Court of Appeal rules on arbitrators' duty to disclose

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In *Halliburton Company v Chubb Insurance* (1) the Court of Appeal found that there was no appearance of bias where an arbitrator had accepted multiple arbitral appointments from one party to several arbitrations where the subject matter of the arbitrations was the same or overlapping. Nevertheless, the court held that the arbitrator had had a duty in law and as a matter of good practice to disclose issues where there was a real possibility of bias.

Background

The court has the power to remove an arbitrator if there are grounds to consider that he or she is not impartial. The applicable test under Section 24(1)(a) of the Arbitration Act 1996 mirrors the test for apparent bias under the common law; the court should consider whether a fair-minded and informed observer would conclude that there was a real possibility that the arbitrator was biased. The test is objective and takes account of all relevant facts.

Applications for arbitrator disqualification can arise when an arbitrator has disclosed circumstances which may jeopardise the independence and impartiality of the tribunal, or when circumstances come to light which the arbitrator could have disclosed but did not. When and what to disclose is a complex issue which is not expressly regulated by the Arbitration Act. In practice, arbitrators and parties often follow non-binding guidance, such as the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration, which set out the circumstances in which it is appropriate to make disclosures.

Facts

The arbitration arose from an explosion at the Deepwater Horizon rig in the Gulf of Mexico in 2010. Halliburton had provided cementing and well-monitoring services to BP, the lessee of the rig. Transocean Holding LLC owned the rig and provided crew for its operation. Both Transocean and Halliburton bought liability insurance from Chubb on the Bermuda Form.

Following the settlement of claims between the three companies, Halliburton claimed on the policy. Chubb refused to pay on the basis that the settlement was unreasonable and Chubb's consent had been withheld. Halliburton commenced *ad hoc* English-seated arbitration against Chubb in January 2015. The chair of the tribunal ("M") was appointed by the court in June 2015. M was Chubb's preferred candidate and at the time of his appointment, he declared previous appointments by Chubb and his appointments in ongoing arbitrations to which Chubb was a party.

By August 2016, M had accepted an arbitral appointment from Chubb against Transocean and an appointment from a different insurer in another claim against Transocean relating to the same layer of insurance (the Transocean arbitrations). It later became apparent from the pleadings that the terms of the settlement were also relevant to the Transocean arbitrations. No disclosures were made

by M. However, the appointments came to light in November 2016 when the English court was called on to determine certain preliminary issues in the Transocean arbitrations.

In subsequent correspondence, M made clear that at the time of the appointments, he had not considered it necessary to make disclosures. However, he noted that "with the benefit of hindsight, it would have been prudent" to have done so and apologised for the omission. Nevertheless, he was not prepared to resign without Chubb's consent, which was not forthcoming.

In December 2016 Halliburton applied for M's removal under Section 24(1)(a) of the Arbitration Act. The application was dismissed by Mr Justice Popplewell in February 2017 on the bases that there was no apparent bias, no disclosure was necessary and the arbitrator had dealt appropriately with the challenges to his appointment raised by Halliburton.

On December 5 2017 a final partial award was rendered in Chubb's favour.

Decision

After the award was rendered, the Court of Appeal heard and dismissed Halliburton's appeal of the lower court's decision and, in doing so, considered the following key questions.

To what extent may an arbitrator accept appointments in multiple references concerning the same or overlapping subject matter with one common party without raising the appearance of bias?

The Court of Appeal recognised that if an arbitrator sits in multiple arbitrations relating to similar issues and where there is a party common to both arbitrations, the arbitrator could be privy to 'inside information' to which the other arbitrators do not have access.(2)

The court therefore accepted that Halliburton may have had legitimate concerns regarding M's appointment by Chubb in closely related arbitrations.

However, the court held that such concerns did not justify an inference of apparent bias sufficient to remove an arbitrator under Section 24 of the Arbitration Act.(3) Arbitrators are "assumed to be trustworthy" and understand that they should approach every case with an open mind; the "mere fact" that an arbitrator accepts appointments in these circumstances is not in and of itself enough to give rise to an appearance of bias. Something of more substance is required,(4) which requires an examination of the factual circumstances.

Applying the relevant facts, apparent bias was not made out in this case as there was limited overlap between the arbitrations. The court noted that the issue that gave rise to the preliminary issues in the Transocean arbitrations was not an issue in the present reference. Further, the details regarding the settlement which involved both Halliburton and Transocean, though common to both arbitrations, would need to be considered against different factual contexts in each arbitration.(5)

What is the effect of non-disclosure?

The court held that non-disclosure is a factor to be taken into account when considering apparent bias, as is an 'inappropriate' response to any suggestion that a disclosure should have been made. However, the court held that non-disclosure of a fact which, on further examination, does not give rise to doubts as to the arbitrator's impartiality cannot in itself give rise to an inference of bias – something more is required.(6)

On the facts on this case, the court held that M's non-disclosures did not give rise to an appearance of bias because:

- non-disclosure in itself does not justify an inference of bias;
- M's non-disclosure was innocent and accidental;
- there was limited overlap between the arbitrations;
- a fair-minded and informed observer would not consider the non-disclosure to give rise to doubts as to M's impartiality; and
- M had conducted himself appropriately following the challenges raised by Halliburton to the non-disclosures.

Duty of non-disclosure?

The first instance court held that because there were no justifiable doubts as to M's impartiality, disclosure was unnecessary as there were no circumstances to disclose. The Court of Appeal took a different approach.

First, it made clear that the question of disclosure should be judged at the time when the appointments in the Transocean arbitrations were made, and not with the benefit of hindsight.(7) The court then stated that the appropriate question was:

> "*whether there are facts or circumstances known to M which would or might lead the fair-minded and informed observer, having considered the facts, to conclude that there was a real possibility that M was biased. If so, M was under an obligation to disclose them.*"(8)

Applying this question in the case, the court considered that there were several relevant factors. First, when M accepted the appointments in the Transocean arbitrations, M did not know whether there was significant overlap between the arbitrations. Second, the IBA Guidelines recommends that a disclosure is made where an arbitrator serves in an arbitration on a related issue involving one of the parties to the arbitration (IBA Guidelines, Orange List at 3.1.5). As a matter of good international arbitration practice, a disclosure should have been made.

In these circumstances there was a "clear possibility"(9) that a fair-minded and informed observer might have reasonably considered there to be a lack of impartiality. Accordingly, the court held that a disclosure should have been made both as a matter of law and as a matter of good practice.

Comment

Some members of the arbitration community disapprove of an arbitrator sitting in two or more arbitrations relating to the same or similar facts and issue, but with different co-arbitrators. However, the court's decision in relation to the removal of arbitrators under the Arbitration Act is not unexpected. While the court gave credence to the view that this fact pattern might be cause for concern, there were no objective grounds for a finding of apparent bias in this case. The evaluation of apparent bias is fact-sensitive and the outcome depends on the circumstances of each individual case.

The court's findings regarding arbitrator disclosures raises further questions. The judgment suggests that arbitrators have an obligation under English law to disclose facts where there is a "real possibility" of apparent bias or impartiality, even if, on investigation, none is established (as in this case).

To date, the standard for arbitral disclosures has been set by the IBA Guidelines. These have been widely adopted by the arbitration community and aim to clarify for arbitrators and parties when and how disclosures should be made and reduce ill-founded challenges to arbitrators that can cause cost and delay.

The English court's ruling is welcome in that it recognises and endorses the approach to disclosures that is already taken in international commercial arbitration. However, it arguably creates a new legal duty of disclosure on arbitrators that goes beyond what is expressly required under the Arbitration Act. As presently formulated, the scope and extent of the duty is not clear-cut. It remains to be seen whether this duty will cause difficulties for arbitrators in practice and whether the ruling will give rise to more frequent arbitrator challenges as the parameters of the duty are tested.

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Endnotes

(1) [2018] EWCA Civ 817.

(2) See *Guidant LLC v Swiss Re International SE* [2016] EWHC 1201.

(3) *Halliburton Company v Chubb Insurance* [2018] EWCA Civ 817 [49].

(4) *Ibid*, [53].

(5) *Ibid*, [81].

(6) *Ibid*, [76].

(7) *Ibid*, [83].

(8) *Ibid*, [71], [84].

(9) *Ibid*, [91].
