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U.K. Supreme Court Clarifies Rules on Apparent Bias in Relation to Multiple Appointments of Arbitrators

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In a judgment issued on 27 November 2020, in *Halliburton Company v Chubb Bermuda Insurance Ltd*,[1] the U.K. Supreme Court clarified how apparent arbitrator bias will be assessed by the courts of England and Wales, and confirmed that arbitrators are under a duty to disclose other relevant appointments to the arbitrating parties where the factual circumstances justify that disclosure.

In *Halliburton*, the Supreme Court clarified that, under English law, the relevant test for arbitrator bias 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*". However, based on the specific facts of the case, the Supreme Court held that a "*fair-minded and informed observer*" would not have found that the arbitrator's failure to disclose his other arbitral appointments meant that he was biased.

The decision will be comforting to the international arbitration community, particularly those involved in arbitrations seated in London, because it confirms the position of the U.K.'s highest Court that an arbitrator's duty to act fairly and impartially is paramount, and includes a duty of disclosure where relevant.

The Facts

The case arose out of the Deepwater Horizon oil spill in the Gulf of Mexico in 2010, which caused extensive damage and loss of life. The U.S. government brought several claims under federal statutes against BP, Transocean and Halliburton, who also faced a number of private damages claims pursued through a Plaintiff's Steering Committee ("**PSC**"). Following a trial on liability, the U.S. courts apportioned approximately 3% of the liability to Halliburton, as provider of offshore services in relation to the temporary abandonment and plugging of the well. Fellow defendants, BP and Transocean, were apportioned 67% and 30% of the liability, respectively.

Halliburton paid approximately US$1.1 billion in settlement of the private damages claims brought by the PSC and sought indemnification for that amount under its insurance policy with Chubb. Chubb refused to indemnify Halliburton and argued, *inter alia*, that the settlement was not reasonable. Transocean also had an insurance policy with Chubb and sought indemnification for its own PSC claims settlement under that policy. Chubb contested Transocean's claim on the same grounds.

Halliburton commenced arbitration against Chubb in January 2015 to resolve the dispute. After disagreement between the party-nominated arbitrators on the selection of the third arbitrator and a contested High Court hearing, Mr Kenneth Rokison was appointed as the third arbitrator in June 2015 (the **"Halliburton Appointment"**). Before accepting the Halliburton Appointment, he disclosed to the parties that he had previously been appointed as arbitrator in other unrelated cases involving Chubb and was currently involved in two such cases.

Several months later, in December 2015, Mr Rokison was also appointed by Chubb as arbitrator in an arbitration commenced by Transocean against Chubb arising out of the same Deepwater Horizon claims, and was contested by Chubb on largely the same grounds (the **"First Transocean Appointment"**). Before accepting the First Transocean Appointment, Mr Rokison disclosed to Transocean that he had been appointed on another arbitration arising from the same oil spill that also involved Chubb (*i.e.*, the Halliburton Appointment). Transocean did not object to his appointment. However, conversely, and crucially for this case, Mr Rokison failed to inform Halliburton of the First Transocean Appointment.

In addition, in August 2016, Mr Rokison accepted another appointment from Transocean in an arbitration arising out of the same oil spill. This arbitration again involved Transocean but in respect of Transocean's claim against a different insurer (the **"Second Transocean Appointment"**). Again, Mr Rokison did not inform Halliburton of the Second Transocean Appointment.

In November 2016, Halliburton learned of the First and Second Transocean Appointments (together, the **"Transocean Appointments"**) and wrote to Mr Rokinson. Referring to the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration (the **"IBA Guidelines"**), Halliburton noted that arbitrators were under a continuing duty to disclose potential conflicts of interest. In what the Supreme Court described as a "*measured response*", Mr Rokison replied to Halliburton. In that communication, he stated that, at the time of accepting the Transocean Appointments, it had not occurred to him that he was required to disclose them under the IBA Guidelines. He also noted that the Transocean Appointments, while arising out of the same oil spill, were confined to two-day hearings about preliminary issues in relation to policy construction. Accordingly, Mr Rokison maintained that there would not be any overlap, in evidence or legal submissions, with the arbitration in which Halliburton was engaged.

Mr Rokison nevertheless offered to resign from the Transocean Appointments following the conclusion of the preliminary issues hearings in the Transocean arbitrations in order to ease Halliburton's concerns. However, Halliburton called for Mr Rokison to resign from the Halliburton Appointment. In response, Mr Rokison indicated that he believed that he was not able to do so because he had been court-appointed. In addition, Chubb did not agree to Mr Rokison's resignation from that arbitration.

High Court and Court of Appeal Decisions

Halliburton subsequently commenced litigation in the High Court[2] to seek the removal of Mr Rokison pursuant to section 24(1)(a) of the English Arbitration Act 1996 (the **"1996 Act"**) on the grounds that circumstances existed that gave rise to doubts about his impartiality. Halliburton's application was rejected by the High Court, which noted that the fact that an arbitrator may be appointed to different arbitration tribunals with identical or similar subject matters did not preclude that arbitrator from sitting on both tribunals. The Court reasoned that arbitrators were required, under section 33 of the 1996 Act, to "*act fairly and impartially as between the parties*", which meant that an arbitrator is required to decide each case by reference to the material available. The High Court concluded that the "*informed and fair-minded observer*" would therefore not regard Mr Rokison as biased merely because he was appointed on different matters arising out of the same facts.

Following an appeal, the Court of Appeal[3] also dismissed the application. In its opinion, the Court of Appeal observed that: (i) an arbitrator appointed on matters arising out of the same facts could be a legitimate concern, but in itself did not prove apparent bias, which instead required "*something of substance*"; (ii) disclosure of similar appointments was required under law; but (iii) on the facts, Mr Rokison's non-disclosure of the subsequent Transocean Appointments would not lead a "*fair-minded observer*" to conclude that there was bias or the possibility of bias. The Court further noted that Mr Rokison's failure to disclose had been accidental rather than deliberate, and that "*mere oversight*" in such circumstances would not give rise to justifiable doubts as to his impartiality.

The U.K. Supreme Court Decision

The Supreme Court, in upholding both the High Court and Court of Appeal decisions, unanimously dismissed Halliburton's application. Whilst the Supreme Court noted that arbitrators were under a legal duty to disclose relevant other appointments, and Mr Rokison had failed to do so, on the facts presented to it, the Court did not find him biased in these circumstances.

In its decision, the Supreme Court confirmed that the relevant test was whether a "*fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased*". This language reiterates the importance of the fact-bound context of disclosure and confirms that there is no material difference between the duty of disclosure owed by judges under common law and the duty owed by arbitrators in the context of arbitration. Importantly, in its decision, the Supreme Court disagreed with the Court of Appeal that "*something of substance*" was required to establish apparent bias. Instead, the Supreme Court held that, depending on custom and practice in the industry in question, the "*mere acceptance*" of appointments in multiple cases was capable of giving rise to an appearance of bias. However, that was not the case based on the facts here, the Court concluded.

The Supreme Court helpfully summarised English law on apparent bias as follows:

- Impartiality is a core principle of arbitration and applies equally to all arbitrators (whether party-appointed or not);
- The assessment of the "*fair-minded and informed observer*" is an objective assessment, although the observer would be expected to have a considerable understanding of arbitration, which means that customs and practices of the particular field of arbitration (including the private nature of arbitration, the limited rights of appeal and the manner in which the arbitrators are appointed and remunerated), as well as the facts of the particular case, must be taken into account;
- Where the "*fair-minded and informed observer*" reasonably concludes that multiple appointments mean that there is a real possibility of bias, the arbitrator is under a legal duty to disclose;
- The duty of disclosure does not override the arbitrator's duty of privacy and confidentiality, but unless there is a specific contractual prohibition, disclosure may be made without the parties' express consent;
- Where the arbitrator is under a legal duty to disclose, non-disclosure will be a factor to take into account when assessing whether there is a real possibility of bias; and
- The test, therefore, is whether the "*fair-minded and informed observer*" would conclude that there is a "*real possibility*" that an arbitrator is biased by reference to the facts and circumstances at the date of the hearing to remove the arbitrator.

Comment

The judgment, which was published just over a year after the hearing, was highly anticipated because it was expected to have a broad impact on arbitrations seated in London, a leading global centre for international arbitration. Due to the perceived importance of the case, the Supreme Court permitted representations from the ICC, CIArb, LCIA, LMAA and GAFTA. Whilst the ICC, CIArb and LCIA argued that multiple appointments could give rise to an appearance of bias and therefore needed to be disclosed pursuant to the IBA Guidelines, the LMAA and GAFTA took the position that multiple appointments were very common in certain industries and therefore considered normal by parties who did not necessarily expect disclosure.

In holding that multiple appointments could lead to the appearance of bias, but that the test is objective and requires the assessment of the customs and practice of a particular field of arbitration, the Supreme Court's decision adopts somewhat of a middle stance on disclosure and apparent bias. In this regard, the *Halliburton* arbitration concerned a Bermuda Form arbitration, and the Supreme Court observed that it was not established practice for arbitrators in Bermuda Form arbitrations to be appointed on multiple tribunals arising out of the same subject matter. Whilst the decision of the Supreme Court is therefore useful in its reiteration and confirmation of the general principles of English law, it is also highly fact-specific and therefore, there can be no single rule applied to all London-seated arbitrations with regard to multiple appointments and apparent bias.

Accordingly, while the Supreme Court ultimately found that there was no reason to doubt Mr Rokison's impartiality, the case is a critical reminder that arbitrators must remain conscious of their duty of disclosure in circumstances where they are appointed in multiple arbitrations concerning the same or an overlapping subject matter.

Further, although there was no finding of bias under these facts, the Supreme Court's judgment is likely to comfort many arbitration users because it further highlights the importance of an arbitrator's duty to act fairly and impartially as well as the important role that an arbitrator's duty of disclosure plays in the arbitration process. Conversely, there is likely to be a disappointed subset of the international arbitration community hoping that this judgment would have gone a step further by applying a "gold standard" in respect of apparent arbitrator bias in order to cement London as a leading arbitral-centre. According to the Supreme Court, context is key, but this makes it difficult to ascertain and apply a general principle.

Finally, it is worth noting that the Supreme Court held that disclosure cannot override the duty of privacy and confidentiality, but that consent to disclose could ordinarily be inferred from the arbitration agreement in the context of custom and practice in the relevant field, and that express consent of the parties was not needed to share basic details of the existence of another appointment. It remains to be seen whether parties will include express clauses in their arbitration agreements to control or prohibit any such disclosures and how international arbitral institutions respond to the Supreme Court's established standard.

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[1] [2020] UKSC 48.

[2] *H v L, M, N, and P* [2017] EWHC 137.

[3] *Halliburton Company v Chubb Bermuda Insurance Ltd, M, N and P* [2018] EWCA Civ 817.