CPR Arbitration Committee

Friday, January 11, 2019
12:30 pm to 2:00 pm (ET)

White & Case LLP
1221 Avenue of the Americas
New York, NY 10020

From the US:	International:
Dial-in number: +1 646-948-1606 PIN: 95953 Optional Web Link: www.uberconference.com/ahershenberg	1. Find your Country International Access Number Here: www.uberconference.com/international 2. Enter Conference Number: +1 646-948-1606 3. Enter PIN: 95953

Attendees

Hagit Muriel Elul – *Chair*
Hughes Hubbard & Reed
In Person

Jennifer Glasser – *Vice-Chair*
White & Case LLP
In Person

Helena Tavares Erickson – *Staff Liaison*
CPR Institute
In Person

The other attendees at this meeting were not recorded.

Minutes

1. Welcome and introduction

The meeting was moderated by Jennifer Glasser, Vice-Chair of the Arbitration Committee of the International Institute for Conflict Prevention & Resolution (CPR)

Ms. Glasser welcomed the members of the Arbitration Committee of the International Institute for Conflict Prevention & Resolution (CPR) and began the meeting by introducing Mr. Jim Boykin, partner at Hughes Hubbard, who subsequently held a presentation on international arbitrations arising out of Russia's annexation of Crimea.

2. Presentation by Jim Boykin of Hughes Hubbard on international arbitration arising out of Russia's annexation of Crimea.

Jim Boykin presented the genesis of and the latest developments in several international arbitrations arising out of Russia's annexation of Crimea.

The arbitrations are governed by Ukraine-Russia BITs. The cases raised in particular issues of jurisdiction, and of post-award jurisdiction; thereby complementing the discussion of post-award jurisdiction issues raised under Schein that SCOTUS decided on Jan. 8.

Russia did not participate in the UNCITRAL/PCA arbitrations raising the objection that the tribunals were not allowed to entertain jurisdiction over the claims under the BITs invoked because the investments originated from a domestic context. However, all tribunals disagreed with that position. To date, all twelve arbitrators rejected Russia's position, incl. Brigitte Stern who is known to well consider arguments raised be respondents. Ms. Stern is typically appointed by respondents. That is also the case in one of the referenced Crimea-arbitrations. The tribunals held that Ukrainian assets seized after the annexation and under transition laws of the separatist Crimean government and the Russian Federation met the standard of "internationality" as required under the BITs. That argument was also confirmed by the Swiss Federal Supreme Court in set aside proceedings in 2018.

While the Russian federation failed to participate in the arbitrations, it challenged the competence of two Switzerland seated tribunals to the Swiss Federal Supreme Court. The highest Swiss court, however, dismissed the challenges. Among other things, it rejected to hear new factual allegation raised by the Russian party for it deemed those barred since delayed. Moreover, under Swiss laws the highest Swiss court's review of facts were for most parts excluded.

Further challenges are pending before Dutch courts.

The arbitrations are entertained under UNCITRAL Rules and, thus, are generally key to commercial arbitration.

3. Report from the India Task Force

Viren Mascarenhas and Thomas Childs, both King & Spalding, reported on the latest updates on the ***CPR Manual for Cross-Border Dispute Resolution in India*** on behalf of the of the CPR India taskforce.

Mr. Mascarenhas first summarized the genesis of the Manual. CPR member or affiliated lawyers at both leading Indian law firms and international law firms contributed to the supplement. Within the past weeks and days, the taskforce has received and reviewed revised draft chapters from the contributors.

Mr. Mascarenhas and Mr. Childes then gave a quick and general overview on the current draft chapters and their comments on those. It was also pointed out that the draft circulated prior to the meeting was not the latest version. Further comments were included. The latest draft version would be circulated after the meeting. Accordingly, Mr. Mascarenhas invited CPR members to provide comments, if possible, asap, or within the next days.

The Manual is being finalized. Jan. 18 is the deadline for changes to be implemented. The Manual will be presented at the AM in DC.

The draft has not been circulated among the Indian Bar. But Indian and non-Indian lawyers participated. All are connected to CPR. They are either CPR member lawyers, or lawyers of CPR India members.

Some authors take slightly different positions, in particular on controversial and recently amended matters. There was no dialogue yet whether such should be reconciled. However, the taskforce is aware of that issue and might further reconcile conflicting paragraphs.

Mr. André, CPR, thanked Mr. Mascarenhas and Mr. Childs for putting the Manual together with (new) Indian members. The Manual was a great endeavor. Much work was contributed by all involved in the drafting works. Many have already expressed keen interest in the Manual. Mr. André recalled that initially the wish was articulated that a manual would be helpful for India businesses since parties faced difficulties with conducting disputes in India.

Ms. Glasser raised a concern with regard to the chapter on strategic consideration for in-house counsel. The reference that the “Future looks bright” in India seemed bold. She suggested to add language also reflecting caution with regard ti India as a venue. Mr. Childs responded that that language has been already changed in the latest draft. The Manual would point to the fact that India is an unfriendly ADR place. However, there was also some optimism on the ground. Mr. Mascarenhas suggested to take another look at that issue.

All drafts should be sent by Monday, Jan. 14. Those could still be reviewed. Comments could be limited to particular chapters in view of the size of the draft manual, that is 130 pages.

Upon questions asked, Mr. Childs answered that India was a very diverse venue. While some judges were arbitration friendly, as referenced in their decisions, others were not at all, and even hostile. The situation was quite unpredictable. Even at the Supreme Court the situation would be unpredictable. The highest Indian court has many justices which rotate. While the situation might have generally improved, flawed decisions were still happening. Mr. Childs added that, by and large, the Manual does not recommend India as a venue. But that may change. Things may improve substantially.

Mr. Glasser pointed to the fact that even if the seat was not in India but Indian parties involved, Indian courts might interfere in those arbitrations as recently happened.

Mr. Mascarenhas further commented that since sometimes the Indian government was a party, the Indian courts then rather ruled against arbitration. Yet, in commercial contexts, courts were more arbitration friendly. Familiarity with courts and arbitration centers was important for India was very divers with regards to decisions. A lot was depending on what court and what dispute was at issue.

Upon a question, Mr. Mascarenhas answered that arbitrators acting in good faith were not subject to individual sanctions under the revised Indian arbitration laws. That comment would be taken into account for consideration in the Manual.

Finally, Mr. Mascarenhas said that two hefty and important chapters would be distributed after the meeting.

4. Report from the Cybersecurity Task Force

Mr. André spoke about the Cybersecurity Task Force and latest updates with regard to that project. The Protocol was a joint project of the ICCA, the New York City Bar, and the CPR, established in 2017.

The final draft would be presented fairly soon, at the ICA congress in April of'18. Public consultations have ended. A broad feedback was received from the arbitration community. Also a fair number of organizations submitted a feedback.

The working group would currently process that feedback. The goal was to get a final draft ready for March 26, that is for the ICCA Congress in Mexico City. It was also intended to discuss the final draft at the March 27 ICCA conference.

Upon a question, Mr. André explained that the feedback was favorable with regard to the Protocol. That no negative resistance was experienced. Interested professionals were glad that the project was started. It generally raised awareness. The value of the protocol was broadly recognized. Specific feedback was received regarding language and structure of the Protocol.

Thanks to the draft Protocol, some professionals realized they might be not well prepared. They asked for advice what to do. But this was not the purpose of the Protocol. Rather, the protocol would flag concerns. What professionals should be wary about. The Protocol aimed at striking a balance between general guidance and providing particular solutions for particular cases. The Protocol could not be too detailed with regard to any practical issues that might arise under cybersecurity because changes would be likely to follow. Future amendments were to be expected as much as further developmenst in cybersecurity.

Mr. Childs asked how to practically use the Protocol. Cost and time in arbitration were already an issue. If the Protocol were to be implemented in a case for a specific value. How much time should be scheduled for Protocol purposes? Would it take 1 hour or three days?

Mr. André answered that the Protocol provided for model agreements for enhanced security and guidance of what parties should be wary of. One had to go through a risk analysis. Then, and accordingly, a lower or higher level of security had to be implemented. Much depended on the case and on who the participants were.

Mr. André answered a question that Google or similar companies were not contacted to provide made to measure solutions. The Protocol would address what one had to implement to meet minimal or certain standards. One would assess the risk and then would adapt measures on a case by case basis. While everyone should follow minimal standards. It might well be that cybersecurity experts will be required for some cases.

A discussion followed where providers were suggested. It was also pointed out that ICDR was experimenting with a platform. A platform should be adaptable because changes were not likely but sure. Flexibility was demanded. CPR would keep track of providers and could be provide with further names.

Mr. André further added that during an international "townhall" meeting the idea was discussed to pool all resources of all institutions to provide for, figuratively and literally speaking, a "Swiss" super fortress. There was a broad discussion on that. In the end, flexibility was deemed prevailing. Arbitration institutions should train arbitrators in cybersecurity.

5. New Committee Business

n/a.

6. CPR Announcements

Jan. 23, CPR's Energy, Oil and Gas Committee's "Cocktail and Conversation", at BakerHostetler's event space in Houston.

Jan. 26-28, CIArb & CPR Joint International Arbitration Training, at Locke Lord LLP in Houston. A few spots were left, please register asap.

Feb. 4, 2019 CPR Canada Conference, with the keynote speaker, the Hon. Thomas Albert Cromwell, former Justice of the Supreme Court of Canada. Fasken offices in Toronto. Organized by CPR Canada Advisory Board.

Feb. 28-March 2. CPR annual Meeting in Washington, D.C. Fairmont Hotel. The program is outstanding. It includes the presentation of the India Manual.