

**PODCAST: The Art of International Arbitration –
October 2019 Conference Preview**

9/20/2019

Categories: Construction, IP, International, Litigation

[Brian Dolan]

Hi, this is Brian Dolan from the law firm of Pepper Hamilton. On October 11 in 2019, Pepper will be hosting a conference in our Philadelphia office entitled, “The Art of Arbitration, Hot Topics and Practical Advice on International Construction and Commercial Arbitration.”

Joining me today are three Pepper attorneys that will be speaking at the conference. I’m lucky enough today to have in our Philadelphia office with me Matt Adler, partner and chair of the International and Domestic Arbitration Practice Group for Pepper, and Zach Torres-Fowler, associate in the Construction Practice Group. And then from our Boston office on the phone, we have Maia Harris, partner with our Intellectual Property Department.

Welcome everybody. Thanks for being here today.

[Matthew H. Adler]

Thank you.

[R. Zachary Torres-Fowler]

Thanks, Brian.

[Maia H. Harris]

Thanks.

[Brian Dolan]

So, we gathered together just to spend a few minutes to give our audience a preview of the topics that you are going to be addressing at the conference and talking a little bit about who might be interested in attending.

Matt, let’s start with you. Why is Pepper hosting this conference?

[Matthew H. Adler]

Pepper is hosting this conference because a good law firm should mirror the needs of its clients, both what they’re doing and what they will be doing, and with the explosion in international commerce, so many of our clients are involved in transnational business ventures. Many of them cooperative; many of which end in disputes. And those ventures often begin in contracting. We help with that.

Those ventures sometimes and unfortunately end in disputes. We help with that.

So the short answer is anyone who has any kind of international issue in their portfolio, which may or may not go to dispute, should be at this conference.

The other reason we're hosting it is because we have found it to be an extremely interesting topic. It raises cross cultural issues. It gives us a lot of opportunities to meet with folks in other countries. That advances our clients' interests as well.

And the third is that this is an area that is still relatively new, both procedurally and in terms of the substantive development of the law. We, as good lawyers, want to stay on top of those changes and we want our clients, many of whom are lawyers, also on top of those changes. So we view it as educational for both us and for them.

[R. Zachary Torres-Fowler]

Just to follow up on that last point by Matt, I find in my personal experience that I get questions all the time from clients and even colleagues about what does international arbitration really feel like. You know, what are the ins and outs of this process and how is it different from what you see in the United States, and I think this is a really good opportunity to provide some insight – some practical insight – into a view of what is relatively uncommon to a lot of people here in the U.S., and in the Philadelphia area.

[Brian Dolan]

Great. Thanks for that answer. In the title, we talk about Hot Topics in arbitration. Let's go over a couple. What are some of those hot issues right now in international arbitration? Matt, let's start with you again.

[Matthew H. Adler]

Well, I actually want to defer to Maia because I think one of the hottest topics is what she does, as an outstanding IP and patent lawyer, and from there, the other hot topic that I see really growing is that which Zach specializes in, so they can each address that. Let's start with Maia, if we could.

[Maia H. Harris]

Yeah, thank you, Matt. Yeah, I agree. You know, in the IP – intellectual property – context, we are increasingly seeing disputes that are not just domestic in nature in the U.S. Obviously, we have a lot of clients that have domestic U.S. intellectual property rights that may need to be enforced or otherwise disputed, but increasingly those portfolios are global collaborations that might arise – in which disputes might arise later are increasingly global in nature.

Patent rights might just not just relate to U.S. but also have related parallel rights in the E.U. in China, and elsewhere. So, increasingly, we're seeing disputes that are right for a kind of centralized dispute resolution process, and international arbitration allows for that.

Now, some of the interesting issues that we're seeing, because these are rights that are generally generated out of countries, nation states, so it's hard to manage different rights, different legal systems, different ways of enforcing, different ways of deciding whether or not the rights themselves should exist, but having one place to dispute all of those issues and hopefully find a resolution to those issues rather than having a set of disputes in five, six, seven different countries – it's something that our clients are increasingly finding to be a more efficient way of resolving disputes over rights that are sometimes worth hundreds of millions of dollars.

So, we're finding that this is a useful tool. We're even finding proactively that we're increasingly advising clients to consider it for forum selection cost purposes – if there are contracts that might involve IP rights later on, that might be in dispute, but, you know, we're working a vast increase in use of this as a particular and very specialized dispute resolution process.

Just to throw some stats out for you, I recently was at a conference that had a member of the World Intellectual Property Organization also in attendance at a panel, and they're quoting about 50% of the arbitrations that they personally handle involve some kind of patent IP rights. This is a very, very new trend that we're seeing, and I think we're going to see it continue in the future.

[R. Zachary Torres-Fowler]

On the construction side of international arbitration, I think over the past decade, two decades, you've really seen a very substantial increase in the number of construction disputes being resolved by international arbitration proceedings – whether they going to be institutional or ad hoc – you know, across the board, and I think you've seen construction arbitration take an increasingly large segment of international arbitration proceedings.

I think if you look at some of the statistics from the arbitral institutions, construction engineering disputes take up one of the largest, if not the second largest, piece of their case load. So, it is a really important sector of international arbitration. You've seen this also much more recently, at least we'll see that in the coming months, the Queen Mary survey under international arbitration, which is a fairly influential, statistical survey that Queen Mary University in London produces every year.

This year's edition is going to be focused exclusively on construction disputes. I think it just speaks to you the significance that the construction industry is really having on international arbitration proceedings. And broadly speaking, as you've seen the construction industry group abroad, if needed or required a pretty flexible model for managing very complex disputes, often times involving hundreds upon thousands of individual claims. They can be complicated. They can be costly. There's always questions of neutrality with tribunals working abroad and questions of enforcement and security and assets around the world. And so international arbitrations really served a really important role in the construction industry, and so that's why in volley speaking, it's a really relevant topic for this conference as well and something we hope to cover.

[Matthew H. Adler]

Just going back to my colleagues' answers on their specialized fields, that of IP and that of construction, if you listen to what they're saying, they are talking about the fundamental issues that our clients have to deal with when they are approaching a transaction like this.

If you are going to have a dispute, where do you have it? Where do you have the arbitration? Everybody wants to play the ballgame in their home field. Where do you play the super bowl? Where do you play it neutrally? What law do you apply?

Do you do the arbitration through an institution, which is going to cost you more money, but have more predictability in its rules? What do you do what we call ad hoc? Where should the arbitrators be from? What courts are going to be more likely to enforce the law?

So all of those are questions that make it interesting to us and we think, on both hot topics and the standard topics, we have the expertise in it.

[Brian Dolan]

So we're talking a lot about what you're going to be talking about. Let's talk a little bit about who should be listening. Zach, let's go with you. Who should be interested in attending this conference?

[R. Zachary Torres-Fowler]

Well, I think the obvious answer is people who are clients or practitioners here generally interested in this field. I mean whether or not it's a field that they intend to rely on – if they have a business interest abroad – or if they just have a general curiosity about international arbitration. But I think separately, just apart from the individual who has an interest in international arbitration, I think it is more broadly applicable to people who work in kind of the domestic arbitration space, who are trying to look into practices and procedures that are used in international arbitration, more commonly than you've seen in the domestic space and whether or not there are some cross pollination that could occur to help them prove efficiencies here in the United States.

I'm sorry, you know, I think the broader point is that this shouldn't just be limited to people who have some sort of interest in international arbitration that is much more widely applicable than I think most people appreciate.

[Brian Dolan]

Matt, let's jump back over to you. Let's talk a little bit about what is not international arbitration.

[Matthew H. Adler]

I'm laughing a little bit because my colleague, Zach, just touched on part of it.

There were several things that I think international arbitration sometimes gets looped in with, but that it is not. So one is domestic arbitration. I agree completely with Zach that there are commonalities, but, for example, in international arbitration, you don't introduce your direct testimony by direct examination. It's all in writing. In what we call witness statements.

So, there are particular procedural issues and procedural ways of going about an international dispute that's an arbitration from a domestic dispute. So, it's not domestic arbitration. It's also not trade wars. I mean the current trade wars that we're engaged in right now and that we apparently are going to be in for a while may have spillover effects on international commerce, but asking that there be greater customs duties imposed on China is a trade and an international issue, but it's not an arbitration issue.

And then finally, at least as far as what we do here, it is not state versus investor disputes. That's called investment arbitration. There's a huge battle for that. We sometimes touch on that, but

we tend not to get involved with disputes versus governments, and we certainly are not involved in government versus government disputes.

When I grew up and was studying this stuff in school, international arbitration meant a border dispute between India and Pakistan. But now it's what we do in terms of a contract for widgets at the cross border. So there's a lot of things that it's not, but there's a whole lot more that it is, and that's why we're excited about this conference.

[R. Zachary Torres-Fowler]

So, just to add back to that, and I think one of the things to keep in mind is that international arbitration is not common law specific. It is intended to be a blend of common law traditions and civil law traditions, and out of that, you get a very different type of dispute resolution process that is not so discovery-centric with what you'd see in the State and Federal Courts of the United States. Not so, well, you don't get direct examinations, you get more witness statements, which is really a produce of U.K. and European cuts into European practice.

I guess, the bottom point is that – and this is one of the facets that makes international arbitration so interesting – it really is a combination of legal cultures and traditions that you don't commonly see in the United States, and being able to adapt to those traditions and understanding the approaches of various counsels, and arbitration may view the world – how they view the world, I think is what makes this practice so interesting.

[Maia H. Harris]

And I think for just to add to that, Zack, I think for purposes of this event and swinging back to maybe the question that we were just talking about – who should be interested. You know, I think some clients might for the exact same reasons that you just identified as being unique, be a little bit afraid of this procedure. I think once you become a little bit more familiar with the process and a little bit familiar with the dispute resolution forum itself. I think you'll come to realize the efficiencies that we are all talking about in the kind of global disputes before – the idea that instead of having kind of multiple disputes and in many different places, maybe with many different parties, you now have kind of a single place that you can incorporate all of these cultural differences and hopefully reach a resolution in the most efficient – and I think probably the most cost effective way – when you look at these disputes in an international context.

[Brian Dolan]

So, folks, we are running short on time today and I wanted to get in a last question, and it was hard, I know, to get the three of you to find time to work for this podcast because you're all so busy. Let's talk a little bit about that. How active is Pepper in this field? Maia?

[Maia H. Harris] Yeah, I mean, you know the obvious answer is super active. (laughs) But I want to broaden that out a little bit because what you happen to have at the table and on the phone today are three individuals who are involved in the actual dispute portion of the practice, but – and we've all referenced this a little bit earlier – the other piece to this is making sure that you have the proper procedures and terms in place if you are thinking about things proactively.

I think we all have clients that are more inclined, especially in the U.S., to want to choose their own home forum, but part of the event – part of the things that we can do as attorneys who are

engaged in this area of practice is make sure our clients are aware of the benefits, potentially, for any particular kind of proactive thought process in the event that contracts that they are engaged in negotiating might result in a dispute somewhere down the road. So from a life cycle of a dispute, kind of, perspective, our activity starts at the beginning of contract negotiation and ends up if a dispute actually does arise in helping those clients work through this very novel way of approaching a dispute resolution process.

[R. Zachary Torres-Fowler]

Yeah, and just to echo kind of what Maia said, I think in my practice, I advise clients in practically all facets of international arbitration. So, not exclusively disputes, and not exclusively once we get to the request for arbitration or the demand. I am advising clients in connection with clause drafting. I am trying to advise them and explain to them the process, the procedures, you know, what is the seed of arbitration, how does that affect their rights and obligations, whether or not you seek the arbitration in New York versus Miami versus London versus Paris. It is a wide practice. It's not just disputes related. And I think I get questions all the time about these features and what to do.

[Matthew H. Adler]

Yeah, we're extremely involved temporarily from a subject matter standpoint and geographically. Temporarily, as my colleagues have said, from contract drafting to my colleague, Jeremy Heep, just chased millions and millions of dollars all around the world last year and found it successfully in Dubai, so we get our clients paid. The subject matter, you've heard it, we do every single kind of contract dispute, IP, patent, construction, and geographical, we do all over the world. And there is no firm within many, many miles north and south of us that has that broad and deep an experience. So we'll look forward to seeing everybody on October 11.

[Brian Dolan]

Well, thanks a lot everyone. This has been great. This program on October 11 sounds like it's going to be very robust. For those of you in the Philadelphia area that are interested in attending or just would like to come to Philadelphia in October, because it's just beautiful here that time of year, we would love to have you join us for this event. There are no fees to register and we are offering CLE credit. For more information about the event and how to register, there's a link to it off our website where this podcast is posted on Pepper's Insight Center at www.pepperlaw.com. Also on that page will be an email address for Kim MacAlister. For those of you that can't attend but would like the materials post-October 11, feel free to email Kim and she will send you the materials after the conference.

Thanks for listening today, and have a great day.

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