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The Contractual Weapon to Avoid Uncertain Judicial Expertise

The risk of judicial expertise, which is often lengthy, costly, and uncertain in outcome, discourages many companies from pursuing the liability of their contracting parties in the event of a failed IT project. However, a well-drafted contractual framework established in advance, along with effective monitoring of the IT project, may allow avoidance of judicial expertise.

It is perfectly understandable that after enduring the hardships of a failure, along with the difficulty of accepting it and its financial consequences, the company may, at best, favour an unfavourable settlement agreement, or at worst, simply forgo any compensation from its contracting party, which it may consider preferable to the risk of judicial expertise in the event of a liability action.

Indeed, judicial expertise serves to inform the judge who lacks sufficient elements to render a decision (Article L. 144 of the Civil Procedure Code "CPC") on the facts that determine the resolution of the dispute (Article L. 143 CPC). Article 170 CPC excludes the use of judicial expertise to "supplement the party's failure to provide evidence."

It should be noted that a judicial expertise may be preceded by a request for findings[1] or a request for consultation[2], which are rarely implemented. It is frequently observed in practice that requests for expertise:

- do not present any grounds related to the subject of the dispute.
- constitute dilatory maneuvers that delay the course of justice, sometimes made many months after the commencement of the proceedings and/or after the relevant IT systems (machines, networks, applications, etc.) have been manipulated, modified, or changed since the cessation of services.

[1] Article 249 CPC: The judge may assign a person to make observations. The observer must not express any opinion on the factual or legal consequences that may result from such observations.

[2] Article 256 CPC: For purely technical questions not requiring complex investigations, the judge may commission someone to provide a simple consultation.

- lack a basis, goes to say that they attempt to compensate for the absence of evidence to demonstrate or refute the origin of liability.

And aim to overwhelm the contractual discussions with technical aspects, the analysis of which is superfluous.

However, it is also common for requests for expertise to be justified and admissible if the company has neglected the contract underlying its IT project and/or has refrained from documenting the project's progress.

It is often observed that the service provider offers its clients contracts that are naturally protective of its interests, takes the lead in preparing committee meetings, and drafts the minutes, allowing it to favourably shape the description and interpretation of the facts constituting the IT project.

The client, for valid reasons of technical incompetence, lack of personnel, and trust, entrusts the leadership of the relationship and documentation to its service provider. The client finds itself at a disadvantage when it can only rely on a streamlined contract concerning the service provider's obligations, which is heavily weighted toward its own commitments, and on technical documentation that exceeds its expertise.

Conversely, a service provider involved in an IT project with poorly defined parameters set by the client, which are difficult to delineate, and/or where the internal project team maintains significant autonomy over the project, may lose control of events and the administration of evidence.

On one hand, it is necessary to integrate the technical aspects of the project into the contract and align the technical and operational aspects with the legal commitments. On the other hand, this effort must continue throughout the project's lifecycle while providing the necessary flexibility to promote the project's success, trace events, and establish factual communication, thus illuminating the judge without the need for technical expertise.

The contractual framework as the cornerstone of the IT project

A well-drafted contract offers dual effectiveness: it ensures that during negotiations, the client and the service provider mutually understand each other’s needs and limitations, confirming that they are aligned, and it serves as the primary

documentary reference for the IT project, both for its successful execution and in the event of disputes.

It is essential to consider the contract and its technical annexes as being on the same level as the client's specifications and the service provider's proposal, rather than as a collateral requirement.

Certain precautions for drafting the contract:

The contract should not resemble a collection of clauses unrelated to the technical aspects of the project; it must be constructed accordingly. The more tailored the contract is to the IT project, the more it serves as a relevant management tool for the project and the technical and legal reference for the service provider's obligations and any potential shortcomings.

In cases where standard templates provided by search engines or contracts submitted by service providers are used, it is advisable to incorporate the salient and specific technical aspects of the IT project by including technical warranty clauses, such as:

- warranty of compliance with the specifications,
- warranty of scalability,
- warranty of robustness,
- warranty of performance,
- warranty of availability,
- warranty of upward compatibility,
- warranty of security,
- warranty of data integrity,
- warranty of sustainability,
- warranty of non-regression...

These examples are not exhaustive and must be adapted to the nature of the specific project. The task is to translate the service provider's technical commitments, as identified in their technical and commercial offer and technical annexes, into legal terms. This allows for the identification of any contractual breaches, enabling the client to hold the provider accountable without the need for technical expertise to guide the court.

From the provider's perspective, it is crucial to clearly define the scope of its services and specify the prerequisites expected from the client that are essential for the

project’s completion. Indeed, it is common for the expert's role to involve analyzing the contractual documents, agreed deliverables, and the mode of cooperation, as well as the acceptance of deliverables and each party's obligations, which should not be left to the discretion of a third party.

It is advisable to involve legal counsel from the preparation of the request for proposals (or specifications) and to work collaboratively on drafting the contract, the service provider's technical annexes, and the analysis of the provider's offer.

The critical importance of Technical Annexes

Too often, in practice, the contract is reduced to a collection of generic clauses that defer the substance of the services to technical annexes, such as the SLA or service agreement, the quality assurance plan, the security assurance plan, the confidentiality policy, the reversibility plan, the financial terms, and the service timeline. Some of these annexes are often prepared by the service provider after the contract is signed, as they do not wish to spend time on these documents during the pre-sales phase and justify the need to hold workshops to familiarize themselves with the project. While this may be a valid point, there is nothing preventing the agreement on a preliminary version of the document and locking in the conditions for its future development. This avoids finding, within these annexes, legal or commercial terms that were never discussed during negotiations and which will be imposed without the legal adviser's attentive oversight.

The service provider's technical commitments must be made comprehensible to all parties in the contract and in the technical annexes.

By way of illustration, it is preferable to:

- Avoid copying and pasting the service provider's offer directly into the contract.
- Avoid referencing commitments through links provided by the service provider, as they may freely alter the content.

- Simulate in the contract or annexes all calculations for performance indices to assess their relevance and rules.
- Simulate in the contract or annexes all calculations for delay penalties, to assess their relevance and rules. These simulations may highlight the inadequacy of the financial incentive.
- Present the contractual commitments in a manner that is consistent with the project, mirroring the client's specifications and the provider's offer. This alignment will facilitate understanding in the event of a project failure.

To maximize the chances of success, both parties must actively engage in the factual description of the project elements throughout its execution.

IT Project Governance

The signing of the contract marks the starting point for the formation of mixed teams between the client and the service provider. The professional relationships established between these teams significantly contribute to the success of the project but can also lead to negligence due to a lack of perspective.

Establishing a Cross-Functional Team

While the legal advisor often tends to step away after the contract is signed, it is highly recommended to maintain their involvement throughout the project. The legal advisor should be integrated into the team, which is composed of the contract manager, the project manager, internal technical teams, and project management assistance, until the project is fully deployed.

Even a well-drafted and tailored contract will be of no help if the execution of the project deviates from the contractual terms without proper documentation.

The first step is to raise awareness among the technical teams of the mutual (technical and legal) commitments agreed upon in the contract. This precaution helps to minimize divergent personal interpretations and prevents unfounded requests to the service provider or unjustified expectations from the client, which are common sources of disputes.

Factual Description of Events

The proactive participation of the client in the committees is highly advisable. The client must be actively involved in tracking the actions and timelines of the service provider, contributing to the agenda, and either taking the initiative to draft the meeting minutes or meticulously reviewing those prepared by the provider.

A factual description of the events marking the progress of the project should be provided. This task is often difficult for both the service provider's and the client's technical teams, who may communicate ambiguously or hope that certain difficulties will be resolved later. However, judicial expertise will likely be ordered if the facts are unclear[3].

For example, the Paris Court of Appeal[4], in a decision dated June 26, 2020, rejected a request for judicial expertise on the grounds that "all necessary elements were available to the court to rule on the present dispute." In this case, the court found that the serious breaches by the service provider were demonstrated based on the contract, its annexes (the specifications and the SLA), emails, and meeting minutes detailing the difficulties.

In another case, the Paris Court of Appeal[5] held that "the documents whose submission was requested within the framework of the expertise had already been provided" and thus rejected the request for expertise.

According to the jurisprudence of the Court of Cassation, trial judges have full discretion to assess the necessity of an investigative measure. It is recommended to allocate the necessary human and financial resources throughout the project to ensure proper documentation of technical and legal facts.

Involving a legal advisor with knowledge of the contractual documents and operational perspective can prove to be a decisive asset.

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[3] Article 143 of the Code of Civil Procedure (CPC) - "The facts upon which the outcome of the dispute depends (...) may be subject to any investigative measure (...)."
Article 144 CPC - "Investigative measures may be ordered at any stage of the proceedings, provided that the judge does not have sufficient elements to rule."
Article 145 CPC - "If there is a legitimate reason to preserve or establish, before any trial, evidence of facts on which the outcome of a dispute may depend, legally admissible investigative measures may be ordered (...)."
Article 146 CPC - "An investigative measure may only be ordered concerning a fact if the party alleging it does not have sufficient elements to prove it."

[4] Judgment of the Paris Court of Appeal, 5th Division, 11th Chamber, June 26, 2020 - No. 17/20843.
[5] Judgment of the Paris Court of Appeal, 1st Division, 2nd Chamber, October 29, 2015 - No. 14/04429.

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Published in the journal EXPERTISES of December 2020