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Apparent Bias

The resolution of disputes by an independent and impartial tribunal is a fundamental aspect of arbitration (albeit that English law only requires impartiality and not independence – the latter typically becomes a factor due to institutional rules requiring it). Arbitration conflicts have become a hot topic.

Two particular issues are relevant for arbitrations. Firstly, when is the arbitrator "impartial" for the purpose of potential conflicts of interest? Secondly, what are the powers of arbitrators in relation to conflicts of interest on the part of the lawyers appearing in front of them?

We address the first of those problems here in light of a number of recent English decisions.

Unanswered question on Apparent Bias

Although sometimes termed a conflict of interest, properly analysed questions of the lack of impartiality or independence of a member of the tribunal is, strictly, usually a question of apparent bias. Appearances are important because what is at stake is the confidence which the administration of justice must inspire in the public and the users of the system. In deciding whether in a given case there is a legitimate reason to fear that a particular arbitrator lacks impartiality, what is decisive is whether the concerns of the party making the complaint can be objectively justified.

The law on apparent bias[1] for arbitrators has received an unusual degree of scrutiny with recent decisions from the Privy Council and Court of Appeal. In *Almazeedi v Penner*[2] and *Hailburton v Chubb*[3] the Privy Council and Court of Appeal respectively, applied established law, albeit with different results.

In *Almazeedi*, Cresswell J (a former Commercial Court judge) had been appointed, in 2009, as an ad hoc judge of the Grand Court in the Cayman. He was also appointed, in 2011, as an *ad hoc* judge of the Qatar Financial Centre. In the event, Cresswell J never sat in Qatar Court and did not receive any remuneration for his role. In Cayman, Cresswell J sat in a case involving the Qatar Investment Authority and Qatar National Bank. Officers of those organisations were Ministers in Qatar who also had the power of appointment for judges in the Qatari Court. The majority of the Privy Council held that, with reluctance, the appointment to the Qatar Court ought to have been disclosed and, having failed to do so, the decisions made by Cresswell J could not stand. This had far reaching consequences, including the setting aside of a winding-up order.

Similarly, although with a different result, in *Halliburton* the Court upheld the dismissal of a challenge to an arbitrator who had been appointed in linked arbitrations. All of the references arose out of the Deepwater Horizon incident: M had been appointed as chair by the Court (albeit he was Chubb's preferred candidate) in reference 1; had been appointed by Chubb in reference 2; and had been

[1] The law on apparent bias is well settled, namely whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased: *Porter v McGill*. Bias is not used in a pejorative sense, rather it means the absence of demonstrated independence and impartiality: *Yiacoub v The Queen*. That case coined the phrase that it "surely cannot be right" that the tribunal judge the case. The question is one of law, albeit to be answered in light of all the relevant facts: *Helow v S/S for Home Department*. It does not matter that had the matter been conducted before an independent tribunal it would have made no difference: *Millar v Dickson*.

[2] [2018] UKPC 3

[3] [2018] EWCA Civ 817

appointed in a reference concerning another insurer in the same layer as Chubb in reference 3. Although M disclosed on his appointment in reference 1 that he was then sitting in other (unrelated) references involving Chubb (including as its nominee), he did not disclose to Halliburton the appointments in references 2 and 3. The Court held that as a matter of practice, and law, the disclosures ought to have been made, however, not making the disclosures did not give rise to the appearance of bias.

The Court of Appeal held that disclosure of appointments in references 2 and 3 ought to have been made: as being something that might lead the fair-minded observer to consider that there was a real possibility of bias. This is consistent with *Taylor v Lawrence*[4]. Non-disclosure, when there ought to be disclosure, must "inevitably colour the thinking" of the observer, but will not, of itself, be sufficient to remove an arbitrator[5].

The results in *Almazeedi* and *Halliburton* are heavily fact dependent. *Halliburton* will probably (and perhaps wrongly) be seen as a greater contribution to the jurisprudence in this area, especially as to multiple appointments with a common party. It has certainly attracted more comment.

Notwithstanding this recent judicial scrutiny there remain three areas of the law that were not directly addressed and remain unsatisfactory.

Firstly, there is a sentence, obiter, in *Halliburton* that causes concern. Addressing an arbitrator's disclosures the Court said: "You can only disclose what you know and there is no duty of inquiry." The first part of that sentence is a truism, it is the second that is more insidious.

It is spasmodic international practice for the parties to inform the arbitrator of relationships that might impact on independence. Typically, a potential arbitrator will only have the names and addresses of the parties. The IBA Guidelines on Conflicts do, however, recognise a broad duty of disclosure by parties to the tribunal in General Standard 7(a)[6]. That duty obliges parties to disclose connections and relationships to arbitrators.

The duty on the arbitrator to enquire and investigate is well recognised in ICSID cases[7]; IBA Guidelines on Conflicts in General Standard 7(c), case law[8] and by leading commentators[9]. Furthermore, whilst the ICC Rules are silent on inquiry the statement of acceptance form that potential arbitrators must complete now has language that reflects that duty[10]. Arbitrators will invariably undertake some form of conflict check. Disclosure is the logically anterior question to enquiry and investigation. A potential arbitrator cannot know against whom he should search if he is not given the information on e.g. affiliates, counsel, witnesses, experts and third party funders.

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[4] [2003] QB 528

[5] "If disclosure is made, then full disclosure must be made": *Taylor* at [65]

[6] And see *J&P Avax v Techimont* Paris Court of Appeal 12 February 2009, 1 Rev. Arb. (2009) 186; and institutional rules usually stipulate details of the parties (but not of e.g. affiliates, witnesses, experts and counsel). It is also the logically anterior step for arbitrator investigations.

[7] *Suez v Argentina II* Challenge Decision of 12 May 2008 and *Vivendi v Argentina II* Challenge Decision of 10 August 2010.

[8] In *Schmitz v Zilveti* 20 F. 3d 1043 the Ninth Circuit Court of Appeals vacated an award on evident partiality grounds where an arbitrator's law firm had represented the parent of the respondent in 19 cases over 35-years, albeit the arbitrator knew nothing of it. In *New Regency v Nippon Herald* 501 F. 3d 1101 the arbitrator had begun a role with a company days before an award. The new employer was negotiating a contract with New Regency but there was no evidence that the arbitrator knew of the negotiations. The award was vacated.

[9] Lew, Mistelis and Kroll state "the duty to disclose also requires and arbitrator to make inquiries as to whether relationships exist which have to be disclosed. He cannot just rely on his existing knowledge."

[10] The instruction, on the form, provides that the disclosure must be: "complete and specific, identifying, inter alia, relevant dates (both start and end dates), financial arrangements, details of companies and individuals, and all other relevant information". The duty is a continuing one: Article 11(3).

Moreover, in *Locabail*, the Court of Appeal acknowledged[11], indeed recommended, that solicitors "conduct a careful conflict search" (barristers are, apparently, "expected to know of any past or continuing professional or personal association" – so whilst the 'conflict search' might simply be asking themselves a question it is a 'search' nevertheless). However it is framed, the Court in *Locabail* plainly endorses inquiry and investigation and the Court in *Halliburton* is at odds with that.

Secondly, both *Almazeedi* and *Halliburton* were cases of 'known knowns' i.e. Cresswell J and M both knew that they had the other appointments. Equally, both Courts held that the other appointments ought to have been disclosed. But the two courts reached different results. The Privy Council in *Almazeedi* held that the non-disclosure "represented a flaw in his apparent independence"[12]. The Court of Appeal in *Halliburton*, however, rejected the concept of non-disclosure amounting to unconscious bias[13]. As bias means the absence of demonstrated independence and impartiality[14] it is difficult to reconcile these positions. Non-disclosure can only be acceptable where there is no real possibility of it being regarded by the fair minded and informed observer as raising the possibility of bias.[15]

Thirdly, there are cases of 'unknown knowns': these are cases where a tribunal does not, but ought to, know, at the time of making an award, of some connection or other matters that might question their independence. In *W v M*[16] Knowles J dismissed a challenge to two awards. The arbitrator stated that he did not know of the relationship that developed during the reference between his law firm and an affiliate of one of the parties. Knowles J held that the fair minded and informed observer "would say that this was an arbitrator who did not know" of facts that affected his independence and might have amounted to the appearance of bias: as it was "not in his mind" and it cannot, he held, have had any impact[17]. This followed *Locabail v Bayfield*[18] where a solicitor, sitting as a deputy judge, had done a conflict search on the parties but not the appellant's husband. The observer, and the court personifying the observer, accepted the deputy judge's statement about his knowledge and, on that basis found no difficulty in concluding that there was no real danger that the judge had been biased.

In the US, albeit applying a different test (that of 'evident partiality'), the Second Circuit reached a similar conclusion in *Ometto v ASA Bioenergy*[19]. The arbitrator's[20] firm had acted in certain transactions involving an affiliate of one of the parties that were not identified due to deficiencies in the conflict check system. The Court accepted that the arbitrator did not know of the conflicts and confirmed the awards. In seeking to enforce the awards, however, the Brazilian Court refused recognition due to the undisclosed conflict, rendering the awards largely useless.

Of course, it is the lack of full and proper disclosure and the lack of rigorous enquiry and investigation (and in some cases not updating the disclosures and inquiries) that leads to the 'unknown knowns'.

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[11] At [20]
[12] At [34]
[13] At [97], [98].
[14] *Yiacoub v The Queen* [2014] UKPC 22
[15] Taylor at [64]
[16] [2016] EWHC 422 (Comm)
[17] At [24]
[18] [2000] QB 451 at [20]. This was a special sitting of the Court of Appeal comprising Lord Bingham, Sir Richard Scott and Lord Woolf (the famous Tom, Dick and Harry sitting).
[19] 549 Fed. Appx. 41. Also noteworthy is *Certain Underwriting Members of Lloyds v Florida, Department of Financial Services* 2018 WL 2727492 (2d Cir. Jun 7, 2018) where the Court held that a party appointee "is expected to espouse the view or perspective of the appointing party" and "serve as *de facto* advocates". That said there are two "baseline limits": (1) failure to disclose a relationship that violates the arbitration agreement, and (2) an undisclosed relationship that has a "prejudicial effect on the award." There must be a "clear showing" that the relationship or non-disclosure "influenced the arbitral proceedings or infected an otherwise valid award."
[20] David Rivkin – sometime chair of the IBA

This reinforces the need for disclosure by the parties to the tribunal at the outset and proper enquiry and disclosure by the tribunal.

In determining the facts that the notional fair minded and informed observer is deemed to be aware of, the Court can receive a statement from the arbitrator as to what he knew at the time, although the Court is not bound to accept any such statement at face value, and there is no question of cross-examining the arbitrator. However, no attention is paid to any statement by the arbitrator as to the impact of any knowledge on his mind: *Locabail*[21].

Is it satisfactory that a challenge to an arbitrator or an award is to be determined by the asserted state of mind of the arbitrator[22]? There is no room for fine distinctions if Lord Hewart's famous dictum is to be observed: it is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done": *R v. Sussex Justices, Ex parte McCarthy*[23]. The apparently subjective nature of the knowledge of the arbitrator sits unhappily with the objective nature of the test for apparent bias: "The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. … She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially": *Helow*[24].

In *Almazeedi* the Privy Council cited with approval the judgment of Rix LJ in the Court of Appeal in Cayman that if a judge of the utmost integrity lacks independence "then there is a danger of the unconscious effect of the situation, which it is impossible to calibrate or evidence[25]." That must be right for a 'known known' case. However, if the tribunal, viewed objectively, lacks independence as was the case in *W v M and Ometto*, and justice must be manifestly and undoubtedly seen to be done - can the flaw in the independence, albeit unknown, be corrected simply by the tribunal saying that they were not aware of it? The losing party may well have a justified sense of grievance that an asserted lack of knowledge, which cannot be tested, is determinative.

The answer to this conundrum lies, as ever, in a spectrum: a highly remote connection that has no substance ought not to trigger the disqualification of the arbitrator or the refusal to recognise the award: it would be too easy for disgruntled parties to find some obscure connection. However, anything of substance[26] ought, out of caution and to protect the integrity of the process and any award, to lead to those results: at some stage, in the words of *Yiacoub* it "surely cannot be right" that the particular tribunal judge the case, even with asserted, and no doubt actual, ignorance of the underlying facts. This is the case in the U.S. where trivial or insubstantial associations are not sufficient[27].

Note further, in *Halliburton* the Court accepted that the arbitrator's experience was a relevant factor, the retired Judge[28] might be contrasted with a rookie and the Judge ought to be trusted with a greater degree of relationship. This is a dangerous step into the realm of subjectivity.

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[21] At [19] approved in *Helow* at [39]

[22] In the famous words of Bowen LJ in *Edgington v Fitzmaurice* (1885) 29 Ch D 459 "…the state of a man's mind is as much a fact as the state of his digestion…"

[23] [1924] KB 256, 259

[24] At [2]

[25] At [1]

[26] A word used in *Halliburton* at [21] and also *Locabail* at [21]

[27] *Positive Software Solutions, Inc. v New Century Mortg. Corp*. 476 F. 3d 278 (5th Cir. 2007) but note that this was, again, a decision on the U.S. test of 'evident partiality'.

[28] Whose mind is conditioned to "independence of thought and impartiality of decision": *Bolkiah v Brunei* [2007] UKPC 62 – albeit it was not enough to save the decisions of Cresswell J in *Almazeedi*.

The higher courts have not had the opportunity to consider an 'unknown known' case since *Locabail*. *Almazeedi* was a majority decision (and perhaps harsh on the facts - as are many of the cases) and might be seen as a stricter approach to the appearance of bias, an approach perhaps relaxed in *Halliburton*, but *Almazeedi* does more to protect the integrity of the process than does *Halliburton*. If the courts are to be wary of the unconscious effect of an admitted known state of facts (as Creswell J knew of his appointment in Qatar) that cannot be measured or evaluated, then situations like *W v M* and *Ometto* are unsatisfactory where the factual connections are retrospectively admitted or found, the arbitrator's statement as to knowledge does not have to be accepted and no attention is to paid to the impact of knowledge on a state of mind.

Similarly, *Halliburton's* "no duty of inquiry" deserves further consideration. The Court's conclusion that as a matter of law, disclosure ought to have been made drew heavily on international practice to make such disclosures. The duty of inquiry ought to be, consistent with international practice, elevated to a legal obligation.

Peter Ashford
Partner
pashford@foxwilliams.com
+44 (0)20 7614 2596