CHANCERY BAR

Arbitrator bias after *Halliburton*

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- Analysis of the UK Supreme Court's judgment in *Halliburton Co v. Chubb Bermuda Insurance Ltd* [2020] 3 WLR 1474
- Practical implications
- Uncertainties & unresolved issues

1) Background

- Halliburton provided cementing and well-monitoring services to BP for the Deepwater Horizon drilling rig in the Gulf of Mexico
- Catastrophic incident in 2010
- Multiple actions against those involved including Halliburton, who had taken out insurance with Chubb under a form known as the Bermuda Form liability policy
- Chubb refused to accept Halliburton's claim
- The policy provide for ad hoc arbitration seated in London

Background

- The parties appointed their own party-appointed arbitrators
- In the absence of agreement as to the chair, the Court appointed Kenneth Rokison QC in June 2015
- KR was subsequently appointed to two other arbitrations relating to the Deepwater Horizon incident:
  - In Dec 2015, as party-appointed arbitrator nominated by Chubb ('**Reference 2**')
  - In August 2016, as a substituted arbitrator in relation to claims by Transocean Holdings LLC, represented by the same law firm as Chubb (Clyde & Co LLP), against another insurer ('**Reference 3**')
- In Nov 2015 Halliburton discovered KR's appointment in Reference 2 and wrote to him expressing concerns

Background

- KR wrote to the parties explaining the sequence of events, conceding that with hindsight it would have been prudent to disclose the further appointments, and concluding:

  "I do not believe that any damage has been done but, if your clients remain concerned, I would be prepared to consider tendering my resignation from my appointment in the two Transocean cases if the results of the determination of the preliminary issues of construction, which are likely to be issued shortly, do not effectively bring them to an end."

- Halliburton south KR's resignation but Chubb did not agree to it
- KR considered himself obliged to continue
- Halliburton applied to the High Court under s.24 of the Arbitration Act 1996 seeking KR's removal

Background

- Arbitration Act 1996, s.33:

(1) The tribunal shall –

(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and

(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

(2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.”

Background

- The grounds for Halliburton's application to the Court were that circumstances existed that gave rise to "*justifiable doubts as to his impartiality*" (AA 1996 s.24(1)(a)), in particular:
  - (i) his acceptance of the appointments by Clyde & Co in references 2 and 3 and his failure to notify Halliburton or give it the opportunity to object and
  - (ii) his offer to resign from the tribunal in reference 1 but Chubb's refusal to permit him to do so."
- The High Court and Court of Appeal dismissed the application.

2) The Supreme Court's judgment

The two central issues:

- Whether, and if so to what extent, can an arbitrator accept appointments in multiple references concerning the same or overlapping subject matter with only one common party without giving rise to an appearance of bias?
- Whether, and if so to what extent, may an arbitrator accept such multiple references without making disclosure to the party who is not the common party?

The duty of impartiality: principles restated by the Supreme Court

- ***Porter v Magill*** [2002] 2 AC 357 at para 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"

- ***Helow v SSHD*** [2008] 1 WLR 2416 per Lord Hope at para. 3

"[T]he observer is 'informed'. [B]efore she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographic context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment." (Emphasis added by Lord Hodge at para. 52 of ***Halliburton***)

In applying the test, "it is important to bear in mind the differences in nature and circumstances between judicial determination of disputed and arbitral determination of disputes" (Lord Hodge JSC, para. 55)

- Courts sit in public; arbitration is generally conducted in private
- Arbitrators have no power to order concurrent hearings without the consent of the parties
- A judge is the holder of public office with no financial interest reappointment
- Arbitrators come from a wide range of background and jurisdictions which may have divergent views on what constitutes ethically acceptable conduct
- In the field of international arbitration there are different understandings of the role and obligations of the party-appointed arbitrator

Conclusion on Issue 1: can an arbitrator accept appointments in multiple references concerning the same or overlapping subject matter with only one common party without giving rise to an appearance of bias?

- In some circumstances, acceptance of multiple appointments in multiple references concerning the same or overlapping subject matter with only one common party may give rise to an appearance of bias:

  "…inequality of knowledge between the common party and the other party or parties has the potential to confer an unfair advantage of which an arbitrator ought to be aware. It must depend on the circumstances of the particular arbitration, including the custom and practice in arbitrations in the relevant field, which should be examined closely" (130)

  "The objective observer will consider whether in the circumstances of the arbitration in question it would be reasonable to expect the arbitrator not to have the knowledge or connection with the common party which the multiple references would give him or her" (127)

The duty to give disclosure: Lord Hodge's analysis

- Disclosure is a means of avoiding the appearance of bias "*by disclosing matters which could arguably be said to give rise to a real possibility of bias*", to enable the parties to take advice and consider whether there is a problem (para. 70)
- Hence the practice of judges to "*disclose a previous activity or association which would or might provide a basis for a reasonable apprehension of lack of impartiality*" (ibid; the Court's emphasis)
- **There is a legal duty of disclosure:** the arbitrator would not comply with the duty under s.33 if the arbitrator ought to have made disclosure but did not**.**
- If disclosure was not made, then a party was unable to make an informed decision as to whether or not to seek to exercise its entitlement to seek the removal of an arbitrator under s.24 of the 1996 Act

Conclusion on Issue 2: can, and if so to what extent, an arbitrator accept multiple references without making disclosure to the party who is not the common party?

"In summary, the arbitrator's legal obligation of disclosure imposes an objective test. This differs from the rules of many arbitral institutions which 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 which would cause the informed observer to conclude that there was a real possibility of a lack of impartiality. It is sufficient that the matters are such that they are relevant and material to such an assessment of the arbitrator's impartiality and could reasonably lead to such an adverse conclusion. Whether and to what extent an arbitrator may disclose the existence of a related arbitration without obtaining the express consent of the parties to that arbitration depends upon whether the information to be disclosed is within the arbitrator's obligation of privacy and confidentiality and, if it is, whether the consent of the relevant party or parties can be inferred from their contract having regard to the customs and practices of arbitration in their field." (para. 116, emphasis added)

Reconciling disclosure with confidentiality: L Hodge's analysis

- No absolute entitlement to privacy/confidentiality (para. 99)
- Though it depended on the custom of arbitrators acting under certain institutional rules (para. 92), it was, in many forms of arbitration, custom and practice to disclose multiple appointments
  - That included under the 'Bermuda Form' (para. 94)
- Consent can be inferred for disclosure limited to (i) the identity of the common party who was seeking the appointment of the arbitrator and (ii) whether the appointment was a party-appointment or nomination by a court or third party (iii) that the references relate to similar issues.

Consequences of failure to comply with the duty to disclose

“ a failure in his or her duty to disclose those matters to the party who is not the common party to the references deprives that party of the opportunity to address and perhaps resolve the matters which should have been disclosed. The failure to disclose may demonstrate a lack of regard to the interests of the non-common party and may in certain circumstances amount to apparent bias.” (para 118)

The SC's conclusions on the facts of *Halliburton*

- KR's failure to disclose his appointment in reference 2 , which was a potentially overlapping arbitration with only one common party, was in breach of his legal duty of disclosure
- However, in the circumstances the reasonable observer would not infer from the oversight that there was a real possibility of unconscious bias given (inter alia):
  - The lack of clarity at the time re. whether there was a legal duty of disclosure
  - The time sequence made it more understandable why KR saw the need to disclose reference 1 to Transocean but not reference 2 to Halliburton
  - The unlikelihood of overlap in evidence or legal submissions

3) Practical implications

- **More clarity from arbitral institutions?**

  "[…] rather than having disputes about the existence or absence of such a duty by proof of a general custom and practice in a particular field of arbitration, there may be merit in putting the matter beyond doubt by express statement in the rules or guidance of the relevant institutions." [Lord Hodge JSC at para. 135]

- LCIA rules do not currently address the issue of a common party to multiple disputes. Might this change?
- Contrast the ICC Guidelines para 27 which include as matters that an arbitrator should disclose prior to appointment (i) appointments in an arbitration involving one of the parties or its affiliates, or by their lawyers (ii) appointments in related cases

Practical implications cont'd

- **Court caution in appointing an arbitrator who has already been appointed in arbitrations involving one of the parties and/or related matters**
- As Lord Hodge recorded at para. 35, the CA had "*recognised that the existence of appointments in such related arbitrations could cause the party which was not involved in the related arbitrations to be concerned and could be a good reason for a judge to decline to appoint a person as an arbitrator…in the face of an objection by that party*."
- Similarly, the Supreme Court cited with approva, *Guidant LLC v Swiss, In re International SE* [2016] EWHC 1201 (Comm), where Leggatt J. declined to appoint as the third arbitrator in two related arbitrations a person who had been appointed the third arbitrator in a prior overlapping arbitration. The overarching reason was that there would be a legitimate concern that he would be influenced by arguments and evidence in the earlier arbitration.

Practical implications cont'd

- **Arbitrator caution – erring on the side of disclosure**

3) Uncertainties & unresolved issues

- **Differences of approach across different jurisdictions regarding party-appointed arbitrators**

"64. …*But this* [the fact that all arbitrators are subject to the same duty of impartiality' *does not negate the fact that in some quarters there are understandings of the arbitral process which appear not to accept that requirement. Further, some legal systems take a different view and accept the proposition that a party-appointed arbitrator has a special role in relation to his or her appointing party…*

66. When such ideas are in play the parties in reality put a particularly heavy responsibility on the arbitrator who is not a party-appointee and who chairs the tribunal. The courts in applying the test of the fair-minded and informed observer would credit that objective observer with the knowledge both that some, maybe many, parties and some, maybe many, arbitrators in international arbitrations have that understanding and that there is a debate within the arbitration community as to the precise role of the party-appointed arbitrator and the compatibility of that role with the requirement of impartiality."

Uncertainties & unresolved issues (cont'd)

- **No bright line rule**
- A theme of the judgment is that the particular practices of arbitral institutions or arbitrations in a certain field of commerce will inform a finding of
  - whether an arbitrator can sit in multiple arbitrations where there is a common party; and
  - whether the arbitrator should make disclosure of that fact.

Uncertainties & unresolved issues (cont'd)

- **When will multiple appointments generate apparent bias?**
- Unlike the CA, Supreme Court did not rule out that multiple appointments *"without more"* could in certain circumstances generate an apparent bias.
- What circumstances might these be?