technology innovation, and the freedom to re-focus internal resources on strategic initiatives. Economic values do remain an incentive and clients are primarily looking for year-over-year service delivery cost reductions and relief from capital investment.



LJ: What are their biggest concerns around an outsourcing deal?

AS: Buyers need assurance that while they outsource the delivery of a function, they are not outsourcing their governance and control over how they receive the services. The contract needs to create governance processes that drive collaboration and knowledge sharing between the parties while permitting the client to propose service delivery changes that reflect its changing policies and priorities. Successful outsourcing relationships are dynamic in that they accommodate change and provide security to the client in the form of information and reasonable control (in a manner that equitably protects the provider). *(continues on next page)*



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Also, buyers are concerned with the cultural fit with a provider. The services and economics may be great, but if the cultures clash, the transaction will be a failure. Buyers should demand the ability to meet the provider's proposed service delivery team and perform reference checks to ensure that first impressions are indeed accurate impressions.

There is also a heightened focus on successful transition of the services to the provider. The transition period is stressful for buyers as they undergo significant internal procedural and personnel changes. Successful transitions treat the buyer as a partner rather than service recipient and allow the buyer to retain the ultimate go/no-go decision rights on each critical transition milestone. Providers and buyers need to address transition planning, roles, and remedies in detail during the contract negotiation phase rather than deferring these critical activities until after contract signing.

LJ: From a legal perspective, are there significant differences in the approach to an ITO versus a BPO deal?

AS: The line between legal and commercial perspectives of outsourcing contracts is blurred and often non-existent. The best approach is to evaluate and negotiate outsourcing contracts holistically with the recognition that service-oriented terms impact legal/risk-oriented terms and vice-versa. Within that framework, in general, the contract structure and negotiation strategies for ITO and BPO contracts are similar. However, the service elements (SOWs), performance metrics, and fee models vary significantly and require experience to maximize the outcomes. But, given the different commercial sensitivities of outsourced services and the different stages of maturity between ITO and BPO service models, different risks exist and need to be accounted for in the contract. This can lead to different remedies, limitations of liability, indemnities, and representations and warranties. There is no one-size-fits-all contract for outsourcing; each transaction and the buyer's and provider's specific needs must be harmonized and resolved.



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LJ: What has allowed you to be successful?

AS: Over my career, I have been fortunate to be mentored by top industry leaders. These experiences have enriched my outsourcing expertise and demonstrated the value of diverse thinking. My success, and ultimately my clients' success, is rooted in my respect and understanding of the commercial and legal imperatives that motivate both buyers and providers. The cornerstone of my outsourcing counsel and methodology is a collaborative approach that strives to achieve market-based, equitable, and sustainable contractual solutions that work for both parties.



"If your parents never had children, chances are you won't either." ...

Dick Cavett