August 22, 2008

M E M O R A N D U M

TO: All Panelists

FROM: Richard Chernick and Robert Davidson for the NAC

RE: Fees and Costs in Arbitration Awards

We began our review of all Final arbitration awards on January 1. We were pleased to see the generally high quality of our work product (what we would expect of the Resolution Experts™).

One area that was not consistently good, however, is the handling of fee and cost awards. Some awards do not reveal that this issue was even considered; some apply the wrong standard for allocating fees and costs; some acknowledge the issue and "reserve jurisdiction" to consider it but then issue a Final Award thereby preventing any later consideration of any allocation. Some awards allocate fees and costs but do not reveal what was requested, what was opposed and why the Arbitrator decided the issue. Because the amounts in controversy on fee applications are often in six figures and sometimes in seven figures, this is an important element of the process, and our clients deserve a carefully considered determination, and a clear written record of what we did and why. In smaller cases, we suggest a more limited approach (*see* ¶ 4 below).

The basic principles:

1. All Cases will Require Consideration of Fees and Costs. In virtually every case, one or both parties will seek an award of attorney fees, arbitration fees and/or costs. It is common to bifurcate this issue in the Scheduling Order so that it will be taken up after decision on the merits. The Scheduling Order might recite:

Bifurcation of Issues. The issue of the amount of attorneys' fees and costs to which any party may be entitled shall be bifurcated and determined subsequent to the Hearing. The entitlement, if any, to an award of fees and costs shall be determined as part of the Hearing.

2. Determining Fees and Costs is a Two-Step Process. In the Interim Award, the Arbitrator usually determines the entitlement to fees and/or costs based on a reading of the applicable clause, statute or rule in the context of what was determined on the merits in the evidentiary hearing. If there is a prevailing party attorney fee provision, the arbitrator would determine who, if anyone, is the prevailing party for purposes of directing the filing of fee application and opposition evidence and argument:

For example:

* * *

Section 20 of the EAA provides that "the prevailing party in any . . . arbitration proceeding . . . to enforce the terms of this agreement shall be awarded costs of suit, including reasonable attorneys' fees, in addition to any other relief to which the prevailing party may be entitled." Ex. 10. Claimant is the prevailing party and is entitled to be reimbursed its reasonable attorneys' fees, costs of suit and arbitration fees and expenses. Claimant may file an application for fees, costs and expenses by March 20, 2006, together with supporting evidence and argument. Respondents may file opposition evidence and argument by April 3, 2006, and Claimant may reply by April 10, 2006. The matter shall be submitted for final decision at that time unless any party requests an oral hearing, in writing, by April 10, 2006. If requested, the oral hearing shall be conducted by telephone conference on April 17, 2006 at 8:00 a.m. (PT) or at another time as agreed by counsel and the Arbitrators.

3. Fee and Cost Awards are Always "Reasoned." The determination of the issue of fees and costs warrants the same level of analysis and reasoning as other issues in dispute. It is not appropriate to "conclude" that a party is entitled to an award of $xx,xxx in fees and costs without providing a reasoned analysis of pertinent facts and applicable law. We attach a portion of a Final Award where fees were claimed in a substantial amount and the Arbitrators determined that some but not all of the claimed fees and costs were warranted.

4. Fee and Cost Awards in Small Cases. As with all issues, we must be sensitive to the nature of the dispute and particularly the amount at issue. Contracts in smaller cases also routinely contain prevailing party fee shifting clauses. Smaller cases, as well, may contain claims based upon a state or federal statute that grants attorneys' fees to the prevailing party. In non-statutory smaller cases, it would not be inappropriate for you to arrive at a conclusory figure representing a reasonable attorney's fee provided that you go through at least some analysis of the factual bases for your fee award and, in addition, you recite the legal basis (for example, "In accordance with Paragraph X of the

Contract, the prevailing party is entitled to his reasonable attorney's fees. I find that Mr. Y is the prevailing party and, as such, is entitled to the benefit of that clause. Accordingly, I find that $ZZZZ is a reasonable counsel fee for the work performed taking into account the effort required, the need to defend against Mr. W's counterclaim and the amount in controversy.") You may do this provided you are comfortable doing so. Thus, you should have had enough experience either in your practice or on the bench to be comfortable with your fee decision. Otherwise, it is the better practice-- even in small cases-- to ask for affidavits of costs. You might, for example, take the affidavits and dispense with a hearing. In a case where a state or federal statute provides for fees to the winner, you should go through the more lengthy exercise. Many of these statutes provide for the reimbursement of actual fees or fees based on the result achieved, so deciding the issue in an abbreviated fashion would be inappropriate.

5. JAMS Rules Provide Authority for an Award of Fees and/or Costs. Where there is no contractual provision relating to fees or costs, but the parties are proceeding under the JAMS Rules, usually Rule 24(f) will give the arbitrator authority to award arbitration fees and arbitrator compensation. (Rule 24(g) deals with attorneys' fees.)

> (f) The Award of the Arbitrator may allocate Arbitration fees and Arbitrator compensation and expenses unless such an allocation is expressly prohibited by the Parties' agreement. (Such a prohibition may not limit the power of the Arbitrator to allocate Arbitration fees and Arbitrator compensation and expenses pursuant to Rule 31(c).)
>
> (g) The Award of the Arbitrator may allocate attorneys' fees and expenses and interest (at such rate and from such date as the Arbitrator may deem appropriate) if provided by the Parties' agreement or allowed by applicable law.

The only case where there would be no allocation under these rules is if the clause states that the parties shall bear their own fees and costs (regardless of the outcome of the proceeding) or if it is determined that because of the outcome of the case each side shall bear its own fees and costs. The allocation under rule 24(f) may result in a 50-50 sharing, but whether it does or not, your award should state what is supposed to happen, what you decided and the basis for your determination.

Attorneys' fees ordinarily may only be awarded if there is a provision in the clause or if there is an applicable statute (*e.g.*, Title VII). Rule 24(g), *supra*. There is case law that holds that it to be error for an arbitrator not to award counsel fees to the prevailing party where fees are authorized by statute. You must satisfy yourself that your decision in this regard is supported by the applicable law.

AAA Commercial Rules have similar provisions regarding arbitration fees and arbitrator compensation; AAA Rules also provide that if each side requests an award of attorneys' fees in the demand/response, the Arbitrator has the discretion to award such fees even if there is no provision in the clause and no statutory basis for such an award. AAA Rule R-43(d)(ii). There is no comparable provision in our Comprehensive Rules.

Other Rules (CPR, ICDR, and our own International Rules) and some statutes (*e.g.*, Cal. Int. Arb. Act) provide for discretionary awards of attorneys' fees in all cases.

6. Court Rules Do Not Usually Provide Authority for an Award of Fees and/or Costs. It is unlikely that a clause would call for application of a court-based rule on cost allocation (such as Cal. Code Civ. Proc. § 1033 *et seq*.). Case law governing cost awards in court are inapplicable to an arbitration (even where arbitration was ordered by a court) unless the clause expressly so states.

7. A Final Award May Not "Reserve" the Issue of Fees and Costs to Later Determination. Fees and costs must be awarded in the Final Award or the power to do so is relinquished by the Arbitrator. It is not a "final" award if jurisdiction is "reserved" to award fees or costs at a later time. If that is your intention, it is an Interim Award and should so state.

cc: Jay Welsh
Kim Taylor
Chris Poole

Excerpt from Final Award in Majestic/Hilton Hotels Corp.

IV. ATTORNEYS' FEES, COSTS AND EXPENSES

The Dispute Resolution Addendum (Schedule A to Ex. 10, ¶ 2.2.5) provides that "[a]s part of the award, the arbitrators shall designate the party whose position is substantially upheld, who shall recover from the other party all of its reasonable attorneys' fees, costs and expenses, including its share of the fees and costs paid to the neutral arbitrator, expert witness fees, compensation for in-house counsel and all other fees and expenses incurred in connection with the arbitration . . . ."

Respondents are the party whose position was substantially upheld and are entitled to recover their fees and costs as prescribed by the Amended Management Agreement. As directed in the Interim Award, the parties filed evidence and argument supporting and opposing Respondents' application for an award of attorneys' fees, costs and expenses. A hearing was waived by the parties.

The Application: Respondents seek attorneys' fees in the amount of $900,283.50 and costs and expenses in the amount of $319,817.78. Reimbursement is not sought for the expense for experts not actually called to testify at the hearing (estimated at $200,000). The total application is in the amount of $1,220,101.28.

The Opposition: Claimant's opposition to the application is limited to the attorney fee claim of more than $900,000 as unreasonable in the rates charged and the number of hours billed and as unsupported by sufficient detail. Claimant asserts that the attorney fee claim should be reduced to $360,133.40. (Although Claimant also refers in passing to costs, there is no claim for reduction of any cost category or of any particular cost claimed.)

Analysis of Fee Application: Claimant makes four essential points in support of the requested reduction: (a) the reasonableness of the rates charged by all timekeepers is unsupported; (b) the Las Vegas legal community rather than the Los Angeles legal community ought to be the reference point for the establishment of reasonable hourly rates; (c) work performed by partners at their higher rates should have been performed by associates at lower rates; and (d) block-billed time entries should be reduced in amount or disregarded entirely as an unreliable measure of actual work performed.

(a) Reasonableness of Rates: The arbitrators are the ultimate judge of the reasonableness of rates which are used to determine the lodestar amount in a fee application. We function in the Los Angeles and Las Vegas legal communities as well as numerous other venues where commercial disputes are litigated, routinely learn of prevailing rates for lawyers and law firms and are often called on to assess the reasonableness of claimed fees in arbitration. The information and data presented by Respondents to support their fee application is consistent with our understanding of prevailing rates in pertinent legal communities. The rates charged by Messrs. Fairbank and Gluck for their

participation in this proceeding ($550 and $350, respectively) are reasonable by any standard. The rate for Ms. Hines, based on her resume and her experience, is also reasonable.[1]

(b) Relevance of Las Vegas Rates: Other than for work actually performed in Las Vegas on Nevada law issues, this litigation proceeded between parties with substantial ties to Los Angeles, each of whom selected Los Angeles counsel to represent them and to conduct the hearing, and chose a Los Angeles hearing venue and which involved two Los Angeles-based arbitrators. It is inappropriate to tie the issue of fee reimbursement to Las Vegas because of the strong Los Angeles nexus to the way this proceeding was conducted.

(c) Composition of Respondents' Legal Team: Claimant asserts that associates should have been used to perform some of the work performed by trial counsel Fairbank and Gluck. This assertion is addressed by Mr. Dent's declaration, which observes that the source of excessive billing in litigation of this sort is often the assignment of tasks to associates whose work product is often unhelpful and whose billings are often excessive. The assertion that Mr. Gluck performed "associate level work" throughout the proceeding is belied by his key role during the hearing. The use of second chair trial counsel is common in cases such as this, where the number of witnesses and the scope of relevant data are too much for one lawyer to handle effectively, and Mr. Gluck performed his role with exceptional skill.[2] Respondents did utilize Ms. Hines for some such work, at a lower rate than trial counsel. The efficiency of the presentation by Respondents demonstrates that Claimant was likely the beneficiary of the selection of the team of lawyers who performed the work in this case.

The time records of Ms. Hines include time charges for 444.6 hours for document review (initial review of Hilton and Claimant documents, review for use at depositions, review for trial exhibits and during the hearing, etc.). The time entries are largely uniform, reflecting the same exact tasks over many days. Trial counsel also participated in this process at various stages, but the aggregate time charges for document review by Hines alone seems excessive even acknowledging that a total of about 20,000 documents were produced by both sides. This $133,000 in charges should be reduced by one-half to $65,500.

(d) Block Billing: It is true that many of the larger time entries are block-billed (numerous tasks for which one aggregate time period is charged). Unlike

[1] Mr. Wrede's billing was decidedly below market for his experience and skill; it is irrelevant to speculate why he chose to make those arrangements with his client, and it is certainly not evidence of what is a reasonable fee for Fairbank's firm to charge its clients.

[2] The fact that Mr. Wrede functioned without a second chair reflects well on him (and on the assistance provided by his client, Mr. Lorenzo Doumani), but should not be the standard by which we measure how opposing counsel should have staffed the case.

other block-billing situations which we have seen, however, the level of detail of the tasks within the "block" are quite descriptive, and a careful reading of these entries makes it apparent that the time consumed appears reasonable for the tasks listed. For example, Fairbank's entry of 5/9/07 in the amount of 3.5 hours is described as follows:

> Review binder of profiles of JAMS arbitrators, send email to J. Dent; telephone call from RDG [Gluck] ; [privileged redaction] review Majestic Resort's arbitration demand and selection of arbitrator; review documents and letters from W. Heaton; telephone call to W. Heaton (LVM); review JAMS bio of potential JAMS arbitrators; telephone call to CNH [Hines] [privilege redaction] review JAMS rules and key contract arbitration provisions; conference call with RDG and J. Dent [privilege redaction]; further review of profiles of potential arbitrators.

This description leaves little doubt that the stated tasks reasonably consumed 3.5 hours of time. It should also be noted that the block billing of trial counsel during the hearing (12 hours for hearing days and 10 hours for interim preparation days) is said to have been reduced from actual totals much higher. This kind of block billing is not objectionable in any event. (Arbitrators often see 16 hour and longer days billed during hearings by multiple counsel.)

It is important to note that the approach taken by counsel for Respondents in this case was exceptional in the "surgical" rather than shotgun approach during the hearing itself (in terms of examination of witnesses called and decisions not to call certain witnesses) as well as the focused discovery and prehearing activity pursued by both sides. It is often the case that a party with greater resources than the other will try to wage a war of attrition and to make the pursuit of a claim uneconomical for the party with lesser resources. None of that was observed by the Panel; indeed, Respondents seem to have selected its trial counsel with the opposite intention. All of this supports the reasonableness of the fees generated in a case in which a multi-hundred million dollar claim was asserted, tens of thousands of documents were exchanged, there were dozens of deposition days, seven hearing days (of eight scheduled), and extensive briefing of legal issues.

AWARD

1. Claimant shall take nothing on its Claim.

2. Respondents shall take nothing on their Counterclaim.

3. Claimant **MAJESTIC RESORTS, INC**. shall pay to Respondents **CONRAD HOTELS U.S.A., INC., CONRAD HOSPITALITY, LLC; HILTON HOTELS CORPORATION** the sum of $834,783.50 for

attorneys' fees and $319,817.78 as costs for a total award of $1,154,601.28.

4. This Award resolves all issues submitted for decision in this proceeding.

End of Excerpt from Final Award in Majestic/Hilton Hotels Corp.