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Technology Dispute Resolution Survey Highlights US and International Arbitration Perceptions, Misperceptions and Opportunities

Gary L. Benton (Gary Benton Arbitration) · Saturday, October 28th, 2017

A recently released study on technology sector dispute resolution highlights significant distinctions in the sector's perceptions of US domestic and international arbitration. The study conducted by the Silicon Valley Arbitration & Mediation Center (SVAMC), a non-profit educational foundation based in Palo Alto, California, was directed to understanding technology sector views regarding litigation and arbitration.

The SVAMC study surveyed corporate counsel, law firm counsel, neutrals and users in the technology sector, representing wide expertise in technology business and law. Most respondents were US-based, and the survey responses reflect the views of an industry segment with limited exposure to international arbitration.

The results appear to suggest the technology industry – including IT, biotech and alternative energy among other segments – is increasingly dissatisfied with litigation, increasingly accepting of arbitration and widely uniformed as to international arbitration.

Top US Litigation Challenges: Cost, Time to Resolution and Lack of Expertise

Cost, time to resolution and inexperienced and unqualified decision-makers top the list of challenges with litigation involving technology companies, according to the study. These results are not surprising. Law firm billing rates for complex cases in the US courts are relatively high, and complex cases typically involve extensive discovery and other costly pretrial and trial expenses. For example, the litigation cost of major patent disputes ranges from $3M-$5M, accordingly to the latest AIPLA study.

Likewise, it takes a relatively long time to obtain a US court judgment, in large part due to overcrowded court dockets and time-consuming pretrial and appellate procedures. Recent studies suggest it takes 2-3 years to obtain a judgment in larger cases; however, many high-profile technology cases in the US courts are in appeals or facing new trials after five years. It is a serious problem when parties are fighting over technology that quickly becomes obsolete.

The expertise of decision-makers is of particular concern in technology-related disputes. Like nearly all jurisdictions, technology disputes in the US trial courts are decided by judges with limited technology law or industry expertise. And even more concerning, cases are typically tried

before juries who have no legal training or subject matter knowledge.

Perhaps more interestingly, overly intrusive discovery, random jury verdicts and lack of international enforcement were not viewed as among the top litigation concerns by the survey respondents. While US technology counsel may be comfortable with US discovery and jury practices, the lack of concern over international enforcement is somewhat surprising. Most likely, the result reflects limited experience with international dispute resolution and efforts to enforce judgments abroad.

US Tech Sector Views on Arbitration: Specialized Expertise, Time Savings and Privacy

According to the SVAMC survey responses, the top benefits of arbitration are specialized expertise, time savings and privacy. The survey did not distinguish between US and international arbitration but it appears the responses were largely directed to domestic disputes.

While specialized expertise and privacy are attributes of both domestic and international commercial arbitration, there has been debate over whether international arbitration, as routinely practiced, provides significant time or cost savings.

The survey respondents' focus on privacy likely reflects both a distaste for public court proceedings and an industry concern for protection of confidential business information and trade secrets. Yet, it is the exception to the rule to find arbitration clauses containing confidentiality protections.

Factors associated with the sector's historical ambivalence to arbitration, particularly concerns over arbitrators exceeding the scope of their authority and perceived limitations on the availability of injunctive relief, ranked low in terms of areas where improvement in arbitration was needed. This suggests that US technology companies may be increasingly accepting of the use of arbitration to resolve disputes.

Notably, however, international enforcement of awards ranked low among identified benefits of arbitration just as it ranked low among concerns with litigation. This reinforces the conclusion that most US technology counsel are unfamiliar with the value of the New York Convention and other international conventions. This is particularly ironic because the conventions provide significant benefits, especially for an industry sector that has globalized and could take great advantage of multinational enforcement of awards involving intellectual property.

Advising the US Tech Sector on the Benefits of International Arbitration

Although directed principally to distinctions between litigation and arbitration, the survey responses appear to highlight a lack of appreciation for many of the benefits of arbitration, particularly in regards to international arbitration.

Understandably, the US technology sector has thrived despite, and perhaps in part due to, its historical reliance on the US courts. Its capability to continue to do so is impeded by the time, cost and expertise challenges identified in the survey. More importantly, its capability to do so is being increasingly challenged by the growing strength of competitors in newly developed markets, their resistance to dispute resolution in the US courts, and their growing insistence that disputes be resolved in their own national courts or regional arbitral institutions.

That said, there is no industry that evolves faster than the technology sector. Perhaps its legal counsel may be less quick to adapt but it is certain that the economic pull between established companies in the West and companies in Asia and other developing regions will compel increased reliance on international arbitration to resolve technology company disputes.

Looking Forward

It is unlikely that the problems associated with technology litigation will be resolved in any significant way any time soon. That leaves arbitration as the most viable mechanism for resolution on the merits. The US technology sector's views regarding US and international arbitration are evolving, and we can expect further change as rising companies in developing regions reject US courts and press for resolution in local forums.

The likely result is that technology companies, and undoubtedly companies in other evolving sectors, will increasingly turn to international arbitration for resolution of disputes. Providers and practitioners who prepare for that transition will likely be well-rewarded.

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