Technology Disputes Digital Edition 2022

LEXOLOGY®
Getting The Deal Through

Luxembourg

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PRELIMINARY CONSIDERATIONS

Common disputes and preliminary actions

1 What are the most common issues that arise in connection to technology contracts? What actions should be considered when these issues arise? (For example, what steps should parties take to protect their rights while negotiating with the other side? Can they agree to suspend time running? How can they preserve any claims that may have arisen?)

A substantial number of the technology disputes we are involved in relate to licences and specifically the interpretation of the metrics used to calculate the number of licences and the interpretation of the notional 'user' of a licence. Especially when virtualisation mechanisms are used, disputes may arise regarding the calculation of the number of processors (in contracts where the number of licences is determined based on the number of processors). In negotiations with companies such as Oracle, it is important to address this issue, and there are ways of carving out or limiting the risks in this respect and agreeing on the licence calculation metrics. As discussions on the number of licences may also arise after an audit, reviewing in detail the rules on audits as well is recommended.

Another area in which we see a lot of technology disputes is the enforceability of limitations on liability, where customers experience damage in excess of the monetary cap defined in the agreement (eg, damage resulting from a cyberattack that occurred due to insufficient security measures on the part of the service provider). Customers are advised to assess carefully whether the proposed liability caps are realistic and whether certain types of damages should be carved out from such caps (eg, damages due to cybersecurity and data protection breaches).

In the past few years, many digitalisation projects have been set up and implemented in both the private and public sectors. Such projects typically require a high degree of customisation, which enhances the need for the parties to carefully define their roles and responsibilities since, in the event of a failure, it is important to be able to determine which party was responsible for which deliverable.

In addition, even when a project has proven to be successful, certain collaborative ways of working may lead to discussion, for example regarding the ownership of the intellectual property rights resulting from the project. Clear arrangements on the recording of processes and project deliverables and definitions for foreground and background intellectual property rights are key.

We are also increasingly seeing (and for the time being, pre-litigation) GDPR-related disputes between customers and IT service providers. The market has widely adopted standard data processing agreements in order to comply with article 28 GDPR, but these agreements often simply repeat the wording of the GDPR. For example, data processing agreements typically provide for an obligation for the data processor (in an IT agreement, the IT service provider) to assist the data controller with certain issues such as data subject requests and proof of compliance. In most cases, no fees are foreseen in the data processing agreement for such assistance, which has led to disputes regarding the related costs. Furthermore, the European Commission has issued standard clauses for data processing agreements. There is a clear trend that data controllers prefer these, but data processors are pushing back on standard clauses, as they require that the parties are explicit (eg, on the security measures to be implemented).

Lastly, attention should be paid to the repercussions of the *Schrems II* judgment of 16 July 2020 of the Court of Justice of the European Union (CJEU) in which it invalidated the EU–US Privacy Shield, a self-certification scheme that served as the basis for many personal data transfers to the US in the context of technology contracts with US-based IT service providers (eg, cloud service agreements where personal data are hosted in or accessible from the US). This means that transfers of personal data must be based on another ground, the most straightforward of which is the conclusion of standard contractual clauses. The validity of such standard contractual clauses for personal data transfers to third countries was confirmed by the CJEU, yet the mere reliance on standard contractual clauses is no longer sufficient. Both the EU controller and the third country recipient need to verify whether the destination country's law will allow compliance with the GDPR, the standard contractual clauses itself and also the EU Charter on Fundamental Rights (essentially equivalent level of protection to that guaranteed within the EU by the GDPR). If this is not the case, then you need to assess whether this can be remedied by supplementary measures (organisation, technical and contractual) (see Opinion 01/2020 of the European Data Protection Board regarding this). Such supplementary measures will be an important point in negotiations between third country-based IT service providers and their customers.

Contract termination

2 How can a contract be terminated in your jurisdiction? What considerations should be taken into account when deciding whether and how to terminate a technology contract?

Fixed-term contracts end in principle upon the expiry of their term. Open-ended agreements, in principle, can be terminated with a reasonable notice period. The parties may derogate from these rules in their agreement. It is recommended that one should expressly state the possibilities for termination in the contract and detail the circumstances under which it is possible to terminate for convenience and what is meant by termination for cause.

In many cases, the insolvency of a party is contractually stipulated as a ground for termination. In this respect, it is advisable to check the insolvency rules governing the party concerned, as the applicable laws (especially those which allow for a chapter 11 type of reorganisation) may prohibit the automatic termination of an agreement. For example,

if the IT service provider is a Belgian entity (which is often the case in Luxembourg) and is subject to a judicial reorganisation of its business, a customer cannot terminate the agreement, even when the contract is governed by Luxembourgian law. The CSSF, Luxembourg's financial sector regulator, also requires that in the case of outsourcing arrangements with a Luxembourg-based professional of the financial sector, a contract cannot contain any clause that would allow termination due to liquidation or insolvency procedures (bankruptcy, judicial reorganisation, etc).

As Luxembourg is an important financial services centre, it is also worth mentioning that the EBA Guidelines on outsourcing arrangements, which are applied by the CSSF, require that credit institutions, investment firms and payment and electronic money institutions should be able to terminate an outsourcing arrangement (thus including most IT service agreements) in accordance with applicable law in at least the following situations:

- where the provider of the outsourced functions is in breach of applicable law, regulations or contractual provisions;
- where impediments capable of altering the performance of the outsourced function are identified;
- where there are material changes affecting the outsourcing arrangement or the service provider (eg, sub-outsourcing or changes of sub-contractors);
- where there are weaknesses regarding the management and security of confidential, personal or otherwise sensitive data or information; and
- where instructions are given by the institution's or payment institution's competent authority, for example, when, due to the outsourcing arrangement, the competent authority is no longer in a position to effectively supervise the institution or payment institution.

It is important to specify in the contract not only the possible grounds for termination but also the consequences of termination. Although there is a trend in Luxembourg case law to accept the interdependence of some types of agreements, it is useful to clarify that the termination of a licence agreement leads to termination of the accompanying maintenance and support agreement (on the other hand, unless stipulated otherwise, the termination of a maintenance and support agreement will not automatically result in termination of the licence agreement). For business-critical IT services, it is necessary to provide an adequate exit arrangement in order to allow the customer to make the transition to another service provider and ensure the continuity of its business.

Luxembourg is one of the only countries in the EU with specific rules imposing an express obligation on Luxembourg-based cloud providers (eg, AWS) to render customer data in the event they go bankrupt.

Financial service providers that fall under the EBA Guidelines on outsourcing arrangements are required to establish a robust exit plan for the outsourcing of critical or important operations. The EU regulators for the insurance and investment sectors, EIOPA and ESMA, require the same in the case of cloud-based outsourcing.

Without-prejudice communications

3 Is it possible to have conversations aimed at settling a dispute which cannot subsequently be used as evidence in legal proceedings if the dispute is not resolved? If so, what formalities are required (if any)? If not, how should confidentiality be preserved through mutual agreement?

The customary, and in fact only, way of ensuring that the content of conversations cannot be used as evidence in legal proceedings is to hold the discussions between counsel. Furthermore, in respect to written exchanges, it is commendable to always add that they are addressed to the counterparty 'under reservation of all rights and without any detrimental recognition'.

Settlement formalities

4 If a settlement is reached, what formalities are required in your jurisdiction for the settlement to be enforceable?

The parties must make mutual concessions in writing in order to reach a settlement that, according to article 2044 of the Luxembourg Civil Code, bars them from starting or continuing legal proceedings. If this is not the case, there is no 'settlement' within the meaning of Luxembourg law and the parties will still be entitled to continue or start legal proceedings.

CLAIMS

Causes of action

5 What causes of action commonly arise in connection to a contract for hardware or software design, implementation and licensing? What elements must be established to succeed in these claims? (Can any non-contractual claims be brought, such as liability for pre-contractual statements?)

The malfunctioning of hardware or software is a common cause of action. As a general rule, the claimant (customer) must be able to prove that the solution does not meet the reasonably expected standard of performance. If the solution does not work properly from the outset, the customer can claim non-conformity, in other words, the solution does not conform to the agreed functionalities.

Very often the question at stake will relate to what was agreed on. IT service providers often make more promising statements in pre-contractual documents (eg, in their reply to a request for a proposal) but exclude them from the scope of the contract via an 'entire agreement' clause. Under Luxembourgian law, an 'entire agreement' clause will in principle not prevent the court from looking at the pre-contractual documentation in order to understand what the parties intended to agree on. If the pre-contractual information was incorrect or incomplete, this could give rise to an extra-contractual (ie, tortious) claim or even a claim for breach of contract and possibly for the nullity of the contract, if the incorrect or incomplete information led to an error regarding the essential characteristics of the solution. Recent Luxembourgian case law did not hesitate to annul a contract where the IT service provider was not able to deliver a solution with the functionality that were promised.

Larger IT contracts usually provide for an acceptance period during which non-conformities will be resolved, meaning claims for non-conformity are less likely.

Normally, upon acceptance of the solution, a contractual warranty is foreseen (often for a period of three months). After the warranty period, any shortcomings in the solution will (have to) be covered by the maintenance and support agreement, which in principle indicates service levels to be respected by the IT service provider and often service credits or penalties if these service levels are not met.

Statutory claims

6 Has your jurisdiction enacted any legislation providing additional protection for business purchasers of hardware, software or associated licences? (For example, are any rights, duties or other terms implied by statute, including a duty of good faith?) What practicalities should be considered when bringing statutory claims?

In the case of hardware (and probably also off-the-shelf software), there is a sale of goods to which the statutory warranty for hidden defects will apply. The warranty for hidden defects covers defects in a product

prior to sale that were hidden and render the product unusable for its intended purpose. In principle, it does not extend to IT services. In case of a hidden defect, manufacturers and professional sellers are required, in addition to repayment of the price received, to compensate the buyer for any damages.

A key principle of Luxembourgian contract law is that contracts should be negotiated and performed in good faith. There is an increasing trend, especially in technology contract disputes, to infer from this principle a duty to inform. This duty applies to both parties, but weighs more heavily on the IT service provider.

Defences

7 | What defences are available against the most common claims raised in technology disputes? What elements must be established for these defences to succeed?

IT service providers tend to refer to the documentation regarding their solution and include a clause confirming that the customer has been able to analyse the documentation and expressly acknowledges that the solution corresponds to its needs. For events occurring after acceptance of the solution, the IT service provider will usually rely on the contractual limitation of liability.

Furthermore, IT service providers will typically try to limit their responsibility and liability in the following ways (other than by means of a monetary liability cap or exclusion of liability for indirect damages, etc), and will invoke such limitations as a defence in the event of proceedings:

- specifying in their contracts that, generally speaking, they are subject to obligations of means (eg, gradations, reasonable, best efforts etc) rather than obligations to achieve a specific result (even in SLAs);
- mentioning that service credits are the sole and exclusive remedy in case service levels are not met; and
- including a detailed service description whereby any change or addition must form the object of a detailed change request procedure, including a non-exhaustive list of out-of-scope services and a list of assumptions and warranties.

Limitation period

8 | What limitation periods apply for bringing claims in your jurisdiction? (Please indicate whether different periods apply for different types of claim.)

The general limitation period for claims against a commercial party – even when the claimant is a consumer, non-profit organisation or a public entity, thus not a commercial party – is 10 years.

LITIGATION PROCEEDINGS

Pre-action steps

9 | What pre-action steps are required or advised before bringing legal action? (For example, is pre-action mediation mandatory in your jurisdiction?)

In principle, and unless contractually required, there are none, but it is strongly advised (and sometimes contractually required) to send a formal notice letter before commencing legal proceedings.

Competent courts

10 | Does your jurisdiction have a specialist court or other arrangements to hear technology disputes? Are there specialist judges for technology cases?

No, but most disputes of this kind are handled by the same division (chamber II) of the Luxembourg district court.

Procedural rules

11 | What procedural rules tend to apply to technology disputes?

The regular rules governing proceedings brought before the district court in Luxembourg or Diekirch (depending on the location of the defendant's registered office or the content of the jurisdiction clause) apply. Proceedings are brought via a summons served by a bailiff.

In the context of technology disputes, the parties often opt for civil proceedings with the exchange of written submissions because such disputes are mostly very complex so that is not in the parties' interest to immediately plead the matter which would be the case in commercial proceedings. The latter, of course, means that a judgment is rendered more quickly.

Judgments of the district courts can be appealed before the Luxembourg court of appeal. Judgments of the latter can be appealed, on points of law only, before the supreme court.

Evidence

12 | What rules and standard practices govern the collection and submission of evidence in your jurisdiction (eg, discovery/ disclosure obligations or obligations to preserve relevant documents)?

The person claiming a fact or relying on an act bears the burden of proof. Acts and (contractual) obligations of professional parties can be proven by any means. If a party invokes certain documentation as evidence before Luxembourg's courts, such party must exchange this documentation with the opposing party in due time in order to enable the opposing party to prepare its defence.

Luxembourgian procedural law does provide for a disclosure process, meaning a specific upfront phase of litigation where each party is required to collect and exchange relevant documents, including documents that could adversely affect its own case. Under Luxembourgian procedural law, each party in principle chooses whether or not to put certain documentation forward as evidence (bearing in mind the burden of proof principle). However, if, pending proceedings, a party knows that the other party, or a third party, possesses evidence that is useful for the resolution of the dispute, it can petition the court to order its production.

Privilege

13 | What evidence is protected by privilege in your jurisdiction? Do any special issues surrounding privilege arise in relation to technology disputes?

There are no specific rules on privilege in technology disputes. The most common types of privileged information are lawyer-client privileged information and confidential communications between lawyers (eg, settlement negotiations).

Protection of confidential information

14 How else can confidential information be protected during litigation in your jurisdiction?

It is possible to petition the court to order special measures in relation to business-critical or otherwise confidential information (eg, restricted access, disclosure of the information only to opposing counsel, etc).

For trade secret enforcement cases, the Luxembourgian law on trade secrets, implementing the Trade Secrets Directive (2016/943), expressly provides for the possibility to petition the court to order trade secret preservation of confidentiality measures (including closed hearings) whereby any non-respect of such measures imposed by the court is subject to a fine of €251 to €45,000.

Expert witnesses

15 Can expert witnesses be used in your jurisdiction? If so, how are they appointed and what is their role in the proceedings?

Yes, parties often rely on their own experts but, in complicated cases, the court can appoint an expert at its own initiative or at the request of a party. The expert provides technical explanations on the questions raised by the court (after the parties have commented on them).

Time frame

16 What is the typical time frame for litigation proceedings involving technology disputes?

Regular proceedings take between 12 and 18 months in the first instance; proceedings on appeal take more or less the same amount of time.

Summary proceedings take between three and six months.

LITIGATION FUNDING AND COSTS

Litigation funding options

17 How can litigation be funded in your jurisdiction? Can third parties fund litigation? Can lawyers enter into 'no win, no fee' or other forms of conditional fee arrangement?

Each party in principle bears its own costs. There is no rule prohibiting third-party funding but it is rare for litigation to be funded by third parties in Luxembourg.

Lawyers cannot enter in a pure 'no win, no fee' arrangement with their clients. However, they can agree on a partial fixed fee, with the remainder contingent on the outcome of the case.

Costs and insurance

18 Can the losing party be required to pay the successful party's costs in the litigation? If so, is insurance available to cover a party's legal costs?

The losing party will be ordered to pay the expert's fees and can be ordered to pay the successful party's legal fees if it would be unfair to have the winning party bear these costs. However, in practice, the reimbursement of lawyer's fees is limited, and it is rare for these fees to exceed €5,000 to €7,500 (even in complicated cases).

REMEDIES AND ENFORCEMENT

Interim remedies

19 What interim remedies are available and commonly sought in technology disputes in your jurisdiction?

Via interim remedies, the parties to litigation can request all urgent measures necessary to the extent the claim cannot be reasonably contested as well as preventive or restorative measures if the damage is imminent or in the case of manifest illegality. Examples of interim remedies include a court order to the IT service provider to continue the contractual relationship or to grant access to customer data. The expedited appointment of an expert is another interim remedy.

In the context of counterfeit litigation, specific interim measures can be ordered for the preservation of evidence, including the appointment of an expert for the examination and description of the objects concerned, a provisional seizure order or an order for the defendant to deposit a suitable bond or equivalent guarantee to ensure compensation.

Substantive remedies

20 What substantive remedies are available and commonly sought in technology disputes in your jurisdiction? How are damages usually calculated?

The most frequent remedies in technology disputes are:

- a court order for specific performance of an obligation (possibly subject to a penalty for non-performance);
- termination of the agreement or, if the agreement has been terminated in accordance with its terms, confirmation of the termination; and
- damages, it being noted that damages are compensatory in nature and it must be possible to prove damage, fault and a causal link between the two.

In the context of counterfeit litigation, the court may order the delivery to the plaintiff of the infringing products and the materials used for their creation, as well as the assignment of the profit made as a result of the infringement.

Limitation of liability

21 How can liability be limited in your jurisdiction?

Liability cannot be fully excluded but limitations on liability are generally acceptable unless the limitation deprives the contract of its essence. Pursuant to Luxembourg case law, it will be very hard to argue that the classic limitation of liability (ie, the fees paid in the past 12 months) deprives the contract of its essence. On the other hand, an exclusion of liability for the loss of data may not be acceptable if the processing of data is essential for the IT services to be provided (eg, in the case of data hosting or migration).

Liability may not be limited in the case of gross negligence or fraud.

Liquidated damages

22 Are liquidated damages permitted? If so, what rules and restrictions apply?

Yes, but such damages can be reduced by the court if the level manifestly (more than 50 per cent) exceeds the actual damage.

Enforcement

23 What means of enforcement are available and commonly used by successful litigants in technology disputes in your jurisdiction?

An order for specific performance of an obligation can be made subject to a penalty payment in case such performance does not occur by the set deadline.

Claims for damages are usually monetary claims, the enforcement of which is carried out by a bailiff.

ALTERNATIVE DISPUTE RESOLUTION

Available ADR mechanisms

24 What alternative dispute resolution (ADR) mechanisms are available and typically used for technology disputes in your jurisdiction? (Do they have statutory support?)

The parties shall have recourse to ADR if they agree to do so or have contractually agreed to it. Recourse to ADR is not obligatory. The most common type of ADR for technology disputes is arbitration. It is more common for parties to refer to institutional arbitration in their arbitration clauses than to ad hoc arbitration. A final arbitral award is binding on the parties and enforced by the president of the district court. An arbitral award can only be challenged before the district court on very limited grounds (contrary to public policy, invalid arbitration agreement, violation of due process rights, etc).

Mediation is also possible if the parties agree to it, possibly at the court's suggestion. If mediation is successful, the agreement reached by the parties must be ratified by the court in order to be binding on the parties and enforceable.

Both arbitration and mediation are governed by the new code of civil procedure. A new bill on the reform of the procedural framework in relation to arbitration, published in September 2020, is under discussion.

Recognition and enforcement

25 What rules and practices govern the recognition and enforcement of foreign arbitral awards in your jurisdiction?

In order to enforce an arbitral award in Luxembourg, a request to this effect must be addressed to the president of the district court. The latter will review the award on an ex parte basis. If the enforcement order is granted, the defendant can bring proceedings before the court of appeal seeking to set aside the award.

Enforcement of an arbitral award can only be challenged on very limited grounds. The court can only refuse an exequatur if:

- the award can still be challenged before the arbitrators;
- the award or its enforcement is contrary to public policy or if the dispute was not capable of being settled by arbitration; or
- there are annulment grounds for setting aside the award.

UPDATE AND TRENDS

Recent developments and trends

26 What have been the most notable recent developments and trends affecting the conduct and resolution of technology disputes in your jurisdiction (including any recent or pending case law and legislative changes)?

Luxembourg does not have a lengthy history of technology litigation as most technology disputes are settled out of court. Over the past few years, however, with the increase in larger outsourcing and digital transformation projects, there has been an uptick in technology-related litigation. There is an emerging trend of decisions in favour of the customer, inferring significant obligations for the IT service provider based on the principle that contracts must be performed in good faith. In addition, limitation of liability clauses that have traditionally been upheld are coming under pressure as Luxembourg (and French) courts are increasingly ready to find gross negligence and to set aside such provisions.

Luxembourg has become a digital nation and many technology contracts are concluded by public authorities and entities, meaning disputes also arise in this context.

Coronavirus

27 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Luxembourg has adopted several measures, including state-backed support, to address the pandemic. However, none of these measures concerns technology contracts and related litigation. Until 24 June 2020, there were measures in place to suspend most judicial deadlines, but these have since been lifted.

LAW STATED DATE

Correct on

28 Give the date on which the information above is accurate.

30 June 2021

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