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IT contract

A CHF 60 million contract termination

Par Célian Hirsch le 26 March 2023

Following the deterioration in relations between a major IT service provider and a Geneva bank, the Court of Justice of the Canton of Geneva recently addressed various issues relating to an IT contract in a ruling dated October 4, 2022 (ACJC/1497/2022).

In 2006, a Geneva bank decided to migrate its IT system. It entered into a series of contracts with a Zurich-based company, which was to carry out the migration and then operate the system. The contract is for a period of 5 years, extendable by 12 months at the bank's request. A clause allows termination for just cause.

At the end of 2007, a major IT service provider took over the Zurich-based company. It then signed an amendment with the bank, which provided for a change in the invoicing system. Differences of opinion soon arose regarding the provider's remuneration.

Following a number of disagreements, in particular concerning its remuneration, the service provider terminated the contracts with immediate effect on February 15, 2010, specifying that it would no longer provide its services at the end of the month. However, it offered to provide its services for a transitional period, at a fixed price. The bank accepts the offer, stressing that it considers itself obliged to do so. In June 2010, it obtained provisional measures to ensure that the service provider would continue to provide hosting and data integration services until a new service provider took over. In March 2011, after the IT system had been taken over by a third party, the bank invalidated the contract for the transition period.

The bank files a claim for payment of over CHF 60 million, to which the service provider responds with a counterclaim. The Court of First Instance ordered the service provider to compensate the bank for approximately CHF 35 million and dismissed its counterclaim.

On appeal, the Court of Justice confirms, firstly, that the parties are bound by an unnamed contract of duration which has the main features of a contract of enterprise. The service provider does not criticize the characterization, but rather the Court's interpretation of the contract with regard to its remuneration. It maintains that all of its services were billable on a "pure time and materials" basis (i.e. according to the number of hours worked), whereas the Court of First Instance held that part of the services had been fixed on a lump-sum basis, according to both the subjective and objective interpretation of the contract. The Court of Justice rejected the service provider's criticism. It considered that he was aware of the flat-rate and capped prices when he took over the contracts, but that he hoped to obtain more favorable conditions

afterwards. However, he failed to demonstrate that the bank would have accepted a change in remuneration as he wished.

Secondly, the Court found that the service provider had terminated the contract on the grounds of non-payment of the invoiced amounts. However, given the above-mentioned interpretation of the contract, these amounts were in fact not due, which rendered the termination unjustified in the eyes of the Court. The Court even emphasized that this non-payment was not the real reason for the service provider's termination. The latter terminated the contract because of a difference in understanding of the contracts, and in particular of its remuneration. This does not therefore constitute just cause.

In the absence of just cause, the bank must be put back in the position it would have been in had the service provider fulfilled its obligations (positive damages). It is therefore necessary to determine the – necessarily hypothetical – termination date of the contract. In this case, the bank would most likely have extended the contract by one year – this unilateral right being contractually provided for – but the service provider would then have refused another extension.

In addition, the contract included a clause limiting liability, which the Court rejected on the grounds of gross negligence on the part of the service provider. The Court confirmed the unenforceability of the clause, but substituted grounds. In fact, the service provider had acted fraudulently in refusing to perform its contractual obligations. The service provider's invocation of two brief legal opinions, which he claimed justified his refusal to perform, has no probative value, since they are mere allegations.

Finally, with regard to the bank's invalidation of the contract for the transitional period, the Court held that the service provider had exerted unlawful pressure on the bank, so that it could legitimately terminate the contract. The Court agreed, pointing out that acceptance of the transitional contract had enabled the bank to reduce its loss, in accordance with art. 44 para. 1 CO. The claimant also criticizes the fact that the rescission took place after the expiry of the one-year limitation period (art. 31 CO). The Court retorted that the plea of well-founded fear could still be raised, even after this period had elapsed.

This decision illustrates the complexity of IT contracts, in particular the method of remunerating the service provider and the termination of contracts. Fortunately, the bank was able to obtain provisional measures following unjustified termination by the service provider.

On the other hand, when the bank itself wishes to terminate the contract, it often finds itself in the delicate situation of vendor lock-in, due to the practical complexity and costs involved in changing provider. If the latter abuses the bank's dependence in order to impose new clauses, the court could uphold the invalidation of the contract entered into under duress on the grounds of well-founded fear, as held in the case under review. The upstream contractual solution is to include a reversibility clause in the IT contract, setting out in particular the rights and obligations of the parties during the period of transition to a new service provider or during the re-internalisation of the IT service.