CHAPTER 20

The Impact of Technology on International Arbitration and the Nature of Substantive Claims Asserted in International Arbitration

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Introduction

Over the last 20 years, we have witnessed an explosion in the application of technologies to all aspects of our daily lives and daily businesses. Indeed, there has been a continued acceleration of this process with each passing year. At the same time, we have seen an explosion in the growth of international arbitration. For this paper and presentation, I use the word technology in a broader sense, not limited to computer or information technology. A basic definition of technology is simply the application of scientific knowledge for practical purposes, especially industry. In 2000, the International Monetary Fund (IMF) noted that economic globalization was the result of human innovation and technological progress, particularly in respect of four areas: trade and related transactions; capital and investment flows; the movement of people; and the dissemination of knowledge.1 One can therefore speculate, with some confidence, that without this explosion of technological applications and the growth of knowledge based activities and business, we would not have seen the inexorable march to economic globalization that has occurred over the last fifteen years and, with this globalization, the significant growth of international arbitration as the preferred dispute resolution process for this international business.

Changes in technology, especially in the past 15 years, have also had a direct impact on the process of international arbitration itself. The use of technology now permeates and facilitates the arbitration process in a wide variety of ways. The purpose of this paper is to explore the influences of changing technologies. Some consequences on international arbitral procedures and practices are obvious and have become commonplace. Technologies have also had a sig-

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significant impact on the nature of evidence now adduced in most arbitrations and have challenged even the most non-tech savvy dispute lawyer and arbitrator to adapt to the digital age. Finally, new technologies and the disputes over the commercialization of those technologies have triggered some new and innovative substantive causes of action raised in cases where a new technology is at the core of the dispute. This paper will more carefully examine some of the innovative substantive claims asserted in a number of recent NAFTA arbitrations instituted against either Canada or the United States by investors seeking to capitalize on technological innovation in various fields. It will be instructive to follow the course of these new cases as they illustrate the tension between the commercialization of new technologies and the legal regime, both domestic and international, for the regulation of business. These NAFTA cases may also provide some useful guideposts for the manner in which future claims may be asserted, particularly in respect of other countries where the efficacy or promotion of new technologies may be the subject of legal disputes.

Technology and the Nature of Substantive Claims

Traditionally, technology disputes have arisen in the context of claims between private parties usually grounded in breach of contract or tort, but which may also extend to infringement of statutory intellectual property rights such as patent, trademark and copyright, breach of confidence or trade secrets. Such technology disputes arise in a rich variety of technology transactions including technology transfers, research and development contracts, various software development, licensing and implementation agreements, telecommunications agreements, joint venture agreements and other alliances, consultancy and engineering agreements, distribution and agency agreements for pharmaceuticals and other products and also mergers and acquisitions.

In the past couple of years we had seen substantial claims asserted in a new context. Investor state claims are now arising from the frustration of commercialization of new technologies by governmental state measures, often where the efficacy or safety of a technology or process comes into question. A series of arbitrations have now been commenced under the North American Free Trade Agreement by investors against either Canada or the United States with respect to the frustration of new projects and also the continuation of existing businesses seeking to exploit the commercialization of certain technologies. Claims are asserted to protect the integrity of the technology and more importantly the commercial value of the technologies. These NAFTA arbitrations highlight the intersection of technological applications, national law, especially the process by which domestic laws are created and then enforced