



WINNING ICT DISPUTES – A CASE STUDY

We cover three common types of ICT disputes:

- claims to recover losses;
- disputes involving remedying breaches to get systems and services functioning adequately (aka, remediation);
- renegotiating existing agreements to meet new needs and to overcome problems in the services.



This case study was presented at a recent NZ Law Society Seminar

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What this paper is about

What do ICT problems and disputes at the big end of town – the Incis scenario – say about how best to deal with all types of ICT disputes as well as endeavours to renegotiate ICT contracts to get better outcomes? The issues and best strategies as to those disputes frequently apply to small ICT projects too, as well as other categories of ICT disputes such as in relation to IP, agile, Telco issues, domain names, cloud computing, security breaches and so on.

We'll use a typical large ICT dispute scenario as a case study. The facts are real but anonymised – and changed a little– to preserve confidentiality.

As is often the case with ICT disputes, our case study involves all three types of ICT dispute we outline below:

- claims to recover losses;
- disputes involving remedying breaches to get systems and services functioning adequately (aka, remediation);
- renegotiating existing agreements to meet new needs and to overcome problems in the services. See —Renegotiating outsourcing contracts to fit new reality¹.

We outline views based on practical involvement in numerous claims: generally, litigation is only a small part of the story, so we focus on the broader issues, touching on court and arbitration considerations at the end.

We've included a checklist for ICT disputes. With capable and optimal handling, ICT disputes can often be handled successfully despite the challenges. We focus primarily on the issues and strategies from the perspective of a customer bringing a claim. The supplier's approach is similar and/or can be the flip-side.

¹ Karl Flinders "Renegotiating outsourcing contracts to fit new reality" (22 October 2012) *Computer Weekly* <<http://tinyurl.com/mboy47r>>.

Case study: what happened

To preserve confidentiality, “Acme” will be the project name, and there’s the Supplier (a large ICT supplier) and the Customer (a large business). The Supplier installed a mission-critical Acme system for the Customer. The Supplier had the best proposal after an RFP process run by the Customer. The system is the core software for the Customer’s business operations.

During the implementation phase, disputes developed over what was in scope, and the type of services to be provided. Plus, changes were needed to reflect changed circumstances. This was resolved by way of a variation agreement.

But things still went badly wrong. The project ran over time by a considerable period. And there were problems after the project went live with significant impacts on the business, and its customers. The Customer had to ensure that the system’s problems were fixed, and the negative impacts on its business and customers were fixed as quickly as possible. This was the priority, ahead of getting compensation for the Customer’s substantial dollar losses.

So, as often happens, the three types of claim we deal with happened in the case study:

- changes to an existing agreement to resolve disputes and to make changes to reflect changed circumstances;
- remediation to fix problems; and
- a claim arising out of losses.

Our case study is no outlier

As ICT projects go, Acme is not exceptional. McKinseys recently reported² that:

On average, large IT projects run 45 percent over budget and 7 percent over time, while delivering 56 percent less value than predicted..... Staggering as these findings are, most companies survive the pain of cost and schedule overruns. However, 17 percent of IT projects go so bad that they can threaten the very existence of the company. These unpredictable high-impact events—“black swans” in popular risk parlance—occur significantly more often than would be expected under a normal distribution.

ICT problems and disputes are rarely publicised. We hear about some public sector problems such as Incis, but many other public sector issues don’t see the light of day (and private sector disputes usually fly under the radar). Additionally, as arbitration clauses frequently appear in ICT contracts, and cases rarely go to court trial anyway (as they are settled), court cases are limited.

In some ways, ICT suppliers are getting better at getting things right, but that’s still not so in some areas. One of the reasons why ICT projects go off the rails, relative to, say, bricks-and-mortar projects such as building an office block, is that ICT projects can and usually do change extensively during the project life-cycle; the building project, on which much ICT project methodology is based – the so-called waterfall method – has much

² Michael Bloch “Delivering large-scale IT projects on time, on budget, and on value” (October 2012) McKinsey & Company <<http://tinyurl.com/nyrw823>>.

clearer definition and implementation from start to finish, producing less space for problems and disputes. ICT projects almost always evolve markedly.

Even the relatively new “*agile*” methodology,³ which is designed to overcome the deficiencies of the waterfall, can end up being poorly designed and implemented, leading to disputes, and can even be more problematic as a poor excuse for careful project management: see the article, “Agile Is Too Often an Excuse For No Process”.⁴ So, expect agile projects to generate ICT disputes too.

Acme contract

The contract between Supplier and Customer is in common form: a detailed head agreement with schedules. It follows from an RFP process in which Supplier put in a proposal (which is similar to the sales material almost usually leading up to ICT deals: this is relevant to what we outline below).

When a dispute arises, the first port of call in the contract is the liability regime,⁵ including the liability provisions, limitation of liability (LOL) clause and the dispute resolution clause. Often the reality is that, no matter how serious the breach of contract, the LOL clause limits liability to small sums.

Limitation of liability

The Acme LOL is a good example of why there should always be close review of LOL regimes in case there might be liability despite what initially appears to be the position. So we tease this out to illustrate some of the thinking around ICT dispute strategy.

Exclusion of consequential loss

With the usual carve-outs,⁶ the Acme contract excludes the Supplier’s liability other than for “*Direct Damages*”:

Neither Party shall under any circumstances be liable to the other (under the law of contract, tort (including negligence), equity, under indemnity or otherwise) for any liability, damages, costs, loss or expenses (collectively, *Loss*) arising out of or in connection with this Agreement (howsoever arising or connected, including as a result of the first Party’s or any third party’s performance, non-performance or delay in performance) other than Direct Damages, regardless of the cause of such damages or whether the other Party had been advised of the possibility of such damage.

“*Direct Damages*”, as referred to in that clause are defined as:

Any liability, loss, damage, costs or expenses suffered or incurred by a party, arising as a direct, natural or probable consequence of the act or omission complained of.

³ Agile programming is defined by that research tool frequently used by lawyers (Wikipedia of course) as follows: “Agile software development is a group of software development methods based on iterative and incremental development, where requirements and solutions evolve through collaboration between self-organizing, cross-functional teams. It promotes adaptive planning, evolutionary development and delivery, a time-boxed iterative approach, and encourages rapid and flexible response to change.”

⁴ Mark Corley “Agile Is Too Often an Excuse For No Process” (8 May 2013) IDG Connect, <<http://tinyurl.com/k6wx79m>>.

⁵ With regard to provisions such as s 4 Contractual Remedies Act 1979.

⁶ Such as in relation to IP.

Given the way Direct Damages are defined, there may be wider liability than expected. Under the English authorities, many LOL clauses unexpectedly do not exclude big-ticket consequential loss items such as loss of profit, loss of benefit and so on. Those cases apply the *Hadley v Baxendale* 9 Ex 341 two limb approach as to remoteness, to the difference between direct and consequential loss. That approach does not exclude liability for most of what is generally regarded as consequential loss. Broadly, the great majority of loss incurred by customers, such as loss of profit and additional expense, flows naturally from the breach, and therefore it is in the first limb (meaning that it is recoverable). Such loss is treated by the English courts as direct not consequential loss. That is so even though many business people and lawyers would regard loss of profit, for example, as consequential loss.

The leading New Zealand case in this area did not apply the English approach, preferring instead the Australian authorities that more closely follow general commercial (and lawyers') expectations: *Oceania Furniture v Debonaire Products* [2009] NZHC 1139. But there is at least an argument that, as the wording in the Acme contract adopts the language of remoteness and *Hadley v Baxendale*, the English authorities would apply in the Acme situation. The Direct Damages definition refers to losses that are the "*direct, natural or probable consequence of the act or omission complained of*". That is the language of *Hadley v Baxendale*. The scope of the LOL clause of course is primarily driven by its wording, and the choices made by the parties in that regard. It can at least be argued that the parties here choose the *Hadley v Baxendale* model, putting it outside the general run of LOL clauses used by parties.

Total cap on liability

Then there is a typical backstop liability clause in the Acme contract, limiting all claims to a maximum sum. Here, it is substantially less than the potential claim by Customer against Supplier. That is often the case.

LOL incorporated in contract?

With Acme, the LOL clause is clearly incorporated in the contract, and therefore enforceable. It's contained in a detailed negotiated written contract. ICT contracts however, such as some online ICT contracts, often fail in this regard. The supplier will be unable to prove that the LOL clause is legally binding as it cannot prove that the clause has been incorporated in the contract. The clause for example could be at another location in a click-accept context. So that's an important area of focus. There's a case study on how a customer saved \$1.3M by leveraging an ICT supplier's errors, including as to incorporating terms in contracts, in our article, "Minimise early termination charges on switching ICT suppliers: a case study".⁷

To give some idea of the significance of this incorporation point, some years back, we acted for parties defending numerous claims by substantial commercial players, in a context where the relevant terms were brought into play by reference to other material and documents. In multiple factual scenarios, around a third of the claims were successfully rejected because the terms weren't adequately incorporated. When drafting

⁷ Wigley and Company "Minimise early termination charges on switching ICT suppliers: a case study" (2012) <<http://tinyurl.com/mtgsaf8>>. See also "Challenges with online contracting – another case and some tips" (2012) <<http://tinyurl.com/p8opz3p>>.

terms, sometimes making sure the terms are incorporated in the contract is a lot more important to achieve effectiveness than fancy drafting of those terms.

Service Level Agreement (SLA)

The Acme contract, like many others, has an SLA, by which the Supplier is liable if it fails to meet certain service levels: it must provide a rebate in those circumstances. But the sums payable are small where there is a failure to meet the service level. The SLA is close to irrelevant in terms of dollar recovery of losses. That is the usual position: across the hundreds of ICT contracts we've reviewed, we've never seen an SLA providing significant money. See our article, "Service Level Agreements: Are they worth the paper they are written on".⁸ Additionally, the service levels are often framed in a way that makes them kick in rarely. Or breach is difficult to prove. See our article, "Service-level blunders".⁹

Although customers often see SLAs as a good thing, the practical reality is that they usually limit rather than expand liability.¹⁰

Other avenues?

So, given the LOL, and the likely SLA restraints, the Customer may need to ferret around elsewhere to see if a claim is available. Nothing may be available but it is well worth checking. One avenue to consider – and one that is sometimes available in ICT scenarios – may be the Fair Trading Act 1986 ("FTA"). Claims for compensation¹¹ for breach of, for example, s 9 of the FTA,¹² are typically, but not always, not limited by the LOL clause. While an FTA claim can arise in multiple ICT circumstances, a classic example is a misleading or deceptive statement in marketing material (such as a proposal in response to an RFP, in brochures, as part of the pitch for the business, etc). There is well-developed jurisprudence in Australasia as to what circumstances give rise to a claim; for example, a common trap is that a breach of a promise or similar commitment made in marketing material will usually not, of itself, give rise to FTA liability.¹³

The party seeking to claim should also look for whether a foot-fault provides an avenue: ICT contracts and projects are complex and, for example, the interrelation between documents – such as the head contract and schedules – can be problematic. See for example our article "Unexpected trap in contract terms prioritising contract documents".¹⁴ Lawyers often think that a clause giving priority to the head contract will remove problems with poor drafting in the detail, such as the statement of work. That is often not so. That's an area to trawl through, along with surrounding communications and steps.

⁸ Wigley and Company "Service Level Agreements: Are they worth the paper they are written on?" (2004) <<http://tinyurl.com/ncl7hvh>>.

⁹ Stuart van Rij "Service-level blunders" (2012) Wigley and Company <<http://tinyurl.com/pax3koe>>.

¹⁰ Particularly if they are the exclusive remedy for the particular breach.

¹¹ Note however that the Consumer Law Reform Bill, if passed in current form, would enable suppliers to contract out of s 9 and other FTA liability in certain circumstances.

¹² Under s 43 FTA.

¹³ Useful resources in relation to FTA claims in ICT disputes include the ss 9 and 43 FTA annotations in T Gault (Ed) Gault on Commercial Law (looseleaf, Brookers) and L Trotman and D Wilson, *Fair Trading: Misleading or Deceptive Conduct* (Lexis-Nexis) of which a second edition is due for publication in July 2013.

¹⁴ Wigley and Company "Unexpected trap in contract terms prioritising contract documents" (2013) <<http://tinyurl.com/lpeqvcv>>.

So far, we've assumed just a \$ claim, but there's more

Just as the \$ claim does not stand in isolation, usually, the dispute can raise other issues. In fact, the Acme Customer did have issues around getting the service, critical to it, up and running. That is a greater priority for the Customer than recovering its losses.

Steps to remedy the problems are often described as remediation.

Generally, the approach relevant to a dispute on a \$ claim is relevant to disputes as to remediation. Plus, the two areas tend to overlap anyway. This is an important area, creating problems and opportunities, which we outline below. That neatly segues into the next topic: the third type of dispute we are dealing with (which also often overlaps).

New ICT deals for tough or changed times?

Here's another important facet to ICT disputes, and one that has affected Acme too. As we note above, ICT disputes fit within a broader environment. One aspect is the desire (well, often, a strong need) of customers to change their contract arrangements to meet new needs, to patch up problems that have emerged in the relationship, and to replace old services with new.

In the Acme project, before the contract escalated into strong dispute around remediation and losses, the parties had entered into a variation agreement. Many of those variations resulted from disputed positions as the variation agreement states. The variation adjusted such things as scope, timeframes and price. Other variations resulted from the need to make changes, beyond the ability to do so in the contract (under regimes such as change control).

A good example of a mid-term variation is that a supplier may wish to change from a traditional computing model, provided by several current suppliers, to a new cloud computing model. Often the contract dates and services of each supplier don't coincide. So the customer may want to negotiate to enable earlier and coordinated transition. This raises aspects just like more "pure" ICT disputes, and in fact these issues are in the nature of disputes quite often (as the Acme variation demonstrates).

Experience (and research) shows that these potentially negative scenarios can lead to positive outcomes, including positive change for the supplier, as we note in our article, "New Deals for Tough Times".¹⁵ A supplier, handling this well, can lock in the customer for a longer term over newer technology. This is just another facet of the importance of addressing ICT disputes and problems in a more holistic fashion, having regard to broader objectives. It's best to resolve these in cohesive fashion.

Situations may emerge where the customer wants to continue only with some of its suppliers, and needs to terminate early. Even then, there may be opportunities to do so less expensively than the contract documents suggest. See for example our articles, "Minimise early termination charges on switching ICT suppliers: a case study"¹⁶ and "Early termination charges – major developments (and for the penalties regime)".¹⁷

¹⁵ Michael Wigley "New deals for tough times" (2009) CIO NZ <<http://tinyurl.com/lebsrz9>>.

¹⁶ Wigley and Company "Minimise early termination charges on switching ICT suppliers: a case study" (2012) <<http://tinyurl.com/mtgsaf8>>.

¹⁷ Wigley and Company "Early termination charges – major developments" (2012) <<http://tinyurl.com/payswgg>>.

The flipside for suppliers, by the way, is to tighten their contract terms to improve recovery where there is early termination.

Dispute resolution provision

The Acme contract has a typical process: first, raise the dispute; then, if necessary, escalate to senior management; then to mediation; and then to arbitration.¹⁸ That's a valuable sequence in getting resolution. It escalates the dispute to senior managers early on (forcing a focus at a high level), and inserts a mediation step which can be particularly effective in ICT disputes. These types of mechanisms are important. Well drafted contracts will often have an independent expert process too. That is valuable for resolving issues such as technical disputes.

The \$ claim rarely stands in isolation

For the Customer, the highest priority is to get Acme working. Seeking compensation is secondary. That's understandable as remediation is usually more important for the organisation. Therefore, the Customer shelved the claim to further down the track.

Customers usually have on-going relationships with the suppliers, and dependencies on the suppliers. That needs to be managed. But so too must the supplier carefully manage the relationship with the customer (even if it has a short term get-out-of-jail-free such as a strong LOL). Both supplier and customer have objectives to resolve matters (even though one driver for a supplier may instead be to make difficult the pursuit of a claim).

Those wider dynamics are crucial in relation to ICT disputes. Not only are they inevitable in most situations, but a claimant (or someone defending a claim) can leverage wider considerations such as the on-going relationship, reputational issues and so-on.¹⁹ The prospect of litigation or arbitration is but one part of the story to consider to get best outcomes, and can even be the smallest part.

Delaying instigation of the claim

As noted above, the Acme Customer did what happens in many projects: it delayed pursuit of the claim until the project problems were ironed out. Importantly, the Customer took steps to document and plan for its claim. Without that, our frequent experience is that, in practical terms, it is too difficult to start pursuing the claim later. It's a natural thing to just say later that this is split milk and too hard. Move on. We've seen that play out many times. Plus, without the ground work carefully established early on, it becomes too hard in practice, and too costly. For example:²⁰

- as the priority is to get the project functioning well, the project team often won't document things, as is highly desirable, to support the claim. This involves many facets from the handling of change control (a frequent issue giving rise to problems in pursuit of ICT claims), to documenting meetings, etc. It is possible to achieve both outcomes (indeed, often better to do so for the system to perform well) but that

¹⁸ Other contracts also may have expert determination of particular issues, and so on.

¹⁹ All that of course must be handled appropriately to meet ethical obligations.

²⁰ A valuable resource in this regard is the article in the Society of Computers and the Law periodical, Computers and Law, "Ten Ways to Reduce Costs in IT Litigation and Arbitration" by D Blunt QC and T Bergin (October 2012).

requires planning ahead of time to ensure it happens, and to ensure very busy people fighting bush fires actually do this. We've seen numerous disputes where this has not happened, often fatally for a claim or its defence. Getting the paper trail right is key;

- similarly, without recording the state of, for example, the software said to be defective, at the relevant point of time, it can become hard to prove the case. Reconstructing the facts can be difficult;
- ICT projects generally involve multiple lines of communication between supplier and customer. Communications must be carefully controlled. Frequent problems we've seen many times include:
 - communications that should be privileged but aren't due to a process not being put in place and followed;
 - intemperate communications: from when a claim is in prospect the idea of "writing for the judge" as well as the recipient becomes important;
 - multiple lines of communication are an especially significant problem. For example, if a strategy is pursued but then someone in the organisation undermines this by taking a different line in discussions with their counterpart (that is commonplace) the organisation's prospects can be substantially undermined. We've seen that play out often, and it is also a strategy that a party can leverage very effectively: divide and rule: it's easy to do when staff do not have clear communication limitations established. Of course the flipside is to leverage the failure of the other party to ensure it has locked down its communication channels. And why not?
- reconstructing the case when it is not well documented becomes too expensive: as in most litigation and arbitration, the paper trail is generally king;
- as noted above, the lateral considerations and circumstances, beyond the \$ claim, are all important.

Are there solutions beyond payment of money?

In most ICT dispute scenarios – whether resolving current project issues or seeking compensation – settlement in kind is easier than in cash. Often it's easier for a supplier to provide an additional system component than to pay its monetary value, for example. Not only does that cost less,²¹ but also the supplier reduces the stigma and precedent associated with paying out money.

Overlapping in this area can be the problems suppliers – especially multinationals – face in making concessions in light of issues such as revenue recognition and the different internal treatment between business units. For tax and accounting reasons, some forms of settlement are more difficult than others (eg due to revenue recognition rules). Similarly, one business unit may find it difficult to settle a matter when its profit centre carries the rap. Is there a way through in the circumstances?

Is it worth the candle?

Often yes. And that is so in many more cases than where claims are brought under current projects or to claim losses. Our experience is that customers don't fully consider the

²¹ Unless of course the customer was going to buy the component anyway, in which event giving that component is equivalent to giving cash.

options, taking an instinctive view it's not worth it, and it's not worth harming relationships with essential suppliers. That is so despite the large problems that are commonplace in ICT projects (as the McKinsey research confirms). The key is carefully deciding whether and what to do, and implementing the approach carefully, taking a more holistic approach as outlined above. Done well, relationships with essential providers can be enhanced (and even the supplier can end up better off, such as getting a longer term commitment from the customer).

Importantly, the issue of proceedings (in litigation or arbitration) is rarely necessary. And even after issue of proceedings the great majority of claims settle anyway. Having noted that, if the supplier perceives the customer does not have the stomach to push things that far if push-comes-to-shove, that will make a good settlement much harder. The supplier will usually detect this and can leverage it. Of course, the claimant can take a step at a time, reassessing at each point. Significant is that the supplier generally has strong incentives to settle and avoid litigation too. For example, the supplier will want to avoid the no-smoke-without-fire PR downside. It's bad for future business in the small ICT community.

Do the cost/benefit analysis

It's important too to formulate what might be achieved, and the percentage chances of achieving that, with estimated cost. Without that vision, senior management are unlikely to be attracted into pursuing things outside core business such as selling widgets. That's an obvious point but it's often not addressed.

Managing cost and time

Many ICT matters are complex, leading to complexity in disputes and consequent strains on cost and time commitments. But also the subject matter of the dispute can involve considerable sums too, often well beyond the cost incurred in pursuing the claim. While carefully prepared claims (or defence of claims) are likely to be powerful in getting great outcomes – and the time and cost is often amply justified – time and cost commitments can be managed to keep them down. A useful resource in this regard – although it focusses mainly on the litigation component of the overall ICT dispute picture – is an article in the periodical, *Computers and Law* from October 2012, “Ten Ways to Reduce Costs in IT Litigation and Arbitration” by D Blunt QC and T Bergin.

What if it's necessary to litigate or arbitrate?

It may seem strange to devote only a few lines to this, in a paper on ICT disputes. But that reflects the reality that going this far is rare, although the prospect of litigating is a strong backstop to drive earlier resolution, particularly if it is apparent that the claimant is prepared to go down that path. Plus, other sources deal with litigation and arbitration strategy and process. Some features specific to ICT disputes include (we'll focus on the High Court but the points are relevant as well in the District Court and arbitration):

- the recently developed case management and discovery processes are much better suited to ICT disputes, particularly in controlling activity arising out of extensive and complex issues and paperwork. Getting it right from the first case management conference is important to keep control and reduce scope creep. Discovery will be

even more of an area to get right than in much other civil litigation, given the volume of documents that ICT projects generate. Care is needed with scope and with the method of discovery (as outlined in more detail in Judge Harvey’s paper);

- similarly, careful definition and focus in the statement of claim is key. That may involve front-ending more activity than might otherwise be the case, but that should pay off down the track;
- experts are likely to be needed. As ever, choosing the right people is key: the right ICT specialist for the particular dispute is needed. (Accounting evidence may be needed too, to deal with loss of profit and expense claims).
- ICT disputes can suit the hot-tubbing approach for experts;
- while litigation or arbitration is an important backstop to drive settlement, both sides should have options in the forefront, ranging from mediation to carving off some issues for resolution in a different way (such as more technical issues resolved by expert determination). Obvious enough points but the nature of ICT disputes make this even more important. See our article, “Tying up Loose Ends, and dispute resolution, in ICT contracts: quicker, simpler and better solutions?”²²

For arbitration or expert determination, take particular care in the choice of the tribunal. ICT matters are specialist and difficult to decide for non-specialists (although the non-specialist could bring in expert assistance). Additionally, there will often be issues outside ICT such as forensic accounting, complex legal issues, etc.

Checklist for ICT disputes

1. Understanding of the facts and overall rights is assumed in this checklist (but front-ending investigation and analysis will often produce better outcomes).
2. Contract terms including in the schedules (such as obligations, SLA, LOL, dispute resolution, etc)
3. Problems in the documentation (eg (a) in the schedules creating liability despite LOL in the head agreement and (b) LOL not incorporated in the contract)?
4. Identify pre-sales material such as proposals, brochures, emails, etc. Implications?
5. Surrounding circumstances and documents (create additional liability, etc?).
6. If the LOL and SLA effectively limit the claim, are there other grounds?
7. Is remediation outside the LOL regime anyway?
8. Is there insurance (if yes, consider notifying before taking steps).²³
9. What is the wider context in terms of the organisation’s needs and objectives? Likewise as to the other party (and does the other party have particular issues such as revenue recognition concerns, reputational risk, etc?). Where does the claim fit in that context (and how can that be leveraged for better outcomes)?
10. Integrating approach to the three types of ICT dispute where relevant (claim for losses; remediation; and renegotiating contract).
11. Cost/benefit analysis. What time and cost may be incurred up to particular points, with an

²² Wigley and Company “Tying up loose ends, and dispute resolution, in ICT contracts: Quicker, simpler and better solutions?” (2004) <<http://tinyurl.com/ot4wgup>>.

²³ If steps are taken before approval from the insurer, this may enable the insurer to refuse cover.

- assessment of a possible range of outcomes with percentage assessment of success?
12. Solution in kind (eg supply of additional services) possible instead of a cash payment?
 13. Vary services so they are more suitable to customer while supplier also benefits (eg longer term)?
 14. Dispute resolution provisions in agreement including options such as independent expert determination, meeting between senior managers and mediation.
 15. Dispute resolution alternatives that might be agreed to reduce time and cost for both parties.
 16. Have actively on agenda methods for reducing cost and time involved in the dispute.
 17. Consider instigating claim sooner than later. If the risk is taken to instigate later, carefully establish paper trail, decision path such as change control, acceptance testing, etc.
 18. Integrate pursuit of claim with ensuring steps are taken to make the system operational.
 19. Retain details of the problems from the start (for example, retain a copy of flawed software, as that may be difficult and expensive to recreate later).
 20. Establish clear protocols for communications (what, who and why). Enforce the protocols (there will very likely be breaches and/or pressures from the other side to breach).
 21. If proceedings needed, upfront getting the approach right, in pleadings, initial case management, scoping of discovery and discovery method, choice of experts, etc. Actively consider other options at all stages such as expert determination, lateral solutions, etc (to minimise time and cost).