



303 Doing Business in India

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Faculty Biographies

Maria L. Carlile
Vice President & General Counsel
CollabNet, Inc.

Robert M. Lindquist

Robert M. Lindquist is a vice president in the legal department of Ingram Micro Inc. in Santa Ana, California. He is responsible for legal and ethical compliance for the company's worldwide operations, as well as other matters. Ingram Micro is the largest wholesale provider of technology products and services in the world with \$28.8 B in revenue in 2005 and operations in North and South America, Europe, and the Asia Pacific region.

Previously Mr. Lindquist served as assistant group counsel for the Systems Integration Group of TRW Inc. and before then he was a partner in the Los Angeles office of Pepper, Hamilton & Scheetz.

Mr. Lindquist was president of ACC's Southern California Chapter and served on the ACC National Nominating Committee. He has served as the chair of the antitrust section of the Los Angeles County Bar Association and vice chair for publications of the State Bar of California antitrust section. He also served on the executive committee of the corporate law department section of the Los Angeles County Bar Association.

Mr. Lindquist received a B.A. from Lawrence University in Appleton, Wisconsin and his J.D. from the University of Texas School of Law.

Richard C. Mosher
Chief Legal Counsel
Engenix Technologies LLC



Doing Business in India Session 303

Maria Carlile
Rob Lindquist
Dick Mosher

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India: A Background

- India is the world's second most populous country, with 1.095 Billion people

- By some estimates, it will surpass China in population by 2025



Indian People

- Although most Indian's national language is Hindi, spoken by around thirty percent of the population, English is the language of business, law and government.
 - There are 14 other official languages.
 - The prevalence of English has given India the entree into the outsourcing and software worlds
 - Even in English language documents you will see the terms lakhs and crores to denote large sums



Indian People (cont.)

- Despite governmental efforts to minimize it, the caste system continues to play a role in Indian society
- India contains the world's third largest population of Muslims
 - But it is denied membership in the Organization of the Islamic Conference of Muslim nations



Legal System

- India is a federal system, with the states having their own parliaments and courts
 - The highest court is the Indian Supreme Court in New Delhi
- The Indian legal system is common-law based and grounded on the independence of the judiciary.
 - The trappings of the system appear quite English
 - The chief court proceedings are in English language



Legal System (continued)

- Indian law firms are quite small by Western standards
- Multi-national firms not present in India
- Pace of legal work in India slower than in the West, or even urban China



Economy

- The Indian economy is the 12th largest in the world, growing at a rate of 7.6% in 2005
- Controls on foreign investment have been liberalized since the early 1990's but limits remain in place.



Economy (cont.)

- Biggest obstacle to economic prosperity is the continuing population explosion

- Although 30% of the population lives below the poverty line, there is a highly-educated middle-class of over 300 million



Indian Economy Compared to China

- China's GDP is \$2.2 Trillion, compared to \$775 Billion for India
- China's per capita income of \$1,700, compared to \$640 for India



Government

- India has been a robust democracy
- There are a plethora of parties but a coalition led by the Congress party won the 2004 national elections
 - Its politics are of a populist nature
- India suffers from pervasive public corruption, especially at the lower levels



Relations with the United States

- In recent years, US and India have moved toward a closer strategic relationship
- They share interests in:
 - War on terror
 - Counterbalance to growing Chinese power
- In September 2001, President Bush lifted many of the sanctions that were imposed under the terms of the 1994 Nuclear Proliferation Prevention Act
- On July 18, 2005, President Bush and Prime Minister Manmohan Singh concluded a framework for a strategic partnership, including greater access to US nuclear technology

Doing Business in India
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Maria Carlisle, Rob Lindquist, Richard Mosher

List of Indian Law Firms Used by Faculty Members

Competition Law

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Tax and Corporate

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CollabNet Experience in India

- Who is CollabNet and why are we represented on this panel?
- Private company in high tech sector with experience in India
- Our product is a secure hosted workspace with software tools and repository designed for globally distributed collaborative software development, hence off shoring and outsourcing are the trends /realities that are integral to our business and how we operate internally as well.



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INDIA - GENERAL INFORMATION

- **GROWTH**
 - **GOLDMAN SACHS INV. \$1B IN 2 YEARS?**
 - REAL ESTATE AND INFRASTRUCTURE
 - **EXPORTS +26% YEAR**
 - **MANUFACTURING +9.4% YEAR**
 - **SPECIAL ECONOMIC ZONES (75+) AND TAX HOLIDAYS**
 - **NOKIA, VICTORIA'S SECRET, HYUNDAI**
- **LANGUAGE, CULTURE, EDUCATION**
 - **U.S. - E.U.- INDIA**
 - **CONSUMER EXPECTATIONS DIFFER**



GENERAL INFORMATION - CONTINUED

- **CASTES , QUOTAS AND COMPETITION**
 - **22.5% PLUS 27% IN GOVERNMENT**
 - PM SINGH WARNING 4-06
 - COURT DECISION IN DECEMBER?
 - **GOVERNMENT POLICY PROGRAM – DRAFT LEGISLATION?**
 - **WIPRO SOFTWARE OUTSOURCING**
- **TRAFFIC**
- **UNIONS - STRIKES! UNION AVOIDANCE?**
- **LABOR (\$2 DAY VS \$4-\$8 PRC)**

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OF INTEREST??

- **WHITE SHIRTS AND YELLOW FLOWERS**
- **MASALA TEA**
- **SANDLEWOOD**
- **INDIAN AND NON-INDIAN RATES**
- **CURRY**
- **MEETINGS, MEETINGS AND TOURISM**

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Doing Business in India: Fact Pattern

- Acme is an American company that makes widgets.
- It manufactures them in Belgium, Brazil and Singapore based on designs developed by the American parent and containing software developed by the American parent. It sells them throughout the world.
- Acme wants to establish a manufacturing arm and sales arm in India and is considering either:
 - A start-up operation,
 - Acquisition, or
 - Joint venture.
- The prospective joint venture partner is owned by a prior prominent member of the Congress Party who had to resign under a cloud of suspicion.
- Currently, the market for these widgets in India is shared by two local firms, each holding 40% of the market



Entry into Indian Market-Acquisition

- In our search for a strategic offshore model we had a stroke of good luck.
- Past working relationship between our CEO and Indian national who had become a US citizen and had created and was CEO of a US company with an existing Indian subsidiary.
- We acquired both companies, and transferred the assets and employees to a new subsidiary in Chennai, India and obtained a new VP Engineering in the bargain.
- Indian subsidiary has had up to 100 employees, primarily engineering and IT personnel, but other disciplines like HR, marketing and sales growing.



Merger/Set Up Issues with Acquisition

- Merger of two development teams:
 - FUD regarding movement of jobs offshore, types of jobs Indian employees might be limited to, different work styles and processes, communications barriers; takes time to work this out
 - Important to have US trained leadership with a local network to bridge the cultural and regulatory gap.
 - Need good HR person to manage local concerns and communication
- Our experience of Indian team:
 - Strong work ethic; quality output; difficulties of life in India
 - Tendency to respect authority and comfortable with hierarchy
 - English is a second language in India; Difficulty on both sides of adjusting to speed and speech patterns
 - Need for managerial training

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Merger/Set Up Issues with Acquisition

- Time differences. Day starts early for both teams and lasts long (13.5 hr difference) and revolves around web ex, conference calls and email, sometimes video conferencing.
- Cultural "etiquette" differences not as daunting as expected
- Real issues with Foreign Corrupt Practices Act; both teams needed education.
- Retention issues: Indian Nationals have many other opportunities. Local SI's hire in large numbers and offer attractive benefits and facilities.
- Corporate setup and operation complex and time consuming; multiple forms and filings both pre and post incorporation; "stilted" boilerplate of forms; "apostilles" for certification of signatures.
- Strict compliance with filings very important; emphasis on appearance of regularity.
- Hire of local chartered accountant proved invaluable.

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GENERAL CONSIDERATIONS FOR MANUFACTURING

- **ALLOW NEGOTIATION-APPROVAL TIME**
 - SIGHTSEEING?
- **DON'T OVER-ESTIMATE MIDDLE CLASS**
- **ASSUME FACILITATING PAYMENTS**
 - FCPA AND OTHER LAWS
- **DON'T OVER-ESTIMATE LABOR COMPETANCY**

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MANUFACTURING CONSIDERATIONS CONT

- **DON'T ASSUME INFRASTRUCTURE OK**
 - 6% GDP (22%PRC)
 - INTERRUPTIONS
- **SMALLER PROD. FACILITIES (TV – TOYS)**
- **NICHE MANUFACURING MARKETS**
(E.G. SHOES \$60-\$240 – INDIA NICHE IN BETWEEN)

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MANUFACTURING ISSUES PART TROIS

- **PAY AND INCENTIVES**
 - US-EU PAY COMPARISON
 - OFF-SHORE PAYMENTS
 - EX-PATS EXPENSIVE

- **MANAGING FROM AFAR**
– A BAD IDEA?
 - WHO'S IN CONTROL?
 - WHAT IS CONTROL
 - TIME LAGS



JOINT VENTURE CONSIDERATIONS

- **PARTNERS - CONTROL-INFLUENCE**

- **REAL ESTATE OWNERSHIP ISSUES**

- **END-GAME**
 - YES, WE MUST PUT THIS IN THE CONTRACT!
 - INTELLECTUAL PROPERTY – DUEL BRANDING AND TM (MODI-LUFT)
 - GOING PUBLIC TO SOLVE PROBLEMS?
 - INSURANCE AND WARRANTY ISSUES



CHECKLIST

- 1. IS THERE A "REAL" INDIAN/EXPORT MARKET?
- 2. DO YOU HAVE TIME AND PATIENCE?
- 3. MANAGE AND CONTROL?
- 4. CAN PARTNER REALLY HELP?
- 5. IS RELIABLE INFRASTRUCURE PRESENT?
- 6. CAN YOU PROTECT IP?
- 7. ARE YOU WILLING TO MAKE FACILITATING PAYMENTS?
- 8. WHY ARE YOU IN INDIA?
 - NICHE MARKET
 - LABOR RATES
 - LONG TERM GROWTH

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US Export Controls

- A US subsidiary selling into India should:
 - Screen all customers against the Restricted Parties List
 - Comply with the license requirements for the four Indian companies still on the Entities List
- India is a Category D Country (like Russia or China)
 - This entails additional anti-proliferation screening of end-users

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Competition Law Concerns

- 2002 Competition Act
 - Mergers cannot “have an appreciable adverse effect on competition”
 - Firms cannot abuse a “dominant position”
 - Enforcement of Act is on hold
- Monopolies and Restrictive Trade Practices Act still in effect



Privacy of Data

- Best protection for your and your customers' data in India is to establish adequate security measures with strong information policies and processes that you audit and monitor on an ongoing basis, and to educate all employees.
- In India, although various EU type initiatives (safe harbor arrangements) have been considered, there are no statutory laws to protect customer data and privacy of personal information even though right to privacy is perceived as a fundamental right
- Existing legislation (Information Technology Act of 2000) provides limited protection against “computer offences” involving unauthorized access to data on computers (hacking, damage to computer source code)



Protection of Intellectual Property

- Significant risks remain in the protection and enforcement of IP rights in India. India is still on US trade representation priority watch list of 2006 listing countries that have Inadequate laws and enforcement for IPR.
- Appropriate contractual and security safeguards are the best protection

Copyright:

- India has a National Copyright Office headed by the Registrar of Copyrights. Copyright Applications can be filed (for literary, artistic, musical and dramatic works) with this office. To get copyright protection in India, it is not compulsory to have copyright registration, however the benefit of registration is that the entry on the Register of Copyrights is prima facie evidence of registration.



Protection of Intellectual Property

● Copyright (Con't)

- “Work made for hire” doctrine in India is limited to work made by an employee within the course of employment, it does not apply to contractors hence need strong assignment provisions from non-employees and best is to have rights assigned directly to you by service providers
- Assignment clauses must deal with certain presumptions under Indian law for items not specified in the clause.
- Solution is to be as explicit as possible as to what the supplier is assigning to you, “irrevocable”, “in perpetuity”, “worldwide”, “all right, title and interest”, etc.
- AS in the EU, Indian law provides authors inalienable “moral rights” in the event of distortion or modification of their work if it could bring them “disrepute”; solution may be to seek a waiver for adequate consideration, if possible.



Protection of Intellectual Property

● Trademarks

- The Registration of a trademark normally takes 4 to 5 years. However when the registration certificate is issued, it is effective from the date on which the application is filed.
- The procedures now look familiar to US law and although registration under the existing Act is prima facie evidence of validity of a trademark, registration cannot preempt a prior consistent user of trademark, for the rule is 'priority in adoption prevails over priority in registration.
- Reciprocity provisions are governed by the Paris Convention of which both the US and India are signatories. To enable you to claim priority of your US applications, you would have to file the Indian applications within 6 months of the US applications.
- The term of a trademark registration is for a period of ten years, with renewal possible for another period of 10 years.



Protection of Intellectual Property

● Patents

- **There is currently no patent protection for software or business methods though Indian patent law is evolving with recent amendments to comply with WTO Agreement on TRIPs**
- **Joint ownership of a patent does not automatically allow each party unlimited use. Joint owners must obtain consent or be accountable to the other joint owners with respect to license, assignment or sale of patents.**
- **Some firms for cost reasons use Indian providers to help draft the claims and have US legal oversight before filings are made.**



Protection of Confidential Information

- Although there is no statutory protection for trade secrets in India, confidentiality agreements are enforceable under Indian law, including by way of injunction, whether or not there is a contract, as common law recognizes a breach of confidence claim
- Indian suppliers may not have reliable or standardized practices for obtaining the intellectual property of their vendors or licensors.
- Non-compete and no-hire clauses are likely not enforceable after the contract term unless in connection with a sale of the good will of a business.
- Good business practice is to provide for strong confidentiality provisions in contracts and implement strong supporting security measures

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Tax Issues

- In selecting entity for business in India, consider risk that Indian entity can be regarded as a permanent establishment ("PE") of the foreign company subject to tax
- Entities in India are eligible for a tax holiday through a series of tax free trade zones such as electronic, hardware or software technology parks, special economic zones, leading to large reduction in tax burden. However it is important to apply for them in advance.
- Transfer pricing regulations govern income arising from international transactions entered into by associated enterprises. The transactions need to be created as arm's length transactions.
- Exit planning important. Generally shareholders of an Indian company can exit by transferring shares or on IPO.
 - Need prior approvals of Foreign Investment Promotion Board and Reserve Bank of India to ensure price of transfer is not below a minimum or maximum price.
 - Capital gains tax realized on sale of shares. This may be reduced if the investments are routed through Mauritius and operations are structured so as to avoid PE risk.

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Application of Indian Law

- **Important to become familiar with Indian law and use local Indian counsel.**
- **Indian law may apply to the entity (captive service provider) you are dealing with and to the intellectual property being covered, even if your contract provides for US law.**
- **You may get sued in India and be in the forum involuntarily.**
- **You may have to enforce a US judgment against a party in India**
- **You may have to seek injunctive relief**
- **Examples of Labor Laws.**
 - Industrial Disputes Act, 1947- certain approvals required for dismissal or lay off of employees or shut down of plant. Seek a voluntary termination plan.
 - Contract Labour Act, 1970, covers individuals performing outsourced functions that may be able to claim benefits
 - Shops and Establishment Acts (vary from state to state) may limit work hours, govern mandatory leave and holidays, statutory bonuses and benefits
- **Worker's safety and environment laws rapidly changing.**



Dispute Resolution

- **Indian courts are backlogged with cases and operate slowly despite recent amendments to dispose of civil cases within a year**
- **Arbitration is preferred mode for dispute resolution to overcome enforcement problems and delays in courts**
- **India is party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958**
- **Generally, Indian courts will stay/dismiss a legal action where parties have agreed to resolve their disputes through arbitration**
- **Indian courts may grant preliminary injunctions or other protective orders pending an international arbitration**
- **Important provisions to consider for an arbitration clause are that arbitration is mandatory, governing law, venue, applicable rules, method of selection of arbitrators, and confidentiality.**



Outsourcing: Common Issues

- Quality Assurance
 - Adequately defining the scope of work
 - Imposing appropriate penalties
- Allocation of Risks
 - Disaster recovery, third-party litigation
- Termination
 - Getting out half way through the contract
- Privacy Rights
- Price
 - FTE v. Transaction Based



Outsourcing

- Many options for offshore model from wholly owned captive to completely outsourcing to established providers, and options in between.
 - Consider staging your entry by starting with a traditional outsourcing model and moving to a captive after you gain experience in the Indian market
 - Insist on financially strong supplier with some US base; consider multi-supplier strategy; build alignment with team in US
 - Owning your own company you have the most control over the operation and spare yourself the endless contract negotiations over the relationship
- Define scope of projects and services with precision using accurate cost estimates and clear language not subject to interpretation, as culturally interpretations may differ in India.



Outsourcing

- **Don't pay in advance, but upon acceptance; create accountability & milestones.**
- **Learn differences in Indian negotiating style.**
- **Dedicate resources for monitoring and oversight at executive level;**
- **Have an exit strategy in the event of issues with supplier viability, rising prices, political instability (Pakistan), or government policy changes.**