U.K. Supreme Court Delivers Landmark Judgment on Apparent Bias of Arbitrators

December 10, 2020

Shortly after its important decision on the governing law of arbitration agreements in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38 (as covered in our recent alert here), the U.K. Supreme Court has handed down another judgment long awaited by arbitration participants and practitioners – namely, *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48, which is set to become the leading authority on arbitrators’ duties of impartiality and disclosure.

The case concerned the situation in which there are multiple appointments of the same arbitrator in arbitrations involving the same subject matter and only one common party. The importance of the issues it raised was such that five arbitral institutions and associations were given permission to intervene (the LCIA, the ICC, the Chartered Institute of Arbitrators, the Grain and Feed Trade Association, and the London Maritime Arbitrators Association).

Factual Background

The arbitration that was the subject of the dispute arose out the 2010 explosion and fire on the Deepwater Horizon oil drilling rig in the Gulf of Mexico. Halliburton (the provider of the cement intended to seal the oil well) had settled certain claims against it in the U.S. in respect of the accident, and sought to recover the amounts paid under an insurance policy with Chubb. When Chubb refused to pay (on grounds of the reasonableness of the settlement), Halliburton commenced arbitration proceedings against it.

After the parties’ nominated arbitrators had failed to agree on a Chairman for the tribunal, the English Commercial Court appointed Mr Kenneth Rokison QC, who had been one of Chubb’s candidates. Later, Mr Rokison accepted appointments in two arbitrations arising out of the same incident and involving claims by the rig owner, Transocean, against its insurers. In one of these, the insurer was Chubb and Mr Rokison was appointed by Chubb. He did not disclose these appointments to Halliburton and, when Halliburton became aware of them, it applied to the High Court to remove him under section 24(1)(a) of the *Arbitration Act 1996* (the “Act”), which allows for removal of an arbitrator where “circumstances exist that give rise to justifiable doubts” about the arbitrator’s impartiality. The High Court refused the application, as did the Court of Appeal, following which Halliburton appealed to the Supreme Court.

The Issues Under Appeal

The appeal involved two main legal issues. The first was whether (and, if so, to what extent) an arbitrator may accept appointments in multiple references with overlapping subject matter and only one common party without creating an appearance of bias. Secondly, the Supreme Court had to determine whether (and, if so, to what extent) an arbitrator may accept such appointments without making disclosure to the party who is not the common party. This involved a number of subsidiary issues in respect of which the position under English law was not entirely clear, including:
• The nature of the arbitrator’s disclosure duty, as to which Mr Justice Popplewell (as he then was) had held below that disclosure is merely good practice (unless legally required by the applicable arbitral rules), whereas the Court of Appeal had held that it was a legal duty and had thereby, as the Supreme Court put it, “developed the English law of arbitration”.

• The scope of the legal duty of disclosure insofar as it existed, as to which Chubb submitted that arbitrators are only obliged to disclose circumstances that the objective observer would regard as giving rise to a real possibility of bias, arguing the Court of Appeal had been wrong to hold that they must disclose circumstances that might be regarded as giving rise to such a possibility.

• The interaction between the arbitrator’s duty of disclosure on the one hand, and obligations of privacy and confidentiality on the other, which the Supreme Court acknowledged was a developing area of law with uncertain boundaries.

The Supreme Court’s Decision

The Supreme Court unanimously dismissed Halliburton’s appeal. In the leading judgment given by Lord Hodge (with which Lords Reed and Lloyd-Jones and Lady Black agreed, and Lady Arden concurred subject to some further points), it laid down the following principles:

1. The obligation of impartiality in section 33 of the Act is a core principle of English arbitration law, and applies to arbitrators regardless of the process by which they have been appointed. Further, although the Act does not directly address the arbitrator’s independence, an arbitrator would be in breach of its provisions if a lack of independence compromised his or her impartiality.

2. Unless the parties to the arbitration have agreed otherwise, arbitrators have a legal duty, arising out of section 33, to disclose matters known to them that might reasonably cause a fair-minded and informed observer to conclude that there is a real possibility that they are biased.

3. Appointment of the same arbitrator in multiple arbitrations with the same subject matter and only one common party may create the appearance of bias. Whether it in fact does so depends on all the circumstances of the case, and in particular the “customs and practices of the relevant field of arbitration”, including whether such multiple appointments are customary.

4. The arbitrator’s disclosure duty is subject to their duties of privacy and confidentiality, so that the consent of the parties to whom these duties are owed is required for disclosure to be made (although this may be “inferred from the arbitration agreement in the context of the practice in the relevant field”). In the context of multiple appointments, if the arbitrator does not or cannot obtain the consent required to disclose either the earlier or later appointment, he or she must decline the later appointment.

5. The test for removing an arbitrator under section 24(1)(a) of the Act is whether a fair-minded and informed observer would conclude that there is a real possibility that the arbitrator is biased. This is a higher threshold than for the arbitrator’s duty of disclosure.

6. For the purposes of determining whether an arbitrator ought to have disclosed a particular matter, the assessment of apparent bias may only take into account facts existing within the period of the alleged duty to disclose. In the context of removal applications, however, the Court assesses apparent bias based on the facts as at the hearing date, including any breach by the arbitrator of their disclosure duty in respect of the matter in question.
7. In cases where an arbitrator breaches their disclosure duty, but a subsequent removal application is unsuccessful, the arbitrator might nevertheless be liable for the costs of the application.

Applying those principles, the Supreme Court found that Mr Rokison’s appointment in a related arbitration also involving Chubb might have reasonably caused the fair-minded observer to conclude that there was a real possibility that he was biased. Consequently, he should have disclosed that appointment to Halliburton, and his failure to do so amounted to a breach of duty.

Based on the facts at the hearing date of Halliburton’s application, however, the objective observer would not have concluded that there was a real possibility that Mr Rokison was biased, including because: (i) he had by then explained to Halliburton that his failure to disclose the later appointments was an oversight, and Halliburton had accepted that explanation; (ii) he had received no secret financial benefit from the later appointments; (iii) the later arbitrations had commenced several months after Halliburton’s arbitration; and (iv) the later arbitrations were likely to be (and subsequently were) resolved by way of preliminary issue, without any overlap in evidence or legal submissions between them and Halliburton’s arbitration. There were accordingly no grounds to remove Mr Rokison under section 24(1)(a) of the Act.

Conclusions

The Supreme Court’s judgment has brought welcome clarity to the nature and scope of arbitrators’ duties of impartiality and disclosure under English law. In particular, it has confirmed that arbitrators, however appointed, are under a legal duty to disclose potential conflicts of interest, which may include multiple appointments in related arbitrations. Together with the possible cost consequences to arbitrators of material non-disclosure, it is hoped that this will promote greater transparency regarding arbitrator appointments, to the benefit of English-seated arbitrations generally.

The Court’s recognition of differing customs and practices, in assessing whether multiple appointments might give rise to the appearance of bias, will also be welcomed by practitioners in certain fields (such as treaty reinsurance) where arbitrations are conducted by a limited pool of specialists and commonly involve multiple disputes about the same subject matter. This pragmatic approach does, however, create some uncertainty, and may therefore lead to future disputes about what is customary in different fields. And, of course, to some commercial parties the very notion that an arbitrator could receive multiple appointments from the same party will remain disquieting.

Finally, it might be said that the Court’s interpretation of section 33 of the Act brings English law a small step closer to the UNCITRAL Model law, by making clear that the arbitrator’s independence is an important factor bearing directly on his or her impartiality.

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