CPR
International Institute for
Conflict Prevention & Resolution

CPR Institute Arbitrator Disclosure Taskforce - Kick Off Meeting

Date: November 3, 2023
Time: 3:00pm – 4:00pm
Location: Online (Zoom)

Attendees:

Anton Maurer
Charlotte Westbrook
Hattie Middleditch
Helena Tavares Erickson
Jeffrey Miles
Jonathan Baccay
Richard Ziegler
Rosey Wong
Shigeki Obi
Tom Cunningham

Minutes

1. Introductory remarks – Shigeki Obi

    a. Mr. Obi identified the general purpose of the Taskforce as being to draft compliance guidelines for arbitrators in preparing disclosures for arbitrations. Part of that exercise will involve collecting experience from Taskforce participants and transforming that into a single document that can be shared with a wider audience. The purpose of the kick-off meeting was to confirm and clarify the objective of the task force and deal with housekeeping matters.
    b. The attendees introduced themselves.
    c. Mr. Obi identified three sets of rules that the Taskforce should bear in mind (which had been circulated prior to the kick-off meeting). These were:
        i. Code of Ethics for Arbitrators in Commercial Disputes (adopting the ABA Code) (in particular, Canon II): https://drs.cpradr.org/rules/protocols-guidelines/ethics-codes/code-of-ethics-for-arbitrators-in-commercial-disputes [drs.cpradr.org]
        ii. CPR Model Rule for the Lawyer as Third-Party Neutral (in particular, Rule 4.5.3): https://drs.cpradr.org/rules/protocols-guidelines/ethics-codes/model-rule-for-the-lawyer-as-third-party-neutral [drs.cpradr.org]

iii. IBA Guidelines on Conflicts of Interest in International Arbitration: https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918 [ibanet.org]

d. Mr. Obi noted that there is currently little consolidated guidance in terms of what arbitrators are required to do in order to comply with these requirements. He identified three core areas namely:
   i. How should arbitrators perform a conflict check.
   ii. How should arbitrators prepare a disclosure form.
   iii. How arbitrators should adhere to continuing disclosure obligations.

2. Discussion

a. The first question raised was the perspective from which the Taskforce should be making its recommendations. The attendees discussed the divergence of standards in different jurisdictions.
   i. Mr. Maurer identified the case of ASA Bioenergy Holding AG et. al. v. Adriano Giannetti Dedine Ometto et al. An issue arose as to the adequacy of one arbitrator's conflict check for the purposes of his disclosures. The Superior Court of Justice in Brazil refused to enforce the awards. By contrast the Swiss Court enforced the award, notwithstanding it considered the conflict check in question to be "clearly careless" (on the basis that a blatant violation of public policy would be required to not enforce).
   ii. Ms. Middleditch identified proposed amendments to the English Arbitration Act in this regard. The applicable amendment (if adopted by parliament) will codify existing case law and arguably places more stringent disclosure duties on arbitrators than that found in the IBA Rules since it introduces a constructive (as opposed to an actual) standard of knowledge.
   iii. Mr. Cunningham asked whether the aim was to produce a set of guidelines that accounted for various rules in different jurisdictions (or attempted to harmonize those rules).

b. In light of the discussion regarding the scope of the exercise, Ms. Erickson provided some further background on what has led to the establishment of the project. Ms. Erickson indicated that CPR had received feedback from users who had experienced issues with arbitrators attached to other organizations, where such arbitrators did not maintain databases of parties and counsel who had appeared before them and had prepared their disclosures from memory. Users have indicated that it would be useful to see some practical guidance for arbitrators on the best practices for complying with their ethical disclosure obligations. The attendees had agreed that that was surprising.

c. Mr. Ziegler emphasized the importance of establishing what the desired deliverable for the Taskforce should be, for example whether it should be a set of practical guidelines or an academic analysis. He noted that the IBA guidelines are generally viewed as the go-to source so the Taskforce should consider how its deliverable will interact with that. RZ also noted that the IBA guidelines are in the course of being updated and that we could potentially expect a revised set of guidelines in Q4 2024.
d. Ms. Erickson noted that from CPR's perspective, the guidelines would be a practical guide on what to do and not to do in order to comply with disclosure obligations. The focus would not necessarily be on differences on the scope of obligations in different jurisdictions (although that might be relevant to certain of the guidelines as was discussed later).
e. Ms. Erickson gave an example of difficulties that might arise when disclosing financial interests. For example, some people control their investments, but others do not. If your broker sends you a monthly 401k statement, should you be tracking the investments made via that and how?
f. Mr. Cunningham identified the difficulties that might arise with very granular guidance in this regard. HE clarified that assessing the level of detail would be for the Taskforce to decide. The basic point (to address user feedback) is that in this day and age producing disclosures from memory is not going to be acceptable. The key will be identifying a balance between client expectation and not creating an overwhelming burden on arbitrators. On the latter point, TC also pointed out that the Taskforce ought to be careful not to create a standard of performance that is beyond that which is required for an arbitrator to be properly deemed impartial.
g. Mr. Ziegler suggested that it would also be useful to produce some guidance on disclaimer language (i.e. what is not being disclosed). Examples include LinkedIn contacts.
h. The key objectives and deliverables arrived at were:
    i. The focus will be on practical guidance rather than a survey of different applicable standards. However, assessing which standard may apply (whether at the seat of the recognition and enforcement stage) is an important consideration for arbitrators and so could form part of the guidance.
    ii. The Taskforce should be cautious of not creating a set of guidance that would make it impossible for anyone to act. The focus should be on what steps should be taken to demonstrate that you have undertaken adequate investigations into circumstances that may compromise arbitrator impartiality.

3. Next Steps

a. Where Taskforce member is aware of further protocols or guidelines, or features of arbitration laws in the jurisdictions that deal with the scope of arbitrator disclosures then those should be identified and shared with the Taskforce.
    i. Ms. Erickson and CPR to set up a taskforce web page on which information can be shared.
    ii. Ms. Erickson to potentially identify individuals from jurisdictions with stringent disclosure requirements (e.g. California and Brazil) to share insights.
b. Mr. Baccay and Mr. Miles to conduct a survey of case law which deals with what "reasonable inquiries" an arbitrator should take to comply with their disclosure obligations. RZ clarified that we are not looking for cases where an arbitrator knew about a fact that would compromise their impartiality but did not disclose it. The research should be completed in time for the next Taskforce Meeting on December 1, 2023.
c. The Taskforce will aim to meet every 2-3 weeks on Friday afternoons, subject to the next meeting being scheduled for December 1, 2023 and a further meeting being scheduled for December 15, 2023. The Taskforce will then pick up again with meetings in January 2024.
d. Ms. Erickson indicated that ideally we would have a set of guidelines ready by February 2024 to be published in March but this will most likely end up being published around September/October 2024 given that the IBA may release new Guidelines before we are done.
e. Finally, the Taskforce discussed the length of the proposed guidance. Mr. Obi and Ms. Erickson confirmed that we'd be aiming for something similar in terms of length to other practical guidance produced by CPR (approximately 12 pages).

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