ISSN : 1875-4120
Issue : (Provisional)
Published : December 2020

Transnational Dispute Management
www.transnational-dispute-management.com

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Halliburton v Chubb: UK Supreme Court Judgment Determines Arbitrator Impartiality and Disclosure Duty

Lucy Winnington-Ingram[1] and Eva Litina[2]

Introduction

On 27 November 2020 the UK Supreme Court handed down its much anticipated judgment in *Halliburton Company (Appellant) v Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd) (First Respondent)*[3] (hereinafter *Halliburton v Chubb*). The court upheld (for different reasons) the decisions of the lower courts and unanimously dismissed Halliburton's appeal. The judgment was handed down by Lord Hodge, with whom Lord Reed, Lady Black and Lord Lloyd-Jones agree. Lady Arden gave a concurring judgment. The central issues to be determined on appeal concerned (i) whether and to what extent an arbitrator may accept multiple appointments involving a common party and overlapping subject matters without giving rise to an appearance of bias; (ii) and whether and to what extent an arbitrator may accept such appointments without disclosure.[4]

The Supreme Court noted that the matter is of considerable importance in the world of arbitration. For this reason, the Supreme Court allowed and received written and oral representations from the International Court of Arbitration of the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA) and written submissions from the Chartered Institute of Arbitrators (CIArb), the London Maritime Arbitrators Association (LMAA) and the Grain and Feed Trade Association (GAFTA). LCIA, ICC and CIArb expressed concerns that the tests set by the Court of Appeal were not sufficiently strict compared with international norms.[5] GAFTA, a commodities arbitration provider, and LMAA, an association of arbitrators specialised in maritime arbitration in London submitted that, in their fields, the mere fact of a multiple appointment in arbitrations with overlapping subject matters but without commonality of parties does not give rise to an appearance of bias as it is a regular feature of such arbitrations.[6]

Notably, the Supreme Court held that there were no good grounds for maintaining the anonymity of the arbitrators in this appeal,[7] naming all three arbitrators including challenged arbitrator Mr Kenneth Rokison QC (previously identified in the decisions of the lower courts only as "M").

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[3] [2020] UKSC 48.
[4] *Halliburton v Chubb* [2020] UKSC 38, para 2.
[5] *Id.*, para 42.
[6] *Id.,* para 45.
[7] *Id.,* para 6.

1. Background[8]

This dispute has its genesis in the Deepwater Horizon incident in the Gulf of Mexico. In April 2010 a blowout caused an explosion on the Deepwater Horizon offshore drilling rig. The Deepwater Horizon incident is reported to have given rise to the largest oil spill in United States' waters. The rig was owned by Transocean Holdings LLC. Transocean had leased the rig to BP Exploration and Production Inc. Halliburton Company had also been engaged by BP to provide cementing and well-monitoring services.

In 2014 the Federal Court for the Eastern District of Louisiana apportioned blame between the parties as: BP 67%, Transocean 30% and Halliburton 3%. Halliburton had previously settled, and Transocean went on to settle. Both Halliburton and Transocean made claims against Chubb under liability insurance they had purchased from Chubb on the Bermuda Form. Chubb contested both claims.

In January 2015, Halliburton commenced an arbitration against Chubb under the Bermuda Form. Having each appointed their respective arbitrators to the tribunal, the nominated arbitrators were not able to agree on the appointment of the third arbitrator as chairman. After a contested hearing in the High Court Mr Rokison, one of the arbitrators whom Chubb had proposed to the court, was appointed as the third arbitrator. Halliburton did not appeal against that order.

In December 2015, Mr Rokison accepted an appointment by Chubb relating to an excess liability claim by Transocean arising out of the same incident ("Reference 2"). In August 2016 Mr Rokison accepted an appointment as a substitute arbitrator in another arbitration arising out of the Deepwater Horizon by Transocean against a different insurer on the same layer of insurance ("Reference 3"). Mr Rokison did not disclose either of these appointments to Halliburton. On 10 November 2016 Halliburton discovered Mr Rokison's appointment in References 2 and 3. Halliburton applied to the High Court on 21 December 2016 to remove Mr Rokison under Section 24(1)(a) of the 1996 English Arbitration Act ("Arbitration Act").

In the first instance decision of the Commercial Court dated 12 January 2017,[9] Popplewell J rejected the contention that the overlap between the references was a matter of concern. He observed that it was a regular feature of international arbitration that the same underlying subject matter gives rise to more than one claim and more than one arbitration without identity of parties.

On appeal by Halliburton,[10] the Court of Appeal held that the appointment of an arbitrator in overlapping or related arbitrations did not itself give rise to a conflict. However, the Court noted that Mr Rokison 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 of his appointments. Nonetheless, the court agreed with Popplewell J's conclusion that the fair-minded and informed observer, having considered the facts, would not conclude that there was a real possibility that Mr Rokison was biased.

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[8] This section summarises the background of the dispute and the judgments of the lower courts, which have been discussed in greater detail in Lucy Winnington-Ingram and Eva Litina (2020), 'Halliburton v Chubb - UK Supreme Court Hearing Report (November 2019)', *Transnational Dispute Management* 2 (2020).
[9] *H v L & Ors* [2017] EWHC 137 (Comm).
[10] *Halliburton Company v Chubb Bermuda Insurance Ltd & Ors* [2018] EWCA Civ 817.

2. The Supreme Court Decision

A. The Duty of Impartiality

Impartiality is a core principle of arbitration. It is one of the first principles set out in Section 1 of the Arbitration Act and is further enshrined in Section 33. Section 24(1)(a) of the Arbitration Act provides that a party to arbitral proceedings may apply to the court to remove an arbitrator if circumstances exist that give rise to justifiable doubts as to his impartiality. A party to arbitral proceedings is empowered by Section 68 of the Arbitration Act to challenge an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award and such serious irregularity includes a failure by the tribunal to comply with Section 33 of the Act.

At the time of his appointment as arbitrator, Mr Rokison became subject to the statutory duties in Section 33 of the Arbitration Act to act fairly and impartially in conducting arbitral proceedings, in decisions on matters of procedure and evidence and in the exercise of all powers conferred on him and those duties were owed to both Halliburton and Chubb.[11]

The Supreme Court confirmed that where the Court is dealing with an allegation of apparent bias as in the present case, the test applied under English law is whether a fair-minded and informed observer having considered the facts, would conclude that there was a real possibility that the tribunal was biased.[12] Giving further colour to this test, the Supreme Court commented that the test in English law involving the fair-minded and informed observer, requires objectivity and detachment in relation to the appearance of bias. Further, the fair-minded and informed observer is "*neither complacent nor unduly sensitive or suspicious*".[13] As to timing, the Supreme Court agreed with the Court of Appeal that when assessing whether there was a real possibility that the arbitrator was biased, the Court will have regard to the facts and circumstances known at the time of the Court hearing to remove the arbitrator.[14]

This objective test is similar to the test of "justifiable doubts" adopted in the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, the International Bar Association Guidelines on Conflicts of Interest in International Arbitration (the IBA Guidelines) and the LCIA Arbitration Rules.[15] The objective test of the fair-minded and informed observer applies equally to judges and arbitrators.[16] But in applying the test, the English courts must have regard to the particular circumstances of international commercial arbitration (which differ from those of litigation):[17]

(i) judges resolve civil disputes in courts which are, as a general rule, open to the public; by contrast arbitration is a consensual form of dispute resolution conducted in private;[18]

[11] *Halliburton v Chubb* [2020] UKSC 38, para 138.
[12] *Id.*, para 52.
[13] *Id.*, para 53.
[14] *Id.,* para 121.
[15] *Id.*, para 54.
[16] *Id.*, para 55.
[17] *Ibid*.
[18] *Id*., para 56-57.

(ii) unlike judges, arbitrators' awards are not subject to appeals on issues of fact and often not on issues of law;[19]
(iii) unlike judges who are funded by general taxation and have a security of tenure, arbitrators are remunerated by the parties to the arbitration;[20] and
(iv) in international arbitration arbitrators come from different jurisdictions and legal traditions and may have divergent views on ethically acceptable conduct.[21]

Moreover, in the field of international arbitration there are different understandings of the role of party-appointed arbitrators.[22] There has been a lively debate as to the justification for party-appointed arbitrators and their role. Notwithstanding this debate, a party-appointed arbitrator in English law is expected to adhere to precisely the same standards of impartiality as the person chairing the tribunal.[23] However, in applying the test of the fair-minded and informed observer, the courts would credit that objective observer with the knowledge that some parties and arbitrators in international arbitrations have different understandings as to the precise role of the party-appointed arbitrator and the compatibility of that role with the requirement of impartiality.[24] This does not mean that apparent bias is measured by reference to the subjective understanding of the parties.[25] Instead, it recognises the context in which the objective observer's judgement as to apparent bias is being made.[26] The disagreement among stakeholders involved in international arbitration as to the role of the party-appointed arbitrator does not provide a ground for non-disclosure, but instead points in favour of the disclosure of multiple appointments.[27]

The professional reputation of an arbitrator is a relevant consideration for the objective observer when assessing whether there is apparent bias, but the weight given to that consideration will depend upon the circumstances and "*whether, objectively and as a generality, one could expect people who enter into references of that nature to be informed about the experience and past performance of arbitrators*."[28] In the context of many international arbitrations, this factor may be of limited weight.[29] The objective observer is also cautious to the possibility of tactical challenges.[30]

The Supreme Court departed from the reasoning of the Court of Appeal (agreeing with the submissions of the LCIA) in holding that that there may be circumstances in which the acceptance of appointments in multiple references concerning the same or overlapping subject matters with only one common party might reasonably cause the objective observer to conclude that there is a real possibility of bias.[31] Whether it does so will depend on customs and practices in the relevant field of arbitration. In particular, the objective observer will consider whether there is any expectation to disclose subsequent appointments occurring in the course of a reference and/or whether it would be reasonable to expect the arbitrator not to

[19] *Id*., para 58.
[20] *Id*., para 59.
[21] *Id*., para 60.
[22] *Id.*, para 62.
[23] *Id.*, para 63.
[24] *Id.*, para 66.
[25] *Ibid*.
[26] *Ibid*.
[27] *Id*., para 144.
[28] *Id*., para 67.
[29] *Ibid*.
[30] *Id*., para 68.
[31] *Id*., paras 130-131.

have any knowledge or connection with the common party which the multiple references would give them. The Supreme Court noted the evidence of the Insurance and Reinsurance Arbitration Society (ARIAS UK) (as submitted by GAFTA) that, as in the Halliburton case it is not uncommon for a number of arbitrations involving claims against different insurers arising out of the same incident to commence at around the same time, and for the same arbitrator to be appointed in respect of several or all of those arbitrations.[32]

On the facts of the Halliburton case, the Supreme Court reasoned that if Halliburton had been aware of the appointment in Reference 2, it might have had concerns about the fairness of its arbitration because of the inequality of knowledge and opportunities to communicate with the arbitrator. On this basis, the objective observer may at that time have reasonably concluded that there was a real possibility of bias.[33] Subsequently however, Mr Rokison had given an explanation of his failure to disclose the appointments in References 2 and 3. Halliburton's lawyers accepted that his explanation of oversight was genuine and they did not challenge his statement that he believed that there was not a material overlap between the references. The Supreme Court also placed weight on the timing of the Halliburton Reference which preceded Reference 2 by six months, considering it more likely that Transocean rather than Halliburton would have cause for concern about one arbitration being a dress rehearsal for the later arbitration.[34] Thus, having regard to the facts and circumstances known at the time of the hearing in January 2017, the Supreme Court concluded that the objective observer would not infer from the oversight that there was a real possibility of unconscious bias on Mr Rokison's part.[35]

B. The Disclosure Duty

Having emphasized the vital role played by disclosure in avoiding the appearance of bias in international arbitration, the Supreme Court upheld the Court of Appeal's finding that the duty of disclosure is not simply good arbitral practice but is a legal duty under English law. This legal duty of disclosure is implied from an arbitrator's statutory duties, in Section 33 of the Arbitration Act to act fairly and impartially in conducting arbitral proceedings.[36] The arbitrator's legal obligation of disclosure imposes an objective test. This differs from the rules of many arbitral institutions which look to the perceptions of the parties to the particular arbitration and ask whether they might have justifiable doubts as to the arbitrator's impartiality. The 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.[37]

Considering next the boundaries of an arbitrator's obligations of privacy and confidentiality, the Supreme Court held that an arbitrator's duty of disclosure does not override the duties of privacy and confidentiality under English law in relation to the other arbitrations. Where the information to be disclosed is covered by the duty of confidentiality, the arbitrator must

[32] *Id*., para 43.
[33] *Id.,* para 143.
[34] *Id.,* para 148.
[35] *Id.,* para 149.
[36] *Id.,* para 76.
[37] *Id*. para 116.

obtain the consent of the relevant parties for that disclosure.[38] However, having sought and weighed further submissions from the parties and the interveners concerning arbitral practices in making disclosure,[39] the Supreme Court concluded that in Bermuda Form arbitrations an arbitrator may, in the absence of agreement to the contrary by the parties to the relevant arbitration, make disclosure of the existence of that arbitration and the identity of the common party without obtaining the express consent of the relevant parties. The consent of the common party can be inferred from its action in seeking to nominate or to appoint the arbitrator. The consent of the other party is not required for such limited disclosure.[40]

On the content of an arbitrator's duty of disclosure, Lord Hodge agreed with the Court of Appeal's formulation, namely facts or circumstances known to the arbitrator which would or might lead the fair-minded and informed observer, having considered the facts, to conclude that there was a real possibility that the arbitrator was biased. However, going one step further, the Supreme Court did not rule out the possibility of circumstances occurring in which an arbitrator would be under a duty to make reasonable enquiries in order to comply with the duty of disclosure.[41]

The Supreme Court went on to hold that a failure to make disclosure in circumstances which might reasonably give rise to justifiable doubts as to his or her impartiality can, in and of itself, amount to apparent bias.[42] As to timing, and distinct to the time of assessment of the possibility of bias, the Supreme Court affirmed the Court of Appeal's finding that a determination as to whether an arbitrator has failed to perform a duty to disclose can only be made by reference to the circumstances at the time the duty arose and during the period in which the duty subsisted.[43] The Supreme Court further noted that the duty of disclosure is a continuing duty and circumstances may change before there is disclosure. Those circumstances may aggravate an existing failure to disclose a matter or, while not expunging such a failure, may render any continuing failure a less potent factor in an assessment of justifiable doubts as to impartiality.[44]

Applying its findings to the facts of the Halliburton case, the Supreme Court accordingly held that Mr Rokison's failure to disclose his appointment in Reference 2 was a breach of his legal duty of disclosure.

3. Lady Arden's Concurring Judgment

Lady Arden begins her concurring judgment by noting that the disclosure duty is not the primary duty.[45] The primary duty is to act fairly and impartially as arbitrator (Section 33 of the Arbitration Act) and an arbitrator who acts with actual or apparent bias does not act impartially.[46] The duty of disclosure stems from the impartiality duty, but it is not an

[38] *Id*., para 89.
[39] *Id*., para 87.
[40] *Id*., para 104.
[41] *Id*., para 107.
[42] *Id*., para 118.
[43] *Id*., para 119.
[44] *Id*., para 120.
[45] *Id*., para 160.
[46] *Ibid*.

independent duty.[47]

Unless the arbitration is one in which there is an accepted practice of further appointments, an arbitrator should proceed on the basis that a proposal to proceed on a further appointment involving a common party and overlapping subject matter is likely to require disclosure of a potential conflict of interest.[48] Lady Arden also stresses that the legislator would not wish Section 24 to give rise to litigation to upset awards and the balancing exercise in Section 24 has to be performed with commercial realities in mind, including the fact that parties who use arbitration must expect arbitrators to accept further appointments to acquire the experience needed.[49] However, further appointments must be consistent with the arbitrator's obligations in current arbitrations.[50]

On the duty of disclosure, Lady Arden considers that this duty based in both the contract of appointment and Section 33 of the Arbitration Act.[51] The contract of appointment gives rise to a contract with all the parties to the arbitration.[52] By rooting the duty of disclosure in both Section 33 and the contract of appointment, there is a clear legal basis for the parties' agreement to waive any objection to a conflict of interest.[53] Such a contract-based approach also overcomes the problem that Section 33 in terms applies only to the tribunal and not a proposing arbitrator.[54]

Differing from Lord Hodge, Lady Arden does not limit what is said in this case to Bermuda Form arbitrations, as opposed to other *ad hoc* arbitrations or arbitrations held under institutional rules which make no relevant provision.[55] Finally, as to confidentiality, she considers that there is no question of the parties' confidentiality being eroded by the decision on this appeal.[56] If more information than (i) the identity of the common party (ii) whether the proposed appointment was to be a party-appointment or a nomination for appointment by a court or a third party, and (iii) a statement of the fact that the second reference arose out of the same incident is required, it cannot be disclosed without the relevant parties' consent.[57] If consent is not forthcoming, the arbitrator will have to decline the proposed appointment.[58]

4. Conclusion

This judgment clarifies the duties of impartiality and disclosure, matters of considerable importance in the realm of arbitration. In their reasoning, the judges took into consideration the UNCITRAL Model Law on International Commercial Arbitration, the IBA Guidelines, and submissions from five intervening parties from different arbitration fields. This confirms London's international approach and sensitivity to the needs of stakeholders, which are essential factors in making London one of the most popular seats of arbitration.

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[47] *Ibid*.
[48] *Id*., para 164.
[49] *Id*., para 165.
[50] *Ibid*.
[51] *Id*., para 167.
[52] *Ibid*.
[53] *Id*., para 168.
[54] *Ibid*.
[55] *Id*., para 171.
[56] *Id*., para 188.
[57] *Ibid*.
[58] *Ibid*.

As noted by the Supreme Court, the judgment addresses a prior "*lack of clarity*" in English case law as to whether there is a legal duty of disclosure and under which circumstances disclosure is needed.[59] The judgment further outlines and affirms the general legal principles, giving additional colour and content to the objective test of the appearance of bias and legal duty of disclosure.

The Supreme Court's departure from the Court of Appeal's reasoning in finding that there may be circumstances in which the acceptance of appointments in multiple references concerning the same or overlapping subject matters with a common party might reasonably cause the objective observer to conclude that there is a real possibility of bias may give stakeholders pause for thought when considering arbitral appointments in the future. However, it is clear that there is no single formulation which can be applied, and the customs and legal practices of each field of arbitration will be highly relevant in determining whether multiple appointments in overlapping references will give rise to the appearance of bias.

[59] *Id.*, para 149.