Halliburton v Chubb

Repeat arbitrator appointments in the context of trade credit and political risk insurance arbitration

6 January 2021

The much-anticipated Supreme Court judgment in Halliburton v Chubb lays out the process for assessing whether there is a real possibility of arbitrator bias and what disclosures that arbitrator must make. The judgment has far-reaching consequences in the context of English-seated arbitration.

Insurers have, for many years, faced significant and repeated objections in respect of their selections of arbitrators. This is particularly the case in the trade credit and political risk market where insurers will often seek to appoint/nominate senior lawyers and experienced market personnel with significant experience in the field. We consider below the extent to which the Supreme Court's judgment impacts those objections and/or challenges.

Halliburton v Chubb: The background

The Supreme Court, like the lower courts before it, was required to determine whether the Chairman of a Bermuda Form arbitration (the well-known arbitrator, Mr Kenneth Rokison QC) ought to be removed from his position (upon Halliburton's application) because of appointments in two other arbitrations; all three arbitrations concerned issues arising in the context of insurance claims made in respect of the Deepwater Horizon disaster.

The arbitrator had been appointed as Chairman in the Halliburton v Chubb arbitration; he subsequently accepted appointments in two further arbitrations. While Chubb was directly involved in one of the subsequent arbitrations, its legal representatives were also engaged by the insurers in the other. The arbitrator

did not disclose his subsequent two appointments to Halliburton.

Halliburton sought the arbitrators on the basis that circumstances existed that gave rise to justifiable doubts as to his impartiality. Critical to Halliburton's position were (i) his acceptance of the appointments made by the same law firm in the second and third arbitrations, and (ii) his failure to notify Halliburton or give it the opportunity to object.

Both the High Court and Court of Appeal dismissed Halliburton's application to remove the arbitrator.

The Judgment

The Supreme Court's judgment, delivered in large part by Lord Hodge, sets out a helpful analysis of the issues. The Supreme Court similarly dismissed Halliburton's application, albeit on different grounds to those set out by the lower Courts. In doing so, the Supreme Court upheld the legal duty of disclosure by an arbitrator but nuanced it to take account of the circumstances of the case. In summary:

- The obligation of impartiality is a core principle of arbitration law and in English law the duty of impartiality applies equally regardless of how the arbitrator was appointed: whether by the parties, by the arbitrators already appointed by the parties, by an arbitral institution, or by the court
- An objective assessment must be undertaken of whether the fair-minded and informed observer would consider a real possibility of bias to exist. Such an observer would have regard to both the realities of international arbitration as a form of dispute resolution as distinct from Court-based litigation; and 'the custom and practice of the relevant field of arbitration'
- Whether such an observer would consider a real possibility of bias to exist in the case of repeat appointments in multiple arbitrations concerning the same or overlapping subject matter with only one common party will depend of the facts on the particular case and 'especially upon the custom and practice in the relevant field of arbitration'
- In Bermuda Form arbitrations (although possibly not in the context of other specialist fields of arbitration), in the absence of agreement to the contrary, an arbitrator is under a legal duty to disclose repeat appointments in multiple arbitrations concerning the same or overlapping subject matter with only one common party and a failure to do so is a factor to be taken into account in assessing whether there is a real possibility of bias, and
- When considering whether an arbitrator has failed in his legal duty to make disclosure a fair minded and informed observer would have regard to the facts and circumstances as at the date the duty of disclosure arose, although the assessment of whether a real possibility exists that an arbitrator is biased is to be made by reference to the facts and circumstances known at the date of the hearing to remove the arbitrator.

Consideration of the 'relevant field of arbitration' and its application to political risk and trade credit insurance disputes

The judgment makes clear that multiple overlapping appointments in ICC arbitrations, where interrelated arbitrations are generally rare, may more readily give rise to an appearance of bias on the part of the arbitrator than multiple appointments in specialist fields such as commodities, maritime and (re)insurance arbitration.

In the context of insurance, Lord Hodge correctly identified that it is not uncommon for a number of arbitrations involving claims against multiple insurers to arise out of the same incident and/or for the same arbitrator to be appointed in respect of 'several or all arbitrations'. In the context of Bermuda Form arbitration, Lord Hodge indicated that there were 'sound reasons' for the repeat appointment of certain arbitrators given the 'interest in obtaining consistency of interpretation of the policy in the absence of published reports of awards' and the fact that 'parties often wish their arbitral tribunal to have particular knowledge and expertise in the law and practices of the relevant business or market'.

The same is equally true of many specialist fields of insurance arbitration. Trade credit and political risk insurance is a highly specialised field with few true legal experts. This applies equally to both law firms and the Bar. Policies are often subject to LCIA arbitration and, in the event of disputes, insurers often look to senior lawyers and experienced market personnel for their arbitrator appointments given the need for the relevant expertise to understand the issues and render an award.

Insurers have long suffered from objections and even challenges to their arbitrator nominations/appointments on the basis that the proposed arbitrator has been appointed previously in arbitrations following nomination by insurers within the market (and not even necessarily the insurer subject to the arbitration). These objections and/or challenges often occur irrespective of whether the nominations were made by the same insurer and/or cover the same underlying incident (as was the case in Halliburton v Chubb). Such objections/challenges are always given significant time and attention, but with time and attention also comes increased cost and delay.

As the Supreme Court made clear, as a matter of English law an arbitrator is required to be impartial irrespective of the nature of their appointment. Therefore, all parties ought simply to be concerned with finding the most qualified arbitrators to determine the dispute. In high value and complex insurance arbitration (and trade credit and political risk insurance generally falls within this category), insurers will often look to those with extensive experience of insurance for their appointment. As noted above, this can be a relatively small pool from which to choose, and especially so if one looks at those with experience in trade credit and political risk. However, in the eyes of insurers, this limited pool is likely to represent the most qualified category of potential arbitrators to determine the dispute.

It is therefore regrettable that objections/challenges are frequently based solely on the fact that the nominated arbitrator has previously been appointed in similar arbitrations concerning disputes under political risk/trade credit policies, as effectively this is a challenge founded on the very thing that makes them qualified to act – their experience of working on complex insurance-related disputes.

In addition, those nominated/appointed (especially if members of legal professional bodies) are required to uphold the highest standards of professional integrity. The Supreme Court recognised that the professional reputation and experience of an individual arbitrator is a relevant consideration for the objective and fair minded observer when assessing whether there is a real possibility of bias, as a prior reputation for integrity and extensive arbitration experience may make any doubts regarding impartiality harder to justify. In the case of nominations/appointments of senior legal professionals in particular, previous appointments as arbitrator in the field (and/or their inevitable prior instructions as counsel by insurers and their legal representatives) alone should not represent a real possibility of bias to the fair-minded and informed observer having regard to the professional reputation of the nominee/appointee in question and the nature of political risk and trade credit insurance arbitration.

Of course, the above does not dispense with the requirement of disclosure and transparency; this is to be encouraged in the context of any arbitrator appointment in any area, regardless of the nominating party. There may be additional facts and circumstances that ought properly to be taken into account for the purpose of determining a real possibility of bias; however, the prior experience of a leading insurance experts should not, in and of itself, represent such a fact or circumstance, in and of itself. Indeed, it should be a welcomed characteristic.

It is hoped that the Supreme Court's judgment in Halliburton v Chubb will remove the time-consuming positioning of unwarranted challenges to insurers' arbitrator nominations/appointments based upon expertise and experience of the proposed arbitrator in complex areas of insurance. Hopefully this should leave the parties to move forward to a resolution at a much-improved pace than has, regrettably, previously been experienced in this field.

Paul Baker
Legal Counsel
+44 20 3060 6031
paul.baker@rpc.co.uk

Naomi Vary
Partner
+44 20 3060 6522
naomi.vary@rpc.co.uk

rpc.co.uk