LOS ANGELES
Daily Journal
www.dailyjournal.com

VOL. 136 NO. 40 WEDNESDAY, MARCH 1, 2023

US Senate confirms immigration attorney for Northern California judge

Araceli Martinez-Olguin's nomination passed 49-48, with four senators absent. Vice President Kamala Harris cast a tiebreaking vote.

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5th District Court of Appeal panel disagrees with U.S. Supreme Court on PAGA

The panel stated that the Federal Arbitration Act and the U.S. Supreme Court's 2022 decision in Viking River Cruises Inc. v. Moriana did not remove the plaintiff's ability to pursue PAGA claims on behalf of her fellow employees.

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Federal Trade Commission Shines Light on Dark Practices of E-Commerce

The FTC's move to expose dark patterns used by Epic Games is likely a harbinger of things to come and online merchants of all types should pay attention. By Anita Taff-Rice

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Viking River PAGA ruling has no clear destination for employers

A California court of appeal held it was not bound by SCOTUS' ruling. By Tal Burnovski Yeyni

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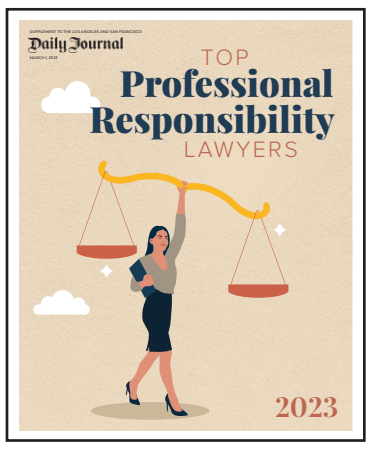

Top Professional Responsibility Lawyers 2023

The annual list highlighting the top performing attorneys in legal malpractice matters and judicial representation.

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DAR
Daily Appellate Report

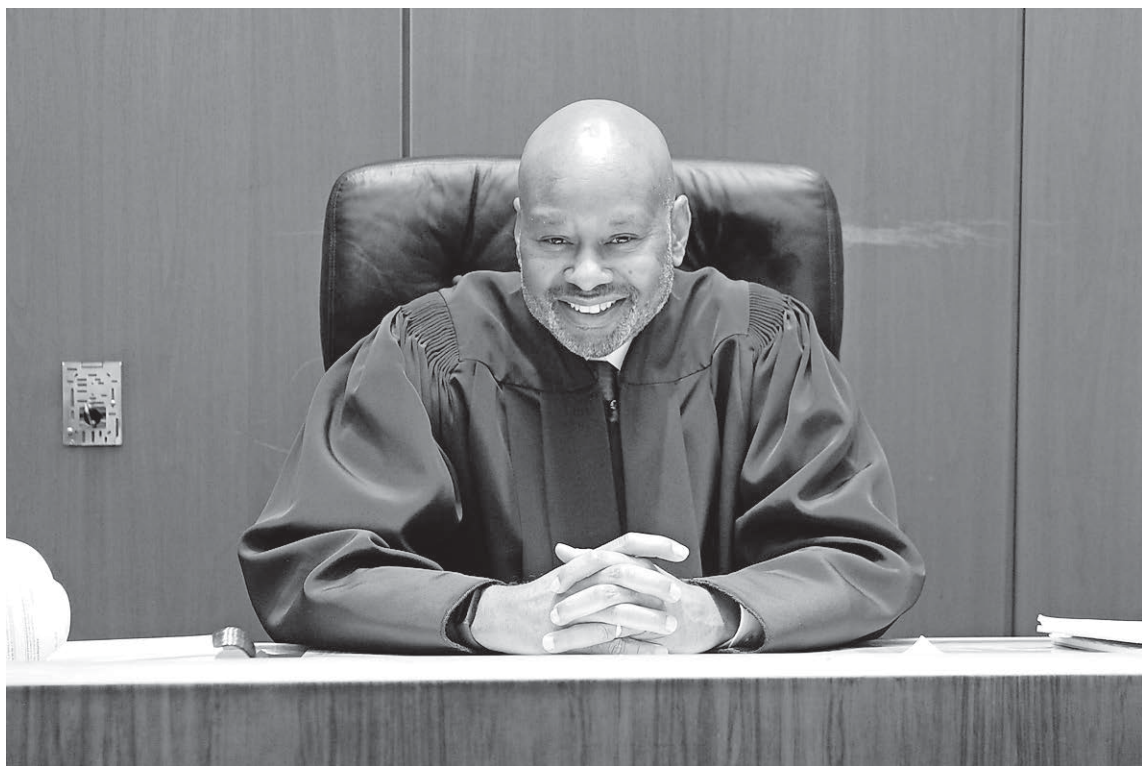
Administrative Agencies: State Water Resources Control Board does not have a constitutional or statutory duty to investigate or prevent unreasonable use or waste of treated water. *Los Angeles Waterkeeper v. State Water Resources Control Bd.,* 2DCA/1, DAR p. 1583

Administrative Agencies: Public utilities commission's interim rate relief was proper because evidence could lead a reasonable person to find California incarcerated persons calling services providers could feasibly charge $0.05 per minute for intrastate calls. *Securus Technologies v. Public Utilities Com.,* 2DCA/4, DAR p. 1571

Administrative Agencies: Employment standards laid out in the Aviation and Transportation Security Act preempted the Rehabilitation Act with respect to Transportation Security Administration screener with disability. *Galaza v. Mayorkas,* 9th U.S. Circuit Court of Appeals, DAR p. 1567

Arbitration: Arbitration agreement containing overwhelming substantively unconscionable provisions was unenforceable. *Gostev v. Skillz Platform,* 1DCA/2, DAR p. 1605

Banking: Nonwillful violations of the Bank Secrecy Act's requirement to file an annual foreign bank account report accrue on a per-report rather than a per-account basis. *Bittner v. U.S.,* U.S. Supreme Court, DAR p. 1548



Ricardo Pineda / Daily Journal photo

Judge Drew Edwards must be courageous, then switch off, to make tough calls

By Ricardo Pineda
Daily Journal Staff Writer

Judge Drew E. Edwards brushes off the stereotype that a criminal defense lawyer, like he used to be, would be softer on criminals once he was on the bench.

"I believe in second chances," he countered. "But the reality is that many individuals like myself who have done that work, when they become judges can be the very opposite."

Why? "Because we've seen every kind of experience and stories."

Edwards has lost count of the number of criminals on whom he has imposed lengthy sentences. "Every time I have to send somebody to prison, that takes a little bit out of me. I don't like to do it. I'd rather have a happy ending," he said. "It shouldn't be easy to take someone's liberty away. For me it's difficult. Having said that, I do it. I've done it for 20 years, and I go forward."

He also believes the criminal justice system is moving toward being less punitive. Therefore, "I give second, third, and fourth chances," the judge continued. "When a person … makes a bad judgment sometimes it is just a bad decision. But are they bad people?"

Edwards' answer is no.

"These are people who made some very poor life decisions," he observes. "They might live in an environment where they are forced to make difficult choices."

In 2019 Edwards presided over the nonjury trial of Mohamed Abdi Mohamed, who tried to run over two Jewish men exiting a synagogue in Hancock Park the previous year. Edwards found Mohamed guilty on two counts of assault with a deadly weapon (his vehicle) along with a hate crime allegation. Another judge had found Mo

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Drew E. Edwards

Superior Court Judge
Los Angeles County
(Los Angeles)

Career Highlights: Appointed Los Angeles Superior Court judge by Gov. Gray Davis, Sept. 2003; deputy public defender, Los Angeles County, 1996-2004; general counsel, USA Basketball, Colorado Springs, Colorado, 1994-95; deputy federal public defender, Los Angeles, 1990-94; associate, Davis Graham & Stubbs, Denver, Colorado, 1989-90; associate, Morrison & Foerster, San Francisco, 1987-88

Law School: UC Berkeley, Boalt Hall School of Law, 1987

Tesla seeks 2 new witnesses in retrial of racism case

By Jonathan Lo
Daily Journal Staff Writer

Tesla Inc. asked a federal judge to allow two new witnesses and exclude the findings of a jury for a damages retrial in a case alleging pervasive workplace racism.

In the first trial, a jury awarded the plaintiff, Owen Diaz, $130 million in punitive damages and $6.9 million in compensatory damages for emotional distress because of racial discrimination.

U.S. District Judge William H. Orrick previously denied Tesla's request for a liability retrial. The damages retrial is happening because Diaz refused a remittitur to $1.5 million in compensatory damages and $13.5 million in punitive damages. Tesla is now seeking a remittitur to $300,000 in compensatory damages and $300,000 to $600,000 in punitive damages because the $6.9 million Diaz was awarded is 35 times the national average after remittitur. *Diaz et al v. Tesla Inc. et al.*, 3:17-cv-06748, (N.D. Cal., filed Nov. 22, 2017).

Diaz's counsel are: Lawrence A. Organ and Cimone A. Nunley of California Civil Rights Law Group, J. Bernard Alexander III of Alexander Morrison Fehr LLP, Michael Rubin and Jonathan Rosenthal of Altshuler Berzon LLP and Dustin L. Collier of Collier Law Firm LLP.

They argued Tesla's attempts go against Orrick's prior order, which limited the scope of evidence for the retrial to ensure the second jury is being presented the same evidence and testimony the first jury heard and prevent a new battle over determining liability, which has already been decided.

The second jury will be made up of eight people and jury selection is

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Ubiquity of AR-15 in America complicates ruling on gun case

By Craig Anderson
Daily Journal Staff Writer

As in other ongoing legal battles over whether California firearms laws are constitutional, plaintiffs and the state attorney general's office are talking past each other — in this case about whether the Assault Weapons Control Act should stand.

The law, passed in 1989 and amended in 2000 to ban the ownership and transfer of more than 50 types of guns classified as assault weapons, is one of several California statutes being evaluated under a new U.S. Supreme Court standard. That ruling, which instructs lower courts to assess laws based on the text, history and tradition of U.S. firearms regulations, is the subject of court hearings about laws across the nation — including in California. *New York State Rifle and Pistol Association v. Bruen*, 20-843 (S. Ct., filed Dec. 17, 2020).

The question turns on how to treat weapons like the AR-15 rifle, one of the most popular guns of its type and often used in mass shootings. Senior U.S. District Judge Roger T. Benitez ruled the law unconstitutional in June 2021, famously comparing the gun to a Swiss Army knife as "a perfect combination of home defense weapon and homeland defense equipment." *Miller v. Bonta*, 19-CV-01537 (S.D. Cal., filed Aug. 15, 2019).

But as with several other California weapon and ammunition laws, the Supreme Court's June 2022 decision in *Bruen* — while welcomed by gun rights groups — meant that all decisions have to be evaluated under the new "history and tradition" standard. The 9th U.S. Circuit Court of Appeals has remanded a number of challenges to California gun laws to district courts, with the most going to Benitez in San Diego, to be evaluated under *Bruen*.

As he has done in other challenges to California laws, Benitez — an appointee of President George W. Bush — asked the state for the "best

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GUEST COLUMN

Losing sleep over the Midnight Clause:

Drafting disputes provisions for cross-border technology agreements and foreign investments

By Sarah Reynolds, Yasmine Lahlou and Brody K. Greenwald

Cross-border technology disputes are on the rise under a wide range of agreements, including licenses and development agreements, long term IT or technical service agreements, joint ventures, and other collaboration and implementation agreements to develop new technologies. These disputes typically are high value, and often involve trade secrets or other forms of proprietary information and intellectual property. Depending on the technology involved, they can also require fact intensive inquiries about compliance issues on both sides.

When parties are negotiating a deal, they often are optimistic about the relationship and focused on collaborating. While dispute clauses might not seem important at that time, those clauses are often the first clause a litigator looks at when a dispute arises. They are critical for international disputes where the contracting parties are from different jurisdictions. In fact, when triggered, the dispute clause determines which jurisdiction will resolve the dispute, whether that resolution will involve litigation, mediation, arbitration, or some combination of the three, and which national law will govern the proceedings.

As part of California International Arbitration Week, Silicon Valley Arbitration and Mediation Center and White & Case are gathering a stable of leading international arbitration practitioners and arbitrators to discuss how advanced planning can help avoid pitfalls when a technology dispute arises.

In this article, we kick off the discussion by examining why technology disputes arise and how to mitigate them, and why arbitration may be the best forum to resolve those disputes (or, for Churchill, the worst forum except for all the others). We also share some key points for drafting arbitration clauses, and we explain how technology companies investing abroad can structure their investment in advance to ensure treaty protection against certain foreign governmental conduct that unlawfully and adversely interferes with their investment.

Why Do Technology Disputes Arise?

While no two disputes are the same, some themes repeatedly come up in technology disputes. Most commonly, disputes arise because of:

- A lack of clarity as to the roles of each party and the allocation of risks;
- A lack of transparency, particularly where a party suspects another is failing to perform or underpaying royalties;
- Unrealistic expectations that cause the parties' commercial interests to diverge over time, including for example:

o Unrealistic implementation timetables; and

o Unrealistic internal expectations about cost savings or profits that make the deal more marginal that anticipated; and

- Unauthorized use of one party's proprietary information (trade secrets, know-how, IP etc.)

How Can Parties Minimize the Risk of Disputes?

The good news is that technology companies can proactively avoid at least some disputes with careful contract drafting. We note a few tips for drafting contracts below.

First, be realistic about the resources needed to implement the agreement. Most technology contracts require dedicated resources

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Viking River PAGA ruling has no clear destination for employers

By Tal Burnovski Yeyni

In June 2022, the United States Supreme Court decided *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906. The Court held that claims under the Private Attorneys General Act (PAGA), Cal. Lab. Code § 2698 et seq., may be separated into individual and non-individual claims, and that individual PAGA claims may be compelled to arbitration. The Court further held that since Plaintiff's individual PAGA claims were subject to arbitration, she lacked "statutory standing to continue to maintain her non-individual claims in court" which resulted in dismissal of "her remaining [non-individual PAGA] claims." 142 S. Ct., at 1925.

In a foreshadowed concurring decision, Justice Sonia Sotomayor stated that the California courts might rule otherwise and "in an appropriate case, will have the last word." (*Ibid*.) Just recently, a California Court of Appeal did, in fact, rule otherwise in *Galarsa v. Dolgen Cal.*, 2023 Cal. App., DJDAR 1497.

In *Galarsa*, the California Court of Appeal for the 5th district classified PAGA claims into two "types": "Type A" (a claim for a violation suffered by the plaintiff) and "Type O" (a claim for a violation suffered by an employee other than the plaintiff). The Court of Appeal held that while Type A claims may be compelled to arbitration, it does not necessarily mean that Type O claims must be dismissed. Here's why:

As an initial matter, to justify its deviation from *Viking River*, the Court stated that "a federal court's interpretation of California law is not binding" and that the California Supreme Court has yet to decide this issue in *Adolph v. Uber Technologies, Inc.* (Court to consider whether aggrieved employees maintain statutory standing to pursue Type O claims in court.) *Galarsa* at p. 18.

Second, the Court followed the California Supreme Court's ruling in *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, and held that Plaintiff had standing to pursue her Type O claims in court as she satisfied the two standing requirements identified in *Kim* – that is, Plaintiff was employed by Defendant and "was subject to at least one of the Labor Code violations [ ] alleged in her pleading." *Galarsa*, at p. 19. This interpretation, per the Court, aligned with "PAGA's remedial purpose … by deputizing employees to pursue civil penalties on the state's behalf." (*Ibid*.)

Third, the Court's holding was based on its prediction that the California Supreme Court "will conclude that California law does not prohibit an aggrieved employee from pursuing Type O claims in court once the Type O claims are separated from the Type A claims ordered to arbitration." *Galarsa*, at p. 22. This is for two reasons: First, that decision "best effectuates [PAGA's] purpose." Second, the Type A claims and Type O claims are based on different primary rights and, therefore, there is no one cause of action that is split when Type A claims are sent to arbitration and Type O claims are pursued in court. *Galarsa*, at p. 22-23.

While the Court of Appeal reasoned that the fate of "Type O claims" is subject to the California Supreme Court's decision, it nonetheless granted the request for publication "to provide guiding precedent for superior courts pending the decision in *Adolph*." *Galarsa* at p. 18 (FT 3). In other words, superior courts in California may no longer dismiss "Type O" (or, as *Viking River* referred to them, "non-individual PAGA claims") when Type A ("individual PAGA claims") are sent to arbitration.

As the *Galarsa* decision reflects, California provides broad PAGA protections to its litigants. PAGA causes frustration for California employers who are faced with significant claims, often due to hyper technical labor code violations. And while *Viking River* offered some relief to employers, other Court decisions following *Viking River* (and before *Galarsa*), suggested its effect was limited.

For example, in *Navas v. Fresh Venture Foods, LLC* (Nov. 2022) 85 Cal.App.5th 626, the Court denied Defendant's motion to compel arbitration as to Plaintiffs' individual claims as the Defendant did not explain "to the Spanish-speaking employee what is an individual PAGA claims" and did not obtain "the employee's consent to waive the right to file an individual PAGA claim in court." 85 Cal. App. 5th at 635.

In *Vaughn v. Tesla, Inc.* (January 2023) 87 Cal.App.5th 208, the Court refused to compel arbitration of claims for the time period plaintiffs were employed via staffing agencies, even though Plaintiffs themselves claimed Tesla was a joint employer during that time period, reasoning that the "joint employment doctrine" was insufficient to justify extension of the arbitration provision to pre-direct-hire claims.

And In *Villareal v. LAD-T, LLC*, (Oct. 2022) 84 Cal. App. 5th 446, the Defendant was unsuccessful in compelling arbitration as the arbitration agreement did not include the correct legal entity, but an unregistered dba.

PAGA's future in California remains to be seen. Several Chambers of Commerce and business groups in California question PAGA's effectiveness in achieving compliance and providing adequate remedies. For this reason, they united to reform PAGA and provide a "better way" for employees "to resolve claims and labor court disputes without lengthy and costly lawsuits" (see cafairpay.com).

Shutterstock

The reform initiative, referred to as the Labor Code Fair Pay and Employer Accountability Act, will be on the November 2024 general election ballot. Per its supporters, the goal is to streamline litigation and awareness by permitting employees to file civil penalties claims with the Labor Commissioner (rather than the Court), put money in the hands of aggrieved employees (by awarding 100 percent of the penalties to aggrieved employees), exclude civil penalties claims from arbitration, and create a unit whose goal is to assist and advise employees and employers about California employment laws.

Tal Burnovski Yeyni *is an employment defense attorney at Lewitt Hackman in Los Angeles.*

Losing sleep over the Midnight Clause

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for ongoing monitoring and compliance.

Second, limit "agreements to agree." Leaving issues open might seem tempting in the thick of negotiations to move things along at the beginning of the deal when both parties are optimistic and working toward a common goal. But down the line, if there is a dispute, the relationship likely has dissolved. Resolving open issues upfront reduces the risk of having a dispute about them later.

Third, draft the agreement to include realistic project milestones with clear consequences for failure to perform, which is a great way to ensure that both sides have the same expectations upfront.

Fourth, include a clear and well thought-out dispute resolution clause in the agreement. Dispute clauses are a great way to support longer-term commercial relationships that both parties typically seek when they enter into a technology agreement.

Why Arbitration May Be the Best Forum to Resolve Cross-Border Technology Disputes

When negotiating dispute clauses, companies should generally insist on arbitration, as opposed to litigation, in just about any cross-border deal and in just about any deal that involves highly technical products where either proprietary information is involved or where specialized technological skills are required to understand them.

The key advantages of arbitration are particularly adapted to those disputes for several reasons.

First, when parties appoint an arbitral tribunal or choose an institution to make that appointment, they have autonomy in the decision-making process and can ensure that it is **neutral** and non-partisan, leveling the playing field. That would not be the case if one party were forced to litigate in the domestic courts of the other party, especially if that party is a State-owned entity.

Second, parties can agree to make their arbitration entirely **confidential**, which is generally of critical importance in disputes involving secret and sensitive information. By contrast, in some domestic court proceedings, including in the United States, the full record of the case may be published online with limited redactions and easily accessible to non-parties.

Third, as it is entirely a creature of contract, arbitration offers parties the ability to devise a **bespoke procedure**, most adequate to their specific dispute. This of course starts with the parties' ability to appoint their arbitrator and/or to agree to any requirements for expertise and nationality that any prospective arbitrator must have. For example, in highly specialized industries, parties often agree in their dispute clauses that each member of the arbitral tribunal, including the arbitrator appointed by the other side and the presiding arbitrator, must be a lawyer with a certain number of years of experience in that industry or in disputes related to that industry.

Fourth, arbitration results in a **final and binding award**. Thus, arbitration awards are generally not subject to appeal and can only be vacated, i.e. annulled, for extremely limited reasons.

Most importantly, unlike US court judgments, **arbitral awards are enforceable in nearly every country in the world**. That is because under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, each of the 160 signatories, including the United States, has agreed to enforce foreign arbitral awards except under very narrow circumstances, which the debtor has the burden of proving. This means there is nearly automatic recognition and enforcement of arbitral awards. The United States is not a party to any similar convention for the foreign recognition of US judgments, except for the 2019 Hague Judgments Convention on the Recognition and Enforcement of Foreign Judgments, which has few signatories and has yet to enter into force.

Drafting Effective Arbitration Clauses in Cross-Border Technology Agreements

We briefly outline the basic building blocks of an arbitration agreement, the "must haves," before discussing the "should haves" for an arbitration agreement in a cross-border technology contract.

Must Haves:

- Keep it clear and simple. To mitigate any jurisdictional dispute, the parties should clearly state their **intent to arbitrate** in binding terms and should precisely define the **scope of their arbitration agreement**. In general, use broad terms to signal that "any controversy or claim arising out of relating to this contract, or the breach thereof, shall be subject to arbitration." If a specific issue is not arbitrable or should be resolved in another forum, clearly carve it out from the arbitration agreement and specify the forum for resolving it.
- Specify the **arbitral rules and/or the arbitral institution** that will support the process, the **number of arbitrators**, which is typically one or three, and how those arbitrators will be selected.
- Pick the **seat or place of the arbitration**. The seat is the country whose arbitration law will govern the arbitration, including in what limited circumstances a court can intervene in support of the arbitration, whether interim measures are available, and the grounds for challenging the award. It is important to choose a seat with a well-developed arbitration law and jurisprudence, where courts have consistently enforced a pro arbitration policy and have intervened as little as possible in the arbitration process.
- Choose the **language** of the arbitration, as cross-border transactions may involve more than one language. If the evidence will likely be in multiple languages, consider whether documents must be translated to the language of the arbitration, which can be costly especially where technical documents are involved, or whether the originals may be submitted without translation.

Should Haves:

- Many complex and long-term agreements include **multi-step, or escalation, clauses**, and require pre-arbitration negotiations before an arbitration commences. Mediation also can be used to seek an amicable resolution, although requiring mediation before arbitration can start may result in wasted costs on a futile or counterproductive process.
- In certain circumstances, adding **accelerated or specific procedures for narrow or technical issues** (akin to dispute boards in construction disputes) may allow the parties to continue collaborating – not every dispute has to blow up the entire commercial relationship.
- Indicate whether the arbitrators must have **specific qualifications and experience**. Agreeing on arbitrator qualifications and experience can help to ensure a rational and predictable decision-making for disputes involving complex industry customs or technological issues and may also make the process more efficient and less costly. In highly specialized fields, however, imposing criteria that are too stringent may make the pool of available candidates overly narrow and has even led some courts to find that the arbitration agreement was unenforceable.
- For highly technical disputes, consider selecting experts that both parties agree should provide independent evidence to the tribunal if a dispute arises. Arbitration provides flexibility on the submission of expert evidence, and agreeing in advance on neutral experts may narrow the scope of the dispute and save time and money.
- As many technology transactions and disputes involve **multiple parties under multiple contracts**, including different agreements for various developers, sub-developers, or suppliers, the arbitration agreement may need to address **consolidation or joinder** of third parties in any potential dispute.

'Technology companies can benefit indirectly from investment treaty protections, even if they are nationals of a State that has not concluded a treaty with the host State.'

Structuring Technology Investments to Benefit from Investment Treaty Protection

Many technology companies are not only engaged in cross-border commercial transactions with other companies, but are investing in new and existing technologies across the globe. These companies may end up in disputes with foreign governments that try to take their investments or curtail their profitability by imposing new onerous regulations.

For these companies, investment treaty arbitration may be the only option to avoid litigating against the foreign government in its own domestic courts.

Thousands of investment treaties are currently in force. These treaties extend protection to covered foreign investors that have made protected categories of investment. The State parties to these treaties typically undertake obligations not to expropriate a protected investor's investments without fair and adequate compensation, to treat those investors and their investments fairly and equitably, and to treat them no worse than local investors or investors from third States.

The State parties also agree in these treaties that covered investors may submit claims for breach of these undertakings to international arbitration. The investor accordingly benefits from a right of action where local remedies are inadequate, a neutral forum to resolve its dispute with the host State, and enforcement of the award under an international convention.

Technology companies can benefit indirectly from investment treaty protections, even if they are nationals of a State that has not concluded a treaty with the host State. Most investment treaties define protected investments as including shares in a company, including minority and indirect shareholdings. For an investment structured through a chain of companies in different States, each company in the chain accordingly may be a protected investor if there is an applicable investment treaty. Technology companies therefore may plan strategically to ensure that they benefit from treaty protection by structuring their investments through a subsidiary in a State that has concluded a treaty with the host State.

As with contract drafting, it is imperative to do this strategic planning **before a dispute arises**. Once problems begin to emerge, it is too late to restructure to gain treaty protection as the tribunal will reject any claim based on an investment made after the State had already begun taking adverse action against it.

* * * *

To learn more about drafting effective dispute clauses and structuring investments in cross-border technology transactions, join Silicon Valley Arbitration & Mediation Center and White & Case on March 15 at 10:40 a.m. Pacific. The event will feature a panel of leading practitioners and arbitrators, including Brody K. Greenwald (International Arbitration Partner at White & Case LLP), Sarah Reynolds (Managing Partner at Goldman Ismail and CEO at SVAMC) Yasmine Lahlou, International Arbitration Partner at Chaffetz Lindsey), Independent Arbitrator Amb. (r.) David Huebner and Independent Arbitrator Barbara Reeves.

The event is taking place in the Los Angeles office of White & Case LLP, and online as part of the second annual California International Arbitration Week from March 13-17, 2023. To view the March 15 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 by searching for www.dailyjournal.com or at

https://us06web.zoom.us/webinar/register/WN_nFl_ZyDGR4CIlMeXThqOBw.

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