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6 Trends Will Shape Future International Commercial Disputes

By **Cedric Chao** (July 28, 2018, 11:24 AM EDT)

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The world of international litigation and arbitration tends to move slowly. However, I expect the pace of change to accelerate in the coming decade as these six trends take hold.

Asia Rising

Asia-based companies and Asia-related transactions will become increasing sources of cross-border disputes. Asia's economies as a share of global GDP have been growing at an accelerating pace over the past decade. Asia's representation in the Fortune Global 30 grew from five companies to nine companies between 2007 and 2017. Seven of those nine Asian companies are based in Greater China. Asia is now home to a number of world class companies whose aspirations are no longer just national or regional but global.

As these large Asian companies strengthen their corporate legal departments and become increasingly familiar and comfortable with the processes and dynamics of international arbitration, they will negotiate dispute resolution provisions that better reflect their unique needs and preferences. There will be a steady increase in the use of Asia-based institutions to administer international arbitrations as Asia-based companies with bargaining leverage push for home-based seats instead of defaulting to North America or Europe. In response to market demand, and already sensing this trend, the International Chamber of Commerce and the International Centre for Dispute Resolution have opened regional offices in Asia to capture their share of these disputes. The demand for arbitrators with language skills, cultural affinity, and familiarity with Asia's business environment will surely increase.

Technology Rising

The big-dollar disputes of the future will increasingly involve science and technology, intellectual property rights, and social media. The smartphone patent litigation wars will be repeated in other industries. Litigation arising from IP ownership; infringement of patents, trademarks and copyright; large scale breaches of privacy; theft of trade secrets; proper accounting for patent licensing

royalties; and breaches of joint research and development agreements and confidentiality agreements will become more frequent and more intense.

Technology-based companies historically have been less interested in arbitrating cross-border disputes than companies in the energy and construction sectors. They have been wary of allowing arbitrators whose rulings generally are not subject to appeal opine on the companies' IP, where an adverse ruling could have ramifications extending far beyond the dollar value of the dispute at hand. Over time, however, the challenges of enforcing court judgments across national borders, and ensuring a level playing field in foreign jurisdictions will drive more technology companies to adopt international commercial arbitration as the dispute resolution mechanism. That said, I expect sophisticated technology companies to depart from the barebones arbitration clauses, found on arbitral institutions' websites, in an effort to mitigate the perceived risks of arbitration, such as carving out from the scope of the arbitrators' authority all questions going to the validity, infringement or ownership of the parties' IP.

As technology companies increasingly turn to arbitration, they will carefully scrutinize the technology bona fides of potential arbitrators. Sophisticated consumers of arbitration will pore through the arbitrator candidates' job histories, and cases and issues handled or heard. The consumers will distinguish among types of technology disputes and will assess the arbitrator candidates' real world experience. Parties to a highly specialized dispute will seek out arbitrators with demonstrated experience in that specialty. I expect the pool of arbitrators to change to meet these demands.

California Rising

If California were a country, its 2017 GDP would place it fifth among nations, behind the U.S., China, Japan and Germany.[1] California is home to many of the world's technology, social media and entertainment industry giants, and to highly successful industry disruptors. California is also home to many of America's most successful venture capital and private equity firms that, in turn, are an integral part of the technology sector's ecosystem. Notwithstanding its economic heft, and its role as the economic and cultural bridge between the U.S. and Asia, California has been punching below its weight as a seat for international arbitrations.

This is about to change. Legislation — based on a report commissioned by the California Supreme Court[2] — was signed into law by California's governor on July 18, 2018, that makes clear that foreign lawyers may represent clients in international arbitrations seated in California.[3] This amendment to the California Code of Civil Procedure brings California into alignment with New York and other states. California-headquartered companies will find it easier to negotiate with

foreign counterparties for a California seat in their arbitration clauses, instead of a location outside the U.S.

By the late-2020s, I expect that California will have emerged as one of the top three, and possibly two, U.S. venues for international commercial arbitration filings because of the state's economic heft and the corresponding bargaining leverage that California companies can exert when negotiating dispute resolution provisions, because the state is a geographically attractive and culturally comfortable venue for U.S.-Asia disputes, and because the state has the necessary "legal infrastructure." Moreover, if California's judiciary were to adopt rules designating specialized courts in the major commercial centers to hear large dollar international disputes and litigation ancillary to international arbitration (e.g., motions to compel arbitration, motions to confirm or vacate awards), that will strengthen the state's efforts to become a top venue in international disputes.

Increasing Competition Among Arbitral Institutions

We are already seeing increased competition among arbitral institutions for business and this will only intensify in the future. The institutions will compete by adopting new rules and procedures that address criticisms and concerns expressed by consumers of their services. This is a positive development because as institutions address shortcomings and provide more procedural options, this will strengthen arbitration in the global dispute-resolution marketplace.

I am retained by clients with global operations seeking to standardize their approach to cross-border disputes, including drafting pre-approved dispute resolution exemplars to be made available to their business units. Although it typically is not possible to designate just one arbitral institution for all geographical regions, all industries, and all types of commercial relationships, one often can narrow the client's options to one or two preferred institutions for each continent.

Major geopolitical shifts might impact dispute resolution patterns. For example, one consequence of Brexit is that a number of financial institutions have already shifted, or have announced plans to shift, part of their workforce from London to alternative financial centers within the European Union. Since the Brexit vote, nearly 20 banks have committed to launching new European Union hubs in Frankfurt alone. In addition to Frankfurt, both Paris and Dublin have actively courted bankers. Although this is still evolving, if over the next decade Frankfurt (or Paris, Dublin or another EU city) emerges as a new "winner" in the competition for regional banking headquarters, we might see a subset of future

contracts follow the business executives by designating those cities as the seat of arbitration.

New Procedures Will Find Favor

Although international arbitration is well suited for many cross-border commercial disputes, as is true of any dispute resolution system, it has its shortcomings. Two procedures stand out as examples of arbitral institutions thoughtfully addressing criticisms and trying to better meet the needs of litigants.

First, several institutions have adopted comprehensive “expedited procedures.” For example, the ICC adopted expedited procedures effective March 1, 2017, which presumptively apply to disputes valued at less than $2 million. The ICC’s expedited procedures give the arbitrator discretion to limit the length of the proceeding, to limit or even eliminate witness examination, and to dispense with hearing briefs. Cases subject to expedited procedures are heard by a single arbitrator, even if the parties’ agreement originally specified a panel of three arbitrators.[4] In small-dollar disputes, such expedited procedures will keep the litigation expenses proportionate to the amount in dispute. Emerging growth companies, with little appetite to spend scarce resources on litigation, may willingly trade away process for cost savings.[5]

Second, several institutions have adopted an internal review process, whereby independent arbitrators within the same institution will review the award of the original tribunal.[6] At the time the dispute resolution provision is negotiated, the parties must insert the review procedure into the arbitration agreement and specify the criteria that would trigger the review process. These provisions remain controversial and are infrequently written into arbitration agreements because the traditional arbitration model provides that the parties get one bite of the apple and no right to appeal from ordinary errors of law. The rationale underlying the absence of an appeal from errors of law is that the parties opted for the heightened speed and lower cost of a no-appeal process. However, in this age of high-dollar commercial and technology disputes, companies that value accuracy or that worry about adverse rulings jeopardizing their IP can take comfort in the ability to contract for a form of "appeal" and thus may be more willing to choose arbitration.

Evaluative Mediation Will Gain Acceptance in Cross-Border Disputes

Due to the litigiousness of the U.S. legal system and the expense of U.S. court litigation, private mediation has become big business in the United States. Mediation in the U.S. is increasingly "evaluative," unlike the "facilitative" form of mediation that is prevalent elsewhere. The differences between the two styles of

mediation are substantial. Over time, evaluative mediation should gain more widespread acceptance in cross-border dispute circles.

In a facilitative mediation, the mediator shuttles between the parties with offers and counter-offers facilitating dialogue and negotiations, perhaps warning the parties about the expense and uncertainty of the litigation process, but typically without providing a meaningful analysis of the factual and legal merits. Facilitative mediation can be helpful where the parties or their counsel are unable to bridge a communications gap due to high emotions, ill will or other reasons.

In an evaluative mediation, the mediator gives the parties his or her own assessment of the relative strengths and weaknesses of their respective cases, along with a damages analysis. If the analysis is well done and accepted by the parties, this process can drive the parties' settlement positions closer to each other. In cases where one or both parties have unrealistic expectations, or where counsel is unable to deliver "bad news," evaluative mediation increases the chances of settlement.

As more foreign companies are faced with the significant litigation expense associated with disputes arising from complex investments and transactions, and become exposed to the options available in mediation, the popularity and use of evaluative mediation in cross-border disputes should rise. This, of course, assumes that there are sufficient neutrals prepared to undertake "deep dive" litigation evaluations and who can command the respect of the parties and their outside counsel. I foresee that a new generation of mediators, accustomed to quickly evaluating case merits and who are able to comfortably work with foreign parties, will open up this practice.

Conclusion

These six trends are powerful ones that in the coming years will change the composition of cross-border commercial disputes and how those disputes will be handled. Others may spot additional trends, but change is coming.

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[1] "California is now the world's fifth-largest economy," Los Angeles Times, May 4, 2018. See also

http://www.dof.ca.gov/Forecasting/Economics/Economic_and_Revenue_Updates/documents/2018/June_final_6_15.pdf

[2] https://newsroom.courts.ca.gov/news/court-working-group-recommends-proposal-for-international-commercial-arbitration

[3] Senate Bill 766 (Monning). See https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB766

[4] See ICC Rule Article 30 and Appendix VI.

[5] See also SIAC Rule 5 (expedited procedures for disputes not exceeding SGD 6 million); HKIAC Rule 41 (expedited procedures for disputes not exceeding HKD 25 million); Swiss Rules Art. 42 (expedited procedures for disputes not exceeding CHF 1 million)

[6] See AAA/ICDR “Optional Appellate Arbitration Rules;” JAMS “Optional Appeal Procedure.”