

RESOLVING TECHNOLOGY DISPUTES THROUGH ARBITRATION*Jennifer Wu****I. INTRODUCTION**

Outside of negotiation and mediation, arbitration and litigation are two of the most common dispute resolution mechanisms for resolving technology disputes. Both are similar on a surface level in how disputes are resolved procedurally, with a team of lawyers and a judge or arbitrator presiding over the dispute, yet their intricacies make all the difference in how a case is run and the effect it has on the parties involved.

Companies that encounter technology disputes would benefit substantially in understanding the differences in how technology disputes are handled by court litigation and arbitration to decide which they should opt for. This article seeks to (i) set out the most prominent factors that are relevant for companies to decide which dispute resolution mechanism would be most appropriate, (ii) to aid companies in deciding how their dispute resolution clauses should be drafted, as choosing the wrong option will lead to additional time, costs, and may limit the remedies available, and (iii) to provide guidance on the trends of emerging technology disputes to watch out for in the near future.

II. TYPES OF TECHNOLOGY DISPUTES

A technology-related dispute is defined by the UNCITRAL Working Group II as “*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.*”¹

The breadth of the definition stands true with time. Technology disputes are often separated into the following two categories: (i) contractual disputes with a technology element (e.g. outsourcing, supply contract for computer software, software licensing etc), and (ii) specialised technology disputes (e.g. intellectual property, distressed IT transformation projects, data privacy, cybersecurity, cryptocurrency etc), where specialist knowledge of the technology matters.

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¹ United Nations Commission on International Trade Law Working Group II (Dispute Settlement), Draft Provisions for Technology-related Dispute Resolution (2022) <https://documents.un.org/doc/undoc/ltd/v22/004/24/pdf/v2200424.pdf>.

First, contractual disputes with a technology element. The core elements of these claims typically turn on the analysis, interpretation, and compliance with the relevant contractual terms (e.g. specifications, fitness for purpose, variation of terms, timing for delivery, entitlement to monetary damages, entitlement to damages for non-performance etc.).²

Second, specialised technology disputes. The core elements of these claims typically turn on the core technology being delivered and some failure of the technology, enabling damages to be claims in contract or tort. To illustrate the distressed IT project claim, in *Hong Kong Hung Shang Electric Limited v New City (Group) Limited Trading As New City Computer System Consultants* [2010] HKCU 1791. In this case, the plaintiff contracted the defendant to design and develop an integrated management software for its business operation in Hong Kong and Mainland China.³ The plaintiff was of the view that the system was “*incomplete and full of errors and inconsistencies*”.⁴ The plaintiff therefore claimed that the defendant should return the contract price (amongst others) for its failure to provide the quality of software system as contracted.⁵

Other technology disputes may involve issues of intellectual property rights, data privacy, cybersecurity breaches and cryptocurrency. To illustrate a copyright infringement case, in *Microsoft Corporation v Able System Development Ltd. T/A Able Computer Centre* [2002] HKCU 1185, the Court awarded the plaintiff damages arising from the defendant’s sale of computers with pre-loaded unlicensed software programs.⁶ Other cases relate to the use and security of personal data. This is a growing area because companies rely on data to facilitate their daily operations. In practice, we have observed increasing claims in the areas of: (i) identity fraud, (ii) class action from cyber incidents,⁷ (iii) cyber fraud,⁸ just to name a few.

III. FEATURES OF ARBITRATION IN TECHNOLOGY DISPUTES

² Richard B. Mawrey, *Commercial Arbitration and Information Technology Disputes*, 30 Denning L.J. 155, 165-166 (2018).; *Hong Kong Hung Shang Electric Limited v New City (Group) Limited Trading As New City Computer System Consultants* [2010] HKCU 1791.

³ *Hong Kong Hung Shang Electric Limited v New City (Group) Limited Trading As New City Computer System Consultants*, *Id.*, at 1.

⁴ *Id.*, at 48.

⁵ *Id.*, at 15.

⁶ *Microsoft Corporation v Able System Development Ltd. T/A Able Computer Centre* [2002] HKCU 1185.

⁷ Karen Zhang et al., *Hong Kong’s Cathay Pacific Faces First Collective Legal Action over Massive Data Breach, with 200 Customers Poised to Make Claims*, South China Morning Post, Oct. 30, 2018 <https://www.scmp.com/news/hong-kong/hong-kong-economy/article/2170805/hong-kongs-cathay-pacific-faces-first-collective>.

⁸ Press Release, The Government of the Hong Kong Special Administrative Region, LCQ9: Combating frauds involving deepfake (Jun. 26, 2024), <https://www.info.gov.hk/gia/general/202406/26/P2024062600192.htm>.

Arbitration has been the preferred option for resolving technology disputes when compared to litigation. According to the findings of the Queen Mary University of London Report (“**Report**”), 92% of respondents indicated that “*international arbitration is well suited for TMT disputes*”.⁹ They considered the “*enforceability*” of arbitral awards, ability to “*avoid litigation in foreign jurisdictions*”, “*confidentiality/privacy*”, “*expertise of the decision maker*”, and “*neutrality*” to be the top five features that make arbitration “*an appealing mechanism in resolving TMT disputes*”.¹⁰ Practitioners have also affirmed that the same features specifically lead to positive outcomes in intellectual property arbitration.¹¹

Given technology disputes can be complex and document-heavy, distressed parties may be incentivised to use arbitration to resolve the dispute¹² (as opposed to going for litigation, “*with possible satellite litigation and subsequent appeals up the line*”).¹³ As observed in the landmark IBM-Fujitsu arbitration,¹⁴ parties’ “*shared interests*” and “*joint gains*” can be effectively maximised by way of collaborative arbitration process (e.g. using a combination of mediation, rule-making proceedings, and ongoing dispute resolution strategies to resolve disputes). In practice, cost-conscious parties who catch themselves in technology disputes will likely prefer arbitration – the dispute resolution mechanism has straightforward case management procedures (usually agreed and set out in procedural order no. 1) and fewer costs.¹⁵

The benefits of arbitration have been widely discussed, professing the key features of flexible and streamlined arbitration rules¹⁶ and the ability to choose technology-specialised arbitrators suited for the subject matter of the technology dispute.¹⁷ Below are some factors that are particularly advantageous for choosing arbitration for technology disputes.

⁹ Queen Mary University of London, Pre-empting and Resolving Technology, Media and Telecoms Disputes, International Dispute Resolution Survey (2016), https://www.qmul.ac.uk/arbitration/media/arbitration/docs/Fixing_Tech_report_online_singles.pdf, at 25.

¹⁰ *Id.* p. 26.

¹¹ Trevor Cook and Alejandro I. Garcia, *Chapter 3: Benefits and Limitations of International Arbitration for IP Disputes*, International Intellectual Property Arbitration, Arbitration in Context Series, Volume 2 (© Kluwer Law International; Kluwer Law International 2010), pp. 23 – 48.

¹² Robert H. Mnookin, *Creating Value Through Process Design: The IBM-Fujitsu Arbitration*, The Arbitration Journal, 1992-09, Vol.47 (3), 6-11, p. 8.

¹³ *Id.* *supra* note 2.

¹⁴ Cliff Dilloway, *Arbitration — IBM v FUJITSU Ltd*, The Computer Law and Security Report, 1988, Vol.3 (6), p.32-34; Elsevier Ltd.

¹⁵ *Id.*, *supra* note [Mawrey] at 164.

¹⁶ Gary L. Benton & Steven K. Andersen, *Technology Arbitration Revisited*, 74(4) Dispute Resolution Journal (2019) 1, 4.

¹⁷ Simon Kenyon et al., *Dispute Resolution Mechanisms for IT Disputes*, [https://uk.practicallaw.thomsonreuters.com/Document/I67cbe5edb41111ebbea4f0dc9fb69570/View/FullText.html?transitionType=SearchItem&contextData=\(sc.Search\)&firstPage=true#skipToDocument](https://uk.practicallaw.thomsonreuters.com/Document/I67cbe5edb41111ebbea4f0dc9fb69570/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search)&firstPage=true#skipToDocument).

A. Confidentiality of Proceedings

Companies which may encounter technology disputes often operate using sensitive information about products and services and possess large amounts of data which may be sensitive or inappropriate to be revealed to the public.¹⁸ The revealing of sensitive information may be harmful to the reputation of such companies, whilst the disclosure of a companies' trade secrets or strategies to maximise profitability may be detrimental to a companies' business.¹⁹ Such companies are particularly vulnerable to these issues, and stand to benefit from confidentiality in arbitration to prevent information related to their company from being made publicly available.²⁰ The Cambridge Analytica cloud security scandal served as the perfect illustration of the potentially disastrous financial consequences that would follow public exposure.²¹ In 2018, world-known newspapers exposed the shocking news that 50 million Facebook user profiles were harvested and analysed by Cambridge Analytica for political microtargeting purposes.²² Soon after, Facebook lost 3 million users in Europe and its share prices plummeted by 19% (i.e. market value evaporation of more than US\$119 billion).²³ To prevent such undesirable happenings, parties would generally prefer to rely on closed hearings and adopt

¹⁸ ICC Dispute Resolution Library, *Tech Disputes and Arbitration*, 3 ICC Dispute Resolution Bulletin (2023) <https://jusmundi.com/en/document/publication/en-tech-disputes-and-arbitration>, at 99.

¹⁹ Gary L. Benton and Richard J. Rogers, *The Arbitration of International Technology - Disputes Under the English Arbitration Act 1996*, in William W. Park (ed), *Arbitration International*, (© The Author(s); Oxford University Press 1997, Volume 13, Issue 4), 361 – 374, 363; Ginta Ahrel, *Chapter 45: New Frontiers II: The Subject Matters of the Disputes of Tomorrow – Cloud Dispute*, in Cavinder Bull, Loretta Malintoppi, et al. (eds), *ICCA Congress Series No. 21 (Edinburgh 2022): Arbitration's Age of Enlightenment?*, ICCA Congress Series, Volume 21 (© Kluwer Law International; ICCA & Kluwer Law International 2023), pp. 761 - 776.

²⁰ Gary L. Benton and Richard J. Rogers, *The Arbitration of International Technology - Disputes Under the English Arbitration Act 1996*, in William W. Park (ed), *Arbitration International*, (© The Author(s); Oxford University Press 1997, Volume 13, Issue 4), 361 – 374, 363.

²¹ *Id.*, *supra* note *New Frontiers II: The Subject Matters of the Disputes of Tomorrow – Cloud Dispute*, in Cavinder Bull, Loretta Malintoppi, et al. (eds), *ICCA Congress Series No. 21 (Edinburgh 2022): Arbitration's Age of Enlightenment?*, ICCA Congress Series, Volume 21 (© Kluwer Law International; ICCA & Kluwer Law International 2023), pp. 761 – 776, at 774.

²² Katie Harbath, Collier Fernekes, *History of the Cambridge Analytica Controversy*, Bipartisan Policy Centre (Mar.16, 2023), <https://bipartisanpolicy.org/blog/cambridge-analytica-controversy/>; *New Frontiers II: The Subject Matters of the Disputes of Tomorrow – Cloud Dispute*, in Cavinder Bull, Loretta Malintoppi, et al. (eds), *ICCA Congress Series No. 21 (Edinburgh 2022): Arbitration's Age of Enlightenment?*, ICCA Congress Series, Volume 21 (© Kluwer Law International; ICCA & Kluwer Law International 2023), at 774; Carole Cadwalladr and Emma Graham-Harrison, *Revealed: 50 million Facebook profiles harvested for Cambridge Analytica in major data breach*, the Guardian (Mar.17, 2018) <https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election>.

²³ *Id.*, *supra* note *New Frontiers II: The Subject Matters of the Disputes of Tomorrow – Cloud Dispute*, in Cavinder Bull, Loretta Malintoppi, et al. (eds), *ICCA Congress Series No. 21 (Edinburgh 2022): Arbitration's Age of Enlightenment?*, ICCA Congress Series, Volume 21 (© Kluwer Law International; ICCA & Kluwer Law International 2023), at 774; Carole Cadwalladr and Emma Graham-Harrison, *Revealed: 50 million Facebook profiles harvested for Cambridge Analytica in major data breach*, the Guardian (Mar.17, 2018) <https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election>.

institutional arbitration rules that safeguard confidentiality (e.g. WIPO Arbitration Rules, the LCIA Rules, and the DIS Arbitration Rules etc.).²⁴

B. Choice of Arbitrator with Specialised Expertise

As noted, specialised technology disputes are different from contractual disputes with a technology element. In specialised technology disputes, distinctly sophisticated technological systems are often involved in the process of tailoring a particular software to suit the customer's needs.²⁵ These are the types of claims resulting from the IT transformation project and distressed IT projects.

The ability to appoint an arbitrator with technology sector knowledge and technology law expertise is a “*strong selling point*” for parties involved in a technology dispute.²⁶ Internationally, there is prevalent cynicism over judges being “*inexperienced and unqualified*” in determining specialised technology disputes.²⁷ In the US, a study by the Silicon Valley Arbitration and Mediation Center in 2017 revealed that 46% of respondents have identified this to be the top three problem with litigation involving technology companies.²⁸ In the UK, it was similarly observed that “*some disastrously bad appointments to the bench of the Technology and Construction Court in London drove some litigants out into the provinces but many others into seeking arbitrator*”.²⁹ Although it was unclear whether Mawrey was hinting at Judge Seymour's “*wounding and sarcastic comments*”³⁰ made about the barrister and defendant's legal advisors in *Co-operative Group Ltd (formerly Co-operative Wholesale Society Ltd) v International Computers Ltd* [2003] EWHC 1 (TCC), such incident lent weight to the argument that certain appointments to the TCC bench could potentially be questionable.³¹ By opting for arbitration, parties to specialised technology disputes may achieve better certainty with

²⁴ Trevor Cook and Alejandro I. Garcia, *Chapter 3: Benefits and Limitations of International Arbitration for IP Disputes*, International Intellectual Property Arbitration, Arbitration in Context Series, Volume 2 (© Kluwer Law International; Kluwer Law International 2010), 23 – 48, 47; Gary L. Benton and Richard J. Rogers, ‘*The Arbitration of International Technology - Disputes Under the English Arbitration Act 1996*’, in William W. Park (ed), *Arbitration International*, (© The Author(s); Oxford University Press 1997, Volume 13, Issue 4), 361- 374, 364; Ay Yunus Emre, *Intellectual Property Disputes and International Arbitration*, 58 ZB. RADOVA 929 (2021).

²⁵ Mawrey, *supra* note 2, at 161.

²⁶ Mawrey, *supra* note 9, at 160; Benton & Andersen, *supra* note 11, at 3.

²⁷ Mawrey, *Id.* at 159; Benton & Andersen, *Id.* at 4.

²⁸ Silicon Valley Arbitration and Mediation Center, *Cost is the Top Tech Litigation Problem, Survey Shows Arbitration Strongly Preferred for Specialized Expertise* (2017), <https://go.adr.org/rs/294-SFS-516/images/SVAMC-2017-Survey-Report.pdf>; Benton & Andersen, *Id.* at 3.

²⁹ Mawrey, *supra* note 14, at 160.

³⁰ *Co-Operative Group (CWS) Ltd v International Computers Ltd* [2003] EWCA Civ 1955, at 326.

³¹ Legal Affairs Correspondent, Robert Verkaik, *Judge is berated for 'wounding remarks'* (Jan.8, 2004), *The Independent*, <https://www.independent.co.uk/news/uk/crime/judge-is-berated-for-wounding-remarks-85007.html>; Judge ousted at the Technology and Construction Court (Jun.17, 2005), *Building*, <https://www.building.co.uk/news/judge-ousted-at-the-technology-and-construction-court/3052517.article>.

decision made by a panel of arbitrator(s) who have spent a lifetime working in the technology sector.³²

C. Presentation of Material during the Arbitration Hearing

Another unique feature of technology disputes and arbitration is that by nature of companies which may encounter technology disputes, much of the companies' assets and information may be stored electronically. The software used by companies may be complex and numerous, with different software used to maintain different operations of a company. Traditional litigation's procedural rules and less technologically advanced courtroom setups may be less adequate for such disputes, where traditionally exchange of pleadings and evidence may still be required to be conducted with physical bundles and printed on paper. An arbitration's procedural rules may provide the option for remote hearings, the exchanging of evidence and pleadings online, and the display of evidence in the courtroom using advanced technology. This may bring substantial ease to the procedures required and cut costs during the dispute resolution process.

D. Discovery

Ancillary to the fact that much of the parties' evidence in technology disputes is stored electronically is the tendency for companies to have large volumes of project-related documents when a dispute arises. Arbitrators are better able to limit the scope of discovery compared to traditional litigation proceedings to mitigate voluminous disclosure.³³ In practice, arbitrators can control the scope of discovery and/or deter excessive discovery by incorporating various "hard" discovery controlling measures³⁴ into the procedural orders. Examples of which include (i) assigning an appropriate "*mode of discovery*" based on the size of the case (e.g. "*ranging from the most basic (no disclosure of documents, other than disclosure, prior to the evidentiary hearings, of documents that each side will present in support of its case), through three more modes, with increasingly expanded discovery in each mode*"),³⁵ or (ii) requiring the requesting party to pay the costs of discovery even if it wins the arbitration.³⁶ This may allow

³² Mawrey, *supra* note [x].

³³ Kenyon et al., *supra* note 11.

³⁴ Steven C Bennett, "*Hard*" Tools for Controlling Discovery Burdens in Arbitration, *Dispute Resolution Journal* Vol 73(4) (2018), pp. 295 – 313 (2018), 1-30, 5.

³⁵ *Id.*, 5-6; CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration, Schedule 2.

³⁶ *Id.*, 8-9; International Chamber of Commerce, *Techniques for Managing Electronic Document Production When it is Permitted or Required in International Arbitration* (2012), 5.23.

parties to limit the amount of costs incurred during the discovery process and throughout the process of pleadings and submissions.

E. Interim Measures

Where a tribunal is not yet constituted, parties may either apply for urgent interim relief from an emergency arbitrator, or the relevant national court.³⁷ As a means for immediate relief, interim measures are particularly relevant for technology disputes, which often involve breaches of intellectual property rights or misuse of digital assets,³⁸ requiring immediate injunctive relief to prevent further harm. For various reasons, however, interim measures in arbitration suffer from flaws which make it less desirable to injunctions in traditional litigation. One of the most significant flaws lies in the questionable enforceability of interim reliefs granted by emergency arbitrators.³⁹ At present, there is “*no international convention regulating the enforceability of interim measures made by arbitrators despite different approaches taken by jurisdictions*”.⁴⁰ Not knowing whether the interim relief obtained from an emergency arbitrator can stop imminent technology exploitation may significantly deter parties from relying solely on arbitration for resolving disputes. In fact, according to the Queen Mary University of London 2015 International Arbitration Survey, only 29% (i.e., less than one-third) of the respondents “*would generally prefer to seek urgent relief from an emergency arbitrator, with almost half (46%) opting instead for relevant domestic courts*”.⁴¹ We will discuss more below on the reasons why this is so.

IV. FEATURES OF LITIGATION FOR TECHNOLOGY DISPUTES

³⁷ Queen Mary University London, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, https://www.qmul.ac.uk/arbitration/media/arbitration/docs/2015_International_Arbitration_Survey.pdf, p. 27; UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006), Article 9; Junmin Zhang, The Enforceability of the Interim Measures Granted by an Emergency Arbitrator in International Commercial Arbitration, Singapore : Springer Nature Singapore (2024), p. 6.

³⁸ Rachel Lidgate et al., *Dispute Resolution in the Technology Industry: Q&A* (Oct. 7, 2023), [https://uk.practicallaw.thomsonreuters.com/Document/Idee5ff93414b11ec9f24ec7b211d8087/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0a89df59000001914fdc047ca0a013de%3Fppcid%3D75a96283c2f84189961d509068868068%26Nav%3DKNOWHOW_UK%26fragmentIdentifier%3DIdee5ff93414b11ec9f24ec7b211d8087%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=d52521b75809b5fdd5fe8d58b447f760&list=KNOWHOW_UK&rank=3&sessionScopeId=b2c7bfbcd499611e5f727ddd7851c21356a96a78664250f5e4abb0aee896bbcc&ppcid=75a96283c2f84189961d509068868068&originationContext=Search%20Result&transitionType=SearchItem&contextData=\(sc.Search\)&comp=pluk#co_anchor_a387257](https://uk.practicallaw.thomsonreuters.com/Document/Idee5ff93414b11ec9f24ec7b211d8087/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0a89df59000001914fdc047ca0a013de%3Fppcid%3D75a96283c2f84189961d509068868068%26Nav%3DKNOWHOW_UK%26fragmentIdentifier%3DIdee5ff93414b11ec9f24ec7b211d8087%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=d52521b75809b5fdd5fe8d58b447f760&list=KNOWHOW_UK&rank=3&sessionScopeId=b2c7bfbcd499611e5f727ddd7851c21356a96a78664250f5e4abb0aee896bbcc&ppcid=75a96283c2f84189961d509068868068&originationContext=Search%20Result&transitionType=SearchItem&contextData=(sc.Search)&comp=pluk#co_anchor_a387257).

³⁹ *Id.*, *supra* note [Junmin Zhang], 213.

⁴⁰ *Id.*, *supra* note [Junmin Zhang], 214.

⁴¹ *Id.*, *supra* note [QMUL 2015 survey], p. 27; *Id.*, *supra* note [Junmin Zhang], 2.

Whilst according to the Report,⁴² arbitration was found to be the preferred mode over litigation,⁴³ it is notable that litigation remained the most common dispute resolution mechanism out of the mechanisms considered. Furthermore, whilst litigation was the most discouraged form of dispute resolution,⁴⁴ it is notable that the responses collected in the Report varied by sector, with litigation being the most encouraged form of dispute resolution in the IT sector.⁴⁵

There is a common misconception that arbitration is definitely more cost-effective than litigation. Taking interim measures as an example, this is not always the case. Arbitral interim relief is incapable of putting a stop to technological infringement (e.g. “*the manufacture and sale of illicit products, the use or publication of trade secrets*” etc.) promptly.⁴⁶ Provided the alleged infringer may have little to no motivation to push forward the consensual arbitration process,⁴⁷ it will be more efficient to apply to the domestic court for such interim measures instead (bearing in mind that “*time is always of essence*”).⁴⁸ It is important to consider the strengths and weaknesses of both dispute resolution mechanisms within your sector in considering which form of dispute resolution would most suit you. For technology disputes, the following are some features of litigation that may lead one to opt for litigation over arbitration.

A. Injunctions

There are several reasons which make injunctive measures by the court attractive:

First, the court’s “*broad and effective*” injunctive powers offer timely assistance to stop infringement.⁴⁹ Such powers are clearly evidenced in *Google Inc. v. Equustek Solutions Inc.* [2017] 1 SCR 824.⁵⁰ In *Google Inc.*, the Supreme Court of Canada ordered Google (i.e. an innocent third party to the underlying action) to globally de-index the intellectual property

⁴² *Id.*, *supra* note 7, at 7.

⁴³ *Id.*

⁴⁴ *Id.*, at 19.

⁴⁵ *Id.*

⁴⁶ Jacques Werner, Intellectual Property Disputes and Arbitration: A Comment on a Recent ICC Report, 1 J. WORLD INTELL. PROP. 841 (September 1998), 855.

⁴⁷ *Id.*

⁴⁸ Deyan Draguiev, Interim Measures in Cross-Border Civil and Commercial Disputes: Interim Relief Proceedings in International Litigation and Arbitration, 1st ed. 2023.; Cham: Springer International Publishing: Imprint: Springer; 2023, 147.

⁴⁹ Jacques Werner, Intellectual Property Disputes and Arbitration: A Comment on a Recent ICC Report, 1 J. WORLD INTELL. PROP. 841 (September 1998), 855.

⁵⁰ *Google Inc. v. Equustek Solutions Inc.* [2017] 1 SCR 824; Deyan Draguiev, Interim Measures in Cross-Border Civil and Commercial Disputes: Interim Relief Proceedings in International Litigation and Arbitration, 1st ed. 2023.; Cham: Springer International Publishing: Imprint: Springer; 2023, 94.

infringer's websites on any of its worldwide search results.⁵¹ On the other hand, arbitration proceedings have limited powers over third parties, and procedural orders cannot be enforced against non-parties to the arbitration.⁵² This is particularly problematic for disputes such as passing off and trademark infringements, where the infringer need not be someone who has a relationship with the intellectual property owner.⁵³ In such case, party to a cross-border litigation would benefit from seeking court remedy to collect or confiscate the products marked with infringed trademarks from third parties.⁵⁴

Second, enforcement of interim measures is considerably more complicated than enforcement of court orders, as parties may find it necessary to enforce arbitration awards in court proceedings. There may also be concerns about whether such interim measures would be enforced by courts.⁵⁵ For technology companies operating in multiple jurisdictions, “*predictability and stability in international commercial relations*”⁵⁶ is likely their first and foremost concern. As such, it is arguable that they would rather opt for cross-border litigation (and apply for interim measures therein) rather than gamble on the enforcing court's attitude towards interim measures granted by an emergency arbitrator (which could vary from case to case).⁵⁷

Third, tribunals may be reluctant to grant interim measures, which may be seen as prejudging the issues in the arbitration.⁵⁸ Pursuant to Article 28(1) of the ICC Arbitration Rules 2021, the tribunal may grant interim measures.⁵⁹ if certain conditions are satisfied (including but not limited to there being “*a risk of imminent irreparable or substantial harm*”, and “*a likelihood of success on the merits*”).⁶⁰ Commentators, however, have found the latter condition to be

⁵¹ *Id.*

⁵² Ay Yunus Emre, Intellectual Property Disputes and International Arbitration, 58 ZB. RADOVA 929 (2021), 939.

⁵³ *Id.*

⁵⁴ Ay Yunus Emre, *supra* note [x], 939.

⁵⁵ Practical Law Arbitration, *Interim, Provisional and Conservatory Measures in International Arbitration*, [https://uk.practicallaw.thomsonreuters.com/Document/I03f4d9b1eee311e28578f7ccc38dcbee/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0a89886000000191597e4ed42d1f6508%3Fppcid%3Dcf21ab5cd08a458f942f9c5dbeb36f69%26Nav%3DKNOWHOW_UK%26fragmentIdentifier%3DI03f4d9b1eee311e28578f7ccc38dcbee%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=9b76a10a3320884d2045e9bf02110a9e&list=KNOWHOW_UK&rank=2&sessionScopeId=3089d57b2749ef94296327872487fc1b6a3b57cc24f0bff2d30c007cac9db3a8&ppcid=cf21ab5cd08a458f942f9c5dbeb36f69&originationContext=Search%20Result&transitionType=SearchItem&contextData=\(sc.Search\)&comp=pluk#co_anchor_a1024539](https://uk.practicallaw.thomsonreuters.com/Document/I03f4d9b1eee311e28578f7ccc38dcbee/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0a89886000000191597e4ed42d1f6508%3Fppcid%3Dcf21ab5cd08a458f942f9c5dbeb36f69%26Nav%3DKNOWHOW_UK%26fragmentIdentifier%3DI03f4d9b1eee311e28578f7ccc38dcbee%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=9b76a10a3320884d2045e9bf02110a9e&list=KNOWHOW_UK&rank=2&sessionScopeId=3089d57b2749ef94296327872487fc1b6a3b57cc24f0bff2d30c007cac9db3a8&ppcid=cf21ab5cd08a458f942f9c5dbeb36f69&originationContext=Search%20Result&transitionType=SearchItem&contextData=(sc.Search)&comp=pluk#co_anchor_a1024539).

⁵⁶ Junmin Zhang, *supra* note [x], at 184.

⁵⁷ Junmin Zhang, *supra* note [x], at 89.

⁵⁸ *Id.*

⁵⁹ ICC Arbitration Rules 2021, Article 28(1).

⁶⁰ Handbook of ICC Arbitration: Commentary and Materials 5th Ed., 487, para 28-67.

controversial.⁶¹ Draguiev noted that this test may inadvertently prompt the tribunal to prejudge the merits of the case before exchanging written submissions or hearing oral evidence.⁶² It is therefore arguable that the tribunal will be hesitant to grant interim reliefs (even if it is empowered to do so). In practice, technology companies in the hurry of stopping ongoing infringement may not necessarily wish to deal with the arbitrator's hesitation. Instead, they may quickly apply for interim measures from court, followed by full cross-border litigation.⁶³

Opting for injunctive relief from courts may forgo these concerns. In the technology sector, where injunctive relief plays a significant role in intellectual property and digital asset disputes, the potency of injunctive relief in litigation may be a substantial factor in opting for litigation over arbitration.

B. Default Judgments and Summary judgments

The procedural options for default and summary judgments increase the efficiency and decrease costs of the dispute resolution process by allowing a party to obtain judgment quickly without the hassle of a drawn-out litigation process.⁶⁴ These options are common in litigation, and do not face the issues in the arbitration equivalents of summary determination and dispositive motions.

Arbitral institutions are still in the process of introducing provisions to cater for summary determination,⁶⁵ yet arbitrators may be reluctant to exercise their power to make a summary determination for fear of appearing biased. Whilst it would not be possible to determine at the contractual negotiation stage what form of disputes would arise and whether default or summary judgments would be applicable, this would be a matter to consider when choosing a dispute resolution mechanism to minimise costs.

C. Pre-action Disclosure and Disclosure by Non-Parties (Norwich Pharmacal Orders)

⁶¹ Draguiev, *supra* note [x], 70.

⁶² *Id.*

⁶³ Jacques Werner, Intellectual Property Disputes and Arbitration: A Comment on a Recent ICC Report, 1 J. WORLD INTELL. PROP. 841 (September 1998), 855.

⁶⁴ Lidgate et al., *supra* note 19.

⁶⁵ Kiera Gans et al., *International Arbitration and IP Disputes*, [https://uk.practicallaw.thomsonreuters.com/Document/I25abe42f282011ef8921fbef1a541940/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0a89886000001915964c10e2d1f4cf2%3Fppcid%3D0aa299f9ce1344d28a439287569d6009%26Nav%3DKNOWHOW_UK%26fragmentIdentifier%3DI25abe42f282011ef8921fbef1a541940%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=a58b2737fde3568ca8b348f8fe6ca2e1&list=KNOWHOW_UK&rank=4&sessionScopeId=3089d57b2749ef94296327872487fc1b6a3b57cc24f0bff2d30c007cac9db3a8&ppcid=0aa299f9ce1344d28a439287569d6009&originationContext=Search%20Result&transitionType=SearchItem&contextData=\(sc.Search\)&comp=pluk#co_anchor_a350822](https://uk.practicallaw.thomsonreuters.com/Document/I25abe42f282011ef8921fbef1a541940/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0a89886000001915964c10e2d1f4cf2%3Fppcid%3D0aa299f9ce1344d28a439287569d6009%26Nav%3DKNOWHOW_UK%26fragmentIdentifier%3DI25abe42f282011ef8921fbef1a541940%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=a58b2737fde3568ca8b348f8fe6ca2e1&list=KNOWHOW_UK&rank=4&sessionScopeId=3089d57b2749ef94296327872487fc1b6a3b57cc24f0bff2d30c007cac9db3a8&ppcid=0aa299f9ce1344d28a439287569d6009&originationContext=Search%20Result&transitionType=SearchItem&contextData=(sc.Search)&comp=pluk#co_anchor_a350822).

Another feature of litigation is the availability of pre-action disclosure and disclosure by non-parties, a feature markedly absent in arbitration due to the inability of procedural orders to be made before the constitution of a tribunal and the inability of orders to bind non-parties to arbitration agreements. Such disclosures are common in data cases with the claimant seeking details on the defendant's data process or information on who is responsible for unlawful data processing.⁶⁶ In certain industries where the data of companies is particularly sensitive and susceptible to unauthorised actors, this may be a feature that suggests that traditional litigation may be more appropriate.

V. WHICH DISPUTE RESOLUTION MECHANISM TO CHOOSE?

The short answer to this question is a cliché, *it depends*. This is however for good reason, for the risks and features of each sector within the technology industry differ greatly. As explained in the Report, the types of disputes commonly encountered in each sector differ,⁶⁷ and as a result, the preferences for dispute resolution mechanisms differ between sectors.⁶⁸

To consider an example, in the 2023 Hong Kong case of *Culturecom Limited & Anor v Jade Dynasty Publications Limited & Ors* [2023] HKCFI 805, the intellectual property owner of a popular comic book titled in Hong Kong, known as “Little Rascals”, signed licensing agreements to allow other entities to publish their comic books. When the licensing agreements ended, these entities continued to publish such works, and thus the owner sued for infringement of copyright, trademark, and passing off. The court allowed the owner's application for interlocutory relief preventing such infringement.⁶⁹ This was an example where traditional litigation would clearly be preferred since interim relief in arbitration would not be possible against non-parties to an arbitration clause.

Technology disputes may however not be so straightforward, and it is imperative to consider the various factors above in deciding which dispute resolution mechanism would suit your needs. Opting for the wrong dispute resolution mechanism may have severe time and cost consequences and limits the remedies which are available to you. It would thus be crucial for you to choose the correct dispute resolution mechanism as early as the contractual negotiation stage, to ensure a smooth and expeditious dispute resolution process in the future.

⁶⁶ Lidgate et al., *supra* note 25.

⁶⁷ Report, at 9-15.

⁶⁸ *Id.* at 18-20.

⁶⁹ *Culturecom Limited & Anor v Jade Dynasty Publications Limited & Ors* [2023] HKCFI 805.

VI. EMERGING TECHNOLOGY DISPUTES

Today, innovations in areas of artificial intelligence (“AI”), data breaches/cybersecurity incidents, and cryptocurrency / virtual assets are transforming at an unprecedented speed. Often the development and operations are of a cross-border nature, adding an extra layer of complexity to the disputes that arise from these growth areas in technologies. Going forward, the need to resolve these emerging technology disputes across the globe is expected to increase and “*the way arbitration is conducted*” will be fundamentally and possibly be impacted.⁷⁰

A. AI

‘*Who is the author?*’, ‘*where is the source?*’, and ‘*is there any copyright infringement?*’ are some of the many recurring themes observed in the recent AI disputes across the globe.⁷¹ Given U.S. and China are the top 2 countries with the highest number of newly funded AI companies over the past 10 years,⁷² a variety of AI-related litigations have naturally arisen in these two jurisdictions.

In the US, it was reported that artists have brought class action claims against generative AI companies for the unauthorized use of billions of “*artistic works*” downloaded from the internet as “*training images*” for their AI software product.⁷³ The artists further alleged that certain AI model is “*built to a significant extent on copyrighted works and that the way the product operates necessarily invokes copies or protected elements of those works*” and “*was created to facilitate that infringement by design.*”⁷⁴ Although the artists’ allegations remain to be tested in Court later, the Court held that their “*allegations of induced infringement are sufficient*” and therefore should not be dismissed.⁷⁵ Until the Court provides clear guidance on its interpretation and application of the “fair use” exception for using copyright works to train AI,⁷⁶ artists and technology companies will continue to find copyright infringement to be an area of troubled waters.

⁷⁰ Benton & Andersen, *supra* note 17, at 18.

⁷¹ *Christopher Farnsworth v. Meta Platforms, Inc.*, No. 3:24-cv-6893 (N.D. Cal. (San Francisco Division), 2024); *Andersen v. Stability AI Ltd*, No. 23-cv-00201-WHO (N.D. Cal., 2024); *Li v Liu*, Jing 0491 Min Chu No. 11279 (2023); [Ekaterina Wagner](https://artfocusnow.com/art-market/co-author-or-assistant-when-artists-argue-over-authorship/), Co-Author or Assistant? When Artists Argue over Authorship, Art Focus Now (Nov.13, 2023), <https://artfocusnow.com/art-market/co-author-or-assistant-when-artists-argue-over-authorship/>.

⁷² Stanford University Human-Centered Artificial Intelligence, Artificial Intelligence Index Report 2024, https://aiindex.stanford.edu/wp-content/uploads/2024/05/HAI_AI-Index-Report-2024.pdf, at 252.

⁷³ *Andersen v. Stability AI Ltd*, No. 23-cv-00201-WHO (N.D. Cal., 2024).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Commerce and Economic Development Bureau & Intellectual Property Department, Copyright and Artificial Intelligence Consultation Paper (2024), <https://www.ipd.gov.hk/filemanager/ipd/en/share/consultation-papers/Eng-Copyright-and-AI-Consultation-Paper-20240708.pdf>, at 34.

In China, the copyrightability of AI-generated pictures was first tested in Court in *Li v Liu*. In *Li*, the Court clarified that copyright can be attached to an AI-generated picture as long as there is sufficient demonstration of “*intellectual labor*” and reflection of “*originality*” (amongst others).⁷⁷ Original intellectual investment must transcend beyond mechanicalness, for example, by “*designing the presentation of the character, selecting prompt words, arranging the order of prompt words, setting parameters, and selecting the preferred picture*”.⁷⁸ Having recognized the plaintiff’s efforts in entering over 150 prompts, negative prompts, and parameters to eventually create a personalized picture that reflects his own aesthetic taste, the Court held that this work is subject to copyright protection under Chinese law. Although not discussed in *Li*, we could reasonably infer that the Court would still come to the same conclusion even if the plaintiff’s prompts would generate a different picture each time it runs through the AI. This is because this case turns on the exercise of personal aesthetics rather than the vast number of prompts entered – as simple as that – a plaintiff will likely own the copyright because he will not stop inputting prompts or altering the parameters until the final image becomes pleasing to the eye.

In contrast, both Hong Kong and Singapore courts are yet to be tested with AI disputes. Having said that, the Hong Kong Government is gearing up its AI-related legislation in foresight. In September 2024, the Hong Kong Government concluded the consultation period of the “*enhancement of the Copyright Ordinance (Cap. 528) (CO) regarding the protection for AI technology development*”.⁷⁹ It remains to be seen whether the possible introduction of specific “text and data mining” copyright exception to requiring lawful access to copyright works for training AI can benefit I&T development⁸⁰ and mitigate against the risk of class actions brought by artists as seen in the US.

B. Data Breaches/Cybersecurity Incidents

Technology companies operating on a global scale have been increasingly cautious about whether their data privacy policies (as offered by their overseas headquarters) would satisfy different stringent and evolving data protection laws (e.g., European Union’s General Data Protection Regulation, China’s Personal Information Protection Law) and the implementation

⁷⁷ *Li v Liu*, Jing 0491 Min Chu No. 11279 (2023).

⁷⁸ *Id.*

⁷⁹ Press Release, The Government of the Hong Kong Special Administrative Region, Government launches public consultation on enhancing Copyright Ordinance regarding protection for artificial intelligence technology development (Jul. 8, 2024), <https://www.info.gov.hk/gia/general/202407/08/P2024070800210.htm>.

⁸⁰ Commerce and Economic Development Bureau & Intellectual Property Department, *supra* note 35, at 35.

of cybersecurity measures to mitigate against the risk of liability and/or negative publicity. However, data breaches can still occur and there is a growth in cyber security breaches in the Asia Pacific region.

In practice, litigation and arbitration will be commenced in parallel for resolving cybersecurity-related contractual disputes either against service providers and/or insurance providers for different reasons.⁸¹ Litigation is used to handle class actions and enforcement authority's investigation actions.⁸² Alternatively, arbitration is used as an efficient means of resolving private disputes.⁸³

C. Cryptocurrency and Virtual Assets

The nature of crypto assets (also referred to as virtual assets) is often at the heart of cryptocurrency litigation across major jurisdictions. In Hong Kong, the Court in *Re Gatecoin Limited* [2023] HKCFI 914 followed the approach adopted by other common law courts and held that cryptocurrency can be widely construed as being a form of “property” if it fulfils four criteria namely: (i) it is definable, (ii) it is identifiable by third parties, (iii) it is capable of assumption by third parties in that it can be and is the subject of active trading markets, and (iv) has some degree of permanence or stability.⁸⁴ The Court also helpfully reiterated that the fact that the intangible nature of cryptocurrency “*is no bar to recognition of its proprietary status*”.⁸⁵

Similarly, the Singaporean Court in *ByBit Fintech Ltd v Ho Kai Xin and others* [2023] SGHC 199 also held that cryptocurrency can be characterized as a form of “property”. The Court in this case shed light on the factors that would persuade the Court to conclude cryptocurrency can be “property” that is definable and identifiable by modern humans:⁸⁶ (i) crypto assets have been both “transferred for value” and valued/reported by accountants on balance sheets, (ii) Monetary Authority of Singapore’s proposed amendments suggest that digital assets can be identified and segregated,⁸⁷ (iii) cryptocurrency has been expressly recognised as property in the Rules of Court,⁸⁸ and (iv) crypto assets “*manifest themselves in the physical world*” with a

⁸¹ Benton & Andersen, *supra* note 31, at 17.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Re Gatecoin Limited* [2023] HKCFI 914, at 57, 59.

⁸⁵ *Id.* at 58.

⁸⁶ *ByBit Fintech Ltd v Ho Kai Xin and others* [2023] SGHC 199, at 33.

⁸⁷ *Id.* at 29.

⁸⁸ *Id.* at 30.

combination of Private Key with Public Key and the holder's public address on the blockchain.⁸⁹

On the other hand, it has been observed that cryptocurrency platform operators have instead to resolve their trading-related disputes either by way of “*internal dispute resolution and others turning to leading international providers*”.⁹⁰ Arbitration remains common for this type of dispute given the dispute resolution clause of the cryptocurrency platform operators.

VII. CONCLUSION

This article provides the beneficial features of using arbitration to resolve specialised technology disputes. Companies are advised to opt for arbitration if: (i) publicising the dispute will significantly tarnish its market value and reputation, (ii) it wants more control over the dispute resolution process (e.g. presentation of materials, or the permissible scope of discovery), (iii) it would benefit from having specialised technology arbitrators, and (iv) it is certain that the interim measures obtained from an emergency arbitrator are enforceable in the jurisdiction of interest. Alternatively, litigation would be preferred if (i) it would benefit from injunctive relief or (ii) the other side is unlikely to participate in the proceeding or their case is meritless.

The fast-changing nature of emerging technology and its integration into different business sectors also calls for an effective mechanisms for resolving AI, data breaches/cybersecurity incidents, and cryptocurrency/virtual assets disputes that arise – and specialised technology arbitrators would be able to dispose of these types of disputes in an effective and cost-efficient manner. Those dealing with technology are advised to choose the appropriate dispute resolution clause and be comforted that their interests will be well looked after in the event of a dispute.

⁸⁹ *Id.* at 31.

⁹⁰ Benton & Andersen, *supra* note 42, at 18.