



What you need to know about...
...IT contract disputes (and how to avoid them!)



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What you need to know about... ...IT contract disputes and how you can avoid them

Anyone who has any dealings with IT contractors or suppliers will know that it is never straightforward. Projects are always delayed and overrun the budget.

IT Contracts

The Alternative Dispute Resolution Directive applies to IT contracts between businesses and consumers. It is likely that the majority of IT contracts are B2B rather than B2C and so would not be covered. Nonetheless, it is still worthwhile considering including a mediation clause in such contracts and using an Alternative Dispute Resolution Provider to resolve any disputes with all customers, whether business or consumer. It is not quite clear why contracts with businesses are not included under the ADR Directive, as with a small business such as a sole trader, you are essentially contracting with an individual.

Making a decision as to which business to use to deliver your IT project can be difficult, particularly as a functioning website is now a key part of any business, with internet sales increasing exponentially year on year. The potential to suffer loss as a result of an IT failure or delay is now greater than ever before. You may also want to consider whether to engage a large or small business. As entrepreneur Emma Sinclair has commented, the wind direction seems to be changing in favour of the small, agile and cost effective technological solutions as opposed to big, slow solutions.

Dan Ward has put it perfectly when saying that: "Speaking as a customer, I prefer to work with companies that deliver, preferably in my lifetime."

Whatever the size of the business you engage, IT disputes frequently arise within a development context and often follow a similar pattern:

The customer will often complain that the developer has taken longer than the contract provided to deliver a product, which ends up being more expensive and less effective than that contracted for. The developer meanwhile complains that the customer unreasonably changed the specification and failed to cooperate or provide information to the developer.

There may be complaints about delay because insufficient resources have been allocated to the project or because the supplier has underestimated the difficulties involved. Finally, there can be arguments over installation, training and maintenance.

With IT contracts, the consumer or business is often in a difficult position because the IT service provider holds the trump card, as they often host the website, or own the software, as well as developing it and changing service provider can involve further delays and hassle. The last thing that anyone wants is a long drawn out and costly dispute.

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Computer Science Corporation Contract - Lorenzo

Large projects have the potential to go very wrong indeed. There is no better illustration of an IT contract failure than the Computer Science Corporation contract, Lorenzo, which was part of the NHS' National Programme for IT initiative, which was marked by huge cost overruns, missed deadlines and undelivered promises. Launched in 2002, the £11 billion project was billed as the biggest civilian technology undertaking in the world, a top-down plan to provide hospitals and health trusts nationwide with electronic health records linked into an interoperable NHS-wide framework. The Chair of the Public Accounts Committee referred to the company as "rotten" and described the system as "hopeless."

MPs on the Public Accounts Committee said final costs are expected to increase beyond the existing £9.8bn because new regional IT systems for the NHS, introduced to replace the National Programme for IT, are also being poorly managed and are riven with their own contractual wrangles. A committee member has said that this was further evidence of a "systemic failure" in the government's ability to draw up and manage large IT contracts. "This saga is one of the worst and most expensive contracting fiascos in the history of the public sector.

Fujitsu - Connecting For Health Contract

The Fujitsu Connecting for Health contract was part of the £12bn NHS national programme for IT, large parts of which have had to be abandoned at a cost estimated by the National Audit Office to be £2.7bn. Fujitsu won its £896 million contract to provide health records for the South of England in 2002/3. In 2008 the contract was cancelled, with only around £150 million spent, after disputes over changes, including a new system for electronically displaying and storing X-rays. The company announced its intention to sue the Department for Health for £700m which it would have received for completing the entire project. Following a dispute, the claim went to arbitration. The legal bill reportedly exceeds £31.5M.

There have been other examples of IT failures such as the child support agency, the passport agency, the tax credit system, late payments from the rural payments agency and difficulties in tracking foreign national prisoners

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Signpost to ADR - Consumer IT Contracts

At the other end of the scale are small consumer disputes about IT systems such as website development, software and hardware. I have already mentioned the case of Mr Durkin which related to the purchase of a laptop which has left him out of pocket to the tune of £300,000 Court costs. IT contracts are covered by the Consumer Rights Act 2015 (from October). For the supply of IT services to consumers, if the contract does not expressly fix a price or does not say how it is to be fixed, and the contract is to be treated as including a term that the consumer must pay a reasonable price for the service, and no more. Also, if the contract does not expressly fix the time for the service to be performed, and does not say how it is to be fixed, then in that case the contract is to be treated as including a term that the trader must perform the service within a reasonable time. What are a reasonable time and a reasonable price are questions of fact. There is an implied duty to exercise reasonable skill and care in the performance of an IT contract.

If the service does not conform to the contract, the consumer's rights are the right to require repeat performance and the right to a price reduction.

If the consumer complains and the complaint cannot be resolved, they also have a right to be signposted to a certified Alternative Dispute Resolution provider, under the ADR Directive, from 1 October 2015. With online sales, the business has to provide a link to the EU Online Dispute Resolution Platform, so a business setting up a website for the sale of goods or services in the EU needs to include this link by January 2016.

How then can a dispute be avoided?

- Specification - make sure that the specification for the services to be provided is properly scoped out.
- Set out the price and timescale for the provision of services in a contract so that the Court does not have to determine what constitutes a "reasonable" time or price. Stick to it! If any issues arise, keep a document trail.
- Include a limitation of liability clause and point it out to the consumer or business (if contracting on standard terms of business). This will be valid as long as it does not seek to exclude liability for personal injury or death, or breach of statutory implied terms, but must be reasonable to be enforceable.
- Include reference to an ADR Provider in your terms and conditions, when dealing with a consumer. Consider including a mediation clause in all terms and conditions. From January 2016, if making online sales in the EU, include a link to the ODR Portal in your website.

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