Kluwer Arbitration Blog

2024 PAW: Full House for the First-Ever PAW In-House Counsel Event

Antoine Cottin (Assistant Editor for Europe) (Laborde Law) · Thursday, March 21st, 2024

As part of Day 2 of the 8th edition of the Paris Arbitration Week ("PAW"), it was in the magnificent First Chamber of the Paris Commercial Court, one of the oldest jurisdictions in France and the place where the International Chamber of Commerce ("ICC") was established in 1923, that the PAW Board invited all PAW partners to the very first PAW event organized with – and for – in-house counsel.

Tailored as a forum for in-house counsel from diverse backgrounds and industries to meet, connect and discuss topics they encounter on a daily basis, the event seems to be the first of a series.

In his welcoming remarks, President Patrick Sayer recalled that the Paris Commercial Court is not only an efficient jurisdiction including 180 non-professional judges who altogether render around 60.000 rulings per year (with only 2% being overturned) in an average time of 12 month, but also a modern business-oriented jurisdiction which can hear cases in English and adapt its rules of procedure to each specific case. Taking advantage of an audience largely composed of in-house counsels, President Sayer made a call for applications for the Court's new recruitment campaign.

In turn, PAW Co-Presidents Marily Paralika (Fieldfisher) and Benjamin Siino (GBS Disputes)

explained that the event was based upon an underlying idea of unity, with the aim to bring altogether to PAW not only counsel, experts and founders, but also in-house counsel.

There were two panels, one moderated by Ioana Knoll-Tudor (Addleshaw Goddard, PAW Co-Secretary General), and one by Claire Pauly (Jones Day). They featured the distinguished speakers: Alexander Fessas (Secretary General, ICC), Jackie van Haersolte-van Hof (Director, LCIA), Jurriaan Kien (SBM Offshore), Mimi Lee (Chevron), Olga Mouraviova (Senior Arbitration Counsel, Engie), Kevin Nash (Registrar, SIAC), Stéphanie Smatt-Pinelli (Orano) and Madeleine Thörn (Deputy Secretary General, SCC).

Lively exchanges of experience were then held as part of two panels. The event was held under the Chatham House Rules, hence, this blogpost offers only a general overview of the issues discussed without revealing the identity or affiliation of any of the speakers.

Panel 1: A Practical Checklist When a Dispute Arises

The first panel proposed to discuss the various steps in-house counsel must accomplish from the moment a dispute arises.

Have a Good Arbitration Clause

As a first point of this in-house counsel checklist, the panel emphasized the obvious necessity to have a good arbitration clause, i.e. a clause that (i) is simple to avoid complex contract interpretation, and (ii) provides for quick and cheap solution and a seat that is not too far away. The panel agreed that standard clauses are simple enough, and should be adapted only when there is a specificity in the case.

Efficient Record Management

Turning to the second point of the checklist, the panel recalled the importance to have an efficient record management. Record management and contract knowledge are issues very frequently faced by in-house counsel when a dispute arises. One solution is for legal teams to establish record processes at the time contracts are being negotiated.

Knowing Your Colleagues

Along with this second point comes a third checklist point, which the panelists labelled as “knowing your colleagues”. The negotiation team being most of the time different from the executing team, gathering all relevant knowledge about a case or a contract requires an in-house counsel to grab information from other persons involved in the project. It is thus crucial to know who is the financial or operational person who was in first line during the project to avoid any loss of information. The panel however agreed that a good balance is to be found, first because not everything should be recorded, but also because a too strict or inefficient record management can lead to a considerable loss of time and productivity. Sometimes these interactions with other colleagues also highlight the necessity for non-lawyer colleagues to be trained on not writing prejudicial things, which led the panel to propose a training entitled “what if it goes to arbitration?”.

How Are Lawyers Picked?

Recalling that every day a notice of dispute is received is a bad day, the panel later addressed the internal steps to be taken before calling a lawyer. Although these steps largely depend on the specific circumstances of each case, the panel agreed on the fundamental importance of having a good pluridisciplinary team, i.e. including for instance finance or tax people, that can cooperate with the legal team. Lawyers need to be on top on that.

As soon as the required internal steps are taken, how do in-house counsel pick the lawyer? The panel reviewed a number of requirements and agreed that of crucial importance is the knowledge of a specific industry, and in particular their strategic vision on the industrial sector and the company's activity, in other words beyond the sole dispute. The panel opined that lawyers too often want to make their deal, while they should think more about the long-term relationships of the company.

A further criterion is that costs must be reasonable. Considering that in-house counsel know the work and the necessary tasks to be undertaken, the need for trust when hiring a counsel should be stressed.

Although different tools are used to select lawyers (panels, tenders etc), the panel added that gathering recommendations from fellow colleagues remains a safe option.

Legal Analysis

Once the factual analysis has been internally conducted, in-house counsel can start their legal analysis. A recurring problem identified by the panel was that legal teams are often pressured to send a letter or submit a document when this legal analysis has not been finalized.

At the time of assessing all available options, the panel agreed that arbitration is often seen as damaging the relationship or the project involved, while mediation is now almost a mandatory pre-condition in all cases, especially when the disputing parties agree to it. In any event, in-house counsel will have to give predictions, a risk assessment, and estimate the costs and time of the proceedings. These predictions are generally not reviewed by an external counsel.

Panel 2: The Appointment of Arbitrators by Arbitral Institutions

Another important theme of the discussion was the methods and approaches followed by arbitral institutions when they are called to appoint arbitrators.

A few statistics about the practice that different institutions follow were provided. For example, in 2023, there was an institutional appointment by the SCC in 37% of cases. Despite the LCIA's default rule that the institution selects the tribunal members (Article 5.6 of the 2020 LCIA Rules), arbitrators were appointed by the parties in 48% of cases, thus reflecting that the parties' agreement applies in priority. Looking at the ICC, also in 2023, the arbitrators were nominated by the ICC Court in 27% of cases, whereas the parties did so in 73% of cases.

The general sentiment seems to be that the appointment of arbitrators is a very important task that arbitral institutions may be called to do Others also mentioned the need to improve list-procedures.

How Arbitrators Are Picked?

Institutions first base their selection on the basis of criteria set out in the arbitration clause. Among some of the qualifications that are frequently agreed upon by the parties are , e.g. specific legal titles (such as KC/QC, retired judge etc.), language requirements, or the reference to specific commercial expertise. Among all the parties' creativity (identified by the panel as a trend), one difficulty arises with clauses referring to individuals "with significant experience in international arbitration", which remains a standard difficult to set.

Aside from the clause, institutions may rely on other important parameters, among which are (i) the place of the parties, and (ii) the applicable law. Further, appointments are more and more influenced by the utmost necessity to promote diversity, in all circumstances. Prior experience of handling an arbitration as a presiding arbitrator can also be a decisive criterion. In practice, some institutions may pre-select five names that are then submitted for consideration.

Of course, criteria such as the candidate's availability, the content of his/her statement of disclosure and the possibility to assess the veracity of any evidence submitted, diversity, and most importantly, that the candidate has not been appointed by the ICC Court within the last 12 months.

As per the view of one in-house counsel in the audience, the understanding of the industry is underestimated. The availability of the arbitrator should be an important criterion, as users of arbitration are for now unsatisfied with the current situation. The perfect profile should be efficiency-driven and arbitrators would benefit from being trained to project management.

Practice and Trends

In practice, parties seem to be rather satisfied with institutional appointments in most instances, while the list-procedure often works well. An institutional appointment is also particularly suitable when the parties do not have the full overview over the dispute that they think they have.

Conclusion

This two-panels event concluded with the announcement of the creation of a "group" of and for in-house counsel, and a cocktail in the Court's First Floor Hall. Judging by the presence of a large number of in-house counsel and PAW partners representatives, the event was a first successful gathering for what promises to be a stimulating forum in the subsequent years.

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