DISPUTE RESOLUTION AND ARBITRATION IN IT CONFLICTS

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The globalised presence of Information Technologies and their implementation as a basic tool for business development have favoured the commercialisation of technology and competitiveness in the market. Thus, this technological expansion inevitably triggers the emergence of new disputes, which must be solved in court or through other Alternative Dispute Resolution (ADR) methods: negotiation, institutional mediation, collaborative law or Arbitration.

Unfortunately, digital expansion does not advance in parallel with the functioning and modernisation of the judicial system since new technological operators demand agility, versatility and specialisation as a response to new conflictive situations. For this reason, we are currently facing an era of retreat from judicial proceedings towards transnational arbitration or, better still, towards effective negotiation and mediation, which advocates a consensus between the parties.

The marked tendency to solve disputes out of court fits well with the avant-garde spirit of entrepreneurship, start-ups, Fintech and ICTs in general. A commercial or civil court proceedings can be the enemy of immediacy and efficiency in terms of profits and losses, although sometimes it is still seen as a necessary evil.

Today's social culture demands freedom (i) to choose the applicable legal system and (ii) to determine the institution adjudicating the disputes. For this reason, the interest of ADRs is rising.

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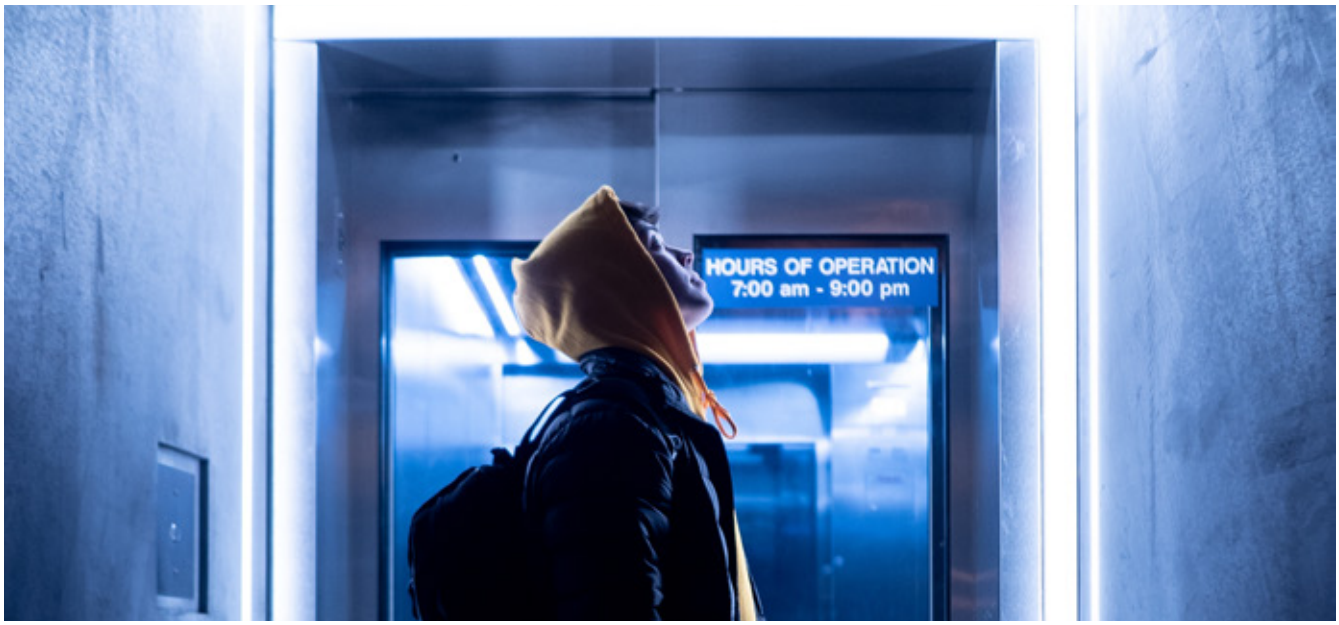

A Changing and Specialised Technological Ecosystem

Each sector has its own specialties and characteristics. In the case of Information Technologies (IT) it is necessary to highlight: their eminently dynamic nature and the complexity of their technical functioning. ICTs are constantly evolving, and new developments occur within very short time frames.

Conflicts arising from technological evolution require a high degree of specialisation from the professionals in charge of disputes in this field, since the regulatory and contractual scope of these disputes is based on technological and very technical concepts and language, sometimes start-up-related, which is alien to some mediators or judges.

In this respect, our experience with some clients has shown us how complex it is to solve contractual disputes in the field of IT and Private Law as opposed to traditional justice, among others:

(i) in legal conflicts related to Blockchain technology and/or Smart Contracts; **(ii) in disputes** arising from domain names related to trademarks and Intellectual Property rights; **(iii) and in IT management and consulting contracts.**

In addition, it is necessary to mention the interest in opting for an agile procedure where there is at least a certain level of control as regards the access to information, since certain commercial relations demand the preservation of confidentiality and the protection of trade secrets, as well as the protection of Intellectual Property related to the creation and design of software and technological platforms.

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Advantages of ADR and Arbitration

The lines of negotiation and intermediation in the resolution of cross-border conflicts have been updated and aligned with the needs of the market and the clients. The radicalisation of opposing positions may lead to national or international arbitration characterised by the following:

Freedom of the parties and flexibility of the proceeding:

Freedom of the parties to agree on the rules governing the proceedings Arbitration is conceived as an open proceeding for the resolution of contractual conflicts, which the parties may design in an agile, concise and tailor-made manner.

Specialisation of arbitrators:

The parties choose the arbitrators and ensure a more technical, precise and understandable award that meets the agreed rules.

" The radicalisation of opposing positions may lead to national or international arbitration. "

Efficiency and speed in getting a solution:

Awards are normally issued within 6 months and they are not subject to appeal. They may only be annulled before the competent courts for limited reasons, including questions of public order.

Confidentiality:

Safeguarding the business reputation and know-how of technology corporations is a priority. Therefore, due to the public nature of court hearings, to possible information leaks or to media pressure, the proceedings can be as confidential as the parties agree to.

Compliance with the arbitral award:

The decision of the arbitral tribunal is final and enforceable in any place where the parties have their residence, depending on the international treaties on recognition and enforcement of foreign awards to which the country where the arbitration took place is a party.

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Contractual Clause for ADR and Arbitration

Any conflict resolution arises from a consensus between the parties or from a prior contractual clause, which compels the parties to solve their disputes in a professionalised or institutional manner.

Submission clauses to ordinary and traditional jurisdiction are relatively simple, since the system is closed and only the applicable law and territorial jurisdiction are indicated. However, in the case of submission clauses to ADR, such as arbitration, all the elements upon which the parties can agree may and should be included:

(I) Scope and purpose of the clause. As a general rule, the scope will always depend on the subject matter of the contract, though there may be certain aspects that cannot be subject to arbitration, so that, where appropriate, it will be essential to define the scope of application in the event of a dispute.

(II) Institution to which the dispute shall be submitted. There are two alternatives as regards who will hear the case: Institutional Arbitration or ad hoc Arbitration. In the first one an arbitral institution (a panel or a court) organises, administers and defines the arbitration proceedings. In the second case, the rules of the arbitration are established by the parties themselves or by the arbitrators. The existence of a body fully dedicated to administering this type of proceedings means greater reliability and security, both from a legal and procedural point of view.

(III) Applicable law, venue and language. Any arbitration clause must include the applicable law and the language in which the arbitration will be held . Moreover,, the determination of the place where the arbitration will take place avoids future discrepancies, especially where there are transnational aspects. It is recommended that the applicable law is the one of the place of arbitration, despite the fact that this aspect is more flexible in international spheres.

(IV) The arbitrators (number and qualifications). The number of arbitrators who will participate in the proceedings must be an odd number so that the possibility of majority exists in case of discrepancies among them. It is not advisable to predetermine specific arbitrators, as circumstances may vary, although it is advisable to establish the minimum professional qualifications they must have in order to arbitrate the case in question.

(V) Confidentiality. The clause must contain an express reference to the absolute confidentiality of the parties regarding what happens before, during and after the arbitration has concluded.

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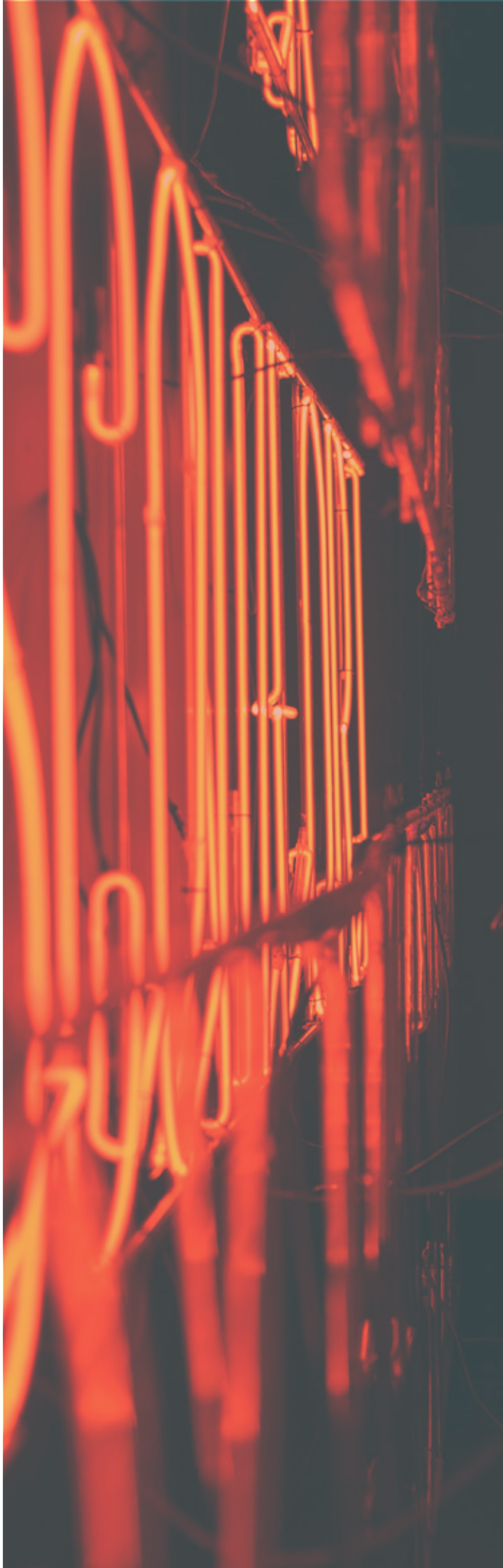
Additionally, depending on the complexity of the subject matter of the contract, other points may be included to further determine the scope of arbitration: (i) the cost bearing of the arbitration, (ii) the obligation to submit to a previous phase of ADR (e.g. negotiation or mediation) to try to reach an agreement without resorting to arbitration and/or (iii) the express reference to other contracts when the contractual relationship is complex, where the submission to arbitration is derived from another previous or parallel contractual relationship, or where there are third parties that could be involved in the event of a conflict.

Dispute Services

Dispute Services can include different stages: , a preventive phase of legal advice and the drafting of the corresponding clauses or agreements; a mediation phase to solve the conflicts between the parties; and representation and defence in a fast and efficient arbitration procedure. ADRs usually take place the field of Private Law, regardless of the fact that the trend is expanding to Public Law (including, to a certain extent, Criminal Law). And precisely regarding disputes in the field of IT, it is advisable to develop a legal strategy to prevent and resolve disputes in an agile and efficient manner. This way, it will be possible to assess and manage from the beginning the expectations of success and the availability of evidence for a negotiation or defence within arbitration proceedings. Sometimes cross-border IT operations tend



to fall into international regulatory lacunae throughout the development of the commercial or legal relationship. Thus, a legal support focused on ADRs builds guarantees and minimises the impact of a possible dispute.

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