



Tips for getting compensation on problematic ICT projects

Plenty of ICT projects lose big money for customers: extra cost, lost profit, problems for business operations, etc. Customers often don't claim compensation because it becomes too hard. Here are some bullet-pointed tips to improve the odds, based on our experience in numerous projects. They're also a component of sorting out delivery of the problematic project. In later articles, we'll touch on:

- *using the contract to help stop project problems; and*
- *drafting the contract in the first place to get better outcomes.*

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● **Our tips:**

- This is not about going to court and winning: it should be easier;
- Strategy including multiple angles;
- There may liability higher than the contractual limitation of liability;
- Don't defer preparing for a claim until the project's end;
- Paper trail;
- Hold back money if possible;
- Single point of contact;
- Get early specialist legal advice.

Dealing with each point:

● ***This is not about going to court and winning: it should be easier***

Going to a full hearing in court and arbitration is a lousy outcome. It's also a rare outcome as the vast majority of claims started settle before then. The strategy should have that at the top of the list: resolve this short of trial (but the back-stop may be going to trial if necessary): that approach in fact makes it more likely the claim will be settled.

● **Strategy including lateral angles**

It's unusual for a claim to succeed by following only a linear path of taking court or arbitration action. Generally there are multiple lateral angles to add to the mix. Relationship issues and opportunities as between vendor and customer usually reveal angles that help get resolution. For example, often there are things a vendor can do that are of real benefit to the customer but are low cost for the vendor.

● ***Don't assume the contract caps liability so there's no viable claim***

Often the contract has a low limitation of liability and/or the payments on breached SLAs and KPIs are low. But in many countries, there may be law around this to extend liability. Plus the facts may not help the vendors. For example, NZ shares unique law with Australia that often overrides the low caps in relation to ICT claims.

● ***Don't defer preparing for the claim until the project's end***

We see customers wanting to do this in many projects. It happens for a number of reasons:

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- Generally a problematic project has the customer's project team overloaded. So there's little time to start dealing with a claim;
- A big issue: typically the project team is incentivised to get the project out the door. But there are longer term issues that the customer's managers should ensure are managed.
- The customer is dependent on the vendor so it doesn't want to alienate the vendor.

Our experience is that, if this causes the customer to defer preparing for a claim – and/or not claiming – compensation until the end, the customer will find it difficult to get the claim going from a standing start. That's been the reality in many projects. Keeping a good relationship with the vendor is often important. But that applies just as much to the vendor keeping a good relationship with the customer. It often has stronger reason to keep the relationship sound. Large vendors can have a good project relationship while a claim is being run in parallel. It's all about managing this well. Handled well, the relationship can be strengthened.

There are other reasons to move early on preparing for a claim. For example, without building the case early on, the information gets lost in the mire of a complex project where there are almost always issues flowing both ways.

Particularly important is sorting the strategy out early on, even if the claim is not notified early. We see many projects with problems with claims because the wrong moves were made early on in the process.

Another big point is that optimally dealing with sorting out the project often overlaps with optimally preparing for a claim. If one's not being done, odds are the other falls by the wayside.

● **Paper trail**

This is critical, but often falls away for the reasons above. For example, the project team are flat out on their day jobs with no time to write things up, etc. Trying to get this done in a typical project management environment can be hard work unless the customer's management make sure this happens, against the background that typical project management structures are not well geared to do this. In theory they are but that's often not what we see in projects.

● **Hold back money if possible**

Possession is 9/10ths of the law. If there's a big milestone payment due, consider holding it back. That's way easier than trying to recover money. Of course the customer needs to weigh up any downside in this, but often that downside is minimal when carefully considered.

● **Single point of contact**

Customers and vendors have multiple lines of communication. We've seen many customers lose money because communication of the strategy is allowed via multiple paths. On the other hand, those that get all to hold the party line prosper, as we've seen with great clients. For an experienced vendor, dividing-and-ruling is drop-dead easy where there is no single point of contact strategy. Managing this is difficult in the real world, but essential.

● **Get early specialist legal advice**

This comes back to the point about planning early on. Customers can unwittingly take the wrong path without the legal aspects factored in. Generally the cost is recovered multiple times over. But if the legal input isn't able to handle the range of issues noted above – beyond just the pure lawyer's role – results may be sub-optimal.

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