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Must we be so Redactionary?

Luke Eric Peterson (Investment Arbitration Reporter) · Tuesday, October 2nd, 2012

Transparency of investment treaty arbitration is back on the radar this week as delegations convene in Vienna for the latest meeting of the UNCITRAL Working Group II on Arbitration and Conciliation.

While governments debate the scope and content of new transparency obligations, one issue that has received less attention is a sometimes-seen corollary of greater transparency: the redaction of confidential business information or other types of protected information from documents before they are published.

While I remain a proponent of mandatory transparency in investment treaty arbitration, I'm troubled by certain aspects of the redaction process – particularly the emerging practice in NAFTA arbitration with respect to publication of awards and tribunal decisions.

Is this going to take long?

It was the Cargill v. Mexico NAFTA Chapter 11 arbitration that first focused my attention on the redaction process.

From the time that an ICSID tribunal rendered its final award in September of 2009, it took until late February of 2011 – that is, 17 months – for the parties to agree on redactions to the award.

The Cargill case is an outlier, but it's also a cautionary example of what can happen when an award is rendered and no one – despite a nominal commitment to transparency – seems in a hurry to put it out there into the public domain.

Nor is Mexico the only NAFTA party that has been slow when it comes to giving effect to transparency commitments.

More than four months ago, an ICSID tribunal rendered a decision on liability in a NAFTA dispute between Exxon-Mobil and the Government of Canada. A confidentiality order in that case gives parties a full 30 days in which to object to the publication of any un-redacted decision of the tribunal; any ensuing redaction process is supposed to take no more than 30 additional days, unless "otherwise directed by the tribunal".

Summer has since given way to autumn here in the Northern Hemisphere, and the Mobil v. Canada decision still remains lost in redaction.

You don't need to impute malign motives to the parties involved in these cases. Once these awards are shunted into redaction, it's perfectly understandable that they might remain stalled while more pressing matters and deadlines arise.

For this very reason, however, I think it's important to examine whether mandatory redaction needs to go hand-in-hand with mandatory transparency of investment treaty decisions.

Can awards be released without running the redaction gauntlet?

What would happen if NAFTA-type awards just tumbled into the public domain mere days or weeks after their release to the parties – without undergoing any sort of redaction?

Fortunately, we don't need to engage in elaborate thought-experiments here. We can look at the emerging practice under another agreement, the U.S.-Central America Free Trade Agreement (CAFTA), where the publication of awards is mandated.

In three recent CAFTA investor-state arbitrations, RDC v. Guatemala, Pacific Rim v. El Salvador, and Commerce Group v. El Salvador, awards and decisions have been made public exceedingly swiftly – generally in a matter of days after having been released to the parties.

Why is it that CAFTA decisions appear so quickly, while NAFTA decisions remain under wraps for so long?

If you look at the procedural history of the aforementioned CAFTA cases, it appears that the disputing parties simply chose *not* to put in place a process that provides windows of a month or more for parties to raise objections to the proposed publication of tribunal decisions (and further periods of time for the redaction process to play out).

The CAFTA approach makes sense when you consider how unusual it is for investment treaty awards to contain genuinely "protected" information, such as confidential business information.

If you take a look at the wider universe of investment treaty arbitration – where there are no mandatory transparency requirements – but where several hundred awards have been released with the blessing of one (or both) parties, such awards are almost always published without any redactions having been made to them.

Have there been any negative repercussions from so many BIT awards hitting the streets in a pure, un-redacted, form? Are the corners littered with lawyers and academics that have overdosed on the undiluted contents of these documents? Have investor-claimants fallen on hard times because their confidential business information was spilled across the internet thanks to the release of so many un-redacted investment treaty awards?

Frankly, I can't recall any real horror stories that have arisen from the common practice of putting BIT awards out there in un-redacted form. Sometimes claimants or respondents don't like it that their loss has been broadcast to the world – but that is a wholly different thing than to say that highly-sensitive "protected" information was leaked and investors suffered financial harm as a result.

The law of unintended consequences

Given the seeming infrequency with which genuinely protected information finds its way into investment treaty awards, the emerging NAFTA practice seems like overkill. Moreover, it leads to a potent irony: newly-rendered awards from BIT cases where there are *no* mandatory transparency provisions are far more likely to land in the hands of the public in mere days – or in a matter of weeks – than awards which stem from cases where there *are* mandatory transparency provisions.

Indeed, while we've been waiting for the Mobil v. Canada NAFTA award, at least a half-dozen ICSID awards have been rendered and tumbled into public view.

Don't get me wrong.

We need mandatory transparency in investment treaty arbitration. Too many awards, and broader case details, remain hidden from public view.

But, protracted redaction processes can hamper transparency by keeping final rulings out of the public eye for months on end.

In NAFTA and CAFTA arbitrations there are already procedural mechanisms for parties to flag confidential business information at the time that it is submitted to the tribunal as part of a party's pleadings or exhibits.

Where parties are "redacting as they go", it should be easy for them to take one look at a decision or final award and to recognize in far less than 30 days whether that decision contains material that has been previously flagged as "protected".

If the award does contain such "protected" information, the parties should enjoy a narrow window in which to request an emergency injunction against publication. Tribunals should be asked to move swiftly to verify the presence of such information, and to create a redacted version for public distribution.

In the rare instances that it's called for, redaction of final decisions should be a mere speed-bump on the path to publication – not a recipe for interminable gridlock.

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