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Should Technology Companies Arbitrate?

Take a look at seven considerations for technology companies when deciding between litigation and arbitration.

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Technology companies choose international arbitration for their cross-border disputes less than other industries, such as the construction and energy sectors. There are reasons for this longstanding wariness, some well-founded and others less so, especially as technology companies become increasingly global. This article presents seven considerations for technology companies when deciding between litigation and arbitration.

Level Playing Field

When a dispute arises from a cross-border contract, international arbitration is the only practicable way to ensure a level playing field.

A U.S. technology company is well advised to avoid litigating in those foreign courts where the foreign counterparty has a "home court" advantage. And, in countries with less developed legal systems, the U.S. company should be concerned about lack of transparency and rule of law issues. Conversely, foreign counterparties are often uncomfortable having their disputes adjudicated in a U.S. courtroom much less by a U.S. jury. International arbitration provides a presumptively neutral, unbiased forum.

Enforceability of the Award

Unless the losing party voluntarily pays, a successful party must seek enforcement of its court judgment or arbitration award where the losing party has assets. The "New York Convention" is a multilateral treaty requiring courts of the more than 150 signatory countries to recognize international arbitration awards issued in other signatory countries. This makes enforcement of an arbitration award straightforward.

By contrast, there is no multilateral treaty for the enforcement of foreign court judgments. Some judicial systems, like Canada and the United Kingdom, will recognize U.S. court judgments, but that is not the case in other countries, such as China. Thus, the U.S. technology company must assess the risk that the losing party's assets will be in a jurisdiction that does not provide recognition to foreign court judgments, greatly complicating enforcement.

Confidentiality

For many technology companies, ensuring confidentiality of trade secrets and intellectual property is essential. In international arbitration, confidentiality is generally the rule.

Some arbitration institutions establish a robust presumption of confidentiality that binds both the tribunal and the parties. For example, SIAC Arbitration Rule 39.1 states: "[A] party and any arbitrator . . . shall at all times treat all matters relating to the proceedings and the Award as confidential." *See also* WIPO Arbitration

Rules, Art. 75(a); LCIA Arbitration Rules, Art. 30.1; HKIAC Administered Arbitration Rules, Art. 42.

Other institutions restrict the ability of the *arbitrators* to disclose information, but do not place limitations on the *parties*. This is true of the ICDR-AAA Rules (see Article 37(1)) and the SCC Arbitration Rules (see Article 3). The ICC Rules simply allow parties to seek confidentiality protections appropriate to the dispute. ICC Arbitration Rule, Art. 22(3).

By contrast, filings in U.S. courts are presumptively public and a litigant must obtain court permission to seal its filings or close the courtroom to the public or press.

'Expert' Arbitrators

Often science or engineering expertise is needed to resolve a technology dispute. International arbitration lets parties specify arbitrator selection criteria in the contracts, like requiring experience in a particular specialty. Independent of the contract, parties retain the right to seek out "experts" when making their appointments. Some arbitration centers, e.g., the HKIAC and SIAC, have formed panels of arbitrators with intellectual property experience in an effort to attract technology disputes.

In contrast, litigants in court proceedings cannot choose their judges, so a company has no control over the level of technical expertise the judge will bring to the dispute. That said, some courts, like the U.S. District Court in the Northern District of California, are known for judges with considerable technology expertise.

Greater Control and Potential Cost Savings

U.S. litigation can be slow and expensive due to liberal discovery rules and judges' heavy dockets. When a young company's new technology is at stake, a long, drawn-out court dispute is not an inviting prospect.

Arbitration, in contrast, can be designed to fit the dispute being resolved. To save time and money, the parties can agree on a fast timetable, including by raising dispositive issues at the outset, sharply limiting discovery and motion practice, and setting telephonic hearings. They can also seek out arbitrators who are not overcommitted and so can move quickly.

A recent innovation is expedited rules designed for smaller value disputes. The ICC offers an expedited procedure for disputes under US$ 2 million, under which the parties are guaranteed to receive a decision within six months. ICC Rules, Appendix VI, Art. 4(1). Moreover, tribunals in ICC expedited proceedings have the authority to limit the arbitration in various ways, including by deciding the dispute on the basis of the written submissions, without a hearing or expert or witness examination. ICC Rules, Appendix VI, Art. 3(5). Other institutions, including the SCC and the ICDR, also offer expedited proceedings. See SCC Rules for Expedited Arbitrations; ICDR-AAA Rules, International Expedited Procedures.

Limited Precedential Value

Arbitration awards are not binding beyond the parties. This may be an attractive feature for technology companies that license their IP to multiple licensees in different countries.

Assume that Licensee 1 brings a claim. If Licensee 1 wins in court, Licensees 2-10, under the same form of agreement, could sue in reliance on the legal principles established in Licensee 1's victory. In contrast, if the company's agreement with Licensee 1 requires arbitration, an adverse decision has no precedential value, and if other licensees bring claims, the technology company can defend itself anew.

Availability of Internal Review

Many technology companies cite the lack of an appeal mechanism for wrongly decided arbitration awards as a reason to prefer litigation, especially when the dispute relates to important IP. In response to this concern, some arbitration institutions have introduced optional internal "appeal" systems to review awards. See ICDR-AAA Appellate Rules; JAMS Optional Arbitration Procedure.

Conclusion

Technology companies justifiably take pride in their innovations, their speed in converting novel ideas into protected intellectual property and commercial products, and their ability to adjust to fast moving marketplace conditions. Designing dispute resolution procedures that fit the company's needs, and understanding how cross-border disputes will play out, warrant equal attention.

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