

# Challenges To The Appointment Of An Arbitrator: What Is The Effect Of Non-Disclosure?

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The award in *Serafín García Armas and others v. Venezuela* (PCA Case No.2013-3) (administered under the 1976 UNCITRAL Rules) was released in April 2019. This post refers to two decisions by Mr. Hugo Siblesz on challenges brought by Venezuela to the claimants' appointment of Prof. Guido Tawil as party-appointed arbitrator. Mr. Siblesz was acting in his capacity as Secretary-General of the PCA and was appointed by the parties to rule on the challenges. The first decision (*Decisión Sobre La Recusación Contra El Prof. Guido Santiago Tawil*) was published on 8 May 2013, the second, by the same name, was released on 12 February 2018 but has only recently been made public.

Examined together, these decisions provide an insight into the handling of challenges to the appointment of an arbitrator – a topic that was the focus of the recent English Supreme Court case of *Halliburton v Chubb* (UKSC 2018/0100).

### **The 2013 Decision**

The claimants appointed Prof. Tawil in late 2012. Soon after, his appointment was challenged by the respondent, Venezuela, on several grounds, including that (i) he had an apparent pre-disposition against states, (ii) was at risk of pre-judging the case as a result of having been involved in similar cases involving foreign investors and sovereign expropriation; and (iii) had a certain affinity with the cause of foreign investors. The challenge was framed as being to Prof. Tawil's impartiality, not his independence. The respondent also alleged that the fact of Prof. Tawil having worked with Freshfields, counsel for the claimants, in a previous investment case and his failure to provide his declaration of impartiality and independence at the time of the challenge gave rise to justifiable doubts as to his impartiality.

Mr. Siblesz rejected the challenge. First, the circumstances surrounding the return of the declaration of impartiality and independence were disputed and Mr. Siblesz found that Prof. Tawil's clear intention was to disclose all relevant issues. Second, the respondent had failed to establish any connection between the investment cases (beyond the fact that they concerned sovereign expropriations) or proof that the information obtained in previous investment cases was capable of influencing the tribunal's handling of points that might arise in the present case. Third, Mr. Siblesz held that there could be no presumption of bias on the basis that Prof. Tawil had previously been involved in similar

cases and acted for foreign investors (at ¶164): “although there may in certain cases be a risk that an arbitrator identifies with the interests of parties that he has represented as an advocate, one cannot presume that this is the case.”

## **The 2018 Decision**

In late 2017, the respondent challenged the claimants’ appointment of Prof. Tawil for a second time. This challenge was brought on the basis that Vanessa Giraud, a former employee of D’Empaire Reyna (the Venezuelan firm acting as co-counsel for the claimants), had been hired by M&M Bomchil, an Argentinian firm in which Prof. Tawil was a partner and head of the arbitration group. Ms Giraud worked for D’Empaire Reyna between 2014 and 2017. The firm was contracted as local counsel in the arbitration at the beginning of 2016.

The respondent argued that Prof. Tawil’s failure to disclose these circumstances was either intentional, or so serious that it should be treated as intentional. Moreover, the respondent alleged that his professional experience was such that he could not reasonably have considered that the situation should not be disclosed. In the circumstances, Venezuela argued that his conduct objectively and reasonably gave rise to a fear of a lack of independence or impartiality.

The respondent argued that a continuing obligation of disclosure on arbitrators was embodied in Articles 9 to 12 of the 1976 UNCITRAL Rules. Venezuela argued that whilst this continuing obligation was not explicit, it was indicated in the preparatory notes and was consistent with disclosure requirements in other arbitral tribunals and with underlying policy considerations. The respondent also pointed to the [IBA Guidelines on Conflicts of Interest in International Arbitration](#) and the approach of the Paris courts (Paris being the seat of the arbitration), which is also that an arbitrator comes under a continuing duty to disclose details relevant to his or her independence and impartiality (see *Sociétés Columbus v. Société AGI*).

As a result, in the respondent’s view, Prof. Tawil had an obligation to disclose any situation that would objectively give rise to doubts about his impartiality or independence as soon as that situation arose, and, in failing to disclose the link with Ms. Giraud, he had failed to comply with this obligation.

Mr. Siblesz also rejected this challenge. Mr. Siblesz held that while Ms. Giraud’s move from D’Empaire Reyna to M&M Bomchil could in principle have triggered an obligation on the part of Prof. Tawil to disclose that circumstance, there was no clear proof that Prof. Tawil had been aware of Ms. Giraud’s move. Even if Prof. Tawil had been aware of the hiring of Ms. Giraud and had failed to disclose this, there was no evidence of the exceptional requirements under which a lack of disclosure alone would give rise to justifiable doubts having been satisfied. Instead, any such lack of disclosure appears to have been inadvertent or the result of an honest exercise of discretion on the part of Prof. Tawil.

## **How to approach non-disclosure**

The Claimants referred in their 2018 challenge to *Total v Argentina* (ICSID Case No, ARB-04-01, [Decision on the Proposal to Disqualify Teresa Cheng](#), 26 August 2015) in support of the notion that the non-disclosure of a fact that one party considers should have been disclosed can never in itself be sufficient for the challenge to be successful.

The significance of this point is questionable: as suggested in argument in *Halliburton*, an omission will not be considered in a vacuum and consideration of a non-disclosure necessarily involves

consideration of the facts surrounding it. Mr. Siblesz's reference to the 'exceptional requirements' under which a lack of disclosure alone would give rise to justifiable doubts demonstrates this ambiguity: discussion of the effect of a lack of disclosure 'alone' or 'in itself' is artificial.

In addition, both decisions referred to the principle that Art. 10.1 of the 1976 UNCITRAL Rules constitutes an objective standard and that any doubt as to the independence or impartiality of an arbitrator must be justified from the perspective of an informed, fair and reasonable third party. In the 2018 challenge, the claimants also cited the explanatory notes to the 2004 IBA Guidelines on Conflicts of Interest, which state in the notes to general standard 3 that "the two tests (objective test for disqualification and subjective test for disclosure) are clearly distinct from each other."

This distinction, which was presumably highlighted in argument because it can be seen to undermine the notion that a failure to disclose can automatically give rise to an appearance of bias, is of limited force: references to the 'eyes of the parties' in the IBA Guidelines and to 'justifiable doubts' in the 1976 UNCITRAL Rules demonstrate that the arbitrator's subjective assessment will be measured against an objective or quasi-objective standard. Nevertheless, the difference between the two tests does emphasise the manner in which the deciding authority must undertake a holistic assessment of the severity of any non-disclosure rather than seeking to draw conclusions from the omission itself: any failure to disclose must be examined in its context.

This reasoning was borne out in Mr. Siblesz's decision, where he stated (with reference to Baker and Davis' *The UNCITRAL Rules in Practice: The Experience of the Iran-United States Claims Tribunal*) that the importance of any omission to disclose matters giving rise to a conflict depended on the circumstances of the case, including (i) whether the omission was the result of an honest exercise of discretion, (ii) whether the facts that were not disclosed raised obvious questions about impartiality and independence, and (iii) whether the non-disclosure is an aberration by a conscientious arbitrator or part of a pattern of circumstances raising doubts as to impartiality.

### **Halliburton v Chubb and the development of arbitrator challenges**

*Halliburton v Chubb* is an English Supreme Court case on the question of whether an arbitrator may accept appointments in multiple references relating to overlapping subject matters with a single common party without giving rise to an appearance of bias and without disclosure.

Many of the issues raised in the *Garcia Armas* challenges are interlinked with those discussed in *Halliburton*. The Court of Appeal in *Halliburton* ([2018] EWCA Civ 817 at [95]) found that, where a relevant circumstance has not been disclosed, the question for the court is whether "*the non-disclosure, taken together with any other relevant factors would have led the fair-minded and informed observer, having considered the facts, to conclude that there was in fact a real possibility that [the arbitrator] was biased.*" In the Supreme Court, the appellant argued for a more robust standard to reflect the international pro-disclosure consensus. As intervenors, the ICC, LCIA and CI Arb also submitted that there should be an objective standard higher than that postulated by the Court of Appeal. By contrast, the respondent proposed a holistic analysis on the totality of the material; in determining whether justifiable doubts exist, it is necessary to examine the 'quality' of the non-disclosure (*i.e.* "*whether it was inadvertent, innocent or deliberate*") along with the circumstance that is not disclosed. It was also argued that a court should consider whether harm was caused by the non-disclosure, albeit that this involved the use of hindsight.

It remains to be seen whether the Supreme Court will affirm the kinds of holistic assessments argued for by the respondent and upheld in *Garcia Armas*. However, insofar as the *Garcia Armas* decisions

are an indication of current international practice, they are arguably consistent with a determination based on an examination of the facts of the particular case, rather than the application of broad presumptions.