

# CIO Connect Expert View When Things Go Wrong

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## Options for a CIO in Resolving Contractual Problems

### The Challenge

Organizations increasingly rely on a complex and fast moving network of third parties including 'as a service' or cloud providers to implement and support critical IT services. And so they should - out-tasking removes many technological risks from businesses not best equipped to deal with them. CIOs are also rightly encouraged to embrace disruption and 'start-up' vendors to maximize opportunities from innovative ways of working.

At the same time we must recognize that these positive trends introduce a significant level of **commercial risk** that cannot be left unmanaged. In a dynamic multi sourced network there is a greatly increased risk of vendors failing to deliver the required level of integrated services. The three most common areas that give rise to problems are vendors

- Not adopting collaborative behaviours when working with competitors to deliver an integrated service
- Being resistant to proposing innovation and change to the benefit of the client
- Not adopting constructive approaches to resolving disputes which can arise even in the best managed relationships

The increasingly volatile nature of the vendor market and the lower capital strength of new vendors in the market also present increased risks to service continuity from **failure to stay in business** or from being absorbed into stronger – potentially less attractive - competitors.

There is much good advice especially from CIO Connect around how to manage vendors to mitigate these risks. I do not intend in this article to repeat that rather to explore what options exist for a CIO and team when prevention has not worked.

### Managing the Conflict

Technology failures and human errors cannot be avoided completely even in Tier 1 providers. In a complex outsourced service model these invariably lead to disputes over who is responsible and who should pay. The contract may appear to be clear on this but very often day to day service delivery depends on important intangibles not covered by the legal allocation of responsibilities and liabilities. From my own experience as a CIO I am clear that naïvely hoping that disputes don't happen doesn't work. We need to accept that a constructive approach to managing conflict is essential to maximizing value from key and long term vendor relationships.

My current role as an arbitrator has taught me that positive dispute management should be based on very clear processes for escalation of a problem within the party organizations. In many cases the problem will be resolved eventually by an agreement between individuals and it is essential that good communication lines are kept open throughout the dispute.

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However it is naive to assume that parties to a dispute will be able to take an entirely objective view of the problem unaffected by their own corporate pressures and interests. Inter-party negotiations should be supported by early recourse to a professional third party able to provide an independent view before parties become too entrenched. It is important to ensure during contract negotiations that such recourse is **incorporated in a valid arbitration clause**.

There are two main approaches to independent involvement in a dispute. In the first category the parties to a dispute may commission an **independent analysis** of the causes of a dispute and a report containing an objective assessment of the dispute and a proposed framework for resolving the dispute. This is known as early neutral evaluation or ENE, and is often the forerunner to the appointment of an independent mediator between the parties who will endeavour to facilitate an agreed settlement between the parties.

However if an agreed settlement is not possible through ENE or mediation, the parties may agree to the appointment of an **independent arbitrator**. An arbitrator will conduct a formal resolution process and the parties must agree in advance to accept the outcome of the resolution. Arbitrations for contracts concluded under English Law will be conducted within the Arbitration Act 1996 but other jurisdictions have similar legislation and sets of arbitral rules governing the conduct of the dispute.

### Why Arbitration?

An arbitration is not a court case and need not involve legal representation. However it still provides an **effective resolution** as it is a legally binding process, rules of evidence apply and an arbitrator's awards are usually legally enforceable.

Managed correctly, arbitration should always be more cost effective than litigation. With the agreement of the parties it is possible for the arbitrator to fix in advance how much the case will cost and how long it will take.

In addition the parties are able to select an arbitrator who is qualified to understand the professional and technical context of their dispute. In many cases the arbitrator can deal with the case without a hearing but even if one is required the arbitrator will seek to minimise the adversarial nature of a court case and concentrate on establishing the merits of each case using the facts rather than points of law.

The arbitrator is also legally bound to conduct the resolution with **strict impartiality** and also ensure **confidentiality** unlike a court case which of course is in the public domain.

In short taking a dispute to arbitration means that it can be resolved in a legally binding way but as it is conducted confidentially, impartially, and relatively swiftly at a known cost the matter can very often be resolved without undisputed areas of the contract being affected.

### Summary

**Prevention is always better than cure** and, to ensure effective management of the risks arising from reliance on external sources for key business services, CIOs should have good vendor management processes and a clear understanding of vendor risks in place.

However CIOs also need to be aware that problems will arise even in the best managed contracts and having a constructive approach to managing disputes in place is essential. Early recourse to an independent mediator or arbitrator is part of a constructive approach and this will often be crucial in ensuring that vendors deliver the business value that was anticipated during the procurement and sales process.

### About the Author:

Stephen Hand is a Fellow of the Chartered Institute of Arbitrators and a member of the Institute's Business Arbitration panel. He is the former CIO of a global marine organisation with many years senior IT management experience.

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