Kluwer Arbitration Blog

Confusion in Disclosure Guidelines for Arbitrators?

Chris Gibson (Suffolk University Law School) · Monday, March 30th, 2009 · American Society of International Law (ASIL)

American Bar Association's International Law Section Criticizes the ABA Dispute Resolution Section's Subcommittee Draft on Arbitrator Disclosure Guidelines

It has been interesting to watch the strong reaction to the draft disclosure guidelines and checklist for arbitrators proposed by the Disclosure Subcommittee of the Arbitration Committee of the ABA's Dispute Resolution Section. Over the last two years the Subcommittee has released for comment several versions of its draft disclosure guidelines for arbitrators. Most recently, on January 3, 2009 a new draft (the "Revised Draft") was posted for public comment, with comments due last Friday, March 13th. The Draft is titled "Disclosures for Arbitrators in Commercial Disputes: A Checklist" and includes 20 pages of background and commentary, plus 5 pages of a Disclosure Checklist. The Revised Draft states that its Checklist "is intended and designed as a tool to assist arbitrators who wish help in deciding what to disclose, not as a hammer to force disclosures where the arbitrator has made his or her own determination that disclosure is unnecessary."

Some of the strongest reactions to the Revised Draft have come from other sections of the ABA. The Revised Draft and a previous draft posted in January 2008 were each circulated to a number of sections including Administrative Law and Regulatory Practice, Business Law, Forum Committee on Construction Industry, International Law, Labor and Employment Law, Litigation, and Tort Trial and Insurance Practice. Like the previous version, the Revised Draft is viewed as controversial due to concerns about overbroad disclosure obligations, the associated burdens on potential arbitrators to investigate insubstantial relationships and other matters, and the more general question of whether yet another set of guidelines is needed at all, given numerous existing sources of disclosure guidelines, ethical codes, arbitral institution disclosure protocols, and requirements found in law and court decisions.

The Revised Draft acknowledges these other sources, yet puts its Checklist and Commentary forward apparently as a means to cope with the various standards. On March 16th, a Working Group of the International Law Section (the "Working Group") released comments on the Revised Draft, in which it stated that "we are unaware of any international organization or international arbitration institution that supports the subcommittee's efforts." In addition, the Working Group emphasized that the Revised Draft should not conflict with the Federal Arbitration Act (the "FAA"), the 2004 ABA/AAA Revised Code of Ethics for Arbitrators (the "2004 Code"), or the

International Bar Association Guidelines (the "IBA Guidelines"). According to the Working Group, the Revised Draft contains numerous examples of recommended disclosures where no such disclosures would be merited under these other sources.

The Working Group also raised concerns of perception: that is, that the Revised Draft should not be confused as an official statement of the ABA. Although the introduction to the Revised Draft makes an effort to clarify that the Subcommittee is not announcing official ABA policy, the Working Group comments that "the introduction does not clearly identify that the Revised Draft is merely a text of a subcommittee of one section of the ABA and confusion still exists concerning whether the Revised Draft is ABA endorsed."

Another related concern is that the Revised Draft will be seen as an ABA default standard that, if not met, could be relied upon by losing parties seeking to overturn arbitral awards in court. In response, the Revised Draft includes a statement that it "is not a roadmap for losing parties seeking vacatur nor for judges in examining, for example, whether 'there was evident partiality or corruption in the arbitrators.'" Further, the Revised Draft, in comparison with the previous version, no longer describes itself as recommending "best practices" for disclosure guidelines, but rather is described as a checklist and commentary.

As to the Disclosure Subcommittee's previous January 2008 draft, the Working Group stated that the draft was "completely at odds with international [arbitration] practice." The ABA Section of Labor and Employment Law had requested that labor and employment disputes should be exempted completely from "any best practices disclosure document produced." Labor arbitrations are covered by a separate Code of Professional Responsibility for Arbitrators of Labor-Management Disputes. In response to this and other similar comments from ABA Sections and groups in fields such as securities arbitration, the Revised Draft moves to exclude labor arbitrations, but nevertheless states that it applies to "commercial arbitrations" and suggests that for employment and other areas, arbitrators may find the Check List and Commentary useful.

Regarding the burdens potentially imposed by the Revised Draft, the Working Group is critical of a number of items in the Revised Draft as being particularly unfair to US-national arbitrators, unrealistic, and improperly requiring investigation and disclosure of matters that are "attenuated, long past, trivial or insubstantial." The Revised Draft continues to take a "when in doubt, disclose" approach beyond what is reasonable, creating a presumption that a contact or connection should be investigated and any findings should be affirmatively rebutted by disclosure to the parties regardless of the triviality of the connection. Moreover, the Revised Draft does not apply the "reasonableness" or "justifiability" parameters found in the FAA, the 2004 Code or the IBA Guidelines when illustrating an arbitrator's responsibility to investigate and disclose. According to the Working Group, the practical impact of the Disclosure Checklist would be extremely onerous for arbitrators from tight legal, business and social communities, and such an approach is at odds with caselaw, where the courts tend to focus on the existence of material relationships rather than those that are attenuated.

Through the efforts of a number of individuals including Mark Kantor, a member of the Working Group, the Revised Draft and the Working Group's recent comments on it have been widely circulated. There appears to be continuing and significant opposition to the Disclosure Subcommittee's Revised Draft. One influential commentator recently put his view quite bluntly: "my reaction is that the ABA Section's checklist should be stamped "BBR": burn before reading. Another example of the excess that characterizes challenges and grounds for them." In view of

these continuing concerns, it will be important to watch how the Disclosure Subcommittee responds to the latest round of comments.

Prof. Christopher Gibson

This entry was posted on Monday, March 30th, 2009 at 3:57 pm and is filed under Arbitrators, Commercial Arbitration, Investment Arbitration, National Arbitration Laws, North America
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.