



Michael Wigley

Recovering losses from wayward vendors

BAD ECONOMIC TIMES lead to more situations where customers look at recovering losses caused by their ICT suppliers. From my long experience with disputes, full-blown litigation is not for the faint-hearted. But this far from rules out seeking to recover losses, especially with careful planning and a lateral approach.

Much will depend on how well the customer positions itself, relative to the vendor, if it has

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a potential claim. (The same points in this article apply on the flip-side to vendors too).

It is just as important to look outside the contract, as at the contract terms themselves. If there are problems, frequently a claim is not limited by the dollar cap in the contract.

For example, claimants could rely on the legislation such as the Fair Trading Act to establish liability, which applies in many situations. If it does apply, generally liability is uncapped (ie a limitation of liability provision is trumped).

With issues of this legal, commercial and technical complexity, the key is to get knowledgeable legal advice. Great lawyers can also help work out the strategy. This extends well beyond the effect of a lawyer being seen to be involved, thereby demonstrating seriousness.

Typically, there will be factors going both ways in terms of negotiating leverage. As a customer, the trick is to maximise leverage. For example,

depending on what the terms of the contract say, withholding payments to the supplier could work powerfully. "Possession is nine-tenths of the law."

Seeking out lateral solutions is particularly important. Trying to get a straight dollar payment is usually much harder than, for example, negotiating lower prices for future work, more work for the same price, and so on. Looking for something approaching a "win/win" is obvious enough, yet frequently overlooked. A big gain for a customer might not cost the

vendor a lot if things go well.

When a vendor sees the customer is serious, it may well want to try and despatch the problem out of the public eye. Vendors usually will be concerned about issues of reputation.

To help unlock differences, in my experience, mediation is a particularly powerful vehicle. The mediator does not decide the dispute one way or another. Rather, he or she helps facilitate resolution of the dispute. The great mediators — and there are few of them — weave real magic in this way, often to the benefit of both parties and even for the benefit of ongoing relationships.

If the parties can't resolve issues and they need to be sorted, litigation (ie Court) can be a difficult option given cost, delay etc. Arbitration follows as a close second in the unsatisfactory stakes. The parties might agree on expert determination if they haven't done what is often a good idea anyway: Included an expert determination provision in the original contract.

Expert determination is a sort of "quick and dirty" arbitration, by which a decision is made relatively quickly by a third party. This has real benefits in terms of speed and cost.

If all else fails, and there is enough at stake, then getting on and suing in Court may be the only way. Less than 5 per cent of all cases where Court proceedings are issued go all the way to trial.

In other words, settlement is the real game and settlement is likely. However, think carefully before embarking on litigation. I have been involved in so many situations where the parties (claimants and defendants) have looked back and wished they never went there.

However, with some clever footwork and careful planning, resolution short of litigation is possible in these situations. Even better, there can be a relatively good outcome for both parties.■

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