

TOP 5 NEGOTIATED TERMS AND DISPUTED ISSUES IN TECHNOLOGY AND OUTSOURCING CONTRACTS (AND WHAT TO DO ABOUT THEM)

Working on many hundreds of technology and outsourcing contracts and contractual disputes each year provides a unique vantage point of the key contract terms and issues that become hot spots for negotiation and disputes. It offers critical insight into aspects of technology and outsourcing contracts that you may want to consider to protect your interests – both to maximise prospects of success and to minimise risks.

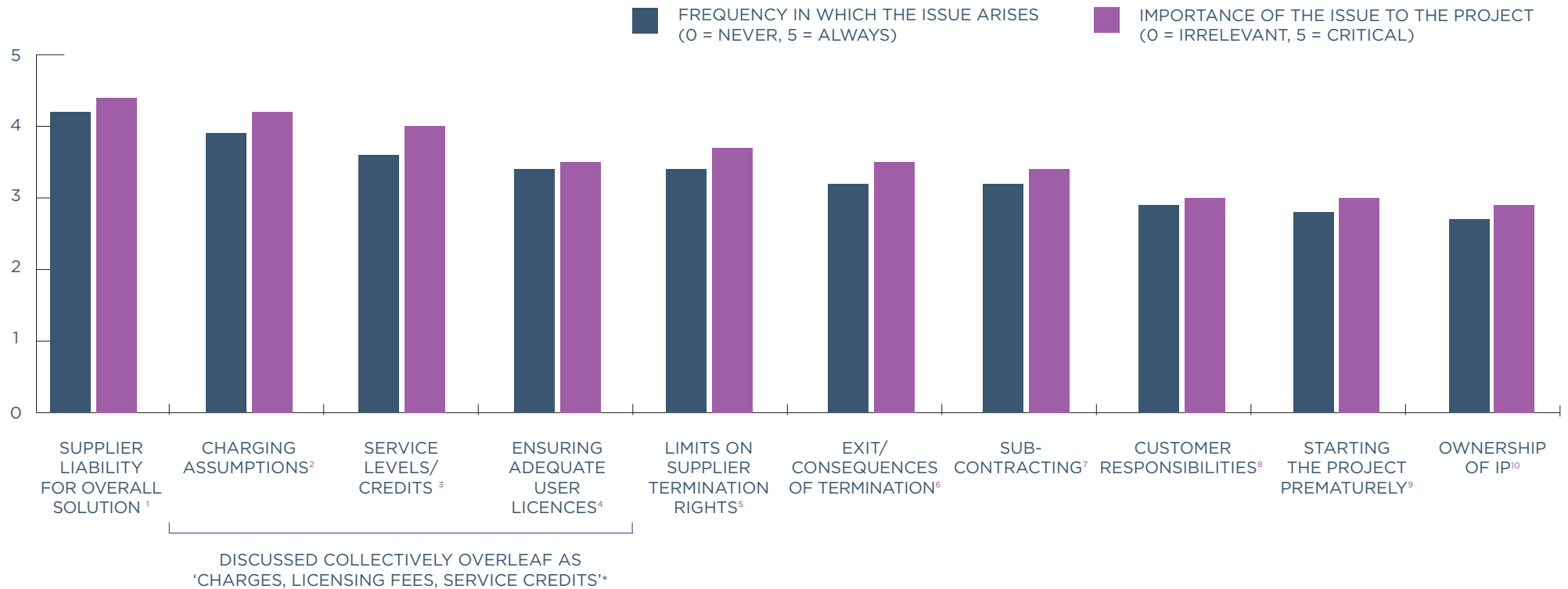
This short report presents those key trends in contract negotiations and disputes, based on the experiences of our expert Commercial and Commercial Disputes teams serving clients over the last 12 months.

The best course of action for you, your transactions and your cases always depends on your unique circumstances, so none of this constitutes advice. Nevertheless, we hope it makes for interesting reading for the purposes of risk assessment, risk management and best practice. We also hope it helps you to compare and benchmark your experiences with those of your peers – fellow large companies and major public sector bodies.

May 2020



CONTRACT NEGOTIATION: MOST FREQUENT/IMPORTANT NEGOTIATED TERMS



¹Supplier liability for overall solution – reluctance to guarantee performance and/or interoperation of component parts. Determining suitable liability caps and agreeing types of losses that are recoverable.

²Charging assumptions, structure, milestone payments.*

³Service levels/credits – agreeing appropriate service level agreements.*

⁴Ensuring adequate user licence allocation (number and scope).*

⁵Limits on supplier termination rights for business critical software.

⁶Contracting for exit – termination assistance/handover provisions (including payments).

⁷Sub-contracting to third parties (e.g. cloud services) and flow-down of Ts&Cs.

⁸Customer responsibilities and dependencies – supplier relief clause and ongoing obligations to continue to perform the services even if a customer dependency has not been met.

⁹Starting the project before any agreement has been signed/ uncertainty during contract negotiations as to which terms (if any) of a letter of intent are legally binding.

¹⁰Ownership of IP (including changes to the original specifications).

*Bars 2 (Charging Assumptions), 3 (Service Levels/Credits) and 4 (Ensuring Adequate User Licences) all relate to financial/costs issues. We therefore discuss these issues collectively on the next page under the heading "Charges, Licensing Fees, Service Credits."

CONTRACT NEGOTIATION: WHAT DOES IT MEAN AND WHAT LIES AHEAD?

TOP 5 NEGOTIATED CONTRACT TERMS

1

SUPPLIER
LIABILITY

IDENTIFY KEY RISKS/ LIABILITIES, AGREE 'SUPER' CAPS.

If supplier won't take overall responsibility for the solution, mitigate risk e.g. termination for convenience, data back-up.

2

CHARGES, LICENSING FEES,
SERVICE CREDITS

AGREE SUITABLE CHARGING STRUCTURE.

Resist unilateral supplier rights to increase charges. Check licence scope and types. Negotiate appropriate service levels and service credits.

3

LIMITS ON SUPPLIER
TERMINATION RIGHTS

CLEARLY DEFINE TERMINATION EVENTS

('persistent'/'material'/'critical'). Resist hair trigger termination rights for suppliers. Regularly test business continuity plans.

4

EXIT/CONSEQUENCES
OF TERMINATION

DETAIL OBLIGATIONS, RIGHTS AND REMEDIES ON TERMINATION.

In most cases ensure there is a detailed exit plan and a robust internal business continuity plan.

5

SUBCONTRACTING AND
FLOW DOWN OF Ts&Cs

CARRY OUT DUE DILIGENCE ON SUPPLY CHAIN

and understand Supplier's subcontracting arrangements.

RISK REDUCTION

IF ISSUES ARISE

CONSIDER STEPS TO MITIGATE LOSSES

from a legal and technical perspective. Notify insurers at an early stage.

ACTIVELY MANAGE LICENCE PORTFOLIO TO GET VALUE FOR MONEY.

Check pricing model if under-licensing claims arise. Claim service credits due.

COMPLY WITH DISPUTE RESOLUTION CLAUSES, TERMINATION OBLIGATIONS

and notice provisions. Beware supplier misuse of Force Majeure provisions (e.g. COVID-19).

IMPLEMENT EXIT PLANS /BUSINESS CONTINUITY PLANS.

Manage the supplier.

CONDUCT IMPACT /RISK ASSESSMENTS.

Enforce audit rights. Consider remedies e.g. step-in, termination.

**INCREASED FOCUS ON
FORCE MAJEURE AND
COVID-19 RELATED ISSUES**
and their impact on remote working, service levels and business continuity.

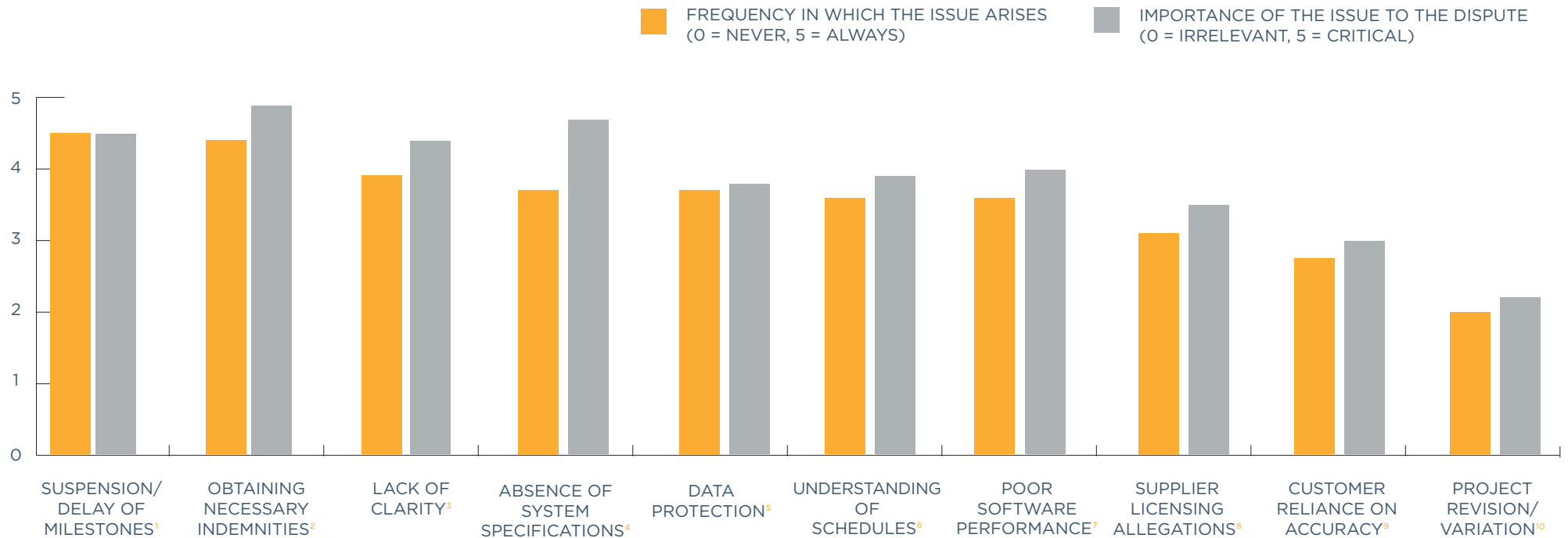
**AUTOMATIC, UNILATERAL
VARIATION OF TERMS BY
SUPPLIERS.**

**WHAT LIES
AHEAD
2020/2021**

**ONGOING IMPACT OF
BREXIT ON CONTRACTUAL
OBLIGATIONS.**

**FINANCIAL SERVICES
SECTOR**
EBA Guidelines on outsourcing compliance; remediation; operational resilience.

CONTRACTUAL DISPUTES: MOST FREQUENT/IMPORTANT LITIGATED ISSUES



¹Suspension/delay of Milestones due to Force Majeure Events (e.g. COVID-19).

²Obtaining necessary indemnities for business critical concerns and identifying what sits outside the liability cap for business-critical concerns.

³Lack of understanding as to which documents form part of the contract.

⁴Absence of clear/detailed system specifications, including milestones, contractual outcomes and acceptance criteria.

⁵Incorporating data protection/GDPR provisions (e.g. allocation of risk for security breaches) and negotiating indemnities.

⁶Understanding of schedules, commercial terms and technical solutions (and ability to point to the commercial and technical schedules to prove breach).

⁷Poor performance of software/platform.

⁸Allegations by software supplier that a third party system is using or accessing the supplier's software, so that additional licence fees are payable.

⁹Customer reliance on accuracy of information provided and/or decisions made using output from supplier's solution. Supplier liability for inaccuracies/errors.

¹⁰Issues involving revisions to/variation of a project, including AI, automation, cloud and data migration.

CONTRACTUAL DISPUTES: WHAT DOES IT MEAN AND WHAT LIES AHEAD?

TOP 5 LITIGATED ISSUES

1

DELAY/FAILURE TO MEET MILESTONES AND/OR "GO-LIVE" DATE

2

WHAT FALLS WITHIN/ OUTSIDE THE LIABILITY CAP AND SEEKING TO RELY ON INDEMNITIES IN THE CONTRACT

3

LACK OF UNDERSTANDING AS TO WHICH DOCUMENTS FORM PART OF THE CONTRACT

4

ABSENCE OF CLEAR SYSTEM SPECIFICATIONS, INCLUDING MILESTONES AND ACCEPTANCE CRITERIA

5

LIABILITY AND ALLOCATION OF RISK FOR DATA/SECURITY BREACHES UNDER GDPR

RISK REDUCTION

REGULARLY REVIEW MILESTONE DATES and progress through technical teams on the ground. Ensure documents/ correspondence accurately reflect progress, issues and business impact.

CONSIDER POSSIBLE SCENARIOS which could result in losses being incurred. Ensure liability cap and indemnities reflect the commercial risks/ scenarios.

ENSURE MUTUAL UNDERSTANDING OF THE CONTRACT, especially for each party's project team. Set out clearly each party's rights, obligations and timelines for delivery.

SEEK LEGAL AND TECHNICAL TEAM INPUT on contractual documents, at the outset & subsequently. Ensure implementation team follows the contractual acceptance procedure.

ASSESS RISKS OF GDPR NON-COMPLIANCE and negotiate adequate protections (e.g. indemnities) where data is being processed.

IF ISSUES ARISE

ASSESS AND DOCUMENT REASONS for delay and business disruption. Consider serving notice to remedy.

ENGAGE WITH LEGAL AND TECHNICAL TEAMS at an early stage, to understand where issues have arisen, what losses have been incurred and how this is treated in the contract.

CHECK RIGHTS AND OBLIGATIONS under the original contract, variations, change requests, etc. Identify specific breaches and collate documents which evidence them.

REVIEW DOCUMENTS AND CORRESPONDENCE setting out agreed deliverables and obligations. Ensure consistency with the original contract.

TAKE LEGAL ADVICE and consider how to mitigate losses. Take required steps under GDPR (e.g. reporting a data breach).

INCREASED REMOTE WORKING, capacity issues and variations for COVID-19 related issues.

UNDER LICENSING AND 'INDIRECT ACCESS' CLAIMS from software vendors and suppliers.

WHAT LIES AHEAD 2020/2021

DIFFERENT MODELS AND METRICS adopted by software vendors for licence counting/software usage.

DATA LEAKS, CYBER ATTACKS and issues arising from cloud based solutions/ data migration.

FOR MORE INFORMATION OR LEGAL ADVICE, PLEASE GET IN TOUCH

COMMERCIAL

Our large team of Commercial law experts helps to safely and effectively deliver significant IT projects, predominantly for 'buyers' of technology. We have a long track record of delivering transformational and business critical deals for large companies, including FTSE 100 clients and public sector equivalents. We regularly act opposite all major IT suppliers.

COMMERCIAL DISPUTES

Our Commercial Disputes team works alongside our Commercial team daily to assist clients in resolving a broad range of disputes. These disputes often involve IT outsourcing, changes in specification/scope, project delivery delays, under licensing (direct/indirect use/access) and performance issues/failures. We bring our clients the right choice of escalated dispute resolution processes, negotiation, mediation, expert determination, arbitration and/or court proceedings to achieve successful commercial, legal and financial outcomes.

