Arbitrators, independence and impartiality – important guidance from the UK Supreme Court

Halliburton Company v Chubb Bermuda Insurance Ltd [2020] UKSC

By Melissa Perkin

On 27 November 2020, the UK Supreme Court handed down its judgment in the landmark case of *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48. The decision has provided important clarification of the nature and scope of an arbitrator's duty to make disclosures of facts and circumstances that may give rise to doubts about their independence and impartiality. It also addresses how this duty interrelates with the duty of privacy and confidentiality, and the circumstances in which an arbitrator's failure to make a disclosure could give rise to an appearance of bias.

The Supreme Court reiterated the importance of the duty of impartiality as a core principle of arbitration law, which applies equally to party-appointed and independently-appointed arbitrators, and the need to apply an *objective observer* test, in determining whether circumstances exist that create the appearance of bias.

Background

Halliburton Company (**Halliburton**) provided cementing and oil well monitoring services to BP Exploration and Production Inc (**BP**) in the Gulf of Mexico. Halliburton entered into a liability policy with Chubb Bermuda Insurance Ltd (**Chubb**). Transocean Ltd (**Transocean**) also provided services to BP. Those services overlapped with those provided by Halliburton. Transocean was also insured with Chubb.

In 2010, the Deepwater Horizon oil spill occurred in the Gulf of Mexico, resulting in civil claims against BP, Halliburton and Transocean.

After a trial in the United States, the judgment apportioned blame between the parties and Halliburton concluded a settlement to agree the amount of damages. When Halliburton sought to claim a proportion of this settlement under its insurance policy, Chubb declined to pay Halliburton's claim. As a result, an arbitration was commenced. Both Halliburton and Chubb selected their own arbitrator but were unable to agree the Chairman of the arbitration, resulting in an application to the High Court in which Chubb's first-choice candidate, Mr Rokison QC, was selected.

In 2016, Halliburton discovered that following Mr Rokison's appointment and without Halliburton's knowledge, Mr Rokison had accepted appointment as an arbitrator in two other references, both of which arose out of the same Deepwater Horizon incident and involved Transocean.

Halliburton applied to the High Court to remove Mr Rokison as arbitrator on the grounds of perceived bias. That application was refused on the basis that there were no grounds for removing Mr Rokison under section 24(1)(a) of the Arbitration Act 1996.

The Court of Appeal dismissed Halliburton's appeal as on the facts of the case, there was no real possibility that the arbitrator was biased when viewed from the perspective of the fair minded and informed observer. The Court of Appeal found that the mere fact that an arbitrator accepts multiple appointments in overlapping subject matter with only one common party does not, of itself, give rise to an appearance of bias. The court also remarked that in keeping with best practice in international arbitration and as a matter of law, disclosure of the appointments should have been made. Notwithstanding that, the court concluded that non-disclosure alone would not have led the fair-minded and informed observer to conclude that there was a real possibility of bias.

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Issues on appeal to the Supreme Court

Halliburton appealed the Court of Appeal's decision to the Supreme Court. Halliburton, asked the Supreme Court to rule on two questions, namely:

1. 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
2. Whether and to what extent the arbitrator may accept appointments in multiple references without disclosure.

Supreme Court Decision

In a unanimous decision, the Supreme Court dismissed the appeal.

In relation to the first ground of appeal, the Supreme Court held:

- There may be circumstances in which the acceptance of multiple appointments with overlap with only one common partymight reasonably cause the objective observer to conclude that there is a real possibility of bias (at [152]).
- The objective test of the fair-minded and informed observer applies equally to judges and all arbitrators, and that in applying that test, it would be wrong to have regard to the characteristics of the parties to the arbitration. There is no difference between the test in section 24(1)(a) of the 1996 Act, which speaks of the existence of circumstances that *give rise to justifiable doubts as to [the arbitrator's] impartiality* and the common law test of whether the fair-minded and informed observer would conclude there is a real possibility of bias (at [55]). However, in applying the test to arbitrators, it is important to bear in mind the differences in nature and circumstances between judicial determination of disputes and arbitral determination of disputes (at [56]-[63]).

On the second ground of appeal, the Supreme Court held:

- Where the hypothetical observer would conclude that circumstances as at and from the date when the duty arose might reasonably give rise to a real possibility of bias, the arbitrator will be under a legal duty to disclose such appointments (at [122]). This 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 (at [116]).
- The duty of disclosure is not simply good arbitral practice but is a legal duty in English law (at [76]). It is a component of the arbitrator's statutory obligations of fairness and impartiality.
- A failure to make disclosure does not necessarily lead to a removal of the arbitrator, but is a factor that the fair-minded and informed observer would consider when making an assessment of whether there is a real possibility of bias (at [155]).
- If a matter would give rise to justifiable doubts as to an arbitrator's impartiality, the disclosure of that matter would not, as a general rule, remove this conflict (at [108]).
- Where the 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. Regard

must be had to the relevant custom and practice to ascertain whether consent can be inferred (at [88]-[89]).

In relation to the specific facts in this case, the Supreme Court held that:

- Mr Rokison had breached his legal duty of disclosure of the subsequent arbitrations in the first reference between Halliburton and Chubb. He should at the time of appointment have disclosed:
  - (i) the identity of the common party who was seeking the appointment of the arbitrator (in this case Chubb);
  - (ii) the nature of the appointment in the subsequent references; and
  - (iii) that the subsequent references arose out of the same incident (at [146]).
- Mr Rokison's failure to disclose his appointment in the subsequent reference, which was a potentially overlapping arbitration with only one common party, was a breach of his legal duty of disclosure (at [147]). The fair minded and informed observer, if she or he had considered the question at or around the date of acceptance may well have concluded that there was a real possibility of bias.
- The Supreme Court applied the common law test and refused to hold that the arbitrator should be removed on the basis that:
  - there appeared to have been a lack of clarity in English case law as to whether there was a legal duty of disclosure and whether disclosure was needed;
  - it was likely that there would not be any overlap between the references;
  - there was no question of Mr Rokison having received any secret financial benefit; and
  - there was no basis for inferring unconscious bias in the form of subconscious ill-will in response to the robustness of the challenge mounted on behalf of Halliburton (at [149]).

The Supreme Court's detailed judgment provides critical guidance for arbitrators, practitioners, institutions and arbitration users alike and is available on the Supreme Court's website.

ABOUT THE AUTHOR

Melissa Perkin

Executive Director
NZDRC Group

Former executive director of the New Zealand Bar Association, Melissa Perkin is an executive director at the New Zealand Dispute Resolution Centre Group, which includes ICRA (Independent Complaints and Review Authority), BDT (Building Disputes Tribunal), NZIAC (New Zealand International Arbitration Centre), and NZDRC (New Zealand Dispute Resolution Centre).

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