IMPLICATIONS FOR ARBITRATORS: *HALLIBURTON COMPANY V CHUBB BERMUDA INSURANCE LTD* [2020] UKSC 48

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Relevance

The decision of *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48 ('*Halliburton v Chubb*') relates to an arbitration conducted pursuant to an arbitration agreement in standard Bermuda Form terms, namely it was ad hoc and seated in London. Therefore the applicable procedural law was the *Arbitration Act 1996* (UK), which does not engage the UNICTRAL Model Law 1985/2006 and which is not a complete code of the law of arbitration.

Halliburton v Chubb sets out disclosure obligations in respect of a Bermuda form arbitration (which is shorthand for arbitrations involving disputes arising under casualty liability insurance policies set up in the 1980s between Bermudian insurers and US policyholders subject to New York law) specifically where an arbitrator accepts appointments in multiple arbitrations concerning the same or overlapping subject matter with only one common party.

The relevant sections of the *Arbitration Act 1996* (UK) which are engaged are s 23, relating to the power of the court to remove an arbitrator on the grounds of circumstances existing that give rise to justifiable doubts to his or her impartiality, and s 33, which requires a tribunal to act fairly and impartially between the parties. Whilst both sections impose a duty of impartiality, the Act does not set out any requirements in relation to disclosure.

Many international arbitrations are conducted today at seats where the UNICTRAL Model Law applies (as in Australia by the *International Arbitration Act 1974* (Cth)). Article 12 of the Model Law makes it mandatory for an arbitrator to disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence, and further that this obligation to disclose is ongoing and continues from time of appointment and throughout the arbitral proceedings. It should be noted that under the s 18A of the Australian Act, the words 'justifiable doubts' are described as meaning 'only if there is a real danger of bias on the part of the arbitrator'. Further, those international arbitrations are often administered by arbitration commissions, whose rules also include the same disclosure obligations (see art 16.3 of the ACICA Arbitration Rules in that regard).

Given these factors, the relevance of the decision in *Halliburton v Chubb* for arbitrators is somewhat limited, but for the finding by the Supreme Court that there is an actual duty (rather than just a 'good practice') of disclosure under the English common law. That said, the decision does raise issues of general relevance to disclosures practices generally.

Disclosure issues

As already noted, disclosure by arbitrators is a duty and not simply good practice. The disclosure obligation remains in force for the entire duration of the proceedings.

Arbitrators are required to disclose any facts and circumstances that may call into question their independence or give rise to doubts as to their impartiality. They are under a duty to investigate and to make reasonable inquiries enquiries to identify such facts and circumstances. This would obviously include conflict searches relating to their appointments in other arbitration references.

On the question of apparent bias, the rules of arbitration commissions adopt a subjective test by requiring the disclosure of facts or circumstances that may call into question the arbitrator's independence or impartiality in the

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eyes of the parties. This is to be compared with the test when there is challenge to the arbitrator's independence and impartiality, which is objective and referred to in the decision as the 'assessment of the fair-minded and informed observer'.

The arbitrator's failure to disclose facts or circumstances base on the subjective test may still be relevant to assessing his or her independence or impartiality in the event of a challenge. Such a failure is not in itself a ground for disqualification. This is borne out in the decision of the Supreme Court in *Halliburton v Chubb*.

Subject to the duty of privacy and confidentiality, an arbitrator must take a liberal approach to disclosure and any doubt as to whether certain facts or circumstances should be disclosed must be resolved in favour of disclosure. As stated by the Supreme Court in *Halliburton v Chubb,* the duty to disclose does not override the duty of privacy and confidentiality. Should consent not be either expressly given or implied for the giving of even a limited disclosure, then the arbitrator must decline the appointment.

The Supreme Court also noted that in various fields of arbitration, including those conducted by trade bodies (for example, GAFTA, LMAA and reinsurance bodies), the duty to disclose did not give rise of itself to a need to disclose, given the customs and practices of those trade bodies. The Court did suggest that in order to give clarity those bodies should consider including specific guidance on the disclosure requirement in their rules.