Kluwer Arbitration Blog

California International Arbitration Week 2023: The Future of California Arbitration and Best Practices for Drafting Technology Disputes Clauses

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The second annual California International Arbitration Week took place in Los Angeles from March 13 to 17, 2023 with a weeklong series of free in-person and hybrid programs focused on innovation in international arbitration and alternative dispute resolution in California.

The Silicon Valley Arbitration & Mediation Center and White & Case jointly presented one of the week's main events – a panel discussion on the future of California arbitration and best practices for drafting disputes clauses in technology agreements. The event was the showcase of three events held in White & Case's Los Angeles office before an in-person and virtual audience of roughly 150 attendees. Sarah Reynolds, CEO of the Silicon Valley Arbitration & Mediation Center and the managing partner of Goldman Ismail Tomaselli Brennan & Baum, moderated the discussion. Panelists included Brody Greenwald, a partner in White & Case's LA office, Yasmine Lahlou, a partner at Chaffetz Lindsey, and two distinguished California arbitrators, Ambassador David Huebner and Barbara Reeves.

This blog post summarizes the key takeaways from the panel's discussion.

Recurring Themes in Cross-Border Tech Disputes

California is home to leading technology companies conducting business all over the world which, at times, may result in international disputes.

While disputes happen for many reasons, the panelists noted that one recurring theme is a lack of clarity in the contract about the scope of the parties' obligations and the consequences for failing to perform those obligations. Unclear contract terms can lead to disputes even where both parties believe they have complied with their contractual obligations. For example, a license may cover a certain technology and any improvements or modifications, but exclude from its coverage any new technologies developed in the future. If the license is not clear about what constitutes an improvement or modification and what qualifies as new, the technology may evolve in a way that ends in a dispute over the scope of the license.

Disputes also may happen if the parties set unrealistic deadlines or allocate insufficient resources for performance, or if there are allegations about the unauthorized use of trade secrets, intellectual property, know-how, or other proprietary information.

Minimizing the Risk of Disputes with Careful Contract Drafting

The panelists explained that, in their experience, careful contract drafting is an effective but often overlooked strategy to minimize the risk of a dispute. Every contract should contain clear and realistic agreements about what it does (and does not) cover, the resources each party must allocate, the timeline and deliverables required for each project milestone, and the consequences for non-performance. Resolving these issues upfront – rather than waiting to address contentious issues through "agreements to agree" – may increase the chances of building a successful long-term commercial relationship based on shared goals and expectations.

While it may seem counter-intuitive, both parties also can protect the value of their deal and reduce the scope of any dispute through the dispute resolution clause in the contract. A clear and effective dispute resolution clause can ensure that if there is a dispute, both parties understand what recourse they have available so that they do not waste time and money arguing about how and where they should resolve their dispute.

Advantages of International Arbitration for Cross-Border Tech Disputes

All of the panelists recommended that tech companies generally should agree to international arbitration if they may have a dispute outside their own country's jurisdiction. They offered several reasons for recommending international arbitration over litigation.

- **Near universal enforcement**: Arbitral awards are enforceable in over 160 countries that have ratified the New York Convention. By contrast, the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters has not even entered into force. Consequently, arbitral awards are subject to nearly automatic worldwide recognition and enforcement that does not apply to foreign court judgments.
- **Finality**: In contrast to court judgments, arbitral awards are final, binding, and shielded from judicial review except in extremely limited circumstances that the award debtor has the burden of proving.
- **Neutrality**: International arbitration ensures a neutral forum to resolve the dispute and the opportunity for both parties to appoint an arbitrator or to agree on the process for constituting the tribunal.
- **Confidentiality**: The confidentiality of international arbitration may be important in cases involving sensitive proprietary information. By contrast, court proceedings in countries such as the United States are public, and the full case record accordingly may be published with limited redactions in online databases that are easily accessible.
- **Remedies**: An arbitral tribunal is not limited to awarding monetary damages, but has the power to grant the same relief as a court, including injunctive remedies and specific performance of a contract.
- **Customized process:** The parties may agree on the procedural rules and process that they

consider most appropriate, including expedited proceedings or recourse to an emergency arbitrator.

Effective Arbitration Clauses and Important Pitfalls to Avoid

The panelists explained that an effective arbitration clause should be clear and simple. Several hallmarks of an effective arbitration clause include:

- unequivocal agreement in binding terms such as "shall be" resolved by arbitration;
- broad terms defining the scope of the arbitration agreement to cover "any controversy or claim" arising out of or relating to the contract or breach of the contract;
- a clear carve-out that specifies any issue(s) that the parties prefer to resolve in a different forum, including the precise forum to resolve any such issue(s);
- agreement as to whether the arbitral tribunal or a court should decide whether a dispute is subject to any carve-out from the arbitration agreement;
- the arbitral rules that will govern the proceeding;
- the arbitral institution that will administer the proceeding, or if the parties prefer an ad hoc procedure;
- the number of arbitrators, typically either one or three;
- the method for appointing the tribunal, if it differs from what the arbitral rules provide;
- the governing law;
- the language(s) of the arbitration; and
- the seat of the arbitration that will determine the applicable arbitration legislation and which national courts will have jurisdiction over any application to vacate the award.

Each of the panelists described dealing with imprecise and inadequate arbitration agreements. They explained that one of the biggest mistakes that unfortunately happens far too often is when a transactional lawyer simply copies a dispute clause from another contract without consulting someone who has experience handling international disputes. This can have serious consequences, and in some cases has left parties helplessly ping-ponging back and forth between arbitration and court for years at tremendous expense.

The Future of California as a Seat of Arbitration

A final topic that the panel addressed is the future of California as a seat of arbitration. In the past, state and federal courts in California found that arbitration agreements with consumers or employees were procedurally unconscionable and therefore unenforceable. Although the invalidated arbitration agreements in those cases provided for domestic rather than international arbitration, the courts' decisions raised concerns more generally about the enforcement of arbitration agreements in California. After the US Court of Appeals for the Ninth Circuit and the US Supreme Court repeatedly reversed those decisions, courts in California have enforced arbitration agreements according to their terms. This, together with California's recent adoption of its so-called California Arbitration Act, have eased earlier concerns and have made California more desirable as a potential seat of arbitration.

More coverage of California International Arbitration Week is available here.

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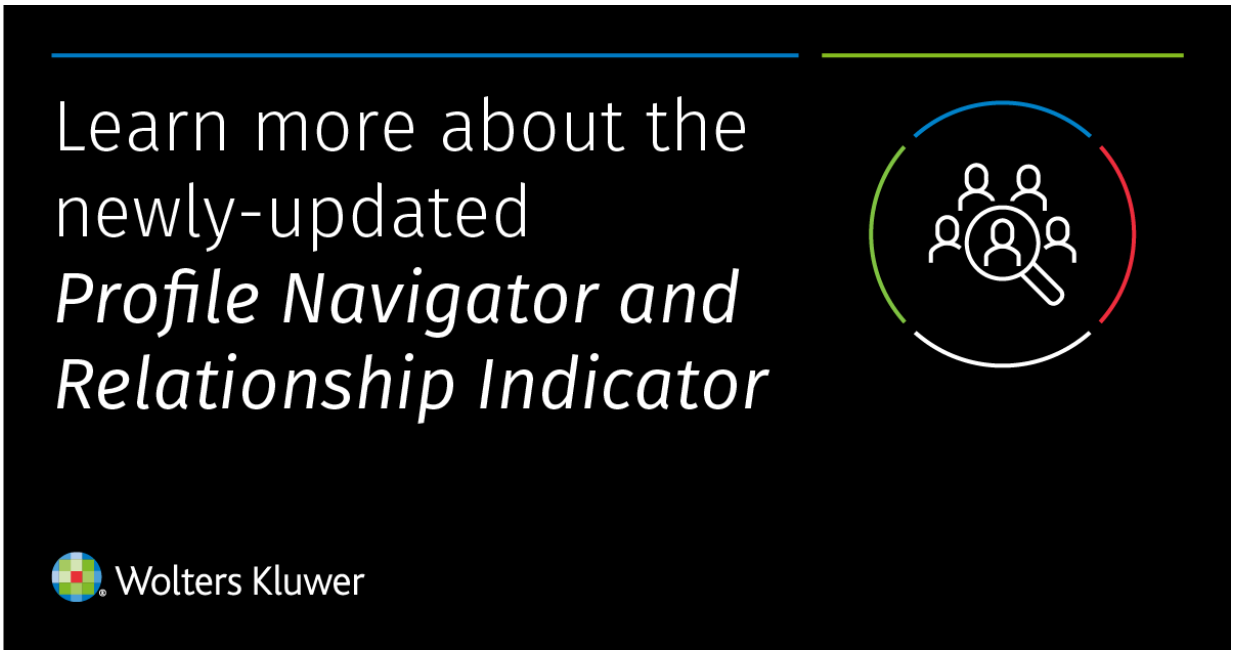

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