

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 us with 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 Technology and Outsourcing team serving clients over the last 12 months.

The best course of action for you, your projects and your relationships 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.

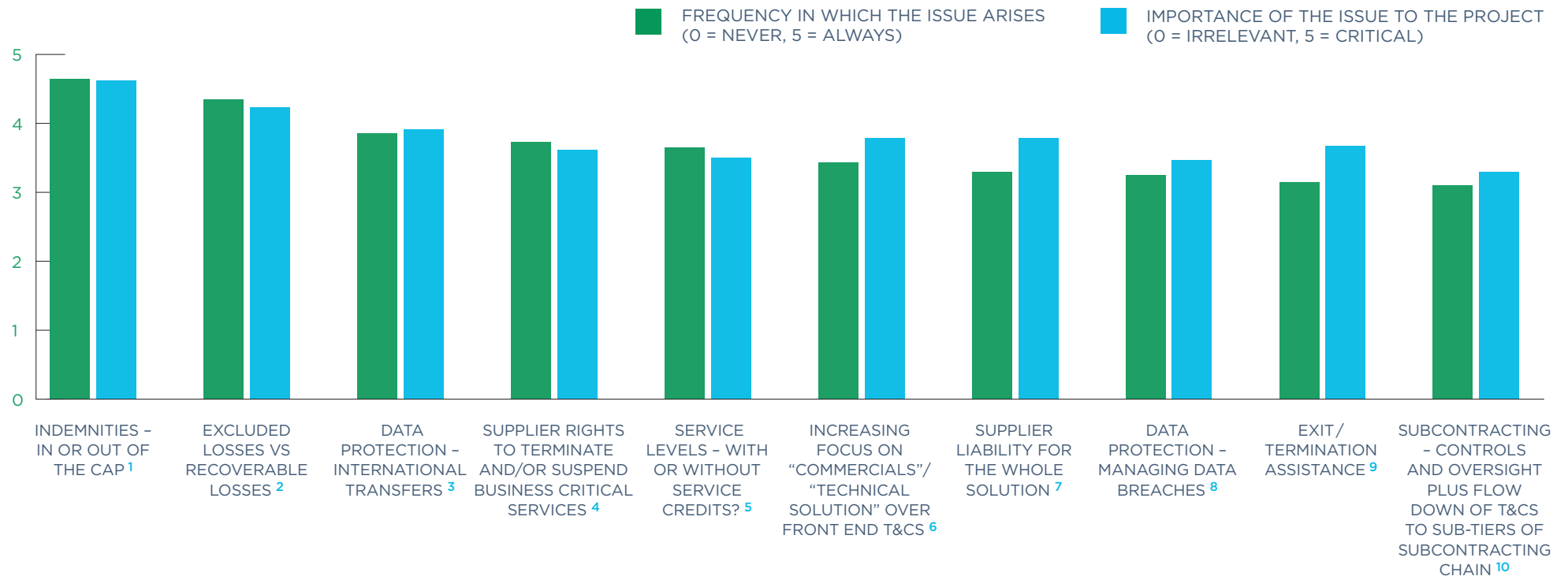
January 2022



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CONTRACT NEGOTIATION: MOST FREQUENT/IMPORTANT NEGOTIATED TERMS



¹ Liability caps/indemnities – agreeing which recoverable losses sit outside of the liability caps and negotiating indemnities for business critical risks

² Recoverable losses – addressing the heads of loss (direct, indirect, consequential loss) that are recoverable. Increasing focus on the meaning of “consequential” loss

³ GDPR – dealing with international transfers, in particular sharing of personal data outside of the UK and the EEA

⁴ Termination rights – limiting vendor termination (and suspension) rights when the software/solution is business critical; customer rights to terminate for convenience (without early termination fees)

⁵ Service levels/credits – agreeing appropriate service level agreements, especially in the financial services sector and for operational resilience purposes

⁶ “Commercial” terms – increasing legal input and focus on schedules, commercial terms and technical solution, rather than just the front-end legal terms during contract negotiations (including ensuring client can point to the commercial and technical schedules if needed to measure performance and prove any breach; and avoiding ‘hidden’ additional charges)

⁷ Supplier liability for overall solution – addressing vendor reluctance to guarantee performance of overall solution and/or interoperation of component parts (‘input’ vs. ‘output’ based model)

⁸ GDPR – including suitable provisions to allow for the practicalities of managing personal data breaches (especially where the vendor may not have access to the data stored e.g. a SaaS provider)

⁹ Contracting for exit – incorporating termination assistance/handover provisions/exit plan/charges

¹⁰ Sub-contracting to third parties – addressing insufficient visibility or lack of clarity over how the vendor’s obligations flow down to subcontractors and the supply chain below those subcontractors (e.g. fourth party risk management) and determining supplier liability for subcontractor breach

CONTRACT NEGOTIATION: WHAT SHOULD YOU DO AND WHAT LIES AHEAD?

TOP 5 NEGOTIATED CONTRACT TERMS

1

INDEMNITIES - IN OR OUT
OF THE CAP

2

EXCLUDED VS
RECOVERABLE LOSSES

3

DATA PROTECTION -
INTERNATIONAL TRANSFERS

4

TERMINATION/ SUSPENSION OF
BUSINESS CRITICAL SERVICES

5

SERVICE LEVELS - WITH OR
WITHOUT SERVICE CREDITS

HOW TO REDUCE RISK

IDENTIFY KEY RISKS / LIABILITIES.

Seek to negotiate "super" caps for certain indemnities, e.g. those relating to data protection and 3rd party IP infringement.

IDENTIFY PROBABLE LOSSES IN CERTAIN SUPPLIER DEFAULT SCENARIOS.

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

MAP THE DATA FLOW
to understand where personal data is stored and/or transferred; who is processing the data; and the location from which processing is performed.

**CLEARLY DEFINE THE
TERMINATION EVENTS**
(‘persistent’/‘material’/‘critical’). Resist hair trigger termination or suspension rights for vendors. Regularly test business continuity plans.

**IDENTIFY IMPACT
TOLERANCES**
and negotiate appropriate service levels and service credits. Beware of sole remedy wording.

WHAT TO DO IF ISSUES ARISE

CONSIDER STEPS TO MITIGATE LOSSES

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

**CONSIDER STEPS
TO MITIGATE LOSSES**
from a legal and operational perspective.

**ENSURE ALL
CONTRACTS REMEDIATED**
to reflect latest standard contractual clauses required in the UK and, if applicable, required by the EU. Implement internal data protection breach policies and procedures.

**COMPLY WITH DISPUTE
RESOLUTION**
clauses, termination obligations and notice provisions. Beware of vendor misuse of Force Majeure provisions (e.g. COVID).

MANAGE THE CONTRACT
and use the relevant contractual levers, including claiming service credits due.

SOFTWARE ASSET MANAGEMENT

under-licensing and indirect access claims are still an important revenue driver for software vendors

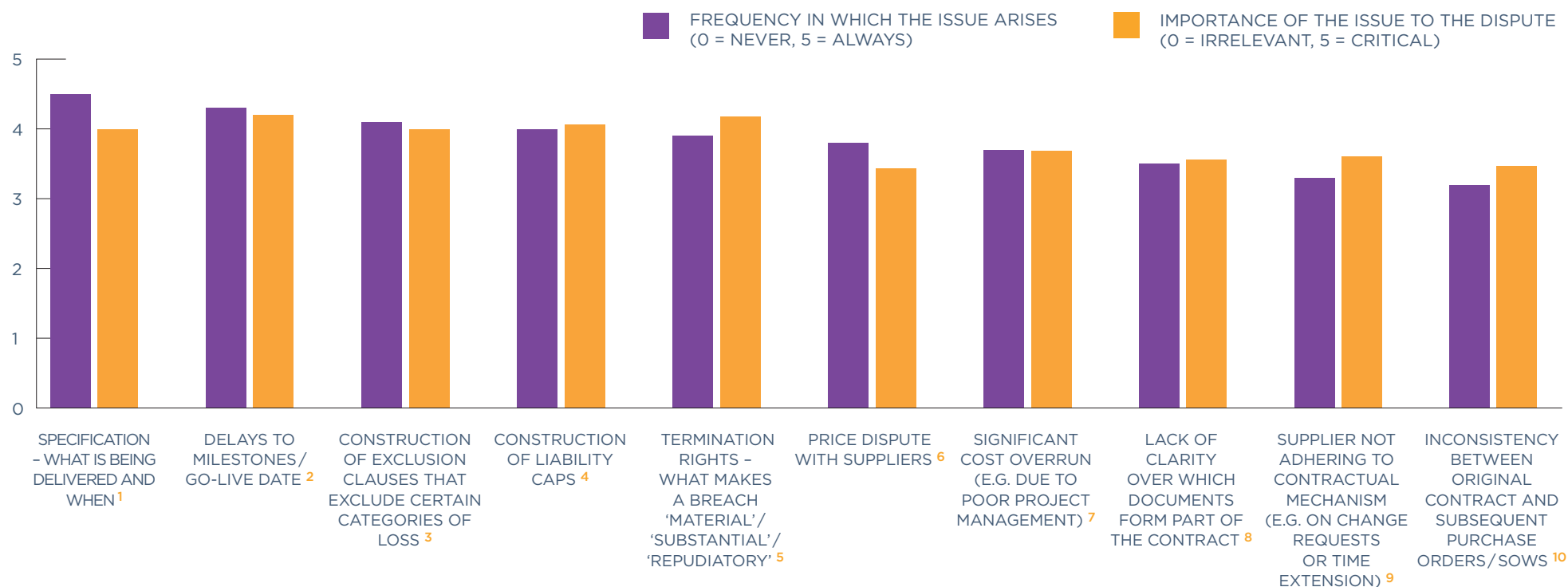
ESCROW: CLOUD
application to SaaS rather than the traditional on-premise software escrow model

WHAT LIES AHEAD 2022

**ARTIFICIAL
INTELLIGENCE (AI)**
increasing role of AI and legislation on the horizon

CONCENTRATION RISK -
over-reliance on a small number of hosting providers (e.g. AWS and Microsoft Azure) potentially resulting in sector-wide issues and regulatory intervention

CONTRACTUAL DISPUTES: MOST FREQUENT/IMPORTANT DISPUTED ISSUES



¹ Specification - lack of clarity on what is being delivered and when, including customer requirements, specific milestones, contractual outcomes and/or acceptance criteria

² Delays - e.g. to milestones and / or the contractual 'go live' date

³ Construction of exclusion clauses that exclude certain categories of losses - e.g. loss of profit

⁴ Construction of clauses which seek to limit a party's liability in the event of breach

⁵ Termination rights - lack of clarity as to what amounts to a 'material', 'substantial' or 'repudiatory' breach and/or delays in exercising any termination rights

⁶ Price dispute with suppliers

⁷ Significant cost overrun - e.g. as a result of inadequate project management

⁸ Lack of clarity over which documents form part of the contract - including responses to tender contents etc.

⁹ Supplier rights / obligations - lack of adherence to contractual mechanisms - e.g. the extent to which the supplier is obliged to advise the customer of events that entitle it to make a change request for an extension of time or additional payment, for instance because the scope/cost of a project has increased

¹⁰ Inconsistencies between the original agreement and the provisions contained in subsequent Purchase Orders and/or Statements of Work - orders of precedence, etc.

CONTRACTUAL DISPUTES: WHAT SHOULD YOU DO AND WHAT LIES AHEAD?

TOP 5 LITIGATED ISSUES

1

SPECIFICATION – LACK OF CLARITY ON WHAT IS BEING DELIVERED AND WHEN

2

DELAYS – E.G. TO MILESTONES / CONTRACTUAL 'GO LIVE' DATE

3

CONSTRUCTION OF EXCLUSION CLAUSES THAT EXCLUDE CERTAIN CATEGORIES OF LOSS

4

CONSTRUCTION OF LIABILITY CAPS

5

TERMINATION RIGHTS – WHAT AMOUNTS TO A 'MATERIAL', SUBSTANTIAL' OR 'REPUDIATORY' BREACH

HOW TO REDUCE RISK

ENSURE MUTUAL UNDERSTANDING OF THE CONTRACT

especially for each party's project team. Set out clearly each party's rights, obligations and delivery timelines.

REGULARLY REVIEW MILESTONE DATES

and progress through technical teams on the ground. Ensure documents/correspondence accurately reflect progress, issues and impact of delays.

REVIEW THE CONTRACT POSITION
and compare the losses the contract seeks to exclude against the losses the business is likely to incur (or has incurred) as a result of potential breaches.

CONSIDER POSSIBLE SCENARIOS
which could result in losses being incurred. Check that the liability caps reflect the commercial risks/scenarios.

ENSURE THAT BREACHES ARE DOCUMENTED,
assess their impact on the business and notify the counterparty (if appropriate). Record the measures discussed/taken to remedy breaches and reserve the business' rights.

WHAT TO DO IF ISSUES ARISE

CHECK RIGHTS AND OBLIGATIONS

under the original contract, variations, change requests etc. Identify specific breaches and analyse them against what has been delivered. Collate supporting documents.

ASSESS AND DOCUMENT REASONS

for delay and business disruption. Consider contractual rights e.g. service credits, withholding payments and / or serving notice to remedy.

ENGAGE WITH LEGAL ADVISERS
categorise losses incurred by the business and clarify the extent to which these categories of loss are likely to be covered by the exclusion clause.

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.

DO NOT DELAY,
as the business could risk losing its right to terminate. Consider termination grounds, the relevant clauses and steps to take (e.g. notice periods). Refrain from serving notice to terminate until legal advice has been taken.

CYBER ATTACKS

and issues around supplier liability/customer fault, business disruption and recovery of data / financial losses

SMART CONTRACTS

and greater automation, supported by emerging technologies

WHAT LIES AHEAD 2022

UNDER LICENSING AND "INDIRECT ACCESS" CLAIMS

from software vendors and suppliers – especially from hybrid working and additions to existing systems

INCREASING COMPLEXITY / COMBINATION

of technology, and changes in businesses' expectations/requirements

FOR MORE INFORMATION OR LEGAL ADVICE, PLEASE GET IN TOUCH

AG TECH GROUP

Our large team of experts helps to safely and effectively deliver significant IT projects from a legal perspective, 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.

In addition, we 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 work with our clients, utilising 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.

We regularly act opposite all major IT suppliers/vendors.



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