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Q&A With DLA Piper's Cedric Chao

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Cedric C. Chao is a trial partner and head of the U.S. international arbitration practice at DLA Piper. Chao, a former federal prosecutor, has a unique skill set, having first-chaired numerous high-stakes U.S. jury and court trials and international arbitration disputes, including four disputes where the amount in controversy exceeded $1 billion and multiple others in the hundreds of millions of dollars. His clients have spanned many industries and countries.

Chao is a U.S. member of the ICC Arbitration Commission, and a director of the American Arbitration Association. He is a former chair of the U.S. Magistrate Judge Screening Committee of the Northern District of California, and of theCalifornia State Bar Litigation Section. He is one of 31 advisers to the American Law Institute project to draft the Restatement of the U.S. Law of International Commercial Arbitration. Chao is an elected member of the American Law Institute, and a fellow of Litigation Counsel of America, an invitation-only trial lawyer honorary society.

Q: What attracted you to international arbitration work?

A: I began my career as a U.S. trial lawyer, not as an international arbitration specialist. The San Francisco federal judge for whom I clerked, the Honorable William Orrick, urged me to forego the traditional law firm route and instead to work in the U.S. Attorney's Office to gain trial experience. The judge in the next chambers, the Honorable Charles Renfrew, gave me the same advice, noting that clients will not risk having a young associate examine witnesses or deliver opening statements or closing arguments in significant cases. I landed a job as a federal prosecutor, and only after several years of trying federal criminal cases, did I join a law firm, working for that firm's most prominent trial partner. As a senior associate and young litigation partner, my diet was business litigation disputes and white collar criminal defense, all in the U.S. courts.

As a mid-level partner, my former firm asked me to start its international litigation practice, which was a sound strategic move since that firm had thriving offices in Asia, which were generating more and more cross-border disputes. International litigation soon segued into international arbitration. We were lucky to have loyal clients who asked us to represent them in our first international arbitration proceedings. Over the years, we gained experience, case by case, and over time we developed significant expertise in international arbitration.

Every time I appear in an international arbitration, whether as an advocate or arbitrator, I am reminded

how lucky I am. International arbitration brings together parties, lawyers and arbitrators from different countries and legal traditions, and together they resolve disputes. International arbitration is an evolving hybrid system of justice, with elements from the civil law tradition and elements from the common law tradition. It is not perfect, but neither is any court system. In arbitration, one must be vigilant to guard against efforts to manipulate the arbitrator selection process, which detracts from the actual, or perceived, impartiality of the tribunal and which, ultimately, undermines the legitimacy of the institution of arbitration. Properly understood and properly administered, international arbitration is an important option for companies engaged in cross border transactions.

Q: What are two trends you see that are affecting the practice of international arbitration?

A: One trend is the increasing percentage of significant arbitrations involving parties from Asia and Latin America, which reflects the direction of the global economy. The three largest economies are the United States, followed by China and Japan. That has great implications for practitioners, arbitrators and arbitration centers. The new consumers of international arbitration will ask questions about why things are done the way they are done, and will not blindly accept the answer "because that is the way it has always been done."

The parties' and their counsel's expectations regarding how disputes should be resolved inevitably will be framed by their legal training and their sense of justice. Just as the increasing participation by large U.S. companies in international arbitration has led to what some traditional arbitration figures from Europe disparagingly call the "Americanization" of international arbitration, so too the increasing participation by large Asian and Latin American companies will lead to changes in how disputes are handled.

A second trend involves the utilization of arbitration by technology companies. There is a 2013 survey conducted by PWC and Queen Mary, University of London where corporate counsel in several industries were asked whether they preferred court litigation or arbitration as the mode of dispute resolution. If memory serves, the construction industry had the highest percentage of respondents who favored arbitration over court litigation, with the energy sector a close second. The financial services industry respondents, by contrast, favored court litigation over arbitration by a substantial margin. The technology industry was not polled.

However, from my years of practice in Northern California, which is the global center of technology, I have heard from many corporate counsel who have misgivings about arbitration. A full discussion of the reasons for such reluctance goes beyond this Q&A piece, but includes corporate counsel's faith in the federal judiciary's respect for intellectual property rights, the right of appeal in the U.S. courts, and a reluctance to expose their companies' intellectual property to rulings by arbitrators who are sometimes perceived to lack familiarity with technology or to lack accountability to a reviewing body. All this having been said, the trend that I am witnessing is an increasing acceptance in the technology sector of international arbitration.

Q: What is the most challenging case you've worked on and why?

A: I led a team defending a large U.S. power developer which, for sound business reasons, decided to withdraw from the development of a major power project in India. Our client's Indian business partner responded by filing a $1.2 billion claim in an ad hoc international arbitration seated in New Delhi, governed by Indian law, and pursuant to UNCITRAL rules. The Indian claimant appointed a retired local judge who the claimant had appointed in several prior arbitrations. Our client appointed a very prominent retired Indian appellate jurist. After several months negotiating over the selection of the

neutral third arbitrator, the parties settled upon a prominent English arbitrator as the tribunal chair.

Before the tribunal held the preliminary conference, we received messages from Indian counsel unaffiliated with our case suggesting that the claimant was attempting to bribe our appointed arbitrator. I flew with the company's corporate counsel to New Delhi where we performed due diligence, as gracefully and quietly as possible under the circumstances. Ultimately, we concluded that the rumors were just rumors.

The arbitration proceeded, and we prevailed on various preliminary issues. Our client and my legal team were feeling quite good about the arbitration. But then I received a letter from opposing counsel challenging the prominent English presiding arbitrator on three grounds: that the claimant had not agreed to the English arbitrator (untrue), that the presiding arbitrator was "biased" in our favor (not true, as the only evidence of "bias" was that the presiding arbitrator had ruled for our position on preliminary procedural matters), and that the English arbitrator was extremely expensive (true, but the parties were provided the billing rates prior to his appointment). After skirmishing, the claimant filed a petition in the Supreme Court of India seeking to remove the presiding arbitrator and to replace him with a citizen of one of the South Asian Association for Regional Cooperation countries who would charge no more than $500 per day. Our fear, of course, was that if the petition were granted, we would end up with a presiding arbitrator who was open to monetary influence and who would not be accustomed to hearing complex, commercial disputes.

We had four hearings before the Indian Supreme Court. We developed a contingency plan, jokingly code named "the apocalypse." In the end, the Supreme Court ruled in our favor, denying the petition to remove the English presiding arbitrator. Facing the resumption of proceedings before a neutral panel, the claimant settled for a very small sum.