Disputes in IT contracts - Source, Impact and Resolution tactics in early stages[1, 2]

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ABSTRACT

Agreements and disagreements are part of everyday life and when it comes to contracts a disagreement can lead to some serious repercussions. The Information Technology sector in particular has been subjected to major contractual disputes, some leading to closure of businesses. The impact of dispute in this sector can be significantly reduced by understanding its sources and implementing effective methods of resolution in the contract documents. This paper describes the different techniques that if applied early in stages of a contract will help to scale down or even diminish an unpleasant situation. The paper provides enough evidences to support the use of Alternative Dispute Resolution techniques in combination with Litigation option in a contract. The results of this document will help to understand the benefits of using both techniques together, with reasoning and will prove that this is the method of the future.

Key words: Dispute, Information Technology, Early Stages, Resolution, Impact, IT, Solution, Tactics

INTRODUCTION

The development of new technologies, the globalization of business and the current political uncertainty in the last 5 years has prompted international organizations to increase its resources to Informational Technology ("**IT**"). IT frequently involves contracting with third parties. This is due to the specific and complex nature of this services and the need for different teams and systems.

IT contracts, like any other contract, will always entail legal and operational risks. Accordingly, for any organization one of the key focus areas to ensure sustainability of is legal dispute

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management. How well an organization handles the disputes that arise with growth and the entering into complex contracts determines the sound progress and development of the company.

The use of emerging technology and online programs has been critical in mitigating and/or resolving a material number of disputes. While there are international bodies and organizations that help to resolve disputes such as the World Trade Organization ("**WTO**"), the International Chamber of Commerce ("**ICC**"), and the National Center for Technology and Dispute Resolution (the "**NTCDR**"), these are organizations whose dispute systems are too specialized.

No doubt, when it comes to budgeting for a legal department, the need to cover for any IT legal fees will result in a significant part of the budget, a direct consequence of the drafting, negotiation and review of agreements. Having a carefully crafted contract may help in reducing the number of disputes arising out of it, but it will not guarantee that such agreement is free from dispute. How a contract works in practice will depend on how it was drafted, the actual underlying facts and eventually how the parties construe or interpret its terms. There may also be external aspects outside the contract which a company cannot foresee.

i. **The Based on the contracting partner**

The laws, the disputes, the contracting methods and the influence on the outcome in both make significant difference.

(a) Business to Business ("**B2B**"); and

(b) Business to Customers ("**B2C**").

ii. **Based on the nature of the domain it caters to**

The way disputes are handled in each of these sectors are significantly different and so is the likelihood of success when it comes to final dispute resolution

(a) Private
(b) Public and Government

1. Problem/Opportunity Definition:

This research paper will focus on answering the following questions:

(i) What are the different major disputes in IT contracts?

(ii) What are the most appropriate dispute resolution techniques available?

(iii) What is the impact of these disputes resolution techniques on a company?

Through this research paper, we will unfold some of the key reasons behind disputes arising in the early stages of contract agreement, share the impact and analyze factual information against proposed solutions. The paper will rely on the qualitative approach to support my research wherein I will include legal points from law journals, research papers, and relevant case law pertinent to key aspects of IT law. The paper will also benefit from a strong empirical approach based on: (a) real and recent disputes being handled by executives of an IT consultancy firm; (b) experience from IT counsel; (c) the work of a Program Manager working for a French government; (d) Relevant English case law on IT; and (e) a Contract Manager Leader working for IT sector.

METHODOLOGY

With the fast-evolving nature of IT industry, the scope of dispute has also widened whether it is the well-defined dispute area relating specifically to the in software license, development, maintenance agreements, or hardware sale and rental agreements, or general disputes common to all industry such as termination of outsourcing and consulting agreements, the scope of dispute is limitless.

Determining the motives of the parties entering contract is not simple, there can be variety of hidden influences that can prevent from finding resolution. Even though it is difficult to identify which motive triggers which kind of issues and impact, through previous practices we now have proven methods that we can certainly say are viable options for dispute resolution.

2. Feasible Alternatives:

The content of this qualitative method discovery is a result of information shared by the **Fadi Elkhoury:** Owner of Global Assure Finance headquarter in Cyprus , **Eduardo Barrachina**: English and Spanish qualified lawyer with White & Case LLP, a **Regional Contract Manger leader** from an IT industry who chose not to be named, and **Patrick Chauffeton**: Chargé de Mission des systèmes d'Informations arbitrator for Computer Architectures with Ministère de la Transition écologuque et solidaire, along with Internet and law journals

There are three solutions that can be applied

A) Alternative Dispute Resolution (ADRs)

B) Litigation:

C) Both ADR + Litigation

3. Development of outcomes and cash flows of each alternative:

A. **Alternative Dispute Resolution (ADRs)**

It is the system of dispute resolution aiming to avoid litigation or going to court for settlement. There is consensus that ADRs usually compromise four mainly methods: namely negotiation, mediation, collaborative law, and arbitration. Each of these techniques aims to settle dispute outside of the court but uses different methodologies to support the practice.

Once a very popular method of settlement recommended by experts in 1980s, was adopted by as many as 600 organizations but soon the popularity dropped. The very reason that ADRs were being recommended, to save time and cost, incurred during litigation process, was in fact resulting in more expenses being occurred by the organizations. Yet IT giants such as AT&T showed strong commitment towards ADRs and benefitted significantly.

(1) **Negotiation:** Participation is voluntary; the process of negotiation and solution search is the disputed party's responsibility

(2) **Mediation:** It is the fastest growing ADR technique, It is similar to negotiation but with the addition of third party. In this, a third-party mediator or facilitator provides a platform for the parties to resolve their own dispute. It is not the job of Mediator to impose solution, but he/she may suggest solution known as "Mediators Proposal"

(3) **Collaborative law:** This technique is similar to a part of litigation process. The discussion of dispute resolution happens in the presence of an attorney that is hired by each party. No one imposes a resolution. This is a formal process even though it is a Litigation variant, the ADRs processes and attitude makes the base of it.

(4) **Arbitration:** This process eliminates the complexities of a trail making it into simplified process which can last up to few weeks to few months. Each party selects an arbitrator, and the arbitrators in turn elect the third arbitrator. It is a confidential hearing, the result of which is not for public.

B. Litigation

It is the traditional court system of resolving dispute. It involves a judiciary system that hears the case. The parties pay for the lawyers but not the judge. The process can be broadly categorized into pretrial, going to trial and post-trial techniques, though the aim is to resolve the dispute in pre-trail phase. It usually enjoys prestige in some jurisdictions like England or New York but may be extremely lengthy and unreliable in emerging market jurisdictions, e.g. India, Mexico or Brazil.

Litigation, based on the court system has improved a lot since 20^{h} century, the systems is more organized, unbiased, and even though the trials and appeals may take significant amount of time in some cases, the system prevails in complex cases of dispute resolution when compared to ADRs, which is mostly apt for resolving simpler disputes

C. Both ADR + Litigation

One of the practices that are prevailing in recent years is specifying both methods. In a contract parties can specify the resolution tactic that is to be used in case of a dispute. Arbitration is of two kinds Binding arbitration and Non-Binding arbitration. In case of Binding arbitration, the decision of Arbitrator is final and afterwards cannot be challenged in court which is possible in Non-Binding Arbitration. Having both options available gives the contracting parties flexibility to choose the best suited option

4. Selection of Criteria: the scale of **Better, Good and Worse** is used for comparison

Criteria	
Worse	0
Good	1
Better	2

The attributes are the following:

All these attributes are related and are important decision points in deciding the dispute resolution technique.

Cost incurred- The cost of resolution process increases with time and complexity of the issue

Time to resolve disputes- Faster resolution of dispute saves cost

Scope of handling disputes- Simpler issues are resolved faster, but it is the complex issues that affect the organization most as they require more time, and sensitivity

Complexity of processes involved- If there are more processes involved in the dispute resolution process, it would increase time and cost

Competitive Advantage- The positive outcome for one of the disputed parties puts them in a favorable or superior business position, which is very useful in business area

Step 1: Using the resolution practices suggested in the interview, with **Dominance technique of Non-Compensatory approach of MADM method,** we can compare the dominant resolution tactics.

The technique is most suited as we have factual historical data to show that ADRs and Litigation techniques are effective in certain contractual disputes, but data to show the effectiveness of ADR and Litigation in a contract is unavailable.

Figure 1: Selection of dominant techniques using Dominance technique of Non-Compensatory approach of MADM method

Interviews	Dispute Resolution Tactics		
	ADRs	Litigation	ADRs + Litigation
Interview from Owner of an IT consultancy firm	Worse	Good	Better
Interview from the IT Council	Worse	Better	Good
Interview from the Programme Manager	Better	Worse	Good
Interview from Contract Manager Leader	Better	Worse	Good
Suggestion from scientific papers	Better	Worse	Good

From the table above it is clear that ADRs and ADRs + Litigation techniques are both advisable methods in IT contracts

FINDINGS

5. Analysis and comparison of the alternatives:

Step 2: In this section, I used two steps of **Dimensional Scaling technique of Compensatory approach of MADM method** for quantifiable analogy. The step provided supporting evidences for selection of a solution

Figure 2: turning each option into a Base 1 (dimensionless) scoring model

Undesirable- (Worst case-Attribute Value)/(Worst case-best case)			
Desirable- (Attribute Value- worst case)/ (Best Case- Worst case)			
Attributes	Value	Formula	Dimension Value
Cost Incurred	**Low**	(3-1)/(3-1)	1
	Medium	(2-1)/(3-1)	0.5
	High	(1-1)/(3-1)	0
Time to resolve dispute	**Low**	(3-1)/(3-1)	1
	Medium	(2-1)/(3-1)	0.5
	High	(1-1)/(3-1)	0
Scope of handling dispute	**Low**	(1-1)/(3-1)	0

	Medium	(2-1)/(3-1)	0.5
	High	(3-1)/(3-1)	1
Competitive Advantage	**Low**	(1-1)/(3-1)	0
	Medium	(2-1)/(3-1)	0.5
	High	(3-1)/(3-1)	1
Complexity of processes involved	**Low**	(3-1)/(3-1)	1
	Medium	(2-1)/(3-1)	0.5
	High	(1-1)/(3-1)	0

From the table above we got the values of Low, Medium and High which we can now apply to calculate the relative weighting of each attribute

Figure 3: Relative Weighting

Attributes	ADR	ADR + Litigation
Cost incurred	Low	Medium
Time to resolve dispute	Low	Medium
Scope of handling dispute	High	Low
Competitive Advantage	High	Low
Complexity of processes involved	Low	Medium

Attributes	ADR	ADR + Litigation
Cost Incurred	1	0.5
Time to resolve dispute	0.5	0.5
Scope of handling Disputes	0	1
Competitive Advantage	0	1
Complexity of processes involved	1	0.5
Total	2.5	**3.5**

6. Selection of the preferred alternative

From the tables above we can most definitely say that keeping both options in an IT contract works in favor of all Contracting parties. This practice ensures the best possible resolution technique is available for application in cases of disputes.

From table 1 it was evident that ADRs are more flexible resolution technique in terms of processes than Litigation, however its incapability of handling complex issues is a drawback. Through the interviews we found that in comparison ADRs and ADR + Litigation provide offer similar higher benefits than litigation. . This step will helped us to **remove the least desirable technique**

By applying "Dimensional Scaling technique of Compensatory approach of MADM method", on the second part of the research we quantified the information. Once we had the values of each criterion, it became clear that among ADRs and ADRs + Litigation, the latter provided more benefits.

7. Performance Monitoring and post-evaluation of results

To provide the evidence of the selection, I am presenting a real contract clause below. During the interview with Mr. ElKhoury, he agreed to share a part of the contracts he uses for this research paper.

Figure below: A real contract clause from Global Assure Finance which shows availability of both options.

25.1 This Agreement shall be governed by and construed in accordance with the general principles of the French law.

25.2 Any dispute between the parties about any matter relating to the performance of this Agreement, which cannot be resolved by the parties amicably within 30 days' notice of the dispute being served by party on the other, will be referred to arbitration procedure on the request of either party which shall be conducted according the Rules of Arbitration of Dubai International Financial Centre (DIFC) London Court of International Arbitration (LCIA) by one arbitrator appointed in accordance with the said Rules. The language of the proceedings shall be English. The place of arbitration shall be Dubai City (DIFC – LCIA Arbitration Center).

25. 3 The parties undertake and agree that all proceedings conducted under this article shall be kept strictly confidential, and all information, documentation, materials in whatever form disclosed in the course of such proceeding shall be used solely for the purpose of those proceedings.

25.4 The parties reserve the right to seek immediate redress to the courts in the event the dispute relates to Intellectual Property Rights or protection of Confidential Information, without the need to resort to the amicable dispute resolution.

To apply this technique, the standard contract documents are modified to include both methods of dispute resolution. Since both ADRs and Litigation have certain advantage over each other, having a flexibility of choice helps the contracting parties to select the best option available resulting in faster and more amicable solution.

In a review of Civil Justice, Lord Justice Briggs, recommended the use of different ADRs techniques such as Mediation, wherever appropriate in combination with Litigation to resolve dispute. The report was published in July 2016 where he quoted "2.86. The relationship between the civil courts and the providers of ADR has undergone fundamental development during the last thirty years but, save in certain respects (described below), it has now reached a relatively steady state. I would describe it as "semi-detached". The civil courts do a reasonable amount to encourage parties to settle their disputes by an appropriate form of ADR, but do not as yet act as primary providers of it, save in certain modest respects"

Similarly in emerging economies such as "India", the mediation concept of ADR is practiced. "Lok Adalat" meaning "People's court", is a system where the disputes are amicably resolved without sorting to Litigation, but this practice does not prohibits the right of an individual to seek jurisdiction.

CONCLUSIONS

Through this research paper we established

- ✓ The cause major disputes in IT contracts
- ✓ The dispute resolution techniques available and
- ✓ The impact of these disputes resolution techniques on a company

There are varieties of disputes that IT contracting parties may encounter; from specific IT related issues such as software license agreements to more generic disputes such as termination or consulting agreements. Even the most well thought contracts can have disputes which can get escalated quickly in case of an ineffective resolution clauses like in case of high profile case of Satyam Ltd vs Venture Global.

These disputes can have multiple effects on an organization. The result of a disaster resolution driving a company to Bankruptcy is not uncommon. The impacts of these disputes are endless.

There are different disputes settlement processes that an organization can practice. ADRs have been in picture since 1980s. This resolution tactic is very effective if used using a formalized process and choosing the right technique for the issue. In case of parties more willing to settle their disputes negotiation technique works well. The absence its structure to handle complex disputes makes it ineffective in such cases as Arbitration waves off the parties right to seek Judicial intervention if unsatisfied. The option of using both techniques in an IT contract makes it easier for a smooth solution. An example of such modification could be parties reserving the right to seek litigation in case of disagreement during arbitration. Another example which is even recommended by U.S and U.K courts is to follow mediation technique before going to the court as it is very effective.

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