Cardinal duty – UK Supreme Court clarifies arbitrators' obligations of impartiality and disclosure

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The United Kingdom Supreme Court has handed down its much-anticipated judgment in *Halliburton Company v. Chubb Bermuda Insurance Ltd* [2020] UKSC 48: https://www.supremecourt.uk/cases/docs/uksc-2018-0100-judgment.pdf in respect of Haliburton's application to remove an arbitrator for apparent bias.

The judgment addresses the circumstances in which an arbitrator may appear to be biased and the related issue of when an arbitrator must disclose circumstances which may give rise to justifiable doubts about their impartiality. In reaching its decision, the UK Supreme Court received interventions from a number of interested parties, including the International Chamber of Commerce (ICC), The London Court of International Arbitration (LCIA), Chartered Institute of Arbitrators, the London Maritime Arbitration Association (LMAA), and the Grain and Feed Trade Association (GAFTA).

The court considered that the fundamental concern behind Haliburton's complaint was valid but proceeded to dismiss Halliburton's complaint on the relevant facts. In arriving at this conclusion the court emphasized the importance of arbitrator impartiality in London-seated arbitrations.

Background

The dispute arose out of insurance claims regarding the explosion of the Deepwater Horizon oil rig in the Gulf of Mexico in 2010. This incident led to legal claims against the parties involved, including against Halliburton, which had provided cementing and well-monitoring services in relation to the temporary abandonment and the plugging of the well.

Halliburton was insured by Chubb under a Bermuda Form liability insurance policy. Halliburton settled its legal claims arising from the incident and then sought to recover these payments from Chubb under the insurance policy. Chubb refused to pay out on grounds that the settlements reached were not reasonable, so Halliburton commenced arbitration proceedings against Chubb.

Under the terms of the arbitration clause, which provided for London-seated arbitration, Halliburton and Chubb each appointed one arbitrator but, as they could not agree on the third arbitrator (to act as chairman), he was appointed by the High Court.

Subsequently, and without Halliburton's knowledge, the appointed arbitrator then accepted arbitrator appointments in two further arbitral references arising out of the same incident. When Halliburton learned of the appointment in the subsequent arbitrations, it applied to the High Court under section 24(1)(a) of the Arbitration Act 1996 Act to have the arbitrator removed as arbitrator for apparent bias on the ground that, "that circumstances exist that give rise to justifiable doubts as to his impartiality."

The High Court and the Court of Appeal refused Halliburton's application. Halliburton appealed to the Supreme Court.

The principal issues raised in the appeal were:

1. Whether and to what extent an arbitrator's acceptance of appointments in multiple references concerning the same or overlapping subject matter (in this case, liability insurance claims arising out of the oil rig incident) with only one common party (in this case, Chubb), could give rise to the appearance of bias?

2. Whether and to what extent an arbitrator can accept such appointments without disclosing them?

Applicable principles

In deciding the principal issues, the Supreme Court considered an arbitrator's core duties of impartiality and of disclosure, and how far an arbitrator's obligation to respect privacy and confidentiality constrains this ability to make disclosure. He also considered the relevant time by reference to which the court must assess the questions of the need for disclosure and the possibility of apparent bias.

The duty of impartiality

The duty of impartiality is a "cardinal duty" of an arbitrator and is enshrined within section 33 of the 1996 Act which sets out an arbitrator's general duty to "act fairly and impartially as between the parties."

The test for whether an arbitrator has shown impartiality or apparent bias in section 24(1)(a) of the 1996 Act (i.e., "that circumstances exist that give rise to justifiable doubts as to his impartiality") is the same as that at common law, and is an objective test. This requires considering, "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased" (*Porter v. Magill* [2001] UKHL 67).

However, in the arbitration context, this test must be applied taking into account the differences between judicial and arbitral determination of disputes. The test should take into account the private and consensual nature of arbitration; the limited nature of appeals; the divergent views of arbitrators arising out of their differing expertise, jurisdictions and legal traditions; the differing perceptions of the role of a party-appointed arbitrator in the arbitration field; and, due to the mainly private nature of arbitration, a party's inability to inform itself (by attending other proceedings) of a common arbitrator's response to evidence and submissions in arbitrations to which it is not a party.

The duty of disclosure

An arbitrator in London-seated arbitrations has a legal duty of disclosure. This is because an arbitrator's disclosure duty is a component of its statutory duties under section 33 of the 1996 Act to act fairly and impartially in conducting arbitral proceedings. These duties also give rise to an implied term in the arbitrator's contract with the parties that he will act fairly and impartially.

An arbitrator is obliged to disclose facts or circumstances known to him or her which would or might reasonably cause the objective observer (having considered the facts) to conclude that there was a real possibility that the arbitrator was biased.

Privacy and confidentiality

The legal duty of disclosure does not override an arbitrator's duties of privacy and confidentiality, and where the information is subject to these duties, disclosure requires express consent**.** However, consent can also be inferred from the customs and practices in the relevant field of arbitration.

For example, arbitrations under certain institutional rules (e.g., the LCIA, ICC, and International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules) require disclosure to the institution or the parties of matters which may include information about other arbitrations so, the arbitrating parties, in incorporating these rules, thereby implicitly consent to disclosing information about their arbitration to the parties to a prospective arbitration under such rules.

By contrast, the practice as to privacy, confidentiality, and disclosure may differ in ad hoc arbitrations in which parties may maintain the confidentiality of the existence of the arbitration itself by prohibiting any disclosure (in which case, the parties' express consent for an arbitrator to disclose its appointments is required)**.**

In assessing whether an arbitrator has failed in his or her duty of disclosure, it is necessary to consider the facts and circumstances as at the time the duty arose – i.e., at the time the arbitrator acquired the requisite knowledge of his or her involvement in potentially overlapping arbitrations (and during the period in which the duty subsists)**.**

By contrast, in assessing whether there is a real possibility that an arbitrator is biased, the court must have regard to the facts and circumstances known at the date of the court hearing of the application to remove the arbitrator under section 24(1)(a) of the 1996 Act.

Overlapping references

There may be circumstances in which an arbitrator's acceptance of appointments in multiple arbitral references involving a common party and the same or overlapping subject matter would, without more, give rise to an appearance of bias.

Whether such an appointment does so in fact, will depend on the facts of the case, the terms of the arbitration clause, and the customs and practices in the relevant field of arbitration. This is because in different subject matter fields of arbitration, there are different expectations as to the degree of an arbitrator's independence and as to the benefits to be gained by having an arbitrator who is involved in multiple related arbitrations. For example, while interrelated arbitrations are not common in ICC arbitrations, and so such circumstances may more readily give rise to an appearance of bias, multiple appointments are common in GAFTA and LMAA arbitrations**.**

The starting point is that, unless the parties to the arbitration agree otherwise, arbitrators have a legal duty to disclose facts and circumstances which would or might reasonably give rise to the appearance of bias.

The fact that an arbitrator has accepted appointments in multiple arbitral references concerning the same or overlapping subject matter with only one common party is a matter which may have to be disclosed. This is because a failure to disclose those matters to the party who is not the common party to the arbitral references may demonstrate a lack of regard to their interests and the non-disclosure deprives that party of the opportunity to address and potentially resolve the matters which should have been disclosed.

However, whether an arbitrator needs to make disclosure to avoid the appearance of bias will depend on the customs and practices in the relevant field of arbitration. For example, while in GAFTA and LMAA arbitrations, there is an established practice or custom by which parties are taken to have accepted that an arbitrator may take on multiple appointments without disclosure, there is no such established custom or practice in Bermuda Form arbitrations; multiple appointments must therefore be disclosed in the context of Bermuda Form arbitrations.

Application to the facts

Where there is a common party to two overlapping arbitrations, there is a possibility it might obtain an advantage in the first arbitration by having access to information about the common arbitrator's responses to the evidence or arguments advanced in the second arbitration. If Halliburton had been aware of the arbitrator's appointment in the second reference, it may have had concerns about the fairness of its arbitration due to the inequality of knowledge and opportunities to communicate with the arbitrator.

Accordingly, the arbitrator was under a legal duty at that time to disclose to Halliburton his appointment in the subsequent arbitration involving Chubb, as well as the fact that it arose out of the same incident and was a party-appointment. In failing to make that disclosure, the arbitrator had breached his legal duty of disclosure.

However, no apparent bias was found on the part of the arbitrator. At the time the High Court heard Halliburton's application to remove the arbitrator, it could not be said that the fair-minded and informed observer would infer from the arbitrator's failure to make disclosure that there was a real possibility of bias.

This was because (among other reasons), the arbitrator's failure to disclose was an oversight at a time when it was not clear whether English law imposed a legal duty of disclosure; the subsequent arbitrations had commenced several months after the Halliburton arbitration which would normally be expected to be heard first; there was no question of the arbitrator having received any secret financial benefit and there was no basis for inferring ill-will on the part of the arbitrator towards Halliburton.

Observations

It is clear from the judgment that, in some cases, the acceptance by arbitrators of multiple appointments in multiple references with overlapping subject matter and one common party may give rise to a real possibility of apparent bias. Whether it does so will be fact-specific and depend on the arbitration clause in question and the customs and practices in the relevant field of arbitration.

The judgment also reaffirms the Court of Appeal's finding that, in London-seated arbitrations, an arbitrator has a legal duty to disclose matters which would or might reasonably give rise to justifiable doubts as to his or her impartiality. The elevation of disclosure to a legal duty is likely to promote greater transparency in arbitration and is consistent with best practice.

For Hong Kong-seated arbitrations, section 25 of the Arbitration Ordinance (Cap. 609) already imposes a duty on the arbitrator to disclose such circumstances before and throughout their appointment. Article 11.4 of the HKIAC Administered Arbitration Rules 2018 tracks this duty. This is reinforced by the HKIAC Code of Ethical Conduct, which describes the duty as an "ongoing duty" which does not cease until the arbitration has concluded. Failure to make such disclosure "may create an appearance of bias and may be a ground for disqualification." The judgment is therefore consistent with the Hong Kong position in this regard.

There may also be circumstances in which the combination of an arbitrator accepting multiple overlapping references and failing to disclose these will give rise to apparent bias. The question of whether an arbitrator must disclose these overlapping appointments to avoid apparent bias will depend on the distinctive customs and practices of the arbitration in question.

The judgment also sheds light on the way in which an arbitrator is to reconcile the competing tensions of party confidentiality and the duty to disclose overlapping appointments (where required). Whether an arbitrator requires the parties' express consent to make disclosures or whether this can be inferred, will depend on the customs and practices in the specific field of arbitration; there is no "one size fits all" approach. We may see arbitral institutions including express clarifications on the duty of disclosure in their arbitral rules following the ruling.

Where arbitrators are appointed in ad hoc arbitrations, we may expect to see that their terms of engagement will include a waiver of confidentiality to enable them to disclose their appointment in subsequent arbitrations, to the extent necessary to comply with the legal duty of disclosure.

It remains to be seen whether raising the duty of disclosure to a legal obligation in London-seated arbitrations will increase the number of challenges to arbitral appointments and awards, and potentially give rise to personal claims against arbitrators (although the Supreme Court considered this unlikely).

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