HERBERT SMITH FREEHILLS

THE CLIENT PERSPECTIVE: AN INTERVIEW WITH JO CROSS, ASSISTANT GENERAL COUNSEL FOR DISPUTE RESOLUTION AND SPECIAL PROJECTS, BP

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Legal Briefings

BP's Joanne Cross discusses issues in arbitration, the nature of in-house counsel's role in the arbitration process and how in-house counsel can get the best out of it.

JO, PERHAPS YOU CAN TELL US SOMETHING ABOUT YOUR CURRENT ROLE AT BP AND WHAT THAT ROLE ENTAILS?

My present role is Assistant General Counsel for Dispute Resolution and Special Projects. Prior to this, I managed the Dispute Resolution team based in Canary Wharf, London. My work is hugely varied and very interesting. I provide advice on contentious issues to a range of different businesses and senior management. This advice covers, for example, issues arising from BP's operations and interests in India, Russia and Algeria, as well as some US cases arising from BP's businesses outside the US. In the course of my role, I also deal with reputational issues and I provide advice, for example, on modern slavery and other business and human rights issues. I am involved in strategic thinking regarding contentious risk mitigation but also retain a role in live cases. I am currently involved in around 20 different matters.

As a disputes lawyer at the heart of BP, I find that I am brought into many and varied conversations with different parts of the business, as well as with many of BP's global functions, such as government affairs, communications, group strategic planning, company secretariat, ethics and compliance, safety and operational risk, finance and audit. Looking at things from a disputes perspective really allows the business to think pro-actively about how we can do things differently and mitigate disputes risk.

WHAT PERCENTAGE OF BP'S DISPUTES IS RESOLVED BY ARBITRATION?

It really varies from year to year. Currently I would estimate around 50% of BP's non-US disputes are being resolved through international arbitration. In previous years, there has been an even higher percentage (between 60 and 70%) of our work involving international arbitration. The ratio of litigation to arbitration arises very much by chance, depending on which disputes fight and which are resolved at an early stage. This obviously depends on an evaluation of the merits of the case at a relatively early stage as well as the commercial considerations which apply to any given dispute.

The reason that BP signs a lot of contracts containing arbitration clauses is the international nature of our work. We do not have a policy mandating arbitration clauses. However, clearly many of BP's businesses have formed a view that it is often preferable in the context of their contracts – we saw a significant increase in the use of arbitration clauses around 15 years ago. In international contracts, counter-parties often seek a neutral forum.

"***Confidentiality is also a positive aspect but the perception of neutrality and independence is often the key driver***"

Enforcement is a relevant consideration but BP has rarely had to take proceedings to enforce an award. Possibly this is because our arbitrations are often against companies in a similar position to BP in terms of their commercial position and reputation which means they tend to honour arbitral awards.

IT IS SAID THAT ARBITRATION COSTS TOO MUCH AND TAKES TOO LONG. DOES YOUR EXPERIENCE SUGGEST THAT THE MORE RECENT FOCUS OF THE INSTITUTIONS AND PRACTITIONERS ON EFFICIENCY AND COST-EFFECTIVENESS IS BEARING FRUIT?

If you asked me about costs and delay 5-7 years ago, I would have given many examples of delay in the arbitration process. In one case we waited two years for an award! But the focus of institutions and practitioners on reducing delay really has had a practical impact on efficiency. In the past we have seen some unreasonable behaviour from arbitrators on costs – for example, a few years ago we experienced what we regarded as very high charges by the arbitrators even when a case settled very early on in the proceedings. However, recent experience has been much more positive in both these respects. There always needs to be focus on cost and efficiency because in comparison to using the courts, when you include arbitrators' fees, the final bill in an arbitration can often be greater.

We find external counsel costs are often much the same whether you are arbitrating or litigating, although using a law firm who can also do the advocacy at the hearing can be an effective way of keeping costs down. We have chosen to bring in barristers for some arbitrations – we are open-minded and it depends on the circumstances of the case – but we had a great experience on a recent case with HSF in which the team did the oral advocacy.

IN A 2015 SURVEY RESPONDENTS IDENTIFIED ARBITRATORS' "DUE PROCESS PARANOIA" AS LEADING TO DELAYS AND AN INCREASE IN COSTS. WOULD YOU AGREE WITH THAT ASSESSMENT?

I would agree completely that this exacerbates time and costs. In one of our cases, a tribunal refused to deal with a key jurisdictional point up front when doing so could have substantially reduced costs. Other examples where the tribunal has not been procedurally strong include decisions on disclosure and procedural questions, as well as the handling of key potentially dispositive issues. I can also cite some good examples of procedural toughness so it really does depend on the arbitrator but, as a general rule, I believe users want arbitrators to be more procedurally robust.

SIAC HAS INTRODUCED A RULE THAT PERMITS THE EARLY DISMISSAL OF A CLAIM OR DEFENCE THAT IS MANIFESTLY WITHOUT LEGAL MERIT, OR MANIFESTLY OUTSIDE THE JURISDICTION OF THE TRIBUNAL. DO YOU REGARD THIS AS A SIGNIFICANT INNOVATION WHICH WILL BE WELCOMED BY USERS SUCH AS BP?

I am encouraged by these kinds of innovations as they help the process become more efficient. Most of the arbitration clauses which BP enters into are dealt with by the business and only a small percentage of clauses come via the dispute resolution team. Due to the size of BP, we do not and could not have oversight of the drafting of all arbitration clauses and so it is very helpful to have these provisions come from the institutions in order for them to find their way into our arbitration clauses.

THE 2010 QMUL SURVEY, RANKED "NEUTRALITY/ INTERNATIONALISM" AND "REPUTATION/ RECOGNITION" AS THE TOP TWO FACTORS FOR IN-HOUSE COUNSEL WHEN CHOOSING AN INSTITUTION. AGAINST THIS BACKDROP, DO YOU CONSIDER THERE IS SCOPE FOR LOCAL INSTITUTIONS TO DEVELOP?

Those are the top two factors for BP's businesses when including arbitration clauses and this does mean that we are less likely to choose local institutions. However, whilst we may not propose a local institution or a different venue, we may nonetheless consider one in the right circumstances. We do often have to confront different choices of institution (as well as seat and governing law) where this is demanded by a counter-party, so there may well be a role for regional institutions in some circumstances.

"***. .. we have had positive experiences of arbitrating in Stockholm and find the SCC is both practical and efficient***"

ON A GENERAL LEVEL, DO YOU PRIORITISE CHOICE OF SUBSTANTIVE LAW OR SEAT OF ARBITRATION?

If we could only get one and not the other we would probably go for English substantive law but obviously the seat is very important. Our preference is usually for a seat in London but we have done a number of arbitrations in other venues. For example, we have had positive experiences of arbitrating in Stockholm and find the SCC is both practical and efficient. We have not had many Singapore arbitrations recently, but Singapore is also considered to be a good choice of venue.

WHAT WAS THE MOST SIGNIFICANT DIFFERENCE FOR YOU WHEN YOU MOVED IN-HOUSE?

How many different things you have to juggle in any one day! An in-house lawyer's role can be extremely intense and often requires very high levels of concentration. You can be asked any number of different questions, many of which are difficult to predict. The week ahead changes a lot from day to day and psychologically you need to be flexible to adapt to that level of uncertainty.

You have to be very nimble and think on your feet – you often do not have the luxury of being able to complete in-depth legal analysis before you give a view on what the position is. My clients are non-lawyers in BP's various businesses and, in this context, I am not likely to be thanked for giving a legally detailed view which is subject to a number of caveats. Clients are usually focussed on the end-game and do not want to take a meandering path to get there. You must be willing to give your first impression and try to be succinct and pragmatic.

NOW YOU SEE DISPUTE RESOLUTION FROM THE IN-HOUSE SIDE, IS THERE ANYTHING YOU WOULD HAVE DONE DIFFERENTLY WHEN YOU WERE IN PRIVATE PRACTICE?

Understanding how in-house lawyers work is important, as is appreciating the sheer number of different things that in-house counsel are dealing with at any one time. External counsel's advice needs to be very practical and pragmatic. I find using an external counsel who has done a secondment is a real plus. Take someone like Craig Tevendale, who has done two stints with BP in-house – Craig's knowledge about how an in-house team can be embedded with the external counsel team during an arbitration is very valuable indeed.

WHAT IS THE ROLE OF IN-HOUSE COUNSEL IN SHAPING THE ARBITRAL PROCESS?

Both arbitrators and counsel are beginning to realise that the clients want to have a louder voice in arbitrations. Six or seven years ago there were some examples of external counsel being dismissive of clients – it reflected a "closed-shop mentality". The client's voice is being listened to now far more than it was. With the external counsel who know how we work, we are engaged in far more discussion about how we can work together to make the process more efficient. If we use counsel who know us less well we may still have to push for this dialogue, and we do push for it.

So there has been a shift in dynamic in recent years. The working model I have described above, which reflects my perspective from BP arbitrations, has become more balanced between in-house and external counsel.

We have always done a certain amount of the labouring in–house when BP is involved in disputes. Ten years ago we did a couple of arbitrations purely in-house, with barristers used for hearings. The volume of disputes has increased so much that we cannot do that as much. We have the capability but not the capacity, but what we will do is take a share of the labour in-house in order to save costs. We also ensure we have a major input into strategy. We have such experience within the team that we can have an informed discussion with external counsel. We generally all come to the same conclusions. Ultimately, however, the business and in-house team will have the final say.

YOU HAVE BEEN INVOLVED IN A NUMBER OF ARBITRATIONS OVER THE YEARS. DO YOU HAVE ANY TOP TIPS FOR IN-HOUSE COUNSEL IN TERMS OF GETTING THE BEST OUT OF THE PROCESS?

The main advice is that you have to be embedded in the process. This is what we do in the arbitrations we do with HSF. In–house counsel must be part of the process at every stage – not only the big strategic questions but also the detail. If we do not have a good grasp of the detail, we cannot be an effective bridge between external counsel and internal lay clients. The team structure should therefore include external and internal resources and there should be careful consideration as to the most efficient balance of resourcing from the outset.

It is also vital to get buy-in from the business stakeholders, for example, the senior person within the business who will have final say as to strategic decisions. You have to keep that person on-board and regularly updated throughout the process. If you make clear to your external counsel your internal reporting lines and the regularity with which you must report, this can make the process easier.

YOU ARE ON THE SELECTION SUB-COMMITTEE OF THE ICC UK NATIONAL COMMITTEE AND VICE-PRESIDENT OF THE LCIA EUROPEAN USERS COUNCIL. DO YOU THINK THERE IS SCOPE FOR A GREATER BALANCE BETWEEN PRIVATE PRACTITIONERS, BARRISTERS AND ARBITRATORS ON THE ONE HAND AND USERS OF ARBITRATION ON THE OTHER HAND, AT INSTITUTIONAL LEVEL?

In-house clients are increasingly having a voice and being asked to be involved in the process of arbitration. As well as the ICC and the LCIA, I am also involved in CEDR and the Global Pound Conference. I do not think in-house counsel would have been invited to take institutional roles 10 years ago. It remains a challenge for busy in-house counsel to be involved in the institutions as much as they would like but it is undoubtedly important if in-house counsel want their views reflected. I would encourage more in-house counsel to get involved and those of us who have been around longer are increasingly encouraging more junior members of our teams to participate. The institutions are making an effort to involve users, but part of the problem may be that there are not enough specialist disputes in-house counsel to fill these roles.

"***In–house counsel must be part of the process at every stage...***"

WHAT ARE THE MOST IMPORTANT CHARACTERISTICS IN CHOOSING AN ARBITRATOR? DOES BP BUILD UP ITS OWN INSTITUTIONAL KNOWLEDGE ABOUT POTENTIAL ARBITRATORS?

We have our own institutional knowledge which we share within our team and we compare our views with our external counsel. Ultimately, the type of arbitrator you want depends very much on the case. However, we may well seek to avoid those who over-sell themselves. We do not want to appoint someone who is too busy with many appointments. It makes it too difficult to schedule hearings. Also, if we see that an arbitrator is generally under-prepared, we will not appoint that arbitrator again.

We want strong arbitrators – particularly a strong presiding arbitrator - in terms of procedural robustness. They need a strong case management skill set which will deliver an efficient process. If an arbitrator delivered on our expectations in terms of case management, integrity, and due preparation and we felt that it was a fair process and a reasoned award, we may appoint that person again even if they had found against us in terms of substantive outcome.

DO YOU HAVE ANY VIEWS ON WHETHER THERE SHOULD BE SOME SORT OF EQUIVALENT TO "TRIP ADVISOR" FOR ARBITRATORS?

Factual information is useful. For example, knowing how many tribunals an arbitrator is sitting on at any one time is valuable. Beyond this, there are a number of possible pitfalls. In terms of subjective feedback, you need to be able to trust the person who is giving the feedback and there are no safeguards against manipulation of this kind of tool. We will always speak to our own team and external counsel when selecting an arbitrator, rather than looking at a directory.

YOU WERE ON THE STEERING COMMITTEE FOR THE EQUAL REPRESENTATION IN ARBITRATION PLEDGE, WHICH WAS LAUNCHED LAST YEAR AND AIMS TO INCREASE THE REPRESENTATION OF WOMEN ON ARBITRAL TRIBUNALS. WAS THIS KIND OF STATEMENT OVERDUE?

I am really pleased to have been part of this initiative. For such a long time, the usual suspects for arbitrator appointments have been men and when you attended conferences, the vast majority of the senior attendees were men. Clients simply have not seen female arbitrators and that has to change. The Pledge has made BP reflect on our appointments and it seems that there has already been a noticeable improvement in the consideration of female arbitrators in lists of potential candidates. I hope and believe that this initiative will spark change. Certainly in my role on the ICC UK National Committee, we have been doing as much as we can to include female arbitrators.

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