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Comparative Aspects of Dispute Resolution in Technology Matters

*Clive V. Allen**

INTRODUCTION

Alternative Dispute Resolution (ADR) is a familiar term in today's world as we seek to settle disputes in an expeditious and cost effective manner long since considered to be beyond the ability of the traditional judicial process. Crowded court dockets, horrendously costly pre-trial depositions, capricious judges, and a multitude of other deficiencies are more the norm than the exception.

The background of Alternate Dispute Resolution is well known and understood by the participants at this conference. I have been asked to discuss the application of Alternative Dispute Resolution to technology disputes. Mediation, conciliation, mini-trials, summary jury trials, binding or non-binding arbitration - how relevant are they to the resolution of disputes involving technology?

Is there a distinction to be made between disputes involving technology matters and disputes having their origin in other commercial or domestic matters? And if there is such a distinction, do such disputes lend themselves *more* or *less* to resolution by Alternate Dispute Resolution?

My belief is that technology disputes are different from many other disputes in terms of their origin, their complexity, their need for fast resolution, and their dependence on technical evidence generally beyond the experience of, and sometimes even beyond the grasp of, the traditional judge.

It has been indicated I would present a Canadian perspective. I propose to present a Canadian perspective, but I caution you it will not be limited to Canada. The corporation with which I am associated is Canadian in origin, but also has substantial operations throughout the world. I expect my comments will have the same scope.

One critic has recently charged: "The inability of our present dispute resolution mechanisms to satisfactorily resolve socioscientific disputes is a manifestation of our society's more general inability to manage and live with the scientific and technological developments that have rushed upon us in the second half of the twentieth century."¹

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¹ Wessel, *Forum: Alternative Dispute Resolution for the Socioscientific Dispute*, 1 J.L. & TECH. 1, 2 (1986).

But he comments further:

We can improve socioscientific dispute resolution dramatically once we recognize that our present problems and concerns are not the same as those we have had in the past. Our dispute resolution mechanisms must adjust to the needs of the times. We are using nineteenth century methods to resolve twentieth century issues. The time has come for 'socioscientific dispute resolution' (SDR) — ADR focusing on the interface between science and law, modifying traditional techniques, and developing new ones that accommodate to the age of science and technology.²

Technology Disputes

Earlier I mentioned certain distinguishing marks of technology disputes: their origin, their complexity, their dependence on technical evidence, and their need for early resolution. Let me explore these further.

Large portions of our commercial activity today are concerned with or based on technology. Commercial activity depends to a great extent on the successful development and exploitation of technology. In the United States and Canada alone, the annual cost of this activity approximates 135 billion dollars. Disputes abound over the failure of technology to perform as expected; over the failure of high technology products to function as promised; over rights of ownership and exploitation between co-developers of technology; and over unauthorized use of patents and technology by others.

Generally speaking, technology disputes pertain either to the technology and its associated rights, or to products representing the physical embodiment of technology. Disputes based on product deficiencies tend to have the same characteristics as any dispute concerning unsatisfactory merchandise, although the complexity of the evidence may be greater. Fundamentally, such disputes address the failure of the product to perform as promised or to meet published specifications with the attendant claims for revocation of the sale, or a demand for specific performance, or the payment of monetary damages, or a combination of such claims. Essentially, the purchaser wants a product meeting his requirements and expects to be compensated as a result of the seller's failure to deliver a product meeting the purchaser's expectations. These disputes tend to be less serious than the other type of technology dispute since that which is not delivered by one supplier, can usually be delivered by another.

Disputes related to the fundamental rights associated with a technology, however, are quite different. They generally revolve around the right of a party to use or exploit alone or with others a technology not ordinarily available from other sources. Who owns the technology? What rights have been granted? Does the user of the technology have

² *Id.*

the right to transfer that technology, either as technology or as embodied in a product?

Alternate technologies are often not available and seldom with the degree of retroactivity required to legitimize an existing product. Sometimes a product line, or indeed all of a company's product portfolio, is based on technology whose ownership or rights to use are suddenly in doubt. Trade secrets, patents, copyrights, industrial designs, mask work protection and all more these factor into the discussion.

Complexity

In resolving technology disputes, one has to be concerned with the complexity of the subject matter of the adjudication. As Bryan Niblett, Emeritus Professor of Computer Science at the University of Wales, wrote:

As industry and commerce become ever more based on technical products and technical services, so disputes are reflecting that technical reliance. It is easy to give illustrations: nuclear energy, biotechnology, laser physics are examples of topics of immense commercial significance and yet specialties in which few advocates, and fewer judges, can claim specialist knowledge.³

Technical Evidence

This easily leads into a discussion of the special evidentiary requirements in technology disputes. In this regard, the same writer has correctly observed: "The essence of the matter is this: how can we most effectively present evidence on specialist matters which goes beyond the experience, the qualifications, the knowledge, the expertise, even the awareness of the tribunal?"⁴

Technology disputes often require a multitude of witnesses, often with diametrically opposed opinions, reviewing and extrapolating on points which might generously be referred to as arcane.

Early Resolution

Technology disputes in many instances require a very early resolution, because pending determination of the rights of the parties a party may be greatly disadvantaged in its inability to proceed confidently with the use of technology. Where a party has based its product line on a certain technology, computer architecture, for example, and the right of that party is being challenged by another party asserting the theft of its proprietary technology, the party seeking to use that technology will be disadvantaged even if it is not prevented from using the technology. The

³ Bryan Niblett, *II: The Challenge of Presenting Technical Evidence*, 16 INT'L BUS. LAW. 5, 236 (1988).

⁴ *Id.*

marketplace will be hesitant to purchase products based on technology of which the right to use is in contention, fearing its non-availability in the future. In addition, technology ages; and technology which is at the out-set state-of-the-art will be, if it is static in the following year, equaled by the technology of others, and surpassed in the next year. Technology by its very nature has to evolve. Those companies that are most successful with technology exploitation have technology which is based on a solid foundation and can support on its foundation many stories. Thus, any challenge to the use of technology affects not only the basic technology, but also its evolution and commercial value.

There are many instances, however, in which, while one party wishes a fast determination of its rights, the other wishes a protracted handling of the dispute. Does ADR, with its flexibility and use of non-conventional means, provide for a speedy resolution in these circumstances? Or does such flexibility afford the opportunity to the devious to cripple the process?

Value of Arbitration

Having considered some of the characteristics associated with technology disputes, let us now assess the value of arbitration in addressing these elements, and perhaps come to some determination as to whether the traditional judicial process or Alternate Dispute Resolution offers the better solution to the special problems associated with technology disputes. In effect, which method best lends itself to settling these disputes depends upon the nature of these disputes, their complexity, their need for high-level technical evidence and their need in many instances for early resolution.

As a general rule, one might be inclined to believe that a single arbitrator, or even a carefully selected arbitration panel, could be appointed on the basis of ability to comprehend and marshal the substantial technical evidence of a complex technology case. As Professor Niblett has observed:

It seems that what is really required is the presence of this power of technical assessment in the judge himself. This is what makes arbitrators so valuable: that a knowledge of the law and of the technical specialty can reside in one person. In my opinion, the surpassing advantage of the arbitrator is that he can engage in a fruitful dialogue with the expert witness. His ability to speak the language of the experts; to hear with exactitude the subtleties of what they are saying; to engage in that active listening which includes interrogation of the witnesses with the authority which comes from sharing that discipline; these are what make an arbitrator a superior tribunal for many technical disputes.⁵

There is obviously much to recommend this approach, but this is

⁵ *Id.* at 237.

not to suggest that people comprehending technical elements have the necessary discipline of mind to permit them to distinguish between a variety of other elements which should be considered in arriving at a conclusion. As Professor Niblett has also indicated: "The ability of the judges in the United Kingdom to deal with technical matters should not be underestimated, and the patent judges in particular have much experience of hearing complex specialist issues."⁶

Perhaps a technical specialist is an arbitrator entering the dispute with biases or perspectives, or even emotions, foreign to one whose experience has not been tainted in any way. I have a high measure of confidence in the strong legally-trained and experienced mind to be able to understand the fundamental issues, if not all the peripheral matters, and to arrive at a fair and reasonable decision notwithstanding technology limitations.

The ability of a technically-trained arbitrator to understand the complex issues is of limited benefit. Do we identify the speed and informality ascribed to Alternate Dispute Resolution as the indisputable advantage of ADR? Certainly, most people at first glance consider ADR as expeditious and relatively inexpensive. The recent and well-known IBM-Fujitsu arbitration resolved in a period of little more than two years, matters of considerable complexity and importance that had been the subject of substantial concern to both parties for an extended period. Issues related to the scope of copyright protection afforded to operating systems software developed by IBM could have taken many years for resolution by the normal judicial process. As a commentator wrote recently:

The IBM - Fujitsu arbitration . . . is extraordinary in that it was decided in substantial part, in two years. The speed of the resolution, of course, was affected by the fact that the arbitration was based upon the parties' previous agreements. It was more a case of contract interpretation than it was an arbitration of proprietary rights dispute. Nonetheless, two years is a short amount of time within which to resolve litigation of this size and complexity.⁷

The speed with which this dispute was resolved looks impressive in comparison with certain matters with which I have been associated over the years. One dispute involved a patent infringement where the action was commenced in 1982 and resulted in a 218 page judgment of the lower court by 1989. Following an appeal to the court of appeal for the federal circuit, the validity of the patent and its infringement was confirmed. But that was only in 1990 - eight years after the initial action had commenced and an even longer period of time since demands were first made upon the infringer. Today, almost a year later, the dispute contin-

⁶ *Id.*

⁷ Johnston, *The IBM-Fujitsu Arbitration Revisited - A Case Study in Effective ADR*, 7 COMPUTER LAW. 5, 15 (1990).

ues with the need for the trial court to determine the actual damages to which we are entitled. This determination does not seem to admit of an early resolution.

On the other hand, in another matter, we concluded our submission to an arbitrator in 1986, and we still await word as to the arbitrator's findings. It is difficult to ascribe delay to a process when in many instances the delays reside within the people charged with administering that process. In a more recent patent case in which we were involved, the judge for the Northern District of Illinois organized the process so effectively that the case would have come to trial within three months of the commencement of the litigation had it not been settled earlier. I am sure he would have rendered a judgement from the bench or the next best thing, and he would have been as astute in his wording of the judgment that an appeal by either party feeling aggrieved by the decision would have been an exercise in futility.

CONCLUSION

If one were entitled to offer a personal assessment of the value of Alternate Dispute Resolution, mine would be as follows. I think there are many instances in which ADR is of value for the reasons I have noted above. In other situations it leaves much to be desired. A fundamental need with respect to Arbitration is good faith on the part of all parties, as well as a great deal of good fortune in selecting the right arbitrator and the right advocate for the occasion. While there are a great number of variables in both the traditional judicial process and ADR, the variables in traditional litigation are better identified, better understood and better controlled. I prefer to deal in a forum where precedents exist, rules are well-defined, and an aggrieved party may take the matter to a higher court. If there is a lot at stake, (and there often is in high-technology disputes), and I can afford the time and the money, my first course, assuming the inability to settle the matter amicably, would probably be the traditional judicial process.

As one can see, there are advantages and disadvantages to various forms of dispute resolution. Perhaps from a practical perspective of settling disputes, one can turn to some correspondence of a long since departed American entrepreneur, Cornelius Vanderbilt, who while involved in a dispute (probably not of a technology matter) wrote to the other party:

Gentlemen:

You have undertaken to cheat me. I won't sue you, for the law takes too long. I will ruin you.

Yours truly,

Cornelius Vanderbilt