Arbitration

Would an arbitrator’s non-disclosure of multiple appointments amount to lack of impartiality?

Introduction

In a recent Supreme Court decision *Halliburton Co v Chubb Bermuda Insurance Ltd and others v International Court of Arbitration of the International Chamber of Commerce and others* [2020] UKSC 48, the Supreme Court considers whether appointment of an arbitrator in multiple arbitration references arising from the same or overlapping subject matter would constitute bias and imposes an obligation of disclosure on the arbitrator.

Background

Transocean Ltd (“Transocean”) leased the Deepwater Horizon drilling rig to BP Exploration and Production Inc (“BP”) while Halliburton Company (“Halliburton”) provided cementing and well-monitoring services to BP in relation to the temporary abandonment and plugging of the well. Halliburton and Transocean both entered into a Bermuda Form liability policy (“Policy”) with Chubb Bermuda Insurance Ltd (“Chubb”). Due to an explosion of the well, extensive damage and loss of life occurred. BP, Halliburton and Chubb were faced with numerous civil claims from the US Government as well as corporate and individual claimants. At the same time, BP also claimed against Halliburton and Chubb.

Halliburton settled the private claims for damages and claimed against Chubb under the Policy. However, Chubb refused to pay Halliburton’s claim with the contention that Halliburton made an unreasonable settlement. Transocean also made similar claim against Chubb but was met with similar contention from the latter. Accordingly, Halliburton invoked the arbitration clause of the Policy to commence arbitration. As a result, three concurrent arbitrations were eventually commenced:

1. Halliburton v Chubb ("Reference 1");
2. Transocean v Chubb ("Reference 2"); and
3. Transocean v third party insurer ("Reference 3").

In all three references, Mr Rokison QC was appointed as the arbitrator but he failed to disclose to Halliburton his appointment in Reference 2 and Reference 3. Upon discovering Mr Rokison’s aforementioned appointments, Halliburton issued a claim in the High Court, seeking for an order that Mr Rokison be removed and replaced as arbitrator and chairman from Reference 1 on the ground that his conduct had given rise to an appearance of bias.
Halliburton’s claim was dismissed at the High Court and the Court of Appeal. The case came to the Supreme Court for final decision.

Issues

The issues before the Supreme Court are:

1. what is the duty of impartiality in the context of arbitration;
2. whether an arbitrator is under a legal duty to disclose particular matters;
3. how far does the obligation of respecting the privacy and confidentiality of an arbitration constrain the arbitrator’s ability to make disclosure; and
4. whether a failure to disclose such matters demonstrates a lack of impartiality.

Decision

1. Duty of impartiality

The Supreme Court reassured that impartiality is a cardinal duty of an arbitrator. A party to arbitral proceedings is entitled to challenge an award in the proceedings on the ground of serious irregularity, which could arise out of loss of impartiality. The test is a well-established one, that 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”, as stated by Lord Hope of Craighead in Porter v Magill [2002] 2 AC 357 (“Test”). When applying the Test, regard must be made to the particular characteristics of international arbitration such as the private nature of arbitrations and the professional reputation and experience of an individual arbitrator. Whilst an arbitrator, when deciding whether to accept an appointment, is not under the same obligation as a judge hearing a case, he is nevertheless under an obligation to carry out the remit unless there are substantial grounds for self-disqualification.

2. Duty of disclosure

On the issue of whether disclosure is a legal duty or merely good arbitral practice, the Supreme Court confirmed that given an arbitrator’s statutory duties to act fairly and impartially, he is obliged to make disclosures in circumstances where his duty may be impeded unless the parties have expressly or implicitly waived their rights to disclosure. Without disclosure, parties may often be unaware of matters which could give rise to justifiable doubts about an arbitrator’s impartiality. The existence of such legal duty also promotes transparency in arbitration.

3. Disclosure and Duty of Privacy and Confidentiality

At the outset, where an information which must be disclosed is subject to an arbitrator’s duty of privacy and confidentiality, disclosure can be made only if the parties to whom the obligations are owed give their consent. Such consent may be express or inferred from the arbitration agreement itself, depending on the custom and practice in relevant field.
For instance, the general principle of the institutional rules (including ICC, LCIA and CIArb Rules) denotes that an arbitrator can disclose (i) the existence of a current or past arbitration involve a common party and (ii) the identity of the common party without obtaining the express consent of the parties to that arbitration, unless the parties have agreed to prohibit such disclosure. The incorporation of the institutional rules provides a basis for the inference that the parties to the arbitration consent to the disclosure.

Contrarily, for GAFTA and LMAA arbitrations, it is an accepted feature that arbitrators will act in multiple arbitrations. Parties which refer their disputes to their arbitrators are taken to accede to this practice and to accept that such involvement by their arbitrators does not call into question their fairness or impartiality. In other words, multiple appointments are not required to be disclosed under the GAFTA and LMAA practice.

In this appeal, the Supreme Court was concerned with a Bermuda Form of arbitration. The Supreme Court held that there was no custom or practice under Bermuda Form that accept an arbitrator’s multiple appointments without making disclosure. In this regard, the Supreme Court found that Mr Rokison should have disclosed the overlapping proceedings, and thus breached his duty of disclosure by failing to do so.

4. Failure to disclose and impartiality
The Supreme Court specifically addressed the arbitrator’s duty of disclosure in the context of overlapping appointments. In the circumstances where a failure to disclose multiple references would possibly give rise to justifiable doubts as to the arbitrator’s impartiality, the non-common party to the multiple references would be deprived of the opportunity to address and perhaps resolve the matters which ought to be disclosed. In this regard, the failure to disclosure may demonstrate a lack of regard to the interests of the non-common party and may in certain circumstances, amount to apparent bias.

The Supreme Court concluded that a fair-minded and informed observer would not find a real possibility of apparent bias in the present case due to the following reasons:

1. there appeared to be a lack of clarity in English case law as to whether there was a legal duty of disclosure;
2. Reference 2 followed about six months after Reference 1 and this time sequence might explain why Mr Rokison saw the need to disclose Reference 1 to Transocean but not the need to inform Halliburton about Reference 2;
3. Mr Rokison provided a measured response that references 2 and 3 would be resolved by the preliminary issue and that there would not be any overlap in evidence or legal submissions between them and reference 1;
4. Mr Rokison did not receive any secret benefit;
5. Mr Rokison responded the challenge in a courteous, temperate and fair way.

Hence, the appeal was dismissed and Mr Rokison remained as the arbitrator for Reference 1.

**Conclusion**

This case sheds light on how an arbitrator’s duty of confidentiality and privacy intermingles with the duty of disclosure. There is no universal prescription as to when a disclosure shall be made in respect of overlapping appointments. In determining whether an arbitrator has an obligation to disclose any multiple appointments, parties should examine closely the applicable custom and practice of the specific arbitration form or institution.

For enquiries, please feel free to contact us at:

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<tr>
<th>E: <a href="mailto:arbitration@onc.hk">arbitration@onc.hk</a></th>
<th>T: (852) 2810 1212</th>
</tr>
</thead>
<tbody>
<tr>
<td>W: <a href="http://www.onc.hk">www.onc.hk</a></td>
<td>F: (852) 2804 6311</td>
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19th Floor, Three Exchange Square, 8 Connaught Place, Central, Hong Kong

**Important:** The law and procedure on this subject are very specialised and complicated. This article is just a very general outline for reference and cannot be relied upon as legal advice in any individual case. If any advice or assistance is needed, please contact our solicitors.

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