

# Tech Projects Gone Wrong: Effectively Managing Disputes

## Introduction

Effective management of tech contracting disputes can protect your organisation from an array of losses, both financial and reputational, and help to preserve revenues and/or restrain cost blow-outs, whilst minimising damage to the ongoing commercial relationship. As discussed in the November 2018 edition of law update 'Contracting to Avoid Technology Outsourcing and Project Disputes', the best way to manage tech contract disputes is to set out in clear terms and sufficient detail the parties' agreement on not only risk allocation provisions but more importantly the commercial and technical aspects which underpin the deal. Where that fails, the next line of defence is to manage the dispute effectively. This article details steps that can help you, as legal counsel, to contain and effectively manage disputes before they reach the courts or alternative dispute resolution forums, such as arbitration and mediation. The necessary ground work at the first hint of trouble is well worth the effort and it pays countless dividends.

## Control Communications

- Ensure the broader team is aware that you are, as the legal counsel, the single point of contact for handling communications to ensure consistent, accurate and internally aligned messaging with the counterparty.
- Vet all future communications to prevent any admissions of fault/liability being made.
- Limit the internal sharing of information in relation to the dispute to 'on a need-to-know basis'.
- Ascertain what communications have taken place with the counterparty and whether any next steps have been proposed to resolve the dispute (for example, are there any meetings planned and, if so, who will be attending?).
- Review correspondence and documents from the counterparty (including after meetings and teleconferences) to ensure it is factually accurate and does not contain biased or self-serving statements.

## Perform Factual and Legal Analysis

- Determine the facts and validate the accuracy and truthfulness of the information from multiple sources within your organisation.
- Analyse contractual clauses relevant to the dispute including provisions relating to:
  - commercial/technical aspects (for example, what deliverables or services are to be provided, by whom, by when, for how much and what are the assumptions and dependencies?);
  - allocation of risk (for example, what are the agreed liability limitations and exclusions, what warranties have been given and representations made etc); and
  - processes and timeframes (including in relation to notices and claims) that are to be followed.
- Formulate alternative contractual interpretations and consider how you can leverage ambiguous language to support your claim/defence.
- Challenge assumptions of fault or breach of contract and explore alternative narratives to help reframe such issues.



## Analyse Options and Develop Strategy

- Work through the analysis with the broader team and highlight the advantages and disadvantages of the various legal interpretations and settlement options, bearing in mind the broader commercial and strategic objectives of the business and the potential financial and relationship implications.
- Formulate a carefully planned dispute resolution strategy with the business (with input from sales, operations, account management, and technical and subject matter experts as appropriate), having regard to the tactics that may be used by the other side. Present a 'win/win' message to the other side.
- Consider whether it would be advantageous to link the resolution of the dispute with addressing other related/unrelated issues or problems or the closing of any new business engagement, as opposed to resolving the dispute at hand in isolation.
- Monetise concessions which you are prepared to give so that you do not end up overcompensating. Also, ensure that the value of concessions which you are seeking or that are being offered to you is appropriate.

## Prepare for Negotiations

- Assist commercial teams to prepare for negotiations, including by providing guidance as to what points are to be raised and what topics they should avoid discussing. Rehearse a script and understand all of the likely scenarios the business team is likely to encounter.
- Consider whether there is significant financial or reputational exposure requiring the engagement of external legal counsel.
- Take note of who is attending meetings/negotiations from the counterparty and whether any senior management/executives are involved in discussions (even if only in the background).
- Be mindful that discussions led by the business with legal counsel mainly listening would suggest that the outcome is more likely to be amicable whereas attendance by litigation lawyers or external counsel would indicate that a more aggressive stance is being adopted.

## Carefully Consider and Vet Settlement Documents

- Build an audit trail throughout the process in support of your position. A written record of notices, minutes, correspondence etc. will facilitate negotiations and a resolution that is more favourable to you.
- Vet settlement and release documents to ensure the appropriateness of the release scope and conditions.
- Be mindful of the interrelationship between the principal contract and the release agreement (for example, which document is to prevail in case of any conflict or inconsistency; and does the release payment reduce the settlor's liability limit under the principal contract – and if so, by how much?).
- Assess the possibility of passing down liability, penalties or service level credits to the subcontractor (if applicable).

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