

Int'l Arbitration Will Keep Thriving Despite Trump Agenda

By **Ava Borrasso** (January 25, 2018, 10:16 PM EST)

In his 2005 bestseller “The World Is Flat: A Brief History of the Twenty-First Century,” Thomas L. Friedman teaches us that globalism is a seemingly unstoppable freight train bringing boons to the overall living standard of the world at large. Those advantages occur, in part, through global reorganization of the workforce. Certain tasks and jobs are performed in places where they can be completed more economically than in the U.S., leaving what Friedman considers more innovative or imaginative work to the U.S. labor force.

A decade later, candidate Donald Trump underscored a somewhat different message, focusing instead on bringing back the manufacturing jobs either long gone or, in Friedman’s view, permanently disappearing from U.S. shores. While President Trump’s impact on outsourced U.S. jobs is just unfolding, some gains are evident in previously written-off segments of the workforce. For example, manufacturing jobs have increased each month under his presidency thus far.[1]



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Against this backdrop, the question is: What will happen in a post-Trump world? Will it revert to the unrestrained globalism that Friedman described? Is the unstoppable freight train merely on a temporary sidetrack? And what, if anything, does this have to do with the role of international arbitration in resolving cross-border business disputes? Is arbitration’s prevalence in this area diminishing?

While time will provide the answers, historical data shows that international arbitration has been enjoying a steady increase.[2] That increase coincides with the spread of globalism. The ease of cross-border deals highlighted by Friedman seems to have increased the popularity of this favored mechanism to resolve international disputes.

The benefits of international commercial arbitration are well established. Widespread appreciation for the ease of award enforcement dates to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[3] Other benefits of international arbitration, to name a few, are the procedure’s flexibility in adapting to the needs of the parties; the parties’ ability to select knowledgeable decision-makers; confidentiality; and the finality of an award that, barring serious irregularities, cannot be set aside or vacated.

The flexibility of the process alone has afforded international arbitration many recent gains, some of which are borrowed from the very litigation system that arbitration is designed to avoid. Recent

developments include, by way of example, the adoption of joinder and consolidation rules; expedited, summary and emergency procedures; and the promotion of mediation to resolve international disputes. Most recently, a new protocol to permit consolidation among institutions has been advanced by renowned international arbitration scholar and counsel Gary Born, president of the Singapore International Arbitration Centre.[4]

Each of these developments permits arbitral institutions to compete even more effectively with litigation by adapting well-tested court procedures. Also, many specialized courts have been created to support arbitration and deal with issues that may arise in international arbitration. Most recently, the Singapore International Commercial Court, first established in 2015, has amended its rules to increase the scope of its jurisdiction. In the United States, similar specialized court divisions have been established to support resolution of disputes arising from international arbitration: New York (in 2013), Miami (in 2013) and Atlanta (in 2015).

International arbitration by nature is a flexible procedure that must accommodate both civil and common law advocates and increasingly aims to bridge any gaps in systemic ways. For example, recent efforts to address variances in the treatment of privilege among jurisdictions is a welcome attempt to introduce overall systemic certainty into the system. Similarly, considerable attention has been paid to the impact and recognition of third-party funding in international arbitration as it expands beyond litigation. Each of these developments reflects the ever-evolving nature of the procedure and willingness to adapt that is favored by businesses operating across borders.

Not surprisingly, litigation also continues to develop for this more interconnected world. The Hague Convention of June 30, 2005, on Choice of Court Agreements, entered into force on Oct. 1, 2015 (“Choice of Court Convention”), has been ratified by nearly 30 countries and applies to international commercial agreements. The convention precludes a designated court from declining jurisdiction over a qualified matter; stops a nondesignated forum from exercising jurisdiction except under limited exceptions; and provides for mutual enforcement of a judgment from a designated court in any other contracting state. The Choice of Court Convention aims to assist contracting states in the enforcement of judgments obtained in national courts, similar to what the New York Convention provides for arbitration awards.

Meanwhile, increases in the time and expense of U.S. litigation have been impacted by the scope of e-discovery and data proliferation. Recent attempts to rein in that expense have included passage of a revised Federal Rule of Civil Procedure 26, effective Dec. 1, 2015, which imposes a requirement of proportionality to the issues presented, amount in controversy, access to information, and resources of the parties, among other factors.

In short, while international commercial arbitration continues to adapt to an increasingly interconnected world, it faces competition from the litigation realm. Nonetheless, it has a substantial lead — most significantly in the form of the New York Convention that has a more than 50-year head start over the Choice of Court Convention and over 120 more signatory states. Coupled with the fact that institutions and proponents engage in continual self-analysis to innovate practices and procedures, international arbitration focuses on delivering to its users a system that reflects their highest values.

Given that lead and the demonstrated willingness to consistently adapt to the needs of users, the proverbial train has left the station. While there may be minor deviations along the way, international arbitration will no doubt continue to flourish in the age of Trump and well beyond, consistent with Friedman’s view of a flat world.

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[1] Those same figures had been on the increase since about the year 2010 of the Obama presidency, having hit its lowest level in about January 2010 after a precipitous decline beginning in about 2007. Nonetheless, the 2017 trend figures generally exceed those of 2016 and will be interesting to watch going forward. See U.S. Department of Labor, Bureau of Statistics, Jan. 15, 2018 available at: https://data.bls.gov/timeseries/CES1000000001?amp%253bdata_tool=XGtable&output_view=data&include_graphs=true

[2] Baker McKenzie charts the growth of international arbitration by cases filed annually. Its most recent chart through 2016 is available at Global Arbitration News: <https://globalarbitrationnews.com/international-arbitration-statistics-2016-busy-times-for-arbitral-institutions/>

[3] The New York Convention has been a game-changer for resolution of international disputes and has been ratified by some 157 countries. While the New York Convention is the most expansive, regional conventions exist as well.

[4] The 2017 SIAC Memorandum Regarding Proposal on Cross-Institution Consolidation Protocol is available at: [http://www.siac.org.sg/images/stories/press_release/2017/Memorandum%20on%20Cross-Institutional%20Consolidation%20\(with%20%20annexes\).pdf](http://www.siac.org.sg/images/stories/press_release/2017/Memorandum%20on%20Cross-Institutional%20Consolidation%20(with%20%20annexes).pdf)