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Conflicts of interest in International Arbitration

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“Soup of ideas”

- Fiduciary duties - duty of loyalty

- Other related obligations and principles:
  - Bolkiah test – confidentiality
  - Duties that attach to the exercise of a contractual power (“good faith”)
  - Obligations of independent experts
  - Common law
  - Contract

Bolkiah Test

Bolkiah Test

- Prince Jefri Bolkiah v KPMG [1999] 2 AC 222 (HL)
- Duty of confidentiality not fiduciary duty of loyalty (ends on termination of retainer) (Millett 235C) (see also Glencairn IP Holdings v Product Specialties [2020] EWCA Civ 609 at [39])
- Policy: *"…overriding importance for the proper administration of justice that a client should be able to have complete confidence that what he tells his lawyer will remain secret …"* (Millett 236G)
- Test for intervention (Millet 235D and 237A):
  - Confidential information
  - Relevant to new client relationship
  - New client's interest are or may be in conflict
  - *"the court should intervene unless it is satisfied that there is no risk of disclosure"* (shift in evidential burden)

Contractual Powers

- **Application**:

  "a contract gives responsibility to one party for making an assessment or exercising a judgement on a matter which materially affects the other party's interests and about which there is ample scope for reasonable differences of view" (Brogden v. Investec Bank plc [2014] IRLR 924 per Leggatt J at [100])

- **Include:**
  - Exercise power for purpose for which it was conferred
  - Exercise power "fairly and honestly"
  - Appropriately consider the relevant facts and circumstances
  - Not act capriciously, arbitrarily, wantonly or oppressively ("good faith")

(Redwood Master Fund Ltd v TD Bank Europe Ltd [2002] EWHC 2703 (Ch); The Duke of Portland v Lady Topham (1864) 11 HL Cas 32 per Lord St Leonards at [55]; Pitt v Holt [2013] UKSC 26 at [60]; Re Hurst (1892) 67 LT 96 per Lindley LJ at 69; Pitt v Holt [2013] UKSC 26 at [2]; Abu Dhabi National Tanker Co v Product Star Shipping Ltd [1993] 1 Lloyd's Rep 397 per Leggatt LJ at 404; Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd [2001] 2 All ER (Comm) 299 per Mance LJ at [67]; Paragon Finance plc v Saunton, Paragon Finance plc v Nash [2002] 1 WLR 685 per Dyson LJ at [39] – [41])

Expert Witnesses

- Common law: Ikarian Reefer [1993] 2 Lloyd's Rep 68 (summary of principles); Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd [2018] EWHC 1577 (TCC) at [237] per Fraser J (expanded)
- Independent and no interest in the outcome: R v SoS for Transport [2003] QB 381, per Lord Phillips MR at [70]; Rowley v Dunlop [2004] EWHC 1995 (Ch) at [19]-[21]
- Civil Justice Council, 2014 Guidance for the Instruction of Experts to give Evidence in Civil Proceedings [11]:
  - *"Experts must provide opinions that are independent, regardless of the pressures of litigation. A useful test of 'independence' is that the expert would express the same opinion if given the same instructions by another party. Experts should not take it upon themselves to promote the point of view of the party instructing them or engage in the role of advocates or mediators."*
- CPR Part 35 (including r35.3 - overriding duty to the court)
- Eg 2014 LICA Rules Art 21

Fiduciary Duties

- Fiduciary duties:
  - Traditionally agency/trusts but also contractual
  - "*a short sighted assumption that all relevant duties are prescribed in a contract can be, and has been responsible for, serious misbehaviour*" (Bowstead & Reynolds on Agency 19th ed, para 6-034)
  - "*The attribution of such duties forms a significant area where the common law techniques of strict interpretation of contract, and reluctance to imply terms … are modified by different techniques*" (Bowstead & Reynolds on Agency, 21st ed, para 6-034)
  - See also Re Goldcorp Exchange [1995] 1 AC 74 at 98 per Ld Mustill; Casson Beckman & Partners v Papi [1991] BCLC 229 at 313; Yasuda Fire v Orion Marine [1995] QB 174 at 186)

Fiduciary duties – when?

- When?
  - *"…someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence…"*
  - Discretion/power to act + vulnerability

(Law Commission, "Fiduciary Duties and Regulatory Rules" (Law Com. No236) Law Commission, "Fiduciary Duties of Investment Intermediaries", (Law Com. No350), para 5.10; Bristol & West Building Society v Mothew [1998] Ch 1 at 18A (cited by PC in Arklow Investments Ltd v Maclean [2000] 1 WLR 594))

Fiduciary duties – what?

- *"The distinguishing obligation of a fiduciary is the obligation of loyalty"* (Bristol and West Building Society v Mothew [1998] Ch 1 at 18A)

- *"… They are based upon the trust reposed by a client in his professional adviser, and in particular the trust that the professional will act solely in his client's interests and not in his own. This is sometimes described as a "duty of loyalty", **but in effect it amounts to an inhibition**: a professional should not put himself in a position in which his duty to act in his client's interests is in conflict with his own interests, let alone prefer his own interests to those of his client should there be a conflict…"* (Jackson & Powell, 8th ed, 2-140)

A Company v X and Others (2020) 189 ConLR 60

- Claimant = developer of petrochemical plant
  - 2 x contracts with Contractor for the construction of facilities
  - 2 x contracts with Third Party for engineering, procurement and construction management services

- First arbitration:
  - Contractor vs Claimant (Claimant pass on to Third Party)
  - Costs due to delays, including late release of drawings produced by Third Party
  - "K" of D1 = delay expert

- Second arbitration:
  - Third Party vs Claimant, sums due
  - Counterclaims = delay, disruption and any sums Claimant had to pay pursuant to Works Package Arbitration
  - "M" of another D = quantum expert

A Company v X and Others (2020) 189 ConLR 60

- The experts:
  - Different individuals: “K” and “M”
  - Different disciplines: delay and quantum
  - Different geographic regions: Asia (“K”) and Outside Asia (“M”)
  - Different companies
  - “Chinese Walls” in place

A Company v X and Others (2020) 189 ConLR 60

- Fiduciary duty vs confidentiality (Bolkiah)
- Confidentiality + independent duty
- Fiduciary duty vs independent duty (at [53]):

> *"the circumstances in which an expert is retained to provide litigation or arbitration support services could give rise to a relationship of trust and confidence. In common with counsel and solicitors, an independent expert owes duties to the court that may not align with the interests of the client. However, as with counsel and solicitors, the paramount duty owed to the court is not inconsistent with an additional duty of loyalty to the client. As explained by Lord Phillips in Jones v Kaney, the terms of the expert's appointment will encompass that paramount duty to the court. Therefore, there is no conflict between the duty that the expert owes to his client and the duty that he owes to the court."*

A Company v X and Others (2020) 189 ConLR 60

- First defendant:
  - Independent report
  - Comply with CIArb Expert Witness Protocol
  - Extensive advice and support throughout proceedings
  - *"In those circumstances a clear relationship of trust and confidence arose, such as to give rise to a fiduciary duty of loyalty"* (at [54])

- Defendants as a group of companies:
  - Fiduciary duty not limited to individual, but by firm or company, and may extend to wider group of companies (at [55])
  - A common financial interest, managed and marketed as one global firm, common approach to identification and management of conflicts
  - Duty owed by the whole of the defendant group

A Company v X and Others (2020) 189 ConLR 60

- Breach:
  - Bolkiah test satisfied
  - Fiduciary duty breached
  - Pending trial, injunction continued

"The defendants' evidence has focused on the separation of the defendants as commercial entities, the physical and ethical screens in place. However, that addresses the risk that confidential information might be shared inappropriately. As clarified in the hearing, the claimant's application is no longer based on the preservation of confidential information but on the obligation of loyalty. The fiduciary obligation of loyalty is not satisfied simply by putting in place measures to preserve confidentiality and privilege. Such a fiduciary must not place himself in a position where his duty and his interest may conflict." (at [60])

Take away?

- When expert witnesses will owe fiduciary duty of loyalty, and relationships of trust and confidence might arise generally

- Can I contract out? Yes, but with extreme care:
  - Fully informed consent;
  - Fiduciary bears burden;
  - Not enough to:
    - Merely disclose interest
    - Put principal on enquiry
    - Est permission would have been given
  - Unfair contract terms?

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Halliburton v Chubb [2018] EWCA Civ 817

- Arbitration arising out of the Deepwater Horizon incident
- Claim by Halliburton against Chubb in respect of a claim under an insurance policy
- Seat of arbitration was London, and so law of the proceedings was English law
- Two party appointed arbitrators, and a third to be appointed by the High Court in default of agreement

Halliburton v Chubb [2018] EWCA Civ 817

- Party appointees could not agree, leading to a contested application in the High Court
- Flaux J appointed "M" as chair, one of Chubb's preferred candidates
- M disclosed numerous previous appointments by Chubb, and his existing involvement in two arbitrations in which Chubb was a party

Halliburton v Chubb [2018] EWCA Civ 817

- However, M did not subsequently disclose two later appointments:
  - Appointment by Chubb in another Deepwater Horizon reference
  - Further appointment in another Deepwater Horizon reference

- Halliburton therefore made an application under section 24(1)(a) of the Arbitration Act 1996 to remove M as arbitrator

Halliburton v Chubb [2018] EWCA Civ 817

- Application was dismissed at first instance (Popplewell J)

- Tribunal subsequently issued Award in Chubb's favour, but one of the arbitrators declined to participate in the Award and issued "Separate Observations":

"…arbitrators who decide cases cannot ignore the basic fairness of proceedings in which they participate. One side secured appointment of its chosen candidate to chair this case, over protest from the other side. Without any disclosure, the side that secured the appointment then named the same individual as its party-selected arbitrator in another dispute arising from the same events. The lack of disclosure, which causes special concern in the present fact pattern, cannot be squared with the parties' shared *ex ante* expectations about impartiality and even-handedness."

Halliburton v Chubb [2018] EWCA Civ 817: Section 24 of the Arbitration Act 1996

(1) A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds—

(a) that circumstances exist that give rise to justifiable doubts as to his impartiality;

(b) that he does not possess the qualifications required by the arbitration agreement;

(c) that he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so;

(d) that he has refused or failed—

(i) properly to conduct the proceedings, or

(ii) to use all reasonable despatch in conducting the proceedings or making an award,

and that substantial injustice has been or will be caused to the applicant.

Apparent bias: the test

- Section 24 reflects the common law test for apparent bias:

  "… whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased" (CA judgment paragraph 39)

- This is an objective test:

  "taking a balanced and detached approach, having taken the trouble to be informed of all matters that are relevant" (CA judgment paragraph 40)

Court of Appeal decision

- Paragraph 53:

… the mere fact that an arbitrator accepts appointments in multiple references concerning the same or overlapping subject matter with only one common party does not of itself give rise to an appearance of bias. As Dyson LJ said, "[s]omething more is required" and that must be "something of substance".

Court of Appeal decision

- Paragraph 76:

Non-disclosure of a fact or circumstance which should have been disclosed, but does not in fact, on examination, give rise to justifiable doubts as to the arbitrator's impartiality, cannot, however, in and of itself justify an inference of apparent bias. Something more is required….

Court of Appeal decision: conclusion

”M ought as a matter of good practice and, in the circumstances of this case, as a matter of law to have made disclosure to Halliburton at the time of his appointments” (paragraph 94)

“relevant experience is material to the risk of such bias” and “M is a "well known and highly respected international arbitrator" with very extensive experience as an arbitrator” (paragraph 98)

“the fair-minded and informed observer, having considered the facts, would not conclude that there was a real possibility that M was biased” (paragraph 100)

Supreme Court: Areas for clarification?

- How to fit a square peg into a round hole?
  - Problem arises because arbitrator and common party have knowledge or information that the other party does not. Legitimate concern about equality of arms, but not enough for bias?
- Experience in relation to unconscious bias?
- The need for “something more”. What is it?

Section 24 of the Arbitration Act 1996

(2) If there is an arbitral or other institution or person vested by the parties with power to remove an arbitrator, the court shall not exercise its power of removal unless satisfied that the applicant has first exhausted any available recourse to that institution or person.

Disclosure: Halliburton paragraph 67

Many arbitration institutional rules impose a **stricter test of disclosure**, importing a subjective test. The **IBA Guidelines**, for example, require disclosure of facts or circumstances "that may, **in the eyes of the parties**, give rise to doubts as to the arbitrator's impartiality or independence" (emphasis added) (General Principle (3)). The **ICC Rules** require disclosure of facts or circumstances which "might be of such a nature as to call into question the arbitrator's independence **in the eyes of the parties** as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality" (emphasis added) (Article 11). The **LCIA Rules** require disclosure of "circumstances currently known to the candidate which are likely to give rise **in the mind of any party** to any justifiable doubts as to his or her impartiality or independence" (emphasis added) (Article 5.4).

ICC Rules Article 11(2)

Before appointment or confirmation, a prospective arbitrator shall sign a statement of acceptance, availability, impartiality and independence. The prospective arbitrator shall disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence ***in the eyes of the parties****, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality. The Secretariat shall provide such information to the parties in writing and fix a time limit for any comments from them.*

(i.e. subjective test, noted at paragraph 67 of CA judgment)

ICC Rules Article 14(1)

A challenge of an arbitrator, whether for an alleged lack of impartiality or independence, or otherwise, shall be made by the submission to the Secretariat of a written statement specifying the facts and circumstances on which the challenge is based.

ICC Rules Article 14(2)

For a challenge to be admissible, it must be submitted by a party either within 30 days from receipt by that party of the notification of the appointment or confirmation of the arbitrator, or within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based if such date is subsequent to the receipt of such notification.

ICC Rules Article 14(3)

The Court shall decide on the admissibility and, at the same time, if necessary, on the merits of a challenge after the Secretariat has afforded an opportunity for the arbitrator concerned, the other party or parties and any other members of the arbitral tribunal to comment in writing within a suitable period of time. Such comments shall be communicated to the parties and to the arbitrators.

ICC Rules Article 15(1)

An arbitrator shall be replaced upon death, upon acceptance by the Court of the arbitrator's resignation, upon acceptance by the Court of a challenge, or upon acceptance by the Court of a request of all the parties.

IBA Guidelines: Explanation to General Standard 6 (Relationships)

The growing size of law firms should be taken into account as part of today's reality in international arbitration. There is a need to balance the interests of a party to appoint the arbitrator of its choice, who may be a partner at a large law firm, and the importance of maintaining confidence in the impartiality and independence of international arbitrators.

IBA Guidelines: Explanation to General Standard 6 (Relationships)

… the activities of the arbitrator's firm should not automatically create a conflict of interest. The relevance of the activities of the arbitrator's firm, such as the nature, timing and scope of the work by the law firm, and the relationship of the arbitrator with the law firm, should be considered in each case.

Responding to a challenge: Halliburton paragraph 32

In relation to element (3), the judge went through each of the complaints made about M's response to the challenge to his impartiality and rejected them. He concluded that M "dealt with the challenge in a courteous, temperate and fair way, demonstrating commendable even-handedness. His response would only serve to reinforce the confidence any fair-minded observer would have in his ability and intention to continue to conduct the reference fairly and impartially."

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Thank you for listening

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