

Chapter 1.17

Evolving Relationship between Law, Offshoring of Professional Services, Intellectual Property, and International Organizations

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ABSTRACT

This article covers four issues. First, it examines evolving international conventions to determine whether countries, especially developed countries, can take any steps to inhibit offshoring with the objective of protecting jobs in their respective countries. Second, it looks at statistics from independent sources to see if outsourcing exceeds insourcing, or vice versa, in the case of the U.S. Third, it looks at trends in outsourcing in the legal arena. Fourth, it looks at the intellectual property aspects of outsourcing and presents a long-term

vision on how this ticklish issue is likely to be addressed in the long-term.

INTRODUCTION

“Outsourcing” is a relatively new term for something that has been happening in the United States for at least 40 years, namely, the shifting of production of goods (and, more recently, services) to nations where wages are lower than in the United States. The most obvious example is textiles and apparel, in which factories located in

New England moved to the southeast beginning shortly after World War II, in search of lower-wage, non-unionized labor and low cost electric power. Beginning in the 1960s or earlier, some producers and consumers shifted their sourcing to Asia and to Latin America, particularly to Mexico, Japan, and later South Korea, Taiwan, and Hong Kong. More recently, China, Pakistan, India, Bangladesh, Sri Lanka, and Vietnam have become popular locations, among others, for textile and apparel production.

The outsourcing of service industry jobs from the United States (and Canada, the EU, and Japan, among others) is somewhat more recent, as it is only viable with very low-priced telephone and Internet communications worldwide, a feature of the fiber optic cable construction in the 1990s. Shifting of low-wage telephone service positions (for computer technical support, airline reservations, etc.) did not seem to raise a good deal of controversy in the United States, except perhaps in the communities which lost the service centers (including Tucson), and among the labor unions. Even the outsourcing, particularly from Silicon Valley, of routine computer software work seemingly raised relatively few alarms.

However, the newest outsourcing phenomenon—mostly to India—is far more troubling both economically and politically to U.S. policy-makers. The prospect of widespread outsourcing of relatively high wage professional services positions—software development, banking and brokerage, medical, and legal services—is creating a good deal of concern, and there have been various proposals to curb such trends, by legislation or otherwise.

The first question this article addresses is what the United States can do under international trading rules to discourage outsourcing. There may be some tax laws and policies that could be modified, primarily to reduce tax incentives for production abroad and to encourage the investments supporting outsourcing to stay home. Some in Congress have suggested trying to prevent U.S. firms from

investing abroad, but in most cases this would be questionable under investment treaties in the unlikely event the Congress tried to impose such restrictions, and would in any event be impossible to enforce against multinational enterprises. There is relatively little action the U.S. could take to reduce the outsourcing process that would not run afoul of international trading rules, which are designed first of all to make it possible for any consumer of goods or services to purchase the best available at the lowest prices, without interference from tariff or non-tariff barriers.

The second question this article addresses is whether the United States is a net beneficiary or net loser when outsourcing occurs. This analysis has been done by others at various levels: at the national level, at the company level, and at the individual level. Companies adopt outsourcing practices because they offer lower costs and other benefits. At an individual level, if a person loses a job, he or she is a loser. However, at the national level, the analysis needs more careful attention: outsourcing leads to jobs moving from the U.S. to other countries, and jobs moving from other countries to the U.S.

The third question this article addresses is how outsourcing will impact the legal community in the short-run and in the long-run. Specific examples are considered.

The fourth and final question is how intellectual property can be equitably protected in an economy that involves growing levels of offshoring.

OUTSOURCING UNDER INTERNATIONAL TRADING RULES

Virtually any nation that accedes to the World Trade Organization (WTO) agreements is required to take a number of specific steps toward facilitating freer trade. Most of these involve the reduction or elimination of trade barriers and opening of domestic markets and trading opportunities to foreign-owned firms. Acceding members in

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