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Cruquenaire, Alexandre

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CHAPTER 1

Agile Project Management and Contract Law

Alexandre CRUQUENAIRE¹

1. Based on a traditional Waterfall approach, the development of IT projects is organized following a chronological stepwise approach, with the initial step of requirements definition, the implementation phase, and the acceptance of the deliverable at the end of the process.²

2. This approach has been challenged by the practice of many project managers, looking for flexibility without the need to trigger a “change request” each time one aspect of a project changes. Indeed, complex IT projects are difficult to ringfence within intangible limits and requirements that are established from the beginning of the implementation phase. An alternative approach to IT project management has therefore been promoted by a community of IT project managers through the Agile manifesto.³

3. An increasing number of companies and institutions are adopting Agile methods for some of their IT projects, considering the major added value brought by the collaborative approach induced by Agile methods, when this is relevant for the considered project.

After a short explanation on the Agile process and its main differences that set it apart from the Waterfall approach (I.), we will focus on a few legal questions raised by the use of Agile for contracting IT projects (II.).

¹ Lawyer (Partner, Lexing Belgium); Visiting Professor UNamur (CRIDS), Certified Scrum Master.

² This stepwise approach is presented as the “waterfall approach”. See https://en.wikipedia.org/wiki/Waterfall_model.

³ https://en.wikipedia.org/wiki/Agile_software_development.

I. Agile (Scrum) in a nutshell

4. *Scrum* is probably the most widely used Agile method which is why this paper refers to it as an illustration of the point at hand.⁴

5. The Scrum process is driven by interactions between two key actors:
- The *Product Owner*, representing the customer, ensures the smooth circulation of all useful business information from the final product users to the development team. The Product Owner is also responsible for the approval of the delivered pieces of work (at the end of each iteration of the process). The Product Owner is also supposed to define the Product Vision, which is a reference document describing the main expectations of the customer;
 - The development team (supplier) is in charge of implementing the project and providing the deliverables (pieces of the final product).

To ensure the process remains on track and that both parties properly observe the Agile principles, the *Scrum Master* leads and monitors the Scrum implementation process.

6. The development of the final product is based on a key reference document which is the *Product Backlog*. It contains a list of items which, used in combination, are supposed to result in the final product. The Product Backlog is by nature not frozen at the start date of the agreement, but is intended to be updated during each iteration of the process. The Product Owner defines the priority level of each item of the Product in the Product Backlog, the development team providing the estimation of required resources for developing it.

7. The development process is based on the sequence of short development cycles (*Sprints*), resulting in the provision of a deliverable. At the beginning of each Sprint, the Product Owner and the development team jointly define the items of the Product Backlog to be developed during the coming Sprint (definition of the *Sprint Backlog*). At the end of the Sprint performance, the development team provides the developed piece of Product, which is subject to testing and acceptance by the Product Owner during the *Sprint Review* meeting. The Product Backlog is then updated

⁴ For a general overview of the Scrum process and actors, see Scrum Alliance, *Core Scrum*, available on the official website of Scrum Alliance: <https://www.scrumalliance.org/ScrumRedesignDEVSite/media/ScrumAllianceMedia/Files%20and%20PDFs/Learn%20About%20Scrum/Core-Scrum.pdf>.

(list of priorities, estimation of the value of items, new items, removal of items...).

8. By the repetition of collaborative routines, the Scrum process induces a close collaboration between customer and supplier, which contributes to an improved mutual understanding and allows to refine the definition of the Product specifications in order to better match with the customer expectations.

9. The traditional Waterfall approach relies on a prior definition of requirements, and on customer-supplier interactions limited to the contract negotiation (and requirements definition) and acceptance steps. The difference between the Agile and the Waterfall approaches raises specific legal questions in the field of contract law.

II. Legal questions raised by the use of Agile in IT contracts

10. The Agile implementation has an impact on several aspects of IT contracts. This paper will highlight the following challenges:⁵ the scope of the advice obligation of the supplier (A.), the collaboration obligation (B.), the acceptance process (C.), and the scope of the warranty obligation (D.).

A. The scope of the advice obligation

11. Case law in Belgium has progressively imposed a duty on IT suppliers to advise their customers, based on the acknowledgement that the IT specialist has a privileged access to all information that is relevant when making a decision in relation to an IT contract.⁶

⁵ For a more complete assessment of the legal questions raised by Agile for IT contracts, see A. CRUQUENAIRE, "Contrats et méthodes Agile: comment mieux gérer les risques liés aux projets informatiques", *D.A.O.R.*, 2021 (to be published).

⁶ Regarding the scope of this obligation, see: F. GEORGE, N. GILLARD, J-B. HUBIN, H. JACQUEMIN, "Chronique de jurisprudence 2015-2017: contrats de l'informatique et commerce électronique", *R.D.T.I.*, 2017/68-69, pp. 11-12; B. DOCQUIR, *Droit du numérique*, R.P.D.B., Bruxelles, Bruylant, 2018, pp. 24-31.

More specifically, the supplier has the duty to (1) communicate all relevant information which may determine the customer decision, but also (2) advise the customer on the adequacy of the proposed solution to meet the customer needs and expectations.⁷ Aligned with the traditional Waterfall approach, the case law mainly focusses on the negotiation phase.

12. With the Agile methods, how could the supplier advise the customer on the specificities of a product for which the requirements are not yet defined?

The use of Agile for the implementation of a project should therefore be reflected in a double change to the advice obligation of the IT supplier.

First, the nature of the obligation to advise at the precontractual stage should be amended. Indeed, the supplier is not able to properly advise the customer on the specifications of the final product, for the reason that these specifications are not to be decided at that moment. The scope of the advice obligation should therefore be reduced with respect to the definition of the product requirements and specifications. However, on the contrary, the advice obligation should encompass new elements, relating to the choice of the project management process to be used in the implementation phase. Since the use of Agile has major implications in terms of customer contribution and availability, the supplier should inform the customer about the advantages and drawbacks of the Agile methods and advise the customer on the opportunity to envisage an Agile driven project.

In addition, part of the advice obligation should be moved to the contract implementation phase. The aim of the advice obligation is to ensure the customer is able to make informed decisions, whatever the moment, and step into the project cycle (in the negotiation phase, to ensure that the decision to sign the contract is not based on a wrongful understanding of the situation; in the implementation phase, to ensure that the project management decisions are consistent with the project goals...). Since the Agile methods require, during the implementation phase, to make decisions which have a major impact on the final product configuration, it would make sense to move part of the advice duty to the implementation phase, to secure the ability of the customer to make the right decisions, when required by the process agreed for the contract

⁷ E. MONTERO, *Les contrats de l'informatique et de l'internet*, Tiré à part du Répertoire Notarial, Bruxelles, Larcier, 2005, p. 62; Y. POULLET *et al.*, "Droit de l'informatique et des technologies de l'information", *Chronique de jurisprudence (1995-2001)*, *Les dossiers du Journal des Tribunaux*, n° 41, Bruxelles, Larcier, 2003, p. 12.

implementation. The aim of the advice obligation becomes slightly different. Prior to the signature of the IT contract, the advice obligation aims at ensuring a valid and informed consent to the agreement. Considering the role of the supplier in the performance of an Agile agreement, the duty to advise the customer during the implementation phase is of another nature: it is a part of the agreement, rather than a condition of its valid formation. The consequences of the non-compliance of the supplier will therefore be those applicable in case of non-performance of contractual obligations (claim for damages, injunction to provide additional services to compensate the consequences of the failed obligation, replacement of the supplier...), and not the option to cancel the agreement on the basis of vitiated consent.

We do not see any legal objection to the proposed changes in the scope of the advice obligation. These changes would not conflict with the existing case law, which has been developed to meet the need to protect the contracting party being who is in a weaker position to access the required information when such party has to make a decision in relation to an IT contract.⁸ If the key decisions are no longer made at the end of the contract negotiation phase, but rather during its implementation, it would be logical to move the advice obligation accordingly, to preserve its efficiency.

B. The collaboration obligation

13. The use of Agile for the project implementation requires an increased involvement of the customer in the contract performance process. The customer must therefore book the appropriate resources (availability, knowledge) to ensure the follow-up of the Agile process.⁹

⁸ On the justification of the creation of the advice obligation, see in particular: M. COIPEL, Y. POULLET, "Introduction aux concepts juridiques", in *Le droit des contrats informatiques – Principes – Applications*, Bruxelles-Namur, Larcier – Société d'études morales, sociales et juridiques, 1983, p. 73; E. MONTERO, "Les obligations d'information, de renseignement, de mise en garde et de conseil des fabricants et vendeurs professionnels", in *Les obligations d'information, de renseignement, de mise en garde et de conseil*, CUP, n° 86, Bruxelles, Larcier, 2006, pp. 320-323; A. CRUQUENAIRE, J.-F. HENROTTE, "Le devoir de conseil dans le Règlement Général sur la Protection des Données: bis repetita placent?", in *Droit, normes et libertés dans le cybermonde – Liber Amicorum Yves Pouillet*, Bruxelles, 2018, p. 602.

⁹ O. DORCHIES, "Pratique contractuelle. Les méthodes agiles dans les contrats informatiques", *Communication Commerce Electronique*, 2020/10, p. 47; T. BEAUGRAND, J.-B. BELIN, "Logiciel. Le contrat de développement logiciel en méthode Agile", *Expertises*, 2013, p. 419.

If they fail to do so, customers would undermine the Agile process, by delaying the necessary decision-making processes, by leaving unanswered the questions from the development team...

14. The Agile contracts should therefore contain specific provisions imposing specific obligations upon the customers in terms of support to the supplier and of business resources availability. The IT-related case law usually considers the lack of collaboration of a customer¹⁰ to be qualified as a breach of the customer obligations.¹¹ This should be *a fortiori* the case for Agile contracts, in light of the key importance of the collaborative approach that characterizes the contract implementation.

C. The acceptance of the provided services

15. Usually, the quality of the services provided under an IT contract is challenged against the specifications and requirements that are defined in the contract itself. Therefore, the concept of acceptance is understood as the action of checking that the deliverables comply with the agreed specifications.¹² This traditional approach is also subject to discussion when considered in an Agile context.

While the acceptance criteria are defined¹³ within a Waterfall contract, or its annexes (specifications/requirements document), the acceptance criteria for an Agile project are less obvious to identify. Indeed, the specifications of the product are, by nature, subject to change during the implementation of the Agile process. What is then the reference to be used to assess the compliance of the deliverables with the contractual commitments?

If the Product Backlog is the key reference document for the definition of the expected final product, it is worth noting that the stepwise approach of the Agile method requires to adopt a Sprint based approach. Indeed, the Product Backlog is refined at the end of each Sprint, which makes the current version of the Product Backlog the only relevant reference for the acceptance of the deliverables to be provided during the

¹⁰ The level of the collaboration requirement being assessed depending on the profile of the customer, of the supplier, and of the nature of the disputed aspect of the contract performance.

¹¹ D. GOBERT, E. MONTERO, "Les obligations de conformité et de garantie des vices cachés en matière informatique: le contrat au secours des incertitudes légales et jurisprudentielles", *R.D.T.I.*, 2002/11, pp. 16-17.

¹² B. KOHL, *Le contrat d'entreprise*, R.P.D.B., Bruxelles, Bruylant, 2016, pp. 404-405.

¹³ With more or less details depending on the quality of the contract drafting.

following Sprint.¹⁴ The Agile contract is therefore based on changing acceptance criteria, implying that the status of the Product Backlog and its evolution need to be properly documented throughout the process.

Beyond the identification of the correct version of the Product backlog, the acceptance of a deliverable provided in the performance of an Agile contract also relies on the *definition of done*,¹⁵ which is the level of compliance – decided by the customer and the supplier – that a deliverable must meet in order to be considered as “accepted” at the end of a Sprint. This level may change during the contract implementation, upon the conclusion of a new agreement between the parties. The Agile contract must specify the requirements for the *definition of done*.

16. Another specific aspect of the acceptance process applied in Agile projects is the legal value of *acceptance* when acceptance is granted to a specific product item that is delivered at the end of a Sprint.

Indeed, if the project implementation is sequenced in several iterations, the scope is limited to the product items selected for inclusion into the Sprint Backlog. The provided deliverable is therefore only one piece of the puzzle. This raises the question of the scope of the acceptance of this deliverable: does the acceptance of specific product items mean that these items may no longer be challenged later, when combined with other product items?

In Agile contracts, it is important to clarify the acceptance process and the effects of a granted Sprint acceptance, to preserve the interoperability and functional regression test for the overall acceptance test, at the end of the final Sprint. A distinction should therefore be made between Sprint Acceptance and Product Acceptance, the latter covering interoperability and non-regression aspects.¹⁶ The Product Acceptance should allow to test again the items previously approved during the Sprint Acceptance process.¹⁷

¹⁴ See O. DORCHIES, “Pratique contractuelle. Les méthodes agiles dans les contrats informatiques”, *Communication Commerce Electronique*, 2020/10, p. 48.

¹⁵ Scrum Alliance, *Core Scrum*, *op. cit.*, p. 11.

¹⁶ In favor of such distinction, see T. HOEREN, S. PINELLI, “Agile programming – Introduction and current legal challenges”, *Computer Law and Security Review*, 2018, p. 1135.

¹⁷ *Contra*, see O. DORCHIES, “Pratique contractuelle. Les méthodes agiles dans les contrats informatiques”, *Communication Commerce Electronique*, 2020/10, p. 48.

D. The scope of the warranty obligation

17. Once the Product is approved, the supplier usually provides a warranty to correct unknown errors of non-compliance of the Product. It is important to note that under the Belgian contract law that governs service agreements, the supplier's warranty obligation is based on its fault.¹⁸

18. How to prove the supplier's fault in relation to non-compliance of the delivered Product?

This raises again the question of the reference to be used for such determination. Indeed, the non-compliance must be evidenced against the final version of the Product Backlog.

The starting point of the warranty period should be specified in the Agile contract. In the absence of such specification, a discussion may occur on the reference to either the Sprint Acceptance or the Product Acceptance.

Conclusion

19. As for many other innovations, the use of the Agile methods to implement IT projects does not mean that contract law is now obsolete. To the contrary, once more, contract law principles are perfectly able to address the challenges raised by Agile methods. The key elements of the Agile process are the iterative implementation of the project, the changing nature of the requirements definition, and the collaborative approach between customer and supplier. With some nuances, the existing case law may fit with these specific elements.

¹⁸ Strictly speaking, the nature of the obligation to fix the notified non-compliance issues is therefore not of a warranty obligation. See B. KOHL, *Le contrat d'entreprise*, R.P.D.B., Bruxelles, Bruylant, 2016, n° 217.