

Silicon Valley Arbitration & Mediation Center: Advancing ADR for Tech Disputes

By Gary L. Benton

It is often said that litigation does more harm than good for technology innovation. Take, for example, the widely watched *Apple v. Samsung* smartphone patent dispute, which at one time involved over fifty litigations in twelve countries. After years of costly litigation, Apple and Samsung voluntarily dismissed all the non-U.S. cases. The \$1 billion U.S. jury verdict for Apple continues to be chipped away through appeals in the U.S. courts. Most remarkably, for the years the dispute has been ongoing, both Apple and Samsung spent more on litigation than on research and development.

Silicon Valley Arbitration & Mediation Center (SVAMC) (www.siliconvalleyarbitration.org) is a non-profit organization created to confront the challenge of efficient technology dispute resolution. SVAMC works with technology companies, law firms, universities and others to promote cost-efficient resolution of technology disputes. Founded in 2015, SVAMC provides educational programming and other resources to the global technology community.

Unlike the New York International Arbitration Center (NYIAC) and other regional centers, SVAMC is industry-focused, not geographically focused. SVAMC's goal is to serve the interests of the global technology dispute resolution community, particularly with respect to providing resources on ADR to the technology industry.

Why Technology ADR?

Most lawyers trained in arbitration and mediation would think the benefits of ADR, particularly efficient decision making and cost-savings, would be obvious to the technology industry. There are at least four reasons why that is not the case.

First, the U.S. technology sector hasn't had a need to pay much attention to ADR in the past. U.S. technology companies have had good experiences in the courts, particularly in the federal courts in California, Delaware, Massachusetts and New York, where many skilled technology litigators practice and there are an above-average number of judges who have experience with intellectual property. In international cases, there is a perception by some that U.S. juries tend to favor U.S. companies, although that perception is not necessarily supported by the research.

Second, historically, U.S. technology companies have had negotiating strength over non-U.S. companies and were able to select forums of their choice. Many U.S. companies are now finding they have less negotiating strength, particularly as they try to compete in emerging markets in Asia. The result is that many technology companies doing business internationally are increasingly confronted with unqualified, biased or corrupt decision makers.

Third, the legal teams in many start-up technology companies are relatively young and inexperienced and have limited exposure to ADR. They are often too quick to rely on outside counsel who practice litigation for a living and disfavor ADR. As companies mature they become increasingly concerned with providing shareholder return from dispute resolution processes and are demanding efficiencies from outside counsel.

Fourth, in the past, there were more uncertainties regarding the enforcement of arbitral awards involving intellectual property and the availability of preliminary relief that slowed the adoption of ADR by some technology companies. These limitations are now better understood as the law has developed. Although arbitration has limitations, studies confirm that it can be many times more cost-efficient than litigation. Accordingly, it should always be a considered choice in technology dispute resolution.

Technology ADR is on the rise given new advances in technology and increased globalization. With the Internet, data flows around the world instantaneously. Transactions that once took weeks or months to process are now completed in less than a second. A result of this technological advancement is that U.S. companies face increased competition from global competitors. Established companies often struggle to keep pace with new innovation. These changes have a particular impact in the technology sector where products are often replaced on an annual cycle or with the push of a button.

A further result of this rapid technological change and globalization is that many U.S. companies, and most non-U.S. companies, do not want to deal with the vagaries of the U.S. court system, including its costs, intrusive discovery, emotion-swayed juries and endless appeals. Many of the rising non-U.S. companies are insisting on litigation or arbitration in China, Singapore or elsewhere in Asia, including in forums that are less favorable to U.S. interests. As U.S. legal teams handle more international work, they come to realize the benefits of international arbitration in terms of potential cost efficiencies, expert decision-making and multi-national enforcement of awards. Likewise, in many instances, relying on mediation to settle a dispute is a cultural preference and simply more practical and efficient.

SVAMC's Role

Through its educational and outreach programs, SVAMC works with U.S. and international technology companies, law firms, ADR providers, neutrals and universities to engage in an open dialogue on the costs and benefits of using of arbitration and mediation to resolve technology disputes. More broadly, SVAMC endeavors to find and develop efficiencies in the resolution of tech disputes both in and out of court by addressing several key

needs in the technology ADR sector, namely (1) educating potential users of the benefits and risks of using different forms of arbitration and mediation to resolve technology disputes; (2) connecting users with skilled legal counsel in the field; (3) providing users a peer-vetted list of leading neutrals with technology expertise, (4) gathering industry feedback for institutional providers and government lawmakers and (5) advancing the use of new technologies to improve dispute resolution. The sections below detail various SVAMC activities that encourage effective and cost-efficient technology dispute resolution.

SVAMC does not administer ADR cases or offer neutral services. It does not compete with anyone. Rather, it works directly with technology companies to address business needs, it helps technology companies better understand ADR opportunities, it connects the technology sector with qualified law firms, providers and neutrals, and it serves as a clearinghouse for academic focus in tech dispute resolution.

Presentations and Programs

The core of SVAMC's work is educational programming that is offered on a complimentary basis to technology companies, law firm and universities. Often the programs are presented privately to corporate legal teams. On some occasions SVAMC collaborates with interested law firms to educate its client base or assist in a business development visit.

Over fifty technology-focused presentations are currently listed on the Center's website. The programs include topics covering technology arbitration and mediation strategies and planning; tech ADR procedures, technology contract/commercial disputes; technology competition disputes; corporate technology disputes; intellectual property disputes; and international disputes. Many of the programs focus on specific segments of the technology sector, such as IT, biotech or alternative energy. Other programs are country specific.

The SVAMC website Programming page is essentially an online marketplace where companies and their counsel can readily access an applicable program category or title, and the credentials, expertise and contact information of each respective speaker. The breadth and depth of these programs reflect well on the expertise of the presenters.

SVAMC is also collaborating with institutional providers, law firms and other professional groups to provide educational programming. SVAMC has already cosponsored several tech ADR focused events in New York, Silicon Valley and Singapore. Plans are in progress for additional collaboration with the American Arbitration Association/ICDR, the International Chamber of Commerce Court of Arbitration, the CPR Institute for Dispute Resolution, SIAC and HKIAC, as well as the College of Commercial Arbitrators and the Chartered Institute of Arbitrators.

Membership

SVAMC offers general membership and young practitioner membership opportunities to corporate and law firm tech lawyers, neutrals, academics, judges, government officials, institutional professionals, young lawyers and others. Although applicants must meet membership criteria, the goal is to have a broad-based membership representative of the entire technology dispute resolution community.

By offering memberships, SVAMC reaches out and involves the entire tech dispute community. It encourages fundamental collaboration across a wide range of legal and ADR professionals, academics, students and government officials connected to technology and dispute resolution.

The SVAMC Tech List

SVAMC publishes a list of neutrals called the List of the World's Leading Technology Neutrals. SVAMC's Tech List is peer-vetted and admission is by invitation only. Admittees to the Tech List are qualified by national and international ADR providers and recognized by peers as the leading experts in technology dispute resolution.

The 2015 Tech List is relatively small, although it is expected to grow each year, particularly as SVAMC expands internationally. In its first year, there are approximately thirty appointees, including five from the New York metropolitan area.

New ADR Technologies

Various SVAMC members are deeply engaged in efforts to integrate technology advancements into dispute resolution and, more importantly, utilize technology to provide improved processes. SVAMC members are working to evolve online dispute resolution (ODR) technologies, such as those developed at eBay and PayPal, from the Bto-C (business to consumer) sector to the B-to-B (business to business) sector to handle major commercial disputes. SVAMC is also beginning collaboration with university researchers to provide publicly available database profiles on individual arbitrator practices so that users have better resources in selecting neutrals.

Tech ADR Thought Leadership

SVAMC has begun work with leading law firms and technology companies to provide an organized forum for thought leadership on efficiencies for technology dispute resolution. Meetings are planned for late 2015 and early 2016 to assemble leading in-house and law firm practitioners to develop strategies for improving court and ADR technology dispute resolution processes, including considering judicial, legislative and private institutional improvements to better serve users.

SVAMC Leadership and Diversity

SVAMC is led by its Board of Directors and guided by its advisors and membership. Management is coordinated through the SVAMC Executive Board and various operating committees and task forces. The Center's leadership is

composed of highly recognized technology practitioners who work collaboratively to advance SVAMC's mission of promoting ADR for tech disputes. They come from a variety of backgrounds, are diverse, and work across borders to build an organization that will serve as the voice of tech ADR. SVAMC intends to expand its leadership base more deeply into the corporate sector as it grows.

One of SVAMC's most important focuses is improving diversity in the technology ADR sector. Both the technology industry and the practice of law are notorious for historical underrepresentation of women and minorities. The resulting harm is compounded in the convergence of the two in technology ADR. SVAMC is working to confront that issue. SVAMC invites young practitioners as general members, is involved in scholarly work on the subject and has a dedicated task force focused on outreach to women and other diverse practitioners. The goal is to have a broad, diverse general membership, encourage the development of tech neutrals with diverse backgrounds, and work to improve opportunities for all.

Internship Program

SVAMC offers internships to motivated students who wish to learn more about technology, law and ADR. SVAMC recruits interns who have an interest in the law, social media and technology, have a willingness to learn and positive attitude, and possess superior grades, accom-

plishments, and references. Applications are accepted on a rolling basis throughout the year.

The focus of the SVAMC internship is to educate interns about tech ADR and to provide a rewarding work experience where they can use their research, writing, and technical skills to promote SVAMC's mission.

Through its internship program, SVAMC generates a student interest in tech ADR and offers an enriching experience and exposure to the tech ADR landscape.

Looking Forward

The SVAMC community is part of a rising tide. With each new member, new program offering, new Tech List appointment and new outreach to users and institutions, And with each advance we increase the opportunities for ADR practice for all.

SVAMC will continue reaching out to the user-community, providing quality resources and service, and expanding both geographically and in diversity.

Gary L. Benton is the founder and Chairman of the Silicon Valley Arbitration & Mediation Center. He is an internationally recognized Arbitrator and Mediator based in Palo Alto. He was previously a partner with Pillsbury Winthrop LLP and Coudert Brothers LLP and the General Counsel of a technology company. www.garybentonarbitration.com.

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