

Resilience — Another (good) reason to choose to arbitrate technology disputes

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There are several reasons why arbitration is seen as the most effective method for resolving cross-border technology disputes. Commonly cited reasons include:

No “home-court” advantage: Choosing arbitration allows a dispute to be resolved in a neutral forum rather than by the national courts of either party. Considerations as to the appropriate court or forum for dispute resolution in the event of a deal falling apart or non-compliance do not only involve practical matters such as location and costs.

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Nowadays, the decision concerning the body that would be competent to determine a future dispute consists of balancing these practical considerations with the type of procedure required and any risks of bias or corruption.

Choice of arbitrator: Choosing arbitration allows litigants to select individuals who have knowledge of the sector or experience with the relevant technology to act as arbitrators. With arbitration, the parties can have their say as to the composition of the arbitral tribunal both in terms of number (one or three) and expertise.

Further, in most situations, the parties can agree on the arbitrator who will rule on the case. Where the dispute is submitted to a three-member tribunal, each party can generally nominate one of the arbitrators that will compose the tribunal, deliberate and decide the case. This important feature, not present in any national court system, makes arbitration particularly attractive to the tech industry.

Privacy and confidentiality: Whether they involve intellectual property issues or not, secrecy is almost invariably at the heart of technology disputes. Choosing arbitration allows parties to resolve disputes privately and to put confidentiality provisions in place to preserve trade secrets and protect other confidential information from being released to the public or competitors.

International enforcement of arbitral awards: Perhaps even more important to technology market stakeholders who find themselves in the midst of a dispute, is the relative ease of enforcing an arbitral award in the 160+ countries that have ratified the New York Convention 1958. Many technology-related transactions having become cross-border in nature, the enforceability of arbitral awards constitutes another major benefit of arbitration.

Another advantage of arbitration, that is sometimes overlooked, is the flexibility of the arbitral process. Flexibility in this context means that parties can tailor the arbitral process to meet their specific needs and circumstances. They can do this at two stages.

Firstly, the parties can adapt the process to their needs when they agree to arbitrate by way of an arbitration agreement. At this stage, parties can tailor the process by agreeing on the framework of the arbitration, for example by agreeing on the seat, the arbitral institution, the rules, the number (and potentially the expertise) of arbitrators, the expedition of the procedure and the timeframe.

Secondly, parties can adapt the process to specific circumstances while the arbitration is ongoing, by seeking to agree on procedural matters with the other party. They can also do this by communicating to the tribunal about what the process should look like in light of the issues in the case, the arguments and the evidence.

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The process may be shaped in many different ways. With respect to technology disputes in particular, the parties may wish to build an inspection or experiments into the process, or provide a technical primer or tutorial to the arbitrators.

There may also be a need to cater for business needs, for example the preservation of trade secret or commercially sensitive information. To this end, the parties may request the appointment of a technical expert to look through documents or data and rule on discovery issues.



Historically, it was not always that easy to depart from the standard arbitration procedure without the agreement of the other side. However, in recent years, there has been an increased focus on speed and efficiency in arbitration.

Institutions have introduced a number of procedural tools in their rules to reduce the costs of arbitration and time within which awards are rendered. These tools include expedited procedures, summary determination and proactive case management powers on the part of arbitrators. As a result, arbitrators have become more willing to tailor procedures without being hamstrung by due process paranoia.

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As a result of the COVID-19 pandemic, counsel, arbitrators and arbitral institutions have been forced to use the flexibility of arbitration in unprecedented ways. Due to travel bans and the remote working environment, an array of solutions has emerged through technology and innovation.

Arbitrators have for the most part embraced such solutions and successfully implemented them, thereby overcoming restrictions and ensuring continuity of service. As a result, new and ongoing disputes have been handled and resolved without complications or interruption. The arbitration community has risen to the challenges posed by COVID-19 and taken the flexibility of arbitration to another level.

The ability to conduct hearings virtually, for example, has underlined the advantage that arbitration has over litigation in respect of procedural flexibility and continuity. Although courts in some jurisdictions have adapted reasonably quickly, this has not been the case everywhere.

The result of some courts shutting down completely has led to uncertainty on certain major issues, including whether a specific technology can be used or a product can be developed, sold or distributed, with potentially significant loss of revenue each day.

Virtual hearings are not the only aspect of arbitration where flexibility has been harnessed. Since the beginning of the pandemic, members of the arbitration community have had to collaborate and innovate to overcome restrictions

and complications. Institutions have stepped in to issue guidelines and adapt their policies and rules.

Arbitrators have had to come up with new ways to communicate with their fellow arbitrators as well as dealing with attendant issues such as the introduction of measures to address any cybersecurity concerns. Further, they have had to deliberate remotely and execute terms of reference and awards electronically while ensuring that any new methods would not compromise the validity of their awards.

The pandemic and its ensuing challenges have therefore provided an opportunity for the arbitration community to demonstrate that arbitration is a resilient dispute resolution process able to provide continuity of service and weather out crises such as COVID-19.

In the future, new risks or events might once again impose restrictions on litigation or court services. In this context, technology companies and other organizations involved in technology-related transactions will no doubt see the resilience of arbitration as an additional (good) reason to insert arbitration clauses into their contracts.

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