HALLIBURTON V CHUBB - SUPREME COURT CLARIFIES ENGLISH RULES ON APPARENT BIAS OF ARBITRATORS

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The UK Supreme Court has delivered what is now the leading English judgment on arbitrator conflicts in Halliburton Company v Chubb Bermuda Insurance Ltd [2020] UKSC 48. The decision clarifies the principles to be applied by the English court when assessing apparent bias. Although the Supreme Court ultimately dismissed the arbitrator challenge, the Supreme Court emphasised the importance of the impartiality of arbitrators and confirmed that there is a legal duty on arbitrators in English-seated arbitrations to disclose matters that could give rise to doubts as to their impartiality.

Background

The decision relates to arbitration proceedings between Halliburton and its insurer Chubb arising out of damage caused by an explosion and fire on the Deepwater Horizon drilling rig in the Gulf of Mexico. The claim was brought under the Bermuda Form excess liability insurance policy between the parties, which was governed by New York law and provided for ad hoc arbitration seated in London.

After the parties failed to agree on the appointment of the tribunal's chairperson, the chair was appointed by the English High Court.

After accepting the appointment, and without Halliburton's knowledge, the chair accepted appointments in two other arbitrations relating to the Deepwater Horizon incident. In one of those cases, the arbitrator had been appointed by Chubb in a claim brought against Chubb by another insured party who had similarly been refused a pay-out under its excess liability cover with Chubb.

On becoming aware of the further appointments, Halliburton applied to the English court under s24 Arbitration Act 1996 to remove the chair on the basis that circumstances existed that gave rise to justifiable doubts as to their impartiality. The High

Court and the Court of Appeal rejected Halliburton's removal application. Halliburton appealed to the Supreme Court.

What did the Supreme Court decide?

The Supreme Court unanimously dismissed the appeal. In reaching its decision, the Supreme Court was asked to consider:

- whether and to what extent an arbitrator may accept appointments in multiple arbitrations concerning the same or overlapping subject matter and where there is only one common party, without this giving rise to an appearance of bias; and
- whether and to what extent the arbitrator may accept such appointments without disclosing them.

"Cardinal duty" of impartiality and apparent bias

The Supreme Court emphasised the importance of impartiality as a core principle of arbitration. The appeal was concerned only with whether there was an appearance of bias (not actual bias). Confirming earlier case law, the Supreme Court said the relevant test was an objective one, namely:

"*whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased*".

The test applies to judges and arbitrators, but in applying the test to arbitrators, it must take account of the realities of international arbitration, in particular: the private and confidential nature of arbitration; the limited powers to appeal an arbitral decision; the potential financial benefits an arbitrator receives when nominated and the financial interest in obtaining further appointments; the fact that arbitrators can be lawyers and non-lawyers from different jurisdictions and legal traditions who may have different views on what constitutes ethically acceptable conduct; and the differing understandings of the role and obligations of a party-nominated arbitrator to the parties nominating them. The Supreme Court held that under English law, the duty of impartiality applies equally to all arbitrators whether party-appointed or otherwise. A party-appointed arbitrator is expected therefore to have precisely the same high standards of fairness and impartiality as a tribunal's chair.

The Supreme Court also acknowledged that, because of the private nature of arbitrations, issues might arise where there are multiple proceedings about the same or overlapping subject matter in which there is a common arbitrator. In these situations, a non-common party will not have access to the evidence before and the legal submissions made to the tribunal (including a common arbitrator) in arbitration proceedings to which it is not a party, nor the tribunal's response.

Whilst the professional reputation and experience of an arbitrator is relevant to the assessment, in the context of many international arbitrations the Supreme Court suggested that it is likely to be given limited weight.

The objective observer will also be alive to the possibility of opportunistic or tactical challenges.

The particular characteristics of international arbitration highlight the importance of proper disclosure as a means of maintaining the integrity of international arbitration.

Duty of disclosure

The Supreme Court (broadly agreeing with the Court of Appeal) confirmed that under English law an arbitrator is under a legal duty to disclose facts and circumstances which would or might give rise to justifiable doubts as to their impartiality. This duty is encompassed within an arbitrator's statutory duties to act fairly and impartially (s33 Arbitration Act 1996) and which underpins the integrity of English-seated arbitrations.

However, the Supreme Court questioned the Court of Appeal's limitation that an arbitrator need only disclose matters "*known to the arbitrator*". An arbitrator can disclose only what they know and, in general, is not required to search for facts or circumstances to disclose. However, the Supreme Court did not rule out the possibility that in certain circumstances an arbitrator would be under a duty to make reasonable enquiries.

The Supreme Court noted that the ICC, LCIA and CIArb, who were among the intervenors in the case, argued in favour of the recognition of such a legal duty. The duty also promoted transparency and was consistent with best practice set out in the IBA Guidelines on Conflicts of Interest in International Arbitration and the rules of institutional arbitrations including the ICC and LCIA. Whilst not legally binding, the Supreme Court considered that the IBA Guidelines can assist the court in identifying what is an unacceptable conflict of interest and what matters may need to be disclosed.

The arbitrator's legal obligation of disclosure imposes an objective test by reference to the "*fair-minded and informed observer*", which is different to the IBA Guidelines and the rules of many arbitral institutions that look to the perceptions of the *parties* to the particular arbitration and ask whether they might have justifiable doubts as to the arbitrator's impartiality. The legal obligation can arise when the matters to be disclosed fall short of matters that would cause the informed observer to conclude that there was a real possibility of a lack of impartiality. It is enough that matters are relevant and material to an assessment of the arbitrator's impartiality and could reasonably lead to an adverse conclusion.

An arbitrator may be expected to disclose appointments in multiple overlapping arbitrations with only one common party, although this will depend on the custom and practice of the type of arbitration in question. In such a case, a failure to disclose is a factor to be taken into account in deciding whether there is a real possibility of bias.

The legal duty of disclosure does not override the arbitrator's duties of privacy and confidentiality under English law. Information that is subject to an arbitrator's duty of privacy and confidentiality can be disclosed if the parties to whom the obligations are owed give their consent. Consent can be express or in some cases it can be inferred from the arbitration agreement in the context of the custom and practice in the relevant field.

The question of whether there was a failure to disclose is to be determined at the time the duty arose and during the period in which the duty subsisted. The question of whether circumstances exist that give rise to justifiable doubts as to an arbitrator's impartiality is to be assessed at the time of the hearing to remove the arbitrator. This distinction proved significant in the Supreme Court's decision to reject Halliburton's arbitrator challenge.

Application to the facts – why was the arbitrator challenge rejected?

The Supreme Court found that the arbitrator in the arbitration between Halliburton and Chubb was under a legal duty to disclose the appointments in the other proceedings. There was no established custom or practice in Bermuda Form arbitrations permitting an arbitrator to accept multiple overlapping appointments without disclosure. Therefore, at the time of the arbitrator's appointment in the second arbitration the existence of potentially overlapping arbitrations with only one common party might reasonably give rise to the real possibility of bias.

The arbitrator should have disclosed: (i) the identity of the common party who was seeking the appointment of the arbitrator in the further proceedings; (ii) whether the proposed appointment was a party-appointment or a nomination for appointment by a court or a third party; and (iii) a statement of the fact that the further proceedings arose out of the same incident.

However, the Supreme Court held that Halliburton's attempt to remove the arbitrator failed. The key issue here was timing. At the time of the hearing to remove the arbitrator, a fair-minded and informed observer would not have concluded that circumstances existed that gave rise to justifiable doubts over the arbitrator's impartiality. This was because:

- at the time, there was uncertainty in English law whether or not there was a legal duty of disclosure and whether disclosure was needed;

- the time sequence of the overlapping arbitrations might explain why the arbitrator did not identify the need to inform Halliburton of the subsequent references;

- the arbitrator explained that it was likely that the subsequent arbitrations would be resolved following determination of a preliminary issue, which meant there would in fact be no overlap in evidence or legal submissions between the arbitrations. If the subsequent arbitrations were not resolved in this way, the arbitrator had offered to resign from those proceedings;

- the arbitrator had not received any secret financial benefit;

- the arbitrator responded in a courteous, temperate and fair way to Halliburton's challenge and there was no basis for inferring any subconscious ill-will towards Halliburton as a result.

A gloss to the decision

Whilst the judgment was unanimous, Lady Arden delivered a concurring judgment to reinforce or, in some instances, qualify the Supreme Court's overall conclusions. Lady Arden noted that unless an arbitration is one where it is accepted practice not to require parties' consent to further appointments, the arbitrator should generally assume that a potential further appointment involving a common party and overlapping subject matter is likely to require disclosure. Lady Arden also took the view that, in general, high-level disclosure can be made without breaching confidentiality by naming only the common party but not the other parties to the arbitration.

What is the impact of the decision?

The Supreme Court's decision in Halliburton is now the leading English case on arbitrator conflicts and represents a significant development in English arbitration law. The decision emphasises the importance of the impartiality of arbitrators under English law and confirms the existence and parameters of a legal duty on arbitrators in English-seated arbitrations to disclose matters that could give rise to doubts as to their impartiality. In doing so, the Supreme Court has confirmed the Court of Appeal's finding that under English law there is a freestanding legal duty of disclosure on arbitrators (rather than it simply being good practice) and therefore it is not only expected in cases where the parties' chosen arbitral rules require it.

The decision highlights an apparent tension between the ability of parties to select arbitrators with sector-specific knowledge and specialist skills to determine their disputes (seen by many as one of the key advantages of arbitration) and the increasing complexity of disputes, including multi-party and multi-agreement disputes, being referred to what remains a relatively small cohort of arbitrators. Against that backdrop, the Supreme Court's finding that, depending on the custom and practice in particular types of arbitration, an arbitrator may have to disclose appointments in multiple overlapping arbitrations with only one common party and that a failure to do so may be taken into account when assessing apparent bias, is welcome.

Although in this case the arbitrator was not ultimately removed, the decision demonstrates the broad scope of disclosure potentially expected of arbitrators in English-seated arbitrations, even in cases where the parties have not opted for arbitral rules expressly dealing with an arbitrator's disclosure duties.

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