Kluwer Arbitration Blog

U.K. Supreme Court Rules on Arbitrator Bias in Halliburton v. Chubb

Joe Rich (WilmerHale) · Tuesday, December 1st, 2020

On 27 November 2020, the U.K. Supreme Court in *Halliburton Company v. Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd)* [2020] UKSC 48 ruled on the approach under English law to determining whether an arbitrator's failure to make disclosure of appointments in multiple arbitrations with overlapping subject matter and only one common party gave rise to justifiable doubts as to his impartiality such that he should be removed.

Background

The underlying facts and the decisions of the High Court (which rejected the application for removal) and Court of Appeal (which dismissed Halliburton's appeal) are set out here. Previous blog posts relating to the case are also to be found here and here.

In summary, the case concerned the involvement of one arbitrator (Mr. Kenneth Rokison QC) in three arbitrations arising out of the Deepwater Horizon disaster in the Gulf of Mexico.

Arbitration 1 was between Halliburton Company ("Halliburton"), which provided cementing and well-monitoring services in relation to Deepwater Horizon, and Chubb Bermuda Insurance ("Chubb"). It began in early 2015. The arbitration related to Chubb's refusal to pay Halliburton's claim under the Bermuda Form insurance policy that Halliburton held with Chubb. Mr. Rokison was appointed by the English High Court (pursuant to the contractual mechanism between the parties) as chairperson of the tribunal in June 2015.

Arbitration 2 was between Chubb and Transocean Holdings LLC ("Transocean"), the owner of the Deepwater Horizon rig. It related to an excess liability claim by Transocean under its Bermuda Form policy. Mr. Rokison was appointed as Chubb's co-arbitrator.

Mr. Rokison gave disclosure before his appointments in Arbitrations 1 and 2. However, in an omission which was central to the dispute before the Supreme Court, Mr. Rokison did not disclose to Halliburton his proposed appointment by Chubb in Arbitration 2.

Mr. Rokison also subsequently accepted joint appointment in a claim made by Transocean against a different insurer in another arbitration arising out of the Deepwater Horizon incident (**Arbitration 3**). This was not disclosed to Halliburton but did not form the focus of the appeal.

In November 2016, Halliburton discovered Mr. Rokison's appointment in the two Transocean arbitrations and raised its concerns with Mr. Rokison. Mr. Rokison explained that his failure to make the necessary disclosure was an oversight for which he apologized. He said that he had not learned anything in Arbitrations 2 and 3 about the facts of the incident that was not public knowledge, but that he would be prepared to consider tendering his resignation in Arbitrations 2 and 3 if they did not shortly come to an end of their own accord (through preliminary determinations on issues of construction). He subsequently offered to resign from Arbitration 1 if the parties were able to agree on a mutually acceptable replacement chairperson who would be available before the hearing in the arbitration in January 2017.

Lower court decisions

In December 2016, Halliburton issued its claim in the English High Court seeking removal of Mr. Rokison and appointment of another chair on the grounds that circumstances existed giving rise to justifiable doubts as to Mr. Rokison's impartiality. In January 2017, Mr. Justice Popplewell heard the application. He dismissed it in February 2017, finding that (i) the circumstances did not give rise to any justifiable concerns about Mr. Rokison's impartiality and (ii) there was accordingly nothing to be disclosed. The Court of Appeal dismissed Halliburton's appeal just over a year later, finding (among other things) that while disclosure ought to have been made, something more than mere non-disclosure was required to justify an inference of apparent bias.

The case came before the Supreme Court in November 2019. Due to the importance of the issue, the Supreme Court allowed and received written and oral submissions from the ICC and the LCIA, as well as written submissions from the Chartered Institute of Arbitrators ("CIArb"), the London Maritime Arbitrators Association ("LMAA") and the Grain and Feed Trade Association ("GAFTA").

Supreme Court Decision

In an expansive judgment which sought to clarify the state of English law on the topic, the court held that:

- To determine whether there is an appearance of bias such that removal of an arbitrator is required, English law will apply the objective test of whether an informed, fair-minded observer would conclude that there is a real possibility of bias.
- The hypothetical informed, fair-minded observer will have regard to context, and may take account of the particularities of international arbitration such as: the debate over the role of party-appointed arbitrators (albeit that English law does not recognise any difference in impartiality obligations between a co-arbitrator and a chairperson); an arbitrator's reputation or experience (subject to a recognition that parties' knowledge of an arbitrator's reputation or experience will vary according to the circumstances); and, the possibility of tactical challenges.
- There may be circumstances in which the acceptance of appointments in multiple references concerning the same or overlapping subject matter with only one common party might reasonably cause the objective observer to conclude that there is a real possibility of bias. This will depend on the facts of the particular case and especially the custom and practice in the relevant field of arbitration.

- Unless the parties to an arbitration agree otherwise, an arbitrator is subject to a legal duty of disclosure under English law in relation to facts and circumstances which would or might give rise to justifiable doubts as to his or her impartiality. This duty (which had not previously been clearly established in English law) derives from an arbitrator's statutory duties under section 33 of the Arbitration Act 1996 ("1996 Act"), which in turn give rise to an implied term in the contract between the arbitrator and the parties that the arbitrator will act with impartiality. An arbitrator will not comply with that term if the arbitrator has knowledge of undisclosed circumstances that render him or her liable to be removed under section 24 of the 1996 Act.
- Disclosure is subject to an arbitrator's privacy and confidentiality obligations. Where such obligations apply, the parties' express or inferred consent is required for disclosure to be made. The ICC Rules (article 11(2)), LCIA Rules (article 5.4) and ICSID Rules (rule 6(2)) all provide a basis for consent to be inferred, and consent may also be inferred from the arbitration agreement itself in the context of the practice in the relevant field.
- A failure by an arbitrator to make disclosure is a factor for the fair-minded and informed observer to take into account in assessing whether there is a real possibility of bias. The hypothetical assessment will have regard to facts and circumstances as at and from the date the duty arose and will be made as at the date of the hearing to remove the arbitrator.

Applying these principles to the facts of the case, the Court dismissed the appeal. It did so on the basis that the question relevant to Mr. Rokison's removal was whether a fair-minded and informed observer *at the date of the hearing for removal in January 2017* would have concluded that there was a real possibility of unconscious bias on Mr. Rokison's part. In the Court's view, the observer would not have so concluded. By the time of the hearing for removal, Mr. Rokison had given an explanation of his failure to disclose the appointments (oversight) and that explanation was not challenged by Halliburton.

An objective observer would not have inferred from such oversight that there was a real possibility of unconscious bias because: (i) there was a lack of clarity in English law as to whether there was a legal duty of disclosure and whether disclosure was needed; (ii) the time sequence of the three references (with Arbitrations 2 and 3 following Arbitration 1) provides some explanation for why Mr. Rokison did not identify the need for disclosure; (iii) it was not likely that there would be any overlap in evidence or legal submissions between Arbitrations 2 and 3 and Arbitration 1, so there was no likelihood of Chubb gaining any advantage by reason of the overlapping references; (iv) there was no question of Mr. Rokison having received any secret financial benefit merely by reason of the appointments; (v) there was no basis for inferring unconscious bias due to subconscious ill-will in respect of the robust challenge made by Halliburton. (*See* judgment, at para. 149)

Analysis

The Supreme Court's judgment brings welcome clarity in respect of certain discrete points of English law, such as the existence of a legal duty of disclosure applicable to arbitrators under English law, an arbitrator's duty to disclose multiple appointments with overlapping subject matter and only one common party in Bermuda Form arbitrations (unless the parties have agreed otherwise) and the fact that consent to disclosure by an arbitrator in the disclosure process of certain limited details concerning an arbitration may be inferred from institutional rules and/or the arbitration agreement itself in the context of practice in the relevant field.

Further, in discussing the interaction between an arbitrator's privacy and confidentiality obligations and his or her duty of disclosure (a topic in which the court was clearly interested and in respect of which it invited further submissions after the hearing), the Court explored an issue that is not always fully investigated in debates on the topic. The IBA Guidelines on Conflicts of Interest, for example, make only passing reference to the risk that "professional secrecy rules or other rules of practice or professional conduct" prevent disclosure (*see* Explanation to General Standard 3(c)). The Court's conclusion as to inferred consent appears pragmatic and it is possible that this will be adopted more widely, should the issue arise elsewhere.

As to the practical implications of the judgment, the court's *obiter* comment that an arbitrator should proceed on the basis that a proposal to take on a further appointment involving a common party and overlapping subject-matter is likely to require disclosure of a potential conflict of interest appears to be sound advice. However, the judgment emphasises the holistic and contextual nature of the assessment of (i) whether information must be disclosed and (ii) whether a failure to disclose relevant information gives rise to an appearance of bias. In effect, any non-disclosure must be assessed in context.

In specialised fields where non-disclosure of multiple appointments and/or appointments arising from the same subject matter is common (as described by GAFTA and the LMAA), it may be that the Supreme Court's suggestion that institutions and/or parties operating in such fields should specify that disclosure of such circumstances is unnecessary in their rules or arbitration agreements will be taken up. This would help to clarify the distinction between arbitrations where disclosure of such circumstances is required, and those where it is not.

Finally, it is important to note that while the Supreme Court upheld the High Court's decision not to remove Mr. Rokison, it considered as a relevant factor in assessing his failure to make disclosure the uncertainty of English law in relation to an arbitrator's disclosure obligations. This uncertainty now having been resolved, it may well be that an English court would not come to the same conclusion on similar facts in the future. This further highlights the importance of timely disclosure.

This entry was posted on Tuesday, December 1st, 2020 at 6:00 am and is filed under Apparent bias, Appointment of arbitrators, Bias, Deepwater Horizon, IBA Guidelines on Conflicts of Interest, Impartiality, UK, UK Supreme Court, Unconscious Bias
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.