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UK Supreme Court clarifies English law on arbitrators' duties of impartiality, disclosure and confidentiality

In Halliburton Company v Chubb Bermuda Insurance Ltd [2020] UKSC 48, the Supreme Court recognised for the first time that there is an ongoing, statutory duty in English law, which requires arbitrators to disclose facts or circumstances which would, or might reasonably, give rise to justifiable doubts as to their impartiality. That duty is, however, subject to an arbitrator's duty of confidentiality in English-seated arbitral proceedings.

The Court unanimously confirmed that, when considering whether justifiable doubts actually exist as to an arbitrator's impartiality, the appropriate test to apply is whether the fair-minded and informed observer would conclude that there was a real possibility that the arbitrator was biased. The application of this test will be highly fact-specific, however, and must take account of the distinctive features of international arbitration, including any customs and practices specific to the relevant field of arbitration.

Background

This was an appeal by Halliburton against a **decision of the Court of Appeal** rejecting Halliburton's application to remove Mr Kenneth Rokison QC as chair of the tribunal in a London-seated 'Bermuda Form' arbitration between it and its insurer, Chubb, arising from the 2010 explosion on the Deepwater Horizon oil rig (the **Halliburton Arbitration**). Mr Rokison was appointed by the High Court, having been Chubb's preferred candidate for chair. Following his appointment as chairman in the Halliburton Arbitration, Mr Rokison accepted an appointment by Chubb, and a joint party appointment, in two other insurance arbitrations commenced by another claimant, Transocean, also in connection with the Deepwater Horizon incident (the **Transocean Arbitrations**). Halliburton sought Mr Rokison's removal on the basis that there were justifiable doubts as to his impartiality, essentially because:

– Mr Rokison failed to disclose to Halliburton his appointments in the Transocean Arbitrations; and

– there was a common issue in the three arbitrations as to whether fines and penalties paid by the policyholders in connection with the Deepwater Horizon incident were recoverable under the policies, and Chubb could benefit from learning in the Transocean Arbitrations what arguments might work in front of Mr Rokison without Halliburton even being aware that it had had that opportunity.

Halliburton's application was rejected by both the High Court and the Court of Appeal. The two key issues that came before the Supreme Court were whether, and to what extent: (i) an arbitrator may accept appointments in multiple arbitrations concerning the same or overlapping subject matter, with only one common party, without giving rise to an appearance of bias (the **First Issue**); and (ii) the arbitrator may do so without making a disclosure (the **Second Issue**). Given the general importance of these questions, the Supreme Court permitted interventions from the LCIA, ICC and the Chartered Institute of Arbitrators, as well as trade-specific arbitration associations, with the LMAA representing maritime arbitration, and GAFTA representing commodities arbitration.

The First Issue: impartiality

Pursuant to s24(1)(a) of the Arbitration Act 1996 (the **Act**), the court may remove an arbitrator in an arbitration seated in London where justifiable doubts exist as to their impartiality. It was not in dispute that the standard of impartiality in the Act reflects the common law test for the appearance of bias, ie whether the fair-minded and informed observer would conclude that there was a real possibility that the tribunal was biased. While in this sense the test is the same for arbitrators as it is for judges, Lord Hodge, giving the leading judgment, said that,

"in applying the test to arbitrators it is important to bear in mind the differences in nature and circumstances between judicial determination of disputes and arbitral determination of disputes".

These differences include the duty of confidentiality in English arbitrations, the limited review by the courts of arbitral decisions and the fact that arbitrators are paid, and often appointed, by the parties. The Court did not explain further how these differences should be taken into account when applying the apparent bias test to arbitrators rather than judges.

Lord Hodge held that the same standard of impartiality applies to party-appointed arbitrators and the presiding arbitrator, and that no account is to be taken of the characteristics of the parties (for example, the familiarity of foreign parties with arbitrator appointment practices). The assessment is, however, a nuanced one, which must reflect *"the customs and practices of the relevant field of arbitration."*

This qualification was made because it became apparent in the case that some fields of arbitration, notably maritime and commodities arbitration, were more tolerant of repeat related appointments of the same arbitrator than 'mainstream' commercial arbitration. As the LMAA and GAFTA explained to the court, in their fields disputes often arise from the same incidents and chain or string supply contracts.

On the specific question in this case, Lord Hodge held that the acceptance by an arbitrator of repeat appointments in related arbitrations with the same or overlapping subject matter and only one common party was capable of giving an appearance of bias.

This would be dependent on the facts of the case and, especially, on the customs and practices in the relevant field of arbitration. He suggested that, where this practice was more acceptable, thought should be given to making this clear in the relevant arbitration rules.

The Second Issue: disclosure

It is widely recognised in arbitration rules, including those of the LCIA and ICC, as well as soft law instruments such as the IBA Guidelines on Conflicts of Interest in International Arbitration (the **IBA Guidelines**), that a prospective arbitrator must disclose any circumstances which could call their impartiality into question, and that this duty continues through the arbitration. Now, for the first time, the Supreme Court has recognised that such a duty exists in English law.

The duty requires arbitrators to disclose facts or circumstances known to them that would, or might reasonably, give rise to justifiable doubts as to their impartiality. The test for disclosure is, therefore, wider than the test for apparent bias, as might be expected. Although it did not decide the point, the Supreme Court suggested that there might be situations that would require an arbitrator to make reasonable enquiries to ascertain whether any disclosure needed to be made (as the IBA Guidelines contemplate). The Court also noted that, since the same facts could lead to different views on whether there was an appearance of bias, it followed that the same facts could require disclosure for one type of arbitration but not another.

The Supreme Court's confirmation that a duty of disclosure exists under English law gave rise to two further questions:

– whether the failure to disclose relevant facts itself indicates partiality; and

– how the duty to disclose interacts with the long-recognised duty of confidentiality, which is considered to be a key feature and attraction of arbitration in London.

On the first point, the Court held that a failure to disclose may itself justify the removal of an arbitrator in a case that was *"close to the margin"* – that is, a case where *"one would readily conclude that there is apparent bias in the absence of further explanation."* A non-disclosure may also result in the arbitrator facing costs consequences from a challenge, even where the challenge is ultimately unsuccessful. These points were the Court's answer to the concern that a breach of the duty of disclosure might not have any adverse consequences for the arbitrator.

On the second point, the Supreme Court held that the arbitrator's duty of confidentiality took precedence over their duty of disclosure. Unless the parties to the arbitration to which the disclosure relates consent to the disclosure, only facts that are not confidential may be disclosed. The Supreme Court observed that the parties' consent to a disclosure may be inferred, for example through their choice of institutional rules. If the arbitrator's obligation of confidentiality means they cannot comply with their disclosure obligation, they must decline the new appointment. On the facts in *Halliburton*, Lord Hodge held that it would not breach confidentiality to disclose: the identity of the common party (Chubb); how, and by whom, the arbitrator was appointed; whether the other arbitration arose out of the same or a related incident; and, at a high level, whether similar issues were likely to arise in the other arbitration. He also suggested that the same details are likely to be disclosable without consent in other cases, absent some express provision in the arbitral rules to the contrary.

Decision

Applying these tests to the facts, the Supreme Court held that Mr Rokison's failure to disclose his appointment in the first Transocean Arbitration to Halliburton amounted to a breach of his legal duty of disclosure, as the overlapping appointments, where only Chubb was a common party, were capable of giving an appearance of bias. According to the court, there was no established practice in Bermuda Form arbitrations that it was acceptable for an arbitrator to take multiple related appointments with only one common party and, absent party agreement to the contrary, disclosure was required.

The Court went on to conclude that, nevertheless, there were no doubts about the impartiality of Mr Rokison that would justify removing him. The key factor seems to have been the timing of the three arbitrations, in that the Halliburton Arbitration started six months before either of the Transocean Arbitrations, meaning that, if any party was expected to be at a disadvantage, it was Transocean and not Halliburton. Among other things, the Supreme Court also : (1) did not regard his non-disclosure as an indicator of partiality given that there was a lack of clarity in English law at the time as to the nature and scope of the duty of disclosure; and (2) considered that his response to Halliburton's challenge, which the Court regarded as measured and fair, showed that there was no subconscious ill will towards Halliburton.

Consequently, the Supreme Court dismissed Halliburton's appeal.

Comment

The Supreme Court's decision will no doubt be the leading case on the standard of impartiality for an arbitrator. It took a somewhat more robust line than the Court of Appeal in holding that overlapping appointments with a single common party were capable of amounting to an appearance of bias. In doing so, the Court largely followed the international consensus on arbitrator conflicts. Equally, the Supreme Court's rejection of the challenge in this case – which must have been quite close to the line – suggests that the bar for a successful challenge remains high.

The case is also notable for recognising an arbitrator's legal duty of disclosure for the first time under English law However, the standards defined by the Court on impartiality and disclosure may not always be easy in practice.

It was already clear that challenges to arbitrators turn on the facts – as exemplified by Halliburton's challenge in this case. The Supreme Court has added further nuance by giving judicial recognition to the varying practices of different fields of arbitration, and by recognising that an assessment of the apparent bias test must take into account the characteristics of arbitration, without providing much explanation on how this should be done. There are sensible reasons for the various distinctions made by the Court but, as Lord Hodge himself recognised,

"how far this ruling on consent, which relates to Bermuda Form arbitrations, can be applied by analogy to other arbitrations will depend on their particular characteristics and circumstances and custom and practice in their field."

It may be that the effect of Halliburton is to make it harder for parties and arbitrators to reach clear views on potential conflicts.

The judgment establishes the principle that an arbitrator's duty of disclosure must yield to their duty of confidentiality. Time will tell how easy this will be to apply in practice. The Court helpfully recognised that the necessary party consent to a disclosure may be inferred from the choice of arbitral rules. However, it is unclear how easy it will be to determine whether a particular set of rules meets this threshold in a particular case. If disclosure of relevant information is precluded by confidentiality, it may be that a further effect is that arbitral institutions could lack full information to rule on challenges to arbitrators. Arbitrators may sometimes find that they have to decline appointments if they are unable to disclose enough information to explain themselves fully.

The *Halliburton* decision is the second from the Supreme Court in as many months dealing with arbitration and involving Chubb. Like the **Enka case**, which addressed the governing law of an arbitration agreement, *Halliburton* brings welcome clarity to the principles of English arbitration law but may lead to difficulties in practical application.

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