ARBITRATION & ADR - UNITED KINGDOM

Supreme Court clarifies test of arbitrator impartiality and arbitrators' duty of disclosure

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Introduction

In *Halliburton Company v Chubb Bermuda Insurance Ltd*,(1) the Supreme Court unanimously upheld the Court of Appeal's decision to dismiss an application to remove an arbitrator on the grounds of apparent bias. The Supreme Court confirmed the Court of Appeal's decision that arbitrators are under a duty to disclose appointments in references concerning the same or overlapping subject matter with a common party, although the Supreme Court's reasoning differed. On the facts of this case, while the Supreme Court found that the arbitrator had breached his disclosure obligations, it further held that an objective observer would not have justifiable doubts as to the arbitrator's impartiality.

The Court of Appeal's ruling developed common law by articulating a disclosure duty on arbitrators under English law. However, that decision left open questions which created much debate in arbitration circles (for further details please see "Court of Appeal rules on arbitrators' duty to disclose"). The Supreme Court's judgment brings clarity on the scope and nature of an arbitrator's existing duty of impartiality, as well as the existence and nature of an arbitrator's disclosure duties under English law.

Background

Section 33(1) of the Arbitration Act 1996 enshrines the duty of impartiality imposed on arbitrators and requires tribunals to act fairly and impartially towards the parties throughout the conduct of an arbitration.

Section 24(1)(a) of the act empowers the courts (pursuant to a party's application) to remove an arbitrator where circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality. To assess whether there is an appearance of bias, the court must consider all relevant facts and assess whether a fair-minded and informed observer would conclude that there was a real possibility of bias.(2) The perspective of the observer is an objective test.

The Arbitration Act does not impose an express disclosure duty on arbitrators. In practice, arbitrators and parties generally follow 'soft law' publications, such as the International Bar Association Guidelines on Conflicts of Interest in International Arbitration (IBA guidelines) to guide their disclosures. Under these guidelines, the duty of disclosure is triggered by facts and circumstances that may, in the eyes of the parties, give rise to doubts as to impartiality or independence. The perspective of the parties is a subjective test.

Facts

A series of arbitrations arose out of an explosion and fire at a drilling rig in Mexico in 2010 (the Deepwater Horizon incident). Chubb had insured both Halliburton and Transocean, which were involved in the incident, on a Bermuda Form liability policy. Halliburton initiated English-seated *ad hoc* arbitration after its claim on its insurance policy with Chubb was rejected.

The High Court appointed Mr Rokison QC to chair the arbitration. At the time of appointment, Rokison disclosed previous appointments by Chubb. After his appointment, Rokison subsequently accepted arbitral appointments from Chubb and another insurer in relation to claims by Transocean concerning the same incident. Neither appointments were disclosed to Halliburton. When the appointments were discovered, Halliburton's counsel called for Rokison's resignation. Rokison conceded that with hindsight it "would have

been prudent" to have made disclosures, although he did not consider that the IBA guidelines gave rise to a requirement to do so. Nevertheless, he invited Halliburton and Chubb to agree on the appointment of a different chair for the ongoing proceedings. Chubb had already refused to agree to Rokison's resignation and therefore Halliburton applied for Rokison's removal pursuant to Section 24(1)(a) of the Arbitration Act.

The application was dismissed at first instance by Mr Justice Popplewell, and by the Court of Appeal. Prior to the Court of Appeal's ruling, both arbitrations involving Transocean concluded, with awards rendered in each case regarding the construction of the insurance policy.

On appeal by Halliburton to the Supreme Court, the two issues raised were:

- whether and to what extent an arbitrator may accept appointments in multiple references concerning the same or overlapping subject matter with only one common party without thereby giving rise to an appearance of bias, and
- whether and to what extent that arbitrator may do so without disclosure.

Decision

Lord Hodge provided the leading judgment, with a concurring judgment rendered by Lady Arden. The Supreme Court's rulings on the two legal issues are summarised as follows:

- Where an arbitrator accepts appointments in multiple references concerning the same or overlapping subject matter with a common party, a failure to disclose these matters to the party who is not common to the arbitration may (depending on the relevant custom and practice of the industry and arbitral context) (3) give rise to an appearance of bias.
- Unless the parties to the arbitration otherwise agree, arbitrators have a legal duty to disclose facts and circumstances which would or might reasonably give rise to an appearance of bias to the fair-minded and informed observer.(4) In contrast to the wording in the rules of many arbitral institutions (eg, Article 5.4 of the London Court of International Arbitration Rules 2020), the test under English law is an objective one.(5)

In applying the law to the facts, based on evidence of normal practice in proceedings relating to the Bermuda Form arbitrations, the Supreme Court concluded that in this case, multiple appointments and the identity of a common party should be disclosed unless there is an agreement to the contrary. This disclosure does not require the express consent of the parties as it is to be inferred from that party's action in seeking to nominate or appoint that arbitrator.(6)

Rokison had been under a legal duty to disclose the two subsequent appointments to Halliburton but, in breach of his duties, had failed to do so.(7)

Nevertheless, the court held that with regard to the circumstances known to the court at first instance, it was not persuaded that the fair-minded and informed observer would infer that there was a real possibility of unconscious bias on the part of Rokison. Therefore, removal under Section 24(1) on the grounds of a real possibility of bias was not justified. This was due to a number of reasons, including:

- the lack of clarity in English case law as to whether there was a legal duty of disclosure and whether disclosure was needed;
- the time sequence of the three references;
- the likelihood that the second (and subsequent) references would be resolved by the preliminary issue and that there would be no overlap in evidence or legal submissions between them and the first reference;
- the fact that Rokison had not received any secret financial benefit; and
- the fact that the court was satisfied that there was no basis for inferring unconscious bias in the form of subconscious ill will in response to the robustness of the challenge mounted on behalf of Halliburton.(8)

The court's determination rested on its consideration and determination of five issues.

Duty of impartiality

The court underscored that impartiality is a cardinal duty of both judges and arbitrators. The court confirmed that there is no difference between the objective test for apparent bias in Section 24(1)(a) of the Arbitration Act (applicable to arbitrators) and the common law test of the fair-minded and informed observer (applicable to judges). However, the court held that in applying the test, the courts must bear in mind the differences between the judicial determination of disputes and the arbitral determination of disputes.(9)

Key among those differences are the following features:

- English-seated arbitrations are generally conducted in private with parties and arbitrators subject to

duties of privacy and confidentiality (therefore, a person not party to an arbitration may know nothing about its existence, the evidence adduced or the legal arguments advanced), placing a premium on frank disclosure.
- There is minimal recourse by a party against an arbitrator's decision on issues of fact (and, often, issues of law).
- Arbitrators receive a financial benefit through nomination.
- Arbitrators hail from different professional and legal backgrounds, potentially giving rise to differing ethical viewpoints.
- The opacity of the arbitration process means that if a party is not common to arbitrations where there are multiple overlapping references, it has no oversight or access to submissions made in those proceedings.
- Generally, there are differing understandings as to the appropriate role and obligations of the party-appointed arbitrator (and the degree to which they should be neutral).

Accordingly, in addressing the question of apparent bias in arbitration, the English courts will apply the objective test of the fair-minded and informed observer and have regard to the characteristics of international arbitration. These characteristics emphasise the need for proper disclosure to maintain the integrity of international arbitration.(10)

Arden considered that, unless the arbitration is one in which there is an accepted practice of dispensing with any need to obtain parties' consent to further appointments, an arbitrator should proceed on the basis that a proposal to take on a further appointment involving a common party and overlapping subject matter (in that it arises out of the same event) is likely to require disclosure of a potential conflict of interest.(11)

Duty of disclosure

Lord Hodge noted that disclosure of issues which could arguably be said to give rise to a possibility of bias can help to mitigate the risk of apparent bias, and prompt disclosure can earn an arbitrator a "badge of impartiality".(12)

As to whether, under English law, there is a legal duty to disclose, the court concluded that there is. Despite the lack of an express statutory duty under the Arbitration Act, the court considered that the duty of disclosure stems from Section 33 of the act, which requires an arbitrator to act fairly and impartially when:

- conducting arbitral proceedings;
- taking decisions on matters of procedure and evidence; and
- exercising all powers conferred on them.

This, in turn, forms the basis of an implied term in an arbitrator's contract with the parties to disclose if knowledge of undisclosed circumstances would mean that the arbitrator could be liable to be removed under Section 24 of the Arbitration Act.(13) The test is an objective one.(14) The duty, the court held, is consistent with international best practice and developments in other jurisdictions and underpins the integrity of English-seated arbitrations.(15)

Privacy and confidentiality constraints

However, the court noted that the boundaries of the duty must be calibrated with the privacy and confidentiality obligations of the arbitrators and the parties in English-seated arbitrations. The court conceded that the parameters are not clear-cut since practice as to privacy, confidentiality and disclosure differs from arbitration to arbitration. Whether and to what extent an arbitrator may disclose the existence of a related arbitration without obtaining the express consent of the parties depends on whether:

- the duty of confidentiality or privacy applies; and
- consent can be inferred, having regard to the distinctive customs and practices of the arbitration proceedings in question.(16)

Disclosure and appearance of bias

Regarding where an arbitrator accepts appointments in multiple references concerning the same or overlapping subject matter with a common party, the court considered that a failure to disclose these matters to the party who is not common to the arbitration deprives that party of the opportunity to resolve any issues of impartiality as they arise.

Timing of assessment

Lord Hodge considered that the timing of the assessment of the possibility of bias is of central importance. He held that the relevant question is whether circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality at the time of the hearing regarding their removal.(17)

Comment

The court has sought to reinforce the importance of arbitrator impartiality in English-seated arbitrations. In so doing, it has also clarified that in the context of arbitration, an English court will take into account the custom and understanding of parties in different arbitral contexts when considering the perspective of the fair-minded and informed observer.

Therefore, whether and on what basis an arbitrator's acceptance of appointments in multiple arbitrations gives rise to justifiable doubts as to impartiality, and whether disclosure is expected, differs among institutions, rules and industries. As was clear from the submissions of five interveners with significant experience and expertise of arbitration, practices diverge significantly – notably, multiple appointments are common in Grain and Feed Trade Association and London Maritime Arbitrators Association arbitrations, and both organisations submitted that non-disclosure of such appointments would not give rise to an appearance of bias among their users.

In reaching its decision, the court was sensitive to the differences in custom in specialised fields. The court's decision to impose, subject to any express agreement by the parties, a legal duty of disclosure is consistent with the United Nations Commission on International Trade Law Model law. Therefore, to some extent, the decision brings English law into line with practice in other jurisdictions. However, given that the English law test is an objective one, it differs from the subjective standards set out in many international arbitral rules and guides, pursuant to which many arbitrators and parties will be used to operating.

As a result of the significant role of custom, it remains to determined, in each application under Section 24 of the Arbitration Act:

- whether the acceptance of multiple references concerning the same or similar issues with a common part will lead to an appearance of bias;
- the extent of arbitrators' disclosure duty; and
- the consequences of a failure to disclose.

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Endnotes

(1) [2020] UKSC 48.

(2) *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 257, Paragraph [103].

(3) *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48, Paragraph [131].

(4) *Id* at [136].

(5) *Id* at [116].

(6) *Id* at [104].

(7) *Id* at [145] to [146].

(8) *Id* at [149] and [150].

(9) *Id* at [55].

(10) *Id* at [69].

(11) *Id* at [164].

(12) *Id* at [70].

(13) *Id* at [76].

(14) *Id* at [116].

(15) *Id* at [80] and [112].

(16) *Id* at [116].

(17) *Id* at [121].