Halliburton Company v *Chubb Bermuda Insurance Ltd* [2020] UKSC 48

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Introduction

On 27 November 2020, the United Kingdom Supreme Court handed down its long awaited judgment in *Halliburton Company (Appellant) v Chubb Bermuda Insurance Ltd (First Respondent)* [2020] UKSC 48 ('*Halliburton v Chubb*'). Widely regarded as a landmark decision on the obligation of disclosure on arbitrators under English law, the decision also considers the question of multiple appointments and of confidentiality in the arbitration process.

In this article, the author discusses the reasoning of the Supreme Court with observations on the decision of the trial judge and, consequently, the Court of Appeal, and considers its implications for parties and arbitrators.

Preliminary Comments

The appeal was heard by Lord Reed, Lord Hodge, Lady Black, Lord Lloyd-Jones and Lady Arden, with Lord Hodge delivering the majority judgment. Lady Arden agreed with the judgment of Lord Hodge, but made additional points in a separate judgment '*to reinforce the overall conclusions which this court has reached*'.[1]

The opening paragraph of the Supreme Court judgment is one which will no doubt be cited for many years:

> It is axiomatic that a judge or an arbitrator must be impartial; he or she must not be biased in favour of or against any party in a litigation or reference. A judge or arbitrator, who is not in fact subject to any bias, must also not give the appearance of bias: justice must be seen to be done. This appeal is not concerned with any deliberate wrongdoing or actual bias but with the circumstances in which an arbitrator in international arbitration may appear to be biased. It raises important questions about the requirement that there be no apparent bias and the obligation of arbitrators in international arbitrations to make disclosure.[2]

Helpfully, the Supreme Court judgment begins by annunciating the important questions before the Court:

(1) 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 giving rise to an appearance of bias; and

(2) Whether and to what extent the arbitrator may do so without disclosure.[3]

Background

The dispute arose in relation to insurance claims made following an incident known as the Deepwater Horizon oil spill in the Gulf of Mexico in 2010. There was a range of litigation following the incident. This included claims against the owner of the rig, Transocean Holdings LLC ('Transocean'), and the company providing cementing and monitoring services, Halliburton Company ('Halliburton'). Transocean and Halliburton settled certain claims and made a claim for indemnity under their respective insurance policies with Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd) ('Chubb').

Chubb refused to pay the claims. In response to Halliburton's claim, Chubb asserted that the settlement was not a reasonable settlement and that Chubb had acted reasonably in not consenting to the settlement.

The relevant insurance policy was a 'Bermuda Form' policy. Chubb was responsible for the top layer cover. The policy in question was governed by New York law and provided for arbitration in London with a tribunal of three arbitrators. Each party was to appoint one arbitrator. The presiding arbitrator was either selected by the two party appointed arbitrators or, in default, by the High Court of London.

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[1] *Halliburton Company (Appellant) v Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd) (First Respondent)* [2020] UKSC 48 [159] ('*Halliburton v Chubb*').

[2] Ibid [1].

[3] Ibid [2].

Halliburton commenced arbitration under the arbitration clause.

Confidentiality of Tribunal Members

A preliminary issue in the proceeding was whether it was appropriate to reveal the names of the parties and the three arbitrators where arbitration was private. In the first instance Court, all names were anonymised. In the Court of Appeal, the names of the parties were disclosed, but the names of the arbitrators were anonymised. The Supreme Court questioned the aptness of this, particularly where the arbitrators themselves were named as defendants in the proceedings. Lord Hodge found that the principle of open justice *points towards disclosure*, noting that whilst the integrity of the arbitrator central to the dispute was important:

> … the protection of that reputation is not a sufficient ground for anonymity, particularly when the courts below have founded on that reputation in their reasoning. In any event, the challenge in this case involves no assertion of actual bias but relies entirely on an assertion of an objective appearance of bias. I am satisfied that there are no good grounds for maintaining the anonymity of the arbitrators in this appeal.[4]

The Appointment of the Tribunal

The steps taken by the parties to appoint the tribunal and the responsive steps of the arbitrators are key to this appeal.

First, when invoking the arbitration clause, Halliburton nominated Professor William Park as its party appointed arbitrator. Secondly, Chubb nominated Mr John Cole. There was no agreement between Professor Park and Mr Cole as to the presiding arbitrator and, after a contested hearing in the High Court, Mr Rokison (one of Chubb's nominees) was appointed as chair. Halliburton did not appeal the appointment, however its objections to Chubb's proposed arbitrators (including Mr Rokison) were based on the fact that the policy was governed by New York law and the arbitrators were English lawyers.

The statement of claim and statement of defence in this reference (which the Court called Reference 1) were delivered in September and December 2015, respectively.

In December 2015, Mr Rokison accepted an appointment by Chubb in another arbitration in relation to a claim by Transocean arising out of the Deepwater incident. The Court refers to this as Reference 2. Mr Rokison did make some disclosures in relation to Reference 2. He disclosed to Transocean his appointment in Reference 1 and in other Chubb arbitrations (which he had earlier disclosed to Halliburton). However, he did not tell Halliburton about his proposed appointment in Reference 2.

In August 2016, Mr Rokison accepted another appointment arising out of the Deepwater incident. The Court refers to this as Reference 3. Reference 3 involved a different insurer, but the same level of insurance as Reference 2. Transocean was the claimant in Reference 3. Mr Rokison did not tell Halliburton about Reference 3.

During November 2016 a preliminary issue relevant to both References 2 and 3 was heard separately in each reference. This issue concerned whether fines and penalties paid by Transocean to the US Government should be taken into account '*in the exhaustion of both the underlying layers of insurance and Transocean's self-insured retention*'.[5]

Halliburton's Concerns

Halliburton discovered Mr Rokison's appointment in References 2 and 3 in early November. A few weeks later, Halliburton's US lawyers wrote to Mr Rokison raising concerns, referring to the *IBA Guidelines on Conflicts of Interest in International Arbitration* ('IBA Guidelines') and asking for confirmation of the appointments and an explanation of why there was no disclosure. Relevantly, the 'general principle' enunciated in the IBA Guidelines is that:

> Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the Final Award has been rendered or the proceedings have otherwise finally terminated.

[4] Ibid [6].
[5] Ibid [18].

Mr Rokison replied to the US lawyers' correspondence, explaining the references and the fact that he had not made disclosure because '*it had not occurred to him at the dates of those appointments that he was under any obligation to do so under the IBA Guidelines*'.[6] He apologised and said that in hindsight he should have done so.

Lord Hodge summarises and quotes Mr Rokison's response:[7]

> He stated his commitment to remain independent and impartial and acknowledged the importance of both parties in an arbitration sharing confidence that their dispute would be determined fairly on the evidence and the law without bias. He concluded:
>
> "I do not believe that any damage has been done but, if your clients remain concerned, I would be prepared to consider tendering my resignation from my appointment in the two Transocean cases if the results of the determination of the preliminary issues of construction, which are likely to be issued shortly, do not effectively bring them to an end."

There was a further exchange of communications between Mr Rokison and Halliburton's US lawyers. Halliburton then issued an application in the High Court seeking an order that Mr Rokison be removed as arbitrator. There was further correspondence in relation to whether there was overlap in issues between the references.

The application was heard on 12 January 2017 and dismissed.

Further Progress of the References

A merits hearing in Reference 1 took place between 27 January and 6 February 2017. Awards on the preliminary issues in References 2 and 3 were issued on 1 March 2017. The issue as to construction of the policy was in Chubb's favour. The awards brought the references to an end.

On 5 December 2017 the tribunal in Reference 1 issued a final partial award on merits. This award was favourable to Chubb.

In relation to this award, Lord Hodge observes:[8]

> The award was signed by all three arbitrators, although Professor Park […] qualified his signature of the award in "Separate Observations". Professor Park stated that he had signed the award to confirm his participation but that he was unable to join in the award as a result of his 'profound disquiet about the arbitration's fairness". He explained that:
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> "… 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."

The other arbitrators responded to Professor Park's statement, but they did not consider the 'Separate Observation' to be part of the majority award.

Litigation

Halliburton's claims in the litigation were that Mr Rokison should be removed as an arbitrator in Reference 1 and replaced on grounds that circumstances existed which gave rise to justifiable doubts as to his impartiality. Halliburton relied specifically on the arbitrator's acceptance of appointments in References 2 and 3, his failure to disclose these to Halliburton and his offer to resign (which Chubb refused).

[6] Ibid [20].
[7] Ibid.
[8] Ibid [26].

The application failed at first instance. In simple terms, the trial judge found that '*the circumstances did not give rise to any justifiable concerns about the arbitrator's impartiality [so] there was nothing which had to be disclosed*'.[9]

Halliburton appealed.

The Court of Appeal considered two issues.

First, '*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 the appearance of bias*'.[10] The Court:

> … recognised that the existence of appointments in such related arbitrations could cause the party which was not involved in the related arbitrations to be concerned and could be good reason for a judge to decline to appoint a person as an arbitrator […] in the face of an objection by that party. But the court held that the appointment of a common arbitrator did not justify the inference of apparent bias; something more of substance was required.[11]

On this issue, the Court of Appeal found that '*the degree of overlap between reference 1 and references 2 and 3 was in fact very limited*'.[12]

The second issue was '*to identify the circumstances in which an arbitrator should make disclosure of matters which may give rise to justifiable doubts as to his or her impartiality*'.[13] The Court of Appeal started with the proposition that:

> Under the common law, judges should disclose facts or circumstances which would or might provide the basis for a reasonable apprehension of lack of impartiality.[14]

Lord Hodge explained the reasoning of the Court of Appeal:

> The court stated that the test for apparent bias applied equally to arbitral tribunals and the practical advantages of early disclosure were just as important. The court held that the question whether there should be disclosure was to be decided prospectively, as it depended on the prevailing circumstances at that time when the disclosure should have been made. When deciding whether circumstances existed that would or might lead to the conclusion that there was a real possibility of bias, with the result that those circumstances needed to be disclosed, a court should not have regard to matters known only at a later stage.
>
> A failure to make disclosure when it should have been made was itself a factor which should be taken into account when considering whether there was a real possibility that the arbitrator was biased. But, the court held, non-disclosure of a matter which should have been disclosed but did not on examination give rise to justifiable doubts as to the arbitrator's impartiality could not in and of itself justify an inference of apparent bias; something more was required.[15]

The Court of Appeal had concluded that Mr Rokison should have made disclosure to Halliburton at the time of his appointments in References 1 and 2, but agreed with the trial judge 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.[16]

The appeal was therefore dismissed.

Proceeding in the Supreme Court

There were five interveners in the matter when it was heard by the UK Supreme Court:

[9] Ibid [32].
[10] Ibid [35].
[11] Ibid.
[12] Ibid [36].
[13] Ibid [37].
[14] Ibid [37].
[15] Ibid [37]-[38].
[16] Ibid [39].

(a) The International Court of Arbitration of the International Chamber of Commerce;

(b) The London Court of International Arbitration;

(c) The Chartered Institute of Arbitrators;

(d) The London Maritime Arbitrators Association; and

(e) The Grain and Feed Trade Association.

At paragraph 48, Lord Hodge set out the questions before the Court:

> Against that background [being the 1996 UK Act], it is necessary to consider, first, the duty of impartiality in the context of arbitration before addressing, secondly, whether an arbitrator is under a legal duty to disclose particular matters, thirdly, how far the obligation to respect the privacy and confidentiality of an arbitration constrains his or her ability to make disclosure, and fourthly, whether a failure to disclose such matters demonstrates a lack of impartiality.[17]

Lord Hodge described the duty of impartiality as '*a cardinal duty of a judge and arbitrator*',[18] confirming that:

(a) In this case, the Court was concerned with an allegation of '*apparent bias*';[19]

(b) The '*objective test of the fair-minded and informed observer [being the test under English law] applies equally to judges and all arbitrators*';[20]

(c) A party appointed arbitrator in English law is expected to come up to precisely the same high standards of fairness and impartiality as the person chairing the tribunal; and

(d) In applying the test, '*it would be wrong to have regard to the characteristics of the parties to the arbitration, including the fact that one or more were foreign parties*'.[21]

Lord Hodge also identified particular characteristics of international arbitration which '*highlight the importance of proper disclosure as a means of maintaining the integrity of international arbitration*'.[22]

As to the duty of disclosure (and to summarise the majority discussion):

(a) An arbitrator must always be alive to the possibility of apparent bias and of actual but unconscious bias;

(b) Disclosure can be a way of avoiding the appearance of bias;

(c) The Court of Appeal was right to hold that the duty of disclosure is a legal duty encompassed within the statutory duties of an arbitrator (not just a matter of good arbitral practice);

(d) Pre-appointment disclosure is best practice;

(e) The '*existence of a legal duty promotes transparency in arbitration and is consistent with best practice as seen in the IBA Guidelines and in the requirements of institutional arbitrations such as those of the ICC and LCIA*';[23] and

(f) The duty of disclosure '*underpins the integrity of English-seated arbitrations*'.[24]

[17] Ibid [48].
[18] Ibid [49].
[19] Ibid [52].
[20] Ibid [55].
[21] Ibid [64].
[22] Ibid [69].
[23] Ibid [80].
[24] Ibid [81].

Consent

As to the duty of disclosure where English-seated arbitrations are private and confidential, this gives rise to the issue of consent, either express or '*inferred from the arbitration agreement itself in the context of the custom and practice in the relevant field*'.[25] Lord Hodge noted that in the case of institutional arbitration, the rules themselves require disclosure which may operate as an implied consent to disclosure for the purposes of compliance with the rules.[26]

In summary:

> Whether an arbitrator can make disclosure of an existing or prospective arbitration without first obtaining the express consent of all parties to the arbitration about which disclosure requires to be made will depend on the relevant arbitration agreement and the custom and practice in the relevant field.[27]

In the case before the court, Lord Hodge observed that there was dissent between the parties as to the practice of disclosure in 'Bermuda Form' arbitrations. His Lordship, having regard to submissions from the intervener institutions, concluded that:

> This current practice of arbitrators in English-seated arbitrations vouches two things. First, as a general rule the duty of privacy and confidentiality is not understood to prohibit all forms of disclosure of the existence of a related arbitration in the absence of express consent. Secondly, the duty of disclosure does not give an arbitrator carte blanche to disclose whatever is necessary to persuade a party that there is no justification for doubts about his or her impartiality. There will be many matters which cannot be disclosed without the express consent of the parties to that arbitration.[28]

His Lordship added that it is clear that information disclosed can only be used by the recipients to judge the impartiality and suitability of the arbitrator making the disclosure concluding, in *Halliburton v Chubb*, that:

> In short, this court should hold 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 in accordance with the practice which I have described 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.[29]

As to the content of the duty to disclose, his Lordship agreed with the Court of Appeal, but added a qualification:

> An arbitrator can disclose only what he or she knows and is, as a generality, not required to search for facts or circumstances to disclose. But I do 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.[30]

The majority judgment includes a discussion of the meaning of the words 'would or might' give rise to justifiable doubts as to impartiality. The judgment suggests that there is a range of matters which might fall within the definition, but it is not intended to capture matters which are trivial.[31]

> 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.[32]

On the question of whether a failure to disclose demonstrates a lack of impartiality, Lord Hodge found that it '*may demonstrate a lack of regard to the interests of the non-common party and may in certain circumstances amount to apparent bias*'.[33] As to the timing of the assessment of the need for disclosure, Lord Hodge emphasised that the duty of disclosure is continuing, adding that '*[t]he question of whether there should have been disclosure*

[25] Ibid [88].
[26] Ibid [80].
[27] Ibid [92].
[28] Ibid [101].
[29] Ibid [104].
[30] Ibid [107].
[31] Ibid [108].
[32] Ibid [116].
[33] Ibid [118].

should not be answered retrospectively by reference to matters known to the fair-minded and informed observer only at a later date'.[34]

Lord Hodge considered a further issue which he found to be central to the case, being the question of timing of the assessment of the possibility of bias. Lord Hodge accepted that the Court of Appeal '*was correct […] to apply the test for apparent bias by asking whether "at the time of the hearing to remove" the circumstances would have led the fair-minded and informed observer to conclude that there was in fact a real possibility of bias*'.[35]

Having identified the duty and the extent of its scope, Lord Hodge turned to the specific issues in the appeal.

The first issue was 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. On this issue, Lord Hodge accepted the submission of the LCIA that:

> … where an arbitrator accepts appointments in multiple references concerning the same or overlapping subject matter with only one common party, this may, depending on the relevant custom and practice, give rise to an appearance of bias.[36]

The second issue was whether and to what extent an arbitrator may accept multiple references without making disclosure to the party who is not the common party. Lord Hodge observed that:

(a) Failure to disclose might itself be a factor in reaching a conclusion that there was a real possibility of bias;[37]

(b) Whether there needs to be disclosure depends on the '*distinctive customs and practices of the arbitration in question*';[38] and

(c) There may be cases where failure to disclose would carry little weight,[39] concluding, that:

> … unless the parties to the arbitration otherwise agree, arbitrators have a legal duty to make disclosure of facts and circumstances which would or might reasonably give rise to the appearance of bias. 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. In cases in which disclosure is called for, the acceptance of those appointments and the failure by the arbitrator to disclose the appointments taken in combination might well give rise to the appearance of bias.[40]

In the case of 'Bermuda Form' arbitrations, Lord Hodge concluded that under English law multiple appointments must be disclosed. And in this particular case, the failure to disclose might well amount to apparent bias. The Court therefore held that:

> Mr Rokison was under a legal duty to disclose his appointment in reference 2 to Halliburton because at the time of that appointment the existence of potentially overlapping arbitrations with only one common party was a circumstance which might reasonably give rise to the real possibility of bias.[41]

The appeal, however, was dismissed, with the Court observing that:

> Having regard to the circumstances known to the court at the date of the hearing at first instance, I am not persuaded that the fair-minded and informed observer would infer from the oversight that there was a real possibility of unconscious bias on Mr Rokison's part.[42]

The Court then held that the Court of Appeal was correct in holding that:

> … the fair-minded and informed observer, looking at the facts and circumstances which would be known to him or her at the date of the hearing in January 2017, would not conclude that there was a real possibility of bias or, in

[34] Ibid [119].
[35] Ibid [123].
[36] Ibid [131].
[37] Ibid [133].
[38] Ibid [133].
[39] Ibid [134].
[40] Ibid [136].
[41] Ibid [145].
[42] Ibid [149].

> the words of section 24(1)(a) of the 1996 Act, that circumstances existed that gave rise to justifiable doubts about Mr Rokison's impartiality.[43]

Mr Rokison's response to the complaint when first raised about his disclosure (or failure to disclose) was a relevant factor in the court's reasoning.

Lady Arden's Observations

As noted in the introduction to this paper, Lady Arden agreed with the majority judgment, but also provided additional observations. Lady Arden concluded that the legal duty to disclose is one which '*only arises if the arbitrator wants to take a further appointment in a different arbitration*',[44] (so there is scope for debate as to whether it is a duty in the strict sense) and that the inference that directors are aware of matters of which they ought reasonably be aware might provide guidance as to when an arbitrator needs to make enquiries before deciding whether to disclose.[45]

Lady Arden further observed:

(a) The law of England and Wales '*is rigorous in its approach to arbitrator bias and conflicts of interest'* and '*courts must be especially mindful of the these [sic] issues in relation to arbitration where the proceedings take place in private and subject to strict obligations of confidentiality*';[46]

(b) '*[U]nless the arbitration is one in which there is an accepted practice of dispensing with any need to obtain parties' consent to further appointments, an arbitrator should proceed on the basis that a proposal to take on a further appointment involving a common party and overlapping subject-matter (in that it arises out of the same event) is likely to require disclosure of a potential conflict of interest*';[47]

(c) The duty of disclosure is '*rooted in both statute and the contract of appointment of the arbitrator*';[48] and

(d) Disclosure for the purpose of a declaration by a potential arbitrator is unlikely to fall into an exception to the obligation of confidentiality, particularly where the disclosure is '*driven by the arbitrator's wish to take the further appointment*'.[49]

Concluding Comments

Halliburton is instructive for a range of reasons and provides guidance for arbitrators and parties in proceedings beyond those which are conducted under English law. First, it is relevant to arbitrators and potential arbitrators who are approached to accept one or more appointments in multiple and related references. It discusses the scope of their disclosure obligations and the time at which a possibility of bias might be seen to arise. Secondly, it provides food for thought for parties (and their legal counsel) when selecting and appointing an arbitrator. A zero risk approach would suggest that parties (and arbitrators) avoid multiple appointments, other than where specific expertise is required and there is a small recognised pool of candidates. In a more general sense, in defining and evaluating the disclosure obligations which apply to an arbitrator, the decision of the Supreme Court comprehensively highlights and reinforces the overarching importance of the integrity of the arbitration process.

[43] Ibid [150].
[44] Ibid [161].
[45] Ibid [162].
[46] Ibid [163].
[47] Ibid [164].
[48] Ibid [167].
[49] Ibid [180].