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GCs See Potential In Shaking Up Arbitration Fee Norms

By **Michele Gorman**

Law360 (August 23, 2018, 11:58 AM EDT) - The American Arbitration Association's recent introduction of an alternative fee arrangement option is a progressive step in making costs more predictable and simplifying budgeting for eligible cases, but it will take time to truly glean whether the move increases interest in the forum, according to general counsel and other legal professionals.

So far, the corporate legal community has generally praised the program, which the AAA has said is the first of its kind offered by a national provider of alternative dispute resolution services. The organization unveiled the alternative fee option on Aug. 6.

The program allows parties in arbitration to choose from two types of alternative fee arrangements: a fixed fee or capped fee arrangement. With fixed fees, all parties agree on a predetermined cost for the pre-hearing, hearing and post-hearing phases of arbitration. In a capped fee arrangement, all parties approve a maximum amount of spending for the entire arbitration process.

"It is a welcomed development to make arbitration a viable option for dispute resolution in cases where you don't have a huge commercial interest and where you do want to control your costs," said Eeva Hakoranta, vice president and general counsel for Nokia Technologies.

Alternative fee arrangements can offer corporate legal departments a level of certainty in budgeting, and in recent years have increased in popularity and use.

The 2018 Association of Corporate Counsel Chief Legal Officers Survey found that 63 percent of departments reported using some combination of hourly billing rates and alternative fee arrangements, based on feedback from 1,275 CLOs in 48 countries. The most recent outcome was slightly lower than in 2017, but still a significant jump from the 42 percent who used this combination of rates in 2016.

Eric Tuchmann, general counsel and corporate secretary of the AAA, said the major

alternative dispute resolution provider listened to users' concerns and suggestions about which options might improve the process.

While Tuchmann said alternative fee arrangements haven't yet widely taken hold for commercial arbitration cases, he said the new program is "a very innovative way of approaching something that exists in the litigation context and bringing it into arbitration."

From a corporate perspective, the option makes costs more predictable. GCs are under pressure to forecast budgets, and the new program has potential to provide in-house counsel with certainty around knowing how much they'll spend.

"A huge concern for GCs today is litigation that spins out of control, where you can't contain the costs of outside counsel or in this case arbitration," said Laura Heltebran, senior vice president and deputy general counsel of Hilton.

She said she doesn't think the program is necessarily a novel idea, but acknowledged it's a big deal for the AAA because alternative fee arrangements may not be as evident to the arbitration process as they are at, say, a law firm.

"Anytime we can work for a vendor such as the arbitrators, where we know going in what our fee is going to be and we can project it, gives us the predictability and certainty we need," Heltebran said. "We absolutely embrace this type of framework, and would use it where we can."

If managed well, arbitration can be less expensive and more efficient than litigation, and lead more quickly to a final outcome. But the cost-savings benefit can shrink when elements of litigation are introduced.

Kim Taylor, senior vice president and chief legal and operating officer at private alternative dispute resolution provider JAMS, said in recent years the organization has been mindful of parties' sensitivities to the costs of litigation, arbitration and any sort of dispute resolution process, and previously introduced expedited procedures in which parties can opt in to speed up the arbitration process.

"It seems that's what AAA is trying to address here, and provide other means of controlling costs," she said. "It will be interesting to see whether that's of interest to the parties and the types of cases that might lend itself to those types of fee structures."

But that's not necessarily the case at the CPR Institute for Conflict Prevention & Resolution, where corporate users haven't expressed an interest in alternative fee arrangements for arbitrators, likely because the associated fees are a small component of the overall fees paid, said Noah Hanft, president and CEO. Under CPR rules, parties are free to negotiate fee arrangements with their arbitrators.

One downside to the AAA program is the uncertainty about how many arbitrators will agree to the terms.

"If it's not attractive from their point of view, then you will not get the good arbitrators that you always want to have," Hakoranta said.

She also pointed out that if arbitrators don't estimate cost or time correctly, all involved will ultimately be unhappy.

To Dan Zinn, general counsel and corporate secretary of OTC Markets Group, which operates over-the-counter trading venues for about 10,000 U.S. and global securities, the program is a commonsense arrangement amid an increasingly competitive legal industry.

If the program evolves into the preferred model over time, Zinn predicts it would have a downstream impact when developing agreements and contracts, and implementing provisions.

Zinn, who said he typically uses outside counsel for expert opinion on specific areas of the law, said he would likely be open to considering whether the program should be worked into OTC Markets' agreements, but will first watch whether the AAA modifies as needed.

Taylor agreed. If the program is something the market acclimates to, JAMS might consider the process. But she said she doesn't expect a widespread shift, at least in the near future.

"The whole concept of AFA arrangements have been talked about within the legal industry for a long time. I think there are some segments of the population for which that has been acceptable, but it's not necessarily universally adopted," she said. "I don't know that it will have a huge impact or change in how arbitration is priced going forward. I think it's probably a little too early to tell."

Tuchmann said the AAA has already had recent cases proceed under the new program during a pilot program. While he expects the adoption may be gradual, over time he thinks other organizations will take advantage of the process.

GCs are also wondering how others will respond.

"It seems," Hakoranta said, "we have a trend now to try to make arbitration a more acceptable option for dispute resolution."

--Editing by Rebecca Flanagan.