Working It Out

With a more interconnected global economy, the increase of international arbitration cases shows no signs of stagnating.

By Maggie Burch

Over the last five to 10 years, arbitration has seen a gradual—albeit significant—increase in acceptance and use in the international community, with corporations and nation-states alike acknowledging it as the preferred method of cross-border dispute resolution. More cases are being filed by more arbitrators, in more jurisdictions, for a variety of reasons. It's a growth-trend worth noting. Not only is international arbitration (IA) becoming a more widely used practice, but it also has the legal field buzzing, prompting discussions between lawyers talking shop, articles like this being published, and the conduction of surveys on the subject. The common question raised is: What has recently changed to catalyze this increased acceptance and usage of IA, given that the practice itself is not so new?

The greater internationalization of the global economy is the most influential factor driving IA's latest boom. Thanks to technological advances and the fact that globalization that shows no signs of waning, the result is a more interconnected world where forming a partnership across the world is no less convenient than one just across town. And inevitably, conflicts will arise out of these partnerships. IA is characterized by neutrality, enforceability of decisions, and autonomy by the participants, and it has proven a more practical option than litigation for resolving cross-border disputes in both commercial and investor-state cases.

Greater awareness of and participation in IA around the world has led to the development of new arbitration institutions and venues. Although it is not necessary for IA proceedings to take place within the jurisdiction of the contracted parties (decisions will be upheld internationally per the New York Convention), there are benefits, economic and otherwise, for a state to be perceived as "arbitration friendly."

"Before, [the main seats of arbitration were] London, Paris, and Geneva, period," says Kevin O'Gorman, a partner in Norton Rose Fulbright's Houston office who serves as counsel and arbitrator in both domestic and international arbitration cases. "As the world has developed, there's been more of an understanding of what international arbitration is and what it's about, and contract holders are looking for more convenient forums."

It is cyclical: A more interconnected world brings awareness of IA to regions where it has not traditionally been practiced; simultaneously, a more globalized economy gives rise to more cross-border contracts and trade deals, inherently creating a greater need for IA.

To further understand this legal

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trend, it is essential to consider how it plays out in actual proceedings, which can be difficult when IA records are not made public as they are with court trials. Fortunately, that body of knowledge is growing. In October of this year, international law firm White & Case published a survey on IA conducted in partnership with Queen Mary University of London. The survey—which incorporated responses from 763 in-house counsel, private practitioners, arbitrators, academics, experts, institutional staff, and third-party funders—provides a great deal of insight into the current state of IA and into which areas users believe have seen improvements and in which they can be made.

Queen Mary's first survey on IA (also sponsored by White & Case) was published in 2006. John Templeman, global arbitration practice manager for White & Case, says that the 2015 survey reexamined some of the same questions asked in 2006. The most significant development to him? That in 2006, 73 percent of respondents preferred IA as a means of resolving cross-border disputes, but in the 2015 survey, that figure rose to 90 percent, showing an overwhelming majority preferring IA. So what has changed in those almost 10 years? According to Templeman, the increase was caused by a number of factors, echoing the above, as well as "subtle improvements to the system, thanks to changes in institutional rules, national laws, and accepted legal practice."

Significantly, the survey revealed the rise of Hong Kong and Singapore as two of the top five preferred seats of arbitration (London, Paris, Hong Kong, Singapore, and Geneva). Singapore and Hong Kong were also found to be the two most improved seats, respectively, in the past five years. This finding coincides with the rise in importance of Asia Pacific to the global economy at large. The survey found users based their preference for venues predominately on "reputation and recognition," so it's evident Singapore and Hong Kong have taken great strides in establishing the necessary infrastructure to repeatedly attract IA users. "Singapore is a leading example of a nationally sponsored effort to get more international arbitration work," O'Gorman says. "They've done a tremendous job."

Surveys such as this one are significant because "they open up the closed doors of international arbitration and really show what is going on," Templeman says. "[They] provide much needed empirical information about the process." Shedding light on what is otherwise a private field is necessary to effect any change in it. As the White & Case survey states, "Collective feedback mechanisms…are rare in a field of law where confidentiality is valued and practice is both diverse and dispersed globally." In addition to the findings on the preference for IA in general, and for specific venues, the survey also addressed the areas where users saw needs for improvement in the field, namely cost, efficiency, lack of transparency from institutions, and some calls for more regulation in certain aspects of the field.

Across the board, IA is being considered more of a requisite legal practice, and less of a substitute for litigation. O'Gorman supports that opinion: "I think there is not much alternative to international arbitration as a procedure," he says. "There is pressure for international arbitration to find a way to make itself faster and to reduce costs, though, which is a trend we'll continue to see." For international law firms, the increased demand for arbitrators is also clear. "Many law firms have responded [to the growth of IA] by establishing or expanding dedicated international arbitration practices," Templeman says. In spite of—and because of—the dynamic nature of IA and its projected growth, there will inevitably be continued efforts to better understand and implement IA for more clients in more regions around the world. ●

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