Technology Company Disputes: Confidentiality and Privacy Considerations in Court and Arbitration[1]

By Gary L. Benton[2]

Private resolution of technology company disputes is highly desired by business and highly controversial to the public. While the concept of protecting the confidentiality of proprietary technical information is readily accepted as a necessity in courts, the press and the public have little, if any, concern for the privacy of technology companies. On the premise that court cases are public record, even most outside counsel don't give sufficient consideration to client preferences for privacy.

In court, the identity of the parties and the nature of their dispute are matters of public record. To the press and the public, technology-related disputes are often front page news, particularly when the disputes involve Fortune 500 technology companies like Apple, Alphabet (Google) and Microsoft, or social media favorites like Facebook, Twitter and Instagram. Too often outside counsel take public dispute resolution for granted rather than acting proactively to satisfy their client preferences for privacy.

Surveys show that technology companies typically view confidentiality and privacy as critical concerns in the dispute resolution process. Most technology companies do not want their disputes aired in public.

Too often the public nature of disputes overshadows the merits. Take, for example, the Apple-Samsung smartphone case, which was termed by the press to be the "patent trial of the century." For Apple, although its billion-dollar jury verdict was whittled away by the appellate courts, the case was a valuable marketing opportunity to highlight to the public its technological ingenuity and the copycat wrongs of its foreign competitor. Samsung would have preferred, presumably, that its design misappropriation was not front page news (although that might be better news than the more recent revelation that some of its phones self-combust). Both sides took unnecessary risks and incurred considerable legal costs in this very public litigation battle.

Many a company has settled a threatened litigation to save time or cost or to avoid public airing of a dispute. Given the publicity associated with litigation, a company may pursue a settlement to ensure its intellectual property is kept secret, avoid alarming customers about service disruptions, insulate suppliers from claims, safeguard its

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distribution channels or keep a private financing, initial public offering or acquisition on track.

Many U.S. companies take for granted that the only way to resolve disputes is in a public forum. The U.S. technology sector is particularly accustomed to turning disputes over to the courts. This is largely because, when a dispute arises, technology companies are typically guided by outside litigation counsel who are trained in and comfortable with the court process. Only recently have U.S. technology companies and their counsel begun to seriously explore the privacy advantages, cost savings and other benefits offered by alternative dispute resolution.

Taking most business cases, particularly technology disputes, to court is almost counterintuitive. There are judges in a few select courts who are very capable handling technology company matters and have experience handling patent cases and other complex technology issues. However, most judges do not any have any IP experience, technical training or technology law background. Moreover, business and technology cases in the U.S. are usually decided by jurors who have no technical training. Court cases are often long, costly ordeals with considerable risk.

Resolution in the courts raises additional concern in the international context. Often an adverse party is not subject to U.S. court jurisdiction or initiates an action in a non-U.S. court. Dispute resolution in many non-U.S. courts increases the risk of error, bias and corruption. Moreover, even a favorable court judgment from a U.S. court cannot be readily enforced internationally.

Alternative dispute resolution, both mediation and arbitration, provide the opportunity to avoid these problems and offer increased confidentiality protections.

In stark contrast to court proceedings — mediation and arbitration proceedings are private. Just like in a private business meeting, only the parties and their representatives may attend. In mediation, the parties meet with an agreed upon mediator to openly discuss the business considerations and reach a mutually acceptable settlement. In private mediation, there need not be any court filings nor other public acknowledgements of the dispute. The parties have an opportunity to focus in private on moving forward to reach a business-practical resolution.

Likewise, in arbitration, the proceeding is private. Although the dispute is resolved on the merits as in a court, the merits are decided behind closed doors by one or more decision-makers selected by the parties. In arbitration, the parties can select arbitrators with legal and business experience in the subject matter of the dispute who can decide the matter in private without distraction.

A distinction should be drawn between privacy and confidentiality in arbitration. Privacy concerns who may attend the proceeding; confidentiality concerns what may be discussed outside the proceeding.

Although arbitrations are almost always private they are not necessarily confidential unless additional steps are taken. Arbitrators are typically bound to maintain the confidentiality of the proceeding but, absent more, the parties are not. As in court, the parties in an arbitration can stipulate to or otherwise request a confidentiality or nondisclosure order to protect proprietary technical information.

But the opportunity for confidentiality goes much further in arbitration. Apart from any public company disclosure requirements, the parties can provide that the very existence of the proceeding and everything discussed therein remain completely confidential, thereby ensuring absolute privacy. By agreement, the parties can restrict any public disclosure of the existence of the dispute, something that is almost never available in court.

Care must be taken to ensure this confidentiality. Ordinarily, there is no prohibition on an opposing party from issuing a press release or otherwise disclosing details regarding an ongoing proceeding. Sometimes the rules of the ADR institution administering the proceeding fill any gap requiring that the parties keep matters relating to the proceeding confidential.

However, the best way to ensure confidentiality in an arbitration is to include a confidentiality provision in the dispute resolution clause. Most standard arbitration clauses do not include confidentiality provisions. A carefully crafted arbitration clause imposing confidentiality may include restrictions on disclosure in the context of court assistance, witness testimony and award enforcement. Even if a broad confidentiality provision is not included at the transactional stage, the parties may be motivated to provide for some level of confidentiality when the dispute becomes ripe for dispute resolution.

Privacy and confidentiality are just two of many benefits of alternative dispute resolution. In arbitration, the parties always can mutually select the forum, the applicable law, the administrator and the decision-makers. The parties are free to specify arbitrator qualifications in their arbitration agreement or simply appoint an arbitrator or a panel of arbitrators that satisfy their requirements. Arbitration offers the opportunity for expedited dispute resolution and for procedures to be structured by the parties to meet their needs. In the international context, arbitration can provide a neutral forum and international enforcement benefits are not available through the courts.

Arbitration is not the right solution for every technology-related dispute but it offers numerous benefits over litigation in many cases, particularly with respect to confidentiality and privacy considerations. Litigation mandates exposure to public scrutiny while arbitration provides the parties a choice in the matter. When done right, arbitration also provides significant cost, timing and other procedural advantages to the parties.

No doubt this opportunity for absolute privacy and confidentiality weighs against the public's desire for public spectacle. However, business is often best conducted behind closed doors.