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Halliburton v Chubb: U.K. Supreme Court Rules on Arbitrator Bias

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On 27 November 2020, the U.K. Supreme Court in *Halliburton Company v Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd)* [2020] UKSC 48 ruled on the approach under English law to determining whether an arbitrator's failure to make disclosure of appointments in multiple arbitrations with overlapping subject matter and only one common party gave rise to justifiable doubts as to his impartiality such that he should be removed (judgment available here).

In an expansive judgment which sought to clarify the state of English law on the topic, the Court held that:

- To determine whether there is an appearance of bias such that removal of an arbitrator is required, English law will apply the objective test of whether an informed, fair-minded observer would conclude that there is a real possibility of bias.
- While the obligation of impartiality applies equally under English law to party-appointed arbitrators and tribunal chairpersons, an informed, fair-minded observer will take into account (among other things) the debate in international arbitration as to the role of party-appointed arbitrators (including the different approaches taken in other jurisdictions to that role) and the fact that parties may in certain circumstances consequently place a heavier responsibility on the chair of the tribunal to be impartial.
- 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. This will depend on the facts of the particular case and especially the custom and practice in the relevant field of arbitration.
- Unless the parties to an arbitration agree otherwise, an arbitrator is subject to a legal duty of disclosure under English law in relation to facts and circumstances which would or might reasonably give rise to justifiable doubts as to his or her impartiality.

- Disclosure is subject to an arbitrator's privacy and confidentiality obligations. Where such obligations apply, the parties' express or inferred consent is required for disclosure to be made. The ICC Rules, LCIA Rules and ICSID Rules all provide a basis for consent to be inferred.
- A failure by an arbitrator to make disclosure is a factor for the fair-minded and informed observer to take into account in assessing whether there is a real possibility of bias.
- The need for disclosure will be assessed with regard to the circumstances when the arbitrator acquired the requisite knowledge of the matters to be disclosed. It is not a retrospective exercise answered by reference to matters known to the fair-minded and informed observer only at a later date, though a continuing failure to disclose may be aggravated or mitigated by changing circumstances.
- The possibility of bias will be assessed as at the date of the hearing of the application to remove the arbitrator: the hypothetical assessment will be undertaken with reference to the facts then available to the fair-minded and informed observer.

Background

Arbitration 1 was between Halliburton Company ("Halliburton"), which provided cementing and well-monitoring services in relation to Deepwater Horizon, and Chubb Bermuda Insurance ("Chubb"). It began in early 2015. The arbitration related to Chubb's refusal to pay Halliburton's claim under the Bermuda Form insurance policy that Halliburton held with Chubb. One of Chubb's proposed candidates, Mr. Rokison QC ("Mr. Rokison"), was appointed by the English High Court (pursuant to the contractual mechanism between the parties) as chairperson of the tribunal in June 2015.

Arbitration 2 was between Chubb and Transocean Holdings LLC ("Transocean"), the owner of the Deepwater Horizon rig. It related to an excess liability claim by Transocean under its Bermuda Form policy. Mr. Rokison was appointed as Chubb's co-arbitrator.

Mr. Rokison gave disclosure before his appointments in Arbitrations 1 and 2. However, in an omission which was central to the dispute before the Supreme Court, Mr. Rokison did not disclose to Halliburton his proposed appointment by Chubb in Arbitration 2.

Mr. Rokison also subsequently accepted joint appointment in a claim made by Transocean against a different insurer in another arbitration arising out of the Deepwater Horizon incident (Arbitration 3). This was not disclosed to Halliburton but did not form the focus of the appeal.

In November 2016, Halliburton discovered Mr. Rokison's appointment in the two Transocean arbitrations and raised its concerns with Mr. Rokison. Mr. Rokison explained that his failure to make the necessary disclosure was an oversight for which he apologized. He said that he had not learned anything in Arbitrations 2 and 3 about the facts of the incident that was not public knowledge, but that he would be prepared to consider tendering his resignation in Arbitrations 2 and 3 if they did not

shortly come to an end of their own accord (through preliminary determinations on issues of construction). He subsequently offered to resign from Arbitration 1 if the parties were able to agree on a mutually acceptable replacement chairperson who would be available before the hearing in the arbitration in January 2017.

Decisions of the High Court and Court of Appeal

In December 2016, Halliburton issued its claim in the English High Court seeking removal of Mr. Rokison and appointment of another chair on the grounds that circumstances existed giving rise to justifiable doubts as to Mr. Rokison's impartiality. In January 2017, Mr. Justice Popplewell heard the application. He dismissed it in February 2017, finding that (i) the circumstances did not give rise to any justifiable concer4ns about Mr. Rokison's impartiality and (ii) there was accordingly nothing to be disclosed (judgment here).[1] The Court of Appeal dismissed Halliburton's appeal just over a year later, finding (among other things) that while disclosure ought to have been made, something more than mere non-disclosure was required to justify an inference of apparent bias (judgment here).[2]

The case came before the Supreme Court in November 2019. Due to the importance of the issues involved, the Supreme Court allowed and received written and oral submissions from the ICC and the LCIA, as well as written submissions from the Chartered Institute of Arbitrators ("CIArb"), the London Maritime Arbitrators Association ("LMAA") and the Grain and Feed Trade Association ("GAFTA"). Among other things, the ICC, LCIA and CIArb called for a clear legal duty of disclosure and argued that a failure to disclose could give rise to an appearance of bias even where the circumstance which should have been disclosed would not of itself give rise to apparent bias.[3] The LMAA and GAFTA argued that, due to factors specific to their fields of operation (such as the frequency with which arbitrators were appointed in multiple disputes with overlapping subject matter), there was no need to impose a blanket obligation of disclosure which would extend to them.[4]

The Supreme Court's Decision

Giving the lead judgment on behalf of Lord Reed, Lady Black and Lord Lloyd-Jones (with whom Lady Arden agreed subject to certain supplementary comments), Lord Hodge examined each of the issues raised by the case in turn.

Arbitrator's Duty of Impartiality

An arbitrator's duty of impartiality is enshrined in section 33 of the 1996 Act, which requires the tribunal to act fairly and impartially as between the parties.[5] Under section 24 of the 1996 Act, an

[1] H v L, M, N and P [2017] EWHC 137 (Comm).
[2] *Halliburton Company v Chubb Bermuda Insurance Ltd, M, N and P* [2018] EWCA Civ 817.
[3] *Halliburton Company v Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd)* [2020] UKSC 48, at para. 42.
[4] *Id.* at para. 45.
[5] *Id.,* at para. 49.

arbitrator may be removed where "circumstances exist that give rise to justifiable doubts as to his [or her] impartiality". This includes apparent unconscious bias, which was alleged by Halliburton.

When considering apparent bias, the question under English law - whether in respect of judges or arbitrators - is well established to be "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."[6] In analysing the application of this test, the Supreme Court emphasised that an *informed* and fair-minded observer will appreciate the importance of context.[7]

Lord Hodge identified several contextual factors specific to international arbitration relevant to this assessment of apparent bias. These included: (i) the privacy and confidentiality of arbitration, which puts a premium on frank disclosure;[8] (ii) the fact that an arbitrator's decision is subject only to very limited powers of review;[9] (iii) the financial benefit received by arbitrators as a result of nomination;[10] (iv) the broad range of backgrounds, legal traditions and ethical norms of arbitrators;[11] (v) the fact that, in multiple references concerning the same or overlapping subject matter, the non-common party has no means of informing itself of the evidence led before and legal submissions made to the tribunal;[12] and, (vi) the differing understandings of the role and obligations of the party-appointed arbitrator.

In discussing this sixth factor, the Court emphasised that a party-appointed arbitrator is held under English law to the same standards of fairness and impartiality as the chair of the tribunal.[13] However, citing Gary Born's observation that the party-appointed arbitrator's role involves a sensitivity to the appointing party's legal, cultural and commercial background and its position in the arbitration, as well as the work of Professor Albert Jan van den Berg and others, the Court acknowledged that there is a debate within the international community regarding the role of party-appointed arbitrators and accordingly that parties to arbitrations may have differing expectations with regard to party-appointed arbitrators and chairpersons.[14] Lord Hodge cited US case law[15] to demonstrate that certain other jurisdictions may draw a distinction between party-appointed and "neutral" arbitrators.[16] As a result, the Court accepted that parties may in certain circumstances place a heavier responsibility on the

[6] *Porter v Magill* [2001] UKHL 67, at para. 103.
[7] *Helow v Secretary of State for the Home Department* [2008] UKHL 62.
[8] *Halliburton Company v Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd)* [2020] UKSC 48, at para. 56.
[9] *Id.*, at para. 58.
[10] *Id.*, at para. 59.
[11] *Id.*, at para. 60.
[12] *Id.*, at para. 61.
[13] *Id.,* at para. 62.
[14] *Id.* at paras. 63-66.
[15] *Certain Underwriting Members of Lloyds of London v Florida* (2018) 892 F 3d 501; 2018 US App Lexis 15377.
[16] *Halliburton Company v Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd)* [2020] UKSC 48, at para. 65.

chair of the tribunal to be impartial.[17] The informed and fair-minded observer would assess the possibility of bias in this context.[18]

The Court noted that the fair-minded and informed observer might also take into account: the experience and reputation of an arbitrator (albeit that the weight to be given to this would depend on the circumstances of the arbitration and whether one could expect people entering into arbitrations of that nature to be informed about the experience and past performance of arbitrators);[19] and, the possibility of opportunistic or tactical challenges by parties to an arbitration.[20]

Existence of Arbitrator's Duty of Disclosure under English Law

It was not previously clear as a matter of English law whether, in circumstances where the dispute is not governed by arbitral rules imposing specific disclosure obligations, disclosure by an arbitrator was a legal duty or merely good arbitral practice. Unlike the UNCITRAL Model Law,[21] the 1996 Act did not provide for any express statutory duty of disclosure.

The Supreme Court clarified this. Lord Hodge found that: (i) an arbitrator's statutory duties under section 33 of the 1996 Act give rise to an implied term in the contract between the arbitrator and the parties that the arbitrator will act with impartiality;[22] (ii) the arbitrator will not comply with that term if the arbitrator has knowledge of undisclosed circumstances that render him or her liable to be removed under section 24 of the 1996 Act;[23] (iii) as such, English law requires an arbitrator to disclose facts and circumstances which would or might give rise to justifiable doubts as to his or her impartiality, tested from the perspective of an objective observer.[24] Unless the parties have expressly or implicitly waived their right to disclosure, such disclosure is not just a question of best practice but is a matter of legal obligation.[25]

Referring to the UNCITRAL Model Law, the Supreme Court noted that the standard for disclosure is different to the standard for assessment of bias: matters must be disclosed if the circumstances might reasonably give rise to justifiable doubts as to an arbitrator's impartiality (or, which appears to be the same, might reasonably cause the observer to conclude that there was a real possibility that the arbitrator was biased), but an arbitrator may only be removed if an informed, fair-minded observer *would* conclude that there was a real possibility of bias.[26]

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[17] *Id.* at para. 66.
[18] *Id.* at para. 66.
[19] *Id.* at para. 67.
[20] *Id*. at para. 68.
[21] Article 12(1).
[22] *Halliburton Company v Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd)* [2020] UKSC 48, at para. 76.
[23] *Id*. at para. 76.
[24] *Id*. at paras. 74-76, 136.
[25] *Id.* at para. 78.
[26] *Id.* at para. 107-115.

Content of Arbitrator's Duty of Disclosure under English Law – Multiple Appointments

The Supreme Court explained that, in order for disclosure to be required, it is sufficient that the matters in question are such that they are relevant and material to an assessment of the arbitrator's impartiality and could reasonably lead to an adverse conclusion.[27] Matters which, if left unexplained, would give rise to justifiable doubts as to an arbitrator's impartiality must be explained and neutralised by disclosure.[28] The disclosure obligation therefore extends to matters which may not ultimately prove to be sufficient to establish justifiable doubts as to the arbitrator's impartiality.[29]

In assessing whether multiple appointments in arbitrations with overlapping subject matter and one common party meet this threshold, Lord Hodge acknowledged that there are practices in maritime, sports and commodities arbitrations in which engagement in multiple overlapping arbitrations does not need to be disclosed because it is not generally perceived as calling into question an arbitrator's impartiality or giving rise to unfairness.[30] Lord Hodge accepted that it was a feature of GAFTA and LMAA arbitrations that arbitrators will act in multiple arbitrations, often arising out of the same events.[31] Parties who refer their disputes to these institutions are taken to accede to this practice and to accept that such involvement by arbitrators does not call into question their fairness or impartiality and disclosure may not be required.[32]

Consequently, the fact that an arbitrator has accepted appointments in multiple references concerning the same or overlapping subject matter with only one common party is a matter which may have to be disclosed, depending upon the customs and practice in the relevant field.[33] In the specific context of Bermuda Form arbitrations, multiple appointments must be disclosed in the absence of an agreement to the contrary between the parties to whom disclosure would otherwise be made.[34] The Court came to this conclusion on the basis that it had "not been shown that there is an established custom or practice in Bermuda Form arbitrations by which parties have accepted that an arbitrator may take on such multiple appointments without disclosure", thereby implicitly placing the onus in multiple-appointment cases on the party asserting that disclosure is not required.[35]

Effect of Confidentiality Obligations on Ability to Make Disclosure

Lord Hodge noted that it was necessary when considering issues of disclosure to have regard to an arbitrator's privacy and confidentiality obligations under English law.[36]

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[27] *Id.* at para. 116.
[28] *Id.* at para. 109.
[29] *Id.* at para. 117 (affirming dicta of Cockerill J in *PAO Tatneft v Ukraine* [2019] EWHC 3740 (Ch) at para. 57.
[30] *Id.* at para. 87.
[31] *Id.* at para. 91.
[32] *Id.* at para. 91.
[33] *Id.* at para. 136.
[34] *Id.* at para. 137.
[35] *Id.* at para. 137.
[36] *Id.* at para. 82.

Recognising the uncertainty of the law in this area, Lord Hodge observed the existence of the following principles. First, where the information which must be disclosed on a new appointment is subject to an arbitrator's duty of privacy and confidentiality, disclosure can only be made if the parties to whom the obligations are owed give their consent.[37] Second, consent may be express or inferred from the arbitration agreement in the context of custom and practice in the relevant field.[38] Third, the ICC Rules, LCIA Rules and ICSID Rules all provide a basis for the inference that parties to arbitrations under those rules consent to disclosure of such information about that arbitration to the parties to a prospective arbitration under such rules.[39] Fourth, in the absence of consent, the arbitrator will have to decline the new appointment.[40]

Applying these principles in a manner that ensures that the law recognises "the realities of accepted commercial and arbitral practice", Lord Hodge explained 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.[41] Lady Arden suggested this analysis could be extended to ad hoc arbitrations more broadly.[42]

Effect of Non-Disclosure

The Court then considered the effect of non-disclosure. When assessing whether there should have been disclosure, a court will have regard to the circumstances prevailing at the time when the arbitrator acquired the requisite knowledge of those circumstances.[43] It will disregard matters of which the arbitrator could not have known at that time.[44] With regard to a continuing failure to disclose matters, however, changes in circumstances may mitigate (for example if the second arbitration does not proceed) or aggravate the seriousness of the non-disclosure.[45]

Lord Hodge stated that non-disclosure in the circumstances before the Court deprived the non-common party of the opportunity to address and perhaps resolve the matters which should have been disclosed.[46] He held that such non-disclosure *may* demonstrate a lack of regard to the interests of the non-common party and may in certain circumstances amount to apparent bias.[47]

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[37] *Id.* at para. 88.
[38] *Id.* at para. 88.
[39] *Id.* at para. 90.
[40] *Id.* at para. 88.
[41] *Id.* at paras. 103-104.
[42] *Id.* at para. 171.
[43] *Id*. at para. 119.
[44] *Id*. at para. 119.
[45] *Id.* at para. 120.
[46] *Id*. at para. 118.
[47] *Id*. at para. 118.

Timing of Assessment of the Need for Removal

Turning to the question of the time at which the possibility of bias must be assessed, the Court noted that section 24(1)(a) of the 1996 Act empowers a court to remove an arbitrator on the ground that circumstances *exist* that give rise to justifiable doubts as to his or her impartiality.[48] On this basis (which was corroborated by English case law), the Court held that the possibility of bias should be assessed as at the date of the hearing of the application to remove the arbitrator: the hypothetical assessment will be undertaken with reference to the facts then available to the fair-minded and informed observer.[49] The Court can therefore go beyond the facts known to the hypothetical observer at the time of the relevant failure or objection.

As demonstrated below, this conclusion was critical to the Supreme Court's decision that Mr. Rokison's removal was not required.

Application to the Facts

Mr. Rokison had been under an obligation to disclose his appointment in Arbitration 2 to Halliburton because at the time of that appointment the existence of potentially overlapping arbitrations with only one common party was a circumstance that *might reasonably* give rise to the real possibility of bias.[50] The disclosure ought to have included (i) the identity of the common party who was seeking the appointment of the arbitrator in the Arbitration 2 (i.e. Chubb), (ii) whether the proposed appointment in Arbitration 2 by the common party was to be a party-appointment or a nomination for appointment by a court or a third party, and (iii) a statement of fact that Arbitration 2 arose out of the same incident."[51] An arbitrator's duty of privacy and confidentiality would not prevent such disclosure.[52]

However, the question relevant to Mr. Rokison's removal was whether a fair-minded and informed observer *at the date of the hearing for removal in January 2017* would have concluded that there was a real possibility of unconscious bias on Mr. Rokison's part. The Supreme Court held that the observer would not have so concluded.[53] By the time of the hearing for removal, Mr. Rokison had given an explanation of his failure to disclose the appointments (oversight) and that explanation was not challenged.[54] An objective observer would not have inferred from such oversight that there was a real possibility of unconscious bias because: (i) there was a lack of clarity in English law as to whether there was a legal duty of disclosure and whether disclosure was needed; (ii) the time sequence of the three references (with Arbitrations 2 and 3 following Arbitration 1 procedurally) provides some explanation for why Mr. Rokison did not identify the need for disclosure; (iii) it was not likely that there would be any overlap in evidence or legal submissions between Arbitrations 2 and 3 and Arbitration

[48] *Id.* at para. 121.
[49] *Id.* at para. 123.
[50] *Id.* at para. 145.
[51] *Id.* at para. 146.
[52] *Id.* at para. 146.
[53] *Id.* at para. 149.
[54] *Id.* at para. 149.

1, so there was no likelihood of Chubb gaining any advantage by reason of the overlapping references; (iv) there was no question of Mr. Rokison having received any secret financial benefit merely by reason of the appointments; (v) there was no basis for inferring unconscious bias due to subconscious ill-will in respect of the robust challenge made by Halliburton.[55]

The appeal was accordingly dismissed.

International Comparisons

In some respects, the Supreme Court's decision brings English law into line with practice in other jurisdictions. In particular, the imposition of a legal duty of disclosure is consistent with the UNCITRAL Model Law as adopted or drawn on in jurisdictions such as Scotland, Germany, Canada, Belgium, Sweden, Austria and Switzerland.

On other points, the judgment explores issues which have received limited attention internationally. The Court's thorough examination of the interaction between an arbitrator's privacy and confidentiality obligations and his or her duty of disclosure (a topic in which the Court was clearly interested and in respect of which it invited further submissions after the hearing) provides useful guidance on a relatively neglected issue even if, as suggested by Lady Arden and in commentary, disclosure will often not breach confidentiality obligations in any event.[56] The IBA Guidelines on Conflicts of Interest, for example, only make passing reference to the risk that "professional secrecy rules or other rules of practice or professional conduct" might prevent disclosure.[57]

Implications

The Supreme Court's judgment brings welcome clarity to certain discrete points of English arbitration law, such as (subject to contrary agreement) the existence of a legal duty of disclosure applicable to arbitrators, an arbitrator's duty to disclose multiple appointments with overlapping subject matter and only one common party in Bermuda Form arbitrations and the fact that consent to disclosure by an arbitrator in the disclosure process of certain limited details concerning an arbitration may be inferred from the arbitration agreement itself in the context of practice in the relevant field.

However, while Lady Arden's *obiter* comment that an arbitrator should proceed on the basis that a proposal to take on a further appointment involving a common party and overlapping subject-matter is likely to require disclosure of a potential conflict of interest may be sound advice in most fields of arbitration, the judgment emphasises that in assessing what needs to be disclosed and the effects of non-disclosure, much will turn on the institutional rules adopted, the custom and practice in the field of the subject matter of the arbitration and the parties' particular circumstances and expectations.

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[55] *Id.* at para. 149.
[56] *Id*. at para. 184.
[57] *IBA Guidelines on Conflicts of Interest*, Explanation to General Standard 3(c).

The Supreme Court thus struck a balance between (i) emphasizing the importance of disclosure and (ii) recognising the importance of custom and practice in particular fields of arbitration. This balance demonstrates a sensitivity to the contrasting positions adopted by the ICC, LCIA and CIArb on the one hand, and GAFTA and the LMAA on the other. It also serves to avoid tying the hands of the English courts as they deal with removal applications in diverse fields of arbitration with divergent customs and practices. However, some practitioners will be disappointed by the Court's focus on the importance of context (which deprives parties and arbitrators of certainty in relation to how disclosure issues will be determined) and its reluctance to provide guidance on how other comparable situations might be approached, such as those involving chain arbitrations or repeat appointments by one party or one law firm.

Nevertheless, the tenor of the Supreme Court's decision is undoubtedly in favour of disclosure wherever reasonably required. It is important to note that while the Supreme Court upheld the High Court's decision not to remove Mr. Rokison, it considered as a relevant factor in assessing his failure to make disclosure the uncertainty of English law in relation to an arbitrator's disclosure obligations. This uncertainty now having been resolved, it may well be that an English court would not come to the same conclusion on similar facts in the future, even in circumstances where other mitigating factors are present.

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