Halliburton v Chubb in the Supreme Court – Challenging times?

With the Supreme Court's judgment in Halliburton v Chubb hot off the press, in this article, James Leabeater KC and Anna Hoffmann take a first look at the judgment.

4 Pump Court's joint head of chambers Nick Vineall KC and Andrew Stevens acted for the LMAA as an intervening party before the Supreme Court in this landmark arbitration decision. The ICC, LCIA, GAFTA and CIArb also intervened.

The Facts

1. The Deepwater Horizon disaster in 2011 gave rise to many disputes, many arbitrations and to many arbitral appointments. This dispute arises from the fact that a well-known arbitrator, Mr Ken Rokison KC, did not disclose to Halliburton that Chubb subsequently appointed him in an arbitration between Chubb and Transocean arising out of the same facts. Subsequently, Transocean and another insurer jointly appointed the same arbitrator in a further related arbitration.

2. At first instance and in the Court of Appeal, Halliburton tried and failed to have the arbitrator removed under section 24(1)(a) of the Arbitration Act 1996 for apparent bias. There was no suggestion of actual bias. The issue went to the Supreme Court; and now, a year after oral argument, the Supreme Court has released its decision.

The Result

3. Lord Hodge delivered the main judgment (with which Lord Reed, Lady Black and Lord Lloyd-Jones agreed) dismissing the appeal. Lady Arden agreed with the outcome but differed in some of her reasoning.

Main Points

4. The important points are as follows:
    - The test for apparent basis remains unchanged from *Porter v Magill* [2002] 2 AC 357 [103]: the question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. Lord Hodge approved the comment, from an Australian case, that the fair-minded and informed observer is "*neither complacent nor unduly sensitive or suspicious*".
    - Arbitrators are under a legal duty to disclose facts or circumstances which would cause the fair-minded and informed observer to conclude that there was a real possibility that the arbitrator was biased or that might reasonably cause the objective observer to reach that conclusion.
    - The international practice of arbitration is not homogenous and different practices in relation to disclosure may properly apply in different fields.
        - The Court accepted that (for example) maritime arbitration is less likely to give rise to apparent bias where there are multiple undisclosed related appointments with only one common party because in that field of arbitration such appointments are common, accepted and probably also seen as desirable or beneficial by users.
        - On the other hand, say, in ICC arbitration, where such appointments are uncommon, multiple

4 Pump Court, Temple, London, EC4Y 7AN
T: +44 (0)20 7842 5555 F: +44 (0)20 7583 2036
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appointments with only one common party could give rise to such an appearance of bias.

- Arbitrators are only required to disclose what they know, but Lord Hodge expressly did not rule out the possibility of circumstances occurring in which an arbitrator would be under a duty to make reasonable enquiries. He held that the IBA Guidelines, which require an arbitrator to make reasonable enquiries, might be an accurate statement of English law: para 107.
- Where there has been a breach of the duty of disclosure, it is necessary then to consider whether the breach of disclosure gives rise to actual or apparent bias.
- Finally, the Court found that there may be a certain level of implied consent to disclosure of multiple appointments. But where there is no such express or implied consent, if an arbitrator is required to make a disclosure but cannot do so the arbitrator will probably have to decline the appointment.

The issues

5. The issues on appeal were:
   - whether multiple related appointments with only one common party are permissible, or more precisely, in what if any circumstances may an arbitrator accept two such appointments without thereby giving rise to an appearance of bias; and
   - whether and to what extent the arbitrator may do so without disclosure of the position.

Issue 1: Are multiple related appointments with only one common party permissible?

6. Lord Hodge's answer on the first issue was that such multiple related appointments are not inherently impermissible. Whether it would lead to actual or apparent bias depends on the type of arbitration and on all of the facts.

7. That assessment has to have regard to the realities of international arbitration and customs and practices of the relevant field of arbitration. Lord Hodge emphasises at para 152 that the custom and practice of the relevant field of arbitration is *especially* important to this question.

8. AArbitration involves contractual jurisdiction. The circumstances and market within which the parties operate when entering into that contractual agreement can therefore give rise to various express or implied degrees of contractually required independence on the part of their arbitrators (para 126).
   - In LMAA or GAFTA arbitration multiple appointments are common, and it is common for the same arbitrator to be appointed in respect of several arbitrations arising out of the same incident (para 128).
   - Lord Hodge noted that in the Bermuda Form context before the Supreme Court, both Halliburton and Chubb made such appointments in relation to the Deepwater Horizon disaster (para 128).
   - Contrast this with fields in which such multiple appointments are uncommon, say in ICC arbitration, where such circumstances may more readily give rise to an appearance of bias (para 128).

Issue 2: Is disclosure required of such appointments?

9. The second issue was whether and to what extent an arbitrator may accept the multiple references described in the first issue without making disclosure to the party who is not the common party. Lord Hodge's answer is, in effect, it depends, but there is a legal duty / standard applicable to the question which can be contracted out of. At paragraph 136 he held:

"The answer to the second issue therefore is that, unless the parties to the arbitration otherwise agree,

4 Pump Court, Temple, London, EC4Y 7AN
T: +44 (0)20 7842 5555 F: +44 (0)20 7583 2036
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arbitrators have a legal duty to make disclosure of 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 references concerning the same or overlapping subject matter with only one common party is a matter which may have to be disclosed, depending upon the customs and practice in the relevant field. In cases in which disclosure is called for, the acceptance of those appointments and the failure by the arbitrator to disclose the appointments taken in combination might well give rise to the appearance of bias."

10. Lord Hodge approached this question from the starting point of impartiality being a core principle of arbitration law that applies to all arbitrators. It is enough to require disclosure if the circumstances might reasonably cause the fair-minded and informed objective observer to conclude that there was a real possibility that the arbitrator was biased. That has to be assessed on the date when disclosure would have been required, not with full hindsight.

11. Again, whether there has been a failure by the arbitrator to disclose depends on the distinctive customs and practices of the arbitration in question. This is similar to the position under the IBA Guidelines on Conflicts of Interest which include a carve out of certain disclosure obligations where there are specific practices in, say, maritime, sport or commodities arbitration and where all parties should be familiar with that custom and practice.

12. Lord Hodge specifically envisages that, "*there will be cases where the custom and practice of the type of arbitration have created expectations which would negative the need for disclosure… There may also be circumstances in which because of the custom and practice of specialist arbitrators in specific fields, such as maritime, sports and commodities and maybe others, such multiple appointments are a part of the process which is known to and accepted by the participants. In such circumstances no duty of disclosure would arise.*" (paras 134-135)

    In relation specifically to Bermuda Form arbitrations, Lord Hodge held that such multiple appointments must be disclosed. Mr Rokison had breached his duty on the facts of this case – although, as we will see, the Court was not unduly critical of that failure. Did this amount to unconscious bias such that the arbitrator should be removed?

13. Lord Hodge held that despite the breach of duty, in the circumstances, the fair-minded and informed observer would <u>not</u> infer from the oversight that there was a real possibility of unconscious bias on the part of the arbitrator or grounds for his removal. This was for five reasons (para 149):
    - First, at the time of the failure to disclose, there was a lack of clarity in English case law on the duty of disclosure.
    - Second, the timing of the appointments might have made the obligation less obvious.
    - Third, on the facts, there was little likelihood of Chubb gaining any advantage by reason of overlapping references.
    - Fourth, there was no question of any secret financial benefit.
    - Fifth, there was no basis for inferring unconscious bias in the form of subconscious ill-will in response to the robustness of the challenge. Lord Hodge's view was that the arbitrator dealt with the challenge in a courteous, temperate and fair way such that there was no evidence that the arbitrator bore any animus towards Halliburton as a result.

Reflections

14. There was some criticism of the Court of Appeal's decision on the basis that failure to remove the arbitrator for a breach of a legal duty makes the duty toothless or meaningless. The Supreme Court appears to have been unmoved by those arguments. Lady Arden specifically addresses this argument at para 169:

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T: +44 (0)20 7842 5555 F: +44 (0)20 7583 2036
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> "I think this misses the point. It would still be a breach of the terms of appointment with such consequences, if any, as the law of contract prescribes. In addition, a person may commit a breach of contract but incur no liability as a result, and the situation postulated falls into that category."

15. The Supreme Court accepted and endorsed submissions made by the LMAA and GAFTA that the individual characteristics of different fields of arbitration should be taken into account, and that parties can contract into or out of such styles of arbitration as they wish and as suits the needs of their particular industry. As such, the Supreme Court has, rightly, resisted a "one size fits all" approach – although that may lead to some extra complexity in this area of the law.

16. Above all, the Supreme Court has emphasised the consensual nature of arbitration and upheld party autonomy. Parties to ICC arbitration already contract into a specific regime for disclosure of potential arbitrator conflicts: as a result, appointing an ICC tribunal can be slow. There is no reason to apply that by default to all arbitrations. Parties to LMAA arbitrations often want a swift commencement of the arbitration and can be taken to recognise that multiple appointments are common and often desirable – and LMAA arbitration is globally successful, accounting for roughly 80% of the global share of maritime international arbitration. The fact that the Supreme Court has permitted these variations between different forms of arbitration may make application of rules more complicated, but it also upholds party autonomy, and that is to be welcomed.

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