

Arbitration Committee Meeting

Date: March 23, 2021

Time: 12:30 – 1:30

Location: Online (Zoom)

Attendees: Jacob Feinberg; Michael Hoepfner; Helena Erickson; Surya Gopalan; James Hosking; Dennis Lynch; Michael Lampert; Jennifer Glasser; John Pinney; Donald Rose; Ellen Parker; Bernardo M Cremades; Shigeki Obi; Richard Gray; Oliver Armas; Douglas Harrison; Vanessa Alarcon Duvanel; Claudia Diaz; Viren Mascarenhas; John Townsend; Russ Bleemer; Brian Harvey; Urs Laeuchli; Charles Patrizia; Ken Reisenfeld; Steven Hammond; John Warden; Ulyana Bardyn; Lio Bocorny; Noah Hanft; Naiane Melo; Harry Trueheart; Preeti Bhagnani; Stephen Rovak; Marc Goldstein; Kevin O'Gorman; Michael Nolan; Chloé Heydarian; Giacomo Rojas Elgueta.

Minutes

Ms. Glasser welcomed members of the Arbitration Committee of the International Institute for Conflict Prevention & Resolution (CPR) and began the meeting. The meeting was held by video.

1. Update on the *Servotronics v. Rolls Royce* case

Mr. Pinney provided an update on the *Servotronics* case. He explained that a certiorari petition had been filed concerning the scope and application of Section 1782 of the U.S. Code to private international commercial arbitrations. He noted that a Circuit split had developed on this issue, with the 4th and 6th Circuits in favor of allowing Section 1782 discovery in the U.S. for U.S. parties to private international arbitrations, with the 2nd, 5th, and 7th Circuits ruling otherwise.

Mr. Pinney then provided a summary of the underlying facts and procedural history of the *Servotronics* case. He noted that CPR filed an amicus brief in January 2021. He also noted that the Supreme Court granted certiorari on March 22 to resolve the Circuit split. Mr. Pinney said that the arbitration tribunal hearing the *Servotronics* case have scheduled a virtual hearing in that case in May, noting that as a practical matter it would be likely that a final award would be issued before the Supreme Court issues an opinion in the case. Mr. Pinney noted that this may give rise to further party submissions concerning the mootness of the question before the Supreme Court.

2. Panel discussion on adapting advocacy to a virtual hearing

Ms. Glasser moderated a panel discussion focusing on the subject of advocacy in a virtual hearing environment. Ms. Glasser started by introducing the three panelists, Mr. Goldstein, Mr. Hosking, and Mr. Hoepfner.

Ms. Glasser asked Mr. Hosking about what configuration of participants he found most effective to maximize impact in a remote hearing. Mr. Hosking said that his preferred way is to proceed, when acting as an advocate, with the full counsel team in the office, but with each presenter in his / her own office with his / her own IT set up with full control of the camera, screen, and other A/V equipment. Ms. Glasser asked whether witnesses testifying from home were perceived by tribunals to be more

authentic. Mr. Hosking said potentially, yes, but noted that the impact depended on the message counsel wished to convey. He noted, for example, that the fact a witness travels could be seen to emphasize the importance of the case and issue.

Ms. Glasser asked Mr. Hoepfner about his views on the ideal configuration of a room for advocacy. Mr. Hoepfner said it would involve keeping the camera at eye level, ensuring adequate light on the speaker's face, and using a real background to provide depth of field. He said that the location matters less if these features are accounted for. Mr. Goldstein explained that in his experience the most important aspect of presentation during a virtual hearing is ensuring solid connectivity of audio and video. He said it matters less where the presenter is, but noted that distortion of audio or video distracts significantly from the presentation.

Ms. Glasser asked whether virtual hearings create impediments for arbitrators. Mr. Goldstein explained that virtual hearings typically require more planning initiative from the arbitrators, and said that collaboration between arbitrators was important to ensuring that a tribunal as a whole is technologically proficient to handle a virtual hearing.

Ms. Glasser asked about screen fatigue in virtual hearings. Mr. Hoepfner explained that this happens faster than one would think. He recommended that speakers check their peripheral vision periodically, and change aspects of their presentation in order to keep listeners engaged. Mr. Hosking noted that he has observed hearing days shortening due to time differences between attendees, and the fear of "zoom fatigue." He noted that, for counsel, it is worth thinking about dividing up the speaking roles between the team to provide variety and mitigate the screen fatigue of viewers.

Ms. Glasser asked Mr. Hoepfner about presentation tips in a virtual hearing. Mr. Hoepfner said that the same thing that sets one apart in person can set one apart in video. He advised speakers to try to record themselves so as to evaluate their sense of perception versus reality. He also said that, instead of trying to look at all attendees on a screen, speakers should pick one person and focus on them, and rely on that individual for feedback cues on their performance. Ms. Glasser asked how speakers should adapt this advice where, for example, it is necessary to view the reactions of the full tribunal. Mr. Hoepfner explained that speakers in a virtual hearing should practice switching their view of others' screens discretely and quickly.

Ms. Glasser asked whether the panelists favored the use of 360-degree cameras. Mr. Goldstein explained that a 360-degree camera gives a speaker an opportunity to enhance their impression by use of their environment. He noted, however, that many arbitrators are concerned only with the testimony of the witness. Mr. Hosking said that he had not ever seen a proper 360-degree camera used, but only a request that the witness manually swivel the computer to show nobody else was in the room. He also noted that he felt security concerns about note-sharing with witnesses are overblown because good counsel would not permit it and the risks of getting "caught" are so high. Mr. Hosking added that, in his view, the hardest part of a remote hearing was getting witnesses used to the process, including adapting to looking straight at a camera and having several eyes directly on the speaker, which he noted could be considered rude in some cultures. Mr. Hoepfner noted that witnesses might consider adding a "comfort moment" – a word they can write down, or a picture they can add to the screen – to remind them to modulate their voice and be comfortable.

Ms. Glasser asked if the panelists had experienced stylistic changes in presentation from counsel in an effort to adapt to the virtual environment. Mr. Goldstein noted that he observed greater courtesy towards witnesses and less frequent use of tones that might be construed negatively such as skepticism, irony, or hostility.

Ms. Glasser asked about changes in clothing worn by counsel and arbitrators. Mr. Goldstein explained that he has observed a few arbitrators adopting a less formal style, but noted that most people continued to dress formally for hearings. Mr. Hosking concurred that most people are sticking to business attire. Mr. Goldstein noted that, beyond clothing, posture and eye contact count for a lot in a virtual hearing. He noted that, if a witness is reclining, or snacking during testimony, it is a step in the wrong direction.

Ms. Glasser asked about things that should be avoided in a virtual hearing. Mr. Hosking suggested that counsel should ensure a witness's environment—lighting, backdrop, headphones, reduced ambient noise, etc.—works well for virtual testimony. Mr. Goldstein noted that arbitrators can help in this regard by directing counsel in advance to select a suitable venue to be used by witnesses, as well as the nature of audio / visual devices. Mr. Hoepfner added that speakers should avoid the temptation of multitasking when appearing on a screen.

Ms. Glasser asked whether virtual hearings could replace physical hearings in the future in certain circumstances. Mr. Goldstein said that online hearings are a good and effective tool, and help tribunals obtain a clear image of witnesses and examining counsel with fewer distractions. Mr. Hosking said that he believed remote hearings in some form are now here to stay, and that this would partly be driven by concerns of cost. Mr. Hoepfner noted that, based on his conversations with clients, he expects that at least 25% of all business activity has changed and will not revert in the aftermath of the pandemic.

Ms. Glasser concluded the panel discussion.

3. CPR Announcements

Ms. Erickson provided two CPR announcements. First, Ms. Erickson noted that CPR will be hosting a West Coast-focused CEDAR training from April 19. Second, she noted that CPR's Corporate Leadership award dinner would take place on June 3, honoring CBS and its General Counsel. Mr. Erickson said the dinner may be partially in person, and noted that tickets were available on CPR's website.

Mr. Feinberg provided an update on upcoming CPR meetings:

- On March 25, a conflict resolution expert, Molly Peterman, will be presenting a program on managing conflict in the remote workplace.
- On April 6, CPR's Insurance Committee is hosting Barbara Parlin, a partner at Holland & Knight, on bankruptcy issues in the insurance industry.
- On April 8, CPR will be hosting a discussion on mediation confidentiality.
- On April 13, CPR's Government and ADR Task Force will convene, and will address ADR claims involving the U.S. government. The Task Force will host Sarah Gleam (Assistant Director of Civil Fraud at the DOJ) and Reed Stephens (Partner, Winston & Strawn) to discuss this issue.

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Ms. Glasser concluded the meeting.