UK DEFENCE CLUB

Soundings

Arbitrators in deep water? Supreme Court hands down key judgment on impartiality of arbitrators

The prospect of removing an arbitrator due to doubts over his or her impartiality will always present a challenge. The particular difficulties surrounding this issue have been under the spotlight since the long-running Halliburton v Chubb dispute reached the Supreme Court in November, 2019. On 27th November, 2020, the eagerly awaited decision of the Supreme Court was handed down.

Background

In April 2010, an explosion tore through the Deepwater Horizon oil rig in the Gulf of Mexico. BP were lessees of the rig. Halliburton provided cementing and well-monitoring services to BP in relation to the temporary abandonment of the well. Following the explosion, a number of claims were brought against Halliburton, BP and the rig owners, Transocean. Halliburton settled some of those claims and in turn sought to recover its losses from its liability insurers, Chubb. Chubb declined to pay the claims, principally on the basis that the settlement was neither reasonable nor approved by Chubb.

Halliburton commenced arbitration proceedings against Chubb. The insurance policy was governed by New York law, but the seat of the arbitration was London. The arbitration clause provided for a panel of three arbitrators: one to be appointed by each party and the third to be appointed by the two so appointed, or, in the absence of their agreement, by the English High Court.

In the event, each party appointed its arbitrator but the two appointed arbitrators could not agree on the third. There followed an application to the High Court, which appointed Mr Kenneth Rokison QC, Chubb's preferred candidate, as the third arbitrator and chair of the tribunal. Prior to this appointment, Mr Rokison QC disclosed that he had acted as arbitrator or Chair in a number of arbitrations involving Chubb, in some cases having been appointed by Chubb, and that two such proceedings were ongoing. Halliburton did not object to these facts at the time.

Sometime later in the arbitration proceedings, it emerged that Mr Rokison QC had since accepted an appointment as arbitrator in two other references relating to the Deepwater Horizon incident. The first was a claim by Transocean against Chubb under the same insurance policy as Halliburton's. Mr Rokison QC was appointed by Chubb in that reference. The second was a claim by Transocean against a separate insurer, in which Mr Rokison QC was appointed as chair. Mr Rokison QC had not disclosed either of these appointments to Halliburton.

When approached by Halliburton about this, Mr Rokison QC responded that it did not occur to him that he ought to disclose those appointments to Halliburton and, but for his duty to both parties, he would have resigned.

Halliburton applied to the High Court under s 24(1)(a) of the Arbitration Act 1996 to remove Mr Rokison QC as arbitrator

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on the basis that Mr Rokison QC's conduct had given rise to justifiable doubts as to his impartiality.

The High Court's decision

The High Court rejected the application. It found that the fact that an arbitrator may be appointed in more than one reference arising out of the same facts does not mean he is unable to act fairly or impartially. Further, and in light of that finding, Mr Rokison QC was not required to disclose to Halliburton his subsequent appointments in the further two arbitration references. Even if Mr Rokison QC had been required to disclose those appointments, his failure to do so in circumstances where he had an honest yet mistaken belief that he did not have to disclose them, would not have given rise to a real possibility of apparent bias against Halliburton.

Halliburton appealed to the Court of Appeal.

The Court of Appeal's decision

In April, 2018, the Court of Appeal rejected Halliburton's appeal. Its judgment contained a useful reminder of the test for impartiality: "whether the fair-minded and informed observer, having considered the facts, could conclude that there was a real possibility that the tribunal was biased".

Similar to the High Court, the Court of Appeal held that *"The mere fact of an appointment in a related reference with only one common party would not of itself justify an inference of apparent bias; something more was required, and that would have to be 'something of substance'"*.

In contrast to the High Court's decision, however, it was found that Mr Rokison QC should have disclosed the two subsequent appointments to Halliburton because that was best practice in international commercial arbitration, and other factors (such as the degree of overlap between the references) meant those appointments might have provided the basis for a reasonable apprehension of lack of impartiality. Nevertheless, given that his failure to disclose was innocent and that the degree of overlap between the references was minimal, this did not give rise to justifiable doubts as to his impartiality.

Halliburton then appealed to the Supreme Court.

The Supreme Court's decision

The matter was heard before the Supreme Court in November 2019. The core issues for determination were: (i) 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 (ii) whether and to what extent the arbitrator may do so without disclosure. The court permitted intervention by various arbitral institutions, hearing oral submissions from the LCIA and the ICC and receiving written submissions from the CIArb, LMAA and GAFTA.

The Supreme Court unanimously dismissed the appeal.

On the first issue, it was considered that multiple related appointments are not inherently impermissible, nor indeed uncommon, in international arbitration. Whether such appointments would lead to actual or apparent bias, however, would depend on the relevant facts and circumstances in each case, including the type of arbitration. For example, whilst multiple appointments are common in GAFTA and LMAA arbitrations, they are less common in ICC arbitrations, so the latter may be more likely to give rise to suggestions of bias.

As to the second issue: This matter involved the Bermuda Form liability policy. Bermuda Form arbitrations are ad hoc arbitrations which are not subject to the rules of an arbitral institution. The court decided that in the context of Bermuda Form arbitrations, multiple appointments must be disclosed in the absence of an agreement to the contrary between the parties. This reflects the fact that an insurance company is much more likely to be a "repeat player" than a claimant in a GAFTA or LMAA arbitration. On this basis, Mr Rokison QC had breached his duty.

The Supreme Court clarified that "unless the parties to the arbitration otherwise agree, 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 test as to bias is a test of the fair-minded and objective observer that should be assessed at the date of the hearing of the application to remove the arbitrator, not (surprisingly) at the time the arbitrator accepted his or her appointment in the first place.

In the circumstances of this case, the Supreme Court panel decided that, despite his breach of duty, such an observer would not infer from Mr Rokison QC's failure to disclose his other appointments that there was a real possibility of unconscious bias. In reaching this conclusion, the court took into account various factors including the lack of clarity in English law as to the duty of disclosure; the sequence of the appointments; the likelihood that the other references would be resolved and there would be little scope for overlap; and the lack of any financial advantage for Mr Rokison QC. It was also considered relevant that Mr Rokison QC dealt with the challenge to his appointment "in a courteous, temperate and fair way" and there was seen to be no evidence that he bore any animus towards Halliburton as a result.

Concluding remarks

An overriding theme of the judgment was that impartiality is a core principle of arbitration law that applies to all arbitrators. The Supreme Court's clarification of the legal principles will therefore be of particular importance in future arbitration references where such concerns may arise. However, it is important to note that each case must be considered on its own facts and a different outcome may be seen in the context of, for example, an LMAA arbitration.

If Members have any questions about the issues covered in this article, they are invited to contact the Managers in the usual way.

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