An Arbitrator's Duty of Impartiality

The Supreme Court, in *Halliburton Company v Chubb Bermuda Insurance Ltd,* has grappled with, and provided the answer to, important questions about "the requirement that there be no apparent bias [on the part of an arbitrator] and the obligation of arbitrators in international arbitrations to make disclosure". The judgment will be of interest to those who sit as arbitrators, and otherwise participate in arbitrations (especially arbitrations arising out of Bermuda Form liability policies). Indeed, and in particular, the judgment provides helpful guidance in relation to two specific questions, namely:

a) 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

b) whether and to what extent the arbitrator may do so without disclosure.

The statutory background

By virtue of Section 33(1) of the Arbitration Act 1996 (hereafter, "AA 1996"), an arbitrator has a duty to act "fairly and impartially" between the parties to the arbitration. Indeed, as Section 24(1)(a) AA 1996 makes clear, a party to arbitral proceedings may "apply to the court to remove

an arbitrator" on the ground that "circumstances exist that give rise to justifiable doubts as to [the arbitrator's] impartiality". As the Supreme Court in *Halliburton* was keen to point out, such duty "applies equally to party-appointed arbitrators and arbitrators appointed by the agreement of party-appointed arbitrators, by an arbitral institution, or by the court". Section 68 AA 1996 cements the importance of this duty of impartiality: it offers a route to challenge the arbitral award on the "ground of serious irregularity", which irregularity includes a failure by the tribunal to adhere to its duty under Section 33.

Multiple appointments and bias

In *Halliburton*, no actual bias was alleged against the arbitrator. Instead, the Supreme Court was concerned with an allegation of apparent bias. In order to judge that allegation, the Court employed the well-known test fashioned by the House of Lords in *Porter v Magill*:

"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."

The Supreme Court, however, clarified what the fair-minded and informed observer ought to consider within the framework of this test so as to take account of the realities of international arbitration. These included, for instance, the fact that arbitration, unlike litigation, is ordinarily a private process and an arbitrator is appointed by one, or other, or both of the parties to the arbitration (unlike, say, a judge in the Commercial Court when "litigation is pending" before her). The "fair minded and informed observer" must, therefore, be made to take account of these commercial realities and the customs and practices of the relevant field of arbitration and must assess whether there is a real possibility that the arbitrator is biased by reference to the facts and circumstances known at the date of the hearing to remove the arbitrator.

Practically speaking (as the *Halliburton* case demonstrated) arbitrators may be appointed in

multiple arbitrations, the subject matter of which overlaps partially or significantly. The Supreme Court, treading a line perhaps between fairness to parties and fairness to arbitrators, concluded that there "may be circumstances in which the acceptance of appointments in multiple references concerning the same or overlapping subject matter with only one common party might reasonably cause the objective observer to conclude that there is a real possibility of bias". Whether it would or not depended on the facts of the particular case and the custom and practice in the relevant field of arbitration. Arbitrators will, therefore, have to look carefully at the particular sphere of arbitration in which they are involved in order to judge the consequences of accepting appointments in multiple and overlapping references.

The duty of disclosure

The second aspect of the judgment of the Supreme Court which will prove of interest to arbitrators is what happens if, say, the arbitrator's appointment in multiple and overlapping would reasonably give rise to a conclusion by the objective observer that there was a real possibility of bias. In these circumstances, the Court held, the arbitrator is under a legal duty to disclose such appointments, unless the parties to the arbitration have agreed otherwise. Of course, the legal duty just mentioned does not override the arbitrator's duty of privacy and confidentiality which English law imposes. Yet, in the absence of a contract which restricts or prohibits disclosure, and in the further absence of binding rules which have a different effect, disclosure of, say, the identity of the common party seeking to appoint the arbitrator in the second set of arbitral proceedings was permissible without the need to obtain express consent from parties to the first arbitral proceedings. This is because such consent may be inferred, either from the relevant arbitration agreements or by virtue of the context of practice in the relevant field. For arbitrators, such clarity is likely to be welcome, as is the fact that a failure to make such disclosure in the circumstances set out in the previous paragraph is a factor which the fair-minded and informed observer will take into account when assessing whether there is a real possibility of bias. In judging whether the arbitrator has failed to comply with the duty of disclosure, the observer must have regard to the facts and circumstances as at and from the date when the duty arose.

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