CPR Institute Arbitrator Disclosure Taskforce - Kick Off Meeting

Date: December 1, 2023
Location: Online (Zoom)

Attendees:

Charlotte Westbrook, DLA Piper LLP ("CW")

Hattie Middleditch, Sullivan & Cromwell LLP ("HM")

Helena Tavares Erickson, Staff Liaison for Taskforce, CPR ("HTE")

Jeffrey Miles, Intern, CPR ("JM")

Jonathan Baccay, Intern, CPR ("JB")

Richard Ziegler, CPR Neutral, Acumen ADR ("RZ")

Shigeki Obi, Task Force Chair, Hughes Hubbard & Reed LLP ("SO")

Tom Cunningham, CPR Neutral, Tom Alan Cunningham PLLC ("TC")

Viven Mascarenhas, Millbank ("VM")

Minutes

1. Introductory remarks – Shigeki Obi

    a. SO introduced the meeting confirming that in the last meeting (held on November 3, 2023), the Taskforce had discussed the objectives for its publication. In short the objective is to produce practical guidance for arbitrators as regards what they should do to comply with their disclosure obligations. Substantive standards may be relevant to the guidance (and noted therein) but the aim is not to comment on or create substantive rules.
    b. In the last Taskforce meeting, it was agreed that the initial task would be to research US case law dealing arbitrator disclosures in the context of applications made pursuant Section 10(a)(2) of the Federal Arbitration Act ("FAA") which lists "evident partiality" of arbitrator as a ground for vacatur. The Taskforce will then potentially consider the substantive standards around arbitrator disclosures in major arbitration seats (e.g. London, Singapore, Brazil).

c. JB and JM have researched the issue since the last Taskforce meeting. SO also produced a separate research note which was circulated prior to this Taskforce meeting.

2. Discussion

a. In terms of what types of information US Courts have found that arbitrators should disclose, JB summarized his findings that that has included information regarding arbitrators' business, managerial and administrative relationship with the parties as well as personal relationships. Courts have also considered instances where job offers were made by parties (and their legal representatives) to arbitrators in the past, whether or not those were accepted or not. Professional memberships may also be relevant.
b. SO explained that his research was focused on different approaches that U.S. Circuits have taken with respect of the scope of inquiry that an arbitrator is required to take (i.e. their duty to investigate). He did no focus on cases where there were facts that arbitrators actually knew would create an impression of partiality.
c. SO explained the Circuit split that he identified in his research in connection with the scope of the inquiry that arbitrators are required to take. He identified and explained the three schools of thought that he had identified:
    i. **First position**: An arbitrator has no duty to investigate. For example, in *Mendel v. Morgan Keegan & Co., Inc*., the Eleventh Circuit stated that "[t]he arbitrator must actually know of the potential conflict—failure to investigate for potential conflicts is insufficient to show evident partiality." *Mendel v. Morgan Keegan & Co.*, Inc., 654 F. Appx. 1001, 1003 (11th Cir. 2016).
    ii. **Second position**: An arbitrator's duty to investigate arises only when s/he knows or should know that "a nontrivial conflict of interest might exist." This position is taken by the Second Circuit in Applied Industrial, which provided that "where an arbitrator has reason to believe that a nontrivial conflict of interest might exist, he must (1) investigate the conflict (which may reveal information that must be disclosed …) or (2) disclose his reasons for believing there might be a conflict and his intention not to investigate." *Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Ve Sanaya, A.S*, 492 F.3d 132, 138 (2d Cir. 2007).
    iii. **Third position**: Under certain circumstances, an arbitrator has a duty to investigate independent from its duty to disclosure. Contrary to the second position, the third position does not require an arbitrator's knowledge of the possibility of non-trivial conflicts, in order to trigger the duty to investigate. Therefore, the Ninth Circuit in *Schmitz* stated that

evident partiality may arise even where "an arbitrator may not know facts of which he may have been suspicious." *Schmitz v. Zilveti*, 20 F.3d 1043, 1048 (9th Cir 1994).

d. HM asked with respect to the second position whether the trigger for the duty to investigate was actual or constructive knowledge. SO explained that the test is slightly unclear and that the question may depend on the facts. *Applied Industrial* suggests a constructive knowledge test. In *Vigorito v. UBS PaineWebber, Inc.*, 557 F. Supp. 2d 303, 306 (D. Conn. 2008) the arbitrator in question actually knew of the facts that created a conflict.
e. RZ thanked SO for the very useful and interesting research. RZ noted that the research was not only substantively useful as an educational tool but also in terms of the deliverable of this Taskforce, which in short is to provide practical guidance on the scope of the conflicts check.
f. RZ highlighted the differences between what an arbitrator could and should reasonably be expected to achieve in terms of his or her conflicts database versus the processes that are typically used at major law firms for new clients. For example, an arbitrator might not be expected to maintain a database that lists the affiliates of all associated parties over time but that is the sort of information that a law firm would typically have access to as part of its conflicts processes.
g. RZ asked the Taskforce to consider whether Second and Ninth Circuits are truly proposing different standards (i.e. the second and third positions identified above). TC later observed that in his view the Circuits were broadly getting at the same point, i.e. ascertaining the objective facts that give rise to the duty to disclose.
h. JB noted some further facts from *Industrial Materials*. In that case the arbitrator had discovered that the Plaintiff was involved in negotiations involving his company/firm, and so had put up an information wall. The court had observed that it would have been preferable for an arbitrator to consult with the parties before developing the Chinese Wall, ~~the fact of the wall to have been disclosed to the parties to the arbitration~~ as opposed to that action being taken unilaterally
i. SO also later went into the facts of the Second and Ninth Circuit cases that may suggest a slight difference in the applicable tests.
j. On the issue of whether knowledge triggers the duty to investigate, RZ observed that in real world, an arbitrator would automatically look at their conflicts data base. Knowledge (whether actual or constructive) does not trigger that step being taken. Conflicts check (by reference to your database) is a given.
k. VM also indicated that the scope of database would be important. The database that an arbitrator at a major law firm might have will be larger than that of an arbitrator at a smaller practice or a full time arbitrator. This changes the scope of inquiry but also raises issues around what the arbitrator needs to track, for example experts and timeframes applicable to past instructions. A key question

is what you would expect party to furnish you with in order to make assessment of what to disclose.

l. TC identified the key two questions as: (1) does the duty to investigate to depend upon actual knowledge of certain facts; and (2) how do you evaluate what the relevant facts are that would trigger a duty to investigate. He observed that when you are an arbitrator at a large Firm, it is very difficult to know. TC's suggested that if the Taskforce is going to address duty to investigate then we would have to predicate that on objective standard of knowledge.

m. CW agreed with TC that whether there was an independent duty to investigate should depend on whether you have a reasonable basis for knowing of a potential for a conflict. She also identified the importance of continuous assessment (i.e. where facts may arise at a later stage of the arbitration that would require investigation and/or disclosure).

n. CW also commented on the critical question of what should be in the database and observed that the duty to investigate should only triggered by facts that create non-trivial conflicts.

o. RZ asked whether the Taskforce was aware of any law at all on what the arbitrator's database ought to contain. The Taskforce agreed that this should be investigated (see Next Steps below). HE noted that CPR had been made aware of certain arbitrators operating from memory with respect to conflict identification and disclosures, as opposed to maintaining a proper database.

p. HE noted that where institutions require arbitrators to disclose relationships with the parties/counsel, then that should be seen as the baseline for the type of information that you should be maintaining to ensure compliance. We should look at what institutions require arbitrators to disclose.

q. VM indicated that it would also be useful to have a sense of what those requirements are in place with respect to financial interest disclosures (shares and stocks etc.).

r. CW noted that if there is limited case law that discusses what an arbitrator's database should contain then we may be able to provide some guidance by looking at the types of information where failure to disclose has created a vacatur issue.

s. TC identified some other areas that may be helpful to consider. First he suggested looking at sources of information on how to run a conflicts check. For example, the AAA has a form that arbitrator candidates must fill out. Second, he indicated that attention should also be given to the issue of what the disclosure should contain. He identified a tension that often exists between the duty of confidentiality with respect to past representations/appointments and the duty to disclose.

t. RZ highlighted that TC's second point raised particular difficulties where the arbitrator is at a law firm. Disclosure of information pertaining to client relationships may be in breach of fiduciary duties to clients.
u. RZ also noted that certain rules concerning disclosures could be interpreted to apply to truly trivial information, citing the IBA Rules on Conflicts of Interest as an example. That requirement could render arbitrators unable to act, or even worse, required to withdraw part way through the proceedings.
v. RZ noted that one potential way around this issue was that the arbitrator could identify that an issue has arisen but they consider it to be trivial. The parties could then consent to the appointment.
w. HE asked to what extent if any the Taskforce wanted to consider counsel obligations of disclosure in the event that a party fails to disclose something. RZ suggested that we footnote that issue in the guidance but that we make clear that this issue is outside the scope.

3. Next Steps

a. SO will prepare an outline of the guidance for the Taskforce to consider. SO will aim to circulate that outline in advance of the next call. SO proposed that the guidance cover three areas:
    i. What the conflict check should cover.
    ii. What the disclosure form should contain (including steps that should be taken to ensure sufficient investigations have been undertaken).
    iii. Continuing disclosures.
b. To the extent participants have experience in the arbitration laws of other major seats, then they will provide a short note on the substantive requirements of those jurisdictions (in terms of the duty to investigate). HM will circulate a short summary of the position under English law.
c. JB will conduct further research on the level of inquiry and specificity for information that should be included in an arbitrators' conflicts database. As noted in the above discussion it was also suggested that the Taskforce look into institutional rules.
d. RZ mentioned a CCA webinar taking place on December 6, 2023 on Ethical Issues in Commercial Arbitration that will touch on what arbitrator databases should include. RZ circulated registration information for the webinar to the Taskforce during the meeting.
e. The next Taskforce meeting will be held at 3pm on December 15, 2023. HE circulated a zoom invite following the meeting.