Technology Projects and Outsourcing: Contracting to Avoid Disputes

An ounce of prevention is worth a pound of cure. Without a doubt, it's always better to take measures to avoid contractual disputes than to have to manage them later. In this article, we discuss a number of measures that can be adopted by service providers and customers in relation to technology projects and outsourcing arrangements with a view to reducing the possibility of disputes arising.

Failure to adequately address and negotiate business interests

Some of the most common areas of disputes arising under technology contracts relate to service scope, fees, the acceptance process for deliverables, and delays in transition or transformation projects. This is reflected in the survey results of more than 2,100 organisations compiled by the International Association for Contract & Commercial Management ('IACCM') in its 2018 report. The IACCM identifies the following terms as those that negotiators consider most important:

1. scope and goals / specification;
2. responsibilities of the parties;
3. price / charge / price changes;
4. delivery / acceptance;
5. service levels;
6. performance / guarantees / undertakings;
7. limitation of liability;
8. payment;
9. data protection / security / cybersecurity; and
10. change management.

However, the IACCM report correctly goes on to state, “this understanding of importance does not translate to a shift in the terms that are most negotiated, which remain dominated by issues around risk allocation and the consequence of failure. Limits of liability, Indemnities, Termination and Warranties occupy four of the top six [most negotiated] positions”.

Unfortunately, contractual negotiations tend to be dominated by a lot of haggling over risk allocation provisions. This preoccupation with such clauses results in parties failing to adequately address the core of the business deal. Whilst risk allocation provisions are important and warrant due consideration, most disputes in technology implementation and outsourcing projects revolve around day-to-day issues that arise at the coalface. This is because when preparing contractual documentation, parties often neglect to specify their key business interests clearly and in sufficient detail. At best, important commercial terms such as scope, pricing, service levels, acceptance criteria etc. are buried in the schedules, without having been properly thought through by the parties, let alone negotiated. Inevitably, disputes arise over these very terms.

This is of particular concern because the head terms of a contract typically stipulate that the schedules are to be given priority over the head terms where there is any ambiguity or inconsistency in the documentation. Accordingly, it is essential that contracting parties give due consideration to the schedules and clearly stipulate:

- **what service is being provided** (i.e. what is the scope of the services and what exclusions, customer dependencies, supplier assumptions apply; what are the required technical specifications, standards; and service levels)?;
- **how much will it cost** (i.e. what are the agreed fees; and is the quantum of fees dependent on service levels being met, successful acceptance of deliverables, achievement of milestones or anything else)?; and
- **what are the implications if changes are required or expectations are not met** (what is the change control process and the associated fee adjustment mechanism; what service level credits and penalties apply where obligations are not met, etc.)?

By fleshing out key commercial interests and agreeing detailed commercial and technical terms up front, parties can pave the path for a smoother project and a much less turbulent relationship. Parties who elect to ‘agree to agree’ key commercial and technical points after the contract has been signed face an uphill challenge. With the passage of time, the parties’ interests are likely to diverge further than at the time of contract execution, and reaching agreement on significant commercial points well into the contract term becomes increasingly difficult. Experienced operators deliberately defer discussions on important commercial issues as a strategy to lock the counterparty into the contract, obtain flexibility and use their increased leverage to obtain a better deal for themselves.
Deferring agreement on various items also raises an additional risk in the UAE. Where a dispute arises as to ‘matters of detail’ that the parties wish to agree upon later on (but which the parties do not actually reach agreement on before the dispute arises), Article 141 of the Civil Code allows the judge to adjudicate on the missing details (in accordance with the nature of the contract and the provisions of the law).

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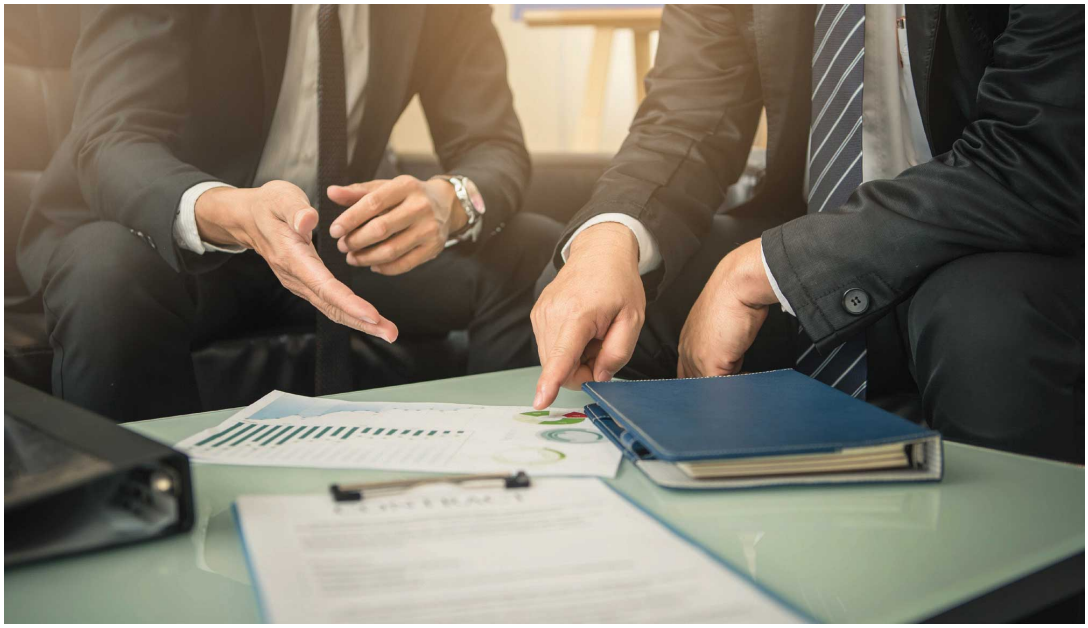

One-sided contracts

Contracting parties can waste valuable time, effort and goodwill by trying to secure every risk concession and commercial advantage from the other side. Excessive focus on risk allocation provisions not only distracts parties from focussing on their business drivers and refining the commercial deal at hand; it also creates animosity and breeds distrust between them. Protracted and heated negotiations on such clauses seem even more futile given that ordinarily, entities with a similar level of bargaining power, will eventually gravitate towards the market position in relation to most issues, if not all. Instead, parties would do better to negotiate with the 'big picture' in mind and with a view to developing and fostering a mutually beneficial relationship. A fair and balanced commercial deal is equally important. This is not to say that parties should not utilise any bargaining power or leverage they may have to secure a favourable outcome, or that all deals must be equally favourable to both parties. The point is to avoid highly one sided contracts, so as to generate goodwill from the counterparty and promote a sustainable and mutually beneficial long term partnership.

Even if a party were to secure a highly biased deal (whether commercially, or from a risk perspective, or both), that would not necessarily translate to a successful business outcome. Successful business outcomes usually materialise where the parties are treated fairly, are incentivised to perform well, and are discouraged from reneging on their commitments. A contract that is too onerous, disadvantageous or costly to one party, only incentivises that party to cut corners and look for ways to minimise the negative impact of the contract or get out of the contract altogether. It is not uncommon for disgruntled service providers to perform loss-making contracts, or contracts with low profitability, strictly 'to the letter' in order to stem their losses or preserve their margins, thereby depriving the aggressive customer of the very advantage it was jockeying to obtain. The end result of most skewed contracts is that the dominating party loses its supplier or customer (as the case may be), and is forced to return to the market to find a replacement. For the customer, the difficulties encountered in finding a replacement service provider are compounded by the business disruption it faces with disengagement and transition to the new service provider. As for aggressive suppliers, they risk alienating customers who seek to dispute and withhold amounts from invoices and take steps to slowly migrate their operations to another service provider, rather than exercising any options to renew or to extend the contract with the existing supplier.

Way forward

Negotiating parties should flesh out the details of their business interests in the contractual documentation and ensure that the deal is mutually beneficial and fair to both sides. This helps to foster a healthy and stable relationship and ensure that each party has a vested interest in the ongoing success of the project

and the other party.

In a future edition of law update, we will consider measures that can be taken to effectively manage technology contracting disputes that have arisen, notwithstanding the parties' best efforts to avoid them by having an unambiguous, sufficiently detailed, and well balanced contract in place.

Al Tamimi & Company's TMT team regularly advises on technology related matters, including technology projects, outsourcing arrangements and pre-litigation disputes. For further information please contact Haroun Khwaja, Senior Associate (h.khwaja@tamimi.com) or Nick O'Connell, Partner (n.oconnell@tamimi.com).