

# Arbitration or Litigation: International High-Tech Business Disputes Resolutions

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## ABSTRACT

This paper discusses a dichotomy that arises on the issue of choosing the right dispute settlement mechanism in matters related to high-tech companies. Such disputes arise in complex issues related to Patents and IPR rights, product piracy, counterfeiting, internet and cyber security and several issues related to marketing and territorial rights of selling scientific products. These cases cannot be handled in traditional court for several reasons. Instead businesses are turning to alternative dispute resolution (ADR) for instance arbitrations institutions like SVAMC that works with high-tech companies and law firms and advocate the promotion of arbitration mechanism to resolve high-tech business disputes. Other international institute such as World Intellectual Property Organization (WIPO) ADR in R&D and technology that has many advantages over normal litigation including low costs, very short time taken to settle disputes and predictability. This paper compares the different approaches in the traditional courts litigation system and ADR in respect of high-tech business disputes and recommends why arbitration is a more preferred method to solve high-tech disputes.

**Keywords:** Arbitration, Litigation, High-tech disputes, International relations, Alternative disputes resolution, Business disputes.

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### Highlights of this paper

- This paper contributes to the existing literature in highlighting the concept of alternative dispute resolution (ADR), particularly through arbitration.
- In addition, The paper explains the high-tech business disputes.
- Finally, the article highlights the comparison between dispute settlements by the arbitration and the traditional courts, particularly with respect to high-tech disputes.

## 1. INTRODUCTION

The term "high technology" or "high-tech" is defined as technology that exploits advanced scientific and engineering techniques in highly sophisticated environment in fields like software, genetic engineering medicine, microelectronics and telecommunications.<sup>1</sup> Organization for Economic Co-Operation and Development (OECD) has identified a few business sectors ascribed to "high-technology," producing "hi-tech products" as found in pharmaceuticals, software, computers, electronics, communications and other precision instruments. These high-tech businesses often enter into B2B scenario and cater to the needs of other businesses (Richard, 1986). To expand their businesses, they need to tie up with other businesses in terms of acquisitions, mergers and demergers, takeovers, sale of high-tech businesses or part thereof; also provide high-tech services in the form of licensing of patents or securing intellectual property rights for their clients; or procuring insurance policies and risks assessment services related to their production or operation of high-tech assets. Owing to such commercialization of business and its products /services, these businesses are open to potential disputes, which are taken to arbitration for a faster, predictable, cost effective award with least procedural mechanism. From the above, the questions arise about the ability of the traditional courts to treat professionally with the disputes of high technology. Furthermore, how is the Technical knowledge of these courts in dealing with the special nature of the disputes of high technology. And then, the comparison is raised between arbitration tribunals which have technical characteristics to treat with the disputes of high technology and the traditional courts.

## 2. INTERNATIONAL ARBITRATION: A PARADIGM SHIFT

For all international projects, particularly in high tech disputes arising from commercial contracts, there is now a provision of mandatory "dispute resolution" clause proposing a binding clause of arbitration in the event of any dispute, a departure from the practice of courtroom litigation. Courtroom litigations are expensive, time consuming, often can damage reputation of the two parties giving a competitive advantage to the business rivals. Since all lawsuits need to be public filings, it could adversely affect the company's image when the disputes go public and in media (Peterson, 2014). Moreover, there are unpredictable results despite expert testimony and submission of facts which further tarnish the image of the company.

On the contrary, arbitration requires two parties in the dispute to agree to work with a third party having no interest in their case who could help them to resolve the dispute. The third party is always neutral with experience and knowledge in the area of dispute *e.g.*, scientific expertise or intellectual property rights (Hafner-Burton and David, 2016). Arbitrators do not have to be lawyers and many times can be engineers, architects, scientists or subject experts. This characteristic of arbitration can eliminate the substantial problems and time involved in educating a judge or jury in the nuances of construction there is often less formality in an arbitration hearing. For

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<sup>1</sup> high technology. Dictionary.com. Dictionary.com Unabridged. Random House, Inc. <http://www.dictionary.com/browse/high-technology> (accessed: November 11, 2016).

instance, the formal procedures of collecting and submitting evidence may not be strictly followed. Instead, the focus is on the facts and testimony (Winograd, 2014).

Moreover, cases that involve business relationships and transactions often go to arbitration as the negotiation process is more natural for business entities. The confidentiality arbitration clause is also favorable when information that may be related to trade secrets and internal policies are subject to discussion. Not only can the company avoid the expensive, time-consuming process of litigation, but arbitration may be less likely to draw negative press to the dispute in the case of high-profile organizations involved in high-tech businesses (Drahozal, 2015).

Arbitration thus has an advantage over the traditional court litigation system where the two contracting parties after entering into a complex dispute agree to resolve it quickly, economically and in a fair manner. The arbitration process also remains private, confined to the two parties and negotiated in very informal manner in a conducive and amicable environment. On the contrary, litigation is a formal act, carried out in a public court room. The costs for arbitration are also limited to the expenses of the arbitrator and the attorney while litigation involves attorney fees, court costs, soft expenses and other indirect costs in terms of loss of business. Moreover, in arbitration both parties jointly decide on the arbitrator unlike in litigation. In the arbitration process, the arbitrator controls what evidence is allowed, negating the rules of evidence so there are no subpoenas, long interrogations, proceedings leading to discovery or disclosure of evidence to both parties, as commonly found in the courtroom litigation method (Mohan and Joseph, 2013). Finally, in arbitration, parties usually have no appeal option, unless included in an arbitration clause. These differences are summarized by the authors in Table 1:

Table-1. Differences between Arbitration and Litigations.

Arbitration	Litigation
Private - between the two parties	Public - in a courtroom
Civil - private	Civil and criminal
Limited evidentiary process	Rules of evidence allowed
Parties select arbitrator	Court appoints judge - parties have no choice
Informal	Formal
Usually binding; no appeal possible	Appeal possible
At discretion of parties; limited	Extensive use of attorneys
Shortly after the arbitrator is selected	Long waiting period for case to be scheduled
Fee for arbitrator, attorneys	Court fees, attorney fees

The parties may also agree to both the number of arbitrators and the manner of their selection. Each arbitration case can opt for one or three arbitrators to decide their disputes. In case of disputes at large scale involving multiple areas of expertise, companies opt for a panel of at least two arbitrators, one with the specialist expertise in the area of dispute, a scientist or an engineer, for instance, and the second having the expertise in accounts, business or commerce or a practicing lawyer. For reasons of cost, only a single arbitrator may also be retained to decide the dispute. In such a situation, both parties must agree unanimously on the name of the arbitrator (Mazalov and Tokareva, 2012).

The parties also negotiate with the educational qualification of the arbitrator(s) or the panel and get such information specified in the arbitration agreement. Besides the technical and scientific qualifications, the arbitrator must have a track record of deciding high-tech disputes and good grasp of arbitration management skills with a reputation for being fair and unbiased. High-tech companies also prefer to hire lawyers and attorneys who are more experienced in arbitration laws than engineers or scientists. In matters related to patents and IP or disputes over innovations, an arbitrator ought to be familiar with patent laws and IP practices in order to settle disputes such as a patent validity or infringement of IP rights. Some companies avoid the appointment of a non-legal individual as a

sole arbitrator because legal knowledge is most desirable to determine issues such as jurisdiction, amount of arbitrariness or problems of evidence (Jacobs, 2015).

All international arbitrations are now performed by established arbitration agencies that have experience to resolve such cross-border disputes, particularly of those high-tech companies that enter into agreements with foreign partners as licensees or licensors or distributors, suppliers or customers. Whatever their role, such agreements do cause disputes on regular basis and hence high-tech companies choose international arbitration agencies. One such agency is Silicon Valley Arbitration & Mediation Center (SVAMC) that collaborates with scientific and technology companies of the Silicon Valley in order to resolve technology-related disputes. SVAMC has attracted record of having devised and promote highly cost-efficient and effective dispute resolution system as an alternative to court proceedings through arbitration and mediation in technology related disputes.<sup>2</sup>

Another agency, World Intellectual Property Organization (WIPO), runs a centre of arbitration and mediation under the supervision of a highly experienced, neutral panel specialized in intellectual property and having rich experience in settlement of technology related disputes (Erk-Kubat, 2014). This centre has established a reputation of being a non-profit dispute resolution provider offering alternative dispute resolution (ADR) options to its parties in a time and cost-efficient manner. In most cases, the centre has managed to settle all types of IP and technology related disputes at domestic and international levels. The centre focuses on administration of disputes related to technology transfer, R&D, licensing agreements and other contracts which mostly include cases from the energy, Pharmaceuticals, biotech, and software sectors.<sup>3</sup>

### **3. HIGH-TECH BUSINESSES PRONE TO DISPUTES**

A high-tech business has several characteristics that can be considered prone to erupting disputes for instance its complexity, its use of proprietary and confidential information, being operating in a rapidly growing competitive market and lastly government regulations.

The complex nature of high-tech businesses is exhibited in their high-tech products and services, particularly in fields of science, technology and engineering. The aerospace industry, for instance, has complex designs and processes, with its presence in air and space in the form of space vehicles and communications satellites. The Telecommunications and IT systems are much more complex due to the design of their application systems and configuring them according to business requirements<sup>4</sup>. Similarly, in the field of medicine, biotechnology and pharmaceuticals, the complexity is more severe due to their products or processes and testing results about new and innovative things (Beghin, 2015).

Similarly, the proprietary and confidential business information of high-tech companies refers to trade secrets, engineering methods, computer programs, chemical formulas and algorithms. This information is privy to the company and would not likely to make public nor reveal upon their business competitors (Brittany, 2018). High-tech companies also operate in rapidly growing commercial markets driven by intense competition. A slight distraction from their objectives could lead to legal disputes (Wu, 2011). Some high-tech businesses are also subject

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<sup>2</sup> Retrieved from [www.siliconvalleyarbitration.org](http://www.siliconvalleyarbitration.org). Accessed November 9, 2016.

<sup>3</sup> Retrieved from <http://www.businesswire.com/news/home/20160128005029/en/SVAMC%E2%80%99s-2016-%E2%80%9CTech-List%E2%80%9D-Names-World%E2%80%99s-Leading>. Accessed November 10, 2016.

<sup>4</sup> <http://www.oracle.com/us/industries/high-tech/accel-ht-accerate-indsty-brief-301213.pdf>.

to government regulations adding legal and regulatory complexities leading to litigations, which add an extra dimension to high-tech businesses to involve in disputes.

#### **4. ARBITRATION: ADVANTAGES AND BENEFITS**

The Arbitration mechanism is more suited to resolving such technical or scientific disputes that are relatively complex and cannot be handled by court litigation mechanism (Bender, 2010).

Arbitration panels comprise of individuals who have experience of not only arbitration and the relevant legal and regulatory framework but also possess scientific and technological expertise required to understand and resolve the dispute. When arbitrator in high-tech disputes are experienced and exhibit suitable skills, they are thus the better decider than the judges in courts.

It is often felt necessary to introduce new reforms in the fields of science and technology. There are numerous products, services and applications, most of which are new and innovative, and require a process that can quickly avoid any potential disputes in order to make an optimum utilization of human and financial resources invested in the business. As one author noted: "Players in fast-paced technology markets cannot afford to have progress stalled for lengthy and expensive litigation (Alba, 2016). For example in the US, a patent may enjoy a statutory protection for about two decades, but it could get obsolete faster than any other advancement made in its technology unless efforts are made for a continuous improvement in the product and the process (Frederick, 2019). In other words, businesses can be disrupted and can suffer huge losses due to the distractions caused by litigations and legal battles. The example of the Apple vs Samsung smartphone patent dispute is relevant where 50 litigations in 12 countries but due to cost and time involved, both parties voluntarily agreed to dismiss all non-US cases. Both parties had spent more on litigations than on research and development.

Arbitration also causes least damage to relationships between parties, or between businesses and their suppliers, business partners and customers even if the award is averse to any one party's interest. However, arbitration is yet to prove an economically effective dispute resolution mechanism because all its award lead to very heavy financial compensations from one party to another, a phenomenon for which arbitration has been widely criticized (Stipanowich., 2009).

There is no provision to appeal against the award of Arbitration.<sup>5</sup>It is because the arbitrator enjoys the privilege of being a mutually accepted and mutually appointed mediator. Therefore, an arbitration award cannot be effective if it can be overturned or appealed for a revision. However, recent amendment in certain jurisdictions allows the parties to appeal against an arbitral award to a panel of appellate arbitrators (Hogan, 2018).

Another advantage of Arbitration is that it facilitates the preservation of proprietary business information and ensures the confidentiality of trade practices of companies engaged in scientific innovations and establishment of new patents and products. For this reason, a non-disclosure or confidentiality agreement is issued regularly by commercial enterprises (Stim, 2016). As noted by one commentator, confidentiality is "a giant issue" when a technology- related dispute arises (Marc, 2017).

However, in litigation practices the issue of confidentiality becomes much more problematic than in arbitration. In several nations including the United States, where judicial proceedings are open to public, it is difficult to maintain confidentiality since everyone has access to documents filed with or issued by the court or proceedings that happened on that day.

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<sup>5</sup> The grounds to vacate an award are limited by statute. For example, see 9 U.S.C. § 10; Del. Uniform Arb. Act, 10 Del. Ch. 1953. § 5714.

## **5. ARBITRATION OR LITIGATION AT INTERNATIONAL LEVELS**

Moreover, for international disputes, there are constraints if the case is litigated on a foreign land. For example, if the trial court is in the other party's home country, which will provide a sort of domestic advantage to that company; and also if the domestic court has little or no experience in international transactions or on the subject matter of the dispute. Additionally, when a company is subject to unfamiliar foreign laws, or forced to follow alien rules and customs, or it has to conduct litigation in a foreign language that people involved in the law suit may not understand, it is always advisable to opt for international ADR.

Arbitration would be a preferred choice because arbitrators are neutral as they belong to a third country in accordance with an arbitration agreement clause; second, they have a vast experience in both arbitration and the subject matter of the case; third, their arbitration that will lead to a resolution will be objective and impartial; fourth, the international arbitration forums allow the contracting parties to choose the procedural practices that they want the arbitration to be governed with including the appointment of a neutral moderating organization to implement the proceedings. Lastly, the two parties can also choose the language of arbitration and whether transcripts be translated into other languages.

The awards of all international arbitrations conducted in foreign locations are recognized and enforceable globally as per the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).<sup>6</sup>Article III of the convention provides that "Contracting States shall recognize and enforce" foreign arbitral awards, with a limited number of exceptions that permit the court to refuse enforcement.<sup>7</sup> Interestingly, 145 nations have ratified New York Convention to date, many of which are the major trading countries. However, such a case is not possible if awards are issued as foreign court judgments. These court judgements are not enforceable and recognized by the courts of a foreign country.<sup>8</sup>However, such an enforcement is more or less discretionary and unpredictable because there are no such codes of conduct under any law to direct a foreign tribunal to recognize a judgment of the court or to facilitate its enforcement. Owing to such enormous risks of litigating in foreign courts, arbitration on technological issues has thus become a more accepted means of dispute resolution at international levels.

## **6. CONCLUSION**

ADR on scientific and technological issues is on rise these days due to rapid advancement in technology and increased globalization. Additionally, new marketing intricacies and innovative high-tech products have created a wave of commercialization at all levels. Internet has though brought to ease many such activities that consumed weeks and months in the past but has also increased competition that sometimes result in complex disputes. In such a situation, it is very much likely that disputes and controversies arise between high-tech companies and their partners, suppliers, customers and other stakeholders. When such a situation arises, they must be prepared to resolve their disputes with a most appropriate dispute resolution mechanism. For reasons discussed in this paper, arbitration appears to be the appropriate and preferred mechanism for high-tech disputes at international levels.

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<sup>6</sup> 330 U.N.T.S. 28. See [www.uncitral.org](http://www.uncitral.org). Accessed November 10, 2016.

<sup>7</sup> The exceptions are in Article V.

<sup>8</sup> Certain European nations have agreed to enforce court judgments obtained in other European states, but this intra-European framework represents a limited reciprocity that has not gained acceptance in other regions of the world. See Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1990, 29 I.L.M. 1413; Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1989, 28 I.L.M. 620; and Council Regulation (EC) No. 44/2001 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

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