HERBERT SMITH FREEHILLS

OVERCOMING RELUCTANCE TO ARBITRATE IN THE TMT SECTOR

29 August 2018 | London
Legal Briefings – By **Susan Field, Senior Associate**

Drawing on two surveys on the use of arbitration in technology, media and telecoms disputes, Susan Field, a senior associate and solicitor advocate at Herbert Smith Freehills in London, considers whether parties in the TMT sector are moving away from their traditional reluctance to use international arbitration.

The technology media and telecoms (TMT) sector has grown by leaps and bounds in recent years. With rapid, sometimes cross-border, development and the increasing spend and dependency on technology, comes the unavoidable pain of disputes as deals go wrong, partnerships turn sour, or things do not go to plan. There are already a large number of TMT-related disputes globally, many involving significant sums.

According to a survey of the TMT sector conducted by Queen Mary University of London in 2016 (International Dispute Resolution Survey – Pre-empting and Resolving Technology, Media and Telecoms Disputes), 23% of participants had experienced more than 20 TMT disputes over the past five years. More than a third said that they had been involved in at least one dispute valued in excess of US$100 million.

The QMU survey also identified the types of TMT disputes most commonly encountered: these included IP, licensing, regulatory, supply chain and consumer disputes, though there was of course variation in the type of disputes encountered in the individual technology, media and telecoms industries.

More recently, in 2017, the Silicon Valley Arbitration and Mediation Centre (SVMAC) conducted its own survey identifying among other things the top perceived benefits of arbitration among technology companies.

While the surveys suggest there is a growing market for dispute resolution in the TMT sector, there remains a perception that parties are reluctant to use it. This article looks at whether there is any basis for this and how the arbitration community should respond.

A DIVERGENCE BETWEEN ATTITUDES AND PRACTICE

When it comes to the TMT sector, it appears there is a divergence between attitudes to arbitration and the use of it in practice.

On one hand, more than four-fifths of the participants in the QMU survey believed that there would be an increase in the use of arbitration for TMT disputes, with a "striking majority" (92%) agreeing that it is well suited to resolving them.

On the other hand, just 4.36% of LCIA cases in 2016 were TMT-related, with only 0.4% relating to the media and entertainment industry. Across the TMT sector, mediation is the most encouraged tool for dispute resolution within companies, though the survey does not identify what, if any, method is encouraged when mediation fails.

Closer examination of the three sectors by the survey showed that arbitration lags behind other forms of dispute resolution as the preferred method. In the telecoms sector, expert determination was found to be the most encouraged method, with not a single participant saying that arbitration was positively encouraged. In the technology sector, litigation was the most encouraged, according to 50% of participants. Arbitration fell behind at 27%.

While the survey did not focus on the media industry, anecdotal evidence suggests that it may be more arbitration friendly. At a Chartered Institute of Arbitrators seminar in June 2017, Andrew Hildebrand, a leading UK commercial mediator, remarked that "50% of film and television contracts stipulate the use of arbitration to resolve disputes."

Given the confidentiality that arbitration often offers, it is perhaps unsurprising that its use might be more prevalent in relation to contracts where damage may be caused if the dispute become public knowledge.

WHY IS THERE A RELUCTANCE TO USE ARBITRATION?

The QMU survey offered a number of possible reasons why arbitration might not be well suited to disputes in the TMT sector as a whole.

First, many of the common TMT disputes are primarily non-contractual matters (issues relating to IP, competition, data protection and data security come to mind). In the absence of agreement between the parties, litigation will be the default mechanism for resolving the dispute. It will be rare in any sector to agree to arbitration after a dispute has arisen.

In addition, participants in the QMU survey considered that injunctive relief is difficult to obtain in arbitration. This is not a baseless concern. While emergency arbitrators and expedited procedures are gaining traction, there are inevitable limits to a tribunal's contractually bestowed powers. However, concern relates not just to the availability of relief but the promptness of that relief: 57% of participants in the QMU survey were of the view that injunctive relief is more time-consuming to obtain in arbitration than making an application to domestic courts.

A further limitation is the often restrictive use of model clauses. Participants in the QMU survey remarked that the default position for dispute resolution in their model contracts is often litigation. While it would not be unduly complex, those responsible for negotiating contracts said they were often discouraged from deviating from the default position or paid insufficient attention to the dispute resolution provisions during negotiations. That is a hard reality in a culture which is not litigious and prioritises resources for growth and development over formal dispute resolution.

Interestingly, the QMU survey indicated that the decision as to which dispute resolution mechanism to choose rests generally with senior management (according to 57% of participants), rather than in-house counsel. It may be that such decision-makers may not necessarily be aware of the mechanics or advantages of arbitration.

A final possible reason for reluctance to use arbitration that emerged from the QMU survey was a perceived lack of TMT specialists in the field. Some suggested that there was a need for more specialised arbitrators and practitioners with TMT expertise, while others thought the sector simply had to develop greater confidence in the abilities of current arbitrators. Overall, 19% of participants thought that specialised judicial courts were better equipped to deal with disputes in this sector.

SECTOR-SPECIFIC REASONS FOR RELUCTANCE

While the QMU survey does not address the reasons why companies in each specific sector may be reluctant to choose arbitration, some of the reasons outlined above may be more relevant to some industries than others.

Disputes in the telecoms industry appear to centre more on the industry's regulatory framework. If this is true, then one reason why arbitration is not encouraged may be the difficulty in obtaining the consent necessary to commence arbitration: a regulatory dispute between a private company and the regulator (or the state) is less likely to arise out of a negotiated contract. It may not always be possible to commence arbitration directly against state entities in the absence of a treaty. There may also be a fixed (or preferred) method of dispute resolution arising by operation of law.

By its very nature, the technology sector is rapidly changing. IP and licensing disputes are inevitably more common in this sector. The availability of injunctive relief is therefore likely to be a significant factor in choosing a dispute resolution method. The availability of injunctive relief was identified as a benefit of arbitration by only 3% of respondents to the SVMAC survey.

Complex technological disputes may in some circumstances require experts and arbitrators with a corresponding degree of technological expertise. Some of those interviewed for the QMU survey remarked that a specialised roster of arbitrators would be welcomed. Participants in the SVAMC survey indicated that there is a need for more specialised decision-makers in arbitration, though 6% listed expert decision-making as one of the top three existing benefits of arbitration.

Again, anecdotal evidence suggests that the media industry is likely to share similar concerns to the technology sector. In addition, speed may be a particular concern, especially if disputes arise in the midst of a media production, and preservation of the long-term relationship is particularly valued. These factors too may explain why there is a disinclination to adopt any form of formal dispute resolution.

RESPONDING TO PERCEIVED DRAWBACKS

A number of the concerns outlined by the surveys are not easily countered – consent to arbitrate may simply not be available in non-contractual disputes, and certain injunctive powers will be beyond the gift of even a promptly formed tribunal or emergency arbitrator. However, there is much that arbitration practitioners can do to defend or respond to other perceived drawbacks of arbitration.

The need to preserve long-term relationships may be the reason mediation is reported to be the most encouraged dispute resolution mechanism across all three sectors, despite its non-binding nature. But this does not mean that the opportunity for arbitration is lost. Where formal proceedings are unavoidable, arbitration is arguably as well or ill-equipped as any other binding dispute resolution procedure to address relationship concerns, and indeed these arise in many other sectors that traditionally use arbitration.

Moreover, given that success in mediation is related to a party's ability to threaten effective sanction through a binding dispute resolution process, one might encourage the use of mediation and arbitration in parallel or as part of an escalating dispute resolution clause. Indeed, it would be unusual for a disputes lawyer to recommend providing for mediation in a contract without the option to escalate to litigation or arbitration.

The recently updated World Intellectual Property Organization Mediation and Expedited Arbitration Rules for Film and Media, which provide for parties to choose to use either mediation or an expedited arbitration procedure, may encourage such an approach.

The surveys further highlight the need for more industry confidence and an increased number of sector specialists. Perhaps the two are interlinked – and the greater the expertise in TMT among arbitrators, the more confidence parties will have.

As an example of how such specialism can be achieved, we need look no further than the energy sector, in which arbitration has long been favoured and which has many specialist arbitrators and counsel. The financial sector branch of the London Arbitration Club has also seen recent growth, including launching new expedited procedures tailored towards financial services disputes. Specialism in TMT disputes could be developed along similar lines. The confidence that a minority of participants in the SVAMC survey place in expert decision-making in arbitration suggests that this specialism has started to develop.

In-house counsel should also note their role in educating senior managers in TMT companies of the role of arbitration. In time, in-house counsel might also play a critical role in tailoring dispute resolution clauses most effectively to the contract in hand and providing for arbitration where appropriate.

The perception that securing injunctive relief may be more time-consuming in arbitration may be a fair one but should not be set in stone. The average time to complete ICC emergency proceedings in 2016 was 18 days, while SIAC statistics suggest that the average time taken by an emergency arbitrator to issue an award ranges from eight to 10 days, with the shortest period being two days. These figures suggest that emergency arbitration proceedings can be completed within a timeframe comparable to the courts and, in some jurisdictions, may be the faster option.

Setting aside the issue of injunctive relief, arbitration has always been well placed to meet the demand for speedy dispute resolution through expedited procedures.

Arbitral procedures can also be made more efficient and effective and are already heading in that direction. Recent initiatives include e-disclosure and document review, e-case management and even e-hearings. Most of these suggestions were well received by participants in the QMU survey. Innovations may be supported by the technology sector itself – with practitioners and arbitral institutions increasingly becoming the consumers of further technology.

In conclusion, arbitration is already well placed to meet many of the concerns raised in the surveys, in addition to offering the much-vaunted advantages of confidentiality and enforceability. But overcoming the lingering reluctance to use it in the TMT sector is a work in progress. Fortunately, the flexible nature of arbitration procedure means that it is capable of adapting to the demands of the sector and providing discreet, speedy, technology-supported binding dispute resolution for international contractual disputes.

First published on the Global Arbitration Review website, 14 August 2018

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

SUSAN FIELD
SENIOR ASSOCIATE,
LONDON
+44 20 7466 2818
Susan.Field@hsf.com

LEGAL NOTICE