ARBITRATORS CAN BE APPOINTED IN OVERLAPPING ARBITRATIONS BUT THEY MUST BE MINDFUL OF THEIR DUTIES TO DISCLOSE

DANIELLA SMITH

Haliburton Company v Chubb Bermuda Insurance Ltd and Others [2018] EWCA Civ 817

In the words of the Court of Appeal in this recent decision "arbitrators are assumed to be trustworthy and to understand that they should approach every case with an open mind." But what happens when an arbitrator accepts appointments in overlapping references with only one party in common? Should he/she disclose this? Who to? And what should happen if they do not?

These were the issues at the heart of the recent Court of Appeal (**CA**) decision in *Halliburton Company v Chubb Bermuda Insurance Ltd and others*. The CA held unanimously that while as a matter of good practice and, in the circumstances of this case as a matter of law, the arbitrator (**M**) ought to have disclosed his appointments in overlapping references, *"the fair minded and informed observer having considered the facts"* would not conclude there was a real possibility that M was actually biased.

This case is significant as it provides guidance on disclosure by an arbitrator as a duty separate from impartiality. It also serves as a reminder that arbitrators should be aware of any potential duties of disclosure when accepting appointments.

Factual Background

Following the BP Oil Spill in the Gulf of Mexico on 20 April 2010, numerous claims were made by both the US Government and corporate and individual claimants against BP (the lessee of the drilling rig), Transocean (the owner of the drilling rig), and Halliburton (who had been engaged to provide cementing and well-monitoring services in relation to the temporary abandonment of the well). The private claims for damages were managed through a Plaintiff Steering Committee (**PSC**).

Following a judgment on liability from the Federal Court for the Eastern District of Louisiana both Halliburton and Transocean settled with the PSC and claimed on the liability insurance policies they had both purchased previously from Chubb on the Bermuda form (the polices were separate but the policy terms were materially the same). However Chubb refused to pay Halliburton's claim contending, amongst other things, that the settlement was unreasonable.

Arbitration Proceedings against Chubb

In accordance with the terms of the insurance policy, Halliburton commenced arbitration proceedings against Chubb. The policy provided for a London seated arbitration and a tribunal consisting of three arbitrators, one appointed by each party and the third by the two arbitrators so chosen. In the event of disagreement between the arbitrators as to the choice of the third, the appointment was to be made by the High Court.

Halliburton appointed N as its arbitrator. Chubb appointed P and in the absence of

agreement from the chosen arbitrators the High Court appointed M. M had disclosed, before the selection process, that he had previously acted as arbitrator in numerous arbitrations in which Chubb had participated.

Subsequently, Chubb appointed M as an arbitrator in an excess liability claim arising out of the oil spill made by Transocean under its liability insurance policy with Chubb (**Reference 2**). Prior to this appointment, M disclosed to Transocean his appointment in the Halliburton arbitration and other Chubb arbitrations. Transocean raised no objection. M, however, did not disclose this to Halliburton.

M also subsequently accepted an appointment as a substitute arbitrator in another claim made by Transocean against a different insurer on the same layer of insurance (**Reference 3**). This was also not disclosed to Halliburton.

All is revealed to Halliburton

When Halliburton realised that M had not disclosed these two appointments to them, they wrote to M, referring to the International Bar Association Guidelines on Conflicts of Interest in International Arbitration. They argued that he had a continuing duty of disclosure regarding potential conflicts of interest, and asked for clarifications and explanations. M responded with an explanation of how he had come to be appointed and admitted that it did not occur to him at the time that he was under any obligation to disclose these appointments to Halliburton. He explained that while he still did not think the circumstances put any obligation on him to make a disclosure to Halliburton, he appreciated that with *"the benefit of hindsight, that it would have been prudent for me to have informed your clients... and I apologise for not having done so."*

In a later letter to the parties M made it clear that he had no wish to continue to serve as chairman of a tribunal in a case where one of the parties had expressed serious doubts about his impartiality. However he felt that he could not resign without the consent of Chubb, which Chubb was not prepared to give. He asked the parties to put aside their differences and agree a mutually acceptable replacement chairman. However no such agreement was reached and shortly after Halliburton issued a claim form seeking an order pursuant to section 24(1) of the Arbitration Act 1996 (the **1996 Act**) to remove M as an arbitrator [1].

High Court Decision

Halliburton's application to remove M was heard at first instance by Mr Justice Popplewell:

- Popplewell J rejected Halliburton's suggestion that M's appointment in References 2 and 3 involved him being given a secret benefit by Chubb in the form of remuneration he would earn from the arbitrations. He also rejected Halliburton's contention that the overlap of references was a matter of concern and commented

that "generally the fact that an arbitrator may be involved in an arbitration between party A and party B, whose subject matter is identical to that in an arbitration between Party B and party C does not preclude him or her form sitting on both tribunals."

• In summary Popplewell J concluded that (1) there was nothing in M's appointments in References 2 and 3 which gave rise to an appearance of bias; and (2) given his conclusion there was no bias the Judge held that there was nothing to disclose; (3) even if disclosure ought to have been made, the failure to do so did not give rise to a real possibility of apparent bias.

Halliburton appealed the High Court's decision.

Results of the Abitration Proceedings

Subsequent to the High Court Judgement but prior to the appeal, the two other arbitrations in which M was appointed were decided in in Chubb's favour on the preliminary issues of policy construction and so the Tribunal was not required to consider any issues relating to the reasonableness of the settlement.

The Tribunal in the Halliburton arbitration issued the Final Partial Award in Chubb's favour. In the *"Separate Observations"* of N's judgment, however, he stated that was unable to join in the award as a result of his *"profound disquiet about the arbitration's fairness"*.

Court of Appeal (CA) Decision

The appeal was heard by Sir Geoffrey Vos C, Simon and Hamblen LJJ and their decision was unanimous. In summary:

(1) Acceptance of appointment: The CA agreed with Popplewell J that the mere fact that an arbitrator accepts appointments in multiple references concerning the same or overlapping subject matter with only one common party does not in itself give rise to an appearance of bias. They agreed with Dyson LJ in the Court of Appeal decision in *AMEC Capital Projects Ltd v Whitefriars City Estates Ltd.* [2005] 1 WLR 723 that *"[s]omething more is required" and that must be "something of substance"*.

(2) Non-disclosure: The CA noted that while the 1996 Act sets out no requirements in relation to disclosure, many institutional rules governing arbitration include provisions requiring disclosure to be made of facts or circumstances which may give rise to justifiable doubts as to an arbitrator's impartiality. Under the common law, judges are also required to disclose facts or circumstances which would or might provide the basis for a reasonable apprehension of lack of impartiality and the CA held that the same approach applies to arbitral tribunals.

The CA referred to the Privy Council's recent decision in *Wael Almazeedi v Michael Penner and Stuart Sybermsa* [2018] UKPC 3 and said it *"supports the importance of disclosure"* at an early stage as set out in the previous body of authorities. Hamblen LJJ said that

"These authorities explain the important practical advantages of giving disclosure and addressing any issues which may arise at the outset. They also show that in borderline cases disclosure should be given - disclosure should be given of circumstances which would or might lead the fair-minded and informed observer, having considered the facts, to conclude that there was a real possibility that the tribunal was biased." (Halliburton, para 65)

In summary, the CA held that the present position under English law is that disclosure

should be given of facts and circumstances known to the arbitrator which, in the language of section 24 of the Act, would or might give rise to justifiable doubts as to his impartiality. Under English law this means that facts or circumstances which would or might lead the fair-minded and informed observer, having considered the facts, to conclude that there was a real possibility that the arbitrator was biased.

(3) Consequences of failing to make disclosure of circumstances which should have been disclosed: The CA suggested that if a disclosure that ought to have been made has not been made, that will mean that the arbitrator will not have displayed the "badge of impartiality" which he should have done and that the fact of non-disclosure "must inevitably colour the thinking of the observer". However the CA held that non-disclosure of a fact or circumstance which should have been disclosed, but does not in fact, on examination, give rise to justifiable doubts as to the arbitrator's impartiality, cannot in and of itself justify an inference of apparent bias.

Therefore while the CA concluded that M ought as a matter of good practice and, in the circumstances of this case, as a matter of law to have made disclosure to Halliburton at the time of his appointments in References 2 and 3, the fair-minded and informed observer, having considered the facts, would not conclude that there was a real possibility that M was biased.

Commentary

Although the circumstances of this case demonstrate that non-disclosure by an arbitrator of potential sources of conflict are not necessarily fatal, it is good practice to disclose issues when in doubt. In the Halliburton judgment the overlap between the different arbitrations was not substantial but in cases where the references have more in common, the duty to disclose may be even more important.

However, provided that those cautionary words are kept in mind, parties and arbitrators should feel more confident following Halliburton that it should be possible to appoint the same arbitrator in overlapping references.

About the Author

ADDLESHAW GODDARD

Daniella Smith
Senior Associate

Daniella is a Managing Associate specialising in commercial litigation. She has experience of working on large and complex litigation both in the English High Court and in International Arbitration. Daniella provides advice to a wide range of clients including FTSE 100 companies and Private Equity Firms in relation to disputes involving warranty claims, shareholder disputes, professional negligence and contract termination highly across all three of the key performance indicators, including client relationship skills, technical legal ability, and project management.