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Report on the session, ‘Effective litigation of complex technology disputes and the impact of emerging technologies on the litigation process’

Friday 29 April 2016

Chair

Cedric Chao *DLA Piper, San Francisco*

Panellists

David Barron *Wragge Lawrence Graham & Co, London*

Cynthia Bright *HP Inc, Palo Alto*

The Honourable Susan Illston *US District Court, San Francisco*

Shelly D. Irvine *FTI Consulting, San Francisco*

Alexandra Neri *Herbert Smith Freehills, Paris*

Bernard Shek, *SanDisk Corporation, Milpitas*

Robert Van Nest *Keker & Van Nest, San Francisco*

Taking advantage of the wealth of knowledge from Silicon Valley, the 2016 IBA Annual Litigation Forum held in San Francisco dedicated one of its sessions to the impact of technology on litigation – both as the object of the dispute and as a tool to facilitate the litigation process.

Complex high-value technology disputes have been increasingly in the spotlight as the technology sector grows as a percentage of global gross domestic product (GDP). These disputes present unique challenges in the presentation of evidence and persuasion

of the fact finder. They present issues of first impression, necessitate explaining complicated technologies and transactions in ways understandable to judges and juries unfamiliar with the intricacies of technology and its special language, and require creative application of old laws and regulatory frameworks to disruptive industries. Rapidly changing technology also affects the conduct of litigation in the courtroom, as well as the data retention obligations of general counsel and litigators given the need for compliance with United States discovery rules.

This very dynamic session led by Cedric Chao took the form of a discussion among leading specialists and provided a very informative and cross-border overview of the challenges faced by the different legal professionals involved in technology-related litigation including judges, trial attorneys, corporate counsel and experts. Different approaches taken by jurisdictions across the globe were compared, in particular the US to Europe and common law to civil law jurisdictions.

What distinguishes technology litigation from commercial litigation?

Quite unanimously, the panellists identified complexity to be a particular feature of technology disputes. Indeed, the often revolutionary nature of the technology at issue requires specific education of those involved and, in particular, the judge hearing the case. By contrast, other kinds of commercial litigation do not generally require as much in the way of detailed explanations on the facts underlying the dispute.

While all seemed to agree that teaching the technology at stake is crucial, it appeared that the methods used to educate the judge or decision maker vary depending on the jurisdiction and the litigation process involved. For instance, while some judges welcome tutorials on the technology in dispute, some remain wary of the neutrality of the information when provided by a party and prefer that expert reports be given to the court in accordance with the usual adversarial approach. The teaching methods will also depend on whether trial is to a jury or a judge.

Another feature of technology disputes that was stressed is the fact that these disputes are not about the past but essentially about the present and more importantly about the future of the technology at issue. This technology is often being developed as the litigation process takes place, and, thus, a particularly rapid dispute resolution process is required in order to provide an effective solution to the dispute.

Jury v bench trial?

Answers to the recurring question of whether technology disputes were best heard by a jury or a judge essentially reflected the legal culture of each specialist questioned. While US practitioners tend to favour jury trials as they allow starting from a 'white page' and permit telling a compelling story aimed at juror emotions, European practitioners remain sceptical about the neutrality of such a process and emphasised the perceived bias a jury may have towards foreign companies involved in litigation in the US.

Role of technology experts

The general view stressed the central role of experts in technology litigation given the crucial importance of educating the judge or the decision maker about the technology at stake. This view was, however,

not entirely shared in civil law countries such as France where the burden of explaining the technology rests largely on lawyers' shoulders and not on experts. The role of experts also seems to differ depending on whether the expert owes a duty to the party who hired it or to the court such as in the United Kingdom where extra care must be taken not to involve experts in litigation strategy meetings.

Experience identified specific features that a good expert should have: teaching abilities, communication skills and authenticity. It was noted that often the best witnesses to educate the decision makers about specific technology are the company's own employees; they are generally viewed as more credible and genuine than experts. From a practical point of view, it was also suggested to take into account the place of litigation when selecting experts, giving preference to experts to whom the jury could relate or more generally who could understand the specifics of the local legal culture. In that respect, even though they may have the same technical knowledge, different experts should be used for litigation in the US than in Europe.

Use of visual aids

Panellists agreed that visual aids are extremely useful in technology disputes. They simplify the issue at stake to the most basic message or image. Based on practical experience, the best visual aids seemed to be the ones that relate to human elements or to everyday objects. Beyond their pedagogic aspect, visual aids must also comply with evidentiary rules unless their purpose can be shown to be simply demonstrative.

Conclusion

The diverse viewpoints expressed led to an interactive and thought-provoking debate among the panellists as well as with the audience on the novel issues that emerging technologies present. These new legal challenges call for different litigation approaches and enhanced reactivity and creativity from all parties involved including judges, lawyers, in-house counsel and experts.

As ever, the challenge remains for the law to keep up with human creativity and for law professionals to keep abreast of the technology evolution. Legal professionals may not necessarily master the technologies they must deal with in cases, but they are crucial to allowing technology to develop and to providing practical solutions to technology disputes in an ever-connected and rapid world.



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