Kluwer Arbitration Blog

Australian Arbitration Week Recap: Hot Issues Involving Technology Arbitration

Reid Hadaway (DLA Piper) · Thursday, November 10th, 2022

On the second day of Australian Arbitration Week, DLA Piper's office in Melbourne, Australia, hosted a panel addressing "Hot Issues Involving Technology Arbitration". The panel comprised:

- Gowri Kangeson (Partner in DLA Piper's Litigation and Regulatory, and Arbitration Groups);
- Tim Lyons (Partner in DLA Piper's Intellectual Property and Technology Group); and
- Jason Choi (Senior Associate in DLA Piper's Litigation and Regulatory, and Arbitration Groups).

The Current State of Technology Arbitration

Mr Choi opened the discussion with an overview of what is happening in technology arbitrations right now.

Mr Choi noted that technology had become an ever-present part of everyday life. Indeed, with the advent of technologies like blockchain, Web3 and cryptocurrency, one could say we are entering a new era of technology. This new era has precipitated a growth in technology-related arbitrations over the past decade. Mr Choi also highlighted that technology is borderless, and the issues stemming from technology disputes are often very complex. These factors make such disputes ideal for resolution by arbitration.

The Origins and Types of Technology Disputes

Mr Lyons addressed the panel topic as a front-end lawyer involved in negotiating and implementing technology-related contracts. In particular, Mr Lyons provided insights on the circumstances where technology-related disputes arise and the types of those disputes.

On the origins of disputes in the technology sector, Mr Lyons noted that disputes often arise out of investments by technology companies; mergers and acquisitions and the associated due diligence; and intellectual property (**IP**) ownership. However, the key message is that technology disputes are not limited to the technology sector. All sectors involve technology, which inevitably increases the prospects of technology-related disputes. Mr Lyons highlighted the following examples:

- Joint venture agreements where technology is developed by more than one entity;
- The use of embedded networks and controls over power to smooth over energy grids in the energy and renewables sector;
- The vulnerability of the massive amounts of data collected and stored by the healthcare and biotechnology sector (an issue exemplified by recent high-profile data breaches in Australia, for example, see here); and
- The use of algorithms relying on data provided by sensors and cameras to manage roads and construct "smart buildings".

On the types of disputes likely to be seen in the technology context, Mr Lyons emphasised their varied nature. For instance, disputes are common where technology licences are afoot, and the parties disagree over the fees payable under the licence. Mr Lyons also mentioned he often witnesses disputes arise in the information technology industry where projects are delayed or a services provider fails to meet agreed service levels. Finally, the growth of the internet of things and the centrality of data privacy have led to claims where third parties manage an entity's data, and the entity is forced to bring a claim against that third party following data breaches.

Common Characteristics of Technology Disputes

Ms Kangeson outlined the characteristics of technology disputes that all potential participants should be aware of.

The first key point Ms Kangeson raised was complexity. Technology disputes frequently involve highly complex technical and factual issues. For example, the dispute may concern ongoing conduct, conduct over an extended period of time or a contract with no clear end goal or product. These factors contribute to two further notable features: a reduced chance for settlement and the difficulty in assessing damages. Ms Kangeson noted that individuals involved may try to shift blame and that where the end goal is unknown, there is no clear point from which to assess damages.

Ms Kangeson also noted that some disputes involve the interaction of various technologies of differing age and sophistication. To alleviate the potential for this and other vague terms causing disputes, Ms Kangeson noted that front-end lawyers should focus on creating certainty around the goals of a contract and clear terms consistent with those goals.

Finally, on the method of dispute resolution, Ms Kangeson reinforced Mr Choi's comment that arbitration was well-suited to handling such large and complex disputes. However, Ms Kangeson did point out that parties may prefer binding expert determination, but only where there were distinct technical issues to be resolved.

Why use arbitration?

Ms Kangeson and Mr Choi addressed the overarching question, "why would parties to a technology dispute prefer arbitration over litigation?".

Mr Choi began by noting that arbitration users, in a 2017 Silicon Valley Arbitration and Mediation

Center survey, have stated their concern that courts are more expensive than arbitration and do not have the same access to technology-specific expertise among adjudicators. In connection with these concerns, Mr Choi focused on the flexibility available to parties to an arbitration. They are free to choose the forum and arbitrators based on their preference for expertise and any neutrality concerns. These benefits are buttressed by the accessibility of arbitration precipitated by the widespread adoption of technology in the conduct of arbitrations. Indeed, Mr Choi proffered the hypothetical scenario where parties embed an arbitration clause within a smart contract that specifies the arbitrator to be appointed and the forum of the arbitration. Such a clause could be automatically executed in the event of a breach.

Mr Choi also highlighted the benefit of emergency procedures, such as those found in the 2021 ACICA Arbitration Rules. For example, in a dispute concerning climate change where the use of green technology is in issue and where there is potential imminent harm to the environment, a party may take advantage of the emergency procedures to obtain urgent interim relief to prevent the harm from occurring.

Ms Kangeson took up the discussion by noting the opportunity for parties to avail themselves of fast-track timelines through special rules, such as the recently updated ACICA Expedited Arbitration Rules. She also noted the speed, efficiency and cost benefits available to parties to arbitrations. However, Ms Kangeson cautioned that such benefits are largely dependant on parties effectively using the procedural flexibility available to them to expeditiously conclude a dispute.

On confidentiality, Ms Kangeson pointed out that many parties to a technology dispute are anxious to keep confidential IP and other trade secrets out of the public domain. To that end, arbitration offers the ability to maintain that confidentiality. Further, any political considerations that often arise in public procurements can also be kept confidential.

Arbitral awards are also final and able to be enforced globally under the New York Convention. In this context, Ms Kangeson also pointed out that parties to technology arbitrations can seek most forms of relief, including damages and injunctive relief.

In respect of potential downsides to arbitration, Ms Kangeson and Mr Choi noted that parties should be aware of potential jurisdictional challenges, especially where certain countries prohibit the arbitration of IP disputes. Parties should also be aware that it is up to them to take advantage of arbitration's benefits through the judicious preparation of their case and management of the procedural timetable.

Future Developments

To cap off the discussion, Ms Kangeson and Mr Lyons canvassed future trends to be aware of in technology arbitrations and disputes. Ms Kangeson highlighted a spate of recent decisions of UK and Singapore courts[1)] recognising property rights over cryptocurrency. These decisions open the way to potential future arbitral decisions granting interim relief over cryptocurrency. Ms Kangeson also highlighted the potential for arbitrations relating to non-fungible tokens, for example, the decision in *Soleymani v Nifty Gateway LLC [2022] EWHC 773 (Comm)*.

Regarding trends in arbitration specifically, Ms Kangeson discussed the growth of blockchain-

based arbitration platforms. However, Ms Kangeson cautioned against the immediate adoption of these methods, given their lack of flexibility in choosing arbitrators and forums.

Mr Lyons raised the use of arbitration in self-executing smart contracts, noting that such contracts are theoretically ill-suited to arbitration as they execute based on the verified occurrence of certain conditions. Mr Choi added that arbitration could be used where external factors interfere in those conditions, through the use of connectors linking the blockchain to off-chain events, requiring adjudication by a human arbitrator.

Finally, Mr Lyons briefly raised the potential for Web3 and the use of AI to up-end the resolution of disputes and the types of disputes referred to arbitration. These trends may raise interesting questions regarding the ownership of property and causality, respectively.

More coverage from Australian Arbitration Week is available here.

References

?1 *D'Aloia v Person Unknown & Ors* [2022] EWHC 1723 (Ch); *Tulip Trading Ltd v Bitcoin Association for BSV & Ors (Rev 1)* [2022] EWHC 141 (Ch)*; Sally Jayne Danisz v Persons Unknown and Huobi Global Ltd (T/A Huobi)* [2022] EWHC 280(QB)*; CLM v CLN and Others* [2022] SGHC 46

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