Milbank

Litigation & Arbitration Group

Client Alert

Arbitrator impartiality and disclosure of multiple appointments: Supreme Court dismisses Halliburton appeal

30 November 2020

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On 27 November 2020, the UK Supreme Court handed down its highly anticipated judgment in Halliburton Company v Chubb Bermuda Insurance Ltd.[1] The case, which involved interventions from the ICC, LCIA and CIArb (among others), is significant as it clarifies the position in London-seated arbitrations as to the duty on arbitrators to disclose their appointments in separate arbitrations and the extent to which such appointments (and any non-disclosure) might support a challenge to their impartiality.

In summary, the Supreme Court confirmed that, as a matter of English law:

1. accepting appointments in multiple arbitrations with overlapping subject matter may, in principle, give rise to justifiable doubts as to the arbitrator's impartiality. However, it is an objective test that will depend on the facts that are known at the date of the hearing; and

2. arbitrators have a legal duty (which is subject to their duty of confidentiality) to disclose matters which might give rise to justifiable doubts about their impartiality. Again, it is an objective test that will depend on the facts but is to be assessed at the time that the duty to disclose arises, rather than at the hearing.

In relation to both issues, the Supreme Court recognised that an objective assessment should reflect the varied customs and practices of parties to arbitration disputes, including that certain types of disputes (such as shipping and insurance) tend to have a smaller pool of recognised arbitrators from which the parties can choose.

In a unanimous decision, the Supreme Court dismissed the appeal. It held that the arbitrator (Mr Kenneth Rokison QC) had breached his duty of disclosure, but nevertheless this breach did not give rise to justifiable doubts as to his impartiality on the facts.

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1 Halliburton Company v Chubb Bermuda Insurance Ltd (Formerly known as Ace Bermuda Insurance Ltd) [2020] UKSC 48.

Background

The appellant, Halliburton, provided cementing and well-monitoring services to BP in the Gulf of Mexico, and had entered into a Bermuda Form insurance policy with Chubb.

Following the Deepwater Horizon disaster and the subsequent US trial in which blame was apportioned between BP, Halliburton, and Transocean (which owned the oil rig and provided BP with crew and drilling teams), Halliburton agreed to settle certain claims that had been made against it, which it then sought to recover under its insurance policy with Chubb. However, Chubb refused to pay on grounds of the reasonableness of the settlements and, therefore, Halliburton commenced arbitration proceedings against Chubb in 2015, pursuant to the arbitration agreement in the policy. Following the parties' failure to agree on a third arbitrator, Chubb's first-choice candidate, Mr Rokison, was selected as chairman by the High Court, following contested proceedings.

In those High Court proceedings, Mr Rokison had declared his appointment as an arbitrator in several previous arbitrations involving Chubb, as well as two pending references also involving Chubb. He subsequently accepted two further arbitrator appointments in proceedings arising out of the Deepwater Horizon disaster (the first being an appointment by Chubb in proceedings against Transocean, and the second in another claim by Transocean against a different insurer). However, he did not inform Halliburton about these appointments.

In 2016, Halliburton became aware of those subsequent appointments, and invited Mr Rokison to resign (which he declined to do). Therefore, Halliburton made an application[2] to the English High Court for the removal of Mr Rokison as arbitrator on the ground that his conduct gave rise to justifiable doubts as to his impartiality. This application was rejected by the High Court,[3] whose decision was then upheld by the Court of Appeal in 2018,[4] holding that while Mr Rokison ought to have disclosed his appointments to Halliburton, a fair-minded and informed observer would not have believed that there was a real possibility that Mr Rokison was biased.

The Supreme Court's Judgment

The two key issues[5] before the Supreme Court were:

1. whether, and the extent to which, an arbitrator can accept appointments in multiple arbitrations with identical or overlapping subject matter and only one common party, without appearing to be biased; and

2. whether, and the extent to which, the arbitrator may do so without disclosing those appointments to the parties.

Duty of impartiality

The Court in this case was concerned only with apparent bias – there were no allegations of any actual bias by the arbitrator. The Supreme Court held that the common law test for apparent bias was "*whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased*",[6] which it held was no different to the test under s.24 of the Arbitration Act to remove an arbitrator where there are circumstances that "*give rise to justifiable doubts as to [the arbitrator's] impartiality*".[7]

The Supreme Court recognised that there may be circumstances where an arbitrator's acceptance of overlapping appointments with only one common party may satisfy the test for apparent bias. However, it also

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2 Under section 24 of the Arbitration Act 1996.
3 [2017] EWHC 137 (Comm).
4 [2018] EWCA Civ 817.
5 As set out in the leading judgment of Lord Hodge. Lady Arden gave a concurring judgment.
6 At [52], as stated by Lord Hope of Craighead in Porter v Magill [2001] UKHL 67; [2002] 2 AC 357, para 103.
7 At [55].

recognised that this would depend on the facts of the particular case as assessed at the time of the hearing to remove the arbitrator (including the custom and practice in the relevant arbitration field – for example, in certain types of disputes there may be a limited pool of arbitrators from which the parties can reasonably choose). Furthermore, the Supreme Court held that the test should have regard to the circumstances of international arbitration, including the private nature of the process which means that a party may know nothing about the existence of, or evidence/arguments raised in, other arbitrations to which it is not a party and, therefore, whether there is a risk that the arbitrator has been affected by anything that takes place in those other arbitrations.

Duty of disclosure

The Supreme Court held that arbitrators have a legal duty under English law to disclose circumstances known to them which "*might reasonably give rise to the real possibility of bias*".[8] The Supreme Court found that this duty is contained in the statutory duty of arbitrators to act fairly and impartially.[9][10]

However, the Supreme Court held that this duty does not override the arbitrators' obligations of privacy and confidentiality. Accordingly, an arbitrator would need to obtain the consent of the parties to the other arbitrations (which may be inferred from the arbitration agreement and/or considering the customs and practices in the relevant arbitration field)[11] before s/he can disclose any information that is protected by confidentiality. In that regard, the Supreme Court indicated that, absent an agreement to the contrary, no express consent is required to disclose (i) the identity of the common party that is seeking to appoint the arbitrator in a separate reference; (ii) whether the proposed appointment is a party-nomination or an appointment by the court or a third party; and (iii) a statement that the other arbitration arises out of the same facts, where the consent is inferred.[12]

In assessing a potential breach of the duty of disclosure, the Supreme Court found that the fair-minded and informed observer must look to the circumstances as they existed when the duty arose and for as long as the duty continued.

Application to the facts

On the facts, the Supreme Court found that Mr Rokison breached his legal duty of disclosure by failing to inform Halliburton of his appointment by Chubb in the arbitration between Chubb and Transocean because, "*the existence of potentially overlapping arbitrations with only one common party was a circumstance which might reasonably give rise to the real possibility of bias*".[13] Notwithstanding that decision, the Supreme Court agreed with the lower courts that, assessing the circumstances existing at the date of the removal hearing (including Mr Rokison's failure to meet the duty of disclosure), the fair-minded and informed observer would not have concluded that there were justifiable doubts about his impartiality.[14] The Supreme Court therefore dismissed Halliburton's appeal.

Conclusion

The Supreme Court's decision emphasises that the tests for the duty of disclosure and impartiality are objective and heavily fact dependent. Those tests will also depend on the particular circumstances of the

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8 At [145].
9 Under section 33 of the Arbitration Act 1996.
10 The Supreme Court found that the existence of the disclosure duty promoted transparency and was consistent with good arbitral practice. Recognition of the duty was also supported by the ICC, LCIA and CIArb.
11 For example, certain subject matters such as shipping and insurance may mean that there is a limited pool of qualified arbitrators from which the parties can choose.
12 At [146] and [154].
13 At [145].
14 This is because i) the law on the duty of disclosure was unclear; ii) the time sequence of the overlapping arbitrations may explain why Mr Rokison did not inform Halliburton about the Transocean arbitration, but did inform Transocean about the Halliburton arbitration; iii) Mr Rokison gave a "*measured response*" to Halliburton's challenge; iv) Mr Rokison did not receive any secret financial benefit; and v) there was no basis to infer "*subconscious ill-will*" by Mr Rokison in response to Halliburton's challenge (At [149]).

arbitration, including the relevant institutional rules (if any) and the context of the dispute (if, for example, multiple appointments are generally accepted by parties to disputes of that nature).

It may be that this decision leads to greater transparency in the disclosure of arbitrators' appointments (particularly given Lord Hodge's comment that arbitrators may be liable for costs in subsequent challenge proceedings).[15] However, the Supreme Court appears to have set a very high threshold for removing an arbitrator on the basis of impartiality (whether actual or apparent) under English law, given that it did not consider there to be justifiable doubts about Mr Rokison's impartiality even though he had breached his duty of disclosure and was involved in multiple arbitrations involving Chubb (including proceedings arising from the same facts).

[15] At [111].

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