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Litigate Different: Why the Tech Sector Is Turning to ADR

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To see how tech-industry litigation can get lengthy and pricey, look no further than the ongoing legal war between Apple Inc. and Samsung Electronics Co. The two technology giants have battled it out over smartphone and tablet design patents for years in courts all over the world, spending tens of millions on attorney fees and racking up even more in damages.

Of course, it's rare that a tech company has the time, motivation and resources of an Apple or Samsung. Many companies facing litigation in this sector are beginning to see how alternative dispute resolution could be a better option in many types of disputes, particularly if the issue crosses international borders.

Technology companies are focused on innovation, but litigation often has the tendency of stifling business and product advancement. According to recent studies, patent litigation alone is putting significant strain on the tech sector, leading to a significant decline in venture capital investment and in company spend on research and development.

Taking a matter into arbitration has proved a faster mode of resolution that avoids complex and expensive proceedings. This is an attractive proposition, especially for many startup companies that would rather not pay huge fees or spend hours and hours in meetings and hearings (even the techies on HBO's "Silicon Valley" have caught on to ADR).

Gary Benton, a U.S. and international arbitrator and mediator and founder and chairman of the Silicon Valley Arbitration and Mediation Center, an organization that advances the use of ADR in tech and related fields, told CorpCounsel.com that although he sees ADR being used most frequently in tech for contract- and licensing-related disputes, it also is being used more widely for intellectual property matters and other issues.

One major plus is that the parties will be able to choose neutrals who have real expertise and experience in the highly specialized areas of law involved. "To begin with, very few U.S. judges have experience with IP," said Benton. "Most U.S. juries don't have any technical expertise, so it's a problem." Although it doesn't run ADR proceedings itself, SVAMC does

publish a list of the most qualified tech neutrals in the country. These neutrals are guaranteed to have experience in technology issues impacting the legal sector and in resolving technology-related business disputes.

Another ADR advantage is privacy. Many conflicts involving tech companies deal with highly sensitive proprietary information, so parties have an interest in keeping proceedings and documentation as far from the public eye as possible. “It makes sense because for the most part these are business disputes between private companies,” said Benton. “They are trying to reach a private resolution.”

ADR also may hold a certain appeal because of the tech sector’s tendency to look at problem solving differently than more traditional industries do. If tech companies are looking to make everyday life more efficient, then doesn’t it make sense to want to do conflict resolution more efficiently too? Arbitration and mediation appeal to the collaborative spirit of tech companies and the millennial generation that is behind many new startups.

“When you’re doing an arbitration or mediation, there is just more of a dialogue between the parties,” said Benton. “There aren’t the formalities of a courtroom setting, so there is much more opportunity for the parties to step away from the proceedings and start talking about opportunity and collaboration.”

On a more practical legal level, many tech companies turn to ADR because if the case crosses borders, they may not want to deal with overseas courts. Language and knowledge barriers could arise when companies take litigation to another country, in addition to the general uncertainty involved with litigating in an unfamiliar jurisdiction. Many foreign parties may not want to have their cases heard in the U.S. court system either.

Perhaps most important, unlike in ADR, U.S. companies involved in regular litigation get no guarantees that a judgment rendered in their favor will be upheld. “A U.S. party could win a case in the U.S., but unless it can reach assets of the other party in the United States, that judgment has no value,“ explained Benton. “And it just can’t be readily enforceable anywhere else in the world.” In contrast, if the company engages in arbitration, the New York Arbitration Convention, with more than 150 signatory countries, will require that the party receive the award it has won.
