PANORAMIC

TECHNOLOGY DISPUTES 2025

Contributing Editors

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White & Case

LEXOLOGY

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Panoramic guide (formerly Getting the Deal Through) enabling side-by-side comparison of local insights into common types of dispute and preliminary steps; claims (causes of action, statutory claims, defences and limitation period); litigation proceedings; litigation funding and costs; remedies and enforcement; alternative dispute resolution; recognition and enforcement of foreign arbitral awards; and recent trends.

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Overview

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Overview

Advances in technology continue to provide fertile ground for disputes, with common examples including alleged failures to complete technology projects on time; the use and ownership of intellectual property rights; the scope of licences; and data security concerns.

The law also continues to show its capacity to adapt to a rapidly evolving technological landscape. A key trend has been the rise of digital assets: in Singapore and the United Kingdom, courts have found that assets such as NFTs and cryptocurrency can be treated as property and made subject to injunctions. In Germany, recent changes to consumer law have been made to accommodate digital goods, such that the law now recognises the provision of personal data as consideration.

Nonetheless, there is variance in the causes of action across jurisdictions. In France in particular, the abusive termination of pre-contractual negotiations, now enshrined in article 1112 of the French Civil Code, gives rise to many IT disputes – a trend that is not so notable in other jurisdictions, as the concept of abusive termination of pre-contractual negotiations is not universally recognised. Similarly, many recent technology disputes in France hinge on a party's duty to 'inform, warn and advise' the other side, including by making relevant inquiries as to the other party's needs, perhaps reflecting a higher emphasis placed on the duty of good faith throughout the lifecycle of a contract. In contrast, good faith does not appear to be a material feature of technology disputes in either the United Kingdom or Singapore.

Forum

The degrees of specialisation in terms of forum vary. In England and Wales, for example, technology disputes are typically conducted in the Technology and Construction Court, a specialist division of the Business and Property Courts, while most other jurisdictions do not have specific courts or judges allocated to technology cases (although specialised technology chambers are beginning to be established in Germany, for example in the regional courts of Hamburg and Stuttgart).

Nonetheless, most jurisdictions recognise the specificity of IP disputes. The Singapore High Court has a specialised list for IP disputes; in France, a specialised court has exclusive jurisdiction over IP cases; and claims for infringement of IP rights in Germany are also usually assigned to a specific court.

Litigation funding and costs

Third-party litigation funding has gained traction across the legal sector in recent years, and has had an impact across multiple jurisdictions, to different degrees. In Germany and the United Kingdom, for example, third-party litigation funding is rapidly gaining popularity, alongside a rise in operators in the market and a potential for greater profits due to increased opportunities for class action claims, while in France the rise of such funding has been more gradual.

In all jurisdictions, agreements relating to costs are closely monitored. Conditional fee arrangements and damages-based agreements in the United Kingdom are subject to the Courts and Legal Services Act 1990, the Damages-Based Agreements Regulations 2013, and the SRA Standards and Regulations, while in Singapore conditional fee agreements are now subject to the Legal Profession (Conditional Fee Agreement) Regulations in addition to the Legal Profession Act. In Germany, contingency fees are increasingly difficult to agree, and have been restricted by a new section of the German Act on the Remuneration of Lawyers introduced in October 2021.

The law is adapting to the rise in litigation funding and its interaction with costs agreements (see, for example, the recent *PACCAR* case in the UK Supreme Court[2023] UKSC 28). Its development may be of increasing interest to large technology companies, particularly those who may find themselves defending class action claims.

Any views expressed in this publication are strictly those of the authors and should not be attributed in any way to White & Case LLP.

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Summary

UPDATE AND TRENDS

Recent developments and trends

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?

The most common issues that arise in connection with technology contracts are as follows.

- Scope and specifications: misalignment between what was agreed and what is delivered, particularly regarding timing of each iteration in agile software development and each stage in software implementation. Contracts should clearly define the scope of work and specifications, including milestones for each stage.
- Performance and quality: failure to meet performance standards or quality expectations. Contracts shouldclearly define performance metrics and quality standards and include remedies for non-compliance.
- Intellectual property rights: ambiguity or disputes regarding ownership of intellectual property, particularly when created during the contract term. Contracts should clearly specify ownership rights for technology developed during the contract term.

When an issue arises, it is common practice to send a pre-action letter summoning the other party to remedy the situation. If the pre-action letter is sent as a formal compliance request, it can be used to put the debtor in default, or to suspend the statute of limitations for six months or any shorter term that corresponds to the limitation period of the action (section 2541 of the National Civil and Commercial Code (CCC).

The affected party will usually request a preparatory measure, to obtain data, reports or specific information necessary for filing the claim, or the production of evidence before trial, to prevent evidence from being lost. The party can request the disclosure, protection or seizure of documents that are related to the subject matter of the claim (section 326 of the National Civil and Commercial Code of Procedure (CCCP)).

Furthermore, in bilateral contracts, when the parties must fulfil their obligations simultaneously, one of them can suspend the fulfilment of the obligation until the other one fulfils or offers to fulfil its own obligation. The suspension may be raised before the court as an action or as a defence to a claim (section 1031 of the CCC).

Law stated - 2 August 2024

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?

Contracts can be terminated:

- by expiration of the term as agreed in the contract;

- by agreement between the parties (bilateral termination). Unless otherwise stipulated, this termination only produces effects for the future, and does not affect the rights of third parties (section 1076 of the CCC); and
- in whole or in part, by declaration of one of the parties (unilateral termination), as provided for by the contract or the law (section 1077 of the CCC). The most usual case is termination due to breach of contract, where the breach must be essential to the purpose of the contract. Unless otherwise provided by law or contract, unilateral termination is exercised by notice to the other party, and the other party may oppose the termination of the contract if the declaring party, by the time of the declaration, has not performed, or is not able to perform, the obligation required in order to exercise the right to terminate the contract. The party entitled to terminate the contract may choose to require performance and damages (section 1078 of the CCC).

When contemplating the termination of a technology contract, several key factors should be considered, including:

- termination fees or penalties: assess the existence of termination fees or penalties. Some contracts may have financial consequences for early termination;
- intellectual property rights: determine whether there are any licences, restrictions or obligations related to the use of intellectual property or enhancements after termination;
- data ownership and migration: determine how data will be handled upon termination and whether there are any obligations to return or destroy certain data;
- transition plan: outline the steps to be taken for a smooth handover or migration to alternative solutions;
- post-termination support: clarify the level of support or assistance that will be provided post-termination, if any, especially if there are ongoing obligations of support or maintenance;
- sublicences to third parties: examine any sublicences granted to third parties to determine whether they need to be revoked; and
- surviving obligations: determine whether there are any surviving obligations post termination.

Law stated - 2 August 2024

Without-prejudice communications

3 Is it possible to have conversations aimed at settling a dispute that cannot subsequently be used as evidence in legal proceedings if the dispute is not resolved? If so, what formalities are required? If not, how should confidentiality be preserved through mutual agreement?

We do not have legislation or court precedents setting forth a doctrine for 'without prejudice' communications. In view of this, any conversations among the parties can be used in legal proceedings unless the parties have expressly agreed otherwise in writing. Parties can

execute confidentiality agreements during negotiations aimed at settling disputes setting forth that conversations cannot be used in legal proceedings, in accordance with the principle of autonomy of will as provided in article 2651 of the CCC.

Law stated - 2 August 2024

Settlement formalities

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

A settlement must be made in writing and with the signature of both parties to be enforceable.

If a settlement concerns litigious rights, it is only effective upon filing of the instrument signed by the interested parties before the court hearing the case. As long as the instrument is not presented, the parties may withdraw it (section 1643 of the CCC).

No settlement can be made on rights where public policy is compromised or rights that cannot be waived (section 1644 of the CCC).

Likewise, the settlement is null and void:

- if any of the parties invokes totally or partially non-existent or ineffective titles;
- if, when entering into the settlement, one of the parties is unaware that the right being settled has a better title; or
- if it relates to a lawsuit already settled by a final judgment, provided that the party challenging it has ignored it (section 1647 of the CCC).

Law stated - 2 August 2024

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?

The most common causes of action are:

- breach of contract – due to performance without meeting the requirements, non-compliance with service level agreements or failure to deliver or implement as agreed; and
- warranty claims – due to breach of implied or explicit warranties such as those regarding functionality, quality or fitness for a particular purpose of the software or hardware.

Other causes of action may include:

- misrepresentation or fraud – due to one party knowingly or negligently providing false information or misrepresenting the capabilities or features of the software or hardware;
- trade secret violation – due to proprietary information or trade secrets being misappropriated during the design or implementation process; and
- termination and damages – due to sudden or unlawful termination of contract.

As per pre-contractual negotiations, the parties are free to promote negotiations aimed at the formation of the contract, and to abandon them at any time (section 990 of the National Civil and Commercial Code (CCC)). However, during the preliminary negotiations, and even if no offer has been made, the parties must act in good faith in order not to frustrate them unjustifiably. The party that breaches its duty must compensate the damage suffered by the affected party for having trusted, without its fault, in the execution of the contract (section 991 of the CCC).

The 'catch all' clause – which is standard in software licensing agreements – aims to nullify any prior negotiations before the execution of a contract, excluding from the contract any prior discussions that do not reflect the intent of the parties and could lead to confusion when interpreting the contract. The legitimacy of the clause could be questioned in an adhesion contract with pre-drafted clauses, but not in contracts that have been negotiated on equal terms. The enforceability will depend on the factual circumstances of each case.

Law stated - 2 August 2024

Statutory claims

6 Has your jurisdiction enacted any legislation providing additional protection for business purchasers of hardware, software or associated licences? What practicalities should be considered when bringing statutory claims?

Under Law 11,723 on Legal Intellectual Property Regime, whoever has received from the authors or the right holders of a computer program a licence to use it, may make a single backup copy of the original copy. The backup copy may not be used for any purpose other than to replace the original copy of the licensed computer program if such original is lost or becomes useless. In addition, as a general rule, contracts must be executed, interpreted and complied with in good faith (section 961 of the CCC).

Law stated - 2 August 2024

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?

Defences available against the most common claims include:

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software failure due to interactions with other programs or third-party software. These types of software failures occur when the installed software interacts with other programs on a computer or network. Such interactions can lead to conflicts or compatibility issues, causing the software to malfunction;

- hardware malfunctions. Hardware failure can significantly impact software performance. When hardware components such as hard drives, memory modules and processors experience malfunctions or become faulty, this can lead to software instability or crashes;
- telecommunications defects. Software often relies on network connections and telecommunications protocols to function correctly. Telecommunications defects, such as network outages, packet loss or latency issues, can disrupt data transfer and communication between software components. This can result in performance degradation or failures in software applications that rely on timely data exchange;
- software failures caused by unauthorised code modifications by the licensee. Unauthorised code modifications refer to alterations made to the software's source code or configuration settings without proper authorisation from the software provider. Such modifications can introduce errors, security vulnerabilities or unintended behaviours into the software. Unauthorised changes can compromise the software's stability and functionality, leading to failures and potential legal issues if they violate the software's licensing terms; and
- usage without meeting the hardware prerequisites. Software applications often come with specific hardware requirements that must be met for optimal performance. Failure to adhere to these prerequisites can result in software failure.

In response to a claim from the licensee, the licensor must ascertain whether the software defects stem from any of these factors, which can be used as defences to counter a claim. These scenarios should be explicitly included in the contract as instances in which the licensor will not be held liable.

Law stated - 2 August 2024

Limitation period

8 | What limitation periods apply for bringing claims in your jurisdiction?

Under the CCC, the general limitation period is five years from the date when the obligation becomes enforceable (section 2560). Contractual claims are subject to this term.

However, the CCC also establishes special limitation periods for specific matters, for example:

- claims for damages: three years from when the damage occurs, or when the claimant could have reasonably become aware of the damage (section 2561);
- claims regarding periodic obligations: two years from the time each obligation becomes enforceable (section 2562);
-

claims regarding endorsable or bearer documents: one year from the day of expiration of the obligation (section 2564); and

- claims for unenforceability due to fraud: two years from when the fault was known, or from when the claimant could have reasonably become aware of it (sections 2562 and 2563).

The limitation period can be interrupted by a petition by the right holder before a judicial authority that reflects their intention not to abandon their right, even if that petition is defective or made before an incompetent court (section 2546). It can be also interrupted by submitting a request for arbitration (section 2548). Furthermore, the initiation of the mediation proceedings stays the limitation period up to 20 days after the closing minutes are available to the parties (section 2542).

Law stated - 2 August 2024

LITIGATION PROCEEDINGS

Pre-action steps

9 | What pre-action steps are required or advised before bringing legal action?

It is common practice to send a pre-action letter before bringing a civil or commercial claim at court. Also, if the pre-action letter is sent as a formal compliance request, it can be used to put the debtor in default or to suspend the statute of limitations for six months or any shorter term that corresponds to the limitation period of the action (section 2541 of the National Civil and Commercial Code (CCC)).

In the City of Buenos Aires (Law No. 26,589) and some provinces in Argentina, pretrial mediation proceeding is mandatory. The mediator will summon the parties to a first hearing in which they present their case. If the parties reach an agreement, the mediator issues a document that states the terms and conditions of that agreement. If the parties do not reach an agreement, or if any party requires the closure of the mediation at any time, the mediation proceeding is closed. The mediator then issues a document stating that the mediation proceeding is concluded, which must be signed by the parties and the mediator. The claimant can then file a lawsuit before the competent judicial court.

If the claimant does not attempt mandatory pretrial mediation before starting court proceedings, the court will suspend the judicial proceedings until the claimant proves that it has complied with the obligation to start pretrial mediation proceedings. The court can impose a penalty equal to 5 per cent of the basic salary of a first instance judge on a party that fails to attempt mediation.

Law stated - 2 August 2024

Competent courts

10 | Does your jurisdiction have a specialist court or other arrangements to hear technology disputes? Are there specialist judges for technology cases?

There are no specialist courts to hear technology disputes in Argentina.

In the City of Buenos Aires, the federal civil and commercial courts exercise jurisdiction over intellectual property disputes. The ordinary commercial courts exercise jurisdiction over ordinary commercial law disputes and other general commercial matters.

Law stated - 2 August 2024

Procedural rules

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

Contractual and damages disputes are usually governed by ordinary proceedings rules.

The general principle is that all disputes are processed through the ordinary proceedings rules unless a special procedure is provided for (section 319 of the National Civil and Commercial Code of Procedure (CCCP)). Ordinary proceedings are the most extensive proceedings, allowing the highest number of motions and means of challenge and the production of all types of evidence.

Law stated - 2 August 2024

Evidence

12 | What rules and standard practices govern the collection and submission of evidence in your jurisdiction?

Argentinian procedural rules do not include the mechanism of 'discovery' as in the US system. However, before the initiation of proceedings, parties can request the following from the court.

- Preparatory measures: these are intended to prepare for the proceeding by obtaining data, reports or specific information necessary for filing a claim (section 323 of the CCCP). Preparatory measures can be requested by potential claimants or defendants that anticipate the proceedings.
- Production of evidence before trial: this measure is aimed at preventing evidence from being lost. The parties can request the disclosure, protection or seizure of documents that are related to the subject matter of the claim (section 326 of the CCCP). The anticipated production of evidence must be carried out with the intervention of the other party unless reasons of urgency justify its non-intervention. If so, the court will order the intervention of a public defence attorney.

Once the proceedings have started, the parties and third parties have a duty to produce documents in their possession, or disclose the location of these documents, when the documents are relevant to the case. If relevant documents are in the possession of a third party, the court will request the third party to submit the documents. The third party can

challenge a request if the document is exclusively its property and where disclosure of such document may cause damage to the third party.

All documents, including paper ones, must be filed electronically by uploading them to the online docket. If electronic documents are not recognised by the other party, the party that submitted the documents must submit a system engineer expert's report to confirm the validity and existence of the documents.

Law stated - 2 August 2024

Privilege

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

Law No. 23,187, which governs the practice of law in the City of Buenos Aires, provides that lawyers can withhold the disclosure of documents based on legal professional attorney–client privilege, unless the client expressly authorises disclosure. Attorney–client privilege also applies to in-house lawyers.

On 22 February 2008, the National Supreme Court stated in *Rossi, Domingo Daniel on illicit enrichment of public officials, resolution 330* that a violation of professional secrecy occurs when a lawyer raises facts or documents that have been entrusted to them by their client in the exercise of their profession.

As for the parties to litigation, under the procedural rules, if there are elements that make the existence and content of a document manifestly plausible, the refusal of the party to present it will constitute a presumption against that party (section 388 of the CCCP).

A recipient of confidential correspondence cannot use that correspondence without the sender's consent (section 318 of the CCC). In addition, third parties cannot file confidential correspondence without the sender's and the recipient's consent.

Law stated - 2 August 2024

Protection of confidential information

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

Confidentiality is provided by law with regard to confidential information disclosed during pre-contractual negotiations (section 992 of the CCC), confidential correspondence (section 318 of the CCC), and information disclosed during mandatory pretrial mediation proceedings (Law No. 26,589 on Mediation and Conciliation). During the litigation proceeding, depending on the specific circumstances of the dispute, the courts may also order the confidentiality of the proceedings.

Parties can agree on confidentiality in their contracts. In addition, parties can agree on confidentiality of arbitration proceedings (section 1658 of the CCC).

Law stated - 2 August 2024

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?

Experts can only be appointed by the court from the list of courts' official experts at the request of the parties. The claimant (when filing the complaint) and the defendant (when answering) can propose expert evidence together with the rest of the evidence, indicating the expert's specialisation and the issues that the expert must cover in its report.

Additionally, each party can appoint a technical consultant who will assist the parties in the production of evidence. When appointing a technical consultant, a party must indicate their name, profession and domicile.

If the expert evidence is admitted, the court will appoint an expert from the list of courts' official experts and determine the issues that the expert's evidence must cover.

Experts are not considered witnesses. Experts are considered as auxiliaries to the court and must therefore provide independent opinion to the court. Technical consultants, if appointed by the parties, can file their own expert reports in writing.

Law stated - 2 August 2024

Time frame

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

Litigation proceedings involving technology disputes generally take around three to five years.

Law stated - 2 August 2024

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?

During proceedings, the claimant must bear the costs of the mediation procedure and the litigation fee for access to court, and each party must bear their attorneys' legal fees. Each party therefore funds the costs of the litigation.

The final judgment determines which party must bear the costs of the proceeding. As a general principle, the losing party bears the legal costs and expenses.

There are no express legal provisions on third-party litigation funding, and therefore no specific restrictions. The general rules governing obligations and contracts apply between the third party and the claimant. In addition, a party can assign disputed rights or claims (or both) to another party.

The Attorneys' Fees Law (Law No. 27,423), which applies to proceedings before national or federal courts, establishes that the anticipated waiver of fees, and the agreement to reduce the fees' scales fixed by this law, are null and void, except where the agreement to waive or reduce fees is reached between the attorney and its lineal ascendants or descendants, spouse, cohabitant or siblings, or if it relates to pro bono activities.

Law stated - 2 August 2024

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?

The general principle is that the losing party bears all court costs, including those incurred by the opposing party (section 68 of the National Civil and Commercial Code of Procedure). Costs include attorneys' fees.

Civil liability insurance can cover legal expenses, such as attorneys' fees. Legal expenses insurance is an additional coverage within the scope of civil liability but is not considered an independent insurance (that is, the insurer must protect the insured from all liabilities, claims, costs and losses, which means that it must bear the legal costs and expenses of the proceeding).

Law stated - 2 August 2024

REMEDIES AND ENFORCEMENT

Interim remedies

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

In their answer to the complaint, the defendant can submit 'prior motions' defences to be resolved before a full trial. These defences are:

- lack of jurisdiction;
- lack of legal representation;
- lack of legal standing to sue or to be sued;
- another identical suit is pending (lis pendens);
- legal defect of the statement of claim;

- a judicial decision already applies to the matter (res judicata);
- the dispute is subject to a transaction or conciliation (or both) or the suit is withdrawn; and
- expiration of the limitation period.

In addition, precautionary measures can be requested to:

- preserve assets (such as attachments);
- seize assets or documents; and
- maintain the status quo (such as orders not to innovate and orders not to contract).

Finally, the parties may also request:

- preparatory measures, aimed at obtaining data, reports or specific information necessary for filing a claim; or
- measures for the production of evidence before trial, aimed at preventing evidence from being lost.

Law stated - 2 August 2024

Substantive remedies

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

Once the final judgment on the merits is rendered, the court may order the following remedies:

- declaration of the existence or scope of a right or legal status;
- recognition of a right of the prevailing party, which includes:
    - payment of compensation for damages caused; and
    - requiring the losing party to perform an obligation; and
- modification of an existing legal situation.

Law No. 24,425 approved the Agreement on Trade-Related Aspects of Intellectual Property Rights, which provides that the judicial authorities shall have the authority to order the infringer to pay the right holder adequate damages to compensate the harm suffered due to an infringement of its intellectual property right caused by an infringer who, knowingly or with reasonable grounds to know, has engaged in infringing activity (section 45.1).

Moreover, the National Civil and Commercial Code (CCC) provides that the reparation of the damage must be full. It consists of the restitution of the situation of the injured party to the state previous to the damaging fact, by means of payment in money or in kind (section 1740 of the CCC). Compensation includes loss or diminution of the injured party's assets, loss of profit in the expected economic benefit according to the objective probability of obtaining it, and loss of opportunities (section 1738 of the CCC).

In cases of unlicensed use of software, case law has held that it is appropriate to pay the cost of the products used irregularly or the highest remuneration in the event that the licence would have been granted (National Court of Appeals in Civil Matters, *Microsoft Corporation v Anselmi Gerencia de Riesgos SA*,28 April 2006). However, it is also understood that compensation for restitution of profits is not appropriate, since the illegitimate use of the software does not make the company that owns the software a partner of the one who used it for the purpose of participating in its profits (National Court of Appeals in Civil Matters, *Microsoft Corporation v Area 099 SA re damages,* 18 February 2019). Likewise, it has been considered that it is not appropriate to award compensation for trademark damage if only damage arising from the use of the unlicensed software was proven, since the improper use of a trademark does not generate damage by itself (Federal Court of Appeals in Civil and Commercial Matters, *Microsoft Corporation and others v Paraná Sociedad Anónima de Seguros,* 2 May 2006*)*.

In addition, the National Supreme Court has considered that the compensation for moral damages is not applicable in favour of companies since its own purpose is to obtain profits. Although the National Supreme Court's precedents are not binding for lower courts in Argentina, this criterion has been followed in some business-to-business technology disputes (eg, National Court of Appeals in Civil Matters*, Microsoft Corporation v Global Autos SRL re damages*, 13 March 2020).

Law stated - 2 August 2024

Limitation of liability

21 | How can liability be limited in your jurisdiction?

The limitation of liability clause is standard in software licence agreements. In Argentina, these types of contractual provisions have been accepted by the courts except in cases where the Consumer Protection Law applies (*Argentoil SA v Softpack SA*, 13 May 2008, National Commercial Chamber of Appeals).

Regarding contracts entered into by adhesion with pre-established clauses, the CCC states that clauses shall be deemed abusive and considered null and void where they:

- distort the obligations of the party imposing them;
- waive or restrict the rights of the adhering party;
- extend the rights of the imposing party beyond supplementary regulations; or
- are not reasonably foreseeable due to their content, wording, or presentation.

There are two significant aspects through which the limitation of liability clause is generally structured in software licence agreements: (1) the exclusion of certain types of indemnification; and (2) the establishment of a maximum monetary limit.

Regarding the first point, it is common to exclude items such as loss of information, loss of profit, loss of opportunities, physical damage and moral damage from indemnification. However, for the clause to not be considered abusive, the exclusion of these items must take into account the functionality of the licensed software.

Typically, the licensor's liability is limited to the price paid for the licence or the price paid during the last year of the licence, and while this may be considered reasonable, it can also be considered insufficient and, therefore, deemed abusive and declared null and void by the courts when the software licence agreement is between two companies. The integration of the software in the licensee's production process excludes the application of the Consumer Protection Law (CCiv y Com San Isidro, Sala I, 5 August 2008, *Sociedad Escolar Alemana de Villa Ballester v Ditada*, Nicolás M).

Law stated - 2 August 2024

Liquidated damages

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

In Argentina, a 'penalty clause' is a clause by which a party, to ensure the performance of an obligation, is subject to a penalty or fine in case of delay or failure to perform the obligation (section 790 of the CCC). A penalty clause may consist of the payment of a sum of money or any other obligation in favour of the other party or of a third party.

The party who does not fulfil its obligation in a timely fashion owes the penalty, unless it can prove external circumstances that break the causal relationship between the non-fulfilment and the damage.

The penalty imposed replaces compensation for damages when the obligor is in default, and the other party is not entitled to claim further damages even if they prove that the penalty is not sufficient reparation (section 793 of the CCC). On the other hand, to request the penalty, the creditor is not obliged to prove that it has suffered damages, nor can the debtor exempt itself from paying it by proving that the creditor did not suffer any damages.

However, courts may reduce a penalty when its amount is disproportionate to the seriousness of the breach, taking into account the value of the considerations and other circumstances of the case, and when they constitute an abusive exploitation of the debtor's situation (section 794 of the CCC).

Law stated - 2 August 2024

Enforcement

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

Once the final judgment on the merits is rendered, the court can order the following remedies:

- declaration of the existence or scope of a right or legal status;
- recognition of a right of the prevailing party, which includes:
    - payment of compensation for damages caused; and

- requiring the losing party to perform an obligation; or
- modification of an existing legal situation.

If the losing party fails to comply with the judgment, the court will order an attachment of the debtor's assets at the request of the prevailing party. The court then summons the debtor, who can raise specific and limited motions (for example, to amend the judgment or the statute of limitations). If the court rejects the motions, or if the debtor does not raise any, the court will order a public auction of the attached assets.

In the event the judgment contains an order to do something, if the party does not comply within the term indicated by the court, it will be done at the party's own expense or the party will be obliged to compensate the damages resulting from the non-execution, at the winning party's discretion.

Law stated - 2 August 2024

ALTERNATIVE DISPUTE RESOLUTION

Available ADR mechanisms

24 What alternative dispute resolution (ADR) mechanisms are available and typically used for technology disputes in your jurisdiction?

The ADR methods that are generally recognised by the procedural rules are mediation, arbitration and, in some cases, expert determination.

Mediation is frequently used, as several jurisdictions require the claimant to initiate mediation proceedings before bringing a judicial claim.

Parties can also submit their disputes to arbitration before or during any court proceedings. Arbitration agreements are regulated by the National Civil and Commercial Code.

International commercial arbitration is governed by the International Commercial Arbitration Law (Law No. 27,449), which mostly mirrors the UNCITRAL Model Law on International Commercial Arbitration. Arbitration is commonly used in large international commercial transactions, particularly those involving foreign investors.

Law stated - 2 August 2024

Recognition and enforcement

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

Argentina is a party to several international treaties that set forth provisions concerning the recognition and enforcement of arbitral awards (eg, the Mercosur Agreement on International Commercial Arbitration 1988; the Inter-American Convention on International Commercial Arbitration 1975; and the Convention on the Recognition and Enforcement

of Foreign Arbitral Awards 1958). According to the National Constitution (section 75(22)), international treaties prevail over domestic law.

Law No. 27,449 on International Commercial Arbitration (ICAL), which is based on the UNCITRAL Model Law on International Commercial Arbitration, is a federal law that governs international commercial arbitration. The ICAL establishes that the party relying on an award or requesting its enforcement shall submit the original award or a duly certified copy thereof to the competent court. If the award is not in Spanish, the court may request the party to submit a translation of the award into that language.

According to the ICAL, the recognition or enforcement of an arbitral award may only be refused, irrespective of the country in which the award was issued:

- at the request of the party against whom it is invoked, if that party proves before the competent court of the country where recognition or enforcement is sought:
    - that one of the parties was affected by some incapacity or restriction on capacity, or that such agreement is invalid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was rendered;
    - that the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings, or was otherwise unable to assert its rights;
    - that the award relates to a dispute that is not provided under the arbitration agreement or that contains decisions that exceed the terms of the arbitration agreement;
    - that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
    - that the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was rendered; or
- if the court finds:
    - that, according to Argentine law, the subject matter of the dispute cannot be submitted to arbitration; or
    - that the recognition or enforcement of the award would be contrary to Argentine international public order.

Law stated - 2 August 2024

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?

Reportedly, Argentina has been leading global rankings in terms of cryptocurrency adoption. Since the new administration took office in December 2023, it has mainly focused on shifting to a more efficient and innovative administration. President Milei has already expressed on several occasions its goal of making Argentina the fourth global technology hub.

Notably, in 2024, certain governmental bodies such as the Financial Intelligence Unit and the National Securities Commission have issued regulations for Virtual Assets Services Providers, which mainly provide crypto-related services.

The drafting of these regulations has been carried out as a collaborative process with the main actors in the crypto ecosystem, evidencing the interest of the current administration in a profound change, in contrast to past over-regulation of unknown technologies and assets.

In light of this, noteworthy developments have been seen in the following areas.

- Cryptocurrencies and NFTs: as mentioned, certain regulations regarding crypto-services providers have been issued in Argentina. The collaborative approach raises expectations that the regulation will be crypto-friendly, but this is still uncertain. Also, classification and taxation of crypto assets is yet to be further developed and a friendly regulation in this regard could be challenging. On a different note, one of Argentina's leading crypto wallets has recently adopted a decentralised dispute resolution method built on Ethereum to handle claims with its consumers. If a consumer is dissatisfied with a response from the wallet, they can initiate arbitration in a decentralised court of justice through the Kleros platform. Jurors are randomly selected and the system aims for transparency by utilising blockchain technology. While this crypto arbitration method has been implemented privately, it marks a milestone in Argentina for consumer dispute resolution, which could lead to its adoption in other types of businesses. Also, criminal litigation based on fraud using crypto is very common. In 2024, Argentina has seen significant developments in cryptocurrency seizures, one of which involved approximately US$30 million. On that note, the Prosecutor's Office (*Ministerio Público Fiscal de la Nación*) published a guide for the identification, traceability and seizure of crypto-assets. This reflects the Judiciary's growing understanding of how the technology works and ongoing training in the field, which could eventually lead to similar outcomes in civil and commercial courts for future commercial disputes.

- Data Privacy and cybersecurity: with the growing importance of data in the digital economy, data privacy and cybersecurity concerns become paramount. Businesses and individuals may engage in disputes related to data breaches, privacy violations and compliance with data protection laws. Particularly, a significant case has been recorded concerning personal data involving the company Worldcoin, which offered rewards in exchange for scanning people's irises in different locations of Argentina. They were not only charged with including abusive clauses in their contracts but were also fined millions in the Province of Buenos Aires due to serious personal data concerns and potential breaches.

- Intellectual property: no significant developments were adverted in connection with IP. In Argentina, technology disputes often involve intellectual property issues, such

as patent infringement, copyright violations and trademark disputes. Changes in technology can lead to new forms of infringement, requiring updates to intellectual property laws and regulations.

- E-commerce and online contracts: disputes arising from e-commerce transactions and online contracts are becoming more common. These disputes may involve issues related to contract formation, payment disputes, validity of contracts and promissory notes executed electronically (as opposed to using wet ink signatures) and consumer protection. As mentioned, the adoption of innovative decentralised arbitration mechanisms could lead to faster and more transparent solutions, though this is yet uncertain. It is important to highlight the necessity of well-trained lawyers and judges in relation to technological advancements.

- Artificial intelligence (AI) and automation: Argentina has started to see notable interest in AI developments. The Ministry of Justice of Argentina has launched a national artificial intelligence programme aimed at modernising and optimising judicial processes. This initiative comes at a time when trust in the justice system has been declining in the country and has reached an all-time low. Changes are expected to be implemented within a reasonable timeframe and may accelerate the administration of justice as well as provide training to officials in these technologies. This could undoubtedly lead to improvements in the handling of future civil and commercial disputes. Data privacy and IP infringements are still a concern regarding the use of AI.

- Fintech disputes: there are many disputes relating to financial technologies and transactions. These agreements frequently contain provisions electing arbitration for dispute resolution. In this arena, we have seen an increase in class actions brought by consumer associations against fintech companies, which, until now, generally focused on banks. We believe that class actions against fintech companies will continue to rise, particularly challenging the charging of fees, interest and failures to provide adequate information to users. In the B2B market, some major companies are choosing to take their disputes to the field of antitrust, as seen in the case of companies MODO and Mercado Pago.
- M&A disputes regarding tech acquisitions and transactions: apart from the increase in disputes (mainly related to acquisition price and earnouts) arising from the boom in tech deals during the covid-19 pandemic, no notable developments have been adverted in M&A litigation arena.

Law stated - 2 August 2024

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Summary

UPDATE AND TRENDS

Recent developments and trends

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?

Technology contracts are specifically defined in article 843 of the Civil Code of the People's Republic of China (the Chinese Civil Code) as contracts the parties conclude for establishing their rights and obligations in respect of the development, transfer, licensing, consulting or service of technology. Accordingly, technology agreements are further classified into technology development contracts, technology licensing contracts, technology consulting contracts and technology service contracts. The relevant specific provisions on these contracts in relation to technology are set in as 843 to 874 of the Chinese Civil Code. Typical disputes arising out of technology contracts include, for example:

- disputes relating to the ownership of the technology. This kind of dispute often arises from technology development agreements whereupon the successful development of a technology, parties may dispute over the right to apply for patents, the right to transfer the technology and the right to license or implement the technology;
- disputes relating to the infringement of technology secrets. This kind of dispute is commonly seen in the execution of technology licensing contracts. The number of cases in this area is growing quickly and recent judgments show a strengthened protection of technology or commercial secretes. For example, lately, the Chinese supreme court ordered a record-setting damage of 460 million yuan in an infringement of technology secret case between Geely and WM; and
- disputes relating to the validity of technology contracts. As the invalidation of the technology contracts will release parties from the relevant contractual obligations and rights, this kind of dispute is also not uncommon. It should be noted that in addition to the general grounds to invalidate a contract, a technology contract would be invalid if it illegally monopolises technology or infringes on the technology owned by another party.

When technology contract-related disputes arise, parties should first carefully review the terms of the relevant contracts and identify their rights and obligations. It should also be noted specific rules are provided in the Chinese Civil Code on certain aspects of disputes arising out of technology contracts. Should there be no specific provision agreed upon between the parties in the relevant contracts, these rules provided in the Chinese Civil Code shall apply. In addition, it is equally important to be aware of the available evidence and what evidence is lacking and formulate plans in advance.

Under PRC law, generally, the statute of limitation is three years. The limitation period starts to run when a party knows or should have known the occurrence of the breach of contract or the infringement. The limitation period can be renewed and run afresh when a creditor claims the rights before the expiry of the limitation period or when an obligor agrees to fulfil the obligation. Therefore, the creditor should timely claim its rights against the other party to renew the limitation, for example, by way of sending a demand letter.

Before initiating a litigation or arbitration, parties may consider alternative dispute resolution methods such as negotiation and mediation, which can be less adversarial and cost-effective. In the process of negotiation, parties should be alert of not waiving any rights inadvertently and ensure that their actions and statements will not be used against them in the forthcoming legal proceedings.

Under the Chinese Civil Procedural Law, there may be more than one court with jurisdiction over a case and a plaintiff is able to choose the court in which the case will be heard. For certain cases, the choice of forum could be crucial to the outcomes. For example, intellectual property courts in major cities such as Beijing and Shanghai might be more inclined to award relatively substantial amounts of damages. Therefore, one should carefully decide on which court to file the case before initiating the proceeding.

Law stated - 1 August 2024

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?

Under Chinese law, a contract may be terminated by agreement or statutory provision.

Termination by agreement

Parties may terminate a contract by consensus. Also, the parties are free to agree on specific conditions for termination in a contract. Upon satisfaction of the conditions, the relevant party would be entitled to terminate the contract unilaterally.

Termination by statutory provision

A contract can also be terminated pursuant to statutory provisions. Article 563 of the Chinese Civil Code outlines the conditions for contract termination that apply to all types of contracts:

- when it becomes impossible to fulfil the contract due to *force majeure*;
- if one party explicitly states, or indicates through its actions, before the performance period ends, that it will not fulfil its main obligation;
- if one party delays in fulfilling the main obligations and fails to do so even after being demanded to perform within a reasonable period;
- if one party delays in fulfilling its obligations or breaches the contract in a way that makes it impossible to achieve the contract's purpose; and
- any other circumstances as provided by the law.

Moreover, article 857 of the Chinese Civil Code provides an additional statutory ground for terminating technology development contracts: if the technology to be developed as provided in a technology development contract is made public by a third party and renders

the performance of the technology development contract meaningless, the parties may terminate the technology development contract.

A party entitled to terminate a contract may do so by written notification to the other party or by requesting the court to terminate the contract through legal proceedings.

Whether to terminate a contract is a complex and comprehensive decision, which is more of commercial essence rather than legal. From a legal perspective, factors to consider may include grounds for termination, severity of the breach, purpose of the contract, consequences of termination, possibility of restoration and alternative remedies.

Law stated - 1 August 2024

Without-prejudice communications

3 Is it possible to have conversations aimed at settling a dispute that cannot subsequently be used as evidence in legal proceedings if the dispute is not resolved? If so, what formalities are required? If not, how should confidentiality be preserved through mutual agreement?

Unlike common law jurisdictions, the without-prejudice principle is not explicitly recognised under Chinese law. Therefore, one cannot prevent the disclosure of the relevant documents created for the purpose of settlement negotiation in legal proceedings. However, it is widely accepted under Chinese law that the documents created for the purpose of settlement negotiation are not binding on the parties. For example, article 107 of the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China provides that the facts admitted by the parties in court proceedings as a result of compromises in order to reach a conciliation agreement or a settlement agreement shall not be used against them in the subsequent litigation proceeding.

Therefore, parties should be extra cautious in settlement negotiations to avoid stating things that could be used adversely against them and always label the communications as 'without prejudice', 'with all rights under the contracts and law being expressly reserved', 'confidential' and other disclaimers to minimise the risks.

Law stated - 1 August 2024

Settlement formalities

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

Generally, no specific formality is required for a settlement agreement under Chinese law and parties can freely agree on the settlement terms.

Parties may also choose to utilise the court conciliation proceeding to reach a settlement agreement under the court's administration and have the court render a conciliation statement accordingly. Such conciliation statement rendered by the court is a legal

instrument binding on the parties and can be enforced directly through court enforcement proceedings.

Likewise, most arbitral institutions in China have mediation procedures that allow parties to negotiate and reach a settlement agreement under the administration of a tribunal and the tribunal may, subject to the parties' application, render an arbitral award or a mediation statement in accordance with the terms of the settlement agreement. The arbitral award or the mediation statement is also binding and enforceable.

Law stated - 1 August 2024

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?

The most common causes of action arising out of these kinds of contracts are breach -of-contract claims, which could result from delayed delivery, failure to meet the technical specifications or regulatory requirements, failure to provide maintenance or technical support services, violation of data privacy provisions, failure to make payment, breach of a confidentiality agreement and breach of other representation and warranties. Infringement claims are also not uncommon and may concern infringement of patents, copyrights, trademarks or commercial secrets.

Under Chinese law, an innocent party needs to establish the other party's breach of contractual obligations of a valid contract and the damage caused by such breach to succeed in a breach-of-contract claim. As for the infringement claims, generally an injured party needs to prove: (1) an intellectual property falls under the protection of Chinese law; (2) the infringement conduct; (3) the existence of damage; and (4) a causal relationship between the infringement conduct and the damage. For different types of infringement claims, there are different rules provided under Chinese law. Aside from the Chinese Civil Code, other relevant laws include but are not limited to: the Trademark Law of the People's Republic of China, the Copyright Law of the People's Republic of China, the Patent Law of the People's Republic of China and the Anti-unfair Competition Law of the People's Republic of China.

The doctrine of pre-contractual liability is acknowledged under Chinese law. Article 500 of the Chinese Civil Code expressly provides that in the course of contract negotiation, if any of the following circumstances occurs and causes damage to the other party to the negotiation, a party shall be liable for damages: (1) negotiating in bad faith under the guise of entering into a contract; (2) the intentional concealment of a material fact or the giving of false information in relation to the formation of a contract; and (3) any other conduct contrary to the principle of good faith. Therefore, the parties should be very cautious in making pre-contractual statements or signing pre-contractual memorandums. For example, in order to avoid giving rise to pre-contractual liability claims, the parties may make it clear that the negotiation is conducted on a non-exclusive basis, either party is entitled to cease

the negotiation without giving any reason and the parties should bear the costs incurred for negotiation by themselves.

Law stated - 1 August 2024

Statutory claims

6 Has your jurisdiction enacted any legislation providing additional protection for business purchasers of hardware, software or associated licences? What practicalities should be considered when bringing statutory claims?

There is no extra technology-related protection specifically provided to business purchasers under Chinese law.

Law stated - 1 August 2024

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?

For breach of contract claims, defences available in ordinary commercial contract disputes are also applicable in technology disputes. For example, one may argue there is no breach of contract and the issue in dispute could be the interpretation of the relevant terms and conditions provided in the contract; one may choose to argue that its breach of contract is due to the other parties' breach of contract, a result of *force majeure* or change of circumstances; one may argue that the contract is invalid on the basis of violation to mandatory law, malicious collusion or false agreement; and one may also argue the damage claimed is unjustified. For disputes arising from technology contracts, the defences could be more focused on the technology itself, such as demonstrating that the technology has met the specifications and requirements outlined in a technology development contract. This kind of defence is generally stronger in cases where there are no specific requirements or specifications for the technology to be developed. In addition to the general grounds for invalidating a contract, a technology contract would be deemed invalid if it unlawfully monopolises or infringes on technology owned by another party, providing the defendant with additional defence.

For infringement claims, depending on the types of intellectual property, one may raise different defences. For example, in infringement of patent cases, one may first initiate an invalidation procedure and if the patent is still valid, one may argue, among others, the technology it implemented is different from the patent or it is a *bona fide* purchaser; in infringement of trademark cases, one may apply to invalidate the trademark on the basis of lack of distinctiveness and others and then argue, among others, the sign or symbol it used is not identical or similar to the trademark and is unlikely to cause confusion; and in infringement of copyright cases, one may choose to raise the fair use defence.

Law stated - 1 August 2024

Limitation period

8 | What limitation periods apply for bringing claims in your jurisdiction?

Under PRC law, the statute of limitation is generally three years. The period starts to run when the parties know or should have known the occurrence of the breach of contract or the infringement. For claims arising out of a technology import or export contract, the statute of limitation is four years. The limitation period can be renewed and run afresh when the creditor claims the rights before the expiry of the limitation period or when the obligor agrees to fulfil the obligation.

Law stated - 1 August 2024

LITIGATION PROCEEDINGS

Pre-action steps

9 | What pre-action steps are required or advised before bringing legal action?

Generally, there is no mandatory pre-action step required under Chinese law before initiating a court litigation. In practice, the Chinese court will arrange mediation between the parties before the hearing unless the parties refuse. As for arbitration, if the arbitration agreement provides pre-arbitration processes, then the parties are required to complete these processes before bringing up an arbitration.

Law stated - 1 August 2024

Competent courts

10 | Does your jurisdiction have a specialist court or other arrangements to hear technology disputes? Are there specialist judges for technology cases?

Since 2014, China has established specialised intellectual property courts (IP Courts) to handle first-instance technology cases, such as patent disputes, trademark disputes, copyright disputes and unfair competition disputes. Right now, there are four IP Courts in Beijing, Shanghai, Guangzhou and Hainan. In addition, many intermediate courts in China set up specialised intellectual property divisions to hear disputes in relation to intellectual property, including but not limited to the intermediate courts of Tianjin, Shenzhen, Nanjin, Hangzhou. Some high courts will also have judges specialised in handling intellectual property cases, such as the Beijing High Court, the Shanghai High Court and the Guangzhou High Court.

If in need, the court can also set up a technical investigation office. The technical investigation officers can participate in the hearing to help the judges on technical issues, such as:

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offering proposals on the focus of disputes of technical facts, as well as the investigation scope, sequence and methods, among others;

- participating in an investigation, evidence collection, inquisition and preservation;
- participating in inquiries, hearings, pre-trial meetings and court trials;
- assisting judges in organising appraisers and professionals in relevant technical fields to offer their opinions; and
- attending the deliberation of the collegiate panel and other relevant meetings.

Law stated - 1 August 2024

Procedural rules

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

Like other civil cases, the Chinese Civil Procedure Law and the relevant judicial interpretations shall apply to intellectual property cases.

Law stated - 1 August 2024

Evidence

12 | What rules and standard practices govern the collection and submission of evidence in your jurisdiction?

The rules of collection and submission of evidence in intellectual property cases are provided in the Chinese Civil Procedure Law and the Supreme People's Court's Provisions on Several Issues Concerning the Evidence in Civil Litigation and Several Provisions of the Supreme People's Court on Evidence in Civil Procedures Involving Intellectual Property Rights.

There is no discovery procedure under Chinese law. However, one may apply for the court to investigate and collect evidence if the parties and their attorneys could not produce such evidence due to objective reasons. In addition, article 47 of the Supreme People's Court's Provisions on Several Issues Concerning the Evidence in Civil Litigation provides that a party is required to submit certain documentary evidence, which includes:

- evidence that has been cited by the evidence controller;
- evidence prepared for the interests of the other party;
- evidence to which the other party has a legal right to obtain;
- account books and original vouchers for bookkeeping; or
- other circumstances where the court finds such evidence shall be disclosed.

The parties may utilise this rule and apply to the court to request the other party to submit such evidence. If the party who controls the above documentary evidence refuses to submit

the evidence without justifiable reasons, the court may deem the relevant facts to be proved by such evidence as true.

Law stated - 1 August 2024

Privilege

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

In China, the concept of privilege, as understood in common law jurisdictions, does not have an equivalent; however, there is a recognised duty of confidentiality that lawyers should bear. This duty obliges practising attorneys to protect their clients' secrets, but it does not necessarily extend to privilege in court proceedings.

Law stated - 1 August 2024

Protection of confidential information

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

Closed hearing: according to article 137 of the Civil Procedure, if a case involves trade secrets, parties may apply for a closed trial. Besides, according to the judicial interpretations, if the evidence involves state secrets, commercial secrets, personal privacy or other contents, that should be kept confidential in accordance with the law.

Confidentiality agreement and other measures: if evidence involves trade secrets or other commercial information that needs to be kept confidential, a court shall, before the relevant litigation participant comes into contact with the evidence, require them to sign a confidentiality agreement, make a confidentiality commitment or order them, by means of a ruling or other legal instrument, to refrain from disclosing, utilising or permitting another person to utilise the secret information that they have come into contact with in the course of the litigation process for any purpose other than the litigation in the case in question.

In addition, the court may, *ex officio* or upon the application, take protective measures such as restricting or forbidding the copying of the evidence and displaying the evidence only to the attorney representing the party.

Law stated - 1 August 2024

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?

In Chinese court proceedings, the court may, *ex officio* or upon the application, appoint a judicial appraisal institute (often randomly selected from a pool) to conduct judicial appraisals on specific issues that need opinions from experts with specific expertise. The judicial appraisal is commonly seen in intellectual property cases.

The parties are also free to introduce their own experts during the hearing. However, the party-appointed experts will not be deemed as independent. Rather, in Chinese court proceedings, the role of the party-appointed experts is to aid the parties in presenting their views on specialised technology issues or to challenge the judicial appraisal result.

Law stated - 1 August 2024

Time frame

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

Under normal circumstances, based on the provisions of the Chinese Civil Procedure law, for the first instance case of a general procedure, a ruling should be rendered within six months, and the time limit can be extended with the approval of the superior of the court. For the second-instance, a ruling should be rendered within three months after the appeal is accepted and the time limit can also be extended. For the cases that are foreign-related, there is no strict time limit.

In practice, as technology disputes often involve complex and lengthy technical appraisal or evidence collection and investigation, the time consumed is usually longer than the time limit provided in the Chinese Civil Procedure law and can even take several years.

Law stated - 1 August 2024

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?

Up to now, legislation in China has not yet made explicit provisions regarding third-party funding in litigation, resulting in a state of non-regulation for third-party funding. In the very first case concerning the validity of the arrangement of third-party funding in litigation, the Shanghai No. 2 Intermediate Court denied the validity of a third-party funding agreement in litigation from the perspective of public policy. In the reasoning, the Shanghai Second Intermediate People's Court expressed concerns that third-party funding poses a threat to financial order, fairness of litigation and public interests. This judg received wide criticism and does not have a binding force absence of the prohibition on third-party funding in litigation at the national legal level. It is entirely possible that other courts may decide differently regarding the validity of third-party funding in litigation. However, for arbitration, third-party funding is relatively well developed and the issue of its legality is hardly

controversial. People's Courts, as well as the arbitration rules of the major international arbitration institutions recognise the mechanism of third-party funding in arbitration.

Lawyers can enter into ‘no win, no fee’ conditional fee arrangement in civil cases. The arrangement is strictly prohibited to implement, or implement in a disguised form, contingent fees for criminal litigation cases, administrative litigation cases, state compensation cases, collective litigation cases, marriage and inheritance cases, as well as cases of claims for social insurance benefits, subsistence allowances, payment for maintenance, child support and upbringing, pensions, relief payments, job-related injury compensation or labour remuneration.

Law stated - 1 August 2024

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?

In China, unless agreed otherwise, the court costs shall be borne by the losing party, while the legal costs should be borne by the parties themselves. For intellectual property cases, there are certain judicial interpretations issued by the Supreme People’s Court providing that a court should consider the losing side to bear reasonable legal costs incurred by the winning party. To be on the safe side, it is recommended for parties to agree in technology agreements that the losing parties should bear all the legal costs, which will generally be supported by courts.

There are insurance products obtainable to cover the legal expenses of the parties. These insurance products are commonly known as legal expense insurance or legal litigation expense insurance and they are designed to help individuals or businesses bear the legal costs incurred due to litigation, such as attorney fees, litigation fees and appraisal fees.

Law stated - 1 August 2024

REMEDIES AND ENFORCEMENT

Interim remedies

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

For technology disputes in China, interim remedies that are available and commonly sought in technology disputes include the following:

- property preservation: before or during court proceedings, a court may issue measures for property preservation to prevent parties from transferring assets and ensure that future judgments can be enforced. This includes freezing bank accounts and seizing property;
-

evidence preservation: to prevent tampering or destruction of evidence, a court may take measures to preserve evidence, including sealing relevant documents and audio-visual recordings; and

- behavioural preservation: a court may issue injunctions to prohibit parties from engaging in certain actions to maintain the status quo or prevent further harm. For example, prohibiting a party from disposing of disputed technological achievements or assets without authorisation.

Also, for arbitration, parties can seek the above interim remedies from a court, before or in the process of the arbitration proceedings. Moreover, some arbitration rules allow an arbitral tribunal to issue interim orders and provide for an emergency arbitrator mechanism, allowing for the appointment of an emergency arbitrator by the arbitration institution to grant interim relief before the constitution of the arbitration tribunal. For example, the arbitration rules of CIETAC and BAC include emergency arbitrator provisions.

Law stated - 1 August 2024

Substantive remedies

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

In technology disputes, the available and commonly sought substantive remedies include, but are not limited to, the following:

- damages: this is the most common form of relief, aimed at compensating for losses suffered due to breach of contract or infringement. Damages can include both actual losses and losses of anticipated profits;
- termination of contract: if one party has materially breached the contract terms, the other party may seek termination of the contract;
- specific performance: in certain situations, a non-breaching party may require the breaching party to continue performing contractual obligations; and
- confirmation of the validity or invalidity of the contracts: in some cases, one party may require the court to confirm the validity or invalidity of technology contracts.

Calculating method of the damages in technology contract disputes typically involves the following:

- actual losses: the compensation amount is determined based on the actual losses suffered by a right holder due to infringement. This can be calculated by the reduction in sales of the infringed product, or the sales volume of the infringing product multiplied by the unit profit of the registered trademark product;
- infringer's profits: if the actual losses of the rights holder are difficult to determine, the compensation amount can be determined based on the profits obtained by an infringer from the infringement. The calculation of infringer's profits generally takes the business profit as the standard, but for defendants who habitually engage in infringement, the sales profit can also be used; and

- licensing fees: the compensation amount can be reasonably determined by referring to the multiple of the patent licensing fee. If the losses of a right holder or the profits obtained by an infringer are difficult to determine, and there is a patent licensing fee for reference, a court can reasonably determine the compensation amount based on the type of patent right, the nature and circumstances of the infringement, the nature, scope and time of the patent licensing.

Law stated - 1 August 2024

Limitation of liability

21 | How can liability be limited in your jurisdiction?

If parties agree in their contract on a liability limitation for breaching of the contract, such agreement will usually be upheld by a court.

According to the provisions of the Chinese Civil Code, a breaching party must compensate for all losses caused to a non-breaching party by its breach, including expected profits. The losses of the non-breaching party can be compensated, but it cannot profit from the breach of contract compensation and the amount of loss compensation it claims cannot exceed the total losses caused to it by the breach of contract. This total amount must also be adjusted according to the following recognition rules:

- Foreseeability Rule: the amount of compensation must not exceed the losses that the breaching party could have foreseen or should have foreseen at the time of entering into the contract;
- Mitigation of Damages Rule: if the non-breaching party has failed to take reasonable measures to mitigate the losses, the compensation amount may need to be reduced;
- Set-Off Rule: if the non-breaching party has obtained certain benefits due to the breach of contract, these benefits should be deducted from the compensation amount; and
- Contributory Negligence Rule: if the non-breaching party is also at fault for the occurrence of the losses, the compensation amount may need to be reduced proportionally.

Law stated - 1 August 2024

Liquidated damages

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

Yes, liquidated damages are permitted in China. Where an agreed liquidated damages are lower than losses incurred, a court or a tribunal may, at the request of parties, increase the damage; where the agreed liquidated damages are excessively higher than the losses incurred, the court or the tribunal may, at the request of the parties, appropriately reduce them.

Law stated - 1 August 2024

Enforcement

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

After obtaining a final judgment or award, a party can apply to a court for enforcement. The court will take a series of enforcement measures to compel a party subject to the enforcement to fulfil its obligation, including but not limited to seizure and preservation of assets, detention, auction and sale of the assets, restriction on the high consumption, restriction on leaving the country and putting the enforced party on the List of Dishonest Persons.

Law stated - 1 August 2024

ALTERNATIVE DISPUTE RESOLUTION

Available ADR mechanisms

24 What alternative dispute resolution (ADR) mechanisms are available and typically used for technology disputes in your jurisdiction?

In China, alternative dispute resolution (ADR) mechanisms for technology disputes are well-established and commonly used. Primary ADR mechanisms include:

- arbitration: the Arbitration Law of the People's Republic of China provides a statutory framework for arbitration. Most technology disputes are arbitrable, making it a popular choice for resolving technology disputes, especially in contractual disputes involving international parties or where a confidential resolution is desired; and
- mediation: a process where a neutral third party (mediator) assists the disputing parties in reaching a mutually acceptable resolution. This process is supported by the PRC Civil Procedure, which encourages parties to resolve disputes through mediation before proceeding to litigation.

Law stated - 1 August 2024

Recognition and enforcement

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

China is a contracting party to the New York Convention and will recognise and enforce foreign arbitral awards in accordance with the New York Convention if the award is made in the territory of another contracting state.

If an award is made in the territory of a non-contracting state of the New York Convention, China will recognise and enforce the foreign arbitral award based on the Principle of Reciprocity.

Law stated - 1 August 2024

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?

Recent years have witnessed the development in the legislation and judicial practice concerning the Standards-Essential Patents (SEP)-related disputes.

For example, in August 2021, the Chinese court, for the first time, affirmed their jurisdiction over global SEP royalty rates in *OPPO v Sharp*. In 2022, the Supreme People's Court reaffirmed Chinese courts' jurisdiction over global SEP royalty rates. Accordingly, as long as there is an appropriate connection between the dispute and China, the Chinese courts shall have jurisdiction over the cases. In December 2023, the Chongqing No. 1 Intermediate People's Court issued the first-instance judgment in the SEP royalty case between OPPO and Nokia. In the judgment, the Chongqing court determined fairness, reasonableness and non-discriminatory (FRAND) licensing rates globally for Nokia's 2G, 3G, 4G and 5G SEP portfolios. This judgment was the first time a Chinese court issued a global royalty rate decision in an SET litigation and the first time that a cumulative rate has been determined globally for the 5G SEP.

In June 2023, the PRC State Administration for Market Regulation drafted the Antimonopoly Guidelines in the Field of Standard-Essential Patents (Draft) and opened it to the public for comments. This regulation aims to strengthen the antitrust regulation of abusive use of SEPs to promote good-faith compliance with principles of fairness, reasonableness and non-discriminatory (FRAND Principle) by holders, to help reach licensing agreements and to maintain market competition.

In August 2023, the Provisions on Prohibiting the Abuse of Intellectual Property Rights to Exclude or Restrict Competition was issued by the PRC State Administration for Market Regulation entered into force. This regulation provides that a SEP right holder is prohibited from, in violation of the FRAND Principle, licensing the patent at an unfairly high price, or rejecting licensing, conducting tie-in sale of commodities, attaching other unreasonable trading conditions, or applying differential treatments without any justification. Also, the SEP right holders are prohibited from seeking a judgment, ruling, or decision on banning the use of the relevant intellectual property right to force the licensee to accept the unfairly high price or other unreasonable trading conditions without good faith negotiation, in violation of the FRAND Principle.

In December 2023, in the *Advanced Codec Technologies v OPPO* case, the Supreme People's Court found that SEP right holder is required to comply with the provisions of article 7 of the PRC Civil Code on the principle of good faith, the provisions of article 132 on the prohibition of abuse of civil rights and the provisions of article 500 on the

liability for negligence in contracting. When a patent becomes SEP, the right holders are required to make a commitment to the relevant standardisation organisation that they will permit unspecified persons to implement their patents in accordance with the FRAND conditions (ie, the FRAND commitment). Although the FRAND commitment is not made to a specific patent implementer, the commitment is already a common practice adopted by mainstream international standardisation organisations to allow the inclusion of patents in the formulation of standard technical solutions, so implementers or potential implementers in the relevant industries will have reasonable reliance on the FRAND commitment. Therefore, the court held that the principle of good faith under PRC law is mainly reflected in the FRAND principle, which is generally recognised and followed by the industry, in the negotiation of SEP licences.

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Summary

UPDATE AND TRENDS

Recent developments and trends

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?

In the Dominican Republic, technology contracts commonly give rise to issues related to termination, non-compliance and adapting to evolving technology. When negotiating such agreements, it is crucial for the parties to consider the following key elements:

- explicit definition of breach: clearly defining what constitutes a breach is essential to prevent misunderstandings and establish a solid basis for addressing violations;
- well-defined termination clauses: having precise and actionable termination clauses enables parties to terminate the agreement when necessary, with specified conditions for doing so;
- transparent audit trail: maintaining a transparent audit trail within software, app and technology services is invaluable, serving as a reliable record of actions, transactions or events and crucial evidence in the case of disputes; and
- revocability clauses: technology agreements should include revocability clauses that outline the conditions under which either party can revoke or terminate the agreement, providing flexibility to address potential breaches or changing circumstances.

Moreover, it is critical to incorporate clauses that ensure:

- control of shared information: clauses specifying the level of control the service recipient has over their information are essential for protecting sensitive data and maintaining ownership authority;
- protection of intellectual property rights: safeguarding intellectual property rights of the licensing party, including ownership, licensing terms and usage restrictions; and
- guaranteed access to owned database: a crucial provision to ensure access to owned databases, even during disputes, allowing the owner to maintain control and availability of their data.

To further enhance the agreement, restricting the rights of the party providing technology services solely to financial aspects can prevent the withholding of critical information or databases that could disrupt operations. Additionally, offering both parties the option for termination ensures a balanced partnership, where either party can terminate the agreement if circumstances change or the relationship becomes untenable.

Safeguarding the codes and copyrights of the technology service provider is crucial. Including licensing provisions that clearly define how these intellectual property rights are shared and utilised, ensuring that the provider retains control while enabling the recipient to use the technology as intended. In the Dominican Republic, if the service provider acts as a contractor, the intellectual property rights of the developed app or software belong to the receiver, whilst the service provider would only hold moral rights as the author.

Lastly, including an arbitration clause in a technology agreement is a wise choice. This clause allows for private resolution of disputes between the parties through arbitration, rather than resorting to traditional litigation in court. This can often lead to more efficient and cost-effective dispute resolution. It is a valuable addition to consider in order to provide a clear framework for handling potential conflicts that may arise during the course of the agreement.

Law stated - 28 August 2024

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?

Under Dominican law, contracts can be terminated through several mechanisms. A unilateral termination due to a breach is possible if the contract includes a unilateral termination clause. Parties can also agree to terminate the contract mutually or at the discretion of any party, provided that the contract explicitly states such provisions.

Article 1134 of the Dominican Civil Code generally allows agreements to be revoked by mutual consent or for causes authorised by law. Mutual consent offers a cooperative form of termination. Revocation based on legal causes can be applicable, such as in service contracts without a specific term, allowing any party to unilaterally terminate it. However, it is important to note that a reasonable notice period is typically required before the intended contract end.

In addition, article 1184 of the Civil Code implies a resolutory condition, often in the form of a termination clause, in bilateral contracts. This condition triggers termination if one of the parties fails to fulfil their obligations.

In cases where there is no explicit termination clause for breaches, resolution can be sought through legal means, such as filing a lawsuit and obtaining a judgment from a judge. Alternatively, if the contract includes an arbitration clause, resolution can be pursued through arbitration proceedings.

However, it is essential to be aware of a recent legal principle adopted by our Supreme Court, inspired by the ‘arrêt Tocqueville’ case from France (known in the early 2000s). According to this principle, a party can unilaterally terminate a contract even without a termination clause, but this action carries inherent risks. An abusive or wrongful termination can lead to liabilities and a requirement to compensate for damages suffered by the affected party.

Therefore, parties should exercise caution when considering unilateral termination without an explicit termination clause in their technology agreements in the Dominican Republic. Seeking legal advice before such actions is advisable.

A best practice is to draft agreements with clear termination conditions, particularly vital for technology agreements due to their unique characteristics and associated rights. Technology agreements often involve intangible evidence or data controlled by one party. Establishing precise termination conditions ensures clarity, fairness and a streamlined

process should termination become necessary, ultimately protecting both parties' interests and reducing the potential for disputes.

Law stated - 28 August 2024

Without-prejudice communications

3 Is it possible to have conversations aimed at settling a dispute that cannot subsequently be used as evidence in legal proceedings if the dispute is not resolved? If so, what formalities are required? If not, how should confidentiality be preserved through mutual agreement?

In the absence of specific agreements between parties regarding the use of conversations and exchanged communications, they can potentially be admitted as evidence in court at any stage of the conversations or negotiations. This underscores the significance of clear and explicit language or covenants in contracts and agreements, particularly in technology contracts where communication records may play a crucial role in legal disputes.

By establishing proper language and covenants, parties can define the terms under which conversations and communications may be used as evidence, providing an additional layer of protection and clarity in the event of disputes.

Establishing a conciliatory period within the agreement, during which negotiations take place, and explicitly stating that these negotiations will not be admissible as evidence in court, provides a clear framework for dispute resolution.

This approach not only promotes open and candid discussions between parties but also provides a level of confidentiality and protection against potential legal implications arising from these communications.

Including such provisions in a technology agreement can significantly contribute to a smoother and more amicable resolution process in the event of disputes. Also, it can be highly effective in managing disputes. By expressly stipulating in the contract that any discussions or negotiations held during this conciliatory period cannot be used as evidence in subsequent judicial or arbitral proceedings, parties can create a confidential and protected environment for resolving conflicts.

This approach not only encourages open communication but also provides a level of assurance that discussions held during the conciliatory period will not have legal repercussions. It offers a structured and mutually agreed-upon process for resolving disputes before resorting to formal litigation or arbitration.

This practice is particularly important in technology agreements, where clear communication and cooperation can be pivotal in achieving successful outcomes.

When negotiating, if a party makes an offer without prejudice or under express reservation, it is typically done with the intent of attempting a settlement without it being interpreted as an admission or concession to the other party. In many jurisdictions, including the Dominican Republic, such offers are protected and should not be admissible as evidence in a court of law. This encourages open and candid discussions during negotiations, allowing

parties to explore potential resolutions without the fear of their statements being used against them in legal proceedings.

This is a valuable practice, especially in technology agreements where negotiations and discussions about complex technical matters can be sensitive. It provides parties with a level of protection and fosters an environment conducive to finding mutually agreeable solutions.

Law stated - 28 August 2024

Settlement formalities

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

A settlement, in accordance with article 2044 and subsequent provisions of the Dominican Civil Code, is defined as a 'named or specified contract' designed to conclude a dispute, whether it has already been initiated or is anticipated. This legal framework outlines the process by which parties can reach an agreement to resolve their disputes, establishing a recognised mechanism for dispute resolution in the Dominican Republic.

Understanding this legal definition of a settlement is essential for parties engaged in technology agreements. It offers a structured approach to address potential conflicts that may arise during the contract's course.

To ensure clarity and enforceability, it is advisable to document settlements in writing. Moreover, the signing parties must possess the legal capacity to enter into such agreements, including the ability to engage in 'disposition acts' as defined by the transaction.

Further, it is highly recommended to formalise settlements in the form of a private document before a notary public. This additional step enhances the legal validity and authenticity of the settlement agreement.

By following these recommended practices, parties involved in technology agreements can establish a clear and legally sound framework for resolving disputes through settlements.

Law stated - 28 August 2024

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?

Some of the common issues that can arise in technology contracts include the following:

- flaws or errors in the technology system that affect its functionality or performance;

- alterations to the system, which can be challenging to manage and may lead to cost increases;
- disputes over additional charges that may not have been initially anticipated;
- changes in the scope of the contract due to the evolving nature of technology design, leading to potential price increases;
- difficulties in making or receiving payments, which can disrupt the contractual relationship;
- supplier withholding access to the system due to non-payment, potentially causing operational issues for the recipient;
- the supplier taking control of or limiting access to information and databases in response to non-payment;
- concerns over breaches in security, leaving the system or data vulnerable to unauthorised access or attacks; and
- technical issues or glitches in the system that affect its performance.

These issues underscore the importance of clear, comprehensive and well-drafted technology contracts. It is essential for both parties to anticipate and address potential challenges in order to establish a strong foundation for the contractual relationship. Additionally, having mechanisms for dispute resolution and clear provisions for payment, system maintenance and security are crucial elements to consider in such contracts.

According to article 1315 of the Dominican Republic Civil Code, whoever alleges a fact must provide evidence for it. Typically, the burden of proof rests on the plaintiff or claimant. In the interest of a fair and effective defence, the defendant also holds the responsibility to present evidence in their defence.

The Dominican legal system recognises various forms of evidence, including witness testimony, expert witness testimony, technical reports, confessions and personal appearances. However, it considers written proof as primary evidence. This includes both traditional written documents and electronic documents. Electronic communications are admissible as evidence if they can be verified or attributed to the sender.

The type of evidence required depends on the nature of the obligation defined in the contract. 'Obligations of effort' require the plaintiff to demonstrate that the obligated party made a reasonable and sincere effort to fulfil their responsibilities. Therefore, the plaintiff must show negligence, imprudence or fault on the part of the defendant by demonstrating a lack of required diligence.

For 'obligations of outcome,' the plaintiff only needs to prove that the expected outcome was not achieved. The burden of proof then shifts to the defendant to demonstrate that the failure to achieve the expected outcome was due to factors such as an act of good faith, fortuitous events, the exclusive fault of the counterparty or the exclusive action of a third party. If the defendant cannot provide such evidence, they may be considered in default.

A plaintiff can file a lawsuit based on a breach of contract or due to a tort or fault outside the contract that caused harm. Precedents in the precontractual phase are limited in the Dominican Republic, emphasising the need for clear and comprehensive contracts that address potential disputes and liabilities before the formal agreement is finalised.

Including a prior resolution clause in agreements, especially in technology contracts, is a common practice. This clause outlines procedures for addressing issues or disputes related to hardware or software. It streamlines the process and can lead to more efficient and effective dispute resolution, crucial in the dynamic field of technology. This practice demonstrates foresight and commitment to clear mechanisms for addressing potential challenges in technology agreements.

Law stated - 28 August 2024

Statutory claims

6 Has your jurisdiction enacted any legislation providing additional protection for business purchasers of hardware, software or associated licences? What practicalities should be considered when bringing statutory claims?

In specific aspects of digital platform usage, particularly within regulated sectors like telecommunications and fintech, specific rules and regulatory guidelines can significantly impact technology agreements. These regulations are in place to ensure compliance with industry standards, protect consumers and maintain the integrity and stability of the sector.

For example, in the telecommunications sector, regulations may govern issues related to data privacy, spectrum allocation, network neutrality and consumer protection. Specifically, regulations set forth by the telecommunications regulatory body, INDOTEL, have a direct impact on entities operating within this sector, including internet service providers and related services. These regulations cover various aspects, such as licensing, spectrum management, quality of service standards, data privacy and more. Compliance with these regulations is not only legally mandated but also crucial for maintaining the integrity and functioning of the telecommunications industry.

Similar regulatory considerations apply to security issues in the financial sector. For instance, in the fintech sector, there may be regulations regarding financial transactions, anti-money laundering measures, know your customer requirements and more.

For parties involved in technology agreements within these regulated domains, it is paramount to have a thorough understanding of the applicable regulatory framework and to engage legal counsel with expertise in these areas. This ensures that agreements are not only legally enforceable but also fully compliant with industry-specific regulations.

Further, when entering a consumer-provider relationship, the provisions of Law 358-05 become relevant. This law plays a crucial role in safeguarding the interests and rights of consumers, specifically in cases involving the final consumer. It encompasses various protective clauses and regulations designed to ensure fair treatment, transparency and accountability in transactions between consumers and providers. These provisions may cover areas such as consumer rights, product warranties, advertising standards and dispute resolution mechanisms.

For parties involved in technology agreements, especially those engaging with individual consumers, understanding and complying with the provisions of Law 358-05 is essential. This helps establish a framework that promotes ethical and responsible business practices, ultimately contributing to a positive consumer-provider relationship.

In general, for statutory claims, a violation of a law or legal obligation is considered a fault that can form the basis of a lawsuit, provided that such a violation directly causes harm to the victim. In cases where no harm has occurred, actions for the correction or regulation of the situation can be initiated, either at the request of one of the parties or by the public administration itself.

Law stated - 28 August 2024

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 defence's objective is to present opposing facts to those asserted by the claimant and to provide supporting evidence that challenges these assertions. This principle holds true not only in disputes within the technology industry but also in contractual conflicts across various sectors.

It is the responsibility of the defending party to offer a compelling counter-narrative supported by relevant evidence. This process ensures a fair and thorough examination of the claims and counterclaims presented, ultimately contributing to a just resolution.

Understanding and applying this principle is essential for parties involved in technology agreements, as well as any other contractual relationships. It serves as a cornerstone for the effective functioning of the legal system and the pursuit of justice in disputes of all kinds.

For instance, in cases involving negligence, establishing negligence or demonstrating that an issue arose from the fault of the opposing party is paramount in building a successful case for the claimant. Conversely, the defendant's task is to present evidence of their diligence or show that they acted in a diligent manner.

This underscores the importance of gathering and presenting compelling evidence to support the respective positions of the parties involved in a dispute. It places a significant emphasis on due diligence and responsible conduct, especially in cases where negligence is alleged.

This principle is applicable not only in cases related to the tech industry but extends to contractual disputes across various sectors. It serves as a foundation for evaluating the actions and responsibilities of the parties involved.

Further, adhering to industry best practices can indeed serve as a valid defence. Since all technology inherently carries vulnerabilities, if the provider can demonstrate that they operated within the state of the art in terms of best practices, any adverse outcomes experienced by the client may be excluded as grounds for default in a court or arbitration proceeding.

Indeed, following established industry standards and employing recognised best practices in technology agreements not only helps to mitigate potential liabilities but also provides a strong basis for defending against claims of default or negligence. This principle is

especially relevant in the dynamic and evolving field of technology, where staying current with industry standards is crucial.

Law stated - 28 August 2024

Limitation period

8 | What limitation periods apply for bringing claims in your jurisdiction?

The statutory limitation for pursuing a claim related to the repair of damage arising from a contractual obligation in the Dominican Republic is two years. In cases involving consumer protection law, the statutory limitation is also set at two years.

However, it is important to note that if a party is pursuing or requesting the execution of the agreement and there is no specific statutory limitation outlined for that action, the general statutory limitation rule of article 2262, which is 20 years, would apply. This distinction highlights the nuanced approach to statutory limitations, taking into account the specific nature of the action being pursued.

Law stated - 28 August 2024

LITIGATION PROCEEDINGS

Pre-action steps

9 | What pre-action steps are required or advised before bringing legal action?

A pre-action process is not mandatory but may be included in a contract. In that sense, if included in a contract, the Supreme Court has ruled that it cannot be used as an obstacle to the constitutional right to access to justice.

Issuing a notification of warning or default in cases of non-compliance or breach serves as a preliminary step before initiating a formal claim. This practice provides the opposing party with notice of the alleged breach, giving them an opportunity to rectify the situation before formal legal action is taken.

This approach is not only considerate of the parties involved but also demonstrates a willingness to engage in good-faith efforts to resolve disputes outside of the formal legal process. It can potentially lead to more efficient and amicable resolutions.

This recommendation is applicable in a variety of contractual contexts, including technology agreements and aligns with established best practices in dispute resolution.

It is noteworthy that the Supreme Court has emphasised that a lawsuit represents a powerful and forceful warning to the conflicting party. However, prior notice is also considered important as it aligns with the right to a defence and the principles of good faith, even in the event of a potential termination or lawsuit.

Law stated - 28 August 2024

Competent courts

10 | Does your jurisdiction have a specialist court or other arrangements to hear technology disputes? Are there specialist judges for technology cases?

There are no specialised courts or judges for technology cases in the Dominican Republic. Therefore, considering the sensitivity and specialisation of matters related to technology, having an arbitration clause can be a crucial strategic decision. Arbitration offers several advantages, including the potential for a more efficient and specialised resolution process, as well as confidentiality in comparison to public court proceedings. It allows parties to select arbitrators with expertise in the relevant technical and legal fields, ensuring a more informed and focused adjudication. Also, by including an arbitration clause, parties can proactively establish a dispute resolution mechanism that aligns with the specific requirements and complexities of technology-related issues. This can ultimately lead to more effective and tailored outcomes in the event of a dispute.

In cases involving regulated parties like internet service providers or telecom companies, the regulatory bodies, such as the Institute of Telecommunication, have the authority to intervene and render a decision. Additionally, the Institute for the Protection of the Consumer plays a role in claims involving ‘consumer-providers’ within the scope of the Consumer Protection Act (Law 358-05). While regulatory bodies can intervene and make decisions, the courts still retain jurisdiction for ultimate dispute resolution.

Law stated - 28 August 2024

Procedural rules

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

Under Dominican law, there are no specific legal actions categorised as 'technological disputes'. Instead, such disputes may arise within the context of telecommunications regulation or in regulated sectors.

In cases where technological disputes do arise, pre-conciliation procedures are outlined. These procedures can serve as a preliminary step in attempting to resolve the dispute before resorting to formal legal action. However, it is important to emphasise that courts still retain jurisdiction over these cases, ultimately having the authority to adjudicate the matter if a resolution cannot be reached through pre-conciliation.

In essence, tech agreements are primarily categorised as civil or commercial contracts and any resulting disputes are primarily addressed within the civil and commercial legal framework.

Law stated - 28 August 2024

Evidence

12 |

What rules and standard practices govern the collection and submission of evidence in your jurisdiction?

In the Dominican Republic, the legal system, which encompasses the Civil Code, Civil Procedure Code and related laws, defines the categories and hierarchy of admissible evidence in court proceedings.

These forms of evidence encompass a wide range of elements, including:

- written documentations: these can be in traditional hard copy or digital-electronic formats. This acknowledges the evolving nature of evidence, especially in the digital age;
- testimonial elements: this category includes witness depositions, which play a significant role in providing first-hand accounts of events or circumstances;
- expert witness reports: particularly relevant in technical matters, expert witness reports offer specialised insights and opinions based on their expertise in the relevant field;
- legal and factual presumptions: these are assumptions or conclusions that are drawn based on established legal principles or facts that are generally accepted;
- Personal appearances: the presence of parties involved in the dispute can be considered as evidence and their statements or actions may hold weight in court proceedings.
- confessions: a party's acknowledgement or admission of certain facts can be a powerful form of evidence; and
- court site visit for verification: in some cases, the court may conduct a site visit to verify certain aspects of the case, which can be considered as evidence.

The legal system in the Dominican Republic predominantly does not adhere to the 'dynamic burden of proof' concept. This means that the application of this concept is quite limited in this jurisdiction. As a result, the responsibility of proving their case falls primarily on the plaintiff. This principle aligns with the broader legal context where the burden of proof typically rests on the party asserting a claim.

However, there are exceptions to this rule. In certain circumstances, the court may exercise its discretion to request the opposing party to present evidence. This discretionary power allows the court to ensure a fair and just adjudication of the matter, especially in situations where it may be difficult for one party to obtain specific evidence.

This nuanced approach to evidentiary responsibility underscores the flexibility and adaptability of the legal system to unique circumstances. It emphasises the court's role in ensuring a fair and equitable legal process.

Law stated - 28 August 2024

Privilege

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

In the Dominican Republic, industrial secrets, source code information, personal data of individuals, and financial data are protected by legal privilege. However, this protection can be extended to any information that is considered confidential in a contract, provided the parties in the agreement are bound by a confidentiality obligation. This means that the disclosure of such information is allowed only in specific and restricted circumstances.

Since there are no specific and clear legal provisions for the protection of sensitive technology information, it is advisable to establish and maintain strong confidentiality provisions in technology contracts to safeguard sensitive information.

Law stated - 28 August 2024

Protection of confidential information

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

The legal system in the Dominican Republic upholds the principle of transparency in judicial proceedings, meaning that court hearings are generally open to the public and court files are publicly accessible, with a few exceptions, such as cases involving minors.

In contrast, arbitration proceedings are subject to a strict obligation of confidentiality. This confidentiality ensures that the details of arbitration processes are kept private, providing parties with a level of privacy not typically available in public court hearings.

It is important to note that if a legal action is initiated to challenge the validity of an arbitration award, a different rule applies. In such cases, the civil courts will not maintain the confidentiality of the documents exchanged in the court and these documents will become publicly accessible.

Law stated - 28 August 2024

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?

Expert witnesses are not only allowed but are commonly utilised, especially in cases where technical expertise is vital for resolving disputes in the Dominican Republic. Their testimony is admitted as evidence in court proceedings. Parties engaged in legal disputes have the option to introduce expert witnesses, either on their own initiative or in response to a request by the judge. This allows for the inclusion of specialised knowledge and insights to help resolve complex technical or factual matters.

Further, in many instances, judges may solicit recommendations from relevant institutions, boards or professional organisations to identify qualified expert witnesses who can provide valuable input to the case. This practice ensures that the expert witnesses possess the necessary expertise and qualifications to offer meaningful assistance.

Law stated - 28 August 2024

Time frame

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

In the context of judicial proceedings, it is worth noting that obtaining a decision from the court of first instance may take anywhere from six months to two years and this timeline can vary depending on the specific court and jurisdiction involved. However, if these cases involve subsequent appeals to the court of appeals or the Supreme Court of Justice, the entire process can take around three to four years. This represents a significant reduction from previous periods and this improvement can be attributed to recent legislative changes and the proactive efforts made by the judicial power to streamline and expedite the legal process.

It is important to note that the time frames for judicial proceedings can vary and may increase under certain circumstances. For example, if numerous incidents or complexities are presented during the legal process. Additionally, if the Supreme Court of Justice annuls a decision and orders a case to be reopened at the court of appeals, this can also contribute to longer timelines in the legal proceedings.

On the other hand, arbitral proceedings generally take around one and a half years. This time frame typically begins from six months to a year after the signature of the terms of reference or mission statement of the case. This shorter duration compared to judicial proceedings highlights one of the advantages of opting for arbitration in certain cases.

Law stated - 28 August 2024

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?

Litigation financing is not a prevalent industry in the Dominican Republic. While there may be specific instances where individuals or entities can finance litigation, it remains relatively uncommon.

Instead, it is customary for attorneys to enter into agreements with their clients. These agreements are often contingent on the outcome of the legal proceedings, where fees are collected based on the result achieved.

Law stated - 28 August 2024

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?

In the Dominican Republic, the allocation of costs in legal proceedings is primarily governed by a very outdated law that does not account for the costs and fees structured in today's legal landscape and relies on rather modest rates. Consequently, even when the losing party is ordered by the court to bear the costs of the proceeding, attorneys usually abstain from liquidating these costs when they are not substantial, as the process to collect these costs can be cumbersome and time-consuming. As a result, attorneys typically collect fees directly from their clients based on the pre-agreed fee arrangements.

In contrast, in arbitration, parties have the opportunity to claim full costs. However, it is important to note that the total fees may not always be fully recognised or awarded.

Further, parties can also contractually agree on who will bear the costs of a legal proceeding and how these fees will be paid in the event of a dispute. This practice is more common when parties opt for arbitration as their chosen dispute resolution mechanism.

Law stated - 28 August 2024

REMEDIES AND ENFORCEMENT

Interim remedies

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

In the Dominican Republic, the legal framework includes provisions for interim remedies that may be sought in cases of urgency. This mechanism allows parties to take prompt action to address pressing issues, even within the context of arbitration proceedings. The arbitration law recognises the importance of judicial assistance in such cases, emphasising the interaction between arbitration and the judicial system.

For instance, in collection actions, the courts have the authority to grant various remedies, such as mortgages, asset seizures and bank account freezes, depending on the severity of the situation and the fulfilment of legal prerequisites. In other cases, the courts can issue provisional orders directing parties to cease actions causing trouble or damage, or to take specific measures to prevent further harm. In the latter scenario, the court may order daily fines until the actions are halted or the required measures are completed, compelling the parties to comply with the court's directives.

Law stated - 28 August 2024

Substantive remedies

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

Dominican law provides several remedies for addressing contract non-performance, encompassing arrears, compensatory damages and the repair of damages resulting from a breach, even if the contract is still in execution. This highlights the legal framework established to handle breaches and their associated repercussions.

Parties possess the right to seek interest for non-payment or late performance. Additionally, parties may choose to incorporate a penalty clause into the contract, delineating potential damages in the event of a breach. This clause serves as a deterrent and offers clarity regarding the potential outcomes of non-compliance.

Damages awarded by the court must be calculated based on the direct consequences of the counterparty's breach, in adherence to the principle of adequate causation. This ensures that damages are proportional with the actual harm endured. Importantly, it is worth noting that punitive damages are not granted under Dominican law.

Law stated - 28 August 2024

Limitation of liability

21 | How can liability be limited in your jurisdiction?

Liability can be limited by contractual provisions, such as:

- penalty clauses: these clauses are designed to compensate for damages resulting from breaches of contract. However, the compensation is pre-determined by the parties and is typically set at a reasonable amount, which acts as a limit in court proceedings. It is noted that sometimes penalty clauses may be set at high amounts, which may not necessarily be considered as limiting;
- limitation of liability clauses: these clauses serve to restrict liability, but they are generally applicable only in cases involving minor or standard faults. They cannot be invoked in situations involving malicious intent or intentional faults. This provides a mechanism for parties to define the scope of liability in the agreement; and
- mitigation clauses: these clauses place an obligation on the obliged party to take measures to mitigate or minimise damages in the event of a breach.

Law stated - 28 August 2024

Liquidated damages

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

The assessment of damages is at the discretion of the judge and this process requires a comprehensive and well-justified rationale. In other words, the judge's decision must involve a thorough and well-substantiated evaluation of damages, ensuring that it is firmly grounded in sound legal principles and factual considerations.

Law stated - 28 August 2024

Enforcement

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

The enforcement procedures available for technology disputes are the same as those applicable in other industries.

In the Dominican Republic, there are several means of enforcement commonly used for the enforcement of court judgments and awards in litigation disputes. These means include:

- seizure of assets: when a judgment creditor needs to satisfy a monetary judgment, they can request the seizure of the judgment debtor's assets. This can include bank accounts, real estate, vehicles and other valuable property. The seized assets may be auctioned to satisfy the judgment debt;
- bank account freezing: creditors can request the freezing of the judgment debtor's bank accounts to prevent the debtor from withdrawing funds. This is a common method for securing the judgment amount;
- registration of property liens: liens can be placed on the judgment debtor's property, such as real estate, registered movable assets or stocks, to secure the debt. These liens can affect the debtor's ability to sell or transfer the property; and
- foreign judgment enforcement: the Dominican Republic has procedures in place to recognise and enforce foreign judgments.

It is important to note that the specific means of enforcement and the process for enforcement can vary based on the nature of the judgment and the circumstances of the case. Additionally, enforcement can be a complex and time-consuming process and parties may seek legal counsel to navigate these procedures effectively.

Law stated - 28 August 2024

ALTERNATIVE DISPUTE RESOLUTION

Available ADR mechanisms

24 What alternative dispute resolution (ADR) mechanisms are available and typically used for technology disputes in your jurisdiction?

In the Dominican Republic, alternative dispute resolution mechanisms, particularly arbitration, are available and often used for technology disputes. The country has an arbitration law that provides statutory support for both domestic and international arbitration. This legal framework enables parties involved in technology disputes to opt for arbitration as a means of resolving their conflicts, offering a more specialised and efficient process outside of the traditional court system.

Arbitration is a widely accepted and commonly used method for technology-related disputes due to its flexibility, confidentiality and the ability to appoint arbitrators with expertise in the technical and legal aspects of technology contracts. This allows parties

to tailor their dispute resolution process to the specific requirements and complexities of technology-related issues.

Law stated - 28 August 2024

Recognition and enforcement

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

The Dominican Republic is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This convention facilitates the recognition and enforcement of foreign arbitral awards in member states.

The Dominican Republic is also a member of the Panama Convention, which promotes and facilitates international commercial arbitration among member states of the Organisation of American States. This underscores the commitment to fostering international arbitration within the region.

All foreign arbitral awards must be submitted before a Dominican court to obtain exequatur and be enforced. This formal process ensures that foreign arbitral awards are recognised and enforced within the jurisdiction. Here is an overview of how it typically works:

- The party seeking to enforce a foreign judgment in the Dominican Republic must initiate the exequatur procedure by filing a formal application with the competent court. The application should include the following:
    - a certified copy of the foreign judgment duly apostilled or legalised by the corresponding Dominican consulate;
    - proof that the judgment is final and enforceable in the foreign country;
    - evidence that the judgment was enacted respecting the defence right of the defendant;
    - a legal translation of the judgment into Spanish (if the original is in another language); and
    - any additional documents required by the specific court.
- The Dominican court where the application is filed will review the documents and assess the validity of the foreign judgment. The court will examine whether the judgment complies with public policy provisions of Dominican law and international treaties to which the Dominican Republic is a party and if it respected the defence right of the defendant.
- After evaluating the application and any objections, the court will issue a decision. If the foreign judgment meets the necessary requirements and there are no legal impediments, the court will grant exequatur, effectively recognising and allowing the enforcement of the foreign judgment in the Dominican Republic.
- Once exequatur is granted, the foreign judgment becomes enforceable in the Dominican Republic. The party with the foreign judgment can then proceed with enforcement actions.

Law stated - 28 August 2024

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?

There are not many precedents on resolution of technology disputes in the Dominican Republic. Specifically, NFTs and cryptocurrencies are not regulated or recognised as valid payment methods by Dominican law; therefore, contracts involving said digital assets are usually bound to foreign laws and jurisdictions.

Law stated - 28 August 2024

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Summary

UPDATE AND TRENDS

Recent developments and trends

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?

Many issues arising from IT contracts relate to the late or wrong performance of contractual obligations by the provider or the customer, which are situations that should be foreseen in the agreement. For instance, in the case of payment default or lack of activity reports by the customer using the technology, it is usually recommended that provision is made for cure periods in the contract to remedy such defaults. Similarly, in a software as a service contract, it is necessary to include a service level agreement (SLA) that sets out clear and transparent expectations as to the level of quality to be met by the software supplier and the associated penalties if these SLAs are not met.

Because of the technical aspect of IT contracts, the allocation of responsibilities between the parties is key. In many IT contracts, customers are unfamiliar with the technology supplied by the service provider, which is therefore subject to an obligation of advice. More specifically, parties will be strongly advised to clearly indicate whether providers are subject to a performance obligation (where the provider must reach a specific result) or an obligation of best efforts. As a result, many disputes relate to the existence and extent of liability of the provider, as providers usually tend to impose an exclusion or a limitation of liability clause. In particular, providers will try to exclude or limit their liability by excluding indirect damages. Such exclusion is authorised under French law; however, providers will try to have a broad definition of 'indirect damages' to include loss of data, loss of clients, breach of data privacy. Unless these liability clauses deny the essential obligation of the provider, in which case they are prohibited, liability clauses (including the amount of the liability cap, if any) are often one of the key topics of the parties. However, because the parties do not have the same bargaining power, especially when customers are consumers or businesses with no IT expertise, or when the product is complex or customised, those clauses may be more easily challenged and unenforceable. To better identify contractual breaches by providers, customers should detail their needs as much as possible and set out clear specifications in terms of performance (eg, through a service level agreement) or in terms of time frame (eg, including provision for liquidated damages).

With respect to insolvency or bankruptcy, which are also critical situations in which parties may find themselves, parties should enter into an escrow agreement with respect to the source code of the software to be licensed. Indeed, this agreement allows the ongoing use of a solution even in the event of the supplier's failure.

Other important elements must be considered: a change of scope in the licensed intellectual property rights especially in the case of state intervention (eg, expropriation or compulsory licensing) or cancellation of the licensed technology (particularly regarding patents).

Given the nature of technology services and products, the handling, storage and transmission of data are often integral components of these contracts. Technology contracts often involve the handling of sensitive data and personal data, financial information, intellectual property and proprietary business information. Therefore, specific

clauses addressing the risk of data leakage should be included in technology contracts. These clauses should outline the responsibilities and measures to be taken by both parties to respond but also to prevent such incidents. This includes specifying the security protocols and encryption standards that must be adhered to, regular security audits and immediate notification procedures in the event of a data leak. The contract should also detail the steps to be taken for data recovery and mitigation of any damage caused by the leakage. Both parties should agree on the allocation of costs related to data leakage incidents, including potential fines, legal fees and the costs of notifying affected parties. Ensuring compliance with relevant data protection regulations, such as General Data Protection Agreement (GDPR) or California Consumer Privacy Act, is essential to minimise legal exposure and protect the integrity of the data.

The Data Governance Act and the Data Act both play an important role in introducing equitable rules that govern data access within the European economy and have been developed to be compatible with the GDPR. These regulations require robust mechanisms for data management and transparency, which should be reflected in the contractual terms. Indeed, compliance with data protection regulation is mandatory and non-compliance may lead to significant legal and financial penalties.

Technology contracts must also consider compliance with sector-specific regulations such as the Digital Services Act, the Digital Markets Act or the E-Commerce Directive in the European Union (even though the latter is not so recent).

In the banking sector, the applicable European Union regulation is the Digital Operational Resilience Act (DORA), which will apply as of 17 January 2025. Its aim is to strengthen the IT security of financial entities such as banks, insurance companies and investment firms. The DORA regulation mandates stringent requirements for managing ICT risks, incident reporting and third-party oversight, all of which are critical considerations in technology contracts.

In the French jurisdiction, the Loi pour la Confiance de l'Economie Numérique , which transposes the e-commerce directive into French law, imposes various obligations ensuring trust and security in the digital economy. The various regulation in the EU and France recognises the legal validity and importance of technology contracts and provides guidelines.

These different laws and regulations respectively impose obligations on digital service providers in technology contracts.

Law stated - 30 August 2024

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?

In addition to the expiration of the contract and the lack of explicit or tacit renewal of the contract, article 1224 of the French Civil Code provides that a contract can be terminated

by application of a termination clause or, in the case of serious non-performance, pursuant to a notification or following a court order.

When drafting termination clauses, it is advisable to be specific about contract breaches that may result in termination. A general termination clause stating that any breach of the contract will result in termination may not be detailed enough to be enforceable. The termination clause must therefore specifically state which breaches by the contracting party will result in termination. Further, the application of a termination clause is subject to an unsuccessful formal notice, which must expressly mention the termination clause. However, the parties may agree that such prior notice is not necessary and that termination may result from non-performance.

In the absence of a termination clause, a party remains entitled to unilaterally terminate the contract in the case of serious non-performance, subject to a prior formal notice specifying the non-performances pursuant to article 1226 of the French Civil Code. Because the terminating party assesses itself whether the non-performance is serious or not, without any decision from a judge, such unilateral termination is at the risk of the terminating party: the termination may be challenged by the other party, in which case the terminating party will have to show that the non-performance was sufficiently serious to justify termination.

In the case of open-ended contracts (ie, where there is no expiration provided in the contract), a party can also unilaterally terminate the agreement for any reason, including for convenience (ie, without any fault from the contracting party), subject to reasonable prior notice. Failure to give reasonable written notice may result in an action for brutal breach of the established commercial relationship, which would result in the continuation of the contract under the previous conditions for a reasonable notice period and the awarding of damages to the terminated party. However, the party who terminates the relationship cannot be held liable if they have given a minimum of 18 months' notice (article L442-1 II of the French Commercial Code).

Finally, the termination of a contract may be sought in court. French courts may either only record the termination (in the case of a termination clause or unilateral termination) or order it, if so requested by the terminating party and if a sufficiently serious non-performance is found. Alternatively, the court may order the parties to continue performing the contract, grant a cure period to the party against which the termination is claimed, or grant damages to the party asking for termination.

In a recent case, the court considered that the mere dysfunctions faced by the purchaser did not sufficiently characterise a serious breach to justify the judicial resolution of the contract based on article 1184 of the French Civil Code (CA Nîmes, 29 October 2020, No. 18/04616). However, a non-conformity by the service provider to their obligations, for example, by way of data breach (CA Grenoble, 9 September 2021, No. 19/02197) or moral prejudice caused to the client (CA Paris, 26 February 2021, No. 18/09828), will engage the liability of the reluctant party.

Besides termination, article 1217 of the French Civil Code provides a list of sanctions in the case of non-performance, including:

- the right of the party disadvantaged by the non-performance to refuse to perform or suspend the performance of its own obligation;
- the order to perform in kind the contractual obligation;

- the right to claim for a reduction in price;
- the right to ask for the resolution of the contract; and
- the right to ask for compensation for the consequences of non-performance.

Formal notice is also expressly required for compulsory performance in kind and reduction in price. Sanctions that are compatible can also be cumulated and damages can always be added to it.

Law stated - 30 August 2024

Without-prejudice communications

3 Is it possible to have conversations aimed at settling a dispute that cannot subsequently be used as evidence in legal proceedings if the dispute is not resolved? If so, what formalities are required? If not, how should confidentiality be preserved through mutual agreement?

When conversations aimed at settling a dispute are conducted by an attorney, they are covered by professional secrecy as a matter of French rule of law (under the conditions laid down by Law No. 71-1130, 31 December 1971, article 66–5 and National Internal Regulations, article 3). Therefore, letters or emails exchanged between attorneys are confidential by principle and cannot be used as evidence in legal proceedings if the parties do not reach an agreement and the dispute is not resolved. There is no special formality to be observed as confidentiality is the principle. On the contrary, exchanges between parties without the presence of an attorney are not covered by professional secrecy.

Confidentiality can be also preserved through mutual agreement of the parties by signing a non-disclosure agreement or inserting a confidentiality clause into a contract. Such clauses prevent parties to an ongoing negotiation from revealing to third parties information communicated during this period. Any breach thereto can result in the payment of damages to the other party.

Law stated - 30 August 2024

Settlement formalities

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

Any settlement reached by the parties to a mediation, conciliation or participatory procedure may be submitted, for the purposes of enforceability, to the judge with jurisdiction to hear the dispute in the matter in question (articles 1565 and 1567 of the French Code of Civil Procedure resulting from Decree No. 2012-66 of 20 January 2012 on amicable dispute resolution). The party entitled to enforce the settlement should file a motion before the judge. As the procedure is non-adversarial, the other party will not be a party to the proceedings.

The judge cannot modify the terms of the settlement. This rule seems to be no more than the application of the principle that settlement is the law of the parties (article 1103 of the French Civil Code). However, the judge may refuse to approve the settlement. In this respect, the judge has power of control over the nature of the deed submitted to him or her and its compliance with public policy and morality, such as the absence of fraud.

If the judge grants the motion, they will issue an order to approve the settlement. At the end of the time limit for appealing against the judge's decision approving the settlement, the judge will have the 'enforceable' formula affixed to the settlement, allowing all bailiffs and law enforcement officers to enforce the decision.

The French Code of Civil Procedure provides that the motion submitted to the judge should include all relevant documentation and evidence demonstrating that the settlement was reached through a legitimate and consensual process. This might include minutes from mediation sessions, signed agreements and any other relevant correspondence.

Practical considerations also include ensuring that the settlement agreement is comprehensive and clearly drafted, detailing all terms and conditions agreed upon by the parties. This will help to avoid any ambiguities and potential disputes during the enforcement phase.

Law stated - 30 August 2024

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?

Many French IT disputes relate to the abusive termination of pre-contractual negotiations, which is now sanctioned under article 1112 of the French Civil Code. The pre-contractual negotiations must normally meet the requirements of good faith. There will then be abusive termination whenever a termination occurs at an inconvenient time (eg, on the eve of the envisaged signature after lengthy negotiations) or if it is demonstrated that, from the beginning, the party terminating the negotiations never had the intention to conclude the contract, the negotiations having, for example, been launched with a view to obtaining a competitive offer to discuss in parallel and in secret with another partner. In such a case, the terminated party can claim compensation; however, compensation shall not cover the loss of the benefits expected from the non-concluded contract.

Litigation may also arise due to a lack of information provided to a customer, for example, when the provider or seller fails to inform the customer as to the limits of the proposed system or the risks involved. The new article 1112–1 of the French Civil Code provides that a party that has information, the importance of which is decisive for the consent of the other party, must pass on such information, if the other party legitimately ignores this information or trusts its co-contractor, it being noted that this provision is a matter of public policy. However, this duty to inform does not relate to the assessment of the value of the product or service. More generally, information that is directly and necessarily related to the content of

the contract or the quality of the parties is of decisive importance. The parties may neither limit nor exclude this duty. In IT agreements, the supplier has a duty to advise the end user of the software package. The supplier must advise the end user on the functionalities and various applications of the programme and establish the end user's needs to determine whether the product is suitable for their requirements. The distributor must also advise the customer to change their system to use the software package if their system is not suitable or warn them of any difficulties they may encounter when using the software package. In a recent case, the judge recalled that the service provider's obligation to advise required said provider to study the needs of its customer and to check the suitability of the software met not only the customer's needs, in view of the functionalities proposed, but also the technical and material configuration with which the customer was equipped (Court of Appeal of Grenoble, 5 September 2019, No. 16/02858). The obligation to provide information will be even more important in the case of custom-made software (compared to a standard software package or software), or if the customer lacks IT or legal expertise.

Once the contract has been concluded, the parties must collaborate in good faith to define the project. To this end, the customer must provide the service provider with the information requested. In a recent case, the judges considered that a service provider was entitled to terminate their contract after the customer refused to provide the historical basis of the support provided by the previous service provider and to implement the personnel and budget changes necessary for adapting the new provider's software. In this case, the provider had identified various risks following an audit and recommended keeping the software in its current version and executing a gradual migration to a later version, a process that required the customer's collaboration (CA Paris, Pole 5, Chapter 11, 19 March 2021, No. 17/20062).

Litigation may also arise due to infringement of intellectual property rights by the licensee of the licensed hardware or software through non-compliance with the restricted use provided in the contract, in particular when the customer uses the hardware or software for purposes that were not allowed or contemplated by the provider or the contract.

Evidently and like in all types of contracts, a mere breach of contractual obligation is a common cause of action. For example, failure to deliver on specifications like not providing software or hardware that meets the agreed-upon performance standards, non-compliance with deadlines, failure to provide the level of support, updates or maintenance services promised in the agreement. To succeed in a claim for breach of contract, it must be established that the other party failed to fulfil their contractual obligations.

For example, in a recent decision of the Court of Appeals of Paris on 13 January 2023 (CA Paris, Pole 5, Chapter 10, 13 January 2023, No. 21/04567), the Court ruled on a breach of contract and performance issues related to a software implementation. The customer claimed that the software provided by the service provider did not meet the agreed specifications and performance standards. The Court found that the service provider had failed to fulfil its contractual obligations, as the software was not fit for the customer's intended use and did not perform as promised. As a result, the Court awarded damages to the customer for the losses incurred due to the non-performance of the software.

Law stated - 30 August 2024

Statutory claims

6 Has your jurisdiction enacted any legislation providing additional protection for business purchasers of hardware, software or associated licences? What practicalities should be considered when bringing statutory claims?

Nothing specific is provided in France.

Law stated - 30 August 2024

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?

Certain defences can be raised by the defending party relating to certain specific disputes. A common defence that might be used by the client is the technology provider's breach of the clauses setting out its obligation to provide technical assistance to the licensee and its success rate (service level agreements).

When disputes arise concerning the delivery, for instance, of an IT product, it is common to argue that the client did not respect its obligation of collaboration in good faith. A recent case stated that an IT contract cannot be terminated exclusively at the expense of the service provider if the client did not respect its obligation of collaboration. In Appeal Court of Amiens, 17 January 2019, No. 17/01041, the judge found that significant delays in the implementation of the product were attributable to the client who pushed back several mandatory employee training sessions and did not provide for the expected opinions on the quality of the product. Further, in a ruling dated 28 June 2019 (No. 15/24198), the Paris Court of Appeal also denied the possibility of terminating the agreement for failure to comply with the contractual timetable, taking the view that the anomalies could have been corrected if the agreement had run to term and that, as a result, the breach was not serious enough to justify termination.

Concerning the default of payment, one possible defence is for the debtor to prove that due to a breach in an obligation of the technology provider (eg, technical assistance or lack of performance of the delivered technology), they had to invest in order to remedy that breach and honour their own obligations.

Law stated - 30 August 2024

Limitation period

8 What limitation periods apply for bringing claims in your jurisdiction?

According to article 2224 of the French Civil Code, commercial, contractual and tort disputes are time-barred after five years from the day on which the rights holder knows or should have known that its right has been violated ('the facts enabling him to exercise

it'). Five years is thus the usual limitation period to bring an action before the courts. Other limitation periods exist, however, such as 10 years in the case of bodily injury or to enforce a decision of justice. The limitation periods above can be interrupted (ie, a new period of the same length as the former is set up) or suspended (ie, temporarily stopped). This time limitation subject to article 2224 was recently confirmed by the Paris Court of Appeal with respect to security breaches affecting computer programs (Court of Appeal of Paris, 22 January 2022, No. 19/02406).

For consumer protection claims, the limitation period for bringing claims for hidden defects is two years from the date the defect is discovered, as set out by article 1648 of the French Civil Code.

For intellectual property claims, the limitation period is the same for trademark or patent infringement claims. For patent infringement, the limitation period is five years from the day the owner of the patent knows or should have known about the infringement as per article L. 615-8 of the French Intellectual Property Code. For trademark, the same applies as per article L. 716-5 of the French Intellectual Property Code.

Law stated - 30 August 2024

LITIGATION PROCEEDINGS

Pre-action steps

9 | What pre-action steps are required or advised before bringing legal action?

Pursuant to article 750–1 of the French Code of Civil Procedure, in civil proceedings, parties must attempt conciliation before going to court when the claim is for the payment of a sum under €5,000, otherwise the court may rule that the claim is inadmissible. Pursuant to articles 54 and 56 of the French Code of Civil Procedure, a claimant must, in its initial claim and writ of summons, specify the measures taken to settle the dispute amicably with the opposing party. To justify the attempt to reach an amicable settlement, a letter to the opposing party or to their attorney offering this amicable attempt shall be communicated with the writ of summons. This letter is akin to a formal notice and serves as a final demand for compliance or remedy within a specified period before legal action is taken. The formal notice letter or 'mise en demeure' in French law letter must demand for performance, compliance or remedy within a specified period. This can serve as evidence of a good faith attempt at resolving the dispute amicably.

In addition, article 127 of the Code of Civil Procedure gives a judge the option of inviting the parties to attempt to reach a settlement to compensate for this lack of prior attempt.

The obligation to follow an amicable settlement procedure does not apply in summary proceedings. Indeed, article 750-1 provides that the absence of having recourse to one of the amicable settlement methods can be justified by manifest urgency, by the circumstances of the case making such an attempt impossible or requiring a decision to be rendered without adversarial hearings, or by the unavailability of judicial conciliators for a period of more than three months.

Law stated - 30 August 2024

Competent courts

10 Does your jurisdiction have a specialist court or other arrangements to hear technology disputes? Are there specialist judges for technology cases?

There is no specific court or judge in charge of hearing technology cases. However, the Judicial Court of Paris has exclusive jurisdiction over cases and actions relating to patents, utility certificates, supplementary protection certificates and topographies of semiconductor products or EU trademarks. Further, specific specialised courts in France, designated by decree, have exclusive jurisdiction over intellectual property cases relating to copyrights, trademarks, designs and geographical indications. Even when a dispute combines intellectual property issues with unfair competition issues, the specialised court has sole jurisdiction.

In addition, international chambers have been created, before both the Commercial Court of Paris and the Court of Appeal of Paris. These chambers have jurisdiction over all international trade litigation. They provide for the litigants to choose English as the language of the proceedings, the hearing of witnesses and experts in English, with the possibility of cross-examination, and the communication of documents in English, under the control of the judge.

While there are no judges exclusively designated for technology cases, these specialised chambers are staffed with judges who have significant expertise and experience in handling complex technology and intellectual property disputes.

Law stated - 30 August 2024

Procedural rules

11 What procedural rules tend to apply to technology disputes?

While there are no specific procedural rules for technology disputes applicable in France, the French legal system provides a framework through specialised courts, international chambers, expert witnesses and ADR mechanisms that facilitate the effective resolution of these complex cases.

Law stated - 30 August 2024

Evidence

12 What rules and standard practices govern the collection and submission of evidence in your jurisdiction?

Under French law, parties do not have to comply with any standard of disclosure and the discovery of evidence is voluntary.

However, it is possible to get some disclosure before a trial. If there is a 'legitimate reason to preserve or establish before any trial the evidence of facts, on which might depend the solution of a dispute', a court may order future measures at the request of a party (article 145 of the French Code of Civil Procedure). The party must demonstrate:

- that the application is made prior to any trial;
- the existence of a legitimate reason; and
- the need to search for evidence that is lacking or to preserve evidence that is in danger of being wasted.

The judge shall then take all legally admissible measures of instruction, such as the appointment of an expert or a judicial officer or the forced production of evidence by the other party or a third party.

A recent case illustrates the importance during pre-litigation phases of building strong and as much contradictory evidence as possible from the start of malfunctions. In this case, the customer produced a private and non-contradictory expert report in which the service provider was invited to participate, and which included bailiffs' and auditors' findings. The judge did not rule out the elements provided by the client or the existence of a malfunction. Nevertheless, the judge indicated that in this case, in the absence of contradictory technical expertise (amicable or judicial) between the parties, it was impossible to determine the origin of the difficulties encountered and to allocate responsibility to either party (Court of Appeal of Lyon, 9 January 2020, No. 17/08188 and Court of Appeal of Rennes, 23 March 2021, No. 19/00243).

In a recent decision, the French Court of Cassation addressed the admissibility of CCTV footage installed without employees' knowledge (Court of Cassation, 14 February 2024, N. 22-23.073). An employer had used this footage to justify dismissing an employee for misconduct. The employee contested the dismissal, arguing that the footage was obtained without proper notification, thus violating their right to privacy.

The Court ruled that while the footage was obtained unlawfully, it was still admissible as evidence. It emphasised that in civil proceedings, the illegality of obtaining evidence does not automatically render it inadmissible. The judge must consider if the use of such evidence is necessary for a fair trial and if the privacy infringement is proportionate to the need to establish the truth. Unlawfully obtained evidence may be admissible if essential for the proceedings, provided that a careful balance of rights is maintained. This ruling signifies a shift in evidentiary law, indicating that courts may prioritise the right to present evidence over fairness, subject to thorough analysis of competing interests.

In addition, other cases have shown that one party may formally request the production of certain documents and information in the course of ongoing proceedings and if the other party refuses, they may refer this refusal to a pretrial judge.

If the evidence is not submitted, the judge can be asked to order its disclosure.

Indeed, if one of the litigants in the civil proceedings does not comply with its obligation to provide spontaneously and in due time the evidence on which it has based its claims, the civil judge has the prerogative to issue an injunction. Article 133 of the Code of Civil Procedure thus provides that if the documents have not been submitted, the judge may be asked, without any formality, to order them to be submitted. If the litigant does not comply,

the judge will take into consideration all the consequences of this refusal to communicate the documents.

Electronic data, emails and other digital formats can also be crucial in technology disputes. Parties should ensure that digital evidence is collected and preserved in a manner that maintains its integrity and admissibility in court. While the same general rules apply to both electronic and traditional forms of evidence, special care must be taken with digital evidence to ensure it is not altered, corrupted or lost. Proper chain of custody procedures and the use of forensic experts can help maintain the integrity of electronic evidence.

Further, bailiffs play a critical role in the collection and preservation of evidence. They can be appointed to conduct on-site inspections, seize evidence or document the state of affairs through official reports, which hold significant evidentiary value in court.

Law stated - 30 August 2024

Privilege

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

There are no special issues regarding privilege in France in technology disputes or any sort of dispute. Unlike common law jurisdictions, France does not apply legal privilege, the purpose of which is to circumvent the confidentiality relying upon the attorney–client relationship. Even though informal discussions are being held to implement legal privilege into French law, no legislative action has been undertaken.

In France, attorneys are subject to professional secrecy and confidentiality of correspondence under the conditions laid down in articles 2, 2a and 3 of the National Internal Regulation and P.2.2.1 and P.3.0.1 of the Internal Regulation of the Paris Bar.

Under French law, there is a strict difference between in-house counsel and external lawyers. In-house lawyers do not benefit from professional secrecy and their communications can be disclosed in legal proceedings.

Law stated - 30 August 2024

Protection of confidential information

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

A party must disclose all documents in its control upon which it relies to support its case. However, there is no discovery or pre-trial disclosure procedure under French law. Hence, it is not compulsory for a party to produce documents that could be damaging to its case unless a production order is obtained from the judge.

France now legally protects business secrecy and there are specific provisions concerning judicial proceedings. According to article L151–1 of the French Commercial Code, information is protected as a business secret if:

- it is not generally known or easily accessible to persons familiar with this type of information because of their sector of activity;
- it has commercial value, actual or potential, due to its secrecy; or
- its holder reasonably attempts to protect it to maintain its secrecy.

According to articles L151–1, L151–2 and R153–2 to R153–10 of the French Commercial Code, for documents dealing with information to qualify as 'business secrets', the judge may decide to:

- be the only one permitted to examine the documents;
- limit disclosure (eg, disclose certain elements only, produce the information only in summary form, or restrict access to certain parts of the documents);
- hear the case and render the decision without a public hearing; or
- redact information that is covered by the obligation of secrecy in the court's decision.

Regardless of business secrecy and by derogation, article 435 of the French Code of Civil Procedure allows a judge to decide that proceedings shall take place or continue in a council chamber, if all the parties request so.

Law stated - 30 August 2024

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?

Expert witnesses can be used in France. They can either be judicial experts or extrajudicial experts.

Judicial expert

Regarding the expert's appointment, they may be appointed during the proceedings or before any trial, either at the request of one of the parties or ex officio by the judge if they do not have sufficient evidence to give a ruling. The decision by which the judge appoints the expert must justify the resort to expertise, specify the expert's mission, and set the time limit for the filing of their report. The expert's fee is determined by the court, which orders a provisional payment.

The expert's mission is set by the judge. The expert may not conciliate the parties. They must, however, allow the parties to submit observations on the elements taken into account and take them into consideration. Pursuant to articles 234 and 237 of the French Code of Civil Procedure, the appointed expert must carry out their mission with conscience, objectivity and impartiality.

Finally, the judge is not bound by the expert's conclusions, but will very often follow the expert's opinion.

In addition, when the expert has submitted their report, article 283 of the Code of Civil Procedure gives the judge the faculty to hear the expert if they do not find the report to be sufficiently enlightening.

Extrajudicial expert

Parties are free to request an expert to carry out an expert report, in which the other parties would not participate. The expert's report shall be admissible. The judge is, however, free to grant or not any probative value to such report, it being noted that its probative value will necessarily be lower than the probative value they would grant to a judicial expertise carried out in a contradictory or adversarial manner. The judge will have to corroborate their assessment with other evidence. In any case, to be admissible by the judge, the extrajudicial expert report must be discussed during the proceedings by the parties.

In a recent case, a judge recalled that a conflict of interest is defined as any situation of interference between the public interest and public or private interests that is likely to influence or appear to influence the independent, impartial and objective exercise of a function. In this case, a judicial expert and a private expert assisting one of the parties were both shareholders of the same IT consulting company. The judges considered that it was legitimate to think that the principle of loyalty between partners could have influenced an appointed expert who had given a favourable opinion on a technical note of his partner on a determining subject. On this basis, the technical part of the report was annulled. However, the court specified that, despite losing its expert value, the report could be used by the judge as a document produced and debated by the parties (CA Chambéry, ch. civ., 1st sect., 26 January 2021, No. 19/00143).

The Court of Cassation recalls that the judge cannot form their conviction solely based on an extrajudicial expert opinion (Civ Court., 25 May 2022, No. 21-12081). This solution is based on the idea that extrajudicial expertise does not benefit from a 'presumption of truth', which would be 'inherent to judicial expertise'.

Law stated - 30 August 2024

Time frame

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

The time frame for litigation proceedings relating to technology disputes is based on the standard civil procedure. It follows from article 781 of the French Code of Civil Procedure that the procedural time frame can be set in two different ways: a unilateral decision of the pre-trial judge, which imposes time limits on attorneys without discussion, or a consultation between attorneys to whom the pretrial judge will have given the opportunity to negotiate the terms of the agreement.

In setting up a time frame, and according to article 781 of the French Code of Civil Procedure, the pretrial judge must consider the nature, urgency and complexity of the matter and request the attorneys' opinions. The pretrial judge can also, after considering the relevance of such actions, postpone the procedure and give more time to the parties.

In addition, article 840 of the Code of Civil Procedure states that in the case of ordinary written proceedings, the president of the court may, in the case of urgency, authorise the claimant, at their own request, to summon the defendant on a fixed date. They shall determine, if necessary, the chamber to which the case shall be assigned.

The motion must state the grounds justifying the urgency and must include the claimant's conclusions and the evidence.

If these special proceedings are approved by the judge, the time frame for litigation proceedings is expected to be quite short.

It is also possible, in the event of imminent damage or unlawful disturbance, to summon the co-contractor before the interim relief judge. The judge examines the case in adversarial proceedings at a public hearing and issues a decision. This order is only provisional and does not have the force of res judicata. This means that the decision of the interim relief judge is not binding on the judges hearing the case on the merits. The interim order does not therefore settle the entire dispute. However, it is enforceable on a provisional basis.

Generally, the average duration of proceedings before the judicial court (first instance) is eight months and about three to four months for summary proceedings and ex parte proceedings. On appeal, the duration can extend to 15 months (2023 data).

Law stated - 30 August 2024

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?

Individuals with low resources may have their legal fees paid by the state, but each party assumes its own costs while proceedings are pending.

Third-party funding is permitted and is gradually gaining popularity in France.

It is not permissible to pay French lawyers a fee based solely on performance. However, fees can be based on results provided this does not constitute the whole fee. They must be combined with another method of remuneration (such as a flat fee or a reduced hourly rate).

Law stated - 30 August 2024

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?

The French Code of Civil Procedure distinguishes between legal costs and irrecoverable expenses. Usually, the losing party is sentenced to pay legal costs as well as a part of the lawyer's fees of the winning party ('irrecoverable costs'). However, the judge may decide that it is not fair to leave the losing party to bear the irrecoverable expenses. In addition, the judge has the discretion to determine, in fairness, the amount that the losing party must pay to the winning party.

Some insurance companies offer to cover legal costs.

Law stated - 30 August 2024

REMEDIES AND ENFORCEMENT

Interim remedies

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

There are no particular interim remedies pertaining to technology disputes. There are, however, interim remedies available for intellectual property rights infringement. It follows from articles L716-4 to L716-6 of the intellectual property code that the plaintiff in infringement proceedings may be granted, as part of summary proceedings (ex parte proceedings or adversarial proceedings), provisional measures, namely, measures intended to prevent an imminent infringement of the rights conferred by the title or to prevent the continuation of alleged acts of infringement, if necessary under penalty. An action before the court on the merits must however be brought after such interim remedies have been sought.

In urgent cases, an option would be to use the summary proceedings under article 834 and article 872 of the French Code of Civil Procedure. It is then possible to ask the judge to order all measures that are not subject to serious challenge. Even if there is a serious challenge, the judge could still order precautionary measures to prevent any imminent damage or cease an obviously unlawful disorder (articles 835 and 873 of the French Code of Civil Procedure).

Law stated - 30 August 2024

Substantive remedies

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

Substantive remedies related to technology disputes are usually based upon ordinary civil remedies. The principle of article 1240 of the French Civil Code is that every damage or harm caused by a person must be remedied by said person. However, in some cases,

specific remedies tend to fix infringements of intellectual property rights. For instance, in patent infringement litigations, the patent holder usually seeks to prevent the infringing product (which contains some or all the parts of the patent's subject) from being distributed and advertised on the territory in which they own intellectual property rights. Remedies will also regularly take the form of financial compensation for the loss of opportunity or clientele, the loss of investment, the restitution of the price and the diminution in value of the licensed technology due to non-compliance with the technology's scope of exploitation.

Damages will generally be based upon the technology licensor's gains or losses. To assess such a loss, several economic and judicial aspects are taken into account, such as the influence of the intellectual property right on the market, the capacity of production of the technology holder, and competition on the specific market. The unitary selling price of the intellectual property rights holder is also considered. Another important aspect when assessing the damage and the relevant remedy is the investment engaged for the exploitation of the licensed technology, especially when the intellectual property right holder can show evidence of the sums of money they invested. Claims for reimbursement of irrecoverable costs based on article 700 of the Code of Civil Procedure (ie, attorney costs) are also systematic.

In a recent ruling dated 26 January 2023 (No. 2021013526), the Lille Commercial Court emphasised that by storing the three backup replications in the same location as the main server, a data hosting company was liable for failing to comply with its contractual obligations under the automatic backup service agreement, and therefore its co-contractor was entitled to claim compensation for the damage resulting from this failure following the fire that occurred at the data hosting company's premises in March 2021. In this case, the company was required to pay €100,000 to the company that suffered the loss of data.

Law stated - 30 August 2024

Limitation of liability

21 | How can liability be limited in your jurisdiction?

The parties may enter into restrictive or exclusive liability contractual clauses. In principle, these clauses are valid in contractual matters. In this respect, article 1231-3 of the Civil Code emphasises that 'the debtor is only liable for damages which were provided for or which could have been provided for when the agreement was entered into, except in the case of gross negligence or wilful misconduct'. Thus, by way of exception, clauses limiting or exonerating liability are not valid in the event of liability in tort, gross negligence or wilful misconduct, or breach of an essential obligation of the agreement.

According to a recent case, gross negligence cannot result solely from a breach of a contractual obligation, even an essential one, and must be deduced from the debtor's conduct (TC Nanterre, 23 April 2019, No. 2018F00579).

A recent case gives an illustration of the derisory nature of a limited liability clause. The liquidator of a company sued a software publisher for damages following significant anomalies due to a software defect. The publisher opposed its limited liability clause that limits the compensation to €2,700. The Court of Cassation considered that this sum

constituted a manifestly derisory cap. The clause, therefore, contradicts the scope of the publisher's essential obligation to deliver functional software (CA Montpellier, 26 May 2021, No. 18/05776).

In a recent ruling dated 26 January 2023 (No. 2021013526), the Lille Commercial Court emphasised that clauses arising from adhesion agreements may grant an unjustified advantage to one of the co-contracting parties in the absence of any corresponding benefit for the customer. In this case, the court held that this limited liability clause creates a significant asymmetry between the obligations of each of the parties and unjustifiably transfers the risk to the other party, thus deeming the clause to be unwritten.

Further, clauses that excessively limit a party's liability in such a way as to create a significant imbalance could result in that party being held liable under article 442–1, I, 2º of the French Commercial Code.

Parties can include force majeure provisions in contracts to limit their liability. In most IT contracts, parties refer to the definition provided in the French Civil Code but in some cases, they expressly include specific events that may not be considered a force majeure event by French courts, such as strikes or cyberattacks.

However, the parties must ensure limitation of liability clauses does not amount to a total exemption of liability beyond the traditional scope of force majeure, which could deprive a contract of its substance or create a significant imbalance in the conditions mentioned above.

Absent any contractual provision with respect to liability, French law provides that indirect damages are excluded and that only the harm suffered can be repaired. It means that parties must be in the same situation as before the damage occurred.

Limitation of liability clauses will no longer apply if the contract is terminated or if the contract was entered into before the 2016 contract law reform (CA Montpellier, 22 May 2020, No. 17/03561 – CA Paris 9 September 2022, No. 20/03880). Since 2016, article 1230 of the French Civil Code has provided that 'the resolution does not affect the clauses relating to the settlement of disputes, nor those intended to have effect even in the event of resolution, such as confidentiality and non-competition clauses'. This may be interpreted to include the limitation of liability clauses. As a precaution, it is recommended to expressly provide for the survival of the clause.

The judge will try to determine the appropriate amount to repair the damage. French law prohibits personal enrichment in a liability action; accordingly, under French law, punitive damages are prohibited. However, case law accepts the exequatur of foreign arbitral awards or court decisions that have pronounced punitive damages if they are not disproportionate with regard to the damage suffered.

Since July 2024, these types of clauses may be opposed to third parties to the contract who would like to rely on a contractual breach that has caused them prejudice.

Law stated - 30 August 2024

Liquidated damages

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

To be valid, liquidated damages clauses must be expressly stipulated in the contract and known by the parties. The application of the clause is automatic as soon as a breach is established. The creditor must give the debtor formal notice to perform before invoking this clause unless the non-performance is final.

A judge may, however, review the amount provided in the liquidated damages clause if they consider that the amount is manifestly excessive or derisory. The parties may not derogate from this intervention by the judge. Moreover, in the event of partial non-performance of the obligation, the judge may moderate the compensation provided in proportion to the obligation actually performed.

Law stated - 30 August 2024

Enforcement

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

The means of enforcement available and commonly used by successful litigants in technology disputes are the same as in standard disputes and are ruled by the French Civil Procedure Code. According to article 500 of the Code, a decision obtains res judicata when it is no longer subject to an appeal. The decision then becomes enforceable if accompanied by a formula of enforcement (article 502). Finally, the decisions can be enforced against those to whom they are opposed only if they are notified to them (article 503). It must be noted that with a recent reform of French civil procedure (December 2019), first instance decisions can, in principle, be temporarily enforced, unless otherwise provided by the law (article 514).

Law stated - 30 August 2024

ALTERNATIVE DISPUTE RESOLUTION

Available ADR mechanisms

24 What alternative dispute resolution (ADR) mechanisms are available and typically used for technology disputes in your jurisdiction?

Several alternative dispute resolution (ADR) methods exist, but none are specific to technology disputes.

Conciliation is an advised settlement, which is free and involves a judicial conciliator.

Mediation differs from conciliation in that mediators are judicial officers and the procedure involves a fee.

Settlement is another ADR mechanism, as set out in article 2044 of the French Civil Code. This consists of a binding agreement between the parties in a dispute to follow mutual commitments, including withdrawing from any pending action or waiving any right to sue the other party, to end the dispute.

Arbitration is also available through an arbitration clause or through a dedicated agreement when a dispute arises.

The participatory procedure is a lesser-known form of ADR. In a participatory procedure agreement, parties to a dispute agree to work jointly and in good faith to resolve their dispute amicably or to settle it. This agreement is entered into for a fixed period (article 2062 of the French Civil Code).

Two new ADRs have been available in France since 2023:

- The fragmentation of civil trials (la Césure): during a trial in which representation by a lawyer is mandatory, the parties may jointly request a fragmentation of the trial, where the court first rules on certain issues only rather than the whole dispute (eg, a ruling on liability only, but not on damages). This allows the judge to rule on only certain central points of the dispute. The parties can then reach an amicable agreement on the other points if they wish. This ADR has been practised for several years before the Judicial Court of Paris in intellectual property matters following agreements with specialised lawyers. The Third Chamber of the Judicial Court of Paris signed a procedural protocol with the Paris Bar after a collaborative approach providing several examples of 'fragmentation'. The court may rule on the principle of infringement and, if established, set only provisional damages. The parties may then discuss, on the basis of the judgement, the quantum of the indemnity due to the holder. The same applies to decisions on the admission of evidence. Moreover, the fragmentation allows the court to rule more quickly on whether or not the alleged acts of infringement were committed in France, which saves the parties valuable time.

- Amicable settlement hearing (l'Audience de Règlement Amiable): amicable settlement hearings are becoming increasingly common before judicial courts and have recently been introduced before commercial and appeal Courts. The judge in charge of ruling on a matter may chose (the decision is discretionary) to hold one or more hearings to attempt to find an amicable settlement. This hearing is entrusted to a different judge, who will not rule on the dispute and is confidential. Parties must personally attend such hearings. They may take place at the request of one of the parties or be decided ex officio by the judge. The trial is interrupted for the time of the settlement hearing. The judge plays a central role: they recall the main principles of law and caselaw applicable to the matter to allow the parties to refine their positions and bring them together towards an agreement. The parties may ask the judge to formalise the terms of their agreement in minutes that will be binding. The Third Chamber of the Judicial Court of Paris, for intellectual property disputes, is inspired by the practice of the Boards of Appeal of the European Union Intellectual Property Office: the dispute can be resolved quickly and is conducted by a judge in conciliation or in a short mediation.

Law stated - 30 August 2024

Recognition and enforcement

25

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

France is a signatory party of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Under the New York Convention, each signatory party can recognise and grant enforcement of an arbitral award in accordance with its national procedural rules.

According to article 1514 of the French Code of Civil Procedure, a foreign arbitral award is enforceable in France if it complies with international public policy. The international public policy with regard to which a judge's review is carried out is understood to be the conception of the French legal system, that is, the values and principles of the French legal system cannot be disregarded even in an international context. Case law has made it clear that the review of the compatibility of an arbitral award with international public policy is limited to the flagrant, effective and concrete nature of the alleged violation.

Law stated - 30 August 2024

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?

There have been no recent specific trends affecting the conduct and resolution of IT disputes, but several significant decisions have been rendered, which are as follows.

- By storing the three replicated backups in the same location as the main server, the data-hosting company failed to comply with its contractual obligations under the automatic backup service agreement, so that its co-contractor is entitled to claim compensation for the damage resulting from this failure following the fire at the company's premises (TC Lille, 26 January 2023, No. 2021013526).
- The Paris Court of Appeal ruled that a customer could not blame their service provider responsible for the development of mobile and internet applications for failing to fulfil its contractual obligations because they had not expressed their specific needs and objectives and had not carried out any tests (CA Paris, 6 January 2023 *Oopet/Dual Media Communication*).
- The court refused to terminate a maintenance agreement for software supplied despite malfunctions, because the customers had continued to use it. The court found that the agreement had been partially performed and, as a result, only ordered that the customers be compensated by a 40 per cent reduction in their invoices for services provided during the three-year period (TC Rennes, 14 October 2021, *GH Diffusion Emballages and others v Alticap and others*).
- A software supplier was found to be in breach of its obligation to deliver software in accordance with regulations, although the customer did not check whether the software had been approved when signing the contract (Cass. com., 9 December 2020, No. 19-10.119).

- The service provider has an obligation to inform, warn and advise its client, which is a reinforced obligation of means that must be assessed according to the complexity of the service provided and the client's competence and tempered by the duty of collaboration imposed on the latter (CA Caen, 22 April 2021, No. 19/00629).
- A licensor breached its duty to advise the other party by not inquiring about all the actual needs of the future licensee in order to be able to inform the latter about the suitability of the offered software for the intended use (CA Lyon, 3e ch. A, 24 September 2020, No. 18/00258).
- A customer does not fail to collaborate with a provider if the provider considers that the information provided by the customer is contradictory or incomplete, or that the customer failed to warn the provider as soon as possible by explaining precisely what it expects from the provider and asking the provider to correct its methods (CA Rennes, 3e ch. com., 23 March 2021, No. 19/00243).
- A service provider intervening in the supply, installation and parameterisation of accounting software in replacement of a previous version is not bound by an obligation of result since the success of the installation would depend on the active collaboration of the customer (CA Caen, 22 April 2021 No. 19/00629).
- A technical part of an expert's report was found to be void because the judicial expert was a shareholder of the same IT consulting company as the private expert assisting one of the parties. The judges considered that it was legitimate to think that the principle of loyalty between partners could have influenced the legal expert. However, the court specified that despite losing its expert value, the report could be used by the judge as a document produced and debated by the parties (CA Chambéry, ch. civ., 1st section, 26 January 2021, No. 19/00143).
- The judicial authority, on request or in summary proceedings, may order ISPs to take all appropriate measures to prevent or halt damage caused by the dissemination of content on the internet. The matter may be referred directly to the judicial authority and the admissibility of a claim against ISPs does not depend on the hosting service providers, publishers or authors of the content having first been implicated or on the demonstration that it is impossible to act against them (Cass. civ. 1ère, 18 October 2023, No. 22-18.926).
- After recalling that non-compliance with the licence terms of free software is an infringement, the Paris Court of Appeal details the various obligations stipulated in the GNU GPL V2 licence, one of the most used, obligations to be respected by users of software distributed under this licence (CA Paris, February 14 2024, No. 22/18071).

Law stated - 30 August 2024

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Summary

UPDATE AND TRENDS

Recent developments and trends

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?

Business-to-business (B2B) technology contracts tend to be complex, long-term agreements that combine elements of different types of contracts. For example, an IT project contract for the implementation of business software may include elements of a contract for work. This is the case if the provider contractually undertakes to achieve a specific result (eg, in the form of the successful implementation of the software). However, the contract may also be structured as a contract for service if the provider does not undertake to achieve a specific result but merely to perform certain activities, such as consulting the customer on the implementation of the software. Irrespective of this, the contract may contain further elements of a contract for service (eg, regarding the necessary software training of the customer) and elements of a purchase or lease agreement (eg, regarding the necessary software licences).

For this reason, it is often difficult to determine which provisions apply to the technology contract. However, this has a major impact on the content and scope of the contractual rights and obligations of the parties.

With this background, the following issues commonly arise in connection with B2B technology contracts:

- the schedule agreed between the contracting parties fails to be met, as agreed deadlines and milestones are not reached (in time);
- the customer is of the opinion that the provider's performance is not of sufficient quality;
- a dispute arises regarding:
  - the agreed scope of performance;
  - the legal nature of the agreed performances; or
  - the agreed allocation of responsibilities; or
- one of the contracting parties adopts strategic changes during the course of the contractual relationship and therefore loses interest in the commenced project.

Due to the factual and legal complexity of extensive IT projects, court litigation usually requires great expenditure, both in terms of time and funding. Therefore, attempts should first be made to settle the dispute out of court through negotiations.

During the time the contracting parties are engaged in out-of-court negotiations regarding their reciprocal claims in connection with the contract, the limitation period for these claims is suspended pursuant to section 203 of the German Civil Code. If the negotiations fail, these claims will then become time-barred at the earliest within three months. In this respect, the parties should ensure that there is sufficient documentation to prove the

exact duration of the conducted negotiations in a potential subsequent legal dispute to demonstrate the particular time period for which the limitation period has been suspended.

In addition, the parties can also agree as part of their settlement negotiations that the limitation period will be suspended for a longer period than stipulated by section 203 of the German Civil Code. This can serve to reduce the time pressure on the parties in enforcing their rights and therefore contribute decisively to the success of the settlement negotiations.

Law stated - 16 September 2024

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?

Under German law it is necessary to distinguish between the right to terminate a contract and the right to declare rescission from a contract. Termination has the legal consequence that a contract is ended *ex nunc*, namely with effect for the future as of the time the termination takes effect. Rescission, on the other hand, obliges the parties to return the performances already rendered under the contract or, if this is not possible, compensate the value of the respective performances. However, comprehensive restitution of the performances rendered under a complex long-term IT project contract is regularly associated with considerable difficulties.

Typically, IT project contracts contain provisions on termination. If the prerequisites specified in the relevant contractual provisions are met, the respective contractual party has a contractual right of termination. Usually, the contract stipulates that the notice of termination be in written form. Also, there may be a period of notice to be observed.

Unless contractually excluded, recourse to statutory termination rights may also be possible. In this context, the specific nature of the contract is of particular relevance.

In the case of contracts for work, section 648 of the German Civil Code applies. Until completion of the work, the customer may terminate the contract at any time. However, the provider is entitled to payment of the agreed remuneration, deducting the expenses saved by the provider as a result of the termination.

In addition, regardless of the specific nature of the contract, termination for cause without observing a termination period is possible (sections 314, 626 and 648a of the German Civil Code), for example in the event of a (justified) loss of confidence in the ability or willingness of the contractual partner to fulfil its obligations. Such termination generally requires the fruitless expiry of a remedial period or fruitless admonition; in addition, the termination must be declared within a reasonable period after becoming aware of the cause for termination.

In general, the statutory provisions do not require any particular form of termination notice. Nevertheless, at least text form is advisable for evidence purposes.

When deciding whether and how to terminate a technology contract, a wide range of considerations must be taken into account, in particular, from the customer's point of view.

First, before terminating a technology contract, the customer should evaluate the available alternatives to the current provider (eg, is there an existing IT solution available on the customer's side that could continue to be used or is it possible to commission an alternative provider in sufficient time?). In this respect, it has to be taken into account that the alternative procurement of services may initially cause considerable additional costs for the customer (irrespective of any subsequent compensation (eg, by way of judicial enforcement of claims for damages against the provider)).

In addition, the customer should consider the extent to which dependencies on the current provider may have already been established as a result of the performance of the contract to date. For example, the software implementation owed by the provider may already have been successfully completed with regard to separable, independent parts of the project and the software may, to this extent, already be in operation with the customer. In such a case, the effects of the termination on the overall project must be taken into account. It may have to be ensured that the provider continues to maintain software or hardware that has already been delivered or implemented and that the corresponding software licences persist. Therefore, it may be expedient to declare the termination of only a separable part of the overall contract.

If different termination rights come into consideration, it needs to be decided which termination rights are to be exercised and how the terminations to be declared will relate to each other. For example, it is possible to declare a primary termination and simultaneously declare further terminations on a subordinate basis, subject to the condition that the respective primary termination should be invalid.

Law stated - 16 September 2024

Without-prejudice communications

3 Is it possible to have conversations aimed at settling a dispute that cannot subsequently be used as evidence in legal proceedings if the dispute is not resolved? If so, what formalities are required? If not, how should confidentiality be preserved through mutual agreement?

To ensure the confidentiality of settlement negotiations, the parties may conclude a confidentiality agreement. No special form is required in this respect, but the agreement should at least be concluded in text form for evidence purposes. However, the agreed obligation to maintain confidentiality does not de facto prevent the parties from disclosing information from the negotiations in breach of their contractual obligations and from presenting such information in potential subsequent court proceedings. In general, there is also no prohibition for the court to use information disclosed in violation of the confidentiality agreement as evidence in the court proceedings.

Therefore, to prevent the risk of disclosure of information, the parties may attempt to ensure compliance with confidentiality by agreeing on a contractual penalty in the event of a breach of the obligations under the confidentiality agreement. However, where contractual penalty provisions are not negotiated individually between the parties, but are unilaterally imposed by one party and therefore constitute general terms and conditions within the meaning of section 305 et seq of the German Civil Code, contractual penalty provisions that do not

differentiate according to the type, weight and duration of the contractual violations are deemed void, as they constitute an unreasonable disadvantage to the contractual partner, pursuant to section 307 of the German Civil Code. In addition, the minimum amount of the contractual penalty must be appropriate even for the slightest conceivable breach of contract.

Law stated - 16 September 2024

Settlement formalities

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

Generally, under German law, settlement agreements cannot be enforced immediately. Rather, enforcement requires a separate lawsuit aimed at obtaining a judgment in which the adverse party is ordered to fulfil its obligations under the settlement agreement. This judgment can then be enforced at the latest after it has become final and legally binding or, if applicable, already preliminarily.

However, exceptions apply to the following types of settlement agreements.

- The parties may conclude the settlement agreement before any German court; pending court proceedings are not required. Such a settlement agreement concluded before a German court is immediately enforceable pursuant to section 794, paragraph 1, No. 1 of the German Code of Civil Procedure.
- The parties may conclude the settlement agreement before a German notary. For such settlement agreement to be enforceable, it is particularly required that the debtor subjects itself expressly to immediate enforcement (section 794, paragraph 1, No. 5 of the German Code of Civil Procedure).
- A settlement agreement concluded between the parties' attorneys in the name and with power of attorney of the parties may be judicially declared enforceable at the request of one of the parties. This requires in particular that the debtor subjected itself expressly to immediate enforcement and that the settlement agreement is filed with a district court with which one of the parties has its general place of jurisdiction at the time of the conclusion of the agreement (section 796a of the German Code of Civil Procedure).

Law stated - 16 September 2024

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?

With regard to common causes of action, a distinction must be made between the provider and the customer.

Regarding licence contracts, typically, a licensee's claims for licence fees are brought by a multi-stage lawsuit (section 254 of the German Code of Civil Procedure), in which the court proceedings are divided into different (usually three) stages. At the first stage, only information about the extent of usage is sought, since the provider might not be aware of the actual usage of the software. At the second stage, an affidavit confirming the accurateness of the information provided at the first stage is requested. At the third stage, the licenser seeks payment based on the information provided. However, multi-stage lawsuits might become less important with the rise of cloud-based software that allows licensees to monitor the actual usage of the software.

With respect to contracts for hardware or software design and implementation, the provider generally seeks payment of outstanding remuneration from the customer. Frequently, the customer (partially) refuses payment of remuneration, claiming that the work to be created by the provider has not yet been accepted by the customer or that the performances rendered by the provider are defective.

For the provider's claim for payment of remuneration to be successful, it must be established in particular that the provider has duly (ie, completely and free of defects) rendered the performances owed under the contract.

The customer generally seeks compensation for damage from the provider and, in this context, also requests reimbursement of payments already rendered. The customer regularly claims to have suffered damage as a result of delays, defects or non-performance on the part of the provider and that expenses incurred in reliance on the receipt of the proper performance have now become futile. In addition, the customer frequently demands payment of agreed contractual penalties from the provider.

For the customer's claim for damages to be successful, the following elements must be established:

- a violation of contractual obligations by the provider;
- generally, the fruitless expiration of a reasonable grace period set by the customer;
- the provider's responsibility for the violation of its contractual obligations (which is in most cases – rebuttably – presumed by law);
- the occurrence of damage or futile expenses; and
- causality of the provider's violation of its contractual obligations for the damage or the futility of the expenses incurred.

Pre-contractual statements of the provider (eg, in the course of a tendering procedure or in advertising) may under certain circumstances constitute a quality agreement or at least define the expected quality of the performance. If the quality of the actual performance then deviates negatively from the pre-contractual statements, this may give rise to warranty claims of the customer.

Also, non-contractual claims are available in principle. Pursuant to section 311, paragraph 2 of the German Civil Code, the commencement of contractual negotiations and similar business contacts may already establish pre-contractual obligations. In addition, claims

based on tort law under section 823 et seq of the German Civil Code may also be considered. This generally requires a violation of one of the conclusively defined legal interests (eg, property). Further, culpability on the part of the adverse party is required, which is not presumed by law but must be demonstrated by the claimant.

Law stated - 16 September 2024

Statutory claims

6 Has your jurisdiction enacted any legislation providing additional protection for business purchasers of hardware, software or associated licences? What practicalities should be considered when bringing statutory claims?

German statutory law does not contain any particular provisions that provide additional protection specifically for business purchasers of hardware, software or associated licences.

A duty of good faith generally applies in German contract law under section 242 of the German Civil Code. For B2B transactions, the duty of 'diligence of a prudent businessman' pursuant to section 347 of the German Commercial Code also applies.

Protection for the customer can generally arise from German law on general terms and conditions under section 305 et seq of the German Civil Code. In B2B transactions, contractual provisions are, in principle, considered to be general terms and conditions if the provisions have not been individually negotiated between the parties but have been unilaterally imposed by one of the contracting parties. If the general terms and conditions are not transparent or cause an unreasonable disadvantage to the contractual partner, they are deemed void. This may, for example, affect contractual provisions on the limitation or exclusion of the provider's liability. In addition, doubts in the interpretation of general terms and conditions are to the detriment of the party that has unilaterally imposed the conditions.

Law stated - 16 September 2024

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?

For the success of the customer's defence against the provider's claim for remuneration, the specific nature of the contract concluded between the parties is usually of decisive importance. In the case of a contract for work, the customer may argue that the provider's claim for remuneration is not yet due because the work to be created has not yet been accepted by the customer or the specific result owed by the provider has not yet been achieved. In the case of a contract for service, under which the provider does not owe the achievement of a certain result, but only the performance of certain activities, the customer, for his or her defence, usually needs to explain in detail which specific quality of the activities to be performed by the provider was agreed upon and why the quality of the activities

actually performed by the provider deviated negatively from this, which often poses great difficulties.

The provider usually objects to the customer's claims for damages by arguing that the specific performances that were allegedly not rendered (in time) or not rendered in a proper manner were not contractually owed by the provider in the first place. Therefore, the precise scope of the provider's contractual obligations needs to be elaborated. Also in this respect, the nature of the contract is of decisive importance. Concerning complex and extensive IT project contracts, a particular challenge in determining the precise scope of the provider's contractual obligations is that the specific performances owed by the provider usually cannot yet be defined by the parties in detail at the start of the contract and are therefore to be defined jointly by the parties only in the course of the project.

The provider may also dispute the damage asserted by the customer, which leads to increased requirements for presentation on the part of the customer. If the customer claims compensation for futile expenses incurred in reliance on the receipt of the performance, the provider may also argue that the expenses were not necessary. Also, the provider may claim that the customer was contributorily negligent with regard to the damage incurred and thus the claim for damages has to be at least reduced in accordance with the customer's share of contributory negligence.

Further, the provider may invoke contractual provisions stipulating a limitation of liability, to the extent that such limitation is legally permissible. The provider then must present and prove the factual preconditions required for these provisions to apply.

Law stated - 16 September 2024

Limitation period

8 | What limitation periods apply for bringing claims in your jurisdiction?

In general, the regular limitation period of three years pursuant to section 195 of the German Civil Code applies. In accordance with section 199 of the German Civil Code, the limitation period generally runs from the end of the year in which the respective claims arose and the creditor became aware of the circumstances giving rise to the claim or should have become aware of them without gross negligence.

In the case of purchase agreements or a contract for work, warranty claims based on defective performance, including claims for damages and reimbursement of expenses, generally become time-barred two years after delivery or acceptance (sections 438 and 634a of the German Civil Code).

Deviating contractual provisions on the limitation period are possible to the extent permitted by law. Unless individually negotiated between the parties, the period may generally not be less than one year.

Law stated - 16 September 2024

LITIGATION PROCEEDINGS

Pre-action steps

9 What pre-action steps are required or advised before bringing legal action?

The German Code of Civil Procedure does not, in general, set out any mandatory pre-action steps that need to be taken before bringing legal action. However, limited to some minor disputes (typically not relevant to technology disputes) and pursuant to the applicable state law, proof of an unsuccessful settlement attempt before a conciliation body is required to file a lawsuit.

It is advisable to request that the defendant definitively and unambiguously perform the requested act or omission before filing an action, which puts him or her in default (at the latest). While this is not a compulsory requirement to bring an action, it avoids the imposition of costs in the event of an immediate acknowledgement by the defendant. Section 93 of the German Code of Civil Procedure provides that the plaintiff shall bear the costs of the proceedings should the defendant not have given cause for an action to be brought and if he or she immediately acknowledges the claim.

Law stated - 16 September 2024

Competent courts

10 Does your jurisdiction have a specialist court or other arrangements to hear technology disputes? Are there specialist judges for technology cases?

In general, there is no specific court or judge in charge of hearing technology cases. However, regarding proceedings for infringement of intellectual property rights, state law usually assigns jurisdiction to one regional court, which is then either competent for disputes within the entire state or a district of a higher regional court. At those regional courts, disputes are assigned to specific chambers.

Recently, specialised technology chambers have been established within a handful of regional courts. The regional courts of Hamburg and Stuttgart both have a specialised chamber for IT law. In North Rhine-Westphalia, the Regional Court and the Higher Regional Court of Cologne have had exclusive jurisdiction for IT proceedings with a value in dispute of more than €100,000 since 1 January 2022. In addition, various regional courts have a special jurisdiction for communication and information technology in combination with other competences. These are often located within the chambers for copyright or press- and media-related matters.

Further, chambers for international commercial disputes where oral hearings can be held in English are available, for instance, in Frankfurt, Hamburg, Stuttgart, Mannheim and Berlin. Parties to a technology contract may choose those chambers through a jurisdiction clause in their contracts. A current draft bill to strengthen the judiciary in Germany through the introduction of commercial courts and English as the (second) court language in the civil courts intends to create the possibility for states to set up senates at the higher regional court, where commercial proceedings with an international dimension and an amount in dispute of more than €1 million can be conducted. Importantly, the draft bill envisages that,

if agreed by the parties, the higher regional court will be competent in the first instance. Both the chambers for international commercial disputes and the draft bill aim to promote Germany as a venue for high-profile disputes (including technology disputes), as it allows international companies to settle their disputes on a level playing field.

Law stated - 16 September 2024

Procedural rules

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

No specific procedural rules apply to technology disputes in Germany.

Law stated - 16 September 2024

Evidence

12 | What rules and standard practices govern the collection and submission of evidence in your jurisdiction?

In general, there is no standard of disclosure or discovery under German law. The German Code of Civil Procedure is, in fact, characterised by the principle of production of evidence, meaning that it is for the parties to state the facts of the case and produce the respective evidence, in the manner and to the extent that is in their interest, thus setting the subject matter of the dispute and binding the court to it.

Law stated - 16 September 2024

Privilege

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

No special issues arise in Germany in connection with privilege in technology disputes. Privilege in the form of the Anglo-Saxon legal privilege or the US attorney–client privilege protecting the correspondence between an attorney and its client as well as exchanged documents is alien to German law.

In Germany, attorneys are subject to professional secrecy and confidentiality under section 43a, paragraph 2 of the German Federal Lawyers' Act and section 2 of the Professional Rules for Attorneys at Law. This applies to all information obtained by the attorney in connection with a mandate.

In criminal proceedings, the duty of confidentiality is supplemented by the prohibition of seizure under section 97, paragraph 1 of the German Code of Criminal Procedure-. This intends to protect the defendant from information being seized that is subject to the attorney's duty of confidentiality.

Law stated - 16 September 2024

Protection of confidential information

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

Given that the German law on civil proceedings does not provide for discovery, a party can choose which documents it discloses to support its case. Therefore, it is not compulsory for a party to produce documents that could be damaging to its case.

Law stated - 16 September 2024

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?

Expert witnesses can be used in Germany. Expert witnesses can be appointed either at the request of a party by the court or, in rare circumstances, ex officio by the court if it finds it does not have sufficient evidence to render a ruling.

However, parties can also use an expert (in the lead up to a legal dispute) to have a party expert opinion prepared. However, these are not classified as expert opinions in the sense of the German Code of Civil Procedure but (merely) as qualified party submissions.

Law stated - 16 September 2024

Time frame

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

Given the increased complexity associated with technology disputes, they usually take at least 18 months and often much longer. It depends, in particular, on whether the court appoints one or more experts.

Law stated - 16 September 2024

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?

Besides self-funding litigation, there are several options available.

Individuals with limited resources can apply for legal aid to have their legal fees covered by the state – an action may even be brought subject to the (suspensive) condition that legal aid be granted.

German lawyers are prohibited from financing their own proceedings and contingency fees can hardly be effectively agreed (section 49b, paragraph 2 of the Federal Lawyers' Act). The possibility of agreeing a contingency fee was further specified and restricted by the new section 4a of the German Act on the Remuneration of Lawyers, which was introduced in October 2021. For example, this is only permissible if the mandate relates to a monetary claim of no more than €2,000 or if, in the individual case, the client would be deterred from pursuing legal action if a contingency fee were not agreed.

Third-party funding is permitted and has been around in Germany for about 20 years. The market has, however, recently gained traction and is rapidly gaining popularity. This is, in part, due to legal technology as well as stray claims (eg, in antitrust law), and new possibilities for mass actions such as those brought against major original equipment manufacturers in the aftermath of the investigation of the United States Environmental Protection Agency into the manipulation of diesel engines (Dieselgate). The London-based litigation funder Burford Capital is said to have provided approximately €30 million to fund claims against Volkswagen. Litigation funders usually agree with plaintiffs to receive a percentage as a share of the amount of damages claimed.

Law stated - 16 September 2024

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?

Section 91, paragraph 1 of the German Code of Civil Procedure provides that the losing party must bear the costs of the legal dispute, in particular any costs incurred by the opponent. In accordance with paragraph 2, sentence 1, this also encompasses the statutory fees and expenditures under the German Act on the Remuneration of Lawyers of the attorney of the prevailing party. The claim for compensation of the prevailing party, however, is limited to this extent – higher amounts on the basis of a fee agreement of the party entitled to reimbursement with its legal representative are not to be reimbursed.

Adverse costs insurance, covering a party's risks that it may have to pay its own or the opposing party's legal costs, is available. Like most other jurisdictions, after the event insurance (ie, insurance taken out during or in the lead up of litigation) is the most common type of adverse costs insurance.

Law stated - 16 September 2024

REMEDIES AND ENFORCEMENT

Interim remedies

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

In Germany, there are no interim remedies specific to technology disputes. Rather, technology disputes are part of the general interim proceedings in accordance with section 935 et seq of the German Code of Civil Procedure. On this basis, there is a wide range of possible interim decisions. In technology disputes, the parties often seek injunctions to prohibit further sales or other business-related conduct.

Law stated - 16 September 2024

Substantive remedies

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

In Germany, there are no substantive remedies specific to technology disputes. For contracts involving the purchase or the implementation of hardware or software, plaintiffs usually seek fulfilment of the contract or damages.

For disputes involving intellectual property, the substantive remedies commonly sought are cease-and-desist orders, information or damages. Plaintiffs usually seek:

- to prohibit other parties from producing or selling technology (products);
- to obtain information about the previous number of sales and other business statistics; and
- damages based on this (previously obtained) information. Often, as a first step, plaintiffs will only request the determination that the defendant is liable to pay damages and then, in a second step, will demand a certain amount of damages.

In technology disputes, especially those involving infringement of intellectual property, three methods exist to quantify damages. The plaintiff has the choice of which method is to be applied. First, the damage, which has actually occurred, can be determined by the 'difference hypothesis'. This involves examining what the financial situation would have been without the damaging incident and comparing it to the actual financial situation.

Alternatively, the plaintiff can demand the profit achieved by the defendant based, for example, on the infringement of an industrial property right.

Finally, it is possible to determine a customary and reasonable licence fee – for example, for an infringement of an industrial property right, on the basis of which the damages are then quantified.

Law stated - 16 September 2024

Limitation of liability

21 How can liability be limited in your jurisdiction?

It is generally possible to limit liability to a certain extent in Germany. Such limitation of liability can be agreed individually within the framework of the contract or by using general terms and conditions. The legal limits of general terms and conditions are stricter for the user than in the case of individually negotiated clauses.

Notably, an exclusion of liability, even under an individual agreement, is only possible to the extent that with regard to intent, a full exclusion of liability, the determination of a maximum amount of liability or a shortening of the limitation period cannot be agreed upon in advance. In addition, liability of the producer with regard to claims under the Product Liability Act cannot be excluded or limited in advance.

When agreeing on a contract using general terms and conditions, liability of the user can only be limited restrictively. A clause intended to limit liability for negligent injury to life, body or health or for grossly negligent breaches of duty is invalid. Further, liability for a breach of essential contractual obligations cannot be limited for cases of negligent conduct. Statutory warranty rights arising from a purchase contract for newly manufactured goods or a contract for work and services can only be limited, but not be entirely waived, and respective limitation periods can only be reduced to a very restrictive extent. In the event of conflicting general terms and conditions of both contracting parties, only those clauses that do not contradict each other shall become effective; with regard to the other clauses, there is a dissent. Consequently, the conflicting clauses are invalid and the corresponding statutory provisions govern the intended scope of regulation.

Law stated - 16 September 2024

Liquidated damages

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

In Germany, it is generally possible to agree on liquidated damages in contracts. The purpose of such a clause is to make it easier for the plaintiff to prove and quantify damages and thus to prevent sometimes lengthy and expensive litigation. However, the liquidated damages must not be set at an unreasonably high level. Also, it must still be possible for the contractual partner to prove that the plaintiff has suffered less damage than specified, or none at all. Within the framework of general terms and conditions, contractual penalty provisions, which do not differentiate by type, weight and duration of the violations, are deemed void, as they constitute an unreasonable disadvantage to the contractual partner. Also, the minimum amount of such contractual penalty must be appropriate even for the slightest conceivable breach of contract.

Law stated - 16 September 2024

Enforcement

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

In technology disputes, the usual means of enforcement in accordance with the German Code of Civil Procedure are available.

Monetary claims, such as claims for damages (eg, in case of non-compliance with a contractual obligation), are usually enforced by means of an attachment and transfer order to be applied for at the local court, which is typically the local court in whose district the debtor has its place of residence or business seat. This allows the creditor to access a third party's monetary claim to which the debtor is entitled. Being relevant for technology companies, the creditor of a judgment may attach the debtor's intellectual property rights, such as patents, which then can be realised by either public auction or sale. Further, the debtor's claims under an internet domain (not the domain itself) are subject to attachment. Movable and immovable property can also be used to settle a monetary claim. To satisfy the creditor of a judgment with the realisation of movable property, a bailiff seizes certain physical objects of the debtor at the creditor's request and takes them into custody. Finally, these objects are sold at a public auction. The creditor then receives the proceeds to satisfy its claim. Enforcement into immovable property is done either by entering a forced mortgage in the register of real estate, by forced administration of the real estate or by a forced sale.

In the event of non-compliance with a cease-and-desist order, the plaintiff can file a motion for coercive penalties, requesting the imposition of coercive fines or coercive detention. The penalty to be imposed is at the discretion of the court. In the case of a first-time infringement, a coercive fine is usually imposed. Repeat violations can lead to coercive detention.

Law stated - 16 September 2024

ALTERNATIVE DISPUTE RESOLUTION

Available ADR mechanisms

24 What alternative dispute resolution (ADR) mechanisms are available and typically used for technology disputes in your jurisdiction?

In general, several mechanisms of alternative dispute resolution are possible, such as mediation, conciliation, arbitration and adjudication. While mediation and conciliation are aimed at achieving an amicable solution between the parties themselves with the support of a third party, in arbitration and adjudication, a third party makes a decision comparable to a court judgment.

In particular, in long-term software project agreements, the parties agree to solve potential disputes by conciliation. Often, the parties chose the German Association of Law and Informatics (DGRI) as conciliator. The DGRI operates a conciliation office to resolve disputes relating to information and communications technology by way of mediation, conciliation proceedings and, if necessary, arbitration proceedings. The conciliation team consists of an IT expert and a lawyer qualified in IT law.

Law stated - 16 September 2024

Recognition and enforcement

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

In accordance with section 1061 of the German Code of Civil Procedure, the recognition and enforcement of foreign arbitral awards in Germany is governed by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). Under this convention, an arbitral award may be recognised and enforced in accordance with the applicable national procedural rules.

The procedure for recognition and enforcement of foreign arbitral awards follows that for recognition and enforcement of domestic arbitral awards (ie, section 1061 et seq of the German Code of Civil Procedure applies). Finally, the general provisions of the German Code of Civil Procedure additionally apply if they are compatible with the character of the declaration of enforceability proceedings as a cognitive procedure of its own kind.

Law stated - 16 September 2024

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?

There have been notable legislative changes recently. This includes, for example, the Data Act is a European regulation that came into force on 11 January 2024. Such covers, inter alia, data portability, fair access to data and facilitation of data sharing. Cloud providers operating in the EU will need to ensure that their services comply to the new rules, which could require significant changes to their offerings and operations. The Data Act emphasises to include specific dispute resolution mechanisms in contracts and promotes the use of alternative dispute resolution.

On a different note, there had been notable court decisions recently.

- The ECJ held that Article 23 I and II of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted to mean that a jurisdiction clause is valid if it is contained in the general terms and conditions, which is then referred to by a provided hyperlink to a website within the contract. This provided hyperlink must make it possible to view, download and print those general terms and conditions. Further, the party to whom the clause is addressed must not have been asked to accept those general terms and conditions by clicking on a box on that website.

- The Higher Regional Court of Munich held that a temporary provision of standard software for a fee is to be regarded as a rental agreement. If the software manufacturer recognises the customer's lack of experience with a booking programme, he must clarify the nature of the customer's business and establish

the requirements of the booking software's use for this purpose. In the event of cancellation without notice, due to failure to provide information, the customer is entitled to claim damages from the software manufacturer. These damages must aim to reimburse payments already made at the time of cancellation of the contract.

- The Higher Regional Court of Cologne held that a clause within general terms and conditions of an energy supplier, stating that 'short-term impairments in the availability of the customer portal do not entitle the customer to terminate the contract without notice' does not constitute an inadmissible reservation of change within the meaning of section 308 No. 4 BGB. The Higher Regional Court of Cologne further held that the fact that the above-quoted term is not described in more detail within the general terms and conditions of an energy supplier does not constitute a breach of the transparency requirement pursuant to section 307 (1) sentence 2 BGB.

Any views expressed in this publication are strictly those of the authors and should not be attributed in any way to White & Case LLP.

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Summary

UPDATE AND TRENDS

Recent developments and trends

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?

Common issues that arise include disputes as to whether technology projects have been or will be delivered on time or to specification, disputes relating to investment in technology and technology companies, disputes over the scope of licences granted for use of software and disputes concerning the use and ownership of intellectual property.

When a potential dispute arises, parties should give careful consideration to contractual mechanisms for resolving disputes and make sure that these are followed or that any deviation is agreed upon in writing. Parties who want to try to negotiate a resolution should consider whether a 'standstill' period can be agreed, during which neither party will enforce rights while negotiations take place, ensuring no admission of fault and expressly reserving rights. There is no clear rule as to the ambit or duration of the operation of a reservation of rights. However, in the case of a repudiatory breach, if a party does nothing and reserves its rights indefinitely, it may be taken to have affirmed the contract by its inaction.

Law stated - 28 August 2024

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?

In English law, a contract may be terminated under the express terms of the contract – this could either be for cause (such as a 'material' breach), on a specified event or as a matter of convenience; or under common law, if a 'repudiatory breach' has occurred (a sufficiently serious breach that goes to the 'root' of the contract). Contractual termination rights operate in addition to common law rights to terminate unless the latter are clearly excluded by the contract.

Where a contract permits termination for material (or similarly expressed) breach, the contract may define specified events that amount to a material breach; otherwise, it is a question of fact. It is common for such termination clauses to provide that where a breach is remediable, a notice requiring remedy within a specified time period must be served before termination can take place.

The ability to treat a contract as terminated for repudiatory breach arises out of common law. A repudiatory breach is a serious breach going to the root of the contract, including:

- a breach of a condition (eg, failure to meet key or crucial milestones);
- a sufficiently serious breach of an intermediate or innominate term (eg, multiple defects in the system or repeated late delivery of non-milestone obligations); or
- a refusal to perform (known as 'renunciation').

The basis for termination is notoriously fact-specific.

Termination for breach is not automatic. The innocent party may elect to either accept the breach and treat the contract as discharged or affirm the contract and press the party in breach to perform (as well as potentially seeking damages). Deciding whether to terminate a contract or keep it alive (but potentially sue for damages) can be complex. Issues such as the nature of termination rights and limits on liability should be considered. However, in addition, the technology context means it is important to consider factors such as:

- the effect of termination on equipment (its ownership and maintenance), information and intellectual property rights including licences;
- the need for transitional arrangements to switch to an alternative provider; and
- duties on termination relating to the destruction or return of confidential information and personal data.

Once a decision has been made to terminate, it is important to be clear as to the basis for terminating. A key consideration is the nature of the remedy sought. Terminating under a contract for material breach will typically only entitle the injured party to claim for past damages, whereas termination for repudiatory breach may entitle the injured party also to recover damages related to the loss of the contract. If a party terminates wrongfully, then it may itself be in repudiatory breach and exposed to a claim in damages.

Law stated - 28 August 2024

Without-prejudice communications

3 Is it possible to have conversations aimed at settling a dispute that cannot subsequently be used as evidence in legal proceedings if the dispute is not resolved? If so, what formalities are required? If not, how should confidentiality be preserved through mutual agreement?

The without prejudice rule generally prevents statements made in a genuine attempt to settle an existing dispute, whether made in writing or orally, from being put before a court or tribunal as evidence of admissions against the interest of the party that made them.

It is good practice to mark documents forming part of without prejudice negotiations 'without prejudice'. However, this does not afford a document without prejudice protection if the communication does not form part of a genuine attempt to settle a dispute. Conversely, failing to label a without prejudice document will not necessarily result in a loss of without prejudice protection. In relation to oral correspondence, parties should make clear that what is being said is without prejudice. If an initial document is without prejudice, it will likely be assumed that the subsequent chain of communications are without prejudice (unless it can be shown they were intended to be 'open' communications).

Correspondence marked 'without prejudice save as to costs' can be put before the court to assist the judge in making a decision in relation to awarding legal costs to a party (usually after a judgment has been handed down). There are specific procedural rules and related case law governing the form and effect of such offers.

Law stated - 28 August 2024

Settlement formalities

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

If a settlement is reached before proceedings have been issued, there are no formal requirements. Where proceedings have been commenced, parties should inform the court immediately if they settle the claim; otherwise, the court may impose costs sanctions.

A settlement may be formalised and documented in an email or letter, settlement agreement or in a court order or judgment, obtained by consent. If the settlement involves altering obligations under an existing contract, it is important that any contractual processes for doing so are followed.

The form of the settlement will affect how it can be enforced. If the settlement terms are not embodied in a court order or judgment, new proceedings will have to be commenced to enforce the settlement. A court order or judgment by consent will be enforceable in the same way as any court order or judgment. A special form of order, called a Tomlin order, can also be used. This is where the dispute is stayed upon the parties having agreed to a settlement agreement, but the parties can apply to lift the stay if the settlement order is breached and seek a new order to enforce the settlement agreement.

Law stated - 28 August 2024

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?

Breach of contract is the most common type of claim. In order to establish such a claim, it is necessary to identify the terms of the contractual obligation and prove that the obligation in question has been breached and that the breach has caused the claimant loss. Customers often complain that suppliers have failed to deliver an IT system on time or in accordance with relevant agreed specifications.

Claims for breach of contract in technology disputes are often combined with claims for misrepresentation (alleging that a supplier's system or capabilities were mis-sold or oversold). Misrepresentation can either be innocent, negligent (where the maker of the statement was careless or had no reasonable grounds for belief in its truth) or fraudulent (where the maker of the statement had no honest belief in its truth). A concurrent claim may also exist for negligent misstatement.

In some situations, tortious claims for negligence may also arise. To succeed in such a claim, the claimant needs to establish that the defendant owed the claimant a duty of care,

that there has been a breach of that duty by the defendant, the breach has caused the claimant's loss and that loss was foreseeable.

Claims for infringement of intellectual property rights (particularly copyright infringement) can also arise, particularly in relation to licensing agreements. In this case, it is necessary to establish the existence of the intellectual property right, that the claimant is the correct holder of those intellectual property rights and that the defendant's actions are in breach of that right. Frequently, this can lead to a need to establish the correct scope of any licence granted to the intellectual property.

Law stated - 28 August 2024

Statutory claims

6 Has your jurisdiction enacted any legislation providing additional protection for business purchasers of hardware, software or associated licences? What practicalities should be considered when bringing statutory claims?

There is no technology-specific legislation designed to provide additional protection for business purchasers of hardware, software or associated licences. The Sale of Goods Act 1979 and Supply of Goods and Services Act 1982 may, in certain circumstances, apply as they do to other business contracts. These imply terms into contracts for the sale, supply or hire of goods, including in relation to title, quality and fitness for purpose, and can only be excluded or restricted by contract terms that are reasonable. Whether or not software falls within the definition of 'goods' for these purposes remains unsettled under English law.

The Unfair Contract Terms Act 1977 also applies to most business-to-business contracts. This imposes restrictions on contractual limitation of liabilities, including in relation to negligence, contractual duties of care and misrepresentation, by way of a 'reasonableness' test.

These pieces of legislation could be used to support claims for breach of contract, particularly in relation to goods purchased on 'standard' terms from a supplier or to challenge limitation of liability clauses that may otherwise restrict or prevent claims for damages.

Law stated - 28 August 2024

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?

As a first step, defendants will seek to challenge whether the requirements for the cause of action, such as breach of contract, have been met. Typically, a supplier will seek to blame a customer for any delays, failure to specify, properly or at all, technical or functional requirements or for changing the scope of the initially conceived project. Additionally,

defences raised may include limitation issues, contributory negligence, failure by a claimant to mitigate loss and issues of causation and remoteness of loss.

Law stated - 28 August 2024

Limitation period

8 | What limitation periods apply for bringing claims in your jurisdiction?

English law on limitation periods is set out in the Limitation Act 1980, which applies different limitation periods depending on the type of claim. As a general rule, the claimant has six years from the date of breach or the date the loss was suffered for contract claims and certain actions in tort.

Special rules apply to actions for damages in negligence in respect of latent damage not involving personal injuries actions (excluding the contractual duty to take reasonable care). Where the claimant does not have knowledge of all material facts at the time the damage is caused, the limitation period is either six years from when the date the damage is caused or three years from the date when the claimant knows or ought to have known the material facts about the loss suffered and the damage caused. It is important to note that there is a 15-year long-stop date from the date of the defendant's negligent act or omission.

In respect of fraud claims, even where more than six years have passed since the accrual of the cause of action, there are certain circumstances in which a claim may still be available.

Law stated - 28 August 2024

LITIGATION PROCEEDINGS

Pre-action steps

9 | What pre-action steps are required or advised before bringing legal action?

The Civil Procedure Rules (CPR) set out what steps parties should take before commencing litigation, including specific pre-action protocols for certain claims (eg, defamation). There is no specific pre-action protocol for technology disputes, but parties should follow the Practice Direction on Pre-Action Conduct and Protocols. As a minimum, parties are expected to write to each other, setting out their position and disclosing key documents. Parties are also required to consider whether negotiation or some form of alternative dispute resolution may assist in avoiding litigation.

All pre-action requirements should be interpreted in the context of what is referred to as the overriding objective, the aim of which is to deal with cases justly. It includes minimising unnecessary expenditure and ensuring that cases are dealt with fairly, expeditiously and proportionately.

The main consequences for non-compliance are potential adverse costs awards and the proceedings being stayed until the parties follow the pre-action protocol. Compliance with

a pre-action protocol is not required where pre-action correspondence would defeat the purpose of the proceedings.

Law stated - 28 August 2024

Competent courts

10 | Does your jurisdiction have a specialist court or other arrangements to hear technology disputes? Are there specialist judges for technology cases?

The Technology and Construction Court (TCC) in London is a specialist division of the Business and Property Courts that typically conducts the hearing of technology disputes. A claim in the TCC is assigned to a particular judge, who will, in general, manage all the procedural directions and eventually try the case, unless it is resolved beforehand.

Certain disputes relating to intellectual property rights must be brought in the Intellectual Property List. The Intellectual Property List consists of two types of cases: (1) those relating to patents; and (2) those concerning other intellectual property rights such as copyright and related rights. Claims of the first type, whose value exceeds £500,000, are heard by the Patents Court, while claims of the second type, whose value exceeds £500,000, are heard in the General Intellectual Property List. Smaller, simpler claims of either type, whose value does not exceed £500,000, are heard by the Intellectual Property Enterprise Court.

Law stated - 28 August 2024

Procedural rules

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

Where a case is brought in the TCC, the standard CPRs are modified by CPR 60. CPR 60 is also supplemented by Practice Direction 60 and the Technology and Construction Court Guide.

For intellectual property disputes, the standard CPRs are modified by CPR 63- , supplemented by Practice Direction 63. There is also an Intellectual Property Enterprise Court Guide, a Patents Court Guide and a Chancery Guide.

Law stated - 28 August 2024

Evidence

12 | What rules and standard practices govern the collection and submission of evidence in your jurisdiction?

A potential litigant (and its solicitors) is obliged to prevent potentially relevant documents from being altered, deleted or destroyed, whether accidentally, deliberately or routinely, by that party, its employees and affiliates and third parties. Solicitors are under a duty to

inform their clients of the obligation to preserve potentially relevant documents as soon as litigation is contemplated. There are many sanctions that may be imposed on a litigant who destroys relevant documents once litigation is in reasonable contemplation, including being found in contempt of court or a costs award being made against them.

Disclosure obligations will be set out in directions by the court. However, claims in the Business and Property Courts will be subject to Practice Direction 57AD, which, on 1 October 2022, made permanent the procedures that previously operated under the Disclosure Pilot Scheme. In cases subject to Practice Direction 57AD, five models of disclosure can be ordered by the court in addition to, or as an alternative to, initial disclosure of key documents. These models range from disclosure of known adverse documents to a wide search-based disclosure, which will only be ordered in an exceptional case. The disclosure ordered by the court must be reasonable and proportionate.

Law stated - 28 August 2024

Privilege

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

There are two main types of legal professional privilege that may apply to protect some evidence: legal advice privilege and litigation privilege. Legal advice privilege protects (written or oral) confidential communications between a lawyer and a client for the dominant purpose of giving or receiving legal advice. Whether something constitutes legal advice depends on whether the advice includes what should prudently and sensibly be done in the relevant legal context. 'Client' is construed narrowly and only covers individuals who are charged with seeking and receiving legal advice. It does not cover all employees within a company. Importantly, communications with employees for the purposes of obtaining factual information to inform the giving or receiving of legal advice may not be covered by legal advice privilege.

Litigation privilege is broader than legal advice privilege and protects confidential, written or oral communications between a client and its lawyers, or either of them and a third party, or other documents created by or on behalf of the client or their lawyer, where the dominant purpose of the communication is the giving, seeking or receiving of legal advice in connection with proceedings, or collecting evidence for use in those proceedings. This privilege only arises when proceedings are reasonably contemplated.

Other potential grounds for privilege include joint privilege, where more than one party retains the same solicitor to advise them (and so have a joint retainer) or where they have a joint interest in the subject matter of a privileged communication, and common interest privilege, which enables the sharing of privileged documents with others with the same interest (unlike joint interest, the right to waive privilege is exclusively that of the party who originally enjoyed the privilege).

In relation to technology disputes, particular issues can arise where a crisis situation has occurred and technical responses and investigations are being carried out as a matter of urgency. Legal advice should be sought at an early stage regarding how privilege

protections could be maximised for those investigations to avoid the creation of potentially problematic material that would have to be disclosed in any later dispute.

Law stated - 28 August 2024

Protection of confidential information

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

Documents filed during litigation form part of the court record and can generally be inspected by non-parties. However, it is possible to apply under CPR 5.4C to prevent or restrict access to a statement of case in order to protect information that is considered to be confidential or commercially sensitive.

Confidentiality 'clubs' can also be used, particularly in patent and trade secret cases. The precise terms of these vary, but essentially, they restrict who can see certain information or documents and can extend to controlling how such information is shared. Other potential options include private hearings (although courts will only agree to this if strictly necessary) and seeking an order under CPR 31.22(2) restricting or prohibiting the use of a document that has been disclosed, even where the document has been read to or by the court, or referred to, at a hearing that has been held in public.

Law stated - 28 August 2024

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?

The court will only allow expert evidence if it is satisfied that the case involves matters on which it does not have the requisite technical or specialist knowledge. Expert witnesses often play a critical role in complex technology disputes. Typically, where expert evidence is permitted, each party will appoint and instruct an expert to give evidence. The instructions to the expert are not privileged but will not usually be ordered to be disclosed to the other party, unless the court is satisfied there are reasonable grounds to consider that the statement of instructions set out in the expert report is inaccurate or incomplete.

The experts prepare written reports, which are normally exchanged simultaneously. It is common for the experts to meet and produce a joint report setting out the areas where they agree and disagree (with a summary of reasons for disagreement). Experts may also give oral evidence and be cross-examined. This is common in complex technology disputes.

The expert's duty is owed to the court, not to the party instructing it and paying its fees. It is usual, therefore, for parties to instruct an expert on an advisory basis first (to obtain a preliminary indication of their thinking) before formally instructing them as an expert.

Sometimes, joint expert evidence is ordered and the TCC guide encourages the use of a single joint expert. However, in practice, this is unusual.

Law stated - 28 August 2024

Time frame

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

It is rare for complex technology disputes to last less than 12 months. Typically, they last between 12 months and two years (and sometimes longer).

Law stated - 28 August 2024

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?

In addition to self-funded litigation, various options exist to fund litigation. These include third-party litigation funding; conditional fee arrangements (CFAs) and damages-based agreements (DBAs).

Third-party litigation funding is permitted in England, with numerous litigation funders operating in the market. Third-party funders can help to fund a claimant to bring a claim, in return for a proportion of whatever is recovered in the event that the claimant is successful.

A CFA is an agreement whereby a solicitor and client agree to share the risk of the litigation, so that part, or sometimes all, of the solicitor's fees will only be payable by the client in the event that the client succeeds in its claim. It must comply with requirements found in the Courts and Legal Services Act 1990 and requirements in the Solicitors Regulation Authority Standards and Regulations.

A DBA is an agreement between a representative and their client, where payment is only required in the event the client is successful and is determined by reference to the amount of damages obtained. It must comply with requirements found in the Courts and Legal Services Act 1990 and the Damages-Based Agreements Regulations 2013.

Law stated - 28 August 2024

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?

The awarding of costs is at the discretion of the court. Usually, the court will order the 'losing' party to pay the successful party's costs. Costs will normally be awarded on the 'standard

basis', which in practice usually leads to recovery of around two-thirds to three-quarters of a party's costs.

In deciding what costs order to make, the court must have regard to all the circumstances of the case, including the conduct of the parties. Relevant aspects of the conduct of the parties include conduct before and during proceedings and whether it was reasonable for a party to pursue a certain issue. Where a party's conduct is held to have been unreasonable, it is possible that indemnity costs may be ordered (ie, a greater recovery of costs) instead of standard costs.

Insurance is available to cover the risk that a party may have to pay its own, or the other party's, legal costs. After the event insurance (which is taken out at the time of litigation) is the most common type of adverse costs insurance.

Law stated - 28 August 2024

REMEDIES AND ENFORCEMENT

Interim remedies

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

English courts can grant a wide range of interim relief. Commonly sought interim relief for technology disputes includes injunctions (preventing or requiring certain actions pending resolution of the dispute) and disclosure orders. It is also possible to obtain orders regarding security for costs and preservation of assets.

Law stated - 28 August 2024

Substantive remedies

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

The most common remedies are damages (the object of which is to compensate the claimant, rather than to penalise a defendant), permanent injunctions (which mandate or prohibit certain specified conduct) and declarations (a statement that a certain state of affairs does or does not exist or as to the meaning of a written document such as a contract).

When claiming damages in technology contracts, the court will assess the loss caused by the breach on a compensatory basis. Generally, this involves looking at the position the claimant is in fact in as a result of the breach and the position it would have been in had the breach not occurred. A claimant can claim damages for breach of contract either on the basis of lost benefit or wasted expenditure, but ultimately cannot recover on both bases.

Where damages are sought on a tortious basis, such as for misrepresentation, lost benefits cannot be claimed.

Whether a contract has been terminated for material or repudiatory breach will also affect what damages can be claimed. If a contract is terminated for material breach, the claimant can recover damages for past breaches. However, it will be necessary to also establish a repudiatory breach if a claimant wants to recover damages for the loss of the remaining contract.

When claiming damages for breach of IP rights, 'negotiating damages' may be awarded. These are damages calculated by reference to what the courts consider would have been the amount required by the claimant (engaged in hypothetical negotiations with the defendant) in order to waive the obligation.

Law stated - 28 August 2024

Limitation of liability

21 | How can liability be limited in your jurisdiction?

Technology contracts usually include clauses expressly excluding or limiting liability. An exclusion clause will seek to exclude liability for certain types of loss or causes of action altogether, whereas limitation clauses may seek to limit liability in other ways, such as by limiting the total amount of damages payable.

Public policy concerns have led to the development of restrictions in respect of what liability can be excluded or limited. It is not possible to limit liability for fraud, and some other liabilities can only be limited by 'clear words', and the courts will likely interpret any limitations or exclusions of liability restrictively.

The Unfair Contract Terms Act 1977 also regulates the exclusion and restriction of liability for breach of express and implied contractual obligations and the common law duty of care (ie, tort). As well as preventing limitation of liability for death and personal injury caused by negligence, and supply of goods without the right to do so, it requires that any limitation of liability for breach of standard terms, negligence, breach of a contractual duty of care, breach of statutory terms for quality of goods or misrepresentation must satisfy a 'reasonableness' test. A term will be reasonable if it is 'a fair and reasonable one to be included having regard to circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made' (section 11(1)).

In practice, courts will be reluctant to interfere in a contract made between experienced businesses of equal bargaining power. However, where, for example, software is purchased on standard terms, the reasonableness test may be harder to satisfy.

Law stated - 28 August 2024

Liquidated damages

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

A liquidated damages clause sets out in advance how damages are to be calculated in respect of certain breaches. The sum specified is payable once the breach occurs, without the need to establish loss.

English courts will enforce a liquidated damages clause unless it is considered to constitute a penalty. A clause will be a penalty if it is a secondary obligation that 'imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation' (*Cavendish v El Makdessi* [2015] UKSC 67, paragraph 32). This will ultimately be a question of fact.

Law stated - 28 August 2024

Enforcement

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

If necessary, English monetary judgments can be enforced by obtaining a writ or warrant or control, or a charging order. If a party does not comply with an injunction, it will be in contempt of court, which could result in serious consequences including imprisonment.

The process for enforcing foreign judgments in England varies depending on the origin of the judgment. Where treaties are in place, typically there is a process whereby a foreign judgment will be 'recognised', following which it is then enforceable as if it were a judgment of the English court. There are normally limited grounds for resisting recognition. Where no treaty applies (eg, with the United States), it is possible to enforce a judgment for a sum of money, but not to enforce a foreign injunction.

Law stated - 28 August 2024

ALTERNATIVE DISPUTE RESOLUTION

Available ADR mechanisms

24 What alternative dispute resolution (ADR) mechanisms are available and typically used for technology disputes in your jurisdiction?

Parties to technology contracts will frequently include ADR mechanisms as part of the dispute resolution provisions. These may include the use of expert determination, dispute boards, mediation or adjudication.

Arbitration is also very (and increasingly) popular for technology disputes, as it proceeds on a confidential basis and the enforcement regime is often broader than for domestic court judgments if the parties are from different jurisdictions. An agreement to arbitrate can be included in the contract or entered into at the time the dispute arises. The UK Jurisdiction Task Force has published its Digital Dispute Resolution Rules (the Rules), which are specifically designed to facilitate the cost-effective resolution of technology disputes. Under the Rules, the default dispute resolution mechanism is arbitration, but parties are able to

choose expert determination to resolve a particular issue or type of dispute. The use of arbitration is supported by the Arbitration Act 1996.

Additionally, the Society for Computers and Law (SCL) has introduced a contractual adjudication process that is intended to allow for quick and efficient resolution of technology disputes (the SCL Procedure). The SCL Procedure is focused on resolving disputes within three months, with an expedited process being used to achieve this timescale. There is no limit on the size or scope of the technology dispute that may be referred to it.

Law stated - 28 August 2024

Recognition and enforcement

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

The United Kingdom is a signatory to the New York Convention, which provides for the recognition and enforcement of foreign arbitral awards. This has been implemented by sections 100 to 104 of the Arbitration Act 1996. In essence, a foreign arbitral award will be recognised and enforced in the same manner as an order or judgment of the English court. Only limited defences are available to any attempt to have an arbitral award recognised or enforced. These are found in sections 66 and 103 of the Arbitration Act 1996.

Law stated - 28 August 2024

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?

The English courts continue to show a willingness to innovate in technology cases. Service by way of non-fungible tokens (NFTs) has been permitted and the courts have also granted proprietary injunctions, third-party debt orders and disclosure orders in relation to cryptocurrency and other digital assets such as NFTs. However, the English courts have refused to allow payment of security for costs to be made in cryptocurrency.

Given the significant developments generally in the capabilities and accessibility of artificial intelligence (AI), the courts have issued guidance to judicial office holders on the responsible use of AI, seeking to ensure that, if AI tools are used, they are used responsibly and safely. In terms of broader trends, with the use of AI increasing exponentially, disputes over representations made on the capabilities of AI systems are a likely area to develop in the future, in addition to the copyright disputes that are already arising in relation to the training of such AI systems. There have been no AI-specific legislative developments and in February 2024, the government committed to a non-statutory, pro-safety approach based on five cross-sectoral principles: safety, security and robustness; appropriate transparency and explainability; fairness; accountability and governance; and contestability and redress.

In terms of regulatory developments, two key pieces of legislation became law between late 2023 and early 2024: the Online Safety Act came into force in October 2023 and the Digital Markets, Competition and Consumers Act (DMCCA) came into force in May 2024. Both impose significant obligations on online service providers, which may give rise to a wider range of technology-related disputes in the years to come. The DMCCA, in particular, strengthens the powers of the Competition and Markets Authority to enforce consumer protection law and introduces new requirements on businesses in relation to pricing, subscriptions and reviews.

In June 2023, the Law Commission published a report on its recommendations for reform and development of the law relating to digital assets. Among other things, the Law Commission recommended that legislation be used to confirm the existence of a third category of personal property – referred to as 'data objects' – in addition to things in possession (such as physical objects) and things in action (such as contractual rights). Data objects will include digital assets such as cryptocurrencies and potentially other assets such as voluntary carbon credits. In July 2024, the Law Commission published a supplemental report, further explaining this recommendation and appending draft legislation to implement it.

Any views expressed in this publication are strictly those of the authors and should not be attributed in any way to White & Case LLP.

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