

Top 10

Legal Issues in Technology, Ecommerce, and Information Management Outsourcing Agreements

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In light of the current economic climate, more companies are relying on outside vendors to provide technology, ecommerce, and information management (“IM”) services. Your company may be considering doing the same. After all, the creation of an internal infrastructure to engage in ecommerce, to manage information, and to provide technology-related services to customers or internal business units can be very expensive and can distract from a company’s core business focus. Outsourcing these services may be an important part of your company’s business plan.

The technology, ecommerce, and IM-related functions of a business that you can outsource include the following:

- Data processing, aggregation, and storage.
- Network, website, and web-based application hosting.
- Inventory and workflow management.
- Software and systems development and maintenance.
- Security and privacy monitoring and compliance.
- Billing, payment processing, and funds transfers.
- Customer and employee support services.

Vendors that provide these and other outsourcing services range from some of the world’s largest multinational computer and technology companies to national and regional technology services vendors to much smaller and more local vendors and service providers.

This article presents a top 10 list of legal issues that you should consider when negotiating outsourcing contracts with vendors of technology, ecommerce, and information management.¹ Some of these issues are as old and as well understood as contract law



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itself and are not necessarily unique to technology outsourcing contracts. Other issues—especially those relating to intellectual property, data and information privacy and security, and vendor compliance controls—are relatively more modern, and their importance is at a premium. You should clearly address all of these issues, along with the basic concepts of who will do what and when and the allocation of liability and risk, in carefully worded outsourcing agreements that provide performance and compliance standards.²

Your outsourcing contracts may take the form of software licensing, information processing, and application service provider agreements. Depending on the nature and value of the services being outsourced and on the relative bargaining positions of your company and the vendor, the preparation and negotiation of your outsourcing agreement may be rather quick and one-sided or more protracted and evenly split between the parties. Both a small business acquiring outsourcing services from IBM and a small outsourcing vendor providing services to General Motors may be expected to fill in some blanks and sign—without negotiation—a form outsourcing services agreement prepared by the much larger company.

Beware, however, because some companies have resorted to novel contract language in an attempt to establish and protect the nonnegotiability of standard form technology services contracts. We

reviewed the following provision in the boilerplate section of a software license agreement: "Licensee agrees to pay a \$275.00 per hour review fee for all work conducted by or on behalf of Licensor that relates to a Licensee-requested modification or addition to, or deletion of, any provision of this standard Software License Agreement, whether or not the requested modification, addition, or deletion is incorporated into the final Agreement."

Needless to say, that language was deleted from the final agreement, without payment of the "review fee." Another approach designed to discourage negotiation of and changes to standard form contracts is the use of password-protected or "read only" electronic document files. Such files permit only certain limited fields, such as the party's name and address, the contract date, and the signature block, to be filled in.

If your company is outsourcing some or all of its most central or critical technology, ecommerce, or IM functions, you need to be comfortable with every aspect of the agreement, regardless of the size and bargaining position of the parties. Another important aspect of the cost/benefit analysis for outsourcing contract drafting and negotiation is the absolute cost or value of the services or deliverables to your company. You certainly do not want to spend tens of thousands of dollars in legal fees on a contract for services that will cost your company only a few thousand dollars over the life of the contract.

Our list of legal issues is not exhaustive. We present it as a basic framework for in-house and outside counsel to consider in structuring contractual relationships with technology, ecommerce, and IM services vendors. We also offer examples of contractual language that you can use to address some of these issues.

1. THE PARTIES' CORE OBLIGATIONS

Each agreement that you have with an ecommerce or technology services vendor should describe—perhaps in an attached statement of work—the vendor's obligations, the contract deliverables, the schedule for completion of the vendor's obligations, and whether the vendor's performance depends on your company's (vendee's) delivery of any content, materials, or intellectual property. This description of the parties' core obligations means that you must have a

clear understanding of the desired end product or service and what is needed to accomplish that end. It is extremely important for the business sponsors of your outsourced project to focus on and clearly comprehend its essential aspects before engaging in the contract drafting and negotiation process. The project sponsors, in turn, need to communicate their understanding to you and your outside counsel before you prepare the outsourcing agreement. In addition, your outsourcing agreement should state whether the vendor's obligations are to be performed only by the vendor or may be performed by affiliates or subcontractors of the vendor and should address contractual controls that may be necessary with respect to any such third parties.

Sample Contract Clause: TechVendor Co. ("Vendor") agrees to perform for and deliver to MyCo, Inc. ("Vendee"), the services and deliverables described in the attached Statement of Work (collectively "Services") in the manner and within the time periods set forth in the Statement of Work. Vendee agrees that Vendor's obligation to perform and deliver the Services is contingent upon Vendee's delivering to Vendor, within the time periods provided in the Statement of Work, the materials identified in the Statement of Work as to be provided by Vendee. Vendor shall have the right to cause its affiliates or subcontractors to perform or deliver the Services, provided that (1) Vendor shall ensure, and shall remain liable to Vendee for, the performance and delivery of the Services in accordance with the terms and conditions of this Agreement, (2) before using any affiliate or subcontractor to perform or deliver Services, Vendor shall obtain Vendee's written consent to the use of the affiliate or subcontractor, and (3) Vendor shall cease using any affiliate or subcontractor to perform or deliver Services immediately upon receipt of written notice from Vendee to do so.

2. OWNERSHIP OF INTELLECTUAL PROPERTY AND DATA

Your outsourcing agreement should identify the intellectual property to be supplied to the project by the contracting parties and by any third parties and should provide appropriate licenses or sublicenses for the use of such intellectual property. The agreement should be very clear about who will own the project deliverables and any new intellectual prop-

erty created in the course of the project, which might include business processes or modifications or customizations of existing software applications or programs. You should clearly spell out your company's rights to receive and use future releases and versions of the vendor's software. If the project involves the receipt, transmission, or collection of nonpublic personal user or consumer data and information, your agreement should be very clear as to ownership and use rights in such data.

You should also check the laws of every jurisdiction that your agreement will be governed by to make sure that your company will be in compliance. For example, two states, Maryland and Virginia, have enacted the Uniform Computer Information Transactions Act ("UCITA"), the somewhat controversial uniform law that governs software licenses and other transactions involving computer information. A meaningful discussion of UCITA is beyond the scope of this article, but if you are entering into a software license agreement that will be governed by the law of Maryland or Virginia, we encourage you to become familiar with UCITA's provisions. See the sidebar on page xx for citations to UCITA as enacted in Maryland and Virginia. Note that UCITA expressly permits contracting parties to opt out of the application of the law to their transaction.

Sample Contract Clause: Both Vendee and Vendor shall provide the Intellectual Property identified in the Statement of Work as part of their performance under this Agreement. Vendee grants Vendor a limited, nonexclusive license for the term of this Agreement to use the Vendee-provided Intellectual Property solely in the performance of Vendor's obligations under this Agreement. Vendee shall be the sole and exclusive owner of the Intellectual Property included in or that is part of the Services, provided, however, that to the extent that any such Intellectual Property was the property of Vendor or any third party before the Effective Date, Vendee shall be a licensee or a sublicensee in perpetuity of such Intellectual Property. Each copyrightable element of the Services created in connection with the performance of Vendor's obligations under this Agreement shall be a "work made for hire" for purposes of U.S. copyright laws. Vendee shall own all data and information by, from, or about Vendee and its customers that is received or obtained by Vendor in connection with its performance under this Agreement, including, but not limited to, all data about the use of the Services by Vendee and its customers.

From this point on . . .

Explore information related to this topic.

ONLINE:

- ACCA's Ecommerce Committee, which has a listserv to join and other benefits. If you have questions about the Ecommerce Committee or other ACCA committees, contact the chair (listed in each issue of the *ACCA Docket*), or contact Staff Attorney and Committees Manager Jacqueline Windley at 202.293.4103, ext. 314, or windley@acca.com, or visit ACCA OnlineSM at www.acca.com/networks/ecommerce.php.
- Roger Bickerstaff and Anthony Sournges, *Application Service Providers: Negotiating the Best Deal*, GLOBAL COUNSEL, 2001, VI(5), 38, available on *PLC Law Department* at www.practicallaw.com/a18394.
- E-COMMERCE PRACTICE MANUAL (Global Counsel 2002), available on *PLC Law Department* at www.practicallaw.com/T2061.
- EU Data Privacy Directive Safe Harbor Overview, U.S. Dept. of Commerce, at www.export.gov/safeharbor/sh_overview.html.
- Federal Financial Institutions Examination Counsel, "Risk Management of Outsourced Technology Services," at www.ffiec.gov/PDF/pr112800_guidance.pdf.
- Rory Graham, *Technology Outsourcing*, GLOBAL COUNSEL, 1999, IV(2), 45, available on *PLC Law Department* at www.practicallaw.com/a10337.
- Scott Leis, *Outsourcing Software Management*, on CFO.com, Oct. 1, 2002, at www.cfo.com/article/1,5309,7790,00.html.
- Outsourcing Research Center, at www.cio.com/research/outsourcing/.
- Wissam Raffoul, *The Road to Outsourcing Success and the Outsourcing Management Maturity Model*, ZD NET TECH UPDATE, Mar. 4, 2002, at <http://techupdate.zdnet.com/techupdate/stories/main/0,14179,2851971-1,00.html>.
- Technology Primer, an InfoPAKSM available on ACCA OnlineSM at www.acca.com/infopaks/tech/infopak.pdf.
- Alison Welterveden, *Drafting IT Outsourcing Contracts*, GLOBAL COUNSEL, 2000, V(3), 58, available on *PLC Law Department* at www.practicallaw.com/a12748.

ON PAPER:

- Henry W. Chesbrough and David J. Teece, *Organizing for Innovation: When Is Virtual Virtuous?* HARV. BUS. REV., Aug. 1, 2002, at 127, summary description and purchasing information available at http://harvardbusinessonline.hbsp.harvard.edu/b01/en/common/item_detail.jhtml?id=R0208J.
- Darrell A. Fruth, *Economic and Institutional Constraints on the Privatization of Government Information Technology Services*, 13 HARV. J. L. & TECH. 521 (Summer 2000).
- Karen K. Harris, *Issues for Healthcare Companies When Contracting with ASPs*, 19 J. MARSHALL J. COMPUTER & INFO. L. 569 (Summer 2001).
- Julie L. Williams and James F. E. Gillespie Jr., *The Impact of Technology on Banking: The Effect and Implications of "Deconstruction" of Banking Functions*, 5 N.C. BANKING INST. 135 (Apr. 2001).

If you like the resources listed here, visit ACCA's Virtual LibrarySM on ACCA OnlineSM at www.aca.com/resources/vl.php. Our library is stocked with information provided by ACCA members and others. If you have questions or need assistance in accessing this information, please contact 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.

3. PRIVACY, SECURITY, AND CONFIDENTIALITY OF DATA AND INFORMATION

You should obtain the vendor's agreement to terms regarding the privacy, security, and confidentiality of nonpublic personal, confidential, or proprietary data and information from or about your company and its customers. Specifically, the vendor should agree to take the following actions:

- Protect and maintain the privacy and security of any personally identifiable data and information that the vendor obtains or to which the vendor has access, consistent with your company's policies and with applicable federal, state, and local data privacy and security laws, including the data privacy and security regulations promulgated by various federal agencies under Title V of the Gramm-Leach-Bliley Financial Services Modernization Act of 1999 (such as the U.S. Securities and Exchange Commission's Regulation S-P).³
- Where applicable, protect and maintain the privacy of health and medical information covered by the patient information privacy regulation promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA").⁴
- Where applicable, comply with foreign laws and regulations regarding data privacy protection, especially the European Union ("EU") Directive on Data Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of such Data, otherwise known as "Directive 95/46/EC" or the "EU Data Protection Directive." A meaningful discussion of the EU Data Protection Directive is beyond the scope of this article. The directive basically prohibits the transfer of personal data to a country outside of the EU, including the United States, that lacks adequate personal data privacy safeguards, as determined by the European Commission. To bridge the gap between the different approaches to data privacy protection taken by the EU and the United States, the European Commission and the U.S. Department of Commerce have developed a safe harbor framework for U.S. companies to use. For more information about the EU Data Protection

Directive and the EC-U.S. safe harbor, see the sidebar in this article on page 48.

- Maintain commercially reasonable data and information privacy, security, and disaster recovery measures, including server firewalls, data encryption, physical facilities security, hacking detection and prevention measures, and a disaster recovery and business resumption program. Regulatory agencies and businesses, understandably, have increasingly focused on disaster recovery planning in the wake of the terrorist attacks on September 11, 2001. For example, on September 4, 2002, the U.S. Securities and Exchange Commission ("SEC"), the Office of the Comptroller of the Currency, and the Federal Reserve Board issued an "Interagency Concept Release: Draft Interagency White Paper on Sound Practices to Strengthen the Resilience of the U.S. Financial System," which discusses and invites comments on business continuity and recovery issues for businesses in the financial services sector. And the HIPAA draft security regulation—in a section that is not expected to change when the regulation becomes final—and good practice require that covered entities have in place a disaster recovery plan and an emergency mode operation plan specific to electronic and paper health information over and above whatever is in place for the organization as a whole.
- Maintain and protect the confidentiality of your company's proprietary and confidential data, plans, and information. If the parties or end-user customers are to have online access to data or information in connection with the outsourced project, your outsourcing agreement should provide user identifications and passwords or biometric or other access controls and clearly state the parties' responsibilities for administration of such controls. In our experience, effective and reliable biometric access and security controls remain a fairly costly and not widely used or available tool for most businesses, but you should conduct a risk analysis to determine whether your company should invest in such security measures, especially if you are a covered entity subject to HIPAA.

Sample Contract Clause: Vendor acknowledges and agrees that, in the performance by the parties of their obligations under this Agreement, Vendee will provide to

DATA PRIVACY AND SECURITY LAWS AND REGULATIONS

Listed below are citations to a number of laws and regulations—none of which existed a mere five years ago—that you may want or need to review or consider when preparing and negotiating an outsourcing agreement.

Title and Web Resource for Text	Citation	Applies to
Gramm-Leach-Bliley Act (Title V) (1999), www.finmod.state.tx.us/content/theact/title5.pdf .	15 U.S.C. §§ 6801–6810	Companies whose business is engaging in financial activities.
U.S. Securities and Exchange Commission (“SEC”) Privacy Regulation (Reg S-P) (2000), www.sec.gov/rules/final/34-42974.htm .	17 C.F.R. Part 248	Brokers, dealers, investment companies, and investment advisers registered with the SEC.
Banking Agencies Joint Privacy Regulations (2000), www.finmod.state.tx.us/content/federal/frb/finpri.pdf .	12 C.F.R. Parts 40, 216, 332, 573	Banks, savings associations, and other depository institutions for which the Federal Reserve Board, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, or the Federal Deposit Insurance Corp. has primary supervisory authority.
Banking Agencies Joint Information Security Regulations (2001), www.complianceheadquarters.com/Privacy/66FR8615.txt .	12 C.F.R. Parts 30, 208, 211, 225, 263, 308, 364, 568, 570	
National Credit Union Administration (“NCUA”) Privacy Regulations (2000), www.complianceheadquarters.com/Privacy/Privacy_Research/ncua51800.pdf .	12 C.F.R. Parts 716, 741	Federal credit unions.
NCUA Information Security Regulations (2001), www.complianceheadquarters.com/Privacy/Privacy_Research/66FR8152.txt .	12 C.F.R. Part 748	
Federal Trade Commission (“FTC”) Privacy Regulations (2000), www.ftc.gov/os/2000/05/glb000512.pdf .	16 C.F.R. Part 313	Financial institutions over which and persons over whom the FTC has enforcement authority under the Gramm-Leach-Bliley Act.
Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) Privacy Regulation (2003 compliance date), www.hhs.gov/ocr/hipaa/privrule.txt .	45 C.F.R. Parts 160, 164	Health plans, health care clearinghouses, and health care providers defined as covered entities.
Uniform Computer Information Transactions Act (“UCITA”) (as of the end of 2002, enacted only in Maryland (2000) and Virginia (2001)). Maryland: http://mlis.state.md.us/2000rs/billfile/hb0019.htm . Virginia: http://leg1.state.va.us/cgi-bin/legp504.exe?001+ful+SB372ER .	Md. Code Ann., Com. Law § 22-101, <i>et seq.</i> Va. Code Ann. § 59.1-501.1, <i>et seq.</i>	Transactions governed by Maryland or Virginia law.
EU Data Protection Directive (1998), www.privacy.org/pi/intl_orgs/ec/final_EU_Data_Protection.html .	Directive 95/46/EC	Personal data of citizens in the European Union.

Vendor or Vendor will have access to nonpublic personal data or information of Vendee's customers ("Customer Information") that is subject to Title V of the Gramm-Leach-Bliley Act of 1999 and the regulations promulgated under that Act (collectively "GLB"). Vendor shall at all times comply with all requirements of GLB and all other federal, state, and local laws, rules, regulations, and ordinances governing the privacy and security of Customer Information (collectively "Privacy Laws"). Such compliance shall include, but not be limited to, Vendor (1) not disclosing any Customer Information to any third party except as expressly provided in this Agreement or otherwise directed or authorized in writing by Vendee, (2) ensuring that its employees and subcontractors who obtain or have access to Customer Information comply at all times with the Privacy Laws and the provisions of this Agreement regarding the use and protection of Customer Information, and (3) protecting and maintaining the security of all Customer Information in Vendor's custody or under Vendor's control. Vendor shall immediately report to Vendee any unauthorized disclosure or use of or any unauthorized access to any Customer Information in Vendor's custody or under Vendor's control. Vendor shall protect and maintain the confidentiality of all proprietary or confidential information of Vendee that is provided to or obtained by Vendor.

4. PERFORMANCE AND WARRANTY STANDARDS AND TESTING

Your outsourcing agreement should provide clear standards by which you measure the vendor's performance and its compliance with contractual requirements. These standards can be very objective, such as "meets or exceeds XYZ industry standard," somewhat objective, such as "professional and workmanlike manner," or more subjective, such as "to the vendee's reasonable satisfaction." You should tie the standards to clearly quantified specifications and parameters for the project services and deliverables and provide for a vendor warranty that the services and deliverables will meet the agreed-upon specifications and standards. In an ongoing services arrangement, you should consider using fee reductions, rebates, or other economic disincentives to discourage the vendor from failing to meet agreed-upon standards of performance. You can set forth the detailed standards, specifications, problem resolution response times,

and consequences of not meeting agreed-upon standards in a statement of work or a service level agreement that you attach to the outsourcing contract. Where feasible, you should subject deliverables and services that are new, unique, or otherwise not standard or widely used software or application products to real-time and worst case scenario testing and quality checks before being accepted.

Sample Contract Clause: Vendor shall perform and deliver the Services in a professional and workmanlike manner. Vendor warrants that the Services (1) will be performed and delivered according to the specifications in the Statement of Work and (2) will meet or exceed the service level standards in the attached Service Level Agreement. In the event of a failure of this warranty, Vendee shall have the termination rights, the right to receive credits, refunds, and discounts, and the other rights set forth in the warranty failure remedies matrix in the Service Level Agreement. Before Vendor shall be deemed to have completed the performance of its obligation to deliver any software, application, or functionality that is a part of the Services, Vendor shall make such deliverable available for testing by Vendee according to the deliverables testing protocol set forth in the Statement of Work.

5. VENDEE AND END-USER CUSTOMER TRAINING AND SUPPORT

Your outsourcing agreement should describe the level, amount, nature, and availability of training and support that the vendor will provide to your company and its end-user customers and include installation support and user documentation, as well as the additional cost, if any, of such training and support. For web, network, or application hosting agreements, you should consider attaching a schedule that provides for escalating vendor response obligations as the duration or severity of outages or other problems increases. You should also consider which of these obligations to include in the outsourcing agreement and which to include in an ongoing maintenance services agreement between the vendor and your company.

Sample Contract Clause: After acceptance of the Services by Vendee as contemplated in this Agreement, Vendor agrees to provide training in the

use of the Services to Vendee's employees at Vendee's offices at a time or times agreed upon by the parties. The training that Vendor will provide at no additional expense to Vendee will consist of a five-day customized advanced training session for up to 10 Vendee employees. In addition, Vendor will provide up to 30 days of post-training consultation to Vendee's management at no additional expense to Vendee. Vendor agrees to provide additional training and consultation for Vendee's employees and management in accordance with the fee schedule in Attachment C to this Agreement. Vendee shall provide "first level" call center and web-based support services for Vendee's customers who are end users of the Services. Vendor shall provide the "second level" call center and web-based support services described in greater detail in the Service Level Agreement to support Vendee and Vendee's customers that are referred by Vendee to such support services.

6. RISK MANAGEMENT (TERM, TERMINATION, INDEMNITY, LIABILITY LIMITS, INSURANCE)

Your outsourcing agreement should provide term and termination provisions that give your company the flexibility to take advantage of the agreement over an initial term and extensions of that term, if so desired, and also permit you to terminate the agreement on short notice and without penalty if the vendor's performance is inadequate. The agreement should provide that the vendor will indemnify your company against third-party claims, particularly claims involving intellectual property rights and improper or unauthorized use of nonpublic personal data, arising from the vendor's performance or breach under the agreement. You should generally limit the parties' respective liability for direct and actual damages, with the exception of some of the vendor's indemnity obligations, such as those for third-party claims of infringement of intellectual property rights or of unlawful or unauthorized use or disclosure of data or information. You should require the vendor to maintain insurance in commercially reasonable amounts covering its business and operations, including insurance against ecommerce risks.

The need for a clear allocation of risk in ecommerce outsourcing contracts is illustrated by cases involving financial services companies whose cus-

tomers cannot execute securities trades or other transactions online because of insufficient web server capacity or other technological problems. For example, in early 2001 the New York Stock Exchange ("NYSE") censured and fined online brokerage firm TD Waterhouse \$225,000 for repeated outages over an 18-month period that prevented customers from trading through the website.⁵ The NYSE found that TD Waterhouse's failure adequately to supervise and control its web-based trading business violated NYSE Rule 342, which requires members to maintain appropriate procedures for supervision and control of "each office, department or business activity."

To the extent that brokerage firms and other financial services companies outsource critical elements and functions of transactional websites used by their customers, their outsourcing agreements should allocate the risk of loss and damages, in the event that failure occurs and the transactional websites become unavailable. This risk allocation should include damages to third-party users of the websites.

Sample Contract Clause: The initial term of this Agreement shall be three years from the Effective Date. Upon the expiration of the initial term and any subsequent renewal term of this Agreement, the term shall automatically be renewed for one year, unless either party has provided written notice of nonrenewal to the other party at least 90 days before the expiration of the then-current term. In the event of a material breach of this Agreement, this Agreement shall terminate 30 days after written notice of breach from the nonbreaching party to the breaching party, unless the breaching party has cured the breach before the end of the 30-day notice period. In addition, Vendee shall have the right to terminate this Agreement immediately upon written notice to Vendor in the event of a breach by Vendor of any of its obligations under this Agreement regarding the use, protection, privacy, or security of Customer Information or regarding Vendee's Intellectual Property or other confidential or proprietary information. Vendor shall indemnify and hold harmless Vendee against any damages, expenses, or losses arising from or relating to any claim that (1) the Services or Vendor's performance under this Agreement infringes a third party's Intellectual Property rights or (2) Vendor made or allowed an unlawful, unauthorized, or inappropriate use or disclosure of Customer Information.

7. FEES AND PAYMENT TERMS

Your outsourcing agreement should describe all fees and costs that your company and the vendor will pay, including taxes, and specify when and by whom they are to be paid. You might also tie milestone or progress payments to the project schedule to encourage the vendor to meet the schedule. As discussed above, you could include economic disincentives, such as fee reductions, credits, or rebates, to discourage the vendor from breaching the warranty or failing to meet performance standards.

Sample Contract Clause: In consideration of the performance of the Services as contemplated in this Agreement, Vendee shall pay Vendor fees in the amounts and at the times set forth in the Statement of Work. The parties agree that some or all of the fees payable by Vendee under this Agreement may be discounted or refunded pursuant to the provisions of the Service Level Agreement. Any fee amount not paid when due will incur a finance charge at the rate of 1.5 percent per month. Each party shall be responsible for the payment of all taxes assessed against it in connection with its performance under this Agreement.

8. PROJECT ADMINISTRATION, REPORTING, AND AUDIT RIGHTS

Your agreement should identify and provide contact information for those vendor representatives who will have knowledge of and be responsible for the administration and performance of the project. Depending on the nature of your project, the agreement should require the vendor to provide regular reports regarding the project status and website or application usage and other metrics. You should insist upon a reasonable right to audit the vendor's books and records that relate to the agreed-upon product or service and the vendor's performance under the agreement. If you are arranging data processing and other "mission critical" outsourcing in a regulated industry, such as banking and financial services or health care, you should also insist upon the vendor's acknowledgment and agreement that its performance will be subject to regulatory oversight and examination by your examiners or regulators.

Sample Contract Clause: The names and contact information of the project managers for Vendor and Vendee are set forth in the Statement of Work. Each project manager shall be the primary point of contact for his or her respective party on all issues arising under this Agreement. Vendor shall provide Vendee a copy of all reports, including internal reports, generated by Vendor regarding Vendor's performance and delivery of the Services and the use of the Services by Vendee and its customers or end users. Vendee shall have the right, not more than twice in each 12-month period during the term of this Agreement, to audit Vendor's books and records relating to Vendor's performance under this Agreement. Vendee shall provide Vendor at least five business days' prior written notice of each such audit, and all such audits shall be conducted at Vendor's place of business during normal business hours. [You should add here any specific language applicable to your situation. For example, if your company is in the health care industry and a covered entity under HIPAA, you would want to add language along the following lines: Vendor shall make immediately available for inspection by the Secretary of the Department of Health and Human Services ("DHHS") or any state licensing agency or recognized professional accreditation organization any requested records, including protected health information ("PHI"), and immediately notify Vendee of such inspection or request for information. See the model business associate agreement in the August 2002 changes to the HIPAA privacy regulation for other required language in business associate contracts.]

9. TRANSITION OF SERVICES OR DELIVERABLES AT END OF CONTRACT

If your company will own or be a continuing licensee of deliverables that are not in its possession, you should provide in the outsourcing agreement for the transfer of the deliverables (or related work in process) upon the termination or expiration of the agreement. For services contracts, you should arrange for the vendor's orderly transition of the services to a new provider that you designate.

Sample Contract Clause: Upon expiration or termination of this Agreement, Vendor shall deliver to Vendee or its designee all deliverables, including work in process related to deliverables, that are included within the Services and are in the custody or under the control of Vendor. Vendor

agrees upon expiration or termination of this Agreement to cooperate with Vendee in the orderly transition of the provision of the Services to Vendee's designee.

10. DISPUTE RESOLUTION

You should consider agreeing to an initial informal dispute resolution mechanism between project managers or senior executives. Your agreement should reflect any arrangement that you negotiate to refer disputes to arbitration, mediation, or other forms of alternative dispute resolution, include the venue and rules and procedures for such dispute resolution, and specify whether the result of the dispute resolution process will be final and binding. If you contemplate a resort to the courts, you should consider including a choice of forum provision and an agreement to be subject to the jurisdiction of the chosen forum.

Sample Contract Clause: All disputes arising under this Agreement that are not resolved by the parties' respective project managers after meetings by them to address the disputes shall be referred to a senior or executive vice president for each party, who shall then meet in an effort to resolve such disputes. All disputes that are not resolved in such meetings shall be determined and settled by binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association. Nothing in this Section shall limit the right of each party to bring an action in court for equitable relief.

CONCLUSION

As we observed earlier, many of our top 10 legal issues are not new or unique to technology, ecommerce, and IM outsourcing contracts. Although the information and technology age has transformed much of what businesses do and how they do it, basic principles of sound commercial contract drafting and negotiation have not changed. It is just as critical in outsourcing transactions as it is in other commercial transactions that you clearly express in your written agreement who will be doing what, who will own what, and when, how, and to what standard the outsourced work will be performed.

What has changed in the past few years, however, is the value to businesses of technology, information, and ecommerce processes. Such value has ascended

considerably. You must take extra care when your company outsources functions that involve these "crown jewels." Your outsourcing agreement must clearly address the ownership and protection of these assets, as well as the allocation and management of risks posed by their unauthorized or improper use.

Careful drafting and negotiation of technology, ecommerce, and IM outsourcing contracts are extremely important functions of both in-house and outside counsel. We expect the complexity and importance of these agreements—and the challenge to counsel to understand and address the issues presented in them—to increase in coming years as technological innovations and the use of data and information continue to change the way we do business. ■

NOTES

1. We note that, for a variety of reasons, outsourcing may not be the best choice for your company's particular business or operations. For an interesting article on the relationship between outsourcing (and similar arrangements) and innovation, which also includes a discussion of the potential danger of such arrangements and a presentation of a framework to help managers determine when to innovate internally or through external alliances and outsourcing, see Henry W. Chesbrough & David J. Teece, *Organizing for Innovation: When Is Virtual Virtuous?* HARV. BUS. REV., Aug. 1, 2002, at 127.
2. Although we refer in this article to some of the federal and state laws and regulations that may govern aspects of technology, ecommerce, and information management outsourcing arrangements, such as those concerning data privacy and security, we do not attempt to provide a detailed analysis of these laws or regulations. See the sidebar "Data Privacy and Security Laws and Regulations" on page 48 of this article. The value-added sidebar on page 45 of this article provides information on governmental and nongovernmental guidelines and resources for technology-related outsourcing, including the Federal Financial Institution Examination Council's guidelines for technology outsourcing by banks, savings associations, and other depository institutions.
3. Title V of the Gramm-Leach-Bliley Act is codified at 15 U.S.C. §§ 6801–6810. See the sidebar "Data Privacy and Security Laws and Regulations" on page 48 of this article for citations to various federal regulations promulgated by different agencies pursuant to the Gramm-Leach-Bliley Act.
4. The Health Insurance Portability and Accountability Act of 1996 ("HIPAA") is codified at 42 U.S.C. §§ 1320(d) *et seq.* The privacy regulation promulgated under HIPAA is codified at 45 C.F.R. Parts 160 and 164; generally, the compliance date for the privacy regulation is April 14, 2003.
5. See NYSE Hearing Panel Dec. 01-3 (Jan. 10, 2001).