CPR Arbitration Committee Meeting
Thursday, March 15, 2018, 12:00-1:30PM ET

Davis Polk LLP
450 Lexington Ave,
New York, New York 10017

MINUTES

Moderated by Hagit M. Elul, Chair of the Arbitration Committee of the International Institute for Conflict Prevention & Resolution (CPR)

Hagit Elul - Chair
Hughes Hubbard & Reed LLP

Andrew Behrman
Baker Botts L.L.P.

Frances Bivens
Davis Polk & Wardwell LLP

Naomi Briercliffe
Allen & Overy LLP

David Brodsky
Brodsky ADR LLC

John Buckley
Williams & Connolly LLP

Thomas Childs
King & Spalding

James Cowan
Shell International Limited

Jeffrey Crabbill
State Farm Insurance Companies

Bernardo Cremades
B. Cremades y Asociados

Jennifer Glasser - Vice-Chair
White & Case LLP

James Duffy
Baker McKenzie

Elizabeth Edmondson
Jenner & Block LLP

Barry Garfinkel
Skadden, Arps, Slate, Meagher & Flom LLP

Roger Jacobs
Jacobs Center for Justice and Alternative Dispute Resolution

Sherman Kahn
Mauriel Kapouytian Woods LLP

Michael Lampert
LampertADR

James E. Lozier
Dickinson Wright PLLC

Paul Lurie
Early Dispute Resolution
Ms. Elul welcomed the members of the Arbitration Committee of the International Institute for Conflict Prevention & Resolution (“CPR Arbitration Committee”) in attendance and began the Meeting by updating the Members on the cross border dispute resolution project on India.

I. Alternative Fee Arrangements (“AFAs”)
Ms. Elul introduced James Cowan, Associate General Counsel for Litigation in Europe, Africa, and Asia at Shell International Ltd. (“Shell”), who called in the meeting from London and agreed to talk about Shell’s perspective and philosophy on AFAs in international arbitration.

Mr. Cowan observed that, while international arbitration offers great benefits for corporations at the international level, it is currently criticized as too costly and lengthy and because only a small circle of arbitrators get the majority of the appointments, leading to further cost increases and delays.

Mr. Cowan argued that the responsibility for pushing the industry to make the required adjustments lies with in-house counsel, since outside counsel does not have real incentives to change the billable hour system.

Shell is in the process of entirely abandoning the billable hour model. Only a fourth of Shell’s existing matters is still on billable hours.

Several factors have to be considered when negotiating AFAs. The timing of the discussion about AFAs is important. The most appropriate moment to engage in discussions about fees is before the litigation commences and the corporation has to hire outside counsel.

AFAs are not designed to set unrealistic expectations or to be a race to the bottom. They serve to share the risk between the corporation and the law firm and enhance the efficiency of the arbitral process and the quality of the outcome. Corporations and law firms must work to negotiate an agreement aligning the corporation’s and the law firm’s business objectives, where ethical rules in place allow it.

*What kind of AFAs work in practice?*

Fixed fees is the most preferred and appropriate form of AFA in international arbitration. Typically, fees are fixed according to the each phase of the arbitration and are built around what actual work each phase entails. The conversation between the parties revolves around the expectations and milestones for each phase and the allocation of risk as to which party will bear the costs for out-of-scope work.

*Can you tell us a little bit about Shell’s Request for Proposal process?*

Mr. Cowan’s discussion was limited to RFPs in international arbitration. Shell’s internal rules require an RFP. The RFP that Shell provides to law firms contains information on the complexity of the case, a summary of the facts, and the key documents of the case. Mr. Cowan’s preference in conducting the RFP process is that all of the law firms competing for the work (or at least 2 of the law firms) be on the panel. Shell’s selection process is iterative. Before the law firms return their proposals, Shell holds a conversation with the law firms to see if they understand the case. Shell also shares any critical facts that developed between the first meeting and the law firms’ proposal submission. Shell typically requests the firms to lay out their work plan and strategy and explain where they want to take the case. Shell may have questions on the law firms’ assumptions that Shell may discuss with the law firm, and the firms may sometimes come up with a legal theory or argument that Shell had not considered.
The cheapest bid does not always win the case. In one instance, for example, Shell chose the law firm with a higher bid but with a clear strategy on how it was going to deal with the experts, and defeat all of the claims on jurisdictional grounds.

The scope of work and the AFAs are defined at the bidding process, much like a commercial negotiation. If the law firm bids for three experts, but ends up with four experts, the fourth expert’s fees is out of scope. Out of scope work is usually not unforeseeable, not in arbitration. Mr. Cowan observed that a bifurcation of the proceedings or an unexpected counterclaim are not events that the firm could not have guarded against. Shell expects its law firms to be sophisticated enough to anticipate such developments.

After the process is over and a law firm is selected, Shell will have a face-to-face with the other law firms to explain the reasons of Shell’s choice.

Mr. Cowan agreed with comments that the process was robust and that Shell gave law firms a lot of information and an opportunity for strategic discussion. He added that the choice of outside counsel and the selection of the arbitrator are critical decisions for Shell.

What is Shell’s perspective on the outside counsel’s incentives in trying to get the case?

Mr. Cowan had one hard message for outside counsel—hourly rates will not survive because do not align with big business. Arbitrations and litigations have become so big that the billable hour model is unsustainable. A good AFA does not mean that the law firm will go out of business; it means that both parties have to assess the risk and negotiate against it. A law firm must also be careful not to underbid. If a law firm submits a low bid, Mr. Cowan will test it very thoroughly.

How do you track the success of AFAs?

To test the success of an AFA, Shell has created a case management plan based on the CPR’s Early Case Assessment Toolkit. Shell’s Sourcing Team also crunches numbers and keeps track of where the Legal Team stands on fees and how many change-of-scope requests from law firms they have been getting. Other metrics measuring the success of AFAs include: (i) the quality of the relationship with outside counsel (e.g., if Shell is in a constant battle on fees with outside counsel the relationship is not working); and (ii) whether law firms are still happy to pitch for Shell’s work.

Do the law firms submit hourly rates and do you compare those with the AFA?

Mr. Cowan does not personally look at those rates. Shell’s Sourcing Team, however, looks at those numbers because it is important to reverse-engineer the law firm’s economics, look at the hours worked, and understand why law firms may not view the AFA as profitable.

How do you manage the arbitrators’ compensation?

The hourly rate model for arbitrators faces similar challenges. But rather than focus on arbitrator fees, Shell tries to influence the arbitration through the arbitrator selection process. Shell will check whether the arbitrators are willing to use the available tools to manage the arbitral proceeding or if they fail to
exercise any management authority. Shell keeps up with who they appoint and what these arbitrators do and how that works. Shell will also assess whether the chairman is in control of the proceedings in a disciplined way, without any undue complexity or disruption.

*Does Shell use success fees and do they work?*

Shell does not insist on it and law firms are reluctant. Some jurisdictions also do not allow it. Another challenge is that the parties have to define success, especially in arbitration since arbitration awards can be ambiguous. But success fees is a form of AFA that may allow a law firm to reduce costs on some hard-and-fast part of the arbitration if it thinks it can do it in a more efficient way than other law firms.

*If you have a fixed fee that settles early will you still pay the fee in total?*

It depends on how the AFA is drafted. Part of the point in negotiating a fixed fee is that it incentivizes the law firm to complete the work with less effort. If it can do the job with less effort, it can keep the money.

*Does Shell evaluate law firms based on their dispute resolution skills?*

Mr. Cowan noted that dispute resolution is a key part of the selection process and it is critical for a law firm to have that sort of skill set.

**II. Other Agenda Items**

**A. Next Steps on AFAs**

The CPR brought Jim Cowan to get feedback on how to develop efficient guidelines for AFAs. Hagit Elul noted that the CPR now needs to coalesce to move forward and invited the Members to share their thoughts on the topic in light of Mr. Cowan’s comments.

The Members of the CPR noted that: (i) since AFAs are the new reality, law firms have to adjust and build a closer relationship with in-house counsel on this issue; (ii) international arbitration is more conducive to fixed fees; (iii) the cost and compensation of arbitrators is a much smaller portion of the fees and thus less relevant; and (iv) the CPR should canvass what has already been done with respect to AFAs by other institutions to understand what CPR can bring to the table.

**B. Update on the Work of the Cyber Security Task Force**

Olivier André and Hagit Elul have been working on behalf of the CPR Cybersecurity Task Force with the International Congress and Convention Association and the New York City Bar Committee on International Commercial Dispute Resolution to develop a protocol on cyber security in international arbitration.

The Task Force has been working very hard with a broader working group and has prepared a draft of the protocol that will be circulated for comment. A finalized draft will be circulated at the Conference for general feedback.
Olivier André noted that the CPR is the first institution with a provision on cyber security in its Rules. Rule 9.3 requires the tribunal to consider the possibility of implementing steps to address issues of cybersecurity and to protect the security of information in the arbitration, and requires that these matters be discussed at the onset of the proceedings.

C. The 2018 Non-Administered domestic and international Rules and the Young Attorney Rule.

On March 1, 2018, the CPR released its 2018 Non-Administered domestic and international Rules, which among other things, incorporate consolidation and joinder provisions and the new young lawyer rule.

Anna Hershenberg noted that in order to support the development of the next generation of lawyers, the CPR has introduced a new rule encouraging lead counsel to permit more junior lawyers with less arbitration experience to examine witnesses at the hearing and present argument. The rule is meant to create more opportunity to train lawyers in an arbitration setting. The CPR is the first arbitral institution to implement such a rule.

III. Next Meeting

The next CPR Arbitration Committee meeting will take place on May 10, 2018.

The meeting concluded at 1:30PM ET.