English Court of Appeal Lowers the Bar for Arbitrator Disclosure

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In a recent important decision for arbitrations seated in England, the English Court of Appeal has, for the first time, considered the scope of arbitrators' duty of disclosure. The court in *Halliburton v. Chubb* found that the duty extends not only to circumstances that a fair-minded and informed observer **would** conclude give rise to a real possibility of bias, but also to circumstances that merely **might** give rise to such a conclusion. In a borderline case, where there is uncertainty as to whether facts would give rise to such a possibility, the court found that disclosure should be given. This sets the bar relatively low and puts the test for arbitrators onto a similar footing as applies to English judges. This is especially important because a failure to make appropriate disclosure may itself increase the likelihood of an appearance of bias.

Challenges to arbitrators on grounds of apparent bias are not uncommon, and this decision may make challenges more likely. Arbitrators in English proceedings should be careful to adopt an inclusive approach to disclosure.

Factual Background

The dispute in *Halliburton v. Chubb* involved a claim by Halliburton relating to indemnification under a Bermuda form of insurance in respect of settlements following the Deepwater Horizon explosion. The insurance policies were governed by New York law, but provided for arbitration with a London seat. Halliburton made an application under Section 24(1)(a) of the U.K. Arbitration Act 1996 to remove one of the three arbitrators on the basis that there were "justifiable doubts as to his impartiality". The two grounds for the application were that (a) he had been appointed as an arbitrator in two other disputes also arising out of the Deepwater Horizon explosion (one of which involved Chubb, but not Halliburton, as a party); and (b) he had not disclosed the fact of those overlapping appointments.

English Law on Apparent Bias and Disclosure

A challenge under Section 24(1)(a) of the Arbitration Act 1996 requires a party to show that circumstances exist that give rise to justifiable doubts as to an arbitrator's impartiality. The court confirmed the established position under English law that this

corresponds to the common law test for apparent bias. This is an objective test and requires a party to show that a fair-minded and informed observer, having considered the facts, **would** conclude that there was a real possibility of bias.

However, the Arbitration Act 1996 is silent as to arbitrators' duty of disclosure.

Overlapping Appointments

The court held that the overlapping appointments in this case did not *per se* give rise to apparent bias—Halliburton would have needed to show "something more". The court acknowledged that overlapping appointments may, in principle, be a "legitimate concern" because the common party (in this case, Chubb) (i) can share information with the arbitrator in a forum where the other party is not present; and (ii) may acquire "inside information" about the arbitrator's views that enables it to tailor its submissions and evidence accordingly. However, it held that Section 24(1)(a) was not concerned with this type of procedural disadvantage or unfairness. The court also stressed that overlapping appointments are commonplace (and often desirable) and that arbitrators should be trusted to approach every case with an open mind.

Disclosure

The Court of Appeal found that, under English law, the test for disclosure is whether circumstances would **or might** lead a fair-minded and informed observer, having considered the facts, to conclude that there was a real possibility of bias. It thereby lowered the bar for disclosure because the Commercial Court, at first instance, had taken the view that only circumstances which would give rise to apparent bias had to be disclosed. The court noted that this test is objective, whereas many institutional rules—as well as the IBA Guidelines on Conflicts of Interest in International Arbitration—impose a stricter subjective test.

Applying the objective test, the court in *Halliburton* found that the arbitrator should have disclosed the overlapping appointments. In reaching this decision, the court stressed the practical advantages of disclosure in borderline cases and at an early stage of proceedings, and it noted that disclosure of overlapping appointments also constituted "good practice" in the context of international commercial arbitration (falling under the "Orange List" of the IBA Guidelines).

The court also confirmed that an arbitrator's failure to disclose and how he or she deals with concerns raised by a party are relevant in determining whether apparent bias exists; such factors will inevitably "colour the thinking of the observer and may fortify or lead to an overall conclusion of apparent bias". However, in the present case, the court found that the arbitrator's failure to disclose had been accidental, that he was highly respected and experienced, and that he had acted appropriately once Halliburton raised concerns. For these reasons, the failure to disclose did not affect the court's finding that there was no apparent bias.

We understand that Halliburton has applied for permission to appeal to the Supreme Court.

***Halliburton Company v. Chubb Bermuda Insurance Ltd* [2018] EWCA Civ 817**
(19 April 2018)