Technology Disputes Digital Edition 2022

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Belgium

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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?)

The most common issues are apprehended under the term 'misselling', which happens when the provided technology is not tested in a sufficient matter and the provider sells to the customer more or less than needed or necessary. In such a case, the validity of the technology agreement is often challenged, and the customer tries to argue that its consent was vitiated or that its consent was based upon an error (in understanding) in order to have the agreement nullified and claim full reimbursement of any amounts already paid under it.

Moreover, malfunctioning of hardware, software and related technology services are other common issues for technology contracts. IT (service) providers have a duty to provide enough information and warn the client without undue delay of possible issues that may arise. In the context of IT implementation projects, most disputes arise in connection with failed or delayed implementation. In the context of IT service agreements (eg, support and maintenance), the most common disputes are those regarding failure to meet agreed service levels.

When a dispute has arisen, before starting negotiations with the other party and more particularly before transmitting any confidential or sensitive information or making any concessions, it is recommended that the parties enter into a non-disclosure agreement so as to ensure the negotiations remain confidential and their contents cannot be used in court.

Since parties are free to organise their contractual obligations as they wish, they can agree to suspend their respective obligations. If there is a risk of expiry of the applicable statutory or contractual limitation period, it is however recommended to send a formal notice of default in order to suspend the running of the limitation period.

If parties wish to preserve any claims, gathering proof of these claims is recommended by requesting, for instance, a bailiff to report on a breach or by sending a notice of default.

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?

A contract can be terminated or expire for the following reasons:

- performance of services (contracts providing for continuing obligations versus buy-sell contracts);
- the lapse of a fixed period (fixed-term contracts);
- the will of one of the parties (convenience, material breach, bankruptcy, change of control, etc);
- the will of both parties (amicable resolution);
- a future circumstance (express resolutory condition-resolutory clause); or
- through the intervention of the courts (eg, judicial resolution of the contract).

In most technology contracts, the term and termination of the contract are dealt with in detail. Hence, it is important to analyse the contractual termination provisions in detail prior to deciding on the course of action to be taken.

Under Belgian law, contracts concluded for an indefinite duration can always be terminated for convenience by giving the other party a 'reasonable' notice period. Most technology contracts will expressly determine the length of the notice period. In addition, a termination fee may be due to compensate the other party for investments made and revenue or profits lost.

In the framework of technology disputes, the most asked question is certainly whether the contract can be terminated for (material) breach. Under Belgian law, the possibility to terminate an agreement for (material) breach is implicitly included, even if the contract itself is silent on the issue. Most, if not all, technology contracts, however, contain detailed clauses on termination for (material) breach, including defining what constitutes a '(material) breach' and providing for an obligation to provide prior notice of default and allowing the other party to remedy the default. Termination for (material) breach is without prejudice to the terminating party claiming damages for breach of contract.

In deciding whether and how to terminate a technology contract, the party willing to terminate is well-advised to consider:

- the facts of the matter (eg, whether there is sufficient evidence of a material breach);
- the contractual framework (eg, termination options; whether a remedy period must be granted; whether the contract provides for the mandatory out-of-court resolution of disputes prior to termination, etc); and
- the consequences of each type of termination.

For example, in certain cases termination for convenience may be an easy option. However, in such a case, the terminating party will not be able to claim any damages for breach from the terminated party and may even be due to certain termination fees applicable in the case of early termination. Furthermore, the terminating customer must consider that it will generally be impossible to use the technology any further after the termination. Hence, contractual obligations regarding 'termination assistance' or 'exit assistance' will play a key role and detailed planning of the termination and the ensuing exit scenario will be important.

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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?

It is indeed possible to have communications aimed at settling a dispute that cannot subsequently be used as evidence in legal proceedings if the dispute is not resolved.

This would happen in the following cases:

- communications between the external counsel of the parties are, in principle, confidential and cannot be used as evidence in legal proceedings;
- conversations in the presence of the external counsel of the parties are, in principle, also confidential and cannot be used as evidence in legal proceedings (it is, however, recommended for the external counsel present to draw the parties' attention to the confidentiality of the meeting prior to the start of the meeting);
- communications that occur without the presence of the external counsel of the parties but after parties have executed a non-disclosure agreement or confidentiality agreement; and
- communications aimed at settling a dispute by (judicial) mediation are confidential and cannot be used as evidence unless the parties give written permission (article 1728 of the Code of Civil Proceedings).

Settlement formalities

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

For a settlement agreement to be enforceable under Belgian law, the following conditions must be met: (i) the parties have the intention to put an end to an existing dispute or to avoid a future dispute; (ii) the parties reach an agreement through reciprocal concessions; and (iii) the agreement is in writing. Furthermore, any waiver of claim should be expressly provided. A 'deemed' waiver of claim is not valid. Hence, it is recommended to provide for a detailed description of the dispute and expressly state the scope and extent of any waiver of claim.

If a settlement is reached following negotiation between the parties without involvement of the court, the settlement agreement itself does not provide an enforceable title. In other words, should either party not comply with the settlement agreement (eg, failure to pay any sums due under it), the other party will need to institute legal proceedings in order to enforce the settlement agreement (eg, have the other party condemned to pay any sums due). However, if a settlement is reached following court mediation, the settlement agreement is enforceable if approved by the court.

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?)

Liability may be incurred for a breach of contractual provisions. If a contracting party can demonstrate that the other party failed to comply with its contractual obligations by not performing the contract in good faith, delivering, manufacturing and so on, a defective product or lately the product, they would be entitled to contractual damages.

The legal warranty of article 1641ff of the Belgian Civil Code must be taken into consideration when the relevant agreement is a sale-purchase agreement. Under these provisions, sellers are liable for hidden defects in their products. A hidden defect, within the meaning of these provisions, is any defect that exists prior to delivery, which is not obvious, and which makes the product unsuitable for its intended use, or which significantly diminishes its use. This liability for hidden defects also applies to business-to-consumer sales but is regulated explicitly in article 1649-bis-quater of the Belgian Civil Code.

In business-to-business (business-to-business) contracts, the specialised seller is presumed by law to be aware of the existence of any hidden defects of the goods it sells and is accordingly liable for all damages caused by the defective goods unless it proves the 'undetectable nature' of the defect. The buyer must however be able to prove that the defect existed at the moment of the delivery.

In business-to-consumer relationships, a reversal of the burden of proof regarding the latent or hidden nature of the defect occurs after six months: if the defect appears in the first six months after purchase, the consumer does not have to prove anything, as there is a legal presumption that the defect already existed at the time of the delivery. If the defect appears more than six months after the delivery, the normal burden of proof on the complainant is applicable and the seller can then ask the consumer to submit evidence.

The consumer is moreover always entitled to obtain compensation for the damage sustained by lenient defects.

Depending on the nature of the contractual obligation for the debtor (obligation of result versus obligations of means), the burden of proof of the alleged contractual fault will be on the defendant (in case of obligation of results) or the claimant (in case of obligation of means).

A claimant could also claim damages in case of tortious liability or non-contractual liability (including pre-contractual breach) if it is able to prove that the defendant behaved in a faulty or negligent manner, the claimant suffered a loss and there is a causal relationship between these two aforementioned elements (article 1382 of the Belgian Civil Code). The fault and the damage must be different than those suffered in case of a contractual breach.

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?

There is no specific legislation providing additional protection for business purchasers of hardware, software or associated licences, with exception of provisions related to the ownership and the transfer or assignment of copyright linked to software.

According to the Belgian Code of Economic Law, in the case of an employment agreement, there is an assumption that the employee has transferred his or her copyright on the software to his or her employer. However, in the case of a service or consultancy agreement, the provider remains the owner of the copyright unless the parties have provided otherwise in writing.

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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?

The following defences are available:

- in case of obligation of means: the claimant does not demonstrate that the defendant did not act diligently and committed a breach or negligence;
- in case of obligation of result: the fault or negligence is due to a force majeure event or due to a fault or negligence of the claimant or a third party;
- the claimant used the software for another purpose than those provided by the contract or did not use it with the appropriate systems or modified it with incompatible systems;
- the claim is introduced too late and is time-barred; and
- invoking an exoneration or limitation clause of liability provided in the agreement.

Limitation period

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

As a rule, a contractual claim may be brought before the courts by any of the parties within 10 years after the contractual breach or knowledge of the breach by the party in default. However, business-to-business buyers invoking the legal warranty for hidden defects must make a formal claim within a 'short period' of discovering the defect. Failure to do so renders the claim inadmissible (article 1648 of the Belgian Civil Code). This short period is not expressly defined in the Civil Code and is determined based on the actual circumstances of the matter, particularly the length of time required by the seller to inspect the products and discover any defects.

Consumers must bring their actions based on the statutory warranty against hidden defects within one year of the discovery of the defect. This period of one year cannot end before the expiry of the legal warranty period of two years (article 1649-quater, section 3 of the Belgian Civil Code).

Claims under tort law become statute-barred within five years from the day following the day on which the claimant becomes aware of the damage and of the identity of the person liable for the damage; and in any case, 20 years and one day after the date of the event that triggered the damage.

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?)

Prior to bringing legal action for breach of contract, it is required to send a formal notice of default. Such notice of default should set out the breach of contract and draw the other party's attention to its possible consequences (eg, termination, damages, etc). Most technology agreements also provide for an obligation to grant the other party a remedy period (unless such remedy period has become useless).

Pre-action mediation is not mandatory. Claimants are however advised to consider negotiations and mediate if possible. This is also in line with the current intentions of the Belgian legislature and courts to keep the courts from overflowing with unnecessary actions. These alternative dispute resolution mechanisms are generally cheaper and faster than legal proceedings. Additionally, parties can include a mediation clause in their contracts to use mediation before any other form of dispute resolution such as arbitration or court proceedings. The court or arbitral tribunal hearing a dispute which is the subject of a mediation clause shall, at the request of either party, stay the proceedings, unless the clause is invalid or has expired.

Before bringing legal actions, it is of course recommended to gather proof of its claims and prepare an inventory of exhibits that can be produced in court. Indeed, once proceedings have been launched, the claimant will have to transmit its inventory of exhibits to the opposing party. In certain cases, it may be useful to request a bailiff to report on a breach or to gather proof of infringements via specific seizure 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?

Depending on the qualification of the parties, disputes are settled by the Courts of First Instance or the Enterprise Courts. The Enterprise Courts are competent for disputes between undertakings or against undertakings, even when the action is brought against an undertaking by a person who is not acting in that capacity himself or herself.

There are no specialist courts for technology disputes. The Enterprise Courts are composed of a presiding professional judge and two non-professional judges. When allocating the matters over the various court chambers, courts however tend to allocate matters according to their nature (eg, intellectual property, distribution, etc). As a result, especially at the larger courts (eg, Brussels, Antwerp, etc), there is some degree of specialisation. Nevertheless, courts cannot be deemed to have a deep understanding of technology and IT and will be hesitant to decide upon any technical matters. As a result, courts dealing with technology disputes frequently order expert proceedings. In such proceedings, external court-appointed experts are called upon to advise on technical or financial matters (eg, which of the parties was responsible for or contributed to a delay in a technology project, or to assess the damages suffered by a party).

As a result of the lack of specialist courts, technology disputes are frequently resolved through alternative dispute resolution. The main reason is that mediators, arbitrators and the parties themselves, are considered and selected according to their own specialisation. Therefore, they can resolve specific matters such as technology disputes based on their qualifications and expertise. Courts are not always familiar with the subject or not as specialised as needed.

Procedural rules

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

The general procedural rules as laid down in the Code of Civil Proceedings are applicable. There are no specific procedural rules for technology disputes. The claimant must have the capacity to institute the legal action and a vested interest in the legal action. The interest needs to be acquired and immediate. If these requirements are not met, the claim will be declared inadmissible.

In general, a calendar for the exchange of written pleadings is issued by the court at the introductory hearing or thereafter upon request of either party. Generally, there are one or two rounds of written pleadings. When all written pleadings have been exchanged, a hearing is held where the parties can defend their respective positions.

It is up to the claimant to demonstrate that his or her claim is founded. Both parties have an obligation to cooperate in finding the

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truth. If certain conditions are met, the claimant may ask the court to oblige the defendant to bring forward certain documents. The defendant is entitled to file counterclaims and counterarguments.

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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 parties must adduce those documents that they consider necessary to substantiate their claims themselves and are not under an obligation to produce any documents that would contradict their claims.

Evidence between or against enterprises can be provided by all lawful means. There are different kinds of evidence used in civil proceedings: written proof, testimony (although this is only rarely used), presumptions, confessions and declarations under oath.

There exist no discovery proceedings in Belgium other than the mechanism of 'description seizure' and the fact that a party may request the court to order the other party to submit to the court a specific document that is proven to be in the possession of such party and relevant to rule on the dispute at stake.

The description seizure is a unilateral procedure specific to intellectual property. The purpose of this procedure is to obtain evidence of the existence and extent of intellectual property rights infringement. The procedure is initiated before the President of the Enterprise Court by unilateral application (ie, without hearing the other party, to maintain the effect of surprise). The President of the Enterprise Court will then appoint an expert who will be entitled to enter the premises of the supposed infringer and seize any items that may prove the infringement.

Two conditions must be met in order to obtain an order for a description seizure:

- the claimant must have an apparently valid IP right; and
- there must be a serious and concrete suspicion of infringement or a threat of infringement of the IP rights at stake. Therefore, the request must be very specific; 'fishing expeditions' are not allowed.

The claimant may be asked to post a deposit in order to guarantee compensation for any damage suffered by the defendant, more in particular when seizure of the alleged infringing items is sought.

Following the ordering of a description seizure and once the expert report has been delivered, the plaintiff must institute proceedings on the merits within the time frame prescribed in the order or within a maximum period of 31 days.

Privilege

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

Only correspondence between external counsel and their clients or correspondence between external counsel is protected by privilege. There are no special issues surrounding privilege arise in relation to technology disputes.

Protection of confidential information

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

Documents and communication drafted during mediation proceedings are confidential. They cannot be used in any other proceedings, nor as evidence or extrajudicial confession. Only if the involved parties agree in writing, confidentiality can be lifted. Not only the mediators themselves but also the expert witnesses are subject to a duty of confidentiality. If these duties are breached, the court or arbitral tribunal can decide in an equitable fashion about the indemnity and the extent of the breach.

Additionally, trade secrets are protected under Belgian law. In order to preserve the confidentiality of trade secrets during and after legal proceedings, Belgian law provides that for proceedings involving a trade secret in a principal claim or a counterclaim, the court can take a series of measures under article 871-bis of the Code of Civil Proceedings:

- the court may prohibit the use or disclosure of information that has been classified as confidential by the court;
- the court can expressly designate the persons or categories of persons who have access to the hearings or documents that the court considers to be confidential;
- the court can subject the parties (court expert, witnesses, court staff, etc) to a duty of confidentiality that continues after the end of the procedure; and
- the judge may decide to publish or communicate what is not secret (delete what is secret).

In order to ensure that this confidentiality obligation is respected and has a dissuasive effect, the court can decide to subject a breach of this obligation to a penalty. In addition, a fine of an amount between €500 and €25,000 can be demanded from the person who fails to comply with the confidentiality obligation.

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?

There are three possible scenarios relating to expert evidence in Belgium, as given below.

Individually appointed experts

A party may have recourse to an expert on its own motion without involving the other parties in the commissioning of this expert report. Belgian courts are rather reluctant to rely on the findings of experts who conduct their inquiries at the request of one of the parties, as they are suspected of bias. Additionally, experts appointed by one party will have received only (partial) information from this party. Strictly speaking, such an expert's report is not enforceable towards other parties, who have the possibility to challenge the expert report, the work done during the compiling of the report and the findings of the expert.

Amicably appointed experts

Parties involved in a dispute may also decide to amicably appoint an expert, selected by all the parties. Parties may also decide to give to this amicably appointed expert's report the value of a court-appointed expert's report. Such a report is very similar to a court-appointed expert's report. The only difference is that it is not necessary, in this case, to initiate court proceedings.

Court-appointed experts

The judge may also appoint one or more judicial experts, this is on its own motion or at the request of one party, or several or all parties. Court-appointed experts' reports are always related to pending proceedings.

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Belgian courts appoint such judicial experts quite frequently in technology cases, which by their nature concern technical or specialist issues. Court expert proceedings are conducted in an adversarial way and include all parties involved in the proceedings. The court expert will allow the parties to comment on a draft report, adduce evidence they consider necessary and ask additional questions, to ensure that each party's viewpoint is taken into account. In theory, the expert's report is not binding on the court but is rather an opinion given to the court. In practice, however, Belgian courts follow the findings of court-appointed experts in most cases. Within the context of technical court expertise, parties are assisted by their lawyers but also by their own technical advisors. Despite certain exceptions, only persons who are registered in the National Registry for Expert Witnesses can be appointed. They need to fulfil three requirements, following a decision by the Minister of Justice or the official authorised by him or her. They should:

- be a citizen of the European Union;
- prove that they have the necessary professional skills and legal knowledge; and
- not have been prosecuted for a criminal or correctional offence.

Time frame

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

Civil litigation proceedings in Belgium are lengthy and take approximately one to two years (depending on the attitude of the adverse party) in the first instance, except in summary proceedings or injunction proceedings. An appeal is possible. As many technology disputes end up in judicial expert proceedings, the typical time frame for handling technology disputes before the ordinary courts can be even longer.

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?

State aid is made available in Belgium to persons with insufficient income and consists of direct payment to the bailiff, to the appointed counsel or the exoneration of procedural taxes.

Private third-party litigation funding is not regulated by any laws and is currently not commonly used in Belgium.

The Belgian Bar Association is very sceptical of independence, especially by private third-party funding, which is not regulated by any laws and is currently not commonly used. Counsel are not allowed to accept work on a 'no win-no fee' basis, nor to accept any other form of a contingency fee. Otherwise, the independence of lawyers could be at risk, the implication being that they would prioritise their personal financial gain above all else.

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?

Any final decision by a Belgian court includes an order for the losing party to pay the cost of the proceedings.

The costs of the proceedings include costs such as investigation measures (judicial expert costs) and the 'procedural indemnity', which is a fixed intervention in the fees and lawyer's costs of the successful party.

The procedural indemnities are determined by Royal Decree, mainly according to the value of the claim. Upon the request of one party, and by a justified decision, the court may reduce or increase the procedural indemnity within the minimum and maximum amounts fixed by the Royal Decree (currently between €97.50 and €39,000 depending on the value of the claim at stake, the complexity of the case, the number of exhibits, etc).

The procedural indemnity can be compensated by a decision of the court if each party loses on one or another claim.

Insurance might be available to cover a party's legal costs but the latter will most likely be limited to a capped fee or predetermined hourly rates.

REMEDIES AND ENFORCEMENT

Interim remedies

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

The president of the court can order interim remedies in case of urgency, such as ordering the further performance of an agreement, ordering certain interim measures (eg, appointment of an expert) or cease an infringement, to the extent such decision does not impact the decision on the merits and can be repaired by damages in the proceedings on the merits. Injunctive relief is therefore available in Belgium and does not require any specific mention in the technology contract between the parties. The most commonly sought interim remedies in technology disputes are the appointment of an expert to assess damages or establish certain facts (eg, a failed implementation) and remedies that seek to oblige the other party to perform its obligations under the agreement, for example, to provide termination or exit assistance).

Substantive remedies

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

The most commonly sought substantive remedies in technology disputes are:

- termination of the agreement for material breach, coupled with a claim for damages;
- return or destruction of materials (eg, software);
- injunctions against the defendant aimed at stopping an infringement or contractual breach under threat of a penalty in case of continued infringement or breach; and
- payment of damages (only compensatory, no punitive damages).

Damages awarded must correspond to the actual damages suffered. It is up to the claimant to prove the amount of damages suffered. It is noteworthy that, under Belgian law, the concept of 'direct' damages is very broad and contains all damages that would not have arisen if the contract breach would not have occurred. Hence, it is important to provide for limitation of liability clauses that exclude the types of damages that usually fall within the Anglo-Saxon concept of 'indirect and/or consequential damages'.

In order to assess the damages, courts and arbitral tribunals often rely upon third-party experts, which sit together with the parties and advise the court (in the form of a report) on the extent of the damages suffered.

If the exact amount of the damages cannot be determined (eg, for reputational damages), courts and arbitral tribunals determine the amounts awarded ex aequo et bono.

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Limitation of liability

21 | How can liability be limited in your jurisdiction?

Contractual clauses that exclude or limit liability are in principle valid under Belgian law, except in case of gross negligence; wilful acts or death. Exclusion and limitation of liability clauses must also not void the agreement of its meaning or purpose.

Within the above limitations, the parties are however free to agree upon exclusion or limitation of liability clauses. In technology contracts, various mechanisms to limit liability are used, including the exclusion of certain heads of losses (eg, loss of profits, loss of revenue, etc) and limitation of the amount of the liability (eg, per contract year, per event, in aggregate, etc). In addition, in major technology deals, specific caps for specific types of liability may be agreed (eg, data protection, regulatory, etc). Finally, one is to be vigilant about the interplay between liability and indemnities. Depending upon the contract, indemnities (eg, for intellectual property infringement) may fall within the general liability cap, may be unlimited or may be subject to a specific cap.

Liquidated damages

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

Liquidated damages are permitted under Belgian law. The amount must be reasonable and must correspond to the actual or anticipated harm caused by the contract breach. This avoids the difficulty of proving the loss. The damages must be structured to function as damages, not as a penalty. Punitive damages or private penalties are void under Belgian law. A court can always a posteriori reassess the amount and reduce it if it considers it too high. When drafting technology contracts, the parties must be aware of the aforementioned restrictions. For example, it is useful to expressly clarify the nature of the 'penalties' or 'service credits'. Another important point of attention is whether such 'penalties' or 'service credits' are the sole and exclusive remedy.

Enforcement

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

If a party does not comply with a court decision, it may be compelled to do so by the enforcement of the decision. The decision must have been served by a bailiff, and most often, it must also be preceded by a summons to pay. Through this document, the debtor is given a final deadline to comply.

In the absence of compliance, the following enforcement measures can be undertaken based on the enforceable title (court decision):

- seizure and execution of movable property;
- seizure and execution of real estate; and
- attachment on salary or on bank accounts.

Specific performance of obligations other than obligations to pay (eg, the obligation to finalise a project by a certain deadline; an obligation to return certain software) is indirectly achieved through an order or injunction under penalty of forfeiture of a penalty per day of delay or per breach.

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?)

In Belgium, the full array of alternative dispute resolution mechanisms is available, ranging from negotiation and mediation to arbitration and encompassing among others technical expert proceedings, binding third-party decisions and mini-trials.

In the context of technology disputes, the parties often rely upon mediation (prior to bringing a claim before a court or arbitral tribunal) and technical expert proceedings. Technical expert proceedings are a preferred method of resolving disputes on technical or financial issues that occur during the lifetime of the contract and that demand technical or financial skills rather than purely legal (eg, invoicing disputes, software quality issues, etc).

As the parties wish to avoid court or arbitral proceedings, technology contracts often contain sophisticated and tailormade dispute resolution procedures, which typically provide for negotiations at various levels (and ultimately at the chief executive level), followed by mediation or technical expert proceedings and finally court proceedings or arbitration.

Parties are advised to consider the preferred method of alternative dispute resolution during contract negotiations. Mediation and negotiation are the fastest. In case of failure, arbitration is still possible. Both arbitration and mediation have statutory support in the Belgian Code of Civil Proceedings. It should also be noted that, as of recently, Belgian courts may impose mediation prior to hearing a dispute.

Arbitration is usually administered by an institute chosen by the parties (eg, CEPANI, the International Chamber of Commerce, the London Court of International Arbitration, the Netherlands Arbitration Institute, etc), which oversees the proceedings and whose arbitration rules are accepted by the parties. This is called institutional arbitration. It is however also possible to opt for ad hoc arbitration, that is, without the assistance of an arbitration institute. In such a case, the parties have complete freedom to agree on the procedure to be followed by the arbitrator.

Recognition and enforcement

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

The recognition and enforcement of foreign arbitral awards have recently been facilitated by the implementation of the European Regulation. The Court of First Instance has the competence to enforce the decision. This is only possible after the proceedings have come to an end or the arbitral tribunal ordered the decision to be provisionally enforceable notwithstanding any possible appeal.

The recognition and enforcement of foreign arbitral awards can only be refused in exceptional cases, such as when the arbitral award would conflict with the public order in Belgium or when the subject matter cannot be subject to arbitration in Belgium.

An arbitral award that meets certain conditions can also easily be enforced in the 159 countries in which the New York Convention is in force.

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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)?

In April 2019, the Belgian Parliament adopted a new act prohibiting:

- unfair market practices in business-to-business relationships;
- the abuse of economic dependence; and
- the use of unfair business-to-business contract terms.

The Act of 4 April 2019 was published in the Belgian State Gazette on 24 May 2019 and has important consequences for undertakings.

The rules on unfair business-to-business market practices entered into force on 1 September 2019 and the other rules on 1st December 2020.

Similar restrictions on contract freedom to the ones already existing for business-to-consumer contracts will soon impose a general prohibition of clauses that, alone or together with other clauses, create a manifest imbalance between the rights and obligations of the parties.

This general prohibition is completed with a list of contract clauses that are always deemed unlawful and thus prohibited. The legislator has blacklisted clauses that serve to:

- create an irrevocable commitment by the other party while the performance of the obligations of the company is subject to a condition, the realisation of which depends exclusively on the will of the company;
- give the company the unilateral right to interpret any clause in the contract;
- have the other party renounce all means of recourse against the company in the event of a dispute; or
- irrefutably establish the knowledge or acceptance of clauses by the other party, while the latter was not actually able to become acquainted with said clauses prior to the formation of the contract.

The grey list also establishes a list of terms that are presumed to be unlawful, unless the lawful character of the clause is proven to:

- grant a company the right to modify the price, characteristics or conditions of the contract unilaterally and without valid reason;
- tacitly extend or renew a fixed-term contract, without providing a reasonable notice period;
- impose the economic risk on a party, without any counter-performance, while that risk would normally be borne by the other company or by another party to the contract;
- inappropriately exclude or limit the legal rights of one company in the event of total or joint non-performance or defective performance by the other company of any of its contractual obligations;
- bind the parties without the right to terminate the contract by means of a reasonable notice period (without prejudice to the possibility of dissolving the agreement, see article 1184 of the Belgian Civil Code);
- exempt a company from its liability for its willful misconduct, gross negligence by itself or its employees or, except in cases of force majeure, for the non-performance of the essential obligations that are the object of the agreement;
- limit the means of evidence that the other party can rely upon; or
- determine the compensation in the event of non-performance or delay in the performance of the other party's obligations, establishing an indemnity that is manifestly disproportionate to the prejudice that may be suffered by the company.

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?

No specific emergency legislation has been adopted in the area of technology contracts or technology disputes.

Specific legislation had, however, been adopted in relation to the institution and further handling of actions before the Belgian courts in general during the recent lockdown but is no longer applicable. This legislation provided, among others, for an extension of all deadlines that expired during the lockdown (eg, deadlines for the filing of trial briefs) and for the principle that cases that were scheduled for oral arguments during the lockdown would automatically be taken into consideration by the court, without oral arguments having taken place.

Furthermore, the legislator has adopted many support measures for companies in difficulty due to the pandemic.

Given that the pandemic can no longer be regarded as an event of force majeure to justify a possible non-performance (such as the failure to meet a binding delivery deadline), clients are well-advised to include specific provisions in their (new) contracts to protect themselves against the (further) consequences of the pandemic in the form of tailored force majeure clauses and tailored provisions regarding the delivery terms and liability.

LAW STATED DATE

Correct on

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

22 June 2021

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