UK Supreme Court confirms dismissal of apparent bias challenge to Bermuda Form arbitrator

The Supreme Court has unanimously dismissed the appeal in Halliburton Company v Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd), holding that a fair-minded and informed observer, at the date of the hearing to consider the proposed removal of an arbitrator, would not have concluded from the arbitrator's failure to disclose his appointments in separate but related arbitrations that there was a real possibility of bias. Before the Supreme Court, two main issues were raised: (1) whether an arbitrator may accept appointments in several arbitrations related to the same or overlapping subject matter with only one common party without giving rise to an appearance of bias, and (2) whether an arbitrator may do so without disclosing those appointments to the other parties. Philippa Charles, partner at Stewarts Law, Philip Clifford QC and Isuru Devendra, partner and associate at Latham & Watkins, and Akhil Shah QC of Fountain Court Chambers provide insightful comments on a judgment which is of significant interest to practitioners in the UK and around the world.

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Halliburton Company (Appellant) v Chubb Bermuda Insurance Ltd (Formerly known as Ace Bermuda Insurance Ltd) (Respondent) [2020] UKSC 48

Background

In 2010, an explosion on the Deepwater Horizon drilling rig in the Gulf of Mexico caused loss of life and severe damage. Halliburton Company (Halliburton) was a provider of cement and monitoring services to BP Exploration and Production Inc, the lessee of the Deepwater Horizon drilling rig. Halliburton settled claims against it for an amount of US$ 1.1bn and then sought to be reimbursed by the insurance company Ace Bermuda Insurance Ltd (Chubb) pursuant to a Bermuda Form liability policy previously purchased from Chubb. As Chubb refused to pay the requested sum (contending that Halliburton's settlement was not a reasonable settlement), Halliburton commenced arbitration against Chubb in accordance with the Bermuda Form policy (a London-seated ad hoc arbitration). The parties each appointed an arbitrator but were unable to agree on the appointment of a chair. Following an application to the High Court, an arbitrator (Mr Rokison) was appointed in June 2015.

Subsequently, and without Halliburton's knowledge, the arbitrator accepted appointment as arbitrator in two separate arbitrations arising from the Deepwater Horizon incident. The first appointment was made by Chubb and related to a claim against Chubb by Transocean Holdings LLC (Transocean), the company that owned the rig. The second appointment was a joint nomination by parties in a claim by Transocean against another insurer.

Following the arbitrator's appointment in those later references, Halliburton applied to the English court under section 24 of the Arbitration Act 1996 for the arbitrator's removal. The High Court (Mr Justice Popplewell as he then was) dismissed that application (*H v L and others* [2017] EWHC 137 (Comm)). On appeal, the Court of Appeal found that, while the arbitrator ought to have disclosed his proposed appointment in the subsequent arbitrations, an objective observer would not in the circumstances conclude that there was a real possibility that he was biased ([2018] EWCA Civ 817). Halliburton appealed to the Supreme Court.

The main issues raised before the Supreme Court were whether and to what extent:

an arbitrator may accept appointments in multiple cases concerning the same or overlapping subject matter with only one common party without giving rise to an appearance of bias, and

an arbitrator may do so without disclosing it to the other parties in all other appointments

The Supreme Court judgment

The unanimous Supreme Court judgment, delivered by Lord Hodge with whom Lord Reed, Lady Black and Lord Lloyd-Jones agreed, concluded that the Popplewell J and the Court of Appeal had correctly decided that a fair-minded and informed observed would not have concluded that circumstances existed that gave rise to justifiable doubts about Mr Rokison's impartiality. Lady Arden delivered a concurring judgment.

Charles highlighted that 'the significance of the Supreme Court's ruling lies, perhaps, less in the determination they reached on this particular set of facts but more in the consideration they have given to the interrelationship between the duty of impartiality, the duty of disclosure, the confidentiality of the arbitration process, and the perspective of the fair-minded and informed observer for the conduct of future cases.'

The first issue

Because the appeal raised questions of law of general importance in the field of arbitration, the court allowed and received representations and submissions from the International Court of Arbitration of the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), the Chartered Institute of Arbitrators (CIArb), the London Maritime Arbitrators Association (LMAA) and the Grain and Feed Trade Association (GAFTA). While it was highlighted that in certain types of arbitrations the appointment of the same specialised arbitrators might be regular practice, the Supreme Court held that multiple appointments must be disclosed in the context of Bermuda Form arbitration under English law unless agreed to the contrary between the parties to whom disclosure would otherwise be made.

As explained by Clifford and Devendra, 'the insurance industry gives rise to many arbitrations and popular arbitrators may be appointed a number of times by or in cases involving a particular party. This can give rise to fears that an arbitrator may be biased in favour of that party or be, for example, too "insurer-friendly" in their approach. In addition, if an arbitrator is appointed by a party in multiple cases it has with different parties but similar factual backgrounds and/or issues, the other parties may well be concerned that the party and the arbitrator may have gained relevant information and insights that the other parties do not have.'

As mentioned by Shah, 'whether there is apparent bias is determined by the assessment of the fair minded and informed observer of whether there is a real possibility of bias. It is an objective assessment which has regard to the realities of modern arbitration. There may be circumstances where the acceptance by an arbitrator of appointments in multiple references concerning the same subject matter with only one common party might reasonably cause the objective observer to conclude that there is a real possibility of bias. The conclusion reached by the objective observer will depend on the facts of a particular case and the custom and practice in the relevant field of arbitration. In the specific context of Bermuda Form arbitration, such circumstances might reasonably give rise to a conclusion by the objective observer that there was a real possibility of bias. As a consequence the arbitrator was under a legal duty to disclose such appointments, absent a different agreement by the parties.'

As explained by Clifford and Devendra, 'the fair-minded and informed observer's assessment of whether an arbitrator has failed in their duty to make disclosure must have regard to the facts and circumstances as at and from the date when the duty arose. The fair-minded and informed observer's assessment of whether there is a real possibility that an arbitrator is biased is to be by reference to the facts and circumstances known as at the date of the hearing to remove the arbitrator.'

The second issue

The Supreme Court confirmed that arbitrators have a legal duty of disclosure which arose from their statutory duty to act fairly and impartially. Moreover, this duty is not overriden by the concurrent duty of privacy and confidentiality under English law. Shah explained that 'those competing duties can be balanced as follows: an arbitrator can permissibly disclose the fact that of appointment in another arbitration to which one of the parties is common to both arbitrations. The consent of the common party to this disclosure by the arbitrator is to be inferred from its action in nominating the same arbitrator, or from the practice in the relevant field. There may be express contractual terms or other binding rules which prohibit such disclosure, but they would have to do so clearly.'

As summarised by Clifford and Devendra, 'the Supreme Court held that, while Mr Rokison had breached his duty to disclose his subsequent appointments, having regard to the circumstances at the date of the first instance hearing, a fair-minded and informed observer would not infer from his failure to disclose that there was a real possibility of bias. In reaching this conclusion, the Supreme Court noted: the lack of clarity at the relevant time as to the requirement for disclosure, the time sequence of the appointments, Mr Rokison's measured response to Halliburton's robust challenge, [Mr Rokison's offer] to consider resigning from his appointments in the later cases if those cases had not been disposed of on the preliminary issues, [and that] there was no question of Mr Rokison having received a secret benefit'.

Charles highlighted: 'On the question of the significance of the duties of confidentiality connected with an arbitration proceeding, the Supreme Court determination seeks to find a way through what is a complex picture: because confidentiality of an arbitration is not a statutory feature of London-seated cases, the Supreme Court recognises that there are different expectations in different types of proceeding as to the obligations of confidentiality on an arbitrator accepting later appointments. Specifically, the Supreme Court recognised that there are certain types of London-seated arbitration proceedings which adopt a practice of not requiring the specific consent of the parties to appointments in multiple appointments. However the approach that they have taken to the identification of implicit consent to disclosure may prove difficult to apply in practice. It may lead to arbitrators seeking express consent from the parties in every case that they may make disclosures as needed for the purposes of any subsequent appointment, which would be good practice, in my view, though it may conflict with existing practice in certain areas where the process is normally less formal and more streamlined.'

Charles further commented: 'With respect to the distinction between the failure by the arbitrator to disclose (which was a breach of his duty) and the assessment to be made by the fair minded and informed observer as to whether or not such breach gave rise to a justifiable doubt as to his impartiality, the Supreme Court stressed that if the point at which the assessment of the appearance of bias was the date of the hearing of the application to remove him, then the facts at that time, in the present case, were insufficient to justify an appearance of bias on the part of the arbitrator. This is obviously a highly fact-specific analysis to be undertaken in each case but one wonders whether – given the findings as to the obligation to disclose – future courts may be more inclined to consider a failure to disclose as a factor which does suggest an appearance of bias.'

Written by Elodie Fortin

Source: *Halliburton Company (Appellant) v Chubb Bermuda Insurance Ltd (Formerly known as Ace Bermuda Insurance Ltd) (Respondent)* [2020] UKSC 48

Philippa Charles, partner and head of International Arbitration at Stewarts Law, is an experienced commercial litigator with a particular interest in and focus on international arbitration.

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