Technology disputes: a perfect storm of complex technical, legal and business issues

Julian Stait and Tom Canning, litigation partners in the London arm of Milbank, look at the complex field of tech disputes

Disputes arising out of complex technology projects continue to arise with alarming frequency; the more complex the project, the more likely it is that problems will arise. And yet, looking back over a large number of years of handling these types of disputes, many of the key causes, issues and themes remain the same, notwithstanding the passage of time. Why is that?

The first reason relates to the underlying causes of many technology disputes. Suppliers of technology products and services (suppliers) have always been keen to win business and differentiate their products and services from those of their competitors. But, as the number and range of suppliers has increased over the years, so has the intensity of competition. In the heat of a competitive tender process, the promises made by some suppliers about their ability to meet the requirements of their potential customers can, on occasion, become divorced from the reality. That is particularly the case if, within supplier companies who are seeking to win work, those leading the sales efforts are separate (and separately incentivised) from those who will deliver the project in practice, thus leading to the prospect of claims for misrepresentation if a bid is successful, and increasing the risk that breaches of contract will occur.

Companies wanting to buy technology products and services (customers) may have a range of objectives. They may, for instance, wish to implement new technologies to improve efficiencies, lower their own costs, comply with the requirements of regulators or differentiate from competitors by the implementation of new technical services that can be used with their own clients. However, those companies can, on occasion, drive the procurement process with potential suppliers too hard, and in a way which encourages unrealistic promises (for instance, in relation to the time or cost within which a project can be delivered). And sometimes the individuals driving the procurement process will not be entirely familiar with the actual requirements of those who will ultimately need to use the new technology, and may be incentivised by the outcome of the procurement process rather than the success of the project. So, in their enthusiasm to get a 'good deal', they may, unintentionally, deliver a bad one.

That is particularly unfortunate when one takes into account the inherent complexity of many technology projects: they may involve the development and implementation of new technologies, platforms or services which, in any event, have a heightened risk of failure.

All of this can place a technology project under profound strain before it even starts.

In addition, the technical complexity of the projects is often matched by the legal complexity of the underlying technology contracts (another important factor in technology

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disputes). Despite the best efforts of transactional lawyers and technical consultants, there can sometimes be a mismatch between the front-end terms and conditions of the contract and the (often numerous) technical schedules, leading to the creation of inherent uncertainties over the true meaning and effect of the parties' contractual rights and obligations. As the Court of Appeal recently noted in *Triple Point Technology v PTT* (when considering the importance of precedence clauses): 'Precedence clauses are of particular importance in substantial… IT contracts. Many people draft different sections of the contract and specification. The final contract is an amalgam of all these efforts. Sometimes… the contracts are so vast that no human being could possibly be expected to read them from beginning to end. The traditional rule that you construe a contract as a whole must now be understood in this context. Conflicts between different parts of the contract documents are almost inevitable in such cases. Precedence clauses tell the reader how such conflicts should be resolved.'

That problem is often exacerbated by a reluctance of the parties to comply with the terms of their contracts in relation to the basis on which any variations should be made – usually, only in writing and pursuant to specific change control provisions. That reluctance to follow the contract can be because those operating at the coal face on both sides prefer to act in a co-operative and informal manner, focusing on identifying sensible ways of working together to achieve their ultimate goals rather than doing so in a regimented manner, where every change of direction, scope and approach is recorded in formal, binding contractual variations.

But that can be a very short-sighted and dangerous approach: where the parties to a technology contract act (potentially over an extended period) other than in accordance with the strict provisions of their contract (eg, in relation to the time for completion of the project or a particular milestone), they risk being held to account for their failure to adhere to the original, unamended terms of the

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contract. The recent decision of the Supreme Court in *Rock Advertising v MWB Business Exchange Centres* has confirmed the effectiveness of contractual provisions requiring specified formalities to be observed in order for a contract to be varied (in that case, a clause providing that any variation must be in writing and signed on behalf of the parties: a so-called 'no oral modification' clause). While the *Rock Advertising* decision does not stand in the way of an argument that the parties are estopped from relying on the original terms of the contract because of their subsequent conduct, placing reliance on estoppel arguments unnecessarily exposes parties to risk and uncertainty. And it means that, if a dispute arises, it may no longer be clear what legal regime they are operating under – that set out in the contract, or that operating on the ground.

The reluctance that we see in parties properly recording variations in the terms of technology contracts (eg, in relation to time or scope) is often matched by an unwillingness appropriately to deal with problems when they first arise. For instance, many technology contracts set out what should be done if a supplier is delayed in its performance because of failures on the part of its customer: typical provisions stipulate that the supplier is only excused from the consequences of delay if timely notices are given with explanations of the way in which the customer's failings have caused or contributed to the delay. Suppliers are, perhaps understandably, reluctant to serve such notices, which necessarily require them to point to their customer's deficiencies. But that reticence can, once again, cause uncertainty in any subsequent dispute.

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When problems arise, it is important for parties to keep accurate records of what has happened and ensure that any relevant contractual provisions are followed.

These issues (and any deficiencies in contract management more generally) will be thrown into particularly sharp focus when it comes to the potential termination of technology contracts. In our experience, many technology disputes which result in litigation concern contracts which have been terminated, and often the validity of that termination is challenged.

If a customer (or, indeed, supplier) wishes to terminate a technology contract, it will be of great importance promptly and carefully to examine whether the other party has complied with its contractual obligations and analyse the extent to which that gives rise to a right to terminate. If there is any uncertainty over the operative terms of the contract, that will be extremely unhelpful. When it comes to terminating technology contracts, the stakes are often very high. If a party gets it wrong, that may well expose that party to a claim for wrongful termination. That will be particularly unfortunate where the party which has terminated the contract has done so because it has been the recipient of poor service which has caused it to suffer loss: exposing itself to a claim for wrongful termination in those circumstances will add a high-value insult to an already expensive injury.

Validly terminating a technology contract can be very challenging. Not only will that often involve a careful forensic analysis of what has happened, but difficult questions arise as to the manner and timing of any termination: how long can you wait after the key events have occurred before you exercise your right; how do you protect your position while you decide; what should you do if you want to explore a potential re-negotiation of the contract; to what extent can you explore the possibility of replacing a supplier while the contract still exists; what does the contract say about the rights and obligations during any post-termination exit period (a key question in *AstraZeneca UK v IBM*); and how do you avoid losing any termination right that you have?

But the range and diversity of technology providers means that, should a project go wrong, there are many alternative options and, hence, an increasing willingness of customers to terminate their contracts with incumbent suppliers and replace them with others (that also extends to government departments, which have traditionally been reluctant to terminate and litigate, but are increasingly prepared to do so).

Returning to the terms of the contract: even where it is possible comprehensively to identify the operative terms of the contract, it is sometimes difficult to interpret those terms. Perceptions of subtle shifts in the approach of the Supreme Court in recent decisions – and which have called into question whether more of a textual or contextual approach is appropriate – have not necessarily helped (although

the Supreme Court has now sought to draw a line under the debate: 'Textual and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation' – Lord Hodge in *Wood v Capita Insurance Services*). Any deficiencies in the drafting of the terms of the contract will be exposed by the intense scrutiny that comes from litigation. For instance, while exemption clauses (ie, those that limit or exclude liability) are of great importance to those defending claims of poor performance, and the drafting of exemption clauses in IT contracts has regularly been reviewed by the courts, clarity of drafting is still often called into question (of course, it is much easier for litigators to pull apart drafting in the light of what has happened than it is for commercial lawyers to draft ahead of time!).

When technology cases reach the courts (and, sometimes, parties choose to have their disputes resolved in arbitration, to limit public scrutiny) their resolution can be time-consuming, expensive and a major business distraction. It is sometimes possible to resolve differences of views on the meaning and effect of contractual provisions through (fast-track) applications for declaratory relief. But where that is not possible, and where alternative forms of dispute resolution are unsuccessful, the ultimate resolution of technology cases through the courts may take many years from the commencement of proceedings through to judgment: technology project disputes often involve huge numbers of documents, factual witnesses and experts, and lengthy trials. They are very much marathons rather than sprints.

Despite this, technology disputes have, as noted at the outset, continued to arise. The inherent complexity of technology projects, many of which are business critical, will mean that some of them go wrong (giving rise to claims). But the intensity of competition between suppliers to win work and the need for customers to drive a hard bargain, often causes additional tensions that later manifest themselves in disputes. When disputes arise which cannot be resolved, there is perhaps a greater willingness to terminate contracts (although, unfortunately, a continuing trend to do so badly) and also to sue. The availability of litigation funding to underwrite the cost of litigation, and of after-the-event insurance to reduce the risk of adverse costs orders, has provided additional impetus in this area of complex business litigation.

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