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Tel-Aviv Arbitration Week: Undefined, Borderless and Inevitable – Tech Disputes, Post-M&A Disputes and the Future of Arbitration

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In the home of the "start-up nation", panels on Technology Disputes and the Future of Arbitration" as well as "Post M&A Disputes" took place as part of the 2023 fourth annual Tel Aviv Arbitration Week ("**TAAW 2023**"), which took place from 26 February to 2 March 2023. This post summarizes the discussions held during both panels.

The first panel, moderated by Chairman of the Planning Committee of TAAW 2023, Shai Sharvit (Gornitzky & Co), comprised of: Inbal Aviad (Papaya Global), Marian Cohen (Israeli High-Tech Association and Mer Group), Andres Jana (Jana & Gil Dispute Resolution, UNCITRAL Working Group II Chair, and ICC Vice President), Claire Morel de Westgaver (BCLP), Justin Price (Kroll), and Yael Weiner (Israel Ministry of Justice).

The second panel took place at the offices of Gornitzky & Co., after welcoming remarks by Nuna Lerner (Gornitzky & Co). The panel was moderated by Steven Finizio (WilmerHale) and included Hilary Heilbron KC (Brick Court Chambers), Nir Keidar (Gornitzky & Co), Talia Sessler (Max Stock), and Franz Schwarz (WilmerHale).

Israel's Work on Tech Dispute Arbitration

Yael Weiner first provided a brief overview of projects to reform dispute resolution to meet the needs of the high tech industry, in which the Israeli Ministry of Justice has been involved. Such initiatives include both institutional reforms (ICSID rules reform, UNCITRAL technical notes, and more) and grassroots research such as discussions with institutions, stakeholders, hi-tech companies' general counsels and external counsels who expressed that often times companies would rather settle than arbitrate, due to the speed, confidentiality, and complexity of the relevant issues at hand.

Importantly, Israel's joint proposal with Japan for UNCITRAL to consider tech disputes was accepted and assigned to UNCITRAL Working Group II (the "**Working Group**"), which considered the topics of dispute resolution and adjudication, with a recent focus on the hi-tech sector. After an initial assessment, the Working Group's hypothesis became to create model clauses that companies can directly insert into their agreements.

Practitioner Insight into the Needs of the Hi-tech Community

Leading hi-tech and corporate executives provided an overview of the specific arbitral needs of hi-tech companies and of companies involved in M&A disputes.

Inbal Aviad shared the need for tech-tailored proceedings, explaining that sometimes it does not make sense for hi-tech companies to go to court, which often includes disclosure of sensitive information (such as revealing trade secrets, IP, data security, or highly technical items) to a judge who does not have the relevant expertise and will likely not fully understand such topics, or to share confidential information with the other side who is often a competitor. Additionally, local litigation is often not appropriate as hi-tech companies generally work in global markets, making it challenging to predict where a dispute might arise.

Marian Cohen agreed that he tries to avoid litigation when possible, for many of the same reasons. However, not every dispute can be settled and that is where he sees the potential for arbitration to play a role for hi-tech companies. He urged to create an arbitration system that would provide for speediness, professionalism and enforceability, noting that an unenforceable ruling is worthless in his opinion.

The M&A panelists provided ways to avoid drawn out and unnecessary litigation/arbitration, noting that one common issue arising in post-M&A disputes is the contractual standing regarding the price adjustment mechanism. Such must be clearly defined in order to determine how to enforce the price adjustment calculation and what the legal standing of the price adjustment document is. Otherwise, parties may end up going to litigation/arbitration just to determine the language of the agreement, before even deciding on if/how to litigate/arbitrate the main dispute.

Categorically, institutional arbitration rules do not contain a definition for expert determination, and it is not considered a form of arbitration. Usually, there is no institution selection for determining a price adjustment dispute, and if one is not selected, the court’s assistance is unavailable, since no local laws or institutional laws govern such clause, leaving the parties with a mechanism they cannot apply.

Though some panelists advocated that one solution to the need for arbitration clauses is to draft them in as specific a manner as possible, others argued that it could be advantageous to leave flexibility to select the right expert for the right issue. The arbitration clause appropriate for each company and for each agreement must be considered on its own merits.

The Challenge of Defining a Tech Dispute

The first surprising challenge the Working Group faced was to define a “tech dispute”. As Shai Sharvit explained, the term can be used narrowly, including only disputes whose main issue is one relating to a piece of technology of a technology company, but it can also be used very broadly, e.g. tech disputes unrelated to a tech company, disputes which are incidental to tech, disputes in which one or both parties is not a tech company, disputes related to tech that could traditionally be classified, for example as a contractual or IP dispute, or even straightforward disputes that are not necessarily tech-related but where the values of the tech community (such as speed and

confidentiality) are particularly important. The Working Group did not want to limit the scope of applicability and ultimately decided not to define the term.

Andres Jana clarified that the beauty of the anticipated model clauses is that they will be "opt-in" such that the parties who use them will be those that define what a tech dispute is. Though Yael Weiner explained that it is important for the group to brand the model clauses as "hi-tech", Shai Sharvit, Andres Jana and Yael Weiner agreed that the Working Group will not limit such mechanism only to tech disputes and recognized that such will be useful in other industries as well.

Thus far, there have been two sessions in which the Working Group began developing legal instruments for specialized and express dispute resolution with specific key features identified by the tech industry, primarily: shorter timeframes, higher levels of confidentiality, and the need for expert advice. Such are based adaptations of the already existing model clauses for this industry.

Due Diligence

Almost all tech companies go through some due diligence process throughout their lifespan, whether during investment rounds or in the context of M&A transactions. The second panel members emphasized the importance of raising awareness of the significance of the due diligence documentation. During a dispute, such documentation will be used to support the parties' claims. For example, if there is a disagreement about the accuracy of financial statements, the due diligence report will be used to determine the facts.

A proper confirmation of due diligence refers to a document that acknowledges the completion of the due diligence process, and confirms the accuracy of the information discovered during the investigation. This confirmation is necessary to protect both parties in case of any future disputes.

If there is a time-gap between when the due diligence was performed and when the dispute arises, parties must assess whether there have been any changes to the information or circumstances that were investigated during the due diligence. In this case, the due diligence documentation will be used to determine whether any changes have occurred and to what extent they might impact the dispute.

A final due diligence notion raised during the panel was that M&A contracts should include provisions allowing for periodic review and renewal of the due diligence process. These clauses should specify the scope of the review and reference the relevant documentation, so that both parties understand the process and its importance. This can help prevent future disputes by ensuring that the parties are aware of any changes that may impact the transaction.

High Tech Needs Addressed by the Working Group

Timeframes

Claire Morel De Westgaver pointed out that while clients generally agree to a quick timeframe when drafting an arbitration clause, such outlook might change depending on the type of dispute that arises, when a dispute actually arises. For example, if a dispute is fact-heavy, has a broad

scope, or is particularly complex, a party may no longer be comfortable with an extremely expedited timeframe. She suggests putting an emphasis on educating non-contentious colleagues on the significance of choosing the best dispute resolution mechanism for a specific contract.

Inbal Aviad explained that the speed of proceedings is something she takes into account in light of the pace at which hi-tech companies work, which is often too rapid for courts to handle and development cannot be bogged down by slow litigation (or arbitration). She also shared that parties often include an entire relationship in the scope of a request for arbitration, even when a dispute is specific. However, experienced counsels should know how to balance between risk and speed.

Marian Cohen confirmed that it is the lawyer's responsibility to limit the scope of arbitration – keeping in mind that generally, periods of 20 years are not relevant to hi-tech companies.

Andres Jana explained that UNCITRAL's tech model clauses will include a mandate to determine the key issues of a dispute at the outset of the arbitration procedure as well as a shorter time limit, even three months, until receiving an award enforceable under the New York Convention.

Confidentiality

The panelists agreed that confidentiality is extremely important in tech disputes, for those reasons cited by Inbal Aviad above. Claire Morel De Westgaver explained that she regularly encounters confidentiality issues in proceedings and it is of the utmost importance that decision makers understand its significance.

Justin Price explained that he deals with confidentiality in three ways: NDAs, arranging a supervised schedule review of the relevant digital evidence (source code, for example), and having a neutral fact finder reporting directly to the tribunal and submitting an expert report which each party can interpret via their own experts.

Andres Jana clarified that, whereas UNCITRAL proceedings are not confidential by default, the tech model clauses will include a default confidentiality mechanism.

Experts

Justin Price emphasized the importance that the parties and the tribunal understand the significance of how digital evidence is acquired, preserved, searched and presented. As such, it is advantageous to have a neutral expert to assist the tribunal with evidence-related expertise.

Andres Jana explained that naturally, there are highly technical components to tech disputes. As such, the model clauses will include the appointment of an expert to assist the tribunal on such aspects.

Conclusion

The panels tasked both drafters and future users of the model clauses with working together to produce an effective product and with carefully considering dispute resolution mechanisms in M&A transactions to avoid costly and time-consuming disputes.

Tech and M&A disputes are not going anywhere anytime soon and the need for resolving them

will continue to grow until a solution that works for the end users – the companies that will be parties to the arbitration – is completed.

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