



Managing disputes

When disputes arise during software projects they can cause further delays and result in the relationship between customer and developer breaking down completely. Where the project is ongoing, it is critical that any disputes are resolved quickly and smoothly, in order to give the project the best chance of being completed successfully.

Our note looking at practical tips on [avoiding software disputes](#) will hopefully minimise disputes arising in the first place. When a dispute does occur, however, a clear and workable dispute resolution clause in the contract can assist parties by providing a practical and useful framework for resolution.

Dispute resolution clause

As a minimum this should include the applicable governing law and jurisdiction (see our Brexit tip box below), but commonly a dispute resolution clause can set out an escalation procedure to be followed in the event of a dispute. This does not prevent the parties from agreeing an alternative process or attempting to resolve the dispute by informal means, but can be helpful in providing a step-by-step process to follow if a disagreement arises.

A multi-tiered dispute resolution clause requires or permits the parties to pursue some form of alternative dispute resolution (ADR) mechanism before embarking on the formal binding mechanism (arbitration or litigation) they have chosen. Most commonly, these clauses tend to have formal or informal negotiation as a first step, then formal mediation, then arbitration or litigation for final resolution.

The advantages of such a multi-tiered clause are that it provides the opportunity for parties to resolve disputes in a less adversarial setting, preserves ongoing commercial relationships and can save significant amounts of time and money. If one party fails to engage properly, however, it can cause delay and the costs of a mediation may be wasted if it is unsuccessful.

It is possible to carve-out certain types of disputes from the dispute resolution clause and make provision for these to be resolved using a different dispute resolution mechanism. In this way, technical disputes can be directed to arbitration whereas more simple disputes can be left to the courts to resolve by way of litigation.

Audit clause

The inclusion of an audit clause in the contract can be a useful tool for policing performance under a software development project. It can be used to discover information, establish whether there has been a breach of contract by the other party, and form the basis for a discussion about how the issue can be resolved. The aim of an audit clause is to grant a party the right to access books and records of the other party, and will often include:

- An obligation to permit access to, or to deliver up, copies of records and materials, either periodically or on request.
- Provisions prescribing the purposes for which a request for access may be made.
- Provisions prescribing the frequency with which requests may be made.
- Provisions on who bears the cost of providing such information, and in what circumstances.
- Carve-outs from the information that must be provided, such as pricing and cost.

The contract should also include provisions (either in the audit clause itself or in a separate clause) setting out which records and supporting materials must be kept and for how long.

I have a dispute – now what?

Many disputes arise out of misunderstandings or miscommunications between contracting parties, and are capable of resolution via an informal discussion. Such a discussion is more likely to be successful following good preparation (and taking legal advice early on in the matter so that you can position your argument tactically), so review your internal records of meetings, as well as minutes of project meetings and email communications so that you can discuss these with your counterparty. If you have an ADR or dispute escalation clause in your contract, you may be required to try and settle the matter by negotiation in any event.

If resolution is not possible via an informal discussion and you need more information in order to establish what has gone wrong, you may want to consider requesting an audit if you have an audit clause in your contract.

The dispute resolution clause in your contract may then require you to try mediation before a formal dispute resolution process is initiated. At this stage, it is worth obtaining legal advice in order to seek advice on the mediation process, and to ensure that the appropriate preparation is carried out in order to allow the best chance of settlement. If mediation is unsuccessful and you or your contracting party wants to pursue formal legal proceedings, we recommend that you seek legal advice from a law firm with specialist expertise in resolving software disputes, who can support you throughout the process. Click [here](#) for our expertise in resolving software disputes.

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