Kluwer Arbitration Blog

Arbitration Tech Toolbox: Technology-related Dispute Resolution: Tailored Rules at UNCITRAL

Raoul J. Renard (Assistant Editor for Technology) (Kluwer Arbitration Blog) · Thursday, July 14th, 2022

From 28 March to 1 April 2022, Working Group II of the United Nations Commission on International Trade Law (UNCITRAL) held a Colloquium to explore legal issues related to dispute resolution in the digital economy and to identify the scope and nature of possible legislative work.

Forty-eight member States, 27 observer States and 57 invited international organizations attended, and more than 40 speakers with expertise in international dispute settlement made presentations during the Colloquium. The programme, video recordings, official documents and presentations can all be found here.

On days 3 and 4, the Colloquium focused on technology-related dispute resolution and draft provisions prepared by a group of experts at the request of the Commission, and upon a proposal by the Governments of Israel and Japan.

Animating these discussions was an observation made by Cedric Yehuda Sabbah (Ministry of Justice of Israel) that technology firms are underutilizing alternative dispute resolutions mechanisms. In preparatory consultations with in-house, firm and venture capital lawyers, the consistent message was that technology companies avoid the use of ADR because the mechanisms are not tailored to the needs of technology disputes.

The high-tech sector presents some unique characteristics: it is highly technical, specialized, dynamic, and populated by micro-, small- and medium-sized enterprises (MSMEs). Each characteristic requires careful consideration. Early-stage startups, for instance, will put a premium on the speed of a dispute resolution process, seeking resolution to pave the way for funding rounds. Some technology disputes will involve highly technical aspects, potentially requiring not only the appointment of experts and neutrals, but also a degree of technical expertise held by the arbitrator. These and other considerations are reflected in the draft provisions, which are designed to stimulate discussion towards the creation of a set of rules to be agreed upon by disputing parties that can adequately address the particular features of technology disputes.

Elliot Friedman (Freshfields Bruckhaus Deringer) gave the perspective of the US tech sector, particularly regarding business-to-business (“B2B”) disputes between established technology players. According to Friedman, we can safely assume a significant up-tick in technology disputes as technology companies continue to increase in the share of world trade. Technology companies

have formed huge parts of the world economy for many years, causing Friedman to pose the question: why haven't we seen more technology companies active in the international arbitration arena? Typically, B2B contracts entered into by technology companies opt to resolve disputes in the California courts, or occasionally in New York courts, even with counterparties from all over the world. For Friedman, this reflects familiarity and bargaining power held by Big Tech in contractual negotiations.

Notwithstanding this preference for court processes among Big Tech, the explanatory note to the draft provisions observes that "technology-related disputes can be described as those that require a speedy and cost-efficient resolution by a person(s) with the appropriate expertise and that require a flexible resolution process to adapt to the evolution of the dispute as well as relevant technology" (at [2]).

In defending resort to courts, Friedman pushed back on the notion that the ability to select specialist arbitrators necessarily makes arbitration a better choice. First, most technology disputes are contractual in nature, and while the subject matter of a contract may be highly technical, the dispute is often not exceedingly technical, at least not to the level that competent generalist arbitrators, assisted by counsel, would be unable to resolve the dispute. Secondly, the use of dispositive court motions such as early dismissal or summary judgment can resolve or significantly streamline disputes. By contrast, while similar case management techniques are available under most of the major arbitration rules for unmeritorious claims (see e.g. ICSID Arbitration Rule 41, discussed here and ICC Rule 22 (2021), clarified here), their use is limited.

For Friedman, international arbitration has two clear benefits that warrant consideration by Big Tech. First, C-suite executives loathe depositions. They are time- and resource-intensive and distract senior executives from their primary job. Therefore, the fact that depositions are fairly alien to international arbitration proceedings is a significant drawcard. Secondly, and even more important, the threat of publicity in the courts can be used as a lever of power in pre-dispute negotiations. The confidentiality of international arbitration thus presents a big advantage.

The draft provisions explore these and other aspects to encourage the use of international arbitration in the context of technology-related disputes, beginning with a definition of "technology dispute."

What is a technology dispute?

Under draft provision 1(1), a technology disputes means:

> "a dispute arising out of or relating to the supply, procurement, research, development, implementation, licensing, commercialization, distribution, financing, as well as to the existence, scope, and validity of legal relationships of or related to the use of emerging and established technologies."

Such disputes may "arise out of ownership (including intellectual property rights in a specific technology), licensing terms, payment or financial issues, non-competition (unfair competition or non-competition), confidentiality (data privacy, non-disclosures), or regulatory issues."

Concern was expressed at the Colloquium that the proposed definition of a technology dispute in

draft provision 1 is overly broad. Switzerland requested – if perhaps rhetorically – an example of a dispute that would *not* constitute a technology dispute. France bristled at the inclusion of intellectual property in the definition – "Have WIPO been consulted?" – while the US noted that a plough is a form of technology… would a dispute involving the use of a plough be a dispute "of or related to the use of emerging *and established* technologies" (emphasis added)?

Against these concerns was a memorable remark made by expert Shai Sharvit (Gornitzky), that when it comes to technology disputes, like the unmentionable in *Jacobellis v. Ohio*, "[You] know it when you see it." Working Group Chair Andrés Jana (Bofill Mir & Alvarez) further clarified that, like the UNCITRAL Expedited Arbitration Rules, the draft provisions would be "opt-in" at the election of the parties, potentially ameliorating concerns as to the open-ended nature of the definition.

Effective and expeditious case management: the need for speed

The draft provisions introduce various techniques for the speedy resolution of technology disputes. Under draft provision 3, an initial case management conference shall be held as soon as possible after the constitution of the arbitral tribunal. Draft provision 4 holds that any supplement to the notice of arbitration, including all supporting evidence, should be communicated within 5 days following the initial case management conference, with any reply also to be communicated within 5 days.

Draft provision 9 provides that an award may be rendered within 20 days of constitution of the arbitral tribunal if done on the papers, that unless otherwise agreed by the parties an award will be made within 40 days, to be extended in exceptional circumstances to 60 days. Draft provision 9(4) states that if the award is not rendered within the established time limit, fee reductions for the arbitrator kick in on a sliding scale, with a 20% reduction for a delay of up to 14 days, all the way up to a 90% reduction for a delay of more than 60 days.

As Tilman Niedermaier (CMS) observed, the case management timeframes are "considerably stricter" than existing arbitration rules, with procedural timeframes typically left to the discretion of the arbitral tribunal. The time limits for the making of an award similarly go beyond existing arbitration rules, such as the 6 month limit in the ICC Rules 2021 (Article 31(1)) and UNCITRAL Expedited Arbitration Rules (Article 16(1)) or the 3 month limit found in the German Institute of Arbitration Rules (Article 37).

One rationale for the compressed timeframe, stated by Israel, is to be flexible to the needs of the high-tech community, especially early-stage ventures that cannot sustain an extended dispute. Several States expressed concern, however, that such a short time frame could come at the expense of thoroughness, noting that some technology disputes are complex, multi-jurisdictional, and involve significant sums.

Default rules on confidentiality

Perhaps the most significant benefit for technology related disputes – as mentioned by Friedman – is the inclusion of a default "inbound" confidentiality clause (between the parties and tribunal) in draft provision 7. Draft provision 7(1), largely based on WIPO Arbitration Rule 54, defines the term "confidential information." Under draft provision 7(2), a party must invoke confidentiality and explain why to the tribunal and other parties. If the parties cannot agree, draft provision 7(3) empowers the tribunal to determine under which conditions and to whom the confidential

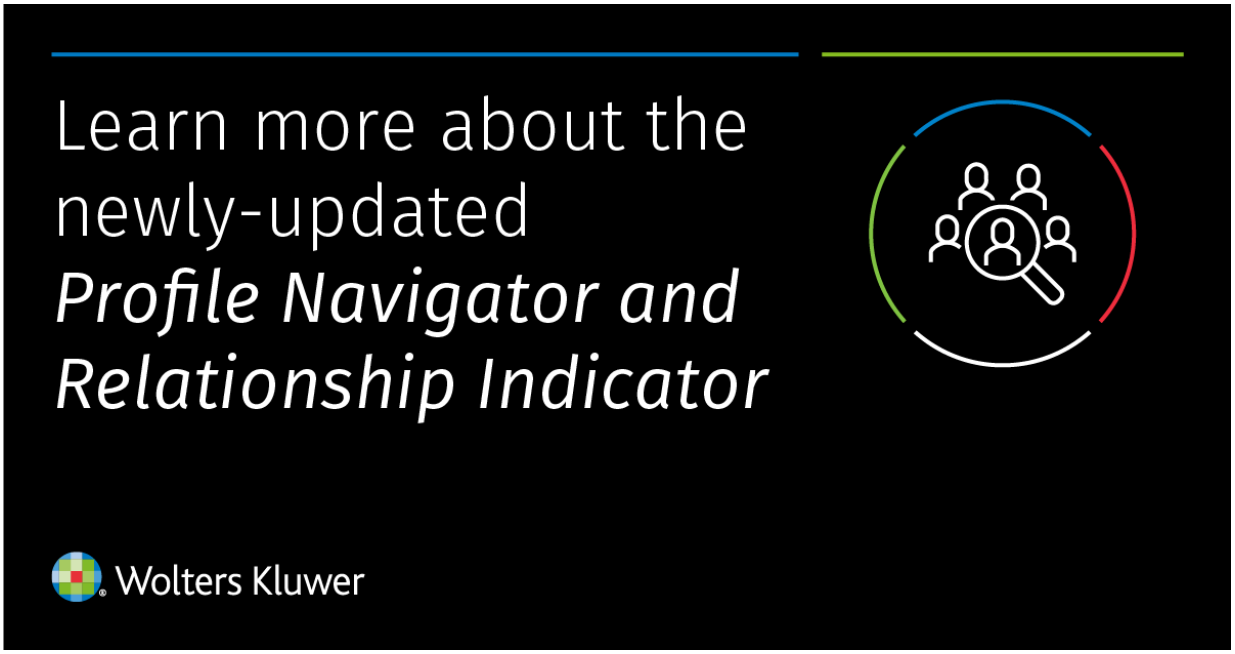
information may be disclosed (in whole or in part). One further innovation suggested by Friedman would be to expressly mention in the draft provision 7(3) conditions such as the "attorneys' eyes only" designation – commonly determined by arbitrators – or the concept of "clean teams" – often used in merger contexts. Draft provision 7(4) also provides that, in exceptional circumstances, the tribunal may designate an advisor to make the confidentiality determination.

The inclusion of an inbound confidentiality default rule is significant, as while the rules of many arbitral institutions contain obligations of confidentiality to be held by tribunals and supporting staff, they are typically silent on confidentiality as between the parties, relying instead on tribunal discretion or national legislation (explored by Marlon Meza-Salas (DLA Piper) here). A default rule of confidentiality may thus act as a significant enticement for technology companies to opt for international arbitration.

Closing thoughts

More than once, attendees of the Colloquium observed that many of the proposed rules – such as a mandatory initial case management conference, resort to a sole arbitrator, and arbitrator discretion to hold virtual hearings – are techniques that could be employed regardless of whether the dispute is a "technology dispute." Work remains to clarify the scope of technology disputes, and the nature of the draft provisions. In the meantime, the proposed innovations offer much food for thought in bringing arbitration to technology and technology to arbitration.

Further posts on our Arbitration Tech Toolbox series can be found here.



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