

The QMUL Study on Resolving TMT Disputes: What Lessons for the UAE?

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The School of International Arbitration is one of Europe's leading research centres on International Arbitration and Litigation. The Study provides practitioners in the Middle East and North Africa ("MENA") region an insight into the global trends of TMT disputes. This article draws lessons from the Study for MENA related TMT disputes and discusses how these lessons can be implemented in practice.

Background of the Study

The Study was conducted as part of an investigation into international dispute resolution practices. It mainly focused on TMT disputes and ways to resolve them efficiently. The Study presents a global view of the TMT dispute resolution market, involving findings from many countries (with 10% of the participants operating in the MENA region). The participants comprised of private practice lawyers, in-house lawyers, arbitrators, mediators and academic counsel.

Types of TMT disputes

The Study revealed that the most common TMT disputes are related to intellectual property rights, joint venture disputes, licensing, information technology implementation programmes, competition, merger and acquisition agreements, non-disclosure agreements, data-related issues, outsourcing programs and reputation management issues.

Similarly, MENA arbitration centres have been receiving an increase in TMT disputed contracts over the last few years. As an example, the Cairo Regional Centre for International Commercial Arbitration experienced a 75% annual increase with 91 new arbitration cases filed in 2016. Out of the 91 arbitration cases filed, 11% involved media and entertainment, 3% related to telecommunications (3%), and 1% related to IPRs.

Preferred Dispute Resolution Method

The Study assessed the responses on an all-participant level to determine the preferred Dispute Resolution method. Arbitration ranked as the most preferred resolution method in TMT disputes. However, litigation scored as the most used method in practice. IT and Telecoms suppliers were less in favor of arbitration, and instead preferred litigation and expert determination, respectively. In addition, the findings indicated that 41% of TMT disputes were settled via amicable settlement.

Participants in the Study indicated that the most significant factors in deciding whether or not to initiate proceedings are (1) legal costs, (2) strength of legal position, (3) parties' relationship, (4) business convenience, (5) recoverable damages, (6) ease of enforcement, (7) strength of evidence, (8) settlement negotiation tactics, (9) solvency of the respondent, and (10) reputation.

Suitability of International Arbitration

The Study revealed that 92% of its participants indicated that international arbitration is well suited for TMT disputes, despite some criticism and acknowledgement of opportunities for improvements. The Study

also revealed that 82% of its participants believe there will be an increase in the use of international arbitration.

The participants stated that arbitration is the “go-to” option because of the TMT disputes’ complex nature. The most attractive features of international arbitration are: (1) enforceability, (2) the ability to avoid foreign jurisdictions, (3) confidentiality, (4) expertise of the decision maker, and (5) desire to use technology to improve the international arbitration process.

The Study also revealed four key elements with regard to suitability. Firstly, TMT contracts and supply chains have increasingly become more international, causing multi-jurisdictional disputes to arise. Therefore, arbitration is an attractive choice since it facilitates enforcement in foreign jurisdictions. International arbitration provides a huge advantage in regards to enforcement, as a result of the New York Convention 1958.

Secondly, parties usually share confidential information throughout their TMT business. Therefore, parties aim to ensure that confidential information remain private and thus try to steer related disputes away from public forums. Parties often choose arbitration because it limits the reputational damage that often results from public disputes, and it ensures that sensitive information remains confidential within the proceedings.

Thirdly, TMT disputes are complicated in nature and require the decision maker to be an expert in the field. Participants stated that, in choosing an arbitrator as a decision maker, the arbitrator’s knowledge of the subject matter is more important than knowledge of the arbitral process. The most important factor for choosing a decision maker is the commercial understanding of the TMT industry, followed by the knowledge of the applicable law of the contract.

Fourthly, international arbitration is particularly dependent on interconnectivity. A typical TMT arbitration dispute may involve parties from two different countries, counsel from a third country, and arbitrators from different parts of the world. The use of Online Dispute Resolution (ODR) tools is key in resolving TMT disputes through international arbitration. 63% of the Study’s participants expected an increase in the use of ODR in TMT disputes in the next ten years. The use of technology can improve international arbitration in many ways including, but not limited to, (1) more efficient e-disclosure, (2) e-case management, (3) reduce the need for physical hearings and meetings, and (4) e-briefs and dematerialized submissions. In the European Union, the Directive on Consumer Alternative Dispute Resolution and the Regulation on Consumer Online Dispute Resolution are increasing the use of Online Dispute Resolution in the consumer context, especially for cross-border matters.

Challenges for resolving TMT disputes through arbitration in the UAE

In the United Arab Emirates (“UAE”), there are a handful of challenges which may make arbitration unsuitable for TMT disputes. Firstly, parties involved in arbitration proceedings may incur high legal costs, which include arbitrator fees and administrative fees (and in some cases, expert fees), especially where the amounts in dispute are large and the arbitration costs are calculated on an ad valorem (percentage) basis or where the issues in dispute are complex. Moreover, in the absence of voluntary compliance, the party who obtains an arbitral award in its favor will have to apply to the Court of First Instance (in the respective Emirate that has jurisdiction) for ratification and enforcement the arbitration award. This process can be costly, since the fees are calculated as a percentage of the value of the claim (i.e., the awarded amount) (which in some, but not all cases, may not be capped). In addition, the parties would be liable to pay additional court fees if the enforcement of the award is appealed to the Court of Appeal and the Court of Cassation.

Secondly, there is no general concept of interim or injunctive relief available in the UAE, save for an attachment of assets. Therefore, depending on the precise wording of the contract at issue, it may be difficult for parties to request and obtain injunctive relief on an ex parte basis.

Thirdly, there is likely a limited pool of UAE-based arbitrators with the requisite TMT expertise, since other

types of disputes (e.g., construction, energy, etc.) tend to predominate. Therefore, parties would likely need to appoint international arbitrators outside of the UAE with TMT experience. However, international arbitrators may be dissuaded from arbitrating in the UAE, as a result of the latest revision of Article 257 of the UAE Penal Code No. 7 of 2016. Article 257 has caused serious concerns to be raised by recognized arbitration practitioners because this provision allows parties to pursue criminal proceedings against arbitrators by alleging contravention of the requirements of neutrality and integrity. This possibility has scared some international arbitrators away from the UAE and unless the provision is revoked or significantly amended, it may ultimately detract from the attractiveness of arbitration to resolve TMT and other technical disputes, at least as far as the UAE is concerned.

Moreover, if one of the parties commences a criminal complaint, pursuant to Article 257 of the Penal Code, against the arbitrator or arbitral tribunal, this could place the confidentiality of the arbitration at risk. It still remains unclear whether the facts of the arbitration can and will be kept confidential or whether they would be disclosed in the UAE criminal courts. However, there is a risk that the merits of the case would no longer remain confidential. Considering the importance attached to confidentiality in resolving TMT disputes such potential disclosure could dissuade parties from arbitrating TMT disputes in the UAE.

In-house Dispute Resolution Policy

The Study revealed that 75% of organizations have a Dispute Resolution policy. In general, 50% of participants chose mediation as the “most encouraged” Dispute Resolution mechanism, while 47% of participants chose arbitration. However, the choice varied by sector, as (1) telecoms sector participants chose expert determination, (2) IT sector participants chose litigation, (3) energy, construction and manufacturing sector participants chose arbitration. Nevertheless, when all participants (not just in-house) were asked about their preference, the majority of the participants chose arbitration over any other method. It is evident that IT and Telecoms sectors usually encourage litigation and expert determination, but the opposite is true of some of their potential customers. These results can suggest that customers and suppliers could find the drafting of the dispute resolution clause in commercial contracts a contentious point.

Improving International Arbitration

The Study invited the participants to contribute suggestions on improving arbitration mechanisms. The top three suggested changes to make international arbitration more appealing are: (1) lower costs, (2) specialized arbitrators, and (3) a neutral system for the accreditation of specialist arbitrators.

The above suggested changes could be used as a checklist to improve arbitration in the UAE. First, as demonstrated above, depending on applicable institutional and court rules or fee scales, there are excessive costs associated with UAE arbitrations. Arbitration might become more attractive if the legal costs and fees are lowered. There is a variety of ways to reduce costs including, but not limited to, (1) the use of technology, (2) better disclosure processes, (3) permitting only limited evidence, (4) submissions with page limits and a focused structure, and (5) limited cross-examination.

Secondly, there is a lack of TMT specialized arbitrators, and international arbitrators with the relevant expertise may well be dissuaded from arbitrating in the UAE for the reasons discussed above. Therefore, it is clear that there is a need for emerging arbitrators with sufficient TMT expertise. 87% of participants stated that it is likely that there would be increased specialism of TMT arbitrators in the next 10 years.

Thirdly, Article 257 should be revoked or significantly amended if it is hoped to attract TMT arbitration to the UAE for the reasons stated earlier.

Most-used Arbitration Institutions

Participants indicated that the most used institutions for TMT disputes are the International Chamber of Commerce (ICC), World Intellectual Property Organization (WIPO), London Court of International Arbitration

(LCIA) and Singapore International Arbitration Centre (SIAC).

There are a number of well-known arbitration institutions in the MENA region, including Dubai International Arbitration Centre (DIAC), Dubai International Financial Centre – London Court of International Arbitration (DIFC-LCIA), Lebanese Arbitration and Conciliation Centre (LAMC) and the Cairo Regional Centre for International Commercial Arbitration (CRCICA). However, 67% of the Participants operating in the MENA region chose the ICC as the most-frequently used institution. MENA arbitration institutions ought to reflect on the reason why the ICC, an international arbitration centre, ranked as the most-frequently used in MENA instead of the regional well-known institutions.

Commentary

In recent years, the growth of the TMT sector has been remarkable. Following such growth, TMT disputes are naturally expected to increase. The UAE, as a dispute resolution jurisdiction, its UAE arbitration centers, and its UAE-based arbitration practitioners should reflect on and draw some lessons from the Study, in order to be prepared to accommodate the likely rise in TMT disputes. It is important for all such stakeholders to take into consideration the views of the participants in order to attract TMT disputes to the UAE.

Al Tamimi & Co's arbitration team members have appreciable experience in the area of TMT disputes, including as counsel, expert and arbitrator. For further information please contact John Gaffney (j.gaffney@tamimi.com).