Tech/Law

6 Reasons That Tech Projects Go Wrong (And How Your Lawyer Can Help!)

Edition 3 – Not tailoring your contract to your delivery model
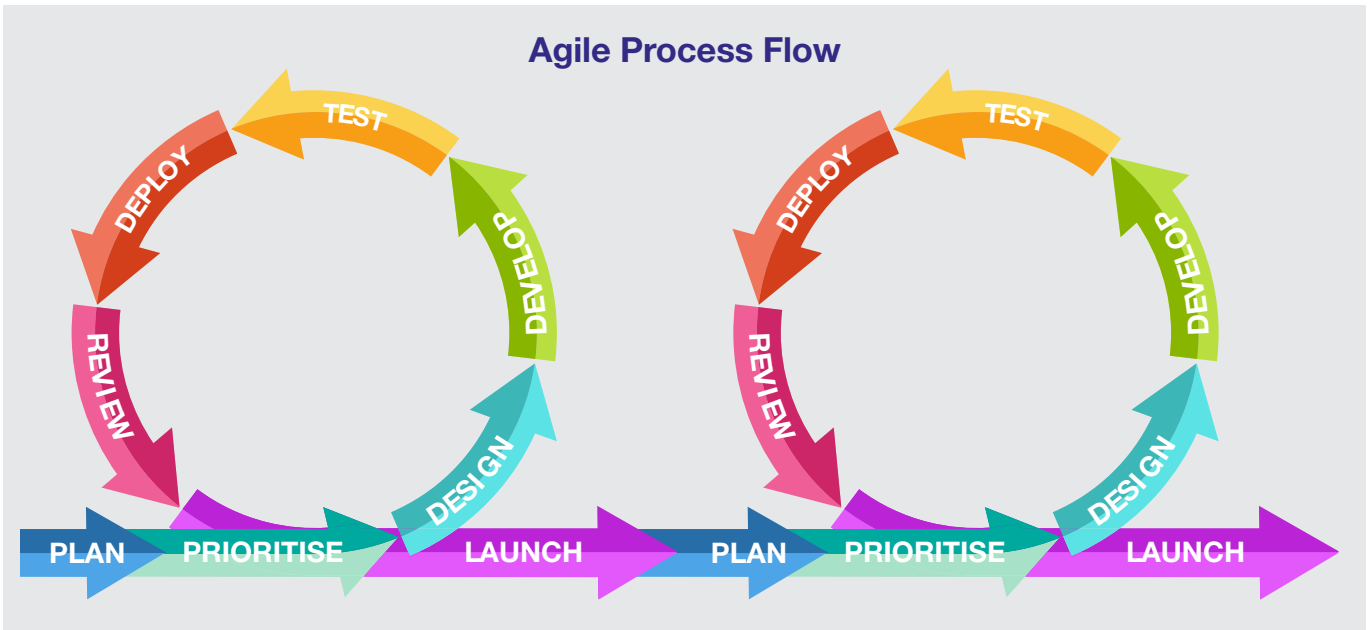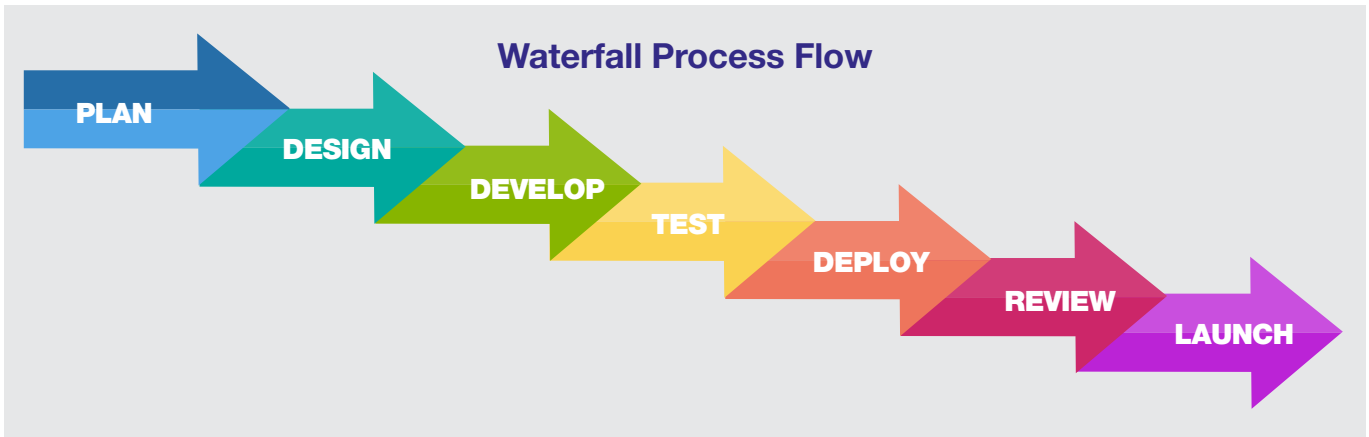
In the first two parts of this series, we highlighted the importance of clearly defining your project and running a competitive process for prospective vendors. In this edition, we'll explore the delivery model and why it is critical to choose the right delivery model for you and your project, and to tailor your contract to reflect that delivery model. Our focus with this article, as with the series, is on how you can better engage with your supplier to ensure successful delivery of your IT projects, in this case focusing on Agile projects.

Agile project methodology has been steadily gaining in popularity. It is widely seen as a way to improve project outcomes and to minimise the risk of large scale project failures where nothing is delivered despite substantial investment in time and money. But to get the benefits of an Agile delivery methodology the customer needs to take a much greater role in the project. It is not enough to require the supplier to implement the project using Agile project delivery methodology and then expect better outcomes without ever getting your hands dirty. In this article we will explore some of the benefits of Agile project delivery, how to decide whether Agile is right for you, and critically what this means for your contract. If you want more of an introduction into Agile you may find our KWM on Agile article useful.
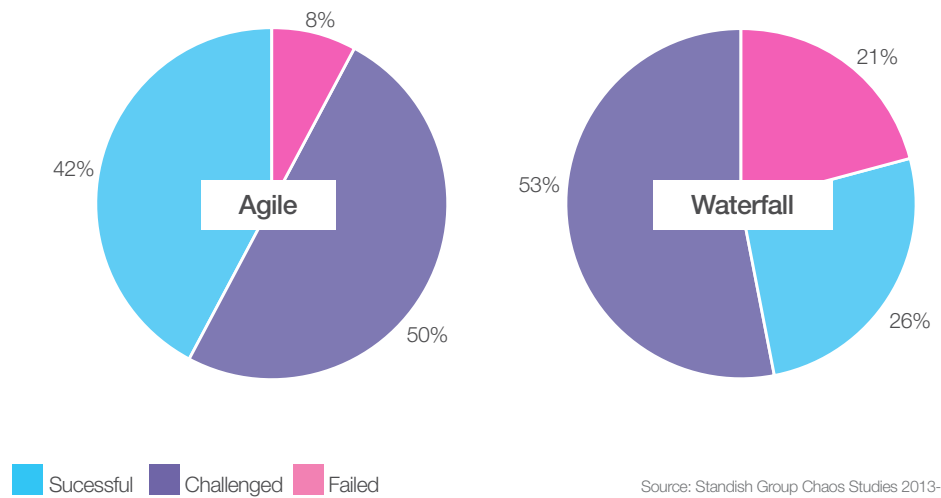
Why Agile?

The key distinction for Agile project delivery is that it is iterative. Solution requirements are defined and updated as the solution itself is built and tested through a series of iterations, with feedback and learnings from each iteration incorporated into the next. This gives the customer visibility into the solution as it is built and enables it to refine its requirements or pivot to reflect changes in the market or its business needs. Compare this to a traditional waterfall approach, where the detailed functional requirements are specified, and a detailed design is developed and approved at the outset of the project. The developers then build the solution to meet that detailed design and deliver the final solution to the customer for testing.

Waterfall Process Flow

PLAN → DESIGN → DEVELOP → TEST → DEPLOY → REVIEW → LAUNCH

Agile Process Flow

DEPLOY · TEST · DEVELOP · DESIGN · REVIEW · PLAN · PRIORITISE · LAUNCH

The benefits of Agile have been extensively touted. These include product quality, speed to market, focus on customer and early delivery of value. However, it is the business and stakeholder engagement, transparency, early identification of issues and flexibility that enable the customer greater control over the solution as it is delivered that can help increase the success of an IT project even if the other benefits are less relevant. The most recent Standish Group Chaos Study suggests that IT projects delivered using Agile have significantly higher success rates compared to those delivered using waterfall methodology; and suggests they are also less than half as likely to fail.

Project Sucess Rate
Agile v Waterfall

Agile: 42%, 50%, 8%

Waterfall: 26%, 53%, 21%

■ Sucessful   ■ Challenged   ■ Failed

Source: Standish Group Chaos Studies 2013-2017

But Agile is not a panacea. As the Standish Group Chaos Study indicates, on its measures (based on time, money and value), Agile projects are still only successful 42% of the time.

Leading causes of failed
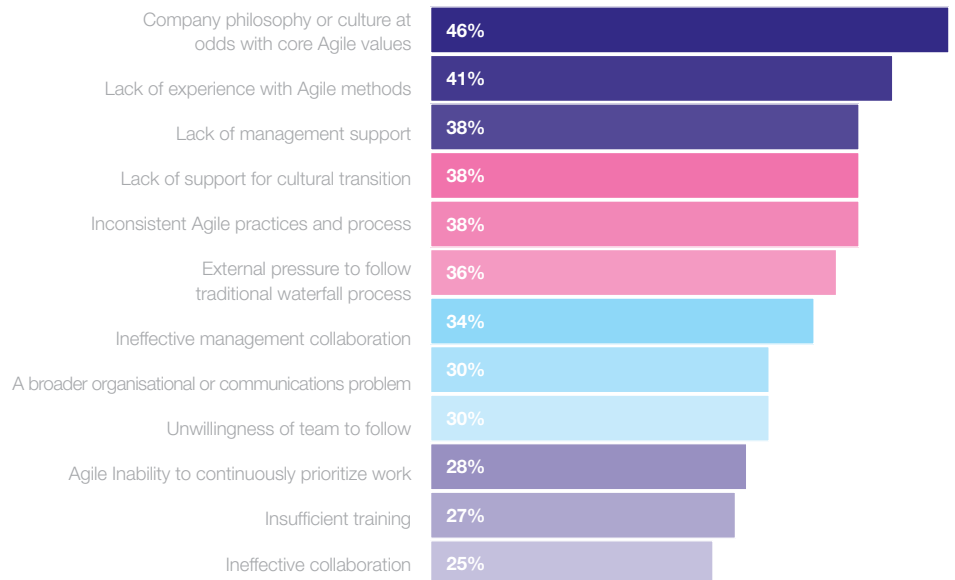### Agile projects

So is Agile right for your project?

The key considerations relating to the suitability of Agile for a particular project can be broadly grouped into the following:

- Project suitability
- Customer readiness
- Supplier capability and experience
- Tailored contract

Firstly, it is important to think about the project itself (particularly if Agile is not already embedded within your business). "*Agile is not better; it is simply better-adapted to some problems, but not so well-adapted to others*."[1] If you have an overall vision for the solution, but the specific requirements are not yet well defined, or the scope is likely to change or be refined during the course of the project, then Agile may be well suited to your project. New consumer-facing products tend to be well suited to Agile, given the flexibility and adaptability the Agile approach offers. However, if the requirements are clear at the time of the contract and are unlikely to change, and the priority is to deliver that scope within a fixed timeframe and budget, then the project could be better suited to a traditional waterfall approach. Projects focused on compliance, or in areas with high regulatory oversight, may also be better suited to a waterfall approach contract, as overall project requirements are less likely to be flexible or subject to change.

Company culture continues to dominate the top causes of failed agile projects with company philosophy or culture at odds with core Agile values at 46%, and lack of management support for cultural transition at 38%

Category	%
Company philosophy or culture at odds with core Agile values	46%
Lack of experience with Agile methods	41%
Lack of management support	38%
Lack of support for cultural transition	38%
Inconsistent Agile practices and process	38%
External pressure to follow traditional waterfall process	36%
Ineffective management collaboration	34%
A broader organisational or communications problem	30%
Unwillingness of team to follow	30%
Agile Inability to continuously prioritize work	28%
Insufficient training	27%
Ineffective collaboration	25%

Source: versionone 2016

Second, and perhaps most importantly, you need to consider customer readiness. The importance of customer readiness and senior management engagement and support cannot be understated. Many of the leading causes of failure in Agile projects can be traced back to a lack of customer readiness or senior management support. This is not just a case of training the project team in Agile methodologies (although clearly training will be important). Senior management and the organisation as a whole need to understand Agile and support the cultural change necessary to support the Agile project delivery methodology.

Two key roles for a customer's Agile delivery are the customer's product owner and product managers. These roles require personnel who understand the customer's business and end customers, who understand Agile processes and their role in them, and importantly have the ability and authority to make decisions as part of the Agile way of working. Organisations wishing to use Agile must first consider whether this customer focus is compatible with their internal delegations and compliance frameworks and, if not, whether it is able to adjust those frameworks to accommodate an Agile approach.

[1] "In praise of agile" Computerworld 1 October 2015.

Third, as with any project, the selection of partner is critical. But with Agile, trust and relationships are even more important, so being able to quickly establish a strong working relationship with your supplier will be critical to the project's success. It is also important to ensure that the supplier and their proposed personnel have experience in Agile project methodology. Ideally the supplier team can co-locate with your team to support a one team approach (although COVID-19 has also demonstrated that Agile can work with distributed teams. However, if you are implementing software from a vendor who has only ever delivered using waterfall methodology, you will need to have high Agile maturity within your own business, and a willingness to invest in the supplier, before embarking on an Agile project.

Finally, it is important that the contract reflects Agile project methodology (more on this below).

'We were asked to assist… We were asked to assist a client who had entered into a contract for a large software solution to replace complex interconnected manual processes at a number of its sites. It had a good standard form IT contract based on a waterfall implementation model.

The project was initially procured using a standard waterfall deployment. The supplier had existing software that it intended to configure to meet the customer's requirements. However, when the initial release did not meet the customer's requirements the parties agreed to move to an Agile project delivery. This was despite the fact that neither the supplier nor the customer's project team had any Agile experience. The parties sought to implement this fundamental shift in approach via a simple contract variation which:

- replaced the detailed specifications with "as agreed by the parties during the sprints";

- removed the timetable; and

- replaced the fixed price with time and materials payments.

No other change was made to the contract.

We were engaged by the client more than 12 months after the move to Agile, at which stage the client still did not have any working software. The project was ultimately abandoned after a budget and timetable blow out of more than double, despite the lack of working deliverables. Unfortunately, the changes to the contract left the customer with limited contractual rights. The variation had removed the standard waterfall protections, but had not replaced them with any practical protections (or in this case risk sharing given that the supplier had already failed to deliver using the traditional waterfall methodology). This experience shows the dangers in moving to Agile without adequate planning or preparation.
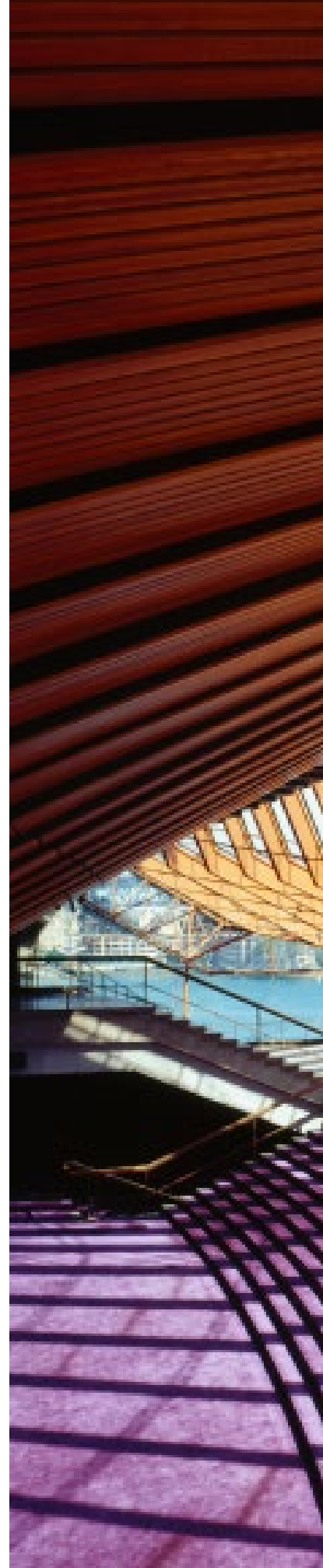
How do you tailor your contract for Agile?

There is a popular misconception that contracts aren't important for Agile. In our view, that is a very dangerous misconception. It can be easy to forget that the contract is the agreement between the parties about what each party promises to do, and what should happen if things don't go to plan. For an Agile contract, the focus is as much on how the parties intend to work together as it is on the end product because the end product may not be defined with any degree of specificity at the start. Without a clear contract dictating the way that the parties will work together to face challenges, Agile projects can quickly unravel.

There is no one size fits all standard Agile contract that will work for all customers for all projects. There are different Agile methodologies and approaches, and contracts should be adapted accordingly. The parties may well have different expectations of what Agile means for the project, unless there is ca clear conversation at the outset. The contract can help the parties clearly articulate how the parties have agreed to work together, what roles and responsibilities each party will perform and what practical protections are appropriate to support the successful delivery of the Agile project.

> **The contract won't save a failing agile project, but it can help set the project up for success and help keep it on track.**

When tailoring your Agile contract keep in mind:

- **Flexibility** – flexibility is a key element of Agile projects. Waterfall contracts can be, can be rigid by their nature, because the supplier is required to deliver a fixed scope, for a fixed price, in a fixed timeframe with limited input or engagement with the customer. In an Agile project it's important to consider how the contract will support and preserve flexibility in the project while still giving each party certainty.

- **Personnel** – Agile values individuals, interactions and collaboration. Personnel take on a critical importance in the Agile project methodology. For this reason, as a customer, it's important to consider what contractual protections you will have about the particular personnel who will be working on your project, and you may expect additional rights to require changes to the supplier's project team.

- **Performance** – in a waterfall contract, performance is assessed by delivery of a solution that is accepted within the timeframe and budget. Agile is about iterations and collaboration. But the performance of the supplier and the Agile teams is arguably more important with Agile to ensure the project can be successfully delivered. Performance can relate to quality, number of defects and need to rework, or it can relate to cadence and ability to deliver value within an agreed period. While critical, there is no silver bullet or easy way to measure supplier performance in these projects. A key aspect of an Agile project will be ensuring the supplier and supplier personnel's incentives are aligned to those of the customer to ensure the success of the project is the team's collective goal. Applying a corporate level performance framework for Agile teams may be one way to do this.

- **Budget protections** – there are many ways to price a supplier's involvement in an Agile project. Time and materials, fixed price per sprint or for a fixed period or outcome, a project budget with +/-% allowance, fixed price per story point or other shared incentive model. The pricing mechanism will depend on the project and the way in which the parties intend to work together. But it is important to build in some budget protections and to seek to align the supplier's incentives with the customers.

- **Practical protections** – the intention of Agile is that the customer has greater transparency and control over the project. It is important to think about practical protections that may be required to support the customer's flexibility and ability to manage the project. For example, ensuring any work is done or saved within the customer's environment, that the customer has the right to use and modify any material provided by the supplier (where appropriate) and the practical ability to access and use that material.

When putting together an Agile contract, here are some of the key differences to a traditional waterfall contract.

AGILE CONTRACTING		
Less	**More**	**Adapted**
• Detailed requirements	• Ways of working and role definition	• Intellectual property
• Long lists of document deliverables	• Governance and personnel	• Testing, acceptance and go live
• Detailed project plan/Gantt chart	• Performance assessment	• Price and payment
• Delay liquidated damages	• Practical protections	• Termination

A key document in an Agile contract will be the ways of working. In a waterfall contract, the supplier's method of working is really a matter for the supplier. Not so with an Agile project. How the parties will work together – and establishing a framework for necessary interactions and collaboration – will be key to the success of the project. This will be important both in terms of ensuring the parties have a shared understanding of how they intend for the Agile approach to function in practice, but also in terms of how, and by who, issues will be resolved. We have outlined in the diagram below, some of the topics that can usefully dealt with in the ways of working.

AGILE CONTRACTING
Ways of working
• Do the parties have a preferred Agile methodology they intend to adopt?
• What are the roles and responsibilities of each party and each role? Will certain roles always be filled by one party, or could there be joint teams that are co-mingled with resources of the customer and supplier both undertaking the same role in different teams?
• What is the process for scoping, planning, delivering, testing, iterating and releasing software and who is primarily responsible for each activity?
• What will be managed within the project and what needs to be escalated or referred out for sign-off or contract variation?
• How will user stories be documented and the definition of "done" be defined?
• How will testing, feedback and changes be managed?
• What will be decided by the team and what needs customer sign off?

As outlined above, there is no one size fits all, or right way to do it. The key for an Agile contract is to tailor it to the project and your specific circumstances. What are you expecting from the supplier, how will you work together, how will you align incentives and what will happen if things don't go to plan?

The benefits of using Agile methodology can be substantial. But they cannot be achieved without significant investment by the customer in Agile and preparation and planning for the customer's role in the Agile project. Is your organisation ready? Is Agile right for this project? Does the supplier have the expertise and capability to help you deliver a successful project? If so, think about the way in which you want to work with the supplier and tailor the contract to agreed approach and build in practical protections to support successful delivery of the project.

And if you need help, we love talking Agile and contracting so give one of our Tech Law team a call.

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