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Is international arbitration adapting to the speed of business?

By Laura Abrahamson

For at least the last two decades, it has been widely accepted that corporations doing business internationally prefer international arbitration, either alone or in combination with a multi-tiered escalating dispute resolution process, to litigating in the courts of one of the countries to a contract..

According to a 2006 survey of general counsels of companies engaged in international commerce published by PriceWaterhouseCoopers (PWC) and Queen Mary University London (QMUL), 73% of companies preferred international arbitration. A follow up PWC/QMUL survey published in 2013 found that 73% of companies responding "agreed" or "strongly agreed" that international arbitration was well suited for their industry and 52% ranked arbitration as their first choice of dispute resolution mechanisms, compared to 28% for court litigation, and 18% for mediation.

But is that changing? In our post-pandemic world, is the pendulum beginning to swing towards deglobalization? How can international arbitration adapt at the speed of business to remain the preferred choice for resolution of cross-border disputes?

As part of California International Arbitration Week, a corporate counsel roundtable will invite chief litigation officers from California's aviation, communications, engineering and construction and luxury consumer goods industries to offer their perspectives on this issue at the 7th Annual USC-JAMS Arbitration Symposium (in collaboration with the Singapore International Arbitration Centre) on Thursday, March 16, at the USC Gould School of Law.

What advantages do corporations expect from international arbitration?

From a corporate perspective, cross border disputes present unique challenges, as they are often subject to the laws of multiple countries, raise thorny issues including which law governs the contract, which countries' courts have jurisdiction, and how to enforce a monetary judgment or injunction in another country.

International arbitration, which differs from domestic arbitration in significant respects, has historically been seen to offer companies clear advantages over litigating in local (or worse, foreign) courts. It offers companies flexibility - they can choose the governing law, how and where their dispute will be decided. The jurisdiction of the arbitral panel is created by the parties' contract and they can agree to determine and shape the procedure - providing executives with reassurance that their disputes will be heard in a fair, transparent and neutral forum.

International arbitration also offers a clear enforcement mechanism: unlike a judgment rendered by a California or foreign court, an arbitral award can be enforced in the 144 signatory countries to the New York Convention without subjecting their award to additional legal hurdles in countries where the counterparty has assets. It also can provide important technical expertise, as parties can select arbitrators with sufficient background and knowledge in their industry, as well as privacy and confidentiality. Not surprisingly, the 2006 PWC/QMUL survey found that flexibility of the procedure and enforceability of awards were the advantages cited by most companies for their reasons in selecting international arbitration.

At the same time, corporate users have historically raised concerns about cost and efficiency, and the time (two years or more) it often takes to get an award, urging arbitral institutions and arbitrators to make changes, improve their processes and streamline arbitrations. Perhaps the biggest challenge facing the industry in 2023 is whether international arbitration can adapt sufficiently to remain the dispute resolution mechanism of choice for corporate end-users.

Market analysis from the 2020 Queen Mary Corporate Counsel International Arbitration Group survey of corporate in-house counsel and clients suggests that corporate clients believe further improve-

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ments are needed for international commercial arbitration to continue to be preferable to litigation in local courts. Indeed, in-house counsel have increasingly voiced frustration, at conferences and in articles, that international commercial arbitration is not meeting their business needs for speed, cost efficiency, predictability and certainty, putting pressure on the industry to adapt.

Since the start of the pandemic in March of 2020, many of the major arbitral institutions in fact amended their international arbitration rules, including the London Court of International Arbitration (2020), the International Chamber of Commerce (2021), JAMS (2021), the International Centre for Dispute Resolution (2021) and ICSID (2022) - almost all of which include new and improved streamlined or expedited procedures and limits on the time to awards.

Will those changes be enough? Arbitral institutions and arbitrators need international arbitration to remain the preferred choice for dispute resolution. To do so, institutions and arbitrators need to demonstrate that international arbitration can deliver on its value proposition for commercial properties, by proving its advantages, particularly in terms of cost and time to decision. Can international arbitrators also adapt and use the new procedures to deliver a dispute resolution process that moves at the speed business demands? That question will be discussed at the Corporate Counsel roundtable on March 16.

To view the March 16 panel or the entire week long CIAW agenda and to register, at no cost, search for "California International Arbitration Week" in any search engine or go to: https://lnkd.in/gnvj3AC9-#CIAW2023. You can attend either in person in Los Angeles, or virtually.

In addition, before the week of CIAW, the Daily Journal is holding a Webinar, *California International Arbitration: Coming of Age*, on March 8 at noon, to expand your knowledge of the area which should be known by all California practitioners. You can register for the Webinar on the Daily Journal website or at https://us06web.zoom.us/webinar/register/WN_nFl_ZyDGR4CIlMeXThqOBw.