Failure to Disclose but No Bias: The UKSC's Decision in *Halliburton Company (Appellant) v. Chubb Bermuda Insurance Ltd (Respondent)*

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The UK Supreme Court unanimously upheld the Court of Appeal's decision that arbitrators appointed in arbitrations seated in England have a legal duty to disclose subsequent appointments in other arbitrations where there is an overlap in parties and subject matter. The Supreme Court held that, in the present case, while the chair of the tribunal had breached this duty to disclose, the facts and circumstances did not call into question his impartiality. Halliburton's appeal and its request that the chair be removed were dismissed.

Background

The dispute originates in the explosion on the Deepwater Horizon oil and gas rig in the Gulf of Mexico on 20 April 2010. Halliburton provided cementing and well-monitoring services on the rig, which was leased by BP and operated by Transocean. The U.S. government pursued each corporation for the devastating environmental damage caused by the incident. Halliburton settled with the government for US$1.1 billion, and subsequently sought to recover that sum from its insurer, Chubb. Chubb refused to pay out under the insurance policy—a Bermuda Form policy—on the basis that the settlement amount was unreasonable. The insurance policy was governed by New York law and provided that disputes were to be resolved by arbitration seated in London. Each party was allowed to appoint an arbitrator, with the chair of the tribunal to be agreed by the parties. The parties could not agree on a chair, so the High Court appointed Kenneth Rokison QC (referred to as "M" in the decisions of the High Court and Court of Appeal), whom Chubb had proposed.

At the time of his appointment on 12 June 2015, Mr Rokison disclosed that Chubb had previously appointed him as arbitrator on a number of occasions and that he was, at that time, sitting in two pending arbitrations to which Chubb was a party.

Subsequently, in late 2015, Mr Rokison accepted an appointment by Chubb in arbitration proceedings against Transocean, arising out of the same Deepwater Horizon incident ("Reference 2"). Mr Rokison also accepted an appointment in August 2016 by a

different insurer in a third Deepwater Horizon-related arbitration between that insurer and Transocean although Halliburton's arguments before the Supreme Court focused on Reference 2. Mr Rokison did not disclose his appointment in Reference 2 to Halliburton. After Halliburton found out about Mr Rokison's appointment in Reference 2 in November 2016, Mr Rokison stated in correspondence that he did not believe that he was required to disclose that appointment to Halliburton (by reference, *inter alia*, to the International Bar Association Guidelines on Conflicts of Interest in International Arbitration, the "IBA Guidelines"). He also explained that the substance of the issues in Reference 2 significantly differed to those in the arbitration between Halliburton and Chubb, being primarily focused on the contractual interpretation of insurance policies. However, he accepted that it would have been "*prudent*" to make a disclosure. Mr Rokison ultimately offered to resign as chair if the parties could agree upon a suitable replacement. Having failed to agree on a replacement with Chubb, Halliburton applied to the High Court, pursuant to s.24(1)(a) of the Arbitration Act 1996 ("AA1996"), for Mr Rokison's removal on the basis that there were justifiable doubts as to his impartiality.

The application was rejected both at first instance and by the Court of Appeal.

The Supreme Court

The following questions were before the Supreme Court:

- whether and to what extent an arbitrator may accept appointments in multiple references that concern the same or overlapping subject matter, and where there is one common party (in this case, Chubb), without giving rise to an appearance of bias; and

- whether and to what extent an arbitrator may accept such multiple references without disclosing those appointments to the non-common party (in this case, Halliburton).

Lord Hodge gave the judgment for the majority. Lady Arden gave a separate and concurring opinion.

The "Apparent Bias" Standard in English-Seated International Arbitrations

The Supreme Court emphasised that an allegation of apparent bias under the AA1996 requires an objective analysis (by reference to a "*fair-minded and informed observer*"),

while having regard to the particular characteristics of international arbitration, which include the following:

- Arbitration is a consensual, private form of dispute resolution. Non-parties have limited or no means of discovering the existence of an arbitration, which puts a "premium on frank disclosure" by arbitrators where appropriate.

- Unlike judges, arbitrators are remunerated by the parties in an arbitration and thus derive a financial benefit from securing appointments. There is therefore a risk that arbitrators may avoid taking actions that would alienate the parties before them to maximise opportunities to secure future appointments.

- International arbitrators come from a great number of different jurisdictions and legal traditions, which may have varying views on the precise scope of "*ethically acceptable conduct*".

- Where there are multiple arbitration references concerning the same or overlapping subject matter, the parties will have no means of informing themselves of legal submissions made to the tribunals in any of the arbitrations to which they are not party (including to any arbitrator who might be sitting on more than one of the tribunals).

- The international arbitration community has different understandings of the role of party-appointed arbitrators as contrasted with that of the chair of the tribunal. In English law, the duty to act independently and impartially applies equally to all arbitrators regardless of how they are appointed. Nevertheless, parties may reasonably believe that tribunal chairs have a particularly heavy responsibility to be impartial.

The Duty to Act Fairly and Impartially Encompasses a Disclosure Obligation

The Supreme Court agreed with the Court of Appeal that English law requires the disclosure of facts and circumstances that might lead a fair-minded and informed observer to conclude that there was a real possibility that the arbitrator is biased. Section 33 AA1996 imposes on arbitrators a duty to act fairly and impartially and implies a term into the contract between the arbitrators and the parties to the same effect. This statutory duty of fairness encompasses an obligation to disclose information that could give rise to justifiable doubts as to an arbitrator's impartiality. A failure to make a necessary disclosure could itself demonstrate a lack of impartiality. The Court did not rule out the possibility that arbitrators may, in certain circumstances, be under a

corollary duty to make "*reasonable enquiries*" to establish whether there was a need to disclose a particular fact.

The Duty of Confidentiality

The Court recognised that arbitrators in English-seated arbitrations are generally subject to a separate duty of privacy and confidentiality with regard to any subsequent arbitration proceedings in which they are appointed. However, that duty is not absolute. In particular, the Court held that the duty of confidentiality applies from the date of the arbitrator's appointment. As such, an arbitrator may make high-level disclosures of his or her subsequent nomination in an arbitration proceeding *before* they are appointed without breaching their duty of confidentiality. According to the Court, such pre-appointment disclosure is essential to ensure that the arbitration process operates smoothly.

The Court recognised that arbitration agreements in certain specialised fields may dispense with the duty to disclose multiple appointments by the same party on the basis that the pool of arbitrators equipped to adjudicate those disputes is small. However, Bermuda Form arbitrations do not fall within this category. This was consistent with Mr Rokison's disclosure of his involvement in the arbitration between Halliburton and Chubb to the parties in Reference 2. Lady Arden noted that she would not limit this finding to Bermuda Form arbitrations but would extend it to any arbitration—whether ad hoc or under institutional rules—absent a specific rule or agreement on disclosure.

Breach of Disclosure Duty Does Not Necessarily Result in Apparent Bias

The Court held that an arbitrator's acceptance of appointments in multiple references concerning the same or overlapping subject matter with a common party may give rise to an appearance of bias, depending on the context. Likewise, a failure to disclose subsequent appointments in these circumstances could also give rise to an appearance of bias. In the appeal before the Court, had Halliburton been aware of Mr Rokison's appointment by Chubb in Reference 2, it might have had legitimate fairness concerns, due to the inequality of knowledge it would have had compared to Chubb as a result of its involvement in Reference 2. The Court therefore found that Mr Rokison had breached his duty to disclose his appointment in Reference 2 to Halliburton, as that appointment was "*a circumstance which might reasonably give rise to the real possibility of bias*".

In assessing whether that breach resulted in apparent bias by Mr Rokison, the Court emphasised that s.24(1)(a) AA1996 allows a party to apply for an arbitrator's removal if "*circumstances exist that give rise to justifiable doubts*" as to the arbitrator's impartiality. Crucially, the Court held that "*exist*" (in present tense) means that in assessing the application a judge has to take into account the circumstances that exist at the time the application is heard, not at the time the arbitrator accepted the appointment.

Having regard to the circumstances known to the court at the date of the hearing at first instance, the Supreme Court concluded that the fair-minded and informed observer would not infer from Mr Rokison's failure to disclose that there was a real possibility of unconscious bias on his part. By the time the High Court heard the application for removal in January 2017, Mr Rokison had explained his reasons for not disclosing his appointments in Reference 2 (*i.e.*, that it was not required under the IBA Guidelines). It was common ground that his explanation for the oversight was genuine. In addition, the Supreme Court found that: (i) there had been a lack of clarity in English case law as to whether a legal duty to disclose existed; (ii) Mr Rokison had derived no secret benefit as a result of the multiple appointments; (iii) ultimately Chubb gained no advantage from the overlap between the present case and Reference 2 (as it was decided on an unrelated preliminary issue); and (iv) there was no basis for inferring unconscious bias in the form of subconscious ill-will by Mr Rokison in response to the robustness of Halliburton's challenge.

Comment

The decision clarifies that an arbitrator owes a duty to the parties to disclose information that could give rise to justifiable doubts as to the arbitrator's impartiality, including prior and subsequent appointments in arbitration proceedings where there is an overlap in parties and subject matter. However, a failure to disclose relevant matters in breach of that duty will not necessarily result in a finding of bias and the removal of the arbitrator.

In assessing whether there is a real possibility that an arbitrator is biased, the Court will apply an objective test having regard to the facts and circumstances—including any breach of the duty to disclose—known at the time of the hearing to remove the arbitrator. The fact that an arbitrator is repeatedly appointed by one party is unlikely—on its own—to support a finding of bias.

More generally, the Supreme Court's emphasis on the special nature of international arbitration in analysing the circumstances in which an arbitrator may be subject to a duty of disclosure and found to be biased affirms the English Courts' respect for

pluralism within the international arbitration community, distinct from English commercial litigation practice.

Further, the Court's careful analysis of the applicable statutory framework and the circumstances of the case before it reaffirms the "maximum support, minimal interference" principle underlying the AA1996 and demonstrates support for the integrity of the arbitral process, in particular the appointment of arbitrators, which is one of arbitration's central and distinguishing features.

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Please do not hesitate to contact us with any questions.

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