Arbitrators' Duty to Disclose: a Tale of Two Jurisdictions

Kluwer Arbitration Blog
September 9, 2020

Guilherme Rizzo Amaral (Souto, Correa, Cesa, Lummertz & Amaral Advogados)

Please refer to this post as: Guilherme Rizzo Amaral, 'Arbitrators' Duty to Disclose: a Tale of Two Jurisdictions', Kluwer Arbitration Blog, September 9 2020, http://arbitrationblog.kluwerarbitration.com/2020/09/09/arbitrators-duty-to-disclose-a-tale-of-two-jurisdictions/

On 11 August 2020, the Court of Appeals of the state of São Paulo, Brazil, annulled an arbitral award[fn]1ª Câmara Reservada de Direito Empresarial do Tribunal de Justiça de São Paulo. Apelação Cível no. 1056400-47.2019.8.26.0100 [Appeal no. 1056400-47.2019.8.26.0100].[/fn] on the grounds that the chair of the arbitral tribunal had failed to timely disclose his appointment to another arbitration by one the parties.

As discussed in a previous post on this blog, less than two years earlier, the Court of Appeal in the UK denied a request[fn][2018] EWCA Civ 817.[/fn] to remove the chair of an arbitral tribunal *despite* the fact that he had not disclosed his appointment to another arbitration by one the parties.

This post draws a comparison between these two decisions and their contrasting outcomes.

Fazon **(Brazil)**

The arbitral procedure (*"Fazon"*) started in 2015, and a final award in favour of the respondent was issued on 7 February 2018. Before deciding on the claimant's request for clarification, the arbitral tribunal issued a procedural order informing, *for the first time,* that, on 18 August 2016, the chair of the tribunal had accepted

an appointment as co-arbitrator in a different proceeding by the respondent.

The award was challenged in the first instance court, which dismissed the case. The decision was then reversed on appeal. The State Court stated that "each and every piece of information of a personal or professional nature that is capable of generating doubts as to the impartiality or integrity of the arbitrator must be immediately disclosed". Furthermore, the lack of disclosure "cannot be seen as normal or usual"; it amounts to "a behavioural failure, which may characterise the lack of confidence claimed by the appellant [claimant], hence affecting the validity of the arbitral award". Citing the Brazilian Superior Court of Justice precedent in *Abengoa,* the Court moved to annul the award, suggesting the existence of a direct link between the *lack of disclosure* and the *arbitrator's lack of impartiality*.

This is, however, too much for *Abengoa* to bear. In *Abengoa*, the law firm to which the chair of the arbitral tribunal was a partner had received significant fees from an affiliate of one of the parties to the arbitration – a circumstance which was not disclosed beforehand. The Superior Court of Justice not only asserted the arbitrator's violation of the duty to disclose, but went beyond to analyse whether the arbitrator's lack of impartiality could be inferred from the non-disclosed circumstances. The conclusion was that (i) the commercial relationship between the arbitrator's law firm and an affiliate of one of the parties amounted to lack of impartiality, (ii) the other party was denied due process due to the lack of disclosure, and (iii) there was an implicit admission of *bias* when the arbitrator resigned from the panel.

That said, it is easy to see that the decision in *Fazon* not only failed to distinguish the case from *Abengoa*, but also misinterpreted *Abengoa's ratio decidendi*.

In *Fazon,* one of the parties appointed the chair of the tribunal as a co-arbitrator in another arbitration. The situation is similar to that described in Paragraph 3.1.5 of the *Orange List* of the IBA Guidelines on Conflicts of Interest in International Arbitration: "3.1.5 The arbitrator currently serves […] as arbitrator in another arbitration on a related issue involving one of the parties […]."

In Abengoa, the Superior Court of Justice considered that the arbitrator's law firm had a significant commercial relationship with an affiliate of one of the parties, which falls squarely within Paragraph 2.3.6 of the Red List. According to the Guidelines, "[b]ecause of their seriousness, *unlike circumstances described in the*

Orange List, these situations should be considered waivable, but only if and when the parties, being aware of the conflict of interest situation, expressly state their willingness to have such a person act as arbitrator […]".

Furthermore, in *Abengoa,* the Superior Court of Justice, not satisfied with a mere statement of lack of disclosure, went on to verify the nature and gravity of the undisclosed facts to reach a conclusion regarding the arbitrator's lack of impartiality. The Court in *Fazon* failed to do so.

It is likely that the *Fazon* decision will be appealed with the Superior Court of Justice for a final say on the matter.

Halliburton v. Chubb **(UK)**

On 20 April 2010, there was an explosion on the Deepwater Horizon oil rig in the Gulf of Mexico, which resulted in several casualties and a large oil spill. Halliburton provided cementing and well-monitoring services, and had purchased liability insurance from Chubb. When Chubb refused to pay Halliburton's claim, arbitration ensued.

An application was made to the High Court for the appointment of a third arbitrator, which resulted in the appointment of "M" on 12 June 2015.

In December 2015, "M" accepted an appointment by Chubb to become co-arbitrator in another case, through the same law firm that represented the company in *Halliburton*. The case involved a claim by Transocean against Chubb related to the same incident. Later, in August 2016, "M" accepted an appointment as a substitute arbitrator in yet another claim made by Transocean against a different insurer on the same layer of insurance.

Neither appointment was disclosed to Halliburton, which only learned of them on 10 November 2016. After a series of developments, Halliburton applied for the removal of the arbitrator. The High Court dismissed the application and Halliburton appealed.

Yet, much unlike the Brazilian court in *Fazon,* the Court of Appeal in the UK dissected the matter into its essential parts.

First, the court set out to decide "[w]hether and to what extent an arbitrator may accept appointments in multiple references concerning the same or overlapping subject matter with only one common party without thereby giving rise to an appearance of bias". The Court concluded that "[t]he mere fact of appointment and decision making in overlapping references does not give rise to justifiable doubts as to the arbitrator's impartiality. Objectively this is not affected by the fact that there is a common party. An arbitrator may be trusted to decide a case solely on the evidence or other material before him in the reference in question and that is equally so where there is a common party". In the case at hand, although the facts concerned the same incident, the court understood that the matters dealt with in the arbitrations were different. Besides, the financial benefit arising for "M" by his appointments was not relevant to the point of compromising his impartiality. If it were, "then objection could be made to every party-appointed arbitrator, which would be absurd".

The court then moved to answer "[w]hen should an arbitrator make disclosure of circumstances which may give rise to justifiable doubts as to his or her impartiality". It stressed the importance of an *early disclosure* of any given 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". In other words, even borderline cases should be disclosed. From the perspective of a *fair-minded and informed observer,* the test is, however, *objective.* As the situations in *Halliburton* fell within the *Orange List* of the IBA Guidelines (item 3.1.5), "M" should have disclosed them. His oversight could *not*, therefore, be excused.

Finally, the court established "[w]hat are the consequences of failing to make disclosure of circumstances which should have been disclosed". While the court admitted that the arbitrator's non-disclosure of relevant information "must inevitably colour the thinking of the observer", it cannot "*in and of itself* justify an inference of apparent bias". It then moved to analyse the specific circumstances of the case, concluding that (i) the mere acceptance of an appointment in a related case with only one common party does not justify an inference of apparent bias (ii) the arbitrator's oversight was accidental rather than deliberate, (iii) the degree of overlap in the cases was limited and did not give rise to justifiable concerns, (iv) a fair-minded and informed observer would not consider the arbitrator's oversight a justifiable reason to doubt the arbitrator's impartiality and, finally, (v) nothing in

the arbitrator's conduct during the arbitration was substantial as to raise doubts regarding his impartiality.

In doing so, the court upheld the first instance decision that had dismissed the application for removal of the arbitrator.

Said decision is clearly in line with the IBA Guidelines (Part II: Practical Application of the General Standards, Paragraph 5) which state that "[n]ondisclosure cannot by itself make an arbitrator partial or lacking independence: only the facts or circumstances that he or she failed to disclose can do so".

The decision was appealed with the UK Supreme Court, which heard the parties and *amici curiae* on 12 and 13 November 2019, and is set to decide the case.[fn]UKSC 2018/0100.[/fn]

What's next?

Both Brazil and the UK are considered arbitration-friendly jurisdictions. Their highest courts will have the final word on *Fazon* and *Halliburton.* One can only hope that a clearer guidance on the arbitrators' duty to disclose will then arise.