Outsourcing by banks of services – the legal issues

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Table of Contents

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Introduction

BPO: legal challenges for any business

The legal challenges inherent in any contract dealing with the outsourcing of a business function or process (a "business process outsourcing" or "BPO" contract) are enough to make any commercial lawyer frown and start writing long checklists of issues.
Issues such as achieving contractual certainty without removing necessary flexibility, performance measures, service credits and incentive schemes, staff transfers, disaster recovery and business continuity, rights on termination, alliance, joint venture and partnering models all need to be considered - and the list doesn't end there.

BPO: additional legal challenges for banks

For banks the task contains more challenges.
If the outsourcing relates to one of the business functions of an Australian bank, the list of regulatory and legal issues which needs to be considered and managed all of a sudden gets a lot longer - the twin spectres of prudential regulation and financial services regulation, the alignment of the outsourcing with existing and future securitisation programs and the perennial issues of privacy of customer information, GST and the "reduced input tax credit" regime, regulatory compliance generally and laws against anti-competitive conduct all need to be considered and dealt with.

The common legal challenges and how to deal with them

Every outsourcing transaction is different and raises its own challenges. However, in this paper we have endeavoured to:

(a) identify the common legal challenges (those common to all businesses *and* those additional challenges faced by banks) which you might face in undertaking a large business process outsourcing transaction for a bank; and

(b) describe the ways which, in our experience, banks might best endeavour to deal with these issues.

Outsourcing and prudential regulation

Do bankers do it better?

One thing which distinguishes Australian banks, insurance companies and superannuation funds, credit unions and building societies from many other industries in Australia is that there is a regulator tasked with ensuring that (amongst other things) such companies manage business risks in a manner designed (in the opinion of APRA) to ensure that they able to meet their obligations to their customers.

In this role, APRA has singled out banks (or, more particularly, ADIs) for special treatment in relation to their approach to outsourcing in its prudential standard APS 231 (the **"Outsourcing Prudential Standard"**) and associated guidance note[2]. The Outsourcing Prudential Standard records the manner in which banks should approach transactions which involve the outsourcing of material business functions (whether this be outsourcing loan administration, back office administration, custody services or IT systems management and operation).

APRA model "Structure" and model "Process"

The aim of the APRA model contained in the Outsourcing Prudential Standard (as outlined in the diagrams below) is to ensure that any significant outsourcing arrangements entered into by a bank are subject to appropriate due diligence, approval and on-going monitoring. Further, it aims to ensure that the risks arising from such arrangements are appropriately managed to ensure that the bank is able to meet its service obligations to its customers.

The model is divided into two parts:

(a) "Structure" which sets out some basic management structures that should be put in place to manage significant outsourcing contracts; and

(b) "Process" which sets out some basic steps that should be followed in establishing such agreements.

Does the Outsourcing Prudential Standard have teeth?

Whilst the Outsourcing Prudential Standard does not require a bank to obtain APRA's approval of every outsourcing transaction, it does require the bank to notify the APRA of the transaction promptly (no later that 30 days) after it has been entered into. In addition to notification, the

[2] Australian Prudential Regulation Authority, Prudential Standard APS 231– Outsourcing, May 2002, - Managing Outsourcing Arrangements - http://www.apra.gov.au/policy/final_adi_standards/APS231.pdf and Guidance Note AGN231.1

bank has to outline the key risks associated with the outsourcing arrangement and the risk mitigation strategies put in place to address the risk.

Most importantly, it is potentially open to APRA to come to a decision that the outsourcing arrangement impacts on the bank's risk profile in such a manner that it must increase the capital it holds to satisfy APRA's capital adequacy requirements. In this regard, APRA may consider the outsource provider's credit rating as a significant factor. This aspect is likely to be even more important when Basel II (which sets out how much capital Banks must hold under capital adequacy requirements) is implemented. Present indications are that this will be by year-end 2006, well within the life of outsourcing agreements signed now.

It is for this reason that banks should ideally include, as a condition precedent in significant outsourcing arrangements, a provision which requires the receipt by the bank of some kind of comfort from APRA in this regard, prior to the commencement of an outsourcing arrangement. One of the key factors which APRA will take into account in its assessment is the credit rating of the outsource provider, an approach which is confirmed by Basel II. It is therefore an important factor in the decision regarding whether to appoint a particular outsource provider. There should also be a right of termination in the event that the outsourcer's credit rating falls below that of the bank.

Structure

Board

Outsourcing Committee Delegated by the Board

- Register reviews re: compliance with outsourcing policy.
- Approval of all outsourcing arrangements of material business activities.
- Auditor's report regarding compliance with the Outsourcing Policy.

Outsourcing Policy

- How to manage and monitor the outsourcing relationship.
- Selecting a qualified provider.
- Structuring the agreement (contracts and SLAs).
- Establishing business continuity plans and SLAs

Management Responsible for arrangements across the whole organisation

Outsourcing Team (Deal Specific)

- Members of business area proposing the arrangement
- Independent outsourcing expert

Manager negotiation of outsourcing process

Manager ongoing relationship

Process

Business Case

- potential costs
- potential benefits
- potential risks

Board

"in principle" approval

Tender Process

Due Diligence

- capacity of service provider to provide service (financial, technical)
- service providers internal procedures
- potential conflicts of interest

Business Continuity Plan

- procedures to be followed in the event that the service provider fails to fulfill its obligations

Contractual Arrangements

- term / periodic review
- performance specifications benchmarks
- pricing (review / benchmarking or hiring)
- restrictions on sub-contracting
- change control
- monitoring / audit procedures (record keeping)
- disaster recovery / business continuity obligations
- consequences of termination, supplier insolvency, transition-out
- dispute resolution
- liability / risk allocation

Outsourcing and FSR Reforms

Note - for the purposes of the comments below, this paper only considers the impact of the FSR regime on the outsourcing of certain customer-contact functions in relation to the "deposit" products of banks - it does not attempt to address the impact of FSR in relation to the sale of superannuation, managed funds or other "financial products" by banking groups or the outsourcing of functions relating to the operation or distribution of such products.

Does a bank need to also comply with ASIC Outsourcing Guidelines under FSR?

Of course, APRA is not the only regulating body that a bank in Australia needs to consider in relation to a proposed outsourcing. As a result of the additional layer of regulation contained in the amendments to the *Corporations Act* collectively known as the "financial services reform" or "FSR" regime, the bank also needs to have any eye out for relevant FSR obligations, ASIC policies and guidelines which apply to it where it is the holder of an Australian financial services licence (**"AFSL"**) (specifically, in relation to "deposit" products, as opposed to its "credit facility" products - which are largely excluded from the FSR regime).

The condition contained in an AFSL which requires the licensee to have adequate risk management systems (which includes the compliance measures, processes and procedures adopted under risk management systems relating to matters such as outsourcing) does not apply to bodies regulated by APRA. However, ASIC still considers that the need for those compliance measures, processes and procedures applies to all licensees, including those regulated by APRA. This is because the licensee is required to comply with a range of conditions, of which the requirement to have adequate risk management systems is only one. The result of all of this is that APRA regulated entities which also hold an AFSL will need to be careful to ensure that they comply with the requirements of both regulators in relation to any outsourcing which is undertaken.

But the FSR conundrum does not end there...

Is the outsource provider providing a "financial service" for the purposes of the FSR regime?

There are many back-office activities of a bank which might be outsourced which would not involve the provision of "financial services" by the outsource provider. However, if, as part of the outsourcing, the outsource provider will be directly involved in contact with the bank's customers in relation to the bank's "deposit" products and other "financial products" (whether by operating a call centre, answering emails, operating a website, or face-to-face customer contact), it is likely that representatives of the outsource provider may be providing "financial product advice" and hence a "financial service" for the purposes of the FSR regime.
As usual with FSR questions, there are a number of exceptions which need to be considered before concluding that an outsource provider that is performing such activities for a bank is providing a "financial service" for the purposes of the FSR regime. For example, the outsource provider may:

(a) only be performing functions which fall inside the "clerks and cashiers exemption", an exemption which applies to conduct done "in the course of work of a kind ordinarily done by clerks or cashiers"; or

(b) only be providing factual information,

in which case, the representatives of the outsource provider would not, necessarily, be providing a "financial service".

Example
However, as the example below illustrates, the provision of factual information can easily become the provision of "financial product advice" during the course of a conversation between a customer and a call-centre representative.

Conversation	**Financial product advice?**
Client: I would like to check on the value of my investment. My investor number is X123456. *Operator*: Your investment is worth $35,427.	No - this is factual information only.
Client: Could you tell me what interest I earned on this investment	No - this is factual information only.

last year? *Operator*: The returns were 5.3%.	
Client: Do you have a better portfolio where I can earn more money? *Operator*: The Australian Shares portfolio returned 12.2% last year - it was our highest returning investment option.	Section 766B(7) provides that this may not be financial product advice. However, the provider needs to consider whether it is reasonable to think the statement is intended to influence the client's decision relating to the financial product (see the ASIC Guide).
Client: What would you do? *Operator*: I have money in the Australian Shares portfolio. How long do you want to invest for?	Again, the operator's responses are likely to become more influential on the client. The question is bound to prompt some information about the client's personal objectives. This looks a lot like "general advice", but it could also depend on the tone of voice and other factors such as whether the telephone operator gets any type of remuneration for directing the client towards the Australian Shares portfolio, or any of a number of other factors (see the ASIC Guide).
Client: I want to use the money as a deposit on a house in around a year's time. *Operator*: Oh, if that's the case, a shares portfolio might be too volatile for you. Perhaps you should stay in your current investment, or maybe just put some of your money into the other portfolio.	Finally, the line has been crossed into "personal advice". The operator appears to be influencing the client after having taken into account the client's short-term saving objective.

Of course, call centre staff could also be engaged in activities other than the provision of financial product advice which may also give rise to licensing issues. The precise activities of the call centre staff will need to be tested in each case to determine the extent to which the outsource provider falls within the FSR regime.

What are the consequences - does the outsource provider require an AFSL?

If, having considered all of the relevant exceptions, one concludes that representatives of the outsource provider are providing "financial product advice" or any other "financial service" in relation to the bank's "financial products", then the outsource provider will need to either:

(a) obtain an AFSL in respect of the relevant activities; or

(b) be appointed as the authorised representative of an entity which holds an AFSL in respect of the relevant activities.

Commercial inefficiencies resulting from the AFSL requirement

If the outsource provider acquires an AFSL in relation to the "financial service" activities that it is performing, it will need to ensure that the manner in which it conducts those activities is in compliance with extensive operational, compliance and financial obligations of an AFSL holder. Such providers would not normally have been regulated by ASIC prior to the FSR regime being put in place, so they will not be entitled to "legal streamlining" of their AFSL applications - adding to the administrative burden.

For many outsource providers this administrative burden will be a significant additional cost which will (if they are even prepared to shoulder the burden), ultimately, be passed back to the customer. Clearly, if the outsource provider is operating under a "single customer" model in respect of those activities (and hence cannot spread those costs across a number of customers for which it is providing similar services) this introduces a considerable inefficiency into the outsourcing model - because both the bank and the outsource provider will be incurring compliance costs in relation to the same types of activity.

If, in the alternative, the bank agrees to appoint the outsource provider as its authorised representative, the bank must (sensibly) impose considerable controls over the relevant activities of the representatives of the outsource provider (i.e. by providing training and accreditation of the relevant personnel and approving relevant call-centre scripts). Of course this kind of control contradicts the approach which is traditionally taken to outsourcing (i.e. outsourcing traditionally involves letting go of the responsibility for the day-to-day supervision of staff) and can leave the outsource provider paying the bank for the significant costs associated with maintaining such controls!

One solution which might be adopted is for the bank to:

(a) provide an authorisation in relation to products like "at call deposits" - because the level of training which ASIC requires in relation to such products is a relatively low level and can be provided at low cost; and

(b) provide no authorisation in relation to products like "term deposits" - because the level of training and accreditation which ASIC requires in relation to such products is much more intensive and costly - in relation to such products the bank would, instead, provide training designed to ensure that the relevant personnel only provided factual information (and didn't fall over the line in the manner outlined in the example above).

A post-FSR model for outsource providers

Since neither of these models outlined above is completely satisfactory, we imagine that in future the companies which provide "financial services" as a consequence of providing outsourced functions to banks will need to structure their businesses in one of two ways:

(a) the provider might obtain an AFSL in respect of activities which its provides to a number of similar bank clients (thus achieving sufficient economies of scale to justify the administrative cost of maintaining an AFSL); or

(b) the provider obtains an authorisation from an AFSL holder that has established a business whereby it authorises a number of similar outsource providers (thus enabling the AFSL holder to achieve sufficient economies of scale to justify the administrative cost of maintaining an AFSL).

Outsourcing and securitisation programs

Obviously a key part of the business model of any modern Australian bank is its mortgage securitisation program. If a bank is proposing to outsource some or all of the mortgage servicing function which it may have been appointed to perform as part of its securitisation program then it needs to carefully consider the following issues (the answers to which will depend on the particular structure and terms of the bank's securitisation program):

(a) What impact will the outsourcing have on the ratings given by Moody's and Standard & Poor's to the debt securities or securities backed by those debt securities of each of the relevant securitisation trusts? The bank should consider including a condition precedent in any such outsourcing arrangement requiring an affirmation by those agencies that the relevant ratings will not be adversely affected as a result of the proposed outsourcing.

(b) Does the bank require written approval of its proposed outsourcing from any of the other entities involved in the securitisation arrangements?

(c) Does the bank require the outsource provider to obtain a strong "mortgage servicer rating" from Standard & Poors and/or Moody's prior to commencing the services?

Outsourcing the "Regulatory Compliance" function

This is always a huge issue in any BPO involving a bank, quite apart from the APRA outsourcing guidelines and the dictates of the FSR.

Inevitably the bank wishes to have its cake and eat it to: put the responsibility on to the outsourcer but retain a right to compel the outsourcer to change the way that the services are provided in the event that the financial institution believes it will be in breach of the law or a regulation unless the change is made.

It is also inevitable that there are practical considerations concerning which of the two players has the relevant expertise and, ultimately, banks tend to find that, the matter being as fundamental as it is, it is too important to simply leave up to a string of warranties and indemnities and that they must get their hands dirty and assure themselves that they are not in breach of any of their licence conditions.

One compromise position is to provide for the outsourcer to take responsibility for regulatory compliance but ultimately leave it up to the financial institution to decide whether or not it will implement a change recommended by the outsourcer (or mandate a change which it believes is necessary). The inevitable consequence is that the outsourcer will demand a release from any warranty or indemnity in circumstances where it has given advice which is not followed.

The problem is less severe where a white label product is provided by one financial institution to the other; the second financial institution can probably have more confidence in the judgment of the first one knowing that the provider's banking licence is also at stake.

The privacy regime

Another area of regulatory involvement to be aware of is the privacy legislation.

In a very real sense the interests of the Bank in keeping its account holders' information confidential are at least closely aligned, if not more demanding than anything imposed by the privacy legislation.

The Australian Privacy Commissioner has provided some guidance (for instance see Information Sheets 8 - "Contractors" and Information Sheet - 18 "Taking reasonable steps to make individuals aware that personal information about them is being collected") concerning outsourcing and the use of contractors. In general terms, the Privacy Commissioner appears to accept that Banks and others will outsource the provision of some services which will result in the exchange of personal information and that, subject to some conditions being satisfied, it is not practicable to treat this exchange of personal information in the same way as an exchange which takes place between organizations operating outside the outsourcing environment.

However, the existence of the privacy legislation does reinforce the need to set up both contractual provisions and practical guidelines which ensure appropriate handling of personal information in addition to protecting confidentiality of the customer data, which should include rights to audit the service provided by the outsourcer and their handling of personal information.

It is also worth remembering that were there to be a breach of the National Privacy Principles resulting from activities of the outsourcer, which led to a complaint by an affected individual, even if strictly the offending conduct was conduct of the outsourcer it is likely that the Commissioner would regard the Bank as primarily responsible. The consequence could be an audit of the privacy regime of the bank generally (which is probably a much worse outcome for the Bank than any amount which might be payable under an adverse determination by the Commissioner concerning a breach of the NPPs).

Anti-Trust Considerations

Particularly when dealing with one of the major industry players it is necessary to keep a weather eye on Part IV of the Trade Practices Act and similar provisions in the NZ Commerce Act.

Where one Financial Institution provides to another a white label product there is an obvious point of "collusion" between the two industry players. Of itself, this is not illegal; however, if the co-operation between the two Banks has the effect, for instance, of fixing, controlling or maintaining product pricing in a retail market; or of lessening competition substantially in a market in Australia, or acts as a severe barrier to entry to other players into a particular market, there could be problems under anti-trust legislation.

Each arrangement needs to be reviewed in light of particular facts and circumstances. However, a general rule of thumb is that if the white label product relates to the back office and the users of that white label product are free to use the product in their own individual way, presenting individual choices to consumers then it is less likely that anti-trust rules will be transgressed. In this scenario competition at the retail level is unhindered by the back office arrangement.

Third line forcing is another issue to be aware of. Whilst third line forcing is far from the top of the hit list of the ACCC in Australia (at least where the breach can be considered a technical per se breach rather than something which actually has an effect on competition) nobody wants to be on the wrong side of the competition regulator. Depending upon the nature of the outsourcing, where one financial institution is providing a service to another, it may be that products offered by a related body corporate of one or the other also come into play. So, for instance, where a financial institution says in effect:

> "I will provide you with access to my technology platform provided that you get your insurance products from my sister company".

There is a classic transgression of the third line forcing rules, which do not have an exception for related bodies corporate. Under Australian law this is a *per se* breach and the fact that there is no effect on competition is irrelevant.

Generally (subject to industry regulatory issues) it is quite simple to draft around the problem, for instance, by having one of the related bodies corporate provide the service to the other which then on-supplies it to the other financial institution.

The challenge of adequately dealing with GST

A topic of great interest to banks in Australia is the GST regime. This is not the place to run again through the compromises made by the Australian Government in framing its legislation and its unnecessary complexity. I guess one can say, at least, that it provides many opportunities for lawyers!

In essence, Australian banks, unlike other businesses, bear an actual cost from GST because, following the decision of the Government that consumers should not pay GST on finance related products (to make a generalization) the banks cannot receive a complete refund in respect of GST paid to suppliers. In an outsourcing context it is most important that the bank be in a position to maximize the extent to which it can claim an input tax credit for the services provided. This may mean that services need to be categorised and strategies adopted to divide out those services which do not attract any input tax credit from those which do and those which receive their full tax credit.

Whilst this is ultimately a question of fact and a question on which the bank and the tax office may have differing opinions, the bank's cause can be aided by ensuring that services are properly characterised. For instance, it may be better to ensure that the bank is receiving a mortgage origination service which includes, as part of that service, a service of reporting on progress to ensure that the entire mortgage origination fee attracts the reduced input tax credit, rather than have a separate fee for that reporting service which could attract no input tax credit whatsoever.

Another very important GST related feature of an outsourcing agreement is that the bank will require certain information from the outsourcer to ensure that each element of the services it receives can be properly characterised for taxation purposes and if need be separated into separate categories. At the very least, a bank must ensure that the outsourcer has an obligation to provide all information which the bank requires in this regard.

A further step would be to actually make the outsourcer responsible for the difference between the amount the bank actually receives as a reduced input tax credit and the amount that it would have received had it been able to claim a reduced input tax credit on an entire service. Understandably outsourcers will always resist such a clause.

Who (or which) is the relevant legal entity?

It may seem a trivial question, but it is always important to think carefully about who is going to be involved in the contract, who is going to provide the services, who is going to supervise the services, who is going to pay for them, and who is going to use the end result.

Who is supplying the services?

For example, who will actually supply the BPO services, the contracting party or some sub contractor or sub-contractors? This could be important:

- to ensure that any software licences or other rights or benefits granted to one entity in a group of companies, may be accessed and/or used by other members of the group;
- to ensure control over the individuals who come on premises and have access to sensitive product information, or other such matters;
- to know who owns important intellectual property which may be developed;
- to pin down responsibility for the work done and any warranties given - the "guilty party";
- to ensure that the customer is not caught in a dispute between contractor and sub-contractor, as to the time or cost of completion of work, or any other matter;
- to determine the scope of limitation and exclusions of liability, as well as any indemnities; and
- to give the customer the chance to evaluate the competence and ability of the sub-contractor to carry the project through to completion.

A clear division of responsibilities, such as establishment of communications links, obtaining consents from software licensors or equipment lessors, making arrangements with service organisations and so on, must be clearly agreed and specified.

With a little thought it will be recognised that the precise identity of who is doing what to whom is also fundamental to just about every aspect of the transaction.

Who is receiving the services?

It is important to know who is recipient, is it the whole group? It needs to be made clear that any entity in the group can receive the services and will be entitled to collect damages if damage is suffered. Achieving this can take careful drafting.

Who is the "guilty party"?

A further "who" question which is essential to determine at the outset is who will be responsible for the outsourcing, not only on the supplier's side but also on the customer's side.

One way to avoid the problems of "agreements to agree" is to give one party or the other the right to make a decision, usually with some preset parameters. Later in this paper, under the heading of "Dispute Resolution" we deal with the role of an expert who can have the job of imposing a solution on parties who fail to agree (as opposed to an arbitrator who can merely rule as to whether one party or the other is right).

"Key personnel" clauses can help identify a "guilty party" on both sides of the transaction. While the focus contractually must always be on which of the parties to the contract have responsibility for a certain task, there needs to also be a recognition that day to day it is important to ensure that individuals are focused on ensuring that the services are delivered. It is therefore clearly in the interests of the Bank to ensure that certain of the key supplier personnel are devoting all their energies to ensuring that the Bank receives good service. If possible, a Bank should try and ensure that the remuneration of at least some of the key personnel is linked to the performance standards or even the satisfaction ratings of bank personnel. An employee of the supplier can make a much more effective advocate for ensuring that the Bank receives excellent service than any bank employee can hope to be.

The challenges of transfer and establishment

With a BPO, even more than IT outsourcing it is difficult to properly define the services which are to be provided before the "point of no return" (the point where there is no possibility of either the customer or the supplier backing out) is reached. The transition plan will need to detail matters such as:

- Employees

Almost inevitably, provision must be made for the transfer of employees of the customer, usually permanently. As well as predictable termination issues, who is employed by whom may have a very significant impact on the responsibility of the outsourcing provider for inadequacies in processing performance - the outsourcer can hardly be blamed for poor performance caused by the customer's own staff.

- Technology Infrastructure

Usually it will be to the advantage of all parties that the employees take with them desktop computers and other technology used by the individuals. The extent to which any of the back office infrastructure moves across depends very much upon the nature of the individual arrangements.

- Licence to occupy

Usually the movement of hardware and employees is actually achieved by them staying still - it makes sense that, for at least a certain period, the former employees of the Bank continue to occupy their same desks in the same building. The service provider can be given a licence to occupy those premises or that part of the premises and terms under which that licence can be exercised need to be clearly set out. Done properly it should not constitute a breach of the Bank's head lease although this should also be checked.

Retaining a competitive edge?

First-to-market advantage

Sometimes it happens that an outsourcing arrangement may be entered to maintain a competitive edge, by giving the bank access to a particular service capability or system which it does not have in-house, and which its competitors do not have either.

This may be recognised by a commitment on the part of the supplier not to provide the same services to the bank's competitors, otherwise known as a "restraint". Clearly, such a restraint must have a finite period.

There are two main legal considerations in relation to such a "restraint of trade":

1. The restraint will be illegal (and void) if it unduly restricts the supplier in the carrying on of its business or the exercise of its profession. Therefore, unless the duration of restraint and the ambit of the restraint (in terms of the definition of people to whom the supplier may not supply, and/or the geographical area in which the prohibited

customers exist) must be reasonable and moderate, otherwise the provision is simply a waste of paper and time - it may be ignored.

2. If the supplier and the customer are in any of their operations or branches competitors, such agreement may be illegal under anti-trust law as an agreement between competitors whereby they agree that one will not supply goods or services to a person or class of persons.

Occasionally, concerns may be raised arising from s. 45 of the Trade Practices Act 1974, which deals with "exclusionary provisions", but such circumstances will be rare.

Economies of scale

We see utility models (where the outsource provider uses a common IT platform and associated systems and procedures to provide similar services to a number of customers) as being an increasingly common way for banks to gain the competitive advantages of economies of scale (i.e. reduced costs) in their business processing functions, without having to achieve enormous volumes in the "front office". Theoretically, this model could allow a small bank to match the largest banks in terms of quality and efficiency of business processes, at the same cost.
We do not intend to address the challenges of this "utility model" approach in any detail in this paper, except to mention that one of the issues which is of greatest concern to many banks regarding the utility model is the risks of confidential information of the customer finding its way into the hands of a competitor, or at least into the hands and minds of outsourcer employees who supply services to a competitor.

Achieving a balanced audit right for the bank

The need for an audit right

A right of audit is an important right. One reason for requiring an audit is because the APRA guidelines require an ability to audit the services and it is therefore beholden on the Bank to ensure that this right of audit exists. However, it is also in the interests of the Bank to ensure that an audit can be carried out with the aim of ensuring that the Bank's customers are being properly taken care of, that the outsourcer is complying with the contract and with the relevant regulations. In this way the Bank can hope to identify any problems long before they come to the attention of the regulator or other authorities.

What information can be audited and by whom?

A vexed question is the extent to which an audit can examine the financial information of the outsourcing provider. The provider will always, naturally, wish to keep its financial information to itself. On the other hand, depending upon the remuneration arrangements and how the benchmarking clause works, the Bank may have a right to audit the outsourcer's relevant financial information.

Another vexed question, where the outsourcer is employing a utility model, is having the audit carried out in such a way that the information of the outsourcer's other clients is not compromised by the first Bank's audit. One way to handle this problem is to specify that the audit can be carried out only by a third party, such as representatives of one of the large accounting firms, who are entitled to report back to their client the Bank on information relevant to the Bank but not on any other data concerning the Bank's rivals which the auditor's personnel see whilst engaged in their activities. In this situation it is also worth the Bank considering what protection it wants against the likelihood that the outsourcer's other customers will have individual audit rights. The Bank may wish to at least be informed that the audit is taking place and of the procedures which have been put in place to protect the confidentiality of the Bank's data.

Limiting the disruption that can be caused by audits

The outsourcer may also be concerned about the disruption to its employees of having them subjected to an audit from outside. Yet the outsourcer is taking the place of employees of the customer, and yet is NOT the customer from the point of view of the customer's obligations, for example, under the Privacy Act 1988.

This is an area, therefore, which is not simply the province of soporific "boilerplate" clauses. It can have acute operational significance. It is important not only to be flexible in drafting the contract but ultimately both parties must be prepared for flexibility in executing its rights under the contract. The compromise may be that audits can be done only after a brief notice period (rather than as a complete surprise), the customer's auditors may not be allowed in to do an audit if it is not reasonable that an audit take place given the other events taking place at the data centre. Other events one can imagine would prevent the audit taking place include the fact that another client is already auditing or testing the business recovery procedures, or possibly that another client is in the middle of a "disaster". Clearly an audit cannot be such that it adversely affects performance standards. These other events are not specified, it is left to a question of reasonableness.

An audit may be limited to once per year, other than where a follow-up is necessary. Special rules apply in the case of an actual suspicion of fraud, as opposed to a routine audit.

Measuring and achieving service standards required by the bank

A further challenge for the bank is to document accurately which services will be provided and how the service standards will be measured.

Remedies Services Credits & Incentive schemes

Service level agreements go hand in hand with schemes to "punish" failure and/or reward success.

Where, as will often be the case, the customer must rely upon the word of the supplier, as is often the case, then the customer should include in the contract a warranty that those representations (which should be spelt out) are accurate, and will remain accurate. Even in the case of facts verified by the customer, such as skill and resource levels available for a project, there should be a warranty that these will remain available.

Some people are attracted by the notion of imposing penalties upon the supplier for a failure to deliver. If the "penalty" is a genuine attempt to pre-calculate the damages properly recoverable at law in defined circumstances it is enforceable (and must be exclusive of all other remedies for that defined event, not cumulative), but if the penalty is:

- arbitrary in amount (for example, a "ratchet" clause which increases the amount payable in multiples each 30 days of delay, where damages likely to be suffered are straight line or even diminishing);
- arbitrary in application (for example $5 million for any breach of a confidentiality obligation - even an accidental disclosure by a contractor to a spouse - or an amount payable where there is a single failure to meet a service level, no matter how trivial; or
- simply in terrorem, with no rhyme nor reason than as punishment

then it is simply unenforceable at law.

In any event, such an approach to remedies is not only very negative, it may back-fire. In many cases, a supplier may determine that it is safer to resort to legal challenge than continue to attempt performance and thereby appear to acquiesce in the remedy - let alone facing intimidation and harassment from the customer.

Other ways to attack the problem are:

(a) to have a system of "rebates" against ongoing charges, calculated against the percentage under performance achieved - but if these are excessive, they may still be regarded as a "penalty";

(b) to have an incentive scheme. If the supplier performs on time, or under budget, it is entitled to claim extra payment of a defined amount. This can create a more positive environment where both parties share in the defined objectives - even when times are tough.

Service Credits and Performance Measures

Measuring performance can be a difficult issue with a BPO. Measuring the service levels in a BPO is not the (relatively) simple task of measuring the downtime of the computer system. The nature of the service levels and the credits which may be attached to them have to be carefully worked out for each contract, it is not something which can be taken off-the-shelf.

A customer satisfaction survey could form the basis of a service level. Of course, providers are likely to strenuously resist any such suggestion. Customer satisfaction can be a very slippery commodity. Particularly in the case of a major BPO where the "customers" are a relatively small band of continuing employees of the Bank, a customer satisfaction survey could be open to manipulation.

Repeated failure to meet critical service levels could be grounds for termination of the contract.

Bank staff and transfers

Often a large outsourcing contract calls for staff movements. It must be recognised that staff cannot simply be transferred as if they were soccer players.

In every case, an employee must have his or her employment terminated and an offer of employment must be made by the outsourcer. Timing here can be critical - it can occur that an employee may be entitled to be treated as redundant before accepting the offer of the outsourcer - thus being entitled to full payment of a redundancy entitlement as well as accepting immediate employment! There are a myriad of other issues to be dealt with, including the treatment of long service leave entitlements, accrued sick leave, and the transfer of superannuation funds, which must be dealt with fully.

More relevant to the present discussion, however, is the effect that a refusal of an employee to be "transferred" may have on the capacity of the outsourcer to perform its obligations - for example, the employee may be the only repository of knowledge essential to the Bank which is inadequately documented.

Maintaining Security of the bank's data

In many customer organisations, an outsourcing contract has important implications for security and other workplace related issues.

It is desirable in such cases, where for example the supplier is locating personnel on customer premises, that the contract provides for controls to be exercised by the customer on those personnel so that security and other important consideration (such as safety) will be maintained.

Access to physical premises is one thing. Access to systems and data is another. It is remarkable how often supplier contracts specify that the only information of the customer to be regarded as confidential is that in documentary form and which is marked "Confidential"! Clearly, employees with access to systems may come across live data the confidentiality of which must be respected. As well, confidential documents may be physically present - not all of which will be so conveniently marked!

Business Recovery Services - ensuring continuity of the bank's business

This is certainly an area in which flexibility is required. The Business Recovery Services which are offered need to take into account the changing nature of the systems or services which are to be replaced in the event of a disaster. The contract must also take into account at least some of the circumstances in which it is likely that Business Recovery Services will be offered.

The basic feature which must be kept in mind in this area is that any disaster is likely to affect a large number of organisations, for example if outsourced through a shared data centre which is often a feature of BPO Contracts. A typical BRS contract might as part of the plan offer the user a guaranteed number of MIPS at a particular data centre run by or available to an outsourcer. However, a clause which says that if the business recovery centre has to cope with more than one disaster it will only use its best endeavours to meet that demand is certainly not in the best interests of the user. Particularly where the supplier is employing a utility model, any disaster means that the user is likely to be competing for resources.

Whilst the contract might need to be flexible because of the myriad possibilities and different types of disaster, there can still be some controls inserted by the user. One is to contractually ensure that no other party subject to a disaster gets a bigger slice of the available resources. This can be particularly important where a user knows that in the event of a disaster it will be competing with related companies of the service provider or some other company with which it has a special relationship. Where there is a white label product offered by a competitor, the user knows that the boss of the person who will decide who gets exactly what resources reports to the boss of the person who will be competing for those resources, they may feel the need to make sure that they have a contract which explicitly details what should happen.

The aim of a good contract is to ensure that the particular project (in this case the business recovery services) are successfully delivered. In the event of a multiple disaster where disaster recovery services are required a lot of decisions will be made instantly, responding to pressure. The user's position will be strengthened in that event if they can point to a contract which has some objective criteria which apply in the particular circumstances at hand.

On the other hand if worst comes to worst and the user finds itself taking legal action, its case will be immeasurably stronger if it can point to some explicit failures, rather than simply claiming a failure on the part of the supplier to use its best endeavours to satisfy the user's needs.

What should be the bank's rights on termination?

In our view, every BPO contract should contain the right to terminate for convenience at any time during the contract whatever the business plan of the customer entity, plans change and having a right to terminate the contract without having to prove breach or without having to rely on the goodwill of the provider can be a very important plank in ensuring that the customer retains flexibility in an outsourcing arrangement. This can easily be provided for by setting out the costs to be paid by the user if it terminates before the end of the contract. Usually these will be on a sliding scale which reflects the fact that the supplier needs to recoup its often considerable set up costs over the full term of the contract. Actual amounts can be set or a formula devised which can be employed in particular circumstances.

It is very important that the user have flexibility at the end of an outsourcing contract, for example, to ensure that the client is not committed in a de facto sense to continue to use the same outsourcing supplier because the difficulty and cost of changing is prohibitive.

This is an area where equality of bargaining power is particularly difficult to attain if left too late. The supplier has the natural advantage of being the incumbent at the end of the relationship, having the capacity, the knowledge and so on.

It is therefore essential that the unwinding of a relationship be worked out, to the greatest extent possible, when the parties are still working together in a co-operative and positive relationship, and not when the tensions are intolerable - that is at the time of negotiating the contract, not at the time of ending it. In an outsourcing contract, this means a fully worked out Disengagement Plan - the mirror of the Transition Plan.

The user may have to have the option of buying any equipment which is being used by the supplier, the supplier may have to transfer necessary licences (with the consent of the licensor being obtained), there may have to be training to transfer technical skills - and it is reasonable for the supplier to be compensated for these services regardless of the question of "fault" in the relationship coming to an end.

In one IT outsourcing contract we advised on, a supplier who was being required by the user to set up a special purpose subsidiary which owned its own hardware and had all necessary staff and tools to carry out all the outsourcing. This ensured that on termination (either though the effluxion of time or on early termination) the user could easily take control of its own destiny simply by acquiring the shares in the special purpose subsidiary. There was to be no need for equipment transfers or licence assignments. Whilst this mechanism works admirably for that purpose, it meant there was very little flexibility in the rest of the contract; everything had to be carried out by the outsourcer only after approval by the user and the special purpose subsidiary had no realistic access to economies of scale.

It is also possible to specify that the service provider provide assistance in drawing the RFP which will be sent to the prospective replacement service provider.

Where should the outsource provider be located?

An important consideration with the splitting away of the processing function from the "users" will be a recognition of the dilemmas arising from that. This raises issues of where certain things will happen.

In a BPO there can be regulatory reasons why the answer to this question is very important. For instance, under Superannuation legislation certain records must be available "in Australia" if the actual database on which the records are held is outside Australia then it cannot be said that those records are "in Australia". A logical test is whether an Australian court could compel access to the records and if access depends upon a telecommunications connection to a foreign jurisdiction then clearly an Australian court cannot itself compel access.

In another example a multinational with a call centre in India found that under UK legislation certain finance transactions had to be concluded on UK soil. The call centre is therefore set up so that if any customer wishes to take advantage of the financing being offered, at a certain point in the call, the call is switched. From the customers point of view it is simply a switch to another department; from the outsourcer's point of view it is a switch from New Delhi to Manchester.

The challenge of creating certainty while maintaining flexibility

Avoiding uncertainty

The great contract killer is uncertainty. The underlying requirement of any contract is certainty. Lack of certainty may lead to a complete failure of a contract, or a crucial section of a contract, as a legally enforceable/meaningful relationship.

The two persistent legal problems with the outsourcing contracts which we see are:

1. the expression of obligations in a vague and general manner; and
2. the inability to agree on what the supplier will do, leading to obligations being left "to be agreed" - so called "agreements to agree".

Contract terms which the Courts find too vague or uncertain cannot form the basis of a legally binding obligation. What is most difficult for many major outsourcing contracts is that this decision must be made by the Court as at the date of entry into the contract. How can the court determine what the enforceable obligations of the parties at the date of the contract are, when the parties have not agreed themselves. An "agreement to agree" is one example of contract in which the obligation is too vague, or alternatively so devoid of substance, that the obligation cannot be regarded as binding. An obligation to negotiate, or do anything else (such as to conduct a "show cause" procedure, or review a document) "in good faith" is also uncertain of being enforceable.

On the other hand, the Courts will always do their best to give meaning to what is obviously intended to be a binding contract, if that is possible. It is always desirable, therefore to at least establish a procedure which is likely to lead to a certain result. In Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234 the NSW Court of Appeal found that the Minister had conducted a "show cause" procedure relating to termination in bad faith, and that the following termination of the contract amounted to a repudiation of that contract, entitling the contractor to substantial damages.

More than this, however, the failure to provide certainty in a contract can be extremely corrosive to the relationship between the parties. How often have you experienced the breakdown of trust and confidence which flows from a reluctance of a supplier to do something, or do something well or properly, because it is not clear that it is obliged to do it?

The most persistent reason for uncertainty in business process outsourcing contracts is a failure to properly assess and address the risks. Both parties to a BPO contract want the contract to be long term. Both are hoping that the other party, (up to a point at least!) remains profitable generally, and derives a profit from the contract itself. In simple terms the greater the risk which is accepted by a party the greater the reward that that party will want in respect of that risk.

If it is clear to both parties which one of them is taking each particular risk it is possible to document an arrangement which provides certainty for both parties and allowed the parties the flexibility to adjust to ever changing circumstances.

Are Flexibility And Certainty Inconsistent Objectives?

A clause which states, in one way or another: "the parties will agree …" is not an indication of flexibility; it is a failure to address and solve an issue, with a consequent lack of certainty and increase in risk. What if the parties cannot agree later? No court in the land can make them agree, nor will it even order that they meet to try and agree!

Inevitably, however, there always remain areas which it is impossible to express with perfect detail, and a number of matters which have not been finalised.

Certainty is not an unrealistic expectation. It is unheard of in any substantial outsourcing contract that the parties will know everything that will happen over the term of the outsourcing - and even if one believes that one does "know", as night follows day it is certain that the customer's requirements will change and/or the supplier's capacities, personnel and circumstances will change! This certain prediction is irrelevant to the question of certainty in contracts - indeed it is one of the factors to be taken into account in making the contract watertight.

Certainty should not be confused with rigidity. Rigid contracts assume that the status quo will continue for the life of the contract or at least that the project will unfold precisely in the predicted fashion. In fact, what is needed is a structure which allows for a reasonable amount of flexibility, so that the parties can adjust to a circumstance in an equitable fashion.

Agreed procedures

Since an "agreement to agree" is an unacceptable business risk, the contract must at least create a procedure for creation of the documents expressing an agreed standard - and consequences if the parties fail to reach such agreement.

In the simplest case, where important areas of the contract are not finalized by the point of no return date, a deadline for completion of this documentation should be set in the contract, and a balanced procedure for its evaluation provided - a procedure that will be enforced by the courts because it is clear enough - with the clear consequence that the parties will then undergo an agreed form of dispute resolution if they are unable to agree on the required documentation. Providing such a procedure maximises the prospects for success.

Whilst clauses drafted in this way may create a seemingly artificial procedure it does not in any way interfere with the parties agreeing in their own way, in their own time, it is merely a backstop, or a default option, if that is not possible. Clauses can provide a series of "guillotines" so that the parties cannot back away or 'fudge' the responsibility of completing the required documentation. By using default acceptances, the procedure also means that the parties may have something at least to use to get the project started, even if a recalcitrant bureaucracy cannot bring itself to sign off anything, leaving improvement of the outcome to subsequent change control mechanisms.

Change control procedure

Additions and changes to a project can be a vexed issue in any agreement. The customer on the one hand needs to keep up with changing circumstances and developments in its business, but on the other doesn't necessarily want to have a new version, with all the implications for training and possibly conversion which are involved without some say in the process. The supplier, on the other hand, has to consider the expense of supplying additional services or of constantly changing work which has been completed or partially completed and has an interest in having all clients use the same service.

One thing is certain. Failure to agree upon a procedure for change control will bring about tension, dissatisfaction (for both sides) and, in the worst cases dispute. Failure to agree upon the contractual significance of a change control procedure will make that dispute even more costly and the result even less certain or satisfactory.

Both parties need to keep an eye on the performance standards and the effect of adding to or altering deliverables - or not altering them.

Both parties should expect change - just as they must assume that none of the negotiators will be around to explain themselves when questions are asked about their intentions in the contractual documents. It is not enough to have a contract that will only be meaningful if nothing changes over an extended period of time (say, longer than 6 months).

There will always need to be a general variation clause which sets out a procedure to be followed when one party or the other perceives a need for a change.

Again, nothing in the clause would prevent the parties from agreeing to changes in another way but it is crucial that any changes are properly documented.

Dispute resolution

(a) Dispute resolution can be a positive tool

Dispute resolution should not be regarded as only a "last recourse" procedure. It has its uses in many areas where the parties may have the benefit of a third party's difference of approach or views - in a way, it is in effect a means by which the parties may share in securing the services of an expert consultant to prepare a report which points the way ahead, if the parties cannot see it.

Its legal merit lies in the fact that, to varying degrees, it is possible to legally enforce obligations to undertake these procedures.

The important question to which we must also turn our minds is the degree of enforceability the decision of the expert may be afforded.

We have already mentioned the importance of allowing for "exit points" where crucial stages are reached at which the parties must agree.

We have also mentioned the importance of contractual change procedures and project management.

When it is not possible to agree, it is sometimes necessary to have recourse to a third party expert to give a ruling.

This is not a dispute resolution mechanism in the sense that one party is accusing the other of breaching the contract. An expert can be called in many different circumstances, for example:

- to determine the cost or resources implications of a change notice,
- to determine whether a specification is complete or accurate,
- to determine whether acceptance tests are adequately specified or scripted,
- to determine whether an acceptance test has been passed (or whether defects are minor),
- to determine an amount payable by the customer to cover the irrecoverable expenses on termination, including a reasonable amount for profit

and so on.

(b) The limits of arbitration

It is amazing how many contracts we see which provide that if the parties fail to agree on something, the matter will be referred to an arbitrator. Such clauses show a fundamental misapprehension of the role of an arbitrator. An arbitrator can decide whether one party or the other is right where there are differing interpretations of the contract or on factual matters; only an expert can impose a solution where the parties simply fail to agree.

(c) Benchmarking

Benchmarking is another device for resolving costing of complex services, such as outsourcing. As yet still much better understood in respect of IT services, by this means the parties refer the service being benchmarked to one of a number of independent organisations, such as Compass or Gartner, who profess to have a large amount of comparative data against which the services being rendered and the cost being charged may be assessed.

(d) Experts must be given sufficient authority

Of course it is not enough to simply appoint an expert and expect he or she to weave some magic solution. The expert must be given some direction. Sometimes, different experts suit different problems - but if the parties cannot agree then some independent third party with knowledge of the relevant environment should be able to do so.

(e) Important rules for "expert" clauses

Note, there can be serious problems with "expert resolution" clauses. The following are a few thoughts on problems with expert determination:

(i) it is important to be precise regarding the nature of the dispute to be resolved - do not have any legal issue, such as contract interpretation or ownership of intellectual property, referred to an expert - traditionally expert resolution clauses have been used for valuations, such as the fair price of shares or a proper rent. Under no circumstances should vague and general words be used, such as "any dispute or difference" - the courts have determined that this can extend to matters such as pre-contractual misrepresentations, the commission of torts such as negligence closely related to the contract, complex legal questions such as release, estoppel, waiver and set-off, rectification, and allegations of breaches of the Trade Practices Act 1974!

(ii) provide a means of choosing the expert - don't leave it to agreement between the parties only - this simply allows a cynical party to obstruct the process by not agreeing to any expert;

(iii) make sure the person appointed to selected to appoint the expert knows what he or she is doing - the President of the Law Society may not be the person best placed to select an expert on mortgage origination;

(iv) if you provide for disqualification on the grounds of bias, make sure you provide a procedure for replacement;

(v) be very careful of legal procedures, such as "discovery" or open hearings with cross-examination - these may bury the process, and the expert, under mounds of paper, and extravagantly increase costs, to little, if any discernible benefit.

(f) The liability of the "expert"

There are also problems for the expert appointed. An expert is not protected by the arbitration laws from liability for negligence or other error. For this reasons, an expert may quite rightly require that the parties enter an agreement (or deed) appointing him, agreeing to pay his fees and indemnifying him from any negligence or other error on his part.

(g) Are expert determinations binding?

It should also be noted that an expert determination clause, even one which specifies that the outcome is final and binding, or that the parties will not commence any court proceedings before completion of the process, will not necessarily exclude the courts if proceedings are commenced. For one thing, there are so many legal issues which may be arise, or be dreamt up, to enable such proceedings. Only arbitration is, by statute, totally effective in excluding the jurisdiction of the courts, in the area of the dispute the subject of arbitration.

(h) Advantages of arbitration

But have you considered arbitration carefully? Arbitrations have many advantages. In addition to those already mentioned, the outcome of an arbitration is legally enforceable. Furthermore, in international transactions, arbitrations may have the benefit of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which Australia, the United States and many other countries are party. Under the New York Convention, arbitral wards may be registered and enforced as judgments in the superior courts of any member nation - there is no equivalent of such scope for court judgments!

There are a number of readymade rules systems for conducting arbitrations. But choose carefully, as you may be substituting procedures which will be slower, more cumbersome and expensive than court proceedings. The problem with arbitrations is seen to be just that, with the wrong arbitrator and inadequate procedures. It should be noted that there are few conventional arbitrators in Australia capable of handling an information technology dispute. For this reason, unconventional procedures may be necessary in order to make the process attractive to professionals with better things to do with their time than listen to barristers wax lyrical on the laws of evidence.

The challenge of aligning the bank's and the supplier's commercial objectives - the partnering approach

In this paper we have assumed a "traditional" outsourcing approach. Another model is the "Partnering" or "Strategic Relationship" model. In such a model it is deemed less important to have certainty in the contract because the overall strength of the relationship will ensure that the parties will act in the best interests of the alliance of the whole.

This can be achieved by ensuring that the service provider has some stake in the financial success of the customer, or at least the relevant portions of the customers business.

In one very important strategic alliance on which we advised, this aspect is handled on a project by project basis. This alliance did not involve a BPO and it is feasible, if undesirable, to end the alliance at the end of every individual project. The mechanism adopted in this matter is that the service provider has a financial stake in every individual project. Simplistically, it must be that the outsourcer receives a portion of the normal fee (enough to cover costs, but not much more) on completion of the project.

Thereafter, the outsourcer can earn anywhere between nothing and a handsome bonus on the standard fee, depending upon the performance of the user's relevant business unit.

"Strategic alliances" cover a host of different approaches, but one thing which is certain in outsourcing contracts, to an even greater extent than other contracts, is that it is of the utmost importance that there be a commercial arrangement such that it is in the interests of both parties to continue to perform the contract. Change is bound to happen and the better the relationship between the parties the easier it will be to adjust to circumstance. Thus whilst at a contractual level there is no difference between paying for a service as it is supplied and paying up front for a service to be provided over the next 5 years, there is an obvious commercial difference if the provider does not have to ensure that the user is satisfied with the service before an invoice is paid.

Conclusion

A BPO for a Bank carries some unique challenges. The APRA guidelines need to be adhered to, but this should not be a hardship as the guidelines are consistent with prudent practice. The FSR requirements, on the other hand, will have a direct effect on the structure of the relationship. The requirement that the entity providing the customer interface be covered by a licence means that a decision about who gets that licence must be made.

More generally, regulatory compliance must be handled very carefully and there can be no room for any misunderstanding. GST provisions also require very careful consideration in Australia; it is in the interests of both parties to maximise the available return in this area but ultimately the burden will have to be with one party or the other.

Privacy and antitrust considerations on the other hand should not present any undue difficulty provided the issues are properly understood and the agreement is carefully drafted.

There are many different forms of outsourcing contract; whilst they all must be built on certainty, this cannot be done in a rigid fashion. Certainty does not need to mean rigidity. Any outsourcing contract which assumes that the status quo will not change is doomed to failure.

It must also be remembered that flexibility must be built on certainty; there is no point in agreeing on the price if the services to be provided have not been agreed. Neither is there any point in having a well worked out flexible structure if such a basic point as the demarcation between the responsibilities of the user and the responsibilities of the outsourcer has not been worked out.

It is therefore essential in any substantial, long-term outsourcing relationship that the parties contract for change and understand the risks which they are taking on, and build considered processes for managing change, giving each party exit points if necessary, but maximizing structurally the likelihood of compromise in response to changed conditions.

Having identified and dealt with these issues, a bank must then also consider the myriad of other legal challenges which are inherent in any large outsourcing relationship.

Ultimately, identifying and appropriately documenting the ways in which the parties propose to deal with these key legal issues will determine the success or failure of the relationship.