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Resolving Tech Disputes Internationally

Litigation and Dispute Resolution

Technology, Privacy, and eCommerce

CHEAT SHEET

- ***A costly mess.*** Litigation is expensive, interrupts innovation, and should be a last resort in international disputes rather than a first step.
- ***Minimize home court advantage.*** Savvy business opponents abroad may insist on litigation in their local court, which US parties may come to regret.
- ***A neutral party.*** International arbitral institutions operate in many locations worldwide and offer fair resolutions.
- ***The sharpest tool in the shed.*** Tech companies recognize that litigation is not always the most efficient or appropriate means of dispute resolution, and arbitration is another equally valid tool.

Less than a decade ago, a leading United Nations study on technology and globalization identified

the key trends changing global competition. Those trends included: increasing speed in the creation and dissemination of knowledge; trade liberalization; globalization and physical disintegration of production; increased importance of integrated value chains; increased role of multinational corporations in production and distribution; and changing elements of competition through continuous innovation and improvements in training, communication, transportation, and enabling infrastructures.

Today, the results of these global business developments are widely evident with significant increases in GDP concentrated in Asia, particularly in China, Korea, Singapore, Taiwan, and in other newly developing regions. China, India, and Brazil, despite having recent economic complications, are now among the top 10 countries in total world economic output, with China vying for the lead against the United States and India rising rapidly as it begins to embrace outward trade strategies. These nations are increasingly using, developing, manufacturing, and exporting technology. With increased trade comes a rise in cross-border disputes.

The substantial increase in international trade disputes, constraints on US courts, and the limited reach of US court judgments create a demand for an innovative way to handle international technology disputes. Technology companies in the United States are now routinely tasked with litigating disputes with foreign suppliers, purchasers, partners, and investors in foreign courts and tribunals or trying to enforce US court judgments in foreign jurisdictions. Neither are particularly good options.

Foreign parties with any negotiating strength will insist on avoiding US courts. Many US technology companies unwittingly agree, anticipating no dispute will arise or that a foreign court will offer the same experience as a US court. In practice, companies finding themselves in foreign courts often have a difficult burden overcoming a mix of legal, cultural, and technical challenges. Apart from having to confront foreign laws, procedures, language, and other cultural differences, parties litigating abroad, particularly in authoritarian or developing nations, may be subject to a foreign judiciary that has limited appreciation for due process and no training in IP or other technology sector issues. In too many countries, it is not uncommon for tribunals to be further burdened by protectionism, prejudice, or corruption.

Legal and cultural problems are not avoided by litigating in the United States first and then seeking to enforce a judgment abroad. Companies expecting to enforce US court judgments in foreign jurisdictions quickly learn that judgments of US courts are not legally recognized and almost never enforced by foreign states. There is no international treaty providing for the enforcement of US court judgments and any enforcement depends on local law which varies from country to country. Typically, the case must start over from the beginning.

Even where a foreign party has operations or other assets in the United States that can be attached, pursuing a judgment in the United States can be frustrating. Complex litigation in the United States costs so much, is so intrusive, and takes so long to complete that it is often ineffective. According to the latest American Intellectual Property Association (AIPLA) Economic Survey, a typical US patent suit costs anywhere from US$2m to UM$6m and takes three to five years to reach a final judgment. Litigation with foreign parties adds substantial cost to litigation in the United States. Further, given the global reach of the technology sector, often a lawsuit in just one country won’t do. (See Apple-Samsung Sidebar.)

Apple-Samsung dispute

The Apple-Samsung dispute over smartphone and tablet technologies began with court filings in 2011 and grew into over 50 lawsuits in nine countries, including South Korea, Japan, Australia, and the United Kingdom. Both companies spent tens of millions of US dollars in legal fees with conflicting results around the world. The parties were soon litigating over technology that had become mostly obsolete. In 2014, Apple and Samsung agreed to dismiss the non-US litigations. They continued to litigate back and forth between the district court and appellate court in the United States, reaching a settlement on the largest of the cases in 2015. Litigation in other cases continued in 2016.

More recently, Apple has relied on arbitration clauses. In November 2015, Apple filed a petition to compel arbitration in San Francisco in response to efforts by a PRC supplier asking a court in China to stop production of Apple iPhone 6 Plus and iPad Mini products in China and have the allegedly infringing product destroyed.

Today, thousands of technology companies face cross-border litigations in courts around the world. The process is unduly costly, time consuming, and all too often provides unsatisfactory results for both sides. Increasingly, technology companies are looking to other dispute resolution processes to resolve disputes more efficiently.

Many companies are adopting mediation and international arbitration as procedures of choice. These alternative dispute resolution (ADR) procedures have long been relied on in other industry sectors for resolving international disputes. What is new in the approach to ADR, however, is three-fold.

First, technology companies are recognizing that litigation is costly and disruptive of innovation. Rather than looking to litigation as the first response, these companies are looking at dispute resolution as part of the business process. They turn to good faith negotiation and mediation as first steps, and then turn to adversarial processes only when needed.

Second, technology companies are facing the dilemma that companies based outside the United States have the negotiating strength and business savvy to insist that disputes be resolved by means other than the United States judicial process. Where disputes cannot be resolved by negotiation or other conciliatory processes, foreign parties often insist on resolution in their local court or a local arbitral institution. US parties will likely regret those choices as being foreign-biased. Established international arbitral institutions now operate from locations around the world and there are several new institutions that can also provide fair and neutral resolutions.

Third, many technology companies in the United States have become more sophisticated in considering dispute resolution processes. They recognize that the courts in the United States cannot resolve problems around the world. They understand that in some instances litigation cannot provide the desired result or an enforceable judgment, and look to mediation and international arbitration as part of an arsenal of tools available to resolve international business disputes. They choose the tools that are appropriate for the task.

Mediation and international arbitration can be advantageous options with respect to speed, efficiency, flexibility, and ability to save cost for technology companies. These processes are useful for resolving multinational disputes. International arbitration provides unique advantages with respect to international enforcement. But it must be done right, taking care to select the appropriate processes, rules, and neutrals. Doing so requires thoughtful consideration of appropriate procedures at the time

of contracting and both before and after disputes escalate.

International ADR in transition

International ADR is undergoing a transition. As with ADR in the United States, it is increasingly being viewed in the context of “appropriate,” rather than “alternative” dispute resolution. This evolved title reflects the idea of dispute resolution being complementary to other legal options, recognizing that each form has its own strengths and weaknesses. Too frequently, business executives and attorneys fail to consider the potential advantages of ADR and automatically default to litigation. Appropriate dispute resolution promotes a course of contemplating the dispute and the potential resolution approaches with a focus on business-practical results. Importantly, ADR is a platform that international technology companies can use to properly assess their disputes as a synergy of business and legal questions.

ADR allows technology companies the flexibility to resolve international disputes without the high cost of litigation and reliance on foreign courts. The mediation side of ADR is relatively well understood, relying on an independent neutral to assist the parties in reaching a settlement. In the context of international technology company disputes, the mediator could be a retired judge but more likely will be an international legal practitioner skilled in the industry or having expertise in international business transactions. As is well known, in much of Asia and in many other regions in the world, mediation or other conciliatory approaches are highly valued over more assertive US litigation processes, and can help maintain or build business relationships.

Arbitration can offer businesses efficient, expert, and neutral dispute resolution. In the context of international disputes, it provides an opportunity for a binding decision by one or more neutral arbitrators selected by the parties. Doing it right requires the client to carefully oversee the process to ensure that the right actions are selected and implemented, one that includes the designation of appropriate arbitral institutions, the selection of qualified tech-savvy arbitration counsel, and the appointment of capable, industry-skilled arbitrators who will work with the parties and their counsel to maintain cross-cultural expectations, implement a fair process, and keep costs under control.

The opportunity for international arbitration in the realm of international technology disputes is particularly intriguing and its greatest benefits are often overlooked. International arbitration can provide much more than a fair, expert international dispute resolution process. It offers multinational, globally enforceable dispute resolution as a matter of international law. International arbitration treaty protections provide solutions that litigation in the United States or anywhere else cannot. As discussed further below, based on international conventions, international arbitration awards are enforceable on a worldwide basis.

Specific considerations for technology company disputes

Increasingly, technology companies are turning to ADR to resolve disputes in commercial contracts, licensing, technology development, and sales and distribution. Embracing international arbitration to manage intellectual property dispute lawsuits is steadily increasing as well.

In 2013, the World Intellectual Property Organization (WIPO) conducted an international survey on dispute resolution in technology transactions. Respondents to the survey were from a wide variety of technology-related sectors, including IT, biotechnology, and pharmaceuticals. When asked about the main considerations for negotiating dispute resolution clauses, 71 percent of respondents to the

survey indicated costs, 56 percent indicated time, and 44 percent indicated quality outcome — including the specialization of the decision-maker. The survey results confirm that international technology companies are consistently concerned with the substantial costs of multinational litigation and desire a dispute resolution process that is more sensitive to the particular needs of the technology sector.

While companies engaged in international technology disputes can benefit from mediation and arbitration, neither is, admittedly, a comprehensive nor perfect solution. Both mediation and arbitration require an agreement between the parties, if not at the time of contracting at least for purposes of resolving a developing or existing dispute. ADR processes, particularly mediation, are ideal where there is an ongoing business relationship or a potential for a future business relationship. Arbitration and mediation are less likely to be embraced by both sides in patent disputes initiated by nonpracticing entities (NPEs), for example, and in other cases where the time and expense of a lawsuit is a critical factor for one party more than the other. However, arbitration and mediation work particularly well where parties have an existing relationship, would mutually benefit from working out a business resolution, or simply desire a fair and independent forum to resolve their dispute. Thus, a large array of international disputes in the technology sector are appropriate for resolution through mediation or international arbitration.

Global dispute resolution

One primary reason for the complexity of international disputes is that parallel lawsuits must be filed in multiple countries. This often leads to inconsistent outcomes. International arbitration resolves this problem by consolidating a dispute into a single expedited adjudication. Rather than having multiple litigations in every country that could have jurisdiction, an agreement to arbitrate generates the power of an arbitral tribunal to hear and adjudicate a case with one final award. This takes away the uncertainty of multinational disputes by consolidating legal efforts into one definitive case in a neutral forum of the parties' choice and avoids the risk of being dragged into a hostile foreign court. The cost savings of a single, coordinated proceeding are readily apparent.

International arbitration also eases the enforcement of an award. Since the authority of the arbitral tribunal comes from a contract between the parties, and the awards are recognized by international convention, there is virtually no geographical limitation on their reach. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as The New York Convention, is one of the key instruments in the enforcement process. This international treaty, adopted by 153 countries, requires signatory countries to uphold arbitration agreements and enforce arbitration awards made in other contracting countries. The New York Convention has been enforced in over 1,750 court decisions in over 65 countries. There are a number of other important international conventions that provide for regional recognition and enforcement of international arbitration awards.

In contrast, there is no bilateral treaty or international convention in force between the United States and any other country on the recognition and enforcement of court judgments. The US Department of State advises that many foreign states are hostile to US efforts to engage in extraterritorial reach. Even if a company prevails in a US court and has a final judgment, there is no readily available means of enforcement outside the United States. In such cases, disputes must be re-litigated in non-US courts, under foreign laws, before foreign judges. Thus, international arbitration awards provide a significant benefit over court judgments by allowing for a single proceeding with a globally enforceable award.

There are limited grounds for review of an arbitration award, generally restricted by international

convention to violations of due process, abuse, and public policy grounds. This avoids the risk of foreign court interference, reduces the cost of the process, and avoids considerable delay when enforcing the award. Since confirmation of an arbitral award by a local court is not required for enforcement, collection on international arbitration is expedited.

Given that the foreign enforcement of international arbitration awards requires some foreign court involvement, there is room for abuse. However, it is increasingly important to developing countries, as well as developed countries, that international arbitration awards be readily enforced. In China, for example, where local courts might be expected to favor Chinese parties, any rejection of an international arbitration award is subject to mandatory review by the Supreme People's Court of the People's Republic of China. China. Thus, while the international enforcement of arbitral awards is not a system completely independent of the local courts, decision-making by neutral tribunals, limited grounds for rejecting awards, and controls over enforcement of awards provide an opportunity for international arbitration proceedings to be far superior options to foreign court litigation.

Forum

Another major advantage of international arbitration is the benefit of avoiding a proceeding in the adversary party's jurisdiction. Since arbitration is governed by the parties' agreement, the place or "seat" of the arbitration may be set in a neutral, mutually agreeable location. Unlike litigation, the proceeding does not need to be set where one of the parties is located. Instead, the parties will want to select a jurisdiction conducive to international arbitration. That is a jurisdiction that is signatory to requisite international conventions, has local laws favoring international arbitration, and has an independent judiciary that applies an appropriate balance in supporting and not interfering with the process. A mutually selected location saves parties from being dragged into foreign courts, possibly multiple foreign courts, and saves the high cost of litigating multiple cases, sometimes without ever acquiring a definitive outcome.

Judicial and arbitral administration

The administration of disputes varies significantly in international arbitration from litigation. In litigation, each court relies on its own local procedure and independently schedules cases; there is no administrative coordination with foreign courts and limited, if any, coordination on judicial findings.

In contrast, an international arbitration is typically administered for the parties by a private (or semi-private) arbitral institution. The selected institution oversees the entire process from filing to closing by providing arbitration rules, managing the appointment and removal of arbitrators, scheduling conferences, and ensuring the award is delivered to the parties in a timely fashion. An arbitral institution can provide the parties flexibility in designing and controlling the process. Private arbitral institutions work at the behest of the parties rather than leaving the parties dependent on government clerks for the administration of their case. The right arbitral institution can expedite the process and save the parties considerable expense.

The quality of arbitral institutions varies. Some are truly international in nature; others operate within a single jurisdiction or are subject to local political pressures. Some have very formal procedures; others provide more flexibility to the parties. Some institutions preclude or discourage appointment of arbitrators who are not on their panels. Many do not have procedures focused on the technology sector.

Many US technology companies have made a mistake in relying on foreign courts to resolve their

disputes; others have made an even greater mistake when they agree to arbitration under the rules of an arbitral institution that is not suited to handle international technology disputes. In India, for example, there is a backlog of tens of millions of cases, and many have been pending for more than a decade. As another example, China now offers hundreds of arbitral institutions but only a small percentage have any expertise in international business, IP law, or technology. The result can be a Kafkaesque process administered by an inexperienced, non-neutral, or otherwise unsuitable institution and decided by technically ignorant, poorly trained, or biased arbitrators.

There are, however, a number of quality institutions around the world that are well-suited for handling international disputes for technology companies. Those institutions operate under laws and provide rules that accommodate international parties. They allow parties to rely on their own counsel, to select arbitrators of their choice, and have rules that work in the context of technology disputes. Some of these institutions offer emergency decision-making rules, technology panels, and arbitral appeals, all of which may be of particular interest to technology companies. There is no one right institution for every dispute but there are some that certainly stand above others.

Most parties in international commercial disputes rely on arbitral institutions to administer the process because it provides significant advantages in selecting arbitrators and dealing with administrative issues as they arise; however, procedures also exist for “ad hoc” arbitrations that have limited or no administrative support by arbitral institutions and some parties rely on such procedures to save costs, particularly filing fees and administrative fees, or in situations where limited administrative support is expected to be required.

Selected arbitrators

A key reason technology companies turn to international arbitration is the ability to select an experienced arbitrator, particularly one who has exposure to the underlying technology or the international business law and practices involved in the case. Even in the United States, most judges are generalists and have no intellectual property or technical experience. There is an obvious problem in having complex technical matters decided by judges with limited technical experience. Most have never worked in a corporate environment, and even fewer have experience with international commercial law and international business practices. The concern increases when disputes are presented to local or foreign judges who may have cultural biases or worse.

Understandably, it is a risk to any party to be in court in a foreign jurisdiction. A solution to this problem is to have cases resolved by experienced arbitrators who have worked with technology companies, have dealt with international business law issues, and have some appreciation for cultural considerations involved in the particular case.

Another impediment to an efficient resolution in United States cases is the reliance on juries. In the United States, a party in a technology dispute has a right to a jury trial but there are no technical prerequisites for jurors in such cases. There is a substantial risk that jury decision-making on technical cases will not be decided based on principled application of the law. In patent cases, for example, jurors may be overwhelmed by the complexity of the legal issues, the volume of evidence, or the highly technical nature of disputes. In such cases, counsel may be tempted to appeal to jury prejudices rather than focus solely on technical analysis and argument. This problem is avoided by using arbitrators with some background on the subject matter.

The parties select the decision-makers in international arbitration. There are a variety of alternatives to select the arbitration panel, so companies can choose the best option for their specific dispute. In

some cases, three neutral arbitrators are appointed, with each party selecting one arbitrator, and the parties or party-appointed arbitrators jointly selecting the third arbitrator. Alternatively, the arbitrator(s) could be designated in the arbitration clause or appointed from a list provided by the arbitral institution. In smaller cases, a single arbitrator is typically appointed either jointly by the parties or the arbitral institution.

The rules of the leading arbitral institutions and the laws of many jurisdictions impose strict requirements for arbitrator neutrality and conflict disclosure, typically more stringent than required of judges, where in many countries, there may be no requirement for conflict disclosure and limited checks and balances on the judiciary process. While there is no guarantee a panel of arbitrators will reach the correct result, an advantage of international arbitration over court proceedings is the ability of the parties to select the panel. For that matter, a panel of arbitrators selected by the parties is more likely to reach the proper result than a judge acting on his or her own, or a jury which lacks international technology business experience.

A related advantage of international arbitration is the ability of the parties to select expert decision-makers. The parties are free to specify arbitrator qualifications in their arbitration agreement or simply appoint a panel that satisfies their requirements. Undoubtedly, a panel of skilled arbitrators, whether engineers, industry insiders, or technology lawyers, are more qualified to address technology business disputes than most jurors and many judges. The parties' selection of arbitrators minimizes the risk of an erroneous ruling by an unqualified judge or runaway jury, allowing the parties more control in the dispute-resolution process. This also saves costs in the long run because the parties need not spend resources on an erroneous ruling by a judge or jury who did not fully appreciate the law or facts.

Privacy and confidentiality

Another important consideration for some technology companies is the benefit of privacy and confidentiality that international arbitral can provide. Since court proceedings in many countries are open to the public, companies may be concerned about confidential business and technical information becoming public in these legal battles, in addition to the verdict. In the United States, protective orders are available but they provide only limited privacy benefits.

In contrast, international arbitration proceedings are held in private. Some arbitration rules require that the proceedings remain confidential and other times the parties expressly agree to confidentiality in advance, which may be highly desirable for businesses seeking to keep technology, customer lists, financial information, other proprietary information, or even the existence of the proceeding confidential. In such circumstances, the only time particulars of an arbitration may be acknowledged is when a party seeks court assistance (e.g., to request preliminary relief at the start of a proceeding or enforcement of an award after a proceeding) or when there is some regulatory disclosure requirement.

Privacy is often an important motivator in opting for arbitration. Conversely, choosing court litigation for greater public scrutiny could be a strategic choice as well. Undoubtedly, there are policy considerations to be taken into account in considering whether major commercial disputes are best resolved in public view or in private hearing rooms. However, international arbitration allows a company to make a strategic decision by selecting the appropriate dispute resolution process for their case.

Preliminary injunctive relief and emergency arbitrators

Since many technology disputes involve requests for preliminary injunctions, it is important that international arbitration also allow for preliminary injunctive relief. Procedural laws vary by country on standards for preliminary relief. In every case, courts must balance the competing claims of potential injury and the potential consequences of granting or refusing the requested relief.

Under the leading international arbitral rules, international arbitrators have broad discretion in issuing instructions for interim relief and making initial awards before rendering a final decision. Often the assistance of a court is not required. It is typical for a party to refuse to comply with an arbitration panel's order. Doing so exposes the party to the wrath of the panel in any final award. In any case, a court with appropriate jurisdiction can be called upon to compel enforcement.

In recent years, the availability of preliminary injunctive relief has become widely accepted and several of the leading arbitral institutions have gone further to address concerns regarding the need to assemble a panel quickly enough to provide necessary preliminary relief by offering rules for emergency appointments of arbitrators.

Discovery

Another crucial advantage to international arbitration for technology disputes is a limited discovery process. International arbitration favors minimal "disclosure" of information, specifically disclosure of documents that the party intends to rely upon, supplemented through narrow document production requests. Alternatively, litigation, depending on where it is conducted, involves a broader pretrial production of evidence, considerably increasing the time and cost of a dispute. Accordingly, international arbitration appeals to technology companies because the expedited discovery process develops a decision more efficiently, allowing companies to resolve a legal claim before the disputed technology becomes irrelevant.

It is typical in international arbitrations, particularly those involving US parties, that some level of document discovery will be allowed. The scope of document production and other discovery allowed routinely depends upon the expectations of the parties, the preferences of their counsel, and the receptiveness of the arbitrators to those desires. A balance is required with respect to customary practices, efficiency, privacy, and the need to garner all the evidence.

In recent years, a number of arbitral institutions have responded favorably to user requests for fuller discovery. Although those arbitral institutions still encourage expedited proceedings, there is a growing willingness for some institutions and certain arbitrators to allow depositions and other traditional US discovery mechanisms when requested by all parties. Where there is a disagreement between the parties and the arbitration clause does not provide guidance, capable arbitrators will take into consideration what would reasonably be expected by the parties in the context of the case while encouraging the parties to strive for some degree of efficiency.

Experts

In many international technology disputes, expert testimony is crucial. In litigation, the parties would spend considerable amounts of time and money in qualifying and educating experts, and having them prepare their testimony for written reports, depositions, and trial. Expert presentations to juries are often colorful, which can generate concern that experts are muddling the issue and trying to confuse the juries. While courts regard experts as important in providing damage calculations, they have warned against using experts as "hired guns" for presenting an "impenetrable facade of

mathematics” to a jury.

In international arbitration, there is significant flexibility in how to handle experts; the parties either appoint their own experts or the tribunal may appoint an independent expert. Where the parties appoint their own experts, there is still a stark difference in arbitration because the experts present their testimony to a vastly different audience — the arbitrator. Where there is a single panel-appointed expert, a battle of the experts is replaced with a theoretically more objective presentation. In some cases, arbitrators will allow opposing experts to testify together, facilitating an expert consensus on key points. In all situations, the expert presentation is more focused and efficient because it is made to an arbitral panel that presumably has more skill in the field than a typical judge or jury.

Ten key tips

1. Make ADR part of your business process not an afterthought to address when a dispute arises.
2. Use ADR clauses that are appropriate for the disputes that might occur.
3. Make sure you select an arbitral seat that is favorable to arbitration and has procedural laws that meet your needs.
4. Make sure your agreement or arbitration submission specifies the substantive law to apply; it does not need to be the law of the seat.
5. Don’t overcomplicate the process: standard clauses customized to ensure confidentiality might be all you need.
6. Consider using three arbitrator panels or arbitral appellate panels if you want further protections for getting the correct decision.
7. ADRs institutions vary greatly: even among the leading institutions you will find differences in rules, oversight and the international, legal, and technical expertise of neutrals, all of which impact efficiency and cost.
8. Select the right neutral to resolve your dispute: consider neutrals who are international ADR experts and have an understanding of technology law, the subject technology and the way the technology industry operates.
9. Look to online resources in selecting neutrals and, in larger cases, interview the candidates.
10. Be responsible with the flexible processes offered by international arbitration: monitor the proceeding, beginning with the Preliminary Hearing, to keep the process cost-efficient.

Hearing procedure

The hearings in international litigation and arbitration differ significantly in both formality and process. The procedural and evidentiary rules strictly govern the trial process in litigation. Conversely, in international arbitration, the principal of party autonomy permits the parties to jointly develop a hearing process that suits the case. This can expedite the trial significantly and allow the parties to save considerable time and money in the process.

The procedural stages for both arbitration and litigation hearings are similar. Both employ the basic stages of a hearing: opening statements, witness testimony, and closing statements. In international

arbitration, direct testimony traditionally comes in the form of written affidavits. Doing so makes the introduction of direct testimony more efficient, and allows counsel and the tribunal to focus in cross and redirect on areas in need of clarification.

Where parties, counsel, and arbitrators from different legal systems are involved, international arbitration allows a balance to be reached. In a matter between parties from common law and civil law jurisdictions, procedures from both systems may be adopted. For example, common law embodies an adversarial process, providing a more engaged role for counsel, and reliance of stare decisis. Civil law is a more inquisitorial system, with reliance on statute rather than precedent. In a case with common law parties, the panel may be inclined to allow discovery, motion practice and fuller cross-examination, whereas in a case involving only civil law parties, it is unlikely there would be, and the matter would largely be decided on documentary evidence. The advantage of international arbitration is that it allows counsel and the arbitrators to develop a procedure that accommodates the reasonable expectations of the parties.

Appellate review

Traditionally, international arbitration has not encompassed appellate review. In contrast, nearly all countries provide rights of appeal against court judgments, in some cases, to specialized courts, and in others, to appellate courts with general jurisdiction. Appellate review can be extraordinarily valuable where it corrects a wrong, but in all instances, it adds time, cost, and uncertainty to the litigation process.

There is generally no appeal from the award of an arbitration tribunal because international arbitration is intended to be an expedited process by decision makers selected by the parties. Arguably, an arbitral tribunal is best situated to reach a correct decision in the first place because the tribunal is composed of experts and has the advantage of collaborative deliberations. These features provide a “built in” error-checking mechanism. Relying on local courts for appellate review would defeat the neutral decision-making offered by international arbitration.

Despite these concerns and the built-in safeguards, some critics contend appellate review is necessary to ensure the correct result is reached and arbitration’s preference for efficiency over appellate review is a defect in the arbitration process. Although efficiency and finality of awards is still largely viewed as an advantage of arbitration, a few arbitral institutions now accommodate appellate processes. The AAA/ICDR, for example, offers review by an arbitral panel under its Optional Appellate Arbitration Rules.

Accordingly, parties in international arbitration now have the opportunity to provide for appeal of awards under certain international arbitration rules. Under these rules, the awards are reviewed by retired judges or other appellate experts agreed upon by the parties. This new appellate process provides a significant advantage over judicial appeals by allowing for expedited appellate review by hand-picked appellate specialists.

Cost and speed

A question that many corporate counsel undoubtedly want to know is: what will be the cost of using international arbitration compared to litigation? There is no doubt mediation can save considerable cost by achieving an early resolution of a dispute. As well, international arbitration can be significantly less costly than litigation. What compounds the complexity of the answer as to arbitration is the flexibility of arbitration. The cost of an arbitration will necessarily change depending on how the

parties and the panel structure the process.

Recent studies have attempted to gain some concrete numbers on how much a party can actually save by arbitrating a dispute. For example, in the latest AIPLA Economic Survey, respondents stated that arbitrating an intellectual property dispute cost 56.2 percent of the cost to litigate the dispute. A similar survey conducted by World Intellectual Property Organization (WIPO) found that arbitration saved 60 percent of time and 55 percent of costs compared to litigation.

These cost and time savings are particularly crucial for technology companies, allowing disputes to be resolved more efficiently and before the technology in question becomes obsolete.

Conclusion

The opportunity to use international mediation and international arbitration to effectively resolve international technology disputes is profound. International mediation provides an opportunity for companies to continue to work together and develop new business relationships, an opportunity that can be significantly lacking when resorting to litigation warfare.

International arbitration should appropriately be viewed as a mode of dispute resolution that provides a reach and breadth that cannot be obtained through litigation. International arbitration has many practical and unique virtues that make it a particularly enticing tool over litigation. Cost, efficiency, expert decision-making, neutrality, and international acceptance make it appealing. And recent developments accommodating parties who want emergency decision-making, preliminary injunctive relief, broader discovery, and appellate review make it particularly appealing to a broader audience of users.

The need for international enforcement of an award may make international arbitration the only choice. Given international conventions, international arbitration awards are enforceable in places where foreign court judgments are not. Additionally, international arbitration can resolve multinational disputes through a single proceeding and provide for enforcement of the award on a global basis.

International resources

MAJOR INTERNATIONAL ARBITRATION INSTITUTIONS

International Centre for Dispute Resolution (AAA/ICDR)

International Chamber of Commerce (ICC)

London Court of International Arbitration (LCIA)

Singapore International Arbitration Centre (SIAC)

Hong Kong International Arbitration Centre (HKIAC)

World Intellectual Property Organization (WIPO)

OTHER RESOURCES

New York International Arbitration Center (NYIAC)

Silicon Valley Arbitration and Mediation Center (SVAMC)

Further Reading

AIPLA 2015 Report of the Economic Survey at 40 (AIPLA 2015).

AIPLA 2015 Report of the Economic Survey at 49 (AIPLA 2015).

Guide to WIPO Arbitration, WIPO Arbitration and Mediation Center, Publication No 919(E),33.

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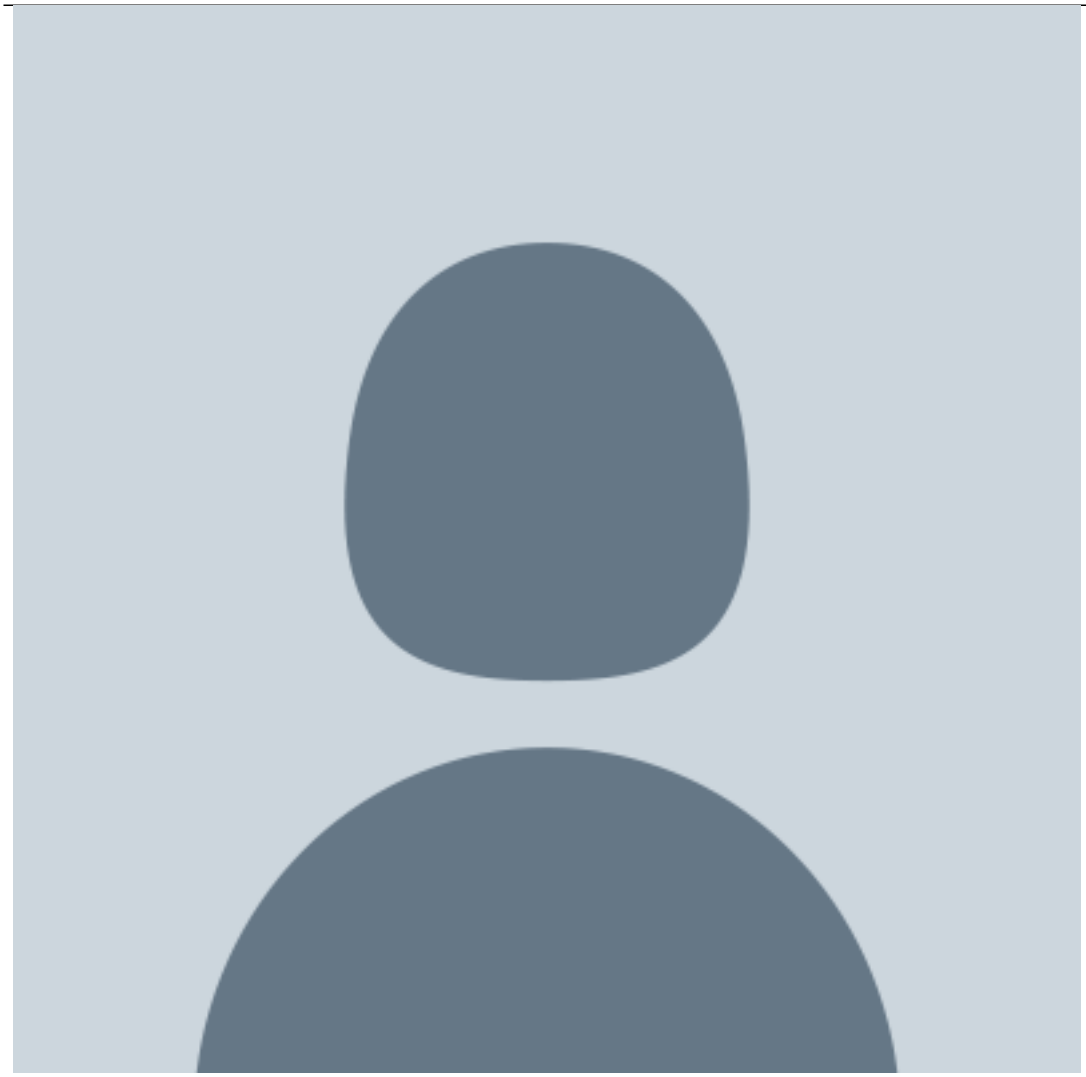

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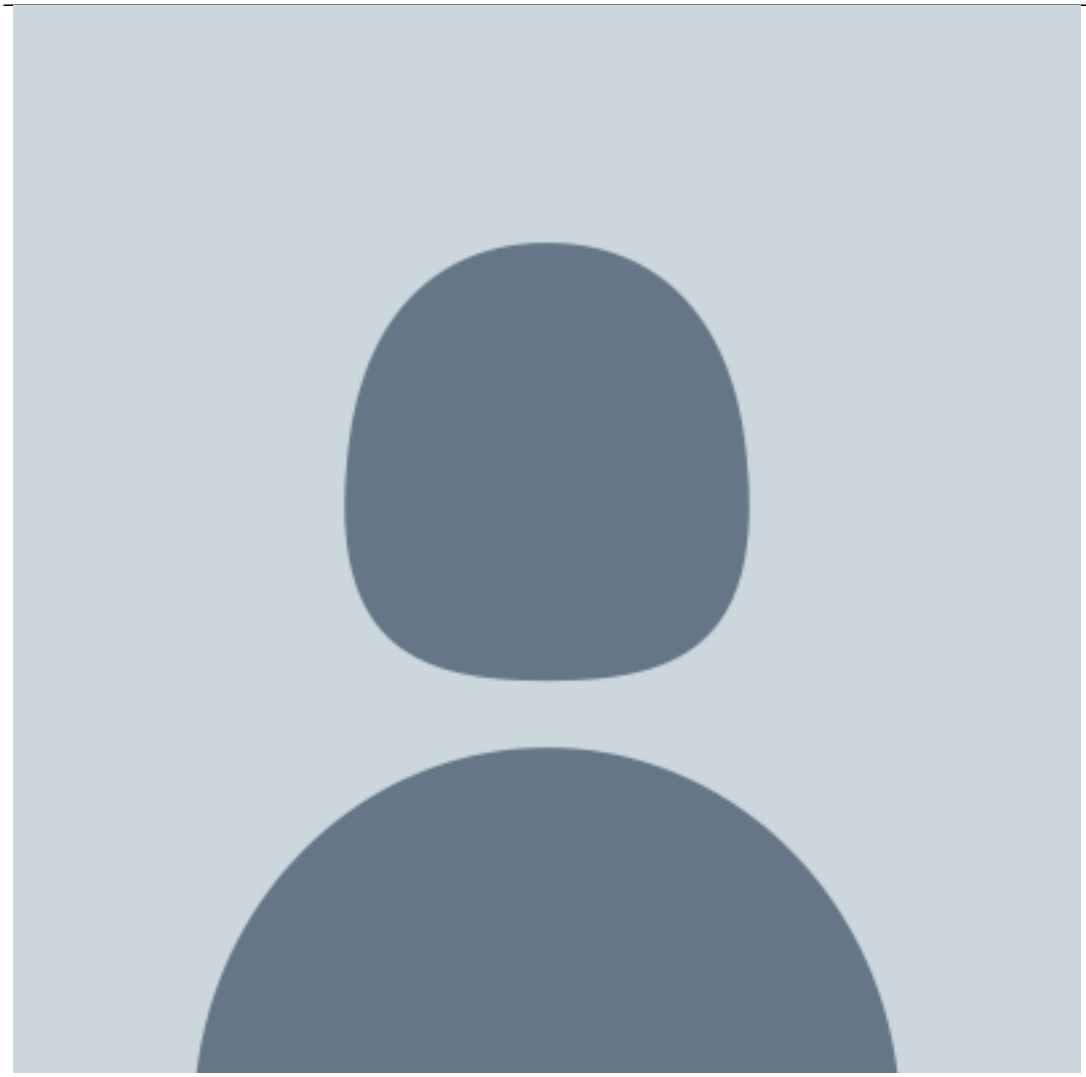

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