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Disclosure and apparent bias in arbitration

– The Norwegian and Nordic perspective in the context of *Halliburton*

The Norwegian backdrop

- Historically
  - A limited pool of arbitrators, in particular within maritime law
  - «Tordenskjolds soldater»
  - Few international cases seated in Norway
- Currently
  - Broader and more diversified pool of arbitrators
  - Significant increase in international cases the last 20 years
  - But still a relatively narrow pool, in particular within maritime law
- Particular features of arbitration in Norway
  - Still dominated by ad hoc arbitration
    - No arbitral body to decide on challenge to arbitrators
  - Transparent legal environment
  - The parties are normally able to agree on the compostion of the Tribunal
  - The latter might be a key reason why apparent bias has not been a big issue

The key questions

1. What is the applicable standard to determine apparent bias in Norwegian and Nordic law?
2. Post *Halliburton*: Does a different standard apply in highly specialised fields of arbitration, like shipping and insurance?
3. Is it relevant that the Nordic pool of arbitrators is not the largest?
4. Would the outcome of *Halliburton* be the same under the Nordic Arbitration Acts?

The questions cannot be decided merely on the basis of «Norwegian» law

- The Norwegian Arbitration Act
  - Based on UNCITRAL´s model
  - Incorporates the New York Convention on recognition and enforcement
- The «international» elements of the Act has a strong bearing on the present matters
  - Ad disclosure
    - IBA Guidelines on Conflict of Interests in arbitration
    - Indeed relevant as «best practice» in international arbitration – «orange list» as a yardstick
  - Ad enforcement beyond Norway
    - Limited room for a particular «liberal» Norwegian standard on «independence and impartiality»
    - The standard must ensure that the award will be enforceable under the New York Convention; in international arbitration – beyond Norway

Disclosure – the key elements

- Arbitration Act Section 14

- When?
  - "When a person is approached in connection with his possible appointment as an arbitrator"
  - "it shall on its own accord disclose"
- How?
  - Not governed, but preferably in writing and to both parties
- Until when?
  - "From the time of his appointment and throughout the arbitral proceedings"
- What to be disclosed?
  - "any circumstances likely to give rise to justifiable doubts about his impartiality or independence"

What to be disclosed

- "circumstances likely to give rise to justifiable doubts about …"

- The obvious issues to be disclosed
  - Relationship to the parties (if any)
  - A close relationship to counsel (if any)
  - But this is a matter of «real», not «apparent», bias
- What about previous appointments?
  - To what extent should the requested candidate routinely disclose all previous appointments having a relationship to the new request?
  - Does it matter whether the previous appointment was joint?
  - A key question to be addressed by the Panel today regarding the number of appointments
    - The bearing of IBAs «orange list»
- What about confidentiality where the requested candidate is a practising lawyer?
  - A practising lawyer cannot disclose clients; subject to consent
  - Similarly, an arbitrator might be subject to confidentiality

The relationship between disclosure and the substantive test

- The starting points
  - That something must be disclosed does not *per se* entail apparent bias
  - That something is not disclosed, but should have been disclosed, does not *per se* entail apparent bias
- The purpose of disclosure and its relationship to the substantive test
  - Basically, the aim is to ensure the integrity of the Arbitral Tribunal
  - The key purpose of disclosure: to bring potential issues on the table to ensure transparency and timely challenge
  - Indeed, much better to address such challenges in the “early days” than after the award

Briefly on the standard to determine apparent bias

- «Apparent» bias
  - Basically, a matter of «justice must be seen to be done»
- The substantive test under the Norwegian Arbitration Act Section 13:
  - "The arbitrators shall be impartial and independent of the parties"
  - The preparatory works does not provide much guidance on the test of apparent bias
  - But it is indeed an objective standard
  - In the absence of Norwegian case law, domestic case law on domstolloven might be relevant
- The objective test in IBA Guidelines Art 2 c) and d):
  - "Doubts are justifiable if a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision".

Challenge of arbitrators in ad hoc arbitration under the Norwegian Arbitration Act

- Institutional arbitration
  - Disagreement on this matter will normally be determined by the Board of the Arbitral Body
- Ad hoc arbitration – Section 15
  - "… Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.
  - If a challenge is unsuccessful and the parties have not agreed to a different procedure, the challenging party may bring the issue before the courts within one month after he received notice of the decision rejecting the challenge …"
- «The arbitral tribunal shall decide»
  - This will only be necessary if the challenged arbitrator is not willing to resign, who will then (still) be a part of the panel
  - The challenged arbitrator will then dissent …