

Dispute Resolution when Negotiating and Contracting IT Outsourcing Contracts^{1, 2}

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ABSTRACT

An Information Technology subcontracting relationship can meet many issues, which can arise during the pre-contractual phase or the already-started business relationship. This fact shows that there is a strong important to choose adapted clauses and provisions when writing the contract and a key verification of all the details to do during the whole contracting process.

Then, the main objective of this paper is to give both parties, the IT supplier and the customer company, the key elements essential to protect their interests and their projects.

When willing to enter or entering into an IT outsourcing contract with an IT supplier, a customer company has to secure its contract from its negotiation, thanks to prevention and cooperation, to the signature of the agreement. On the other hand, if unfortunately a dispute arises after both parties entered into their legal IT relationship, it is recommended to them to have implemented the “Dispute Resolution” clause providing them to use the Standing Neutral alternative solution. This option generally makes the parties saving costs and time, benefiting of a neutral and very competent third party familiar with the contract’s environment (projects, relationship, privacy, etc.).

Keywords: Dispute, Contracts, Management, Solution, Information Technology, Outsourcing, Subcontracting, Negotiating

INTRODUCTION

Because of the acceleration of the digitalization of business processes, more and more companies all over the world start or already have projects of software development. These projects are generally part of development portfolios to make a company more competitive: it is a strategic

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key point (**Figure 1**³). “In response, the organization as a whole and its IT group in particular has to continuously evolve to be more agile and robust”⁴.

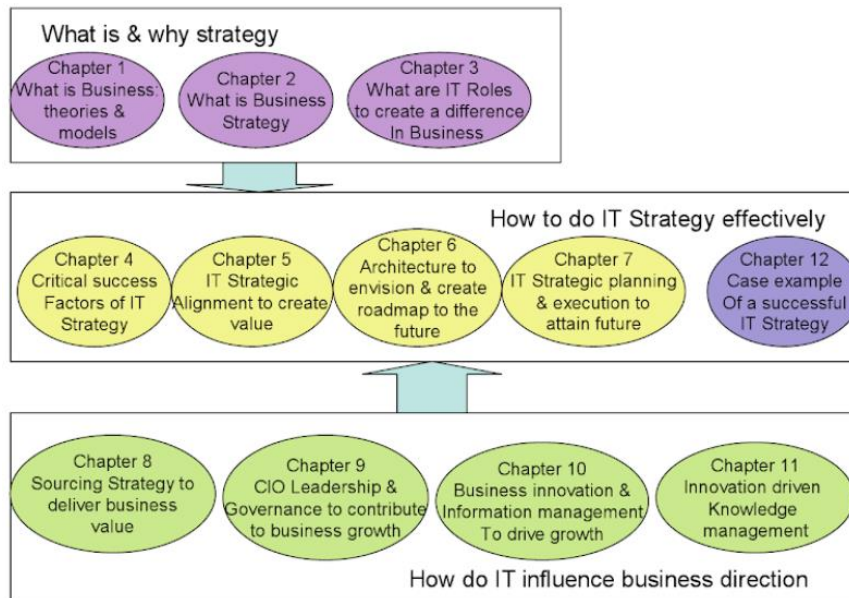


Figure 1: Why IT development and implementation within a company is strategic?⁵

To achieve this Digital Transformation, thanks to their software development, some companies, such as IBM, create their own software, use it personally and sell it to other companies. Otherwise, some other companies do Information Technology (IT) outsourcing which is “the subcontracting of a part of all of the IT function of a company to an external outsourcing vendor”⁶.

Outsourcing has profoundly evolved over time. Now, more than being a way to externalize the production in order to minimize manufacturing costs thanks to third parties, it entails “several

³ “Information Technology Strategy and Management: Best Practices” – Chew, Eng K – Retrieved from <https://books.google.fr/books?id=oOYioSahlYgC&pg=PT330&lpg=PT330&dq=Strategies+for+dispute+prevention+and+management+in+IT+outsourcing+arrangements&source=bl&ots=oOcnF0Vn5d&sig=LDwL4TP6oeG8Dr7-trHUrK8pYWw&hl=fr&sa=X&ved=2ahUKEwjexdHfyNveAhUvzoUKHSiKCRA4ChDoATAFegQIBxAB#v=onepage&q&f=false>

⁴ “Information Technology Strategy and Management: Best Practices” – Chew, Eng K – Retrieved from <https://books.google.fr/books?id=oOYioSahlYgC&pg=PT330&lpg=PT330&dq=Strategies+for+dispute+prevention+and+management+in+IT+outsourcing+arrangements&source=bl&ots=oOcnF0Vn5d&sig=LDwL4TP6oeG8Dr7-trHUrK8pYWw&hl=fr&sa=X&ved=2ahUKEwjexdHfyNveAhUvzoUKHSiKCRA4ChDoATAFegQIBxAB#v=onepage&q&f=false>

⁵ “Information Technology Strategy and Management: Best Practices: Best Practices” – Chew, Eng K – Retrieved from <https://books.google.fr/books?id=oOYioSahlYgC&pg=PT330&lpg=PT330&dq=Strategies+for+dispute+prevention+and+management+in+IT+outsourcing+arrangements&source=bl&ots=oOcnF0Vn5d&sig=LDwL4TP6oeG8Dr7-trHUrK8pYWw&hl=fr&sa=X&ved=2ahUKEwjexdHfyNveAhUvzoUKHSiKCRA4ChDoATAFegQIBxAB#v=onepage&q&f=false>

⁶ “Information systems outsourcing: issues and evidence” – K. Altinkemer, A. Chaturvedi, R. Gulati – Retrieved from <https://www.sciencedirect.com/science/article/pii/S0268401294900035>

strategically important functions: from technological innovation to logistics, customer relations to post-sales services”⁷.

A project is “*an investment that requires a set of logically linked and coordinated activities performed over a finite period of time in order to accomplish a unique result in support of a desired outcome*”⁸. Implementing an Information Technology within a company means using hardware (tangible assets such as computers) and software (intangible assets such as systems, tools, applications) is a good way to perform successfully a project. The person “*responsible for the function of all the business’s technology tools and processes*”⁹ is the IT manager.

For example, if the Customer Service team wants to improve its productivity by having a tool summarizing all the information of customers’ orders (customer path), the Customer Service Manager will ask the IT Manager to find the adapted tool for his team’s needs. Moreover, the asked-tool by the Customer Service Manager may be also the adapted-tool for:

- The Purchasing Service which must help the team to know what are the most demanded products or services by the customers in order to negotiate prices to the company’s products or services suppliers;
- The Marketing and Communication Service which must get the team the access to the necessary data in order to create adapted content to the customers’ needs and expectations.

The addition of these three different projects, having different objectives, is a portfolio of projects which has for objective to “*to minimize the risk and maximize the return*”¹⁰, according to the guild of project compendium. One should understand that this example is the exact illustration of a multi-project program, as it achieves “*synergies from projects with common traits such as shared resources, similar clients or product technology*”¹¹ because there is a “*relative interdependence of constituent projects*”¹².

⁷ “Outsourcing strategies. How to formalize and negotiate the outsourcing contract”, Pallicelli Michela and Meo-Colombo Carlotta – Retrieved from <https://core.ac.uk/download/pdf/6294468.pdf>

⁸ Adapted from a Linked In discussion initiated by William R. Duncan 1/13/2018- Retrieved from <https://www.linkedin.com/feed/update/urn:li:activity:6357416976318558208/>

⁹ “Information Technology” – Margaret Rouse – Retrieved from <https://searchdatacenter.techtarget.com/definition/IT>

¹⁰ Portfolio of projects’ definition – The Guild of Project Controls Compendium and Reference – Retrieved from <http://www.planningplanet.com/guild/gpccar/introduction-to-managing-project-controls>

¹¹ Definition/General Purpose of a Multi-Project Program – The Guild of Project Controls Compendium and Reference – Retrieved from <http://www.planningplanet.com/guild/gpccar/introduction-to-managing-project-controls>

¹² Key feature of a Multi-Project Program – The Guild of Project Controls Compendium and Reference – Retrieved from <http://www.planningplanet.com/guild/gpccar/introduction-to-managing-project-controls>

The IT Manager uses information assets which give him the projects' requirements. Then, his objective is to find the IT software matching with the projects' different technical specifications. So, he will make use of the services of an IT supplier and make an outsourcing contract.

In addition, a company willing to make its portfolios of projects successful must take into account several criteria: human management, risk, planning, data-use, time and costs. To improve the processes and the tool-use within an organization, IT software deliver solutions for projects' success of a company. A process is *"a set of interrelated work activities in which value is added to the inputs to provide specific outputs"*¹³ which *"may be represented by a network and that, on completion, results in the creation of a product"*¹⁴ or a service. Implementing processes, thanks to IT tools, can then optimize the project life cycle (**Figure 2 - above**) which is the "typical phases"¹⁵ of a project.

Data mining allows to get useful information and to base its analysis on the lessons learned in order to select, under the IT provider's advices, the good tools. One should think about what (objective), why (reason) and how (solution) before deciding to create or use new tools¹⁶.

¹³ Definition of process – Max Wideman – Retrieved from http://www.maxwideman.com/pmglossary/PMG_P07.htm#Process

¹⁴ Definition of process – Max Wideman – Retrieved from http://www.maxwideman.com/pmglossary/PMG_P07.htm#Process

¹⁵ Definition of a project life cycle – The Guild of Project Controls Compendium and Reference – Retrieved from <http://www.planningplanet.com/guild/gpccar/introduction-to-managing-project-controls>

¹⁶ By the Author

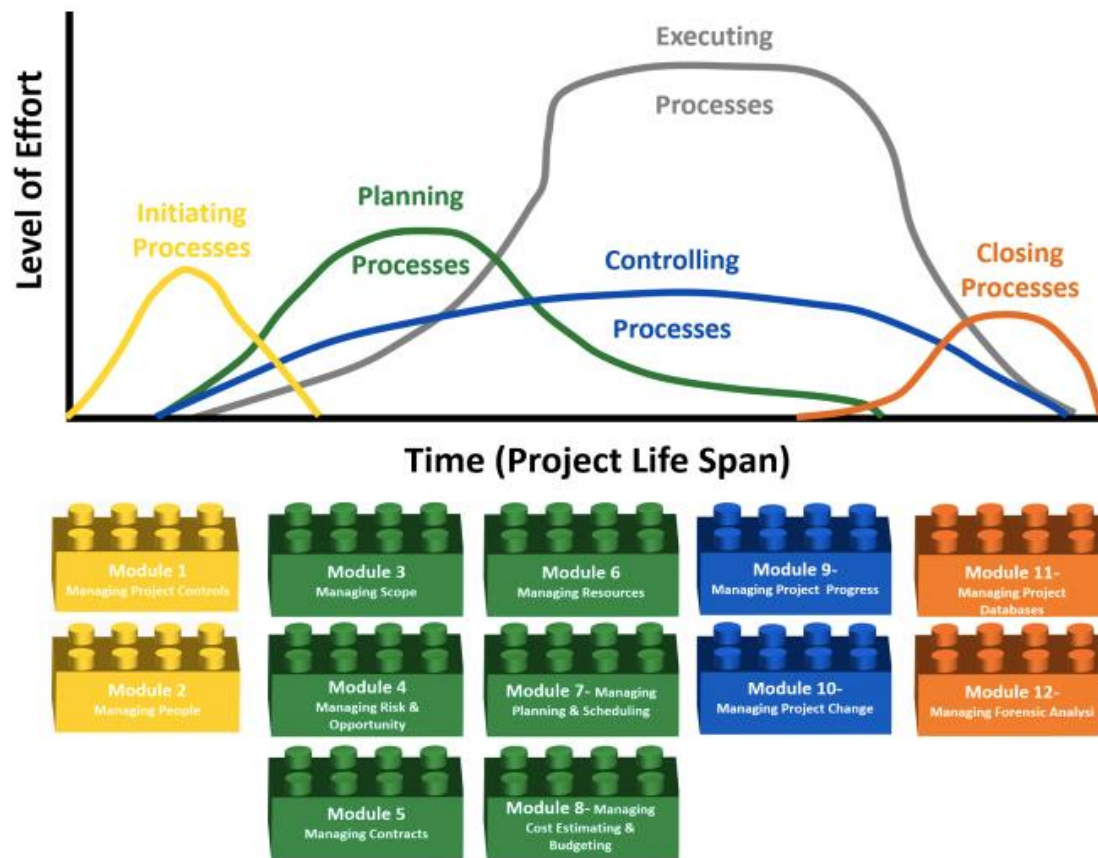


Figure 2: Guild Process Modules Mapped to the 5 Project Management Process Groups¹⁷

An effective project management must be implemented to achieve its goals and objectives thanks to its portfolios of projects and its good use of available assets. So, the use of adapted IT software to implement the good processes and to make the necessary Digital transformation is a real challenge for a company.

This IT subcontracting issue is larger regarding outsourcing contracts and the related potential dispute resolutions. Even if the relationship between the customer and the provider may be a strategical partnership, “disagreements during an outsourcing relationship are nearly impossible to avoid”¹⁸ and these “disputes between outsourcing customers and providers are like a clash between buffalo”¹⁹, according to Daniel Masur. So, both parties are willing to secure their

¹⁷ Guild Process Modules Mapped to the 5 Project Management Process Groups - The Guild of Project Controls Compendium and Reference – Retrieved from <http://www.planningplanet.com/guild/gpccar/introduction-to-managing-project-controls>

¹⁸ Quote from Daniel Masur (partner in charge of the Washington, D.C. office of law firm Mayer Brown) - “Seven steps to resolve IT outsourcing disputes before they happen” – Stephanie Overby – Retrieved from <https://www.cio.com/article/2687967/outsourcing/7-ways-to-resolve-it-outsourcing-disputes-before-they-happen.html>

¹⁹ Quote from Daniel Masur (partner in charge of the Washington, D.C. office of law firm Mayer Brown) - “Seven steps to resolve IT outsourcing disputes before they happen” – Stephanie Overby – Retrieved from

relationship “to ensure that they are not subsequently exposed to a claim for damages for unlawful termination.”²⁰

Moreover, projects within the customer company can be impacted by the failure of a partnership with the IT provider. But what is a project's value within a company? An organization's projects are its most important value. As expressed by Adrian McKnight, “the delivery of business outcomes is realized through the success of projects, and in essence that is the way that project management strategies drive organizational success.”²¹ So, a business value can be measured thanks to the projects started or done by a company: it is the illustration of its performance and business strategy. The good management of portfolios of projects drives the organization's strategies and stops from unnecessary costs and risks.

Therefore, the choice of IT outsourcing is a strategical one: it will impact the project from its design to its final delivery. This highlights the obligation of making contracts. The relationship between both parties must be legally defined to avoid any possible risk of dispute leading to the failure of a portfolio's objective. The choice of a subcontractor is thus a major issue for the company. Because, even if this relationship can be seen as a partnership, they are not “because their profit motives are not shared”.²² The management must be aware of the contract's main issues. Then, the contract is “an agreement between private parties creating mutual obligations enforceable by law”²³. So, the outsourcing legal agreement is “the most important instrument for defining the rights, liabilities and expectations of both parties which guides the behaviors of both parties concerned.”²⁴

Thus, when contracting with an IT provider, the company must be sure that the obligations of its subcontractor comply with the project's, or portfolio's, objectives and exact needs. If the contract is not adapted to the outsourcing relationship and if a dispute arises (E.g. the IT outsourcing mission is not completed), it can lead to higher costs, “a loss of control over quality and level of services, compromised information security and poor staff morale”²⁵.

<https://www.cio.com/article/2687967/outsourcing/7-ways-to-resolve-it-outsourcing-disputes-before-they-happen.html>

²⁰ « IT and Outsourcing disputes » - Penningtons Manches – Retrieved from

<https://www.penningtons.co.uk/expertise/commercial-dispute-resolution/it-and-outsourcing-disputes/>

²¹ Quote from Adrian McKnight (PMP, program director at Suncorp-Metway Ltd., a financial services firm in Brisbane, Queensland, Australia) – Retrieved from <https://www.pmi.org/-/media/pmi/documents/public/pdf/white-papers/value-of-project-management.pdf>

²² “IT Outsourcing contracts: Practical Issues for Management” – Lacity, M. and Hirschheim, R., (1993) The Information systems Outsourcing Bandwagon, Sloan Management Review, 35, 1, 73-86. – Retrieved from <https://pdfs.semanticscholar.org/3bab/7b64d598f13acb81b2299e4aefa230b4d109.pdf>

²³ Definition of Contract – Retrieved from <https://www.law.cornell.edu/wex/contract>

²⁴ “IT Outsourcing Contracts: Practical Issues for Management” – Dr Matthew K. O. Lee – Retrieved from <https://pdfs.semanticscholar.org/3bab/7b64d598f13acb81b2299e4aefa230b4d109.pdf>

²⁵ “IT Outsourcing Contracts: Practical Issues for Management” – Dr Matthew K. O. Lee – Retrieved from <https://pdfs.semanticscholar.org/3bab/7b64d598f13acb81b2299e4aefa230b4d109.pdf>

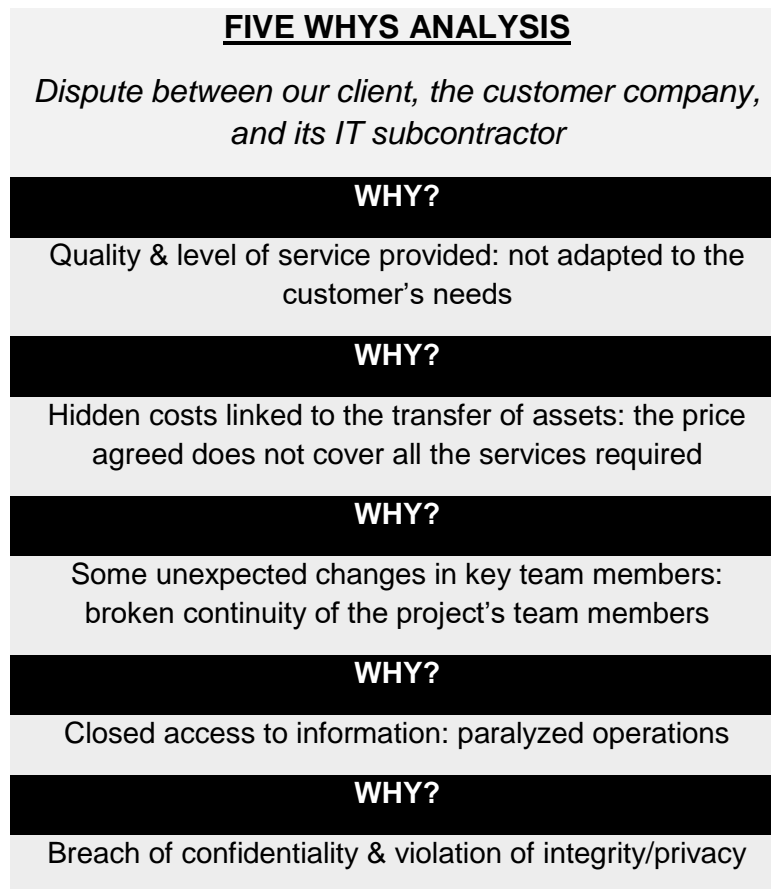


Figure 3: The 5 Why's Analysis: How to best negotiate and contract your Information Technology outsourcing contract?²⁶

METHODOLOGY

STEP 1: WHAT IS THE AIM OF THIS RESEARCH?

This research aims to give best practices when entering into an IT outsourcing contract to avoid a costly, time-costing and long dispute resolution processes. The main problem to solve is: how can they be avoided?

In order to find the best solutions to make sure that no possibilities, explained previously in the 5 Whys Analysis (**Figure 3**), will create a dispute between the customer and the IT provider, we will answer in a detailed analysis to the following questions:

- How to understand and avoid the main dispute subjects enounced within the 5 Whys Analysis?
- How to do the better negotiation with a potential IT subcontractor?

²⁶ By author

- What are the possible resolution processes if a disagreement appears after the signing of the IT outsourcing contract?

The key point in this article is to avoid a breach of contract because outsourcing is generally the birth of a long-term relationship between the company and its IT provider. One will then have the opportunity to secure its IT outsourcing contract by getting solutions for each of the 5 Whys reasons.

The following reasoning focuses on:

- The feasible alternatives for each of the five disputes reasons (Step 2);
- The outcomes and cash flows of each alternative by using and/or combining quantitative and/or qualitative methods ranked from the best to the worst (Step 3);
- The selection of a criteria to accept or reject the alternative solutions (Step 4);
- The analysis and comparison of the alternatives thanks to the criteria selected (Step 5);
- The selection of the preferred alternative (Step 6); and
- The performance monitoring and post-evaluation of results (Step 7).

STEP 2: WHAT ARE OUR FEASIBLE ALTERNATIVES?

Remembering that the objective is to find feasible alternatives for negotiation and dispute resolution about IT outsourcing contracts, there are two different categories of alternatives listed in the below table, depending on the situation (**Figure 4**):

	<i>Situation 1: Negotiation before the IT outsourcing contract being written and signed by both parties</i>	<i>Situation 2: Dispute resolution after the IT outsourcing contract being written and signed by both parties</i>
<i>Feasible alternatives</i>	1. Prevention and cooperation	1. Negotiation
		2. Standing neutral
		3. Non-binding resolution
		4. Private binding resolution
		5. Litigation

Figure 4: Feasible alternatives for negotiation and dispute resolution²⁷

This “*Alternative Dispute Resolution*²⁸” (ADR) is well-illustrated in **Annex 2**. As a global term, it is defined as “*procedures or processes (such as arbitration, conciliation, mediation) that are*

²⁷ Table made thanks to the following scheme “Conduct the Settlement Negotiations Process Map” – Guild of Project Controls Compendium and Reference (CaR) – Retrieved from <http://www.planningplanet.com/guild/gpccar/settlement-negotiations-phase>

²⁸ Term from the Guild of Project Controls Compendium and Reference (CaR) – Retrieved from <http://www.planningplanet.com/guild/gpccar/formal-disputes-resolution>

*voluntarily adopted to resolve controversies (or to settle disagreements) before taking recourse to legal action (litigation)*²⁹.

Situation 1: Negotiation before the IT outsourcing contract to be written and signed by both parties

“Prevention is better than cure”.³⁰

The alternative is **to prevent and cooperate**. This is about acting and sharing information, at early stage, meaning before entering into a legal relationship and facing potential disputes. The objective is to prevent the IT outsourcing relationship from any risk of dispute by motivating parties to act as partners more than as simple contractors.

PREVENTION

The prevention is about the contract's writing: clauses, details and examples. It has to structure legally the relationship, the behaviors, the rights and duties of both parties. The contract must clearly explain and detail each step of the IT offshoring relationship and the four categories of key points, being: *“performance, financial, human and legal”*³¹. One can read a resume of the above four categories explication in **Annex 1**.

1. Performance

a. Service Level and Quality:

It means that the “predetermined standards” must meet the exact and full expectations of the customer company for the IT provider's performance. This includes obviously the final IT software provided and implemented but also all the management to be involved in this IT outsourcing project. For example, the service level must also take into account the *“user change support”*³² and the IT provider support if there are problems with the IT software use.

“Predetermined performance standards should focus on achievement of minimum standards with an emphasis on maximizing profits while defining details of quality, quantity, timing and method

²⁹ Definition of Alternative Dispute Resolution (ADR) – Guild of Project Controls Compendium and Reference (CaR) – Retrieved from <http://www.planningplanet.com/guild/gpccar/formal-disputes-resolution>

³⁰ “Strategies for dispute prevention and management in commercial arrangements” – Joanne Staugas – Retrieved from <https://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1169&context=adr>

³¹ “Outsourcing The Supply Chain: Defining The Optimal Relationship Between Customer and Vendor” – Leah A Platz and Dr. Cecilia Temponi – Retrieved from <https://www.emeraldinsight.com/doi/full/10.1108/00251740710838013?fullSc=1>

³² “Lessons from Dutch IT-outsourcing success and failure” – G.P.A.J. Delen, R.J. Peters, C. Verhoef, S.F.M. van Vlijmen – Retrieved from <https://www.cs.vu.nl/~x/pred/pred.pdf>

of delivery of the corresponding inputs and outputs required from both parties to support the [IT] outsourced process.”³³

b. Performance incentives and penalties:

The “*quality [and service], conformity, responsiveness and reliability of the IT provider’s performance*”³⁴ must be measured. So, “*clearly defined performance objectives and methods for determining attributable rewards*”³⁵ are necessary. The objective is to motivate the IT provider to respect its performance obligation: if it does not respect this key points, there will be penalties.

c. Communication and confidentiality:

The implementation of a “*communication infrastructure that creates channels of communications and the direction of communications, lists methods of communications, and details appropriate subjects and information to be communicated between staff, companies.*”³⁶ The objective is for everyone one to have the good information in order to manage the better this IT outsourcing legal relationship.

2. Financial

a. Costing and Pricing:

It has to make clear which costs are:

- “*Initial costs: training, initial rearrangement depending on the outsourcing relationship, production planning, modifications, new purchases to map out with sufficient estimated values allotted for each costs;*
- *Effectively allocating costs: determine the price of the product*”³⁷.

3. Human

³³ Quote from Sadler (2002) - “Outsourcing The Supply Chain: Defining The Optimal Relationship Between Customer and Vendor” – Leah A Platz and Dr. Cecilia Temponi – Retrived from <https://www.emeraldinsight.com/doi/full/10.1108/00251740710838013?fullSc=1>

³⁴ Quote from Sadler (2002) - “Outsourcing The Supply Chain: Defining The Optimal Relationship Between Customer and Vendor” – Leah A Platz and Dr. Cecilia Temponi – Retrived from <https://www.emeraldinsight.com/doi/full/10.1108/00251740710838013?fullSc=1>

³⁵ Quote from Sadler (2002) - “Outsourcing The Supply Chain: Defining The Optimal Relationship Between Customer and Vendor” – Leah A Platz and Dr. Cecilia Temponi – Retrived from <https://www.emeraldinsight.com/doi/full/10.1108/00251740710838013?fullSc=1>

³⁶ “Outsourcing The Supply Chain: Defining The Optimal Relationship Between Customer and Vendor” – Leah A Platz and Dr. Cecilia Temponi – Retrieved from <https://www.emeraldinsight.com/doi/full/10.1108/00251740710838013?fullSc=1>

³⁷ “Outsourcing The Supply Chain: Defining The Optimal Relationship Between Customer and Vendor” – Leah A Platz and Dr. Cecilia Temponi – Retrieved from <https://www.emeraldinsight.com/doi/full/10.1108/00251740710838013?fullSc=1>

a. Transfer of Staff:

The IT outsourcing contract should answer the more precisely possible to the following questions:

- *“How active the staff of the customer company will be with the staff of the [IT provider] company?”*
- *What personnel functions will remain under control of the customer company?*
- *What recruitment process?*
- *What growth in staff or downsizing?*
- *What personnel infrastructure for the [IT provider] company?”³⁸*

4. Legal

a. Transfer of Assets

The contract must define the more precisely possible the “*terms of ownership of current assets, usage of new and current assets, and the transfer of ownership for assets*”. It also has to take into account the potential “*licensing agreements and protection of intellectual property*”³⁹, considered as assets. According to Smith and Parr, intellectual property represents “*approximately 85% of the overall economic value of a corporation*”⁴⁰. As a result, it is a big “*strategic resource [that] may be represented by patents, trade secrets, copyrights, and trademarks that can assist organizations in the development of core competencies and sustainable competitive advantage*”⁴¹, as explained by Fitzpatrick and DiLullo in 2005.

b. Warranty and Liability

As defined by Brennan (2003), “*a warranty is a promise that the resulting product or service from an outsourced function will be of certain quality, does not infringe upon any ownership rights within the outsourcing contract, and that the product or service will be sold free of any pretenses*”⁴². The warranty that the IT product or service needed and expected by the IT manager for its portfolio of projects since three different departments (Customer, Purchasing, Marketing

³⁸ “Outsourcing The Supply Chain: Defining The Optimal Relationship Between Customer and Vendor” – Leah A Platz and Dr. Cecilia Temponi – Retrieved from

<https://www.emeraldinsight.com/doi/full/10.1108/00251740710838013?fullSc=1>

³⁹ “Outsourcing The Supply Chain: Defining The Optimal Relationship Between Customer and Vendor” – Leah A Platz and Dr. Cecilia Temponi – Retrieved from

<https://www.emeraldinsight.com/doi/full/10.1108/00251740710838013?fullSc=1>

⁴⁰ Quote from Smith and Parr (2000) - “Outsourcing The Supply Chain: Defining The Optimal Relationship Between Customer and Vendor” – Leah A Platz and Dr. Cecilia Temponi – Retrieved from

<https://www.emeraldinsight.com/doi/full/10.1108/00251740710838013?fullSc=1>

⁴¹ Quote from Fitzpatrick and DiLullo (2005) - “Outsourcing The Supply Chain: Defining The Optimal Relationship Between Customer and Vendor” – Leah A Platz and Dr. Cecilia Temponi – Retrieved from

<https://www.emeraldinsight.com/doi/full/10.1108/00251740710838013?fullSc=1>

⁴² Definition of a warranty – Brennan (2003) - “Outsourcing The Supply Chain: Defining The Optimal Relationship Between Customer and Vendor” – Leah A Platz and Dr. Cecilia Temponi – Retrieved from

<https://www.emeraldinsight.com/doi/full/10.1108/00251740710838013?fullSc=1>

and Communication services) asked for an IT software with common needs. The warranty will protect the customer company if the IT software does not meet the agreed specifications. Then, the contract must also “*set a reasonable and fair liability cap*”⁴³.

c. Termination terms

Every business relationship can terminate at any time, so the potential termination must be framed “*to avoid any legal battles that arise due to disputes over property, rights, and payments*”⁴⁴. For example, if the IT software does not meet anymore the expectations of the customer company because of a technological evolution, both parties may be able to end the business relationship “*in peace*”⁴⁵ thanks to the termination terms which must have defined the process of termination.

d. Dispute resolution terms

Even if the contract has many details about the rights, the obligations, the ownership, the staff transfer, the payment or the termination, a dispute can arise at any time of the IT outsourcing relationship between the customer and the provider. Then, the contract should anticipate this tense situation and give to both parties solutions or methods in order to resolve their dispute, to avoid the costly and long process of legal procedures.

COOPERATION

The cooperation is about the management of the relationship, seen as a partnership, between the parties. So, customer company and the IT provider, have to “*act in good faith, cooperate to achieve the objectives and have an open communication*”⁴⁶.

To make a cooperation successful, both parties must “*develop a mutually beneficial relationship*”⁴⁷ as their business relation is unique and their brand image may be impacted by a dispute. One could then ask himself if there is a relationship “*between matching of organization cultures of outsourcer and vendor and the success of the deal?*”⁴⁸

⁴³ “Outsourcing The Supply Chain: Defining The Optimal Relationship Between Customer and Vendor” – Leah A Platz and Dr. Cecilia Temponi – Retrieved from

<https://www.emeraldinsight.com/doi/full/10.1108/00251740710838013?fullSc=1>

⁴⁴ “Outsourcing The Supply Chain: Defining The Optimal Relationship Between Customer and Vendor” – Leah A Platz and Dr. Cecilia Temponi – Retrieved from

<https://www.emeraldinsight.com/doi/full/10.1108/00251740710838013?fullSc=1>

⁴⁵ By author

⁴⁶ Joanne Staugas (January-2002) - Strategies for dispute prevention and management in commercial arrangements - Vol 4 no 9. Retrieved from: <https://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1169&context=adr>

⁴⁷ “Lessons from Dutch IT-outsourcing success and failure” - G.P.A.J. Delen, R.J. Peters, C. Verhoef, S.F.M. van Vlijmen – Retrieved from <https://www.cs.vu.nl/~x/pred/pred.pdf>

⁴⁸ Lessons from Dutch IT-outsourcing success and failure” - G.P.A.J. Delen, R.J. Peters, C. Verhoef, S.F.M. van Vlijmen – Retrieved from <https://www.cs.vu.nl/~x/pred/pred.pdf>

Situation 2: Dispute resolution after the IT outsourcing contract being written and signed by both parties

There are several alternatives in order to resolve disputes arising after the IT outsourcing contract being written and signed by both parties. These are the following: negotiation, standing neutral, non-binding solution, private binding solution and litigation. These solutions are illustrated and well-defined from the least to the most formal alternative in **Annex 3**.

1. Negotiation

This first dispute resolution alternative “*has been defined as any form of direct or indirect communication whereby parties who have opposing interests discuss the form of any joint action which they might take to manage and ultimately resolve the dispute between them*”⁴⁹. When parties are negotiating, they are free to accept the terms of the negotiation. This solution implies that the only parties participating to this action are the concerned parties: the customer company and the IT provider. As a result, the negotiation will be done in the only interests of the parties as they are the only acting parties. Thus, it can be considered as “*the most flexible form of dispute resolution*”⁵⁰. In order to make the negotiation successful, the parties must ensure: “*clear and precise contract, well-planned and documented negotiation (proves of each step of the negotiation), and a good faith and honest commitment*”⁵¹.

2. Standing neutral

This second dispute resolution alternative is about using a neutral agent to solve a disagreement arising between the customer company and the IT provider. It is possible thanks to the above two categories of third parties:

- **Dispute Review Boards:** it generally includes “*one or three experts who can assist in the management of conflicts and disputes in longer term and large projects, [...] by becoming familiar with the project during construction and conducting hearings on any disputes referred to it*”⁵²; and
- **Standing Arbitrator:** he is “*a neutral person [...] hearing arguments and evidence from each side and then decides the outcome of the dispute*”⁵³.

⁴⁹ Definition of Negotiation – “Dispute Resolution Reference Guide” – Retrieved from <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/drrg-mrrc/03.html>

⁵⁰ “Dispute Resolution Reference Guide” – Retrieved from <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/drrg-mrrc/03.html>

⁵¹ “Strategies for dispute prevention and management in commercial arrangements” – Joanne Staugas – Retrieved from <https://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1169&context=adr>

⁵² Definition of Dispute Review Board – Guild of Project Controls Compendium and Reference (CaR) – Retrieved from <http://www.planningplanet.com/guild/gpccar/formal-disputes-resolution>

⁵³ Definition of a Standing Arbitrator - Guild of Project Controls Compendium and Reference (CaR) – Retrieved from <http://www.planningplanet.com/guild/gpccar/formal-disputes-resolution>

3. Non-binding resolution

This third dispute resolution alternative includes “*mediation, mini-trial, advisory opinion and arbitration to preserve their relationship by reaching a mutually acceptable resolution*”⁵⁴ of their disagreement thanks to communication. It is a time and cost saving way of resolving a dispute.

4. Private binding resolution

This fourth dispute resolution alternative calls for a private judge who is an expert “*in deciding legal issues [...] in a formal manner resembling the litigation process but without the need to await an available judge and courtroom*”⁵⁵.

5. Litigation

This final dispute resolution alternative has been defined by the Cambridge Dictionary as being “*the process of causing a disagreement to be discussed in a court of law, so that an official decision can be made about it*”⁵⁶. It is generally a time and costly consuming for both parties as they have to lose time to argue in front of the legal court and to pay lawyers.

A DETERMINED SET OF ATTRIBUTES TO RANK THE BEST ALTERNATIVES TO DISPUTE RESOLUTION

Whatever the situation (1 or 2 exposed previously) where the dispute arises, the set of attributes is the same to rank the best alternatives to disagreement resolution. Indeed, the parties are looking for the same elements to be prevented. Then, the attributes will make possible for on to quantify and qualify the best dispute resolution processes in order to make him determine which solutions are the most adapted to the disagreement.

The chosen attributes are (inspired from the “*Dispute Avoidance and Resolution Best Practices for the Application Service Provider Industry*” article)⁵⁷: Time saving (1), Cost saving (2), Preservation of the IT outsourcing relationship (3), Privacy and confidentiality of the conflict (Visibility – 4), Procedural Flexibility (5), Freedom to choose a neutral and competent decision maker (6), Creative business-driven solutions (7), Expert decision-making (8), Enforceability (9). These explained hereafter.

⁵⁴ Definition of Non-binding resolution - Guild of Project Controls Compendium and Reference (CaR) – Retrieved from <http://www.planningplanet.com/guild/gpccar/formal-disputes-resolution>

⁵⁵ Role of a Private Judge - Guild of Project Controls Compendium and Reference (CaR) – Retrieved from <http://www.planningplanet.com/guild/gpccar/formal-disputes-resolution>

⁵⁶ Definition of Litigation – Cambridge Dictionary – Retrieved from <https://dictionary.cambridge.org/fr/dictionnaire/anglais/litigation>

⁵⁷ Attributes inspired from the model explained in “Dispute Avoidance and Resolution Best Practices for the Application Service Provider Industry” – WIPO – Retrieved from <http://www.wipo.int/amc/en/asp/report/execsum.html>

1. Time saving (Speed)

Time is **precious** in the business world as it can be a key element for strategic projects. One question must be taken into account: *“How quickly will [the dispute resolution process be] resolved?”*⁵⁸. Then, one should be clearly aware that saving time within a dispute resolution process is essential because, while trying to get a solution to a disagreement, some activities or projects can be blocked. This can have a big impact on a company's portfolios or, worst, on its global business activity. Finally, one should be in favour of ADR as it “is usually less formal, less expensive and less-time consuming than a trial”⁵⁹.

2. Cost saving

Both parties, the customer company and the IT provider, have the same interest to save costs and do not spend too much money, or even a “symbolic euro”⁶⁰, in a dispute resolution procedure. So, the question the parties must agree about costs is: *“[How much would you accept to pay and] would you be prepared to accept a process which was more difficult to appeal and potentially more “arbitrary” if the process was cheap?”*⁶¹. Moreover, one should know that when there is a legal procedure or arbitration, costs include “the legal fees of the prevailing party can or must be borne by the losing party”⁶². So, the choice of the alternative solution is also about the **big costs issue** as it may have a big effect on the business activity of the company.

3. Preservation of the IT outsourcing relationship (Adversity)

Depending on the motivation of both parties to preserve their IT offshoring relationship, one of their objectives when facing a dispute can be to preserve their business relation. Then, the customer company and the IT provider must ask themselves: *“Is it important that the dispute resolution process allows the parties to preserve working/commercial relations insofar as possible?”*⁶³. Moreover, as said previously, the relationship between a customer company and an IT provider is expected to be a long-term one and/or can be seen as a partnership beneficial for both parties.

⁵⁸ Speed Question for Dispute resolution – “Alternative ways of resolving disputes” – Justin Byrne – Wright Hassal – Retrieved from <https://www.wrighthassall.co.uk/knowledge/legal-articles/2016/04/27/alternative-ways-resolving-disputes/>

⁵⁹ California Court, The judicial Branch of California, ADR Types & benefits. Retrieved from: <http://www.courts.ca.gov/3074.htm>

⁶⁰ By author

⁶¹ Costs Question for Dispute resolution - “Alternative ways of resolving disputes” – Justin Byrne – Wright Hassal – Retrieved from <https://www.wrighthassall.co.uk/knowledge/legal-articles/2016/04/27/alternative-ways-resolving-disputes/>

⁶²

⁶³ Relationship Question for Dispute Resolution - “Alternative ways of resolving disputes” – Justin Byrne – Wright Hassal – Retrieved from <https://www.wrighthassall.co.uk/knowledge/legal-articles/2016/04/27/alternative-ways-resolving-disputes/>

4. Privacy and confidentiality of the conflict (Visibility)

Brand images can be impacted by disputes being shared publicly, and it can impact in the future both companies as their stakeholders will be aware of a potential dispute arising when dealing with one of them. Thus, they can lose future contracts, partnerships or customers simply because they did not resolved privately their disagreements making it public. Moreover, shareholders can be afraid by this lack of confidentiality. “*The possibility for the parties to engage in a confidential [...] settlement process*”⁶⁴ is **essential**. Keeping a disagreement resolution confidential “*frequently plays an important role in a party’s decision to agree to arbitration*”⁶⁵. Then, one must be aware that “*confidentiality is an important feature for many corporations, particularly when dealing with disputes involving intellectual property and trade secrets or when there are concerns about publicity or damage to reputation or position in the marketplace*”⁶⁶.

5. Procedural flexibility

Does the procedure chosen “*fit their needs and preferences*”?⁶⁷ Then, the customer company and the IT provider must both have the “*ability to choose [the procedure they want to resolve their dispute] to ensure that their dispute is heard by [one] that they trust, that they consider to be independent, impartial and competent in the relevant subject-matter and that they know has the required availability*”⁶⁸. The objective for both parties is to be “*free to fashion the [...] process to suit their needs and preferences*”⁶⁹. Then, “*the more relaxed and informal nature of a [process] may also favor the continuation of the business relationship between the parties*”⁷⁰. Furthermore, this so important issue is generally a clause of the IT outsourcing contract. That is explained by the American Bar which confirms that “*when negotiating their underlying commercial contracts,*

⁶⁴ “II. Other ADR Options (Mediation and Conciliation)” – “Ch. 19 The Decision to Arbitrate” – Peter Sherwin, Ana Vermal, Elizabeth Figueira – Retrieved from <https://www.proskauerguide.com/arbitration/19/II>

⁶⁵ Prokauer, (2017, December) Prokauer on international litigation and arbitration - Retrieved from : <https://www.proskauerguide.com/arbitration/19>

⁶⁶ “Confidentiality” – “Benefits of Arbitration for Commercial Disputes” – Edna Sussman, John Wilkinson – Retrieved from

https://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/March_2012_Sussman_Wilkinson_March_5.authcheckdam.pdf

⁶⁷ Procedural flexibility and Party Control – “Dispute Avoidance and Resolution Best Practices for the Application Service Provider Industry” – WIBO – Retrieved from <http://www.wipo.int/amc/en/asp/report/execsum.html>

⁶⁸ “Cost” – “I. Perceived Advantages and Disadvantages of International Arbitration” – “Ch. 19 The Decision to Arbitrate” – Peter Sherwin, Ana Vermal, Elizabeth Figueira – Retrieved from <https://www.proskauerguide.com/arbitration/19>

⁶⁹ “Flexibility of Process” – “I. Perceived Advantages and Disadvantages of International Arbitration” – “Ch. 19 The Decision to Arbitrate” – Peter Sherwin, Ana Vermal, Elizabeth Figueira – Retrieved from <https://www.proskauerguide.com/arbitration/19>

⁷⁰ “II. Other ADR Options (Mediation and Conciliation)” – “Ch. 19 The Decision to Arbitrate” – Peter Sherwin, Ana Vermal, Elizabeth Figueira – Retrieved from <https://www.proskauerguide.com/arbitration/19/II>

*parties often utilize the flexibility of arbitration to include provisions in the arbitration clause which will enhance the efficient conduct of any arbitration that might arise thereafter*⁷¹.

6. Freedom to choose a neutral and competent decision maker

This is here all about the predictability of the outcome. Does the outcome must “*reflect their respective business interests*”⁷² or be based on law? As a result, both parties may be unwilling to “*risk having a dispute decided by a [person] that is believed to be more sympathetic to the other party’s interest*”⁷³. Then, this attribute is **very important** because the choice of process may impact directly the outcome of a dispute resolution. The most impartial process is the best as it would not be fair to choose a dispute resolution solution in favor of one party and disadvantaging another. Both parties must have the same opportunity to make understand their position within a disagreement. Sometimes, the best solution is to choose a group of persons to resolve quicker a dispute with a fair and equitable point of view.

7. Limited discovery

The decision from an arbitration resolution can lead to creative business-driven solutions. Do the parties want to have “*the ability to fashion win-win resolutions reflecting business objectives and priorities, which might not be available from a court or arbitral tribunal where the decision will typically be based on more technical or narrow issues*”⁷⁴? Then, the alternative solution to choose must allow or not, depending on the parties’ expectations and needs “*a certain degree of discovery [which can] vary greatly from one case to the other, and [depends] on the legal background of the*”⁷⁵ process selected and agreed. But this limited discovery can be also very relevant when the parties are from different regions as they do not have the same laws and arbitration tribunals. For example, in civil law countries, a certain degree is accepted. While in arbitration tribunals, no discovery is allowed. Then, when dealing with international arbitration, “the parties are free to agree to the scope of discovery they choose to allow in the arbitration”⁷⁶.

⁷¹ “Flexible process” – “Benefits of Arbitration for Commercial Disputes” – Edna Sussman, John Wilkinson – Retrieved from

https://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/March_2012_Sussman_Wilkinson_March_5.authcheckdam.pdf

⁷² Predictability of the outcome - “Dispute Avoidance and Resolution Best Practices for the Application Service Provider Industry” – WIBO – Retrieved from <http://www.wipo.int/amc/en/asp/report/execsum.html>

⁷³ “Freedom to Choose a Neutral and Competent Decisionmaker” – “I. Perceived Advantages and Disadvantages of International Arbitration” – “Ch. 19 The Decision to Arbitrate” – Peter Sherwin, Ana Vermal, Elizabeth Figueira – Retrieved from <https://www.proskauerguide.com/arbitration/19>

⁷⁴ Creative business-driven solutions - “Dispute Avoidance and Resolution Best Practices for the Application Service Provider Industry” – WIBO – Retrieved from <http://www.wipo.int/amc/en/asp/report/execsum.html>

⁷⁵ “Limited Discovery” – “I. Perceived Advantages and Disadvantages of International Arbitration” – “Ch. 19 The Decision to Arbitrate” – Peter Sherwin, Ana Vermal, Elizabeth Figueira – Retrieved from <https://www.proskauerguide.com/arbitration/19>

⁷⁶ Prokauer, (2017, December) Prokauer on international litigation and arbitration. - Retrieved from: <https://www.proskauerguide.com/arbitration/19>

8. Expert decision-making

As IT software is a “*technology with technical issues that are difficult for a layperson to visualize and comprehend, [...] the commercial models tend not to follow standard formats [and] are still evolving*”⁷⁷. So, the parties must ask themselves if they want to “*have an expert neutral who is knowledgeable about the business, technical and legal issues that may be involved in the dispute*”⁷⁸. Thus, this technical IT issue requires “*a high level of technical competence, [so] the parties [have to] select [one] that is known to have that competence*”⁷⁹.

9. Enforceability

Does the outcome given by the chosen alternative solution will be enforceable? As a result the decision must be “*[recognized] and [the alternative solution] enforce [the] judgment*”⁸⁰. This means thus that parties have to obey the decision made. This alternative solution decision must make authority and be respected and recognized by both parties. It is one of the major things to take into account when analyzing a dispute as “*the ability to make and enforce contracts and resolve disputes is fundamental if markets are to function properly*”⁸¹. As a result, OECD also clearly explains that “*good enforcement procedures enhance predictability and commercial relationships and reduce uncertainty by assuring investors that their contractual rights will be upheld promptly*”⁸². This attribute is very important in International contract.

10. The ability to select place and language of arbitration

If the IT outsourcing contract is between international parties, from different countries, the choice of a place and a language of arbitration is important as both parties have to agree on the country law and arbitration means that will be used to judge their dispute. Generally, “*negotiations result in agreements pursuant to which the law of one party’s country is to govern the contract, while*

⁷⁷ Expert Decision-making - “Dispute Avoidance and Resolution Best Practices for the Application Service Provider Industry” – WBO – Retrieved from <http://www.wipo.int/amc/en/asp/report/execsum.html>

⁷⁸ Expert Decision-making - “Dispute Avoidance and Resolution Best Practices for the Application Service Provider Industry” – WBO – Retrieved from <http://www.wipo.int/amc/en/asp/report/execsum.html>

⁷⁹ “Freedom to Choose a Neutral and Competent Decisionmaker” – “I. Perceived Advantages and Disadvantages of International Arbitration” – “Ch. 19 The Decision to Arbitrate” – Peter Sherwin, Ana Vermal, Elizabeth Figueira – Retrieved from <https://www.proskauerguide.com/arbitration/19>

⁸⁰ “Enforceability” – “I. Perceived Advantages and Disadvantages of International Arbitration” – “Ch. 19 The Decision to Arbitrate” – Peter Sherwin, Ana Vermal, Elizabeth Figueira – Retrieved from <https://www.proskauerguide.com/arbitration/19>

⁸¹ “Contract enforcement and dispute resolution” – OECD – Retrieved from <https://www.oecd.org/investment/toolkit/policyareas/investmentpolicy/contractenforcementanddisputeresolution.htm>

⁸² “Contract enforcement and dispute resolution” – OECD – Retrieved from <https://www.oecd.org/investment/toolkit/policyareas/investmentpolicy/contractenforcementanddisputeresolution.htm>

the place of arbitration is to be in the other party's country"⁸³. Concerning the language, it is something to be agreed between the parties: if they are from the same country, the choice is easier. Moreover, if parties are from different countries, a language of discussion will be "naturally" chosen between them and the contract will be written in this language. Logically, the parties will agree to keep the same language as the one selected for the legal written agreement. This attribute is more important for subjects about international contract dispute resolution.

11. Effectiveness

As legal procedures are generally long with many costs, ADR methods offer a better effectiveness than legal procedures. It is very important for parties to ensure that the decision will be given "*within a reasonable time*"⁸⁴. The objective here is to make the conflict having the less effects on the project. The decision must be rapid with minimum quality requirements.

12. Absence of Appeal

The absence of Appeal can be seen as an advantage or not. For the winning party, "*it ensures him that the losing party will not be able to delay enforcement by initiating time and cost-consuming appellate proceedings*"⁸⁵ but it is also "*very frustrating to parties not to be able to have another tribunal review a flawed award*"⁸⁶. Then, this attribute entirely depends on the choice of decisionmaker made by the parties. If a party effectively feels that the decision was oriented because of the decisionmaker, it can be a big disadvantage not to have the possibility to appeal the decision. Then, the decision must absolutely be well-founded to give the most fair and adapted decision possible.

13. Potential Need for Court Intervention

Sometimes, the subject of the dispute is so complicated or technical that it needs a court intervention to resolve the conflict, for example, if the parties have "*difficulties to provide*

⁸³ Prokauer (2017) Prokauer on international litigation and arbitration - Retrieved from <https://www.proskauerguide.com/arbitration/19>

⁸⁴ "Efficiency of Justice: Providing Final Judgments Within a Reasonable Time" – Icelandic Human Rights Centre – Retrieved from <http://www.humanrights.is/en/human-rights-education-project/comparative-analysis-of-selected-case-law-achpr-iachr-echr-hrc/the-rights-to-due-process/efficiency-of-justice-providing-final-judgements-within-a-reasonable-time>

⁸⁵ "Absence of Appeal" - "I. Perceived Advantages and Disadvantages of International Arbitration" – "Ch. 19 The Decision to Arbitrate" – Peter Sherwin, Ana Vermal, Elizabeth Figueira – Retrieved from <https://www.proskauerguide.com/arbitration/19>

⁸⁶ "Absence of Appeal" - "I. Perceived Advantages and Disadvantages of International Arbitration" – "Ch. 19 The Decision to Arbitrate" – Peter Sherwin, Ana Vermal, Elizabeth Figueira – Retrieved from <https://www.proskauerguide.com/arbitration/19>

evidences”⁸⁷. But the use of this mean can bring negative outcomes: it can “*complicate the procedure*”⁸⁸. Furthermore, this court procedure is expensive and long. So, one could consider this attribute as being an advantage or not, depending of the situation.

14. Arbitrators’ Inability to Consolidate or Join Third Parties

This attribute can be defined as following: “*Because of the consensual nature of arbitration, arbitrators cannot generally consolidate actions absent an agreement by both parties. That can constitute a significant drawback where disputes between the same parties relate to different contracts that have not been subjected to the same arbitration agreement. [...] Also, the privity of the arbitration agreement bars arbitrators from ordering the joinder of parties who have not signed the arbitration agreement*”⁸⁹. Then, one understands that an arbitrator could never consolidate or join third parties without both the IT provider and the customer company’s agreement. So, this inability can influence the outcome of the process and lead to a court intervention.

STEP 3: ANALYSIS OF OUR ALTERNATIVES’ OUTCOMES

Now, one has in his hands the five attributes to determine which dispute resolution alternative is the best for his situation, then one has to rank them from the best to the worst thanks to the non-compensatory model. *But first, what is the named “non-compensatory model”?*

This methodology is directly linked to the “**Multi-Attribute Decision Making**”⁹⁰, one will apply in Step 4 to select a criteria to select or reject one or several alternative dispute resolution solutions. The choice of this Multi-Attribute Decision Making methodology and its non-compensatory model is based on the fact the nine attributes previously selected are subjective ones. Then, the non-compensatory approach will be based on a “*disjunctive reasoning*”⁹¹ comparing each attribute

⁸⁷ “Potential Need for Court Intervention” - “I. Perceived Advantages and Disadvantages of International Arbitration” – “Ch. 19 The Decision to Arbitrate” – Peter Sherwin, Ana Vermal, Elizabeth Figueira – Retrieved from <https://www.proskauerguide.com/arbitration/19>

⁸⁸ “Potential Need for Court Intervention” - “I. Perceived Advantages and Disadvantages of International Arbitration” – “Ch. 19 The Decision to Arbitrate” – Peter Sherwin, Ana Vermal, Elizabeth Figueira – Retrieved from <https://www.proskauerguide.com/arbitration/19>

⁸⁹ “Arbitrators’ Inability to Consolidate or Join Third Parties” - “I. Perceived Advantages and Disadvantages of International Arbitration” – “Ch. 19 The Decision to Arbitrate” – Peter Sherwin, Ana Vermal, Elizabeth Figueira – Retrieved from <https://www.proskauerguide.com/arbitration/19>

⁹⁰ Multi-Attribute Decision Making term – Guild of Project Controls Compendium and Reference (CaR) – Retrieved from <http://www.planningplanet.com/guild/gpccar/managing-change-the-owners-perspective>

⁹¹ Non-compensatory model of the Multi-Attribute Decision Making - Guild of Project Controls Compendium and Reference (CaR) – Retrieved from <http://www.planningplanet.com/guild/gpccar/managing-change-the-owners-perspective>

by asking “which is more important to give a score of 1 to the winning option and a score of 0 to the losing option”⁹².

	TIME	COST	RELATIONSHIP	PRIVACY & CONFIDENTIALITY	PROCEDURAL FLEXIBILITY	NEUTRAL & COMPETENT DECISION MAKER	LIMITED DISCOVERY	EXPERT DECISION MAKING	ENFORCEABILITY	LANGUAGE & PLACE	EFFECTIVENESS	ABSENCE OF APPEAL	COURT INTERVENTION	ARBITRATOR'S INABILITY	ORDINAL RANKING
TIME		1	1	1	1	1	1	1	1	1	0	1	1	1	12
COST	0		1	0	1	1	1	1	1	1	0	1	1	1	10
RELATIONSHIP	0	0		0	0	0	0	0	0	1	0	0	0	0	1
PRIVACY & CONFIDENTIALITY	0	1	1		1	1	1	1	1	1	0	1	1	1	11
PROCEDURAL FLEXIBILITY	0	2	1	0		0	1	0	1	1	0	1	1	1	7
NEUTRAL & COMPETENT DECISION MAKER	0	0	1	0	1		1	0	1	1	0	1	1	1	8
LIMITED DISCOVERY	0	0	1	0	0	0		0	1	1	0	1	1	1	6
EXPERT DECISION MAKING	0	0	1	0	1	1	1		1	1	0	1	1	1	9
ENFORCEABILITY	0	0	1	0	0	0	0	0		1	0	1	1	1	5
LANGUAGE & PLACE	0	0	0	0	0	0	0	0	0		0	0	0	0	0
EFFECTIVENESS	1	1	1	1	1	1	1	1	1	1		1	1	1	13
ABSENCE OF APPEAL	0	0	1	0	0	0	0	0	0	1	0		0	0	2
COURT INTERVENTION	0	0	1	0	0	0	0	0	0	1	0	1		1	4
ARBITRATOR'S INABILITY	0	0	1	0	0	0	0	0	0	1	0	1	0		3

Figure 5. Table comparing and ranking the attributes from the best (13) to the lowest (0)⁹³

Thanks to this non-compensatory approach, one knows that the **Effectiveness** is the most important attribute and that the Preservation of the IT outsourcing relationship is the less important. The ranking is so (from the best (1) to the lowest (14)):

1	Effectiveness
2	Time saving
3	Privacy and confidentiality
4	Cost saving
5	Expert decision making
6	Freedom to choose a neutral and competent decision maker
7	Procedural flexibility
8	Limited discovery
9	Enforceability
10	Potential need for Court intervention
11	Arbitrators' Inability to consolidate or join Third parties

⁹² Non-compensatory model of the Multi-Attribute Decision Making - Guild of Project Controls Compendium and Reference (CaR) – Retrieved from <http://www.planningplanet.com/guild/gpccar/managing-change-the-owners-perspective>

⁹³ Figure 5. Table comparing and ranking the attributes from the best (4) to the lowest (0) – By the author

12	Absence of appeal
13	Preservation of the IT outsourcing relationship
14	Ability to select a place and a language of arbitration

Figure 6. Ranking of the attributes from the best (1) to the lowest (14)⁹⁴

One will not use the fourteen attributes analyzed and ranked previously and will only select the ten first attributes. Then, the following four last attributes will not be taken into account for the next steps:

1. **Arbitrators' Inability to consolidate or join Third parties:** as the "Expert decision making" and "Freedom to choose a neutral and competent decision maker" attributes are very important, this means that naturally the parties will give to him importance as he is a chosen IT expert. As a result, there is no reason to consolidate his position because he will automatically be considered as "*The Expert*"⁹⁵ with the adapted know-how for decision-making;
2. **Absence of appeal:** it is a controversial attribute which can be an advantage or a disadvantage. Then, using it can be a disadvantage for one's client;
3. **Preservation of the IT outsourcing relationship:** even if both parties dealing for IT outsourcing are generally looking for a partnership, one must remember that, as said in the Introduction, disagreement in this kind of business relationship are nearly impossible to avoid. Thus, the main objective for our client is to protect his interests more than his IT outsourcing relationship; and
4. **Ability to select a place and a language of arbitration:** this attribute is important in International contract, but this is not the article's subject.

⁹⁴ Figure 6. Final ranking of the attributes from the best (1) to the lowest (5) – By the author

⁹⁵ By the author

Once the four last attributes have been set off the reasoning, according to the next table, the ranking stays unchanged for the ten attributes:

	TIME	COST	PRIVACY	PROCEDURAL FLEXIBILITY	NEUTRAL & COMPETENT DECISION-MAKER	LIMITED DISCOVERY	EXPERT DECISION-MAKING	ENFORCEABILITY	EFFECTIVENESS	COURT INTERVENTION	ORDINAL RANKING
TIME		1	1	1	1	1	1	1	0	1	8
COST	0		0	1	1	1	1	1	0	1	6
PRIVACY	0	1		1	1	1	1	1	0	1	7
PROCEDURAL FLEXIBILITY	0	0	0		0	1	0	1	0	1	3
NEUTRAL & COMPETENT DECISION-MAKER	0	0	0	1		1	0	1	0	1	4
LIMITED DISCOVERY	0	0	0	0	0		0	1	0	1	2
EXPERT DECISION-MAKING	0	0	0	1	1	1		1	0	1	5
ENFORCEABILITY	0	0	0	0	0	0	0		0	1	1
EFFECTIVENESS	1	1	1	1	1	1	1	1		1	9
COURT INTERVENTION	0	0	0	0	0	0	0	0	0		0

Figure 7. Table comparing and ranking the attributes from the best (9) to the lowest (0)⁹⁶

Then, the final ranking of the ten best attributes for one's analysis is the following:

1	Effectiveness
2	Time saving
3	Privacy and confidentiality
4	Cost saving
5	Expert decision making
6	Freedom to choose a neutral and competent decision maker
7	Procedural flexibility
8	Limited discovery
9	Enforceability
10	Potential need for Court intervention

Figure 8. Final ranking of the attributes from the best (1) to the lowest (10)⁹⁷

STEP 4: WHAT BEST CRITERIA FOR ANALYZING IT OUTSOURCING CONTRACTS RELATIONSHIP?

Once one has determined, according to the non-compensatory model, the ranking of the attributes, then one can value them. For the most important attribute, being the Effectiveness, the value will

⁹⁶ Figure 7. Table comparing and ranking the attributes from the best (9) to the lowest (0) – By the author

⁹⁷ Figure 8. Final ranking of the attributes from the best (1) to the lowest (10) – By the author

be 1. Then, the value will decrease until being 0,1 for the less important attribute of the ranking, the Potential need for Court intervention. As a result, one has to use the Multi-attribute decision making to highlight the best alternative solution possible⁹⁸.

ATTRIBUTE	Effectiveness	Time saving	Privacy and confidentiality	Cost saving	Expert decision making	Neutral an competent decision maker	Procedural flexibility	Limited discovery	Enforceability	Court intervention
RANKING	1	2	3	4	5	6	7	8	9	10
QUALIFICATIVE QUALIFICATION	Essential	Very important	Very important	Important	Important	Medium importance	Medium importance	Low importance	Low importance	Low importance
QUANTITATIVE QUALIFICATION	1	0,9	0,8	0,7	0,6	0,5	0,4	0,3	0,2	0,1

Figure 9. Table ranking and determining the qualitative and the quantitative (coefficients) value of the attributes⁹⁹

When the attributes have been quantified (given-value), one has to qualify in terms of quality the several alternative situations for dispute resolution, according to the above table representing the qualitative and the quantitative (coefficients) qualifications for each situation towards each attribute:

Color			
Qualitative qualification	BAD QUALIFICATION	MEDIUM QUALIFICATION	GOOD QUALIFICATION
Quantitative qualification	0	0,5	1

Figure 10. Table representing the qualitative and quantitative (coefficients) qualifications for each situation and/or each attribute¹⁰⁰

⁹⁸ Sullivan, Wickes & Kroelling (2014) [Engineering Economics](#) 15th Edition “Then the second step is to calculate the relative weighting of each attribute.” – Retrieved from: <http://www.planningplanet.com/guild/gpccar/managing-change-the-owners-perspective>

⁹⁹ Figure 9. Table ranking and determining the qualitative and the quantitative (coefficients) value of the attributes – By the author

¹⁰⁰ Figure 10. Table representing the qualitative and quantitative (coefficients) qualifications for each situation and/or each attribute – By the author

Then, according to the previous table (**Table 8**), one is now able to qualify qualitatively each situation towards each attribute:

	Prevention and Cooperation	Negotiation	Standing Neutral	Non-binding solution	Private binding solution	Litigation
Effectiveness	Fair	Fair	Good	Good	Fair	Poor
Time saving	Low	Medium	Medium	Low	Medium	Long
Privacy and confidentiality	Good	Good	Good	Good	Good	Bad
Cost saving	Low	Low	Low	Medium	Expensive	Expensive
Expert decision making	Good	Optional	Optional	Optional	Optional	Poor
Neutral an competent decision maker	Absent	Optional	Mandatory	Optional	Optional	Mandatory
Procedural flexibility	High	Medium	High	Low	Low	None
Limited discovery	Good	Limited	Good	Limited	Limited	Good
Enforceability	Low	Low	Low	Low	Low	High
Court intervention	None	None	Optional	None	Optional	Mandatory

Figure 11. Table qualifying qualitatively each situation towards each attribute¹⁰¹

Finally, according to the table representing the qualitative and quantitative (coefficient) value of the attributes (**Figure 9**), one has to weight the application of each attribute to each situation in order to determine the best fit options. One has then to make the multiplication of the attribute coefficient to the equivalent coefficient of each qualified situation towards each attribute.

¹⁰¹ Figure 11. Table qualifying qualitatively each situation towards each attribute – By the author

For example:

- The coefficient of the attribute “Effectiveness” is 1 as it is the best attribute;
- The coefficient of the situation “Prevention and Cooperation” towards the attribute “Effectiveness” is 1 as it has been qualified “Fair” (medium appreciation) in **Table 11**;
- Then, one has to do: “1 per 0,5” to find the final result, being 0,5.

Thus, after having multiplied each attribute coefficient to one situation coefficient towards an attribute, one has finally to add each result to others (for the given situation – column). At the end, one will find the quantitative qualification for each situation towards all attributes.

	Prevention and Cooperation	Negotiation	Standing Neutral	Non-binding solution	Private binding solution	Litigation
Effectiveness	0,5	0,5	1	1	0,5	1
Time saving	0,9	0,45	0,45	0,9	0,45	0
Privacy and confidentiality	0,8	0,8	0,8	0,8	0,8	0
Cost saving	0,7	0,7	0,7	0,35	0	0
Expert decision making	0,6	0,3	0,3	0,3	0,3	0,6
Neutral an competent decision maker	0	0,25	0,5	0,25	0,25	0,5
Procedural flexibility	0,4	0,2	0,4	0	0	0
Limited discovery	0,3	0,15	0,3	0,15	0,15	0,3
Enforceability	0	0	0	0	0	0,2
Court intervention	0,1	0,1	0,05	0,1	0,05	0
Quantitative Qualification	4,3	3,45	4,5	3,85	2,5	2,6

Figure 10. Quantitative qualification of each situation towards all attributes and its results¹⁰²

So, one has now the final ranking of the alternative solutions according to the quantitative qualification of each situation towards all the attributes:

¹⁰² Figure 10. Quantitative qualification of each situation towards all attributes and its results – By the author

RANKING OF THE ALTERNATIVE SOLUTIONS ACCORDING TO THE QUANTITATIVE QUALIFICATION		
1.	Standing Neutral	4,5
2.	Prevention and Cooperation	4,3
3.	Non-Binding Solution	3,85
4.	Negotiation	3,45
5.	Litigation	2,6
6.	Private Binding Solution	2,5

Figure 11. Ranking of the alternative solutions according to the quantitative qualification of each situation towards all the attributes¹⁰³

As a global result, the less suitable alternative solution is the Private Binding Solution as its final quantitative qualification is 2,5. This means that the Effectiveness, the cost, the time, the neutrality and competency of the decision maker are not well-ensured by this alternative. The conflict then has less chance to fit the customer company and the IT provider needs and expectations.

Then, thanks to this methodology, one is able to start eliminating some alternative solutions. To do it, one will do the average of all the alternative solutions' results of quantitative qualification:

$$\text{Average for all alternatives} = (4,5 + 4,3 + 3,85 + 3,45 + 2,6 + 2,5) / 6 = \mathbf{2,892} \text{ (approximately)}$$

There are yet four alternatives being superior to this average:

Standing Neutral (4,5) > Prevention and Cooperation (4,3) > Non-Binding Solution (3,85) > Negotiation (3,45) > 2,892

To conclude on the best alternative solutions for IT outsourcing dispute resolution, one will now focus only on the following:

1. Standing Neutral;
2. Prevention and Cooperation;
3. Non-Binding Solution; and
4. Negotiation.

FINDINGS

Once the best alternative solutions found for IT outsourcing dispute resolution, one has to summarize the decision-making process of the research made in Step 3 and 4 by using an Additive Weighting technique¹⁰⁴ (Step 5).

¹⁰³ Figure 11. Ranking of the alternative solutions according to the quantitative qualification of each situation towards all the attributes – By the author

¹⁰⁴ Sullivan, Wickes & Kroelling (2014) [Engineering Economics](https://www.planningplanet.com/guild/gpccar/managing-change-the-owners-perspective) 15th – Adaptation from Planning Planet – Retrieved from: <http://www.planningplanet.com/guild/gpccar/managing-change-the-owners-perspective>

STEP 5: COMPARISON OF OUR THREE BEST ALTERNATIVES

The Additive Weighting technique is used to rank the alternatives by comparing the attributes' weight with the alternatives' ones.

One has already eliminated two alternative solutions being under the average of all alternatives: the Litigation and the Private Bidding Solution. One will now focus on the four remaining alternatives:

	STEP 1	STEP 2	STANDING NEUTRAL		PREVENTION & COOPERATION		NON-BINDING SOLUTION		NEGOTIATION	
Attributes	Relative ranking	Normalized weight (A)	(B)	(A)*(B)	(C)	(A)*(C)	(D)	(A)*(D)	(E)	(A)*(E)
EFFECTIVENESS	10	0,17	1	0,1700	0,5	0,085	1	0,17	0,5	0,085
TIME	9	0,16	0,45	0,0720	0,9	0,144	0,9	0,144	0,45	0,072
PRIVACY & CONFIDENTIALITY	8	0,15	0,8	0,1200	0,8	0,120	0,8	0,12	0,8	0,12
COST	7	0,14	0,7	0,0980	0,7	0,098	0,35	0,049	0,7	0,098
EXPERT DECISION MAKING	6	0,13	0,3	0,0390	0,6	0,078	0,3	0,039	0,3	0,039
NEUTRAL & COMPETENT DECISION-MAKER	5	0,1	0,5	0,0500	0	0,000	0,25	0,025	0,25	0,025
PROCEDURAL FLEXIBILITY	4	0,08	0,4	0,0320	0,4	0,032	0	0	0,2	0,016
ENFORCEABILITY	3	0,04	0,3	0,0120	0,3	0,012	0,15	0,006	0,15	0,006
LIMITED DISCOVERY	2	0,02	0	0,0000	0	0,000	0	0	0	0
COURT INTERVENTION	1	0,01	0,05	0,0005	0,1	0,001	0,1	0,001	0,1	0,001
TOTALS	55	1	4,5	0,5935	4,3	0,57	3,85	0,554	3,45	0,462

Figure 12. Additive Weighting Technique¹⁰⁵

As a result, this Additive Weighting Technique confirmed the ranking found in Step 4. With a score at 0.5935, Standing Neutral remains the best alternative solution to dispute resolution. It is followed by Prevention and Cooperation (0.57), and the Non-Binding Solution (0.554). On the other hand, Negotiation only gets a score of 0.462 and has the lower score.

Moreover, considering that an IT outsourcing contract brings some additional issues, one may set > 50% as a minimum requirement. Therefore, 46,2% (0.462) is inferior to 50% (0.5): Negotiation has to be removed and is not anymore considered as a good alternative solution.

Then, as seen in Figure 9, the expert dimension is optional within Negotiation and the discovery is limited concerning the solution made by the decision-maker. But these two attributes are essential. First of all, the expertise required in IT outsourcing contract is important as Information

¹⁰⁵ Figure 12. Additive Weighting Technique – By the author

Technologies are something very technical. Secondly, discovery is also a strong element within IT outsourcing disputes as Information Technologies also evolve continuously with the Digital Transformation one nowadays knows and deals with every day¹⁰⁶. Thus, one must definitively remove the Negotiation of the solutions for his IT outsourcing contract's dispute resolution.

One has so three last best solutions for dispute resolution, being:

ALTERNATIVE SOLUTIONS	STANDING NEUTRAL	PREVENTION & COOPERATION	NON-BINDING SOLUTION
TOTALS	0,5935	0,57	0,554
%	59,35%	57,00%	55,40%

Table 13. Three best solutions: scores and their equivalent in percentage¹⁰⁷

STEP 6: RANKING OF OUR ALTERNATIVES

Now, one is able to rank his alternatives from the best to the worst. The following table shows the three remaining solutions (in blue) with their score and the equivalent tendency in percentage is represented in green.

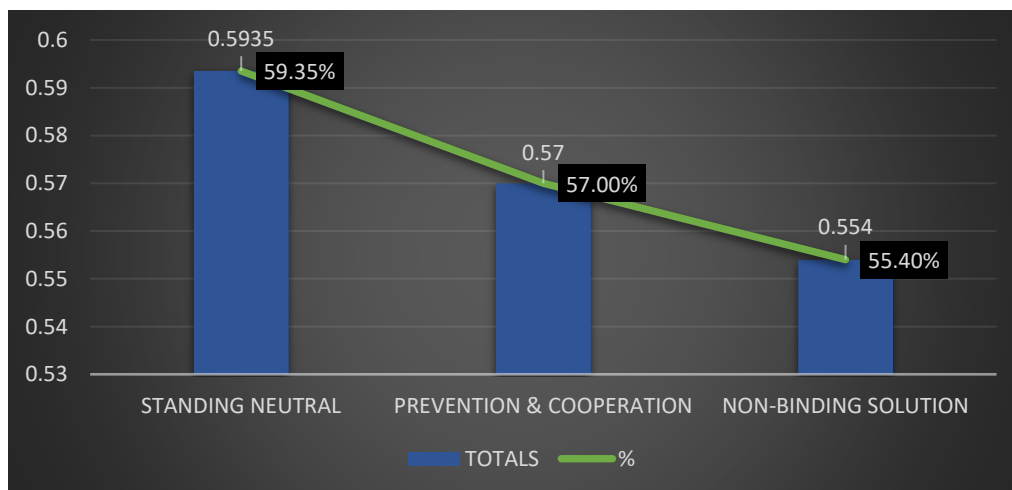


Figure 14. Ranking of our alternatives¹⁰⁸

¹⁰⁶ « Transformation Numérique : La Théorie de l'Évolution de l'Utilisateur dans l'Entreprise » - Toan Nguyen – Retrieved from <https://www.journaldunet.com/solutions/expert/61081/transformation-numerique---la-theorie-de-l-evolution-de-l-utilisateur-en-entreprise.shtml>

¹⁰⁷ “Three best solutions: scores and their equivalent in percentage” – By the author

¹⁰⁸ Figure 14. Ranking of our alternatives – By the author

The best solutions are Standing Neutral, Prevention and Cooperation, and Non-Binding solution. These three options prevent from going to court, but one may quote that Non-Binding solution offers to the parties the option to go to court.

Moreover, one must remember that, regarding his interests, these alternatives minimize the risks (lack of expertise and privacy), the costs and the time involved in dispute resolution processes.

Then, now one must remember that he has two situations to deal with:

- Situation 1: it is the pre-contractual phase which can have a strong influence on the future contractual relationship;
- Situation 2: it is once the contract has been signed and that a disagreement is born.

According to one's research:

1) Standing Neutral is the preferable solution for Situation 2 by:

- 59,35% according to the Additive Weighting Technique
- 107,13% compared to Non-Binding Solution: $(0,5935/0,554) \times 100 = 107,13$
- 116,88% compared to Non-Binding Solution: $(4,5/3,85) \times 100 = 116,88$

Then, if a dispute arises between the customer company and the IT supplier (**Situation 2** – once the contract has been signed), Standing Neutral is the preferable option by 116,88% compared to Non-Binding Solution. This option to use a neutral agent to solve a disagreement between the customer company and the IT supplier can be done thanks to a Dispute Review Board or a Standing Arbitrator.

The main advantage of this solution is that parties, being aware that they need an IT expert, will choose someone or a group of person able to judge the issues of their relationship thanks to his or their expertise in IT but also his or their knowledge of the projects. When choosing the Standing Neutral alternative, the third party being involved has the possibility to assist the management involved of both companies to understand the value of the IT service and to become familiar with the project's issues arising from this IT dispute.

It gives to both parties to have a third look at their disagreement: a neutral and competent solution, which has a power of discovery. This can be a strong advantage because Information Technologies are evolving very rapidly and it is a domain for which it is very difficult to get and secure all the potential inputs and outputs, legally or not.

2) Prevention and Cooperation is the preferable solution for Situation 1 by:

- 57% according to the Additive Weighting Technique

Prevention is **Situation 1**'s best alternative (before the contract has been signed). It is the period pre-contractual during which both parties have the opportunity to agree on appropriate clauses to input in their IT outsourcing contract. This is about acting and sharing information, at early stage, meaning before entering into a legal relationship and facing potential disputes. The prevention is about the contract's writing: clauses, details and examples. It has to structure legally the relationship, the behaviors, the rights and duties of both parties. It is the best time to avoid any potential dispute that could arise in the future.

With the Digital Transformation and the importance of Information Technologies for companies' functioning and success of their projects, Prevention can have a strong influence on the legal agreement which is the essential component of the start and well-being of their future IT outsourcing relationship.

It allows the customer company, who does not have necessarily the expertise necessary to understand all the key elements and details of the contract, to ask questions and explanations on every point and sentence of the agreement. The IT supplier is the "expert" within this phase and has the professional knowledge and know-how. Then, he has an obligation of information towards the customer company. It means that the IT supplier has to explain each technical detail necessary to the customer's understanding of the agreement.

On the other side, because they are willing to enter into a bilateral agreement and relationship, the customer also has to ask questions if there are clauses, or words, it does not understand. The customer company has the obligation to:

- Read the contract proposed by and/or negotiated with the seller;
- Check each word and sentence;
- Make sure he agrees and understands the meaning (incomes and outcomes) of each clause.

So, even if the-considered expert IT provider has to inform the other party, the customer company must be aware of its future legal commitment. Then, this company looking for IT outsourcing has to check all possibilities offered to get out of this business if necessary and also to protect its interests: the viability of its projects or portfolios of projects which could suffer of a dispute's issues with the IT supplier.

This is why Cooperation is also necessary with the Prevention during the pre-contractual phase.

STEP 7: HOW THE TWO BEST ALTERNATIVES DO HAVE AN EFFECT ON COMPANY'S INTERESTS?

Finally, one has to make a Pareto analysis to show the effect of Standing Neutral and, Prevention and Cooperation alternatives on company's interests. According to the Guild of Project, this technique is very useful *"to identify the "significant few" from the "insignificant many" and use that information to prioritize which problems should be addressed"*¹⁰⁹.

As one considered that there are two situations, one will do a Pareto Analysis for the best alternative solution of each situation: Prevention and Cooperation for Situation 1, and Standing Neutral for Situation 2.

To understand the following histograms, one must know that:

- On the bottom, there are eight key reasons of a customer company's dissatisfaction;
- The frequency of each reason having a negative impact on the customer company's interests is in blue, on the left. *E.g. "Cost" has a frequency of 70;*
- The cumulative percentage of the individual reasons (difficulties encountered, risks, cost and time) is on the right, represented between all the reasons with a green curve.

Situation 1: Impact on the dispute resolution before the IT outsourcing contract to be written and signed by both parties, with the adapted clauses and provisions

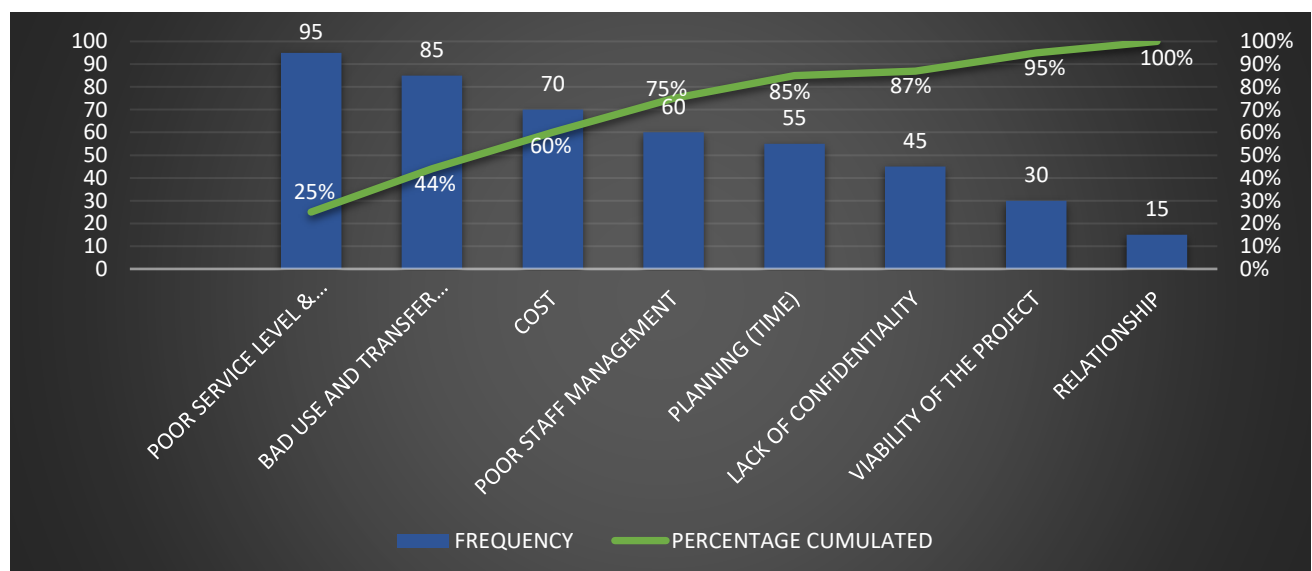


Figure 15. Impact of Disputes WITHOUT Prevention and Cooperation¹¹⁰

¹⁰⁹ « Pareto Analysis » - The Guild of Project Controls Compendium and Reference (CaR) – Retrieved from <http://www.planningplanet.com/guild/gpccar/risk-opportunity-monitoring-and-control>

¹¹⁰ Figure 15. Impact of Disputes WITHOUT Prevention and Cooperation – By the author

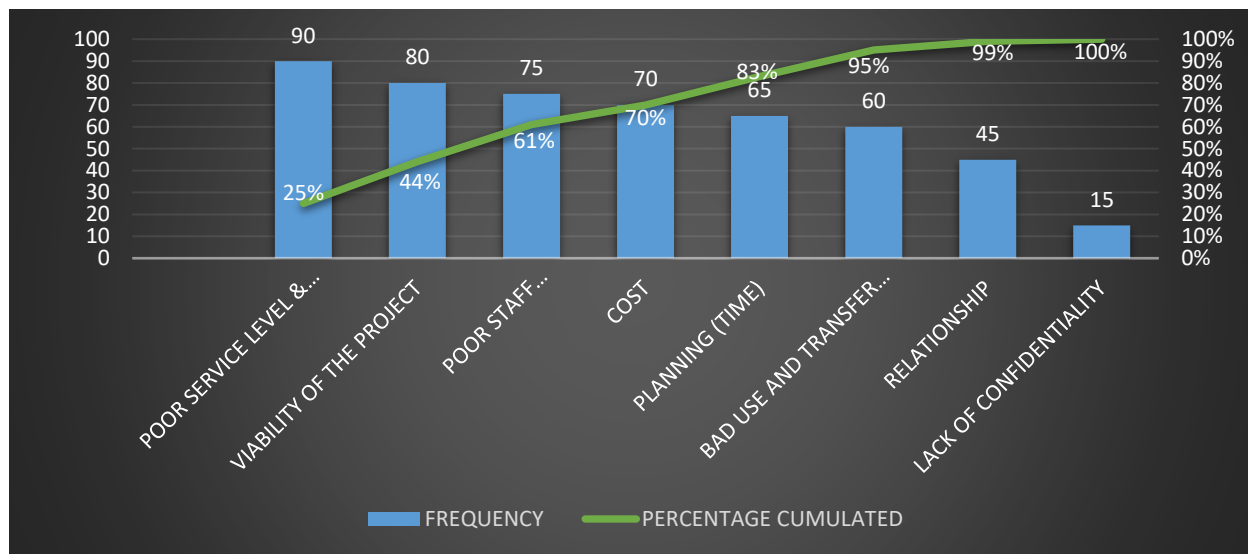


Figure 16. Impact of Disputes WITH Prevention and Cooperation¹¹¹

Situation 2: Impact on the dispute resolution after the IT outsourcing contract being written and signed by both parties

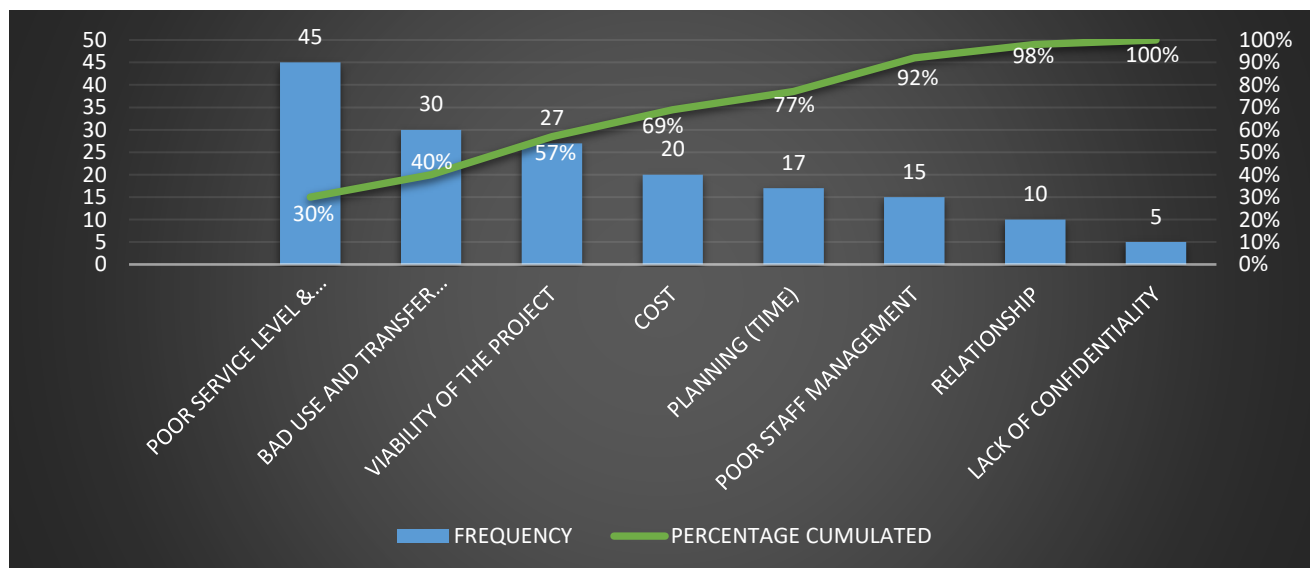


Figure 17. Impact of Disputes WITHOUT Standing Neutral

¹¹¹ Figure 16. Impact of Disputes WITH Prevention and Cooperation – By the author

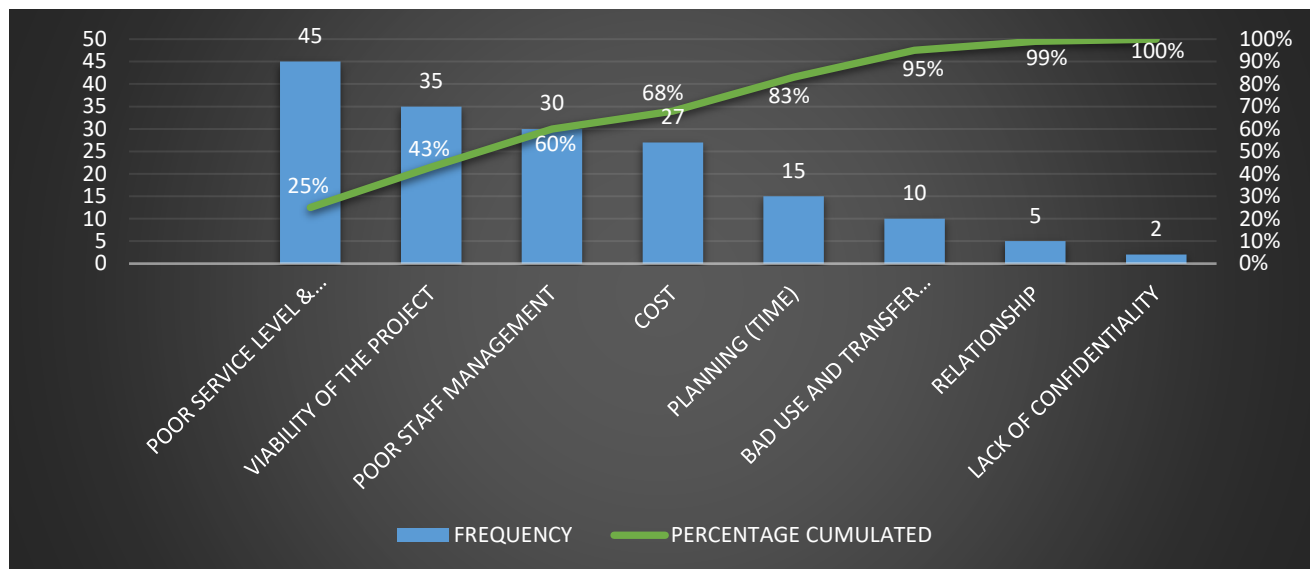


Figure 18. Impact of Disputes WITH Standing Neutral

CONCLUSION: OUR RECOMMENDATIONS

It is worth underlining here that the main purpose of this paper was to recommend and give advices to companies willing to enter into an outsourcing contract with an IT supplier. The primary objective of the study was to find solutions in order to give them the keys to secure the maximum their legal relationship and their interests.

To ensure an IT outsourcing relationship, the first step has to be handled during the pre-contractual phase: Prevent and Cooperate. Both parties have precise roles in this solution. As a matter of fact, the IT future sub-contractor has to give all the information necessary and essential to the customer company's understanding of the agreement: it is the prevention part. It is all about sharing strong information. On the other hand, the company looking for an IT provider has the obligation to read the contract, to ask questions and to verify each detail of the contract: it is the cooperative part. Indeed, even if the IT supplier has an obligation of information, the legal agreement's construction has to be done within a climate of communication and sharing. That is why the potential customer company has to take a step towards its future sub-contractor by answering and verifying.

In Contract Law, each detail is a key element: each task, each definition, each sentence, each word and each punctuation. Everything must be clear for both parties in order to avoid, at the maximum, the risk of a future dispute arising because of a misunderstanding or a lack of detail. The main objective of an IT outsourcing contract is to provide a legal framework to an aspiring business relationship. It gives a structure to the actions and communication of both parties to limit the level of uncertainty. If there is a lack of information within a legal agreement, the parties can lose much more than time or money.

To follow up on our hypothetical example, explained in the Introduction, three important services have different projects (Customer, Purchasing and, Marketing and Communication Services) born from the Digital Transformation of the company. The common objective of these three different projects is to get an adapted IT tool, to implement it (human management to train the employees to work with a new tool) and to work with it. Then, if a dispute arises between the organization and its IT supplier, and the contract did not protect the company against everything: this latter could see three projects being stopped because of a lack of resources. In worst situations, this can lead to the company's closure as Information Technologies are nowadays more and more important, even essential, to organizations' global functioning.

Given this, the creation and writing of a legal agreement has to ensure the best protection possible for the parties' interests. One should seek legal advices from a law firm specialized in IT. Moreover, if one's company has a Legal Department, it could be very interesting to make the firm's lawyers meeting the project manager and/or sponsor in order to make them familiar to the risks and issues of the project or portfolio. Then, once done, the Legal Department can look forward a specialized and strong law firm in Information Technology. The objective here is to make the legal persons who are going to deal with the IT supplier's lawyers, understand the needs, expectations, inputs and outputs required for the project's success. By understanding the project's objective, the company's Legal Department will be better equipped to create a well-designed contract, in cooperation with the IT supplier, preventing the future legal relationship from misinterpretations and disputes' birth.

Furthermore, as seen earlier, disputes unfortunately easily arise in IT outsourcing relationships. But, once the contract written and signed, what to do? Thanks to his legal advisors, the contract has a Dispute resolution clause which says that the chosen solution when facing a disagreement, is to use the Standing Neutral alternative solution. It can be a group of persons or one individual, being neutral and an expert chosen by both parties during the contract's writing. This "Standing Neutral process" step appears during the contractual relationship, meeting difficulties. Standing Neutral is the best option for the company as it ensures the quality and neutrality of the analysis and judgement of the dispute situation.

To conclude, one should remember two important ideas when dealing IT outsourcing contracts. First of all, contracting is a legal action: one must be willing to enter into a such relationship and to understand all the inputs and outputs of this engagement. Secondly, as Information Technologies are an evolving field, the opportunity to get flexibility, expertise and discovery, is critical. It is indeed a fast-moving subject matter which requires a specialist and competent point of view.

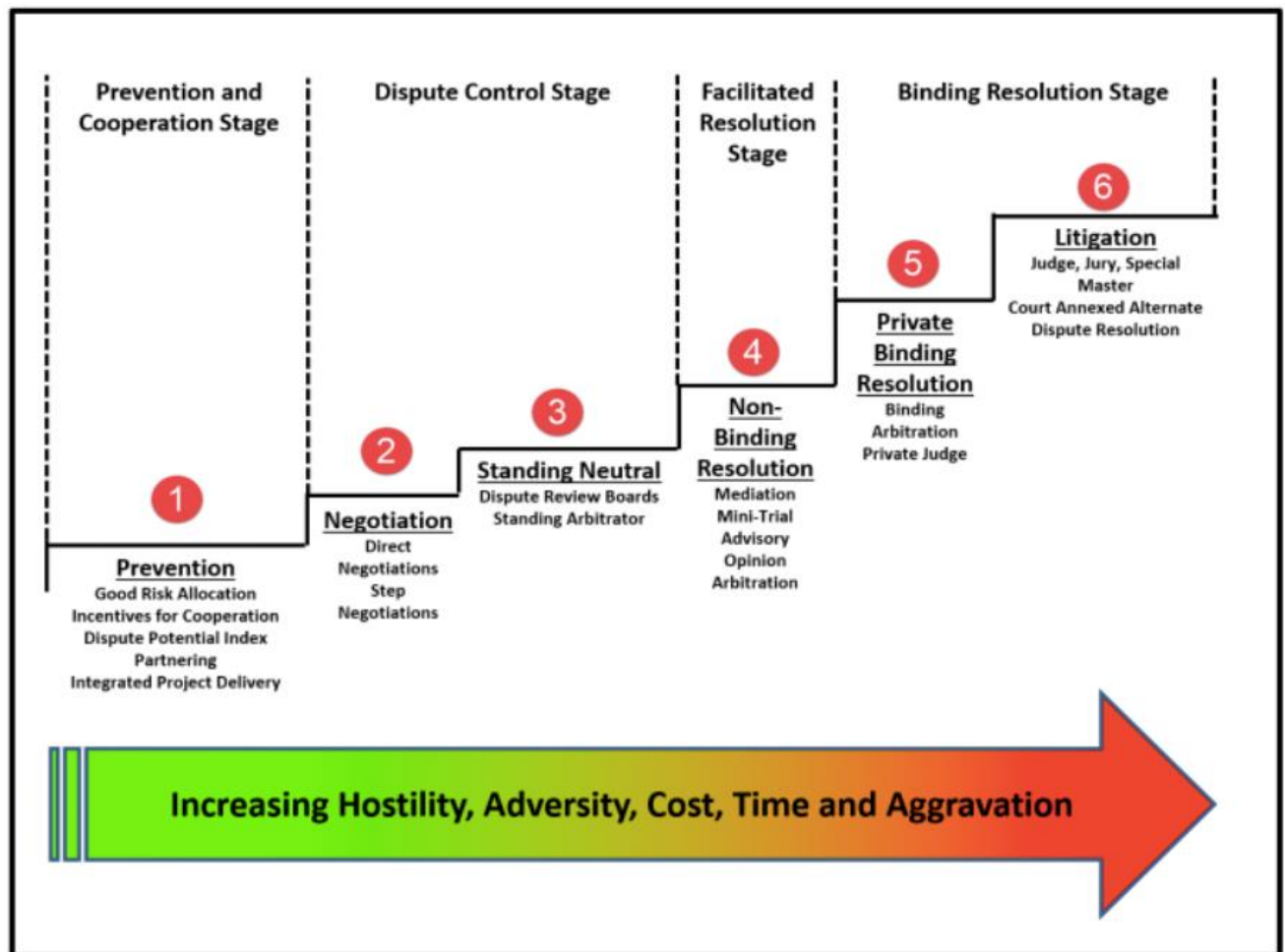
ANNEXES

Annex 1. Key elements of the outsourcing contract¹¹²

Function	Key Element	Associated Problems
Performance	Standards for quality and service levels	<ul style="list-style-type: none"> - Company objectives unmet - Purpose and nature of relationship may be unclear - Increase in costs to implement corrective measures - Dissatisfied end-users
	Performance incentives and penalties	<ul style="list-style-type: none"> - Companies involved settle for mediocrity in their performance and/or output - No real value gained by either company - Could foster consistent underperformance
	Communication and confidentiality	<ul style="list-style-type: none"> - Misguided management decisions - Bullwhip effect - Increased costs for corrective measures or legal action - Sharing of trade secrets and proprietary information - Weakened competitive advantage
Financial	Costing and pricing	<ul style="list-style-type: none"> - Over- or under-spending within the budget or cost cycle - Costs inaccurately assigned - Pricing inaccurately derived from costs - Overpayment by customer or end user for product or service - Lower profit margins
Human Resource	Transfer of staff	<ul style="list-style-type: none"> - Low morale of current employees - Underperformance of employees - Insufficient number of new hires and amount of hire training - Increase in costs for corrective measures
Legal	Transfer of assets, includes IP	<ul style="list-style-type: none"> - Access to new technologies or processes not fully utilized - Insufficient budgeting to cover costs of transfer - Loss of revenue and competitive advantage - Increased costs
	Warranty and liability	<ul style="list-style-type: none"> - Discrepancies in expected and actual quality of product - Fraudulent practices in offering warranty - Huge spending in settlement between customer and vendor companies or the companies and the end-users
	Terms for disengaging	<ul style="list-style-type: none"> - Loss of profit and increased costs by being "stuck" in contract - Missed opportunity for growth - Loss of market share - Cyclical problem cycle of underperformance and overspending plagues companies
	Method of dispute resolution	<ul style="list-style-type: none"> - Deterioration of business relationship - Unnecessary cost of legal fees and settlement - Unclear path towards settling dispute


¹¹² "Table 1. Key elements of the outsourcing contract" - "Outsourcing The Supply Chain: Defining The Optimal Relationship Between Customer and Vendor" – Leah A Platz and Dr. Cecilia Temponi – Retrieved from <https://www.emeraldinsight.com/doi/full/10.1108/00251740710838013?fullSc=1>

ANNEX 2. ILLUSTRATING THE ESCALATION STEPS IN THE ADR PROCESS¹¹³



¹¹³ "Figure 2 - Illustrating the Escalation Steps in the ADR Process" – Adapted from The Handbook of Conflict Resolution: Theory and Practice 3rd Edition, 2014, Coleman, Deutsch & Marcus – Retrieved from <http://www.planningplanet.com/guild/gpccar/formal-disputes-resolution>

ANNEX 3. COMMONLY USED ADR TECHNIQUES¹¹⁴

	Least Formal	Negotiation	An informal, typically unstructured, process, where the parties attempt to resolve their differences through direct interaction. A third party may be appointed by the parties to facilitate the negotiations.
		Settlement Counsel	A relatively new ADR technique where the disputing parties retain counsel who are given the specific mandate of settling the dispute. The settlement counsel normally are not permitted to participate in any subsequent proceedings, in any capacity, if the attempts at settlement fail.
		Mediation	A private, voluntary, non-binding, confidential and flexible procedure in which a neutral intermediary endeavors, at the request of the parties to a dispute, to assist them in reaching a mutually satisfactory settlement of their dispute. Or, if requested, provide a neutral evaluation of the parties respective positions and the final outcome.
		Mini-Trial	A private, voluntary, non-binding, and confidential procedure that takes the form of a "mock trial" in which the parties make submissions to a panel comprised of senior executives of the disputing parties and a third-party neutral.
		Early Neutral Evaluation	A private, voluntary, non-binding and confidential procedure involving the referral of a dispute by the parties to a third party for non-binding evaluation, in which the evaluator applies all of the principles that would be used in the event of formal adjudication.
		Neutral Fact-Finding Expert	A private, voluntary, non-binding and confidential procedure in which the parties submit specialized issues (e.g., technical, scientific, accounting, economic) to an expert for a neutral evaluation of the facts, typically invoked in aid of a parallel dispute resolution process.
		Ombudsperson	A particular kind of fact finder used by many corporations, educational institutions, government agencies, trade groups and consumer agencies to investigate and assist in resolving grievances and complaints. Generally, ombudspersons make non-binding advisory reports and recommendations to the responsible manager about how to resolve a dispute, but can also issue decisions that are binding.
		Dispute Review Board	A private, voluntary and confidential procedure commonly used in the context of an ongoing long-term relationship, which consists of an informed standing group of experts who can quickly deal with disputes as they arise. This is commonly used in the construction industry and in high-value outsourcing contracts. Determinations may be binding or advisory.
		Arbitration	A private, voluntary and confidential procedure involving the adjudication of rights, in accordance with the applicable law, by a tribunal of one or more arbitrators that has the power to render a decision that is final and binding on the parties. Arbitration can also be non-binding.
	Most Formal	Litigation	Formal, public process for resolving disputes before national courts.

¹¹⁴ "Commonly Used ADR Techniques" - "Dispute Avoidance and Resolution Best Practices for the Application Service Provider Industry" – WIBO – Retrieved from <http://www.wipo.int/amc/en/asp/report/execsum.html>

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Sophie Malherbe is a Global Project Management professional with Law background. Born in the Human Rights' country, France, she has a Dual Bachelor's degree in French Law and Common Law from the University of Nanterre (Law School). During her study, in 2017, she had the opportunity to work as a Junior Project Manager at Vivatechnology, a joint-venture created by Maurice Levy (Publicis Group) and Francis Morel (Les Échos, LVMH). She trained herself for six months to become a great and efficient future Project Manager by participating in the organization of a worldwide meeting between startups, investors and big companies from around the whole globe.

She pursued her education by starting to study at SKEMA Business School (France) in 2017. Since she joined this 7th best-ranked French Business School, she already had the chance to enroll for a study semester in Belo Horizonte (SKEMA's Brazilian campus in partnership with the Fundação Dom Cabral, being a world-class Brazilian business school). She now studies Global Project Management in the Master of Sciences "Project and Programme Management and Business Development" at SKEMA Business School (Lille campus France). She is actually completed her last assignments and took the opportunity to further her education by a way of a distance learning mentoring course, under the tutorage of Dr Paul D. Giammalvo, to obtain her International Contract Management degree.

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