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UK Supreme Court Finds Breach of Arbitrator's Duty to Disclose but Denies Bid for His Removal

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International Arbitration

On 27 November 2020, the UK Supreme Court handed down its long-awaited judgment in *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48. The Court unanimously dismissed Halliburton's appeal to remove the court-appointed chair of its tribunal for "apparent bias" in a London-seated insurance coverage arbitration arising out of the *Deepwater Horizon* accident.[1]

The legitimacy of international arbitration depends on both the appearance and the reality of an impartial and independent tribunal. It is thus vitally important that no party have, or be perceived to have, an unfair advantage in the arbitrator appointment process, particularly in regard to the selection of, or any relationship to, the chair of the tribunal. As we cautioned when the Court of Appeal issued its decision in this case two years ago,[2] non-institutional arbitrations conducted in London under so-called "Bermuda Form" arbitration provisions can pose particular concerns to insurance policyholders as it relates to the appointment process for the chair of the tribunal. The UK Supreme Court's judgment, while bringing some welcome clarity to English law in this area, mostly underscores the risks in the appointment process in *ad hoc* arbitrations and suggests that insurance policyholders may face significant and unfair exposure in these cases.

In *Halliburton*, an arbitrator proposed by an insurer (Chubb) to serve as the tribunal chair was rejected by the policyholder (Halliburton) but nonetheless appointed by the High Court in London. The Supreme Court agreed with Halliburton that, as events unfolded, he breached a legal duty to disclose material facts to Halliburton about his appointment by Chubb in an insurance case related to the same *Deepwater Horizon* accident. But the Court, like the two lower courts before it, unanimously denied Halliburton's request for his removal and disqualification, finding no apparent bias.

The message for policyholders is clear: policyholders should resist attempts by insurers to require coverage disputes to be resolved by *ad hoc* arbitration in London (or Bermuda), at least

[1] Covington was lead insurance counsel for BP in connection with the *Deepwater Horizon* accident and related litigation but was not involved in the *Halliburton v Chubb* matter, except insofar as members of the firm agreed with Halliburton's position.

[2] *Covington Alert*, English Court of Appeal Rejects High-Profile Challenge to Arbitrator (8 May 2018).

where the mechanism for selection of the tribunal chair, in the event of a deadlock, is a resort to the courts, where an insurer may secure the selection of its preferred candidate, *even if that candidate is later found to have breached an obligation to disclose potential conflicts of interest.* Policyholders can avoid this risk on renewal by specifying a different mechanism for chair selection and by ensuring that an appropriate arbitral institution is named to serve as an appointing or administering authority. Methods are also available to ensure the selection of an impartial and independent chair, even under policies that contain the unfavorable Bermuda Form language, provided that experienced party-appointed arbitrators commit to such approaches.

Background

Halliburton and Chubb were deadlocked on the appointment of the chair of a tribunal that would hear Halliburton's claims under a Bermuda Form liability insurance policy in connection with the *Deepwater Horizon* accident. Like other Bermuda Form policies, the policy was governed by New York law, provided for *ad hoc* arbitration in London, and included a provision under which the English High Court would appoint the chair, if the two party appointees deadlock on the chair's selection. Despite Halliburton's objection that all of Chubb's proposed chair candidates were retired English judges and QCs rather than lawyers experienced with applying governing New York law, and that insurers had a practice of nominating such candidates already well-known to them, the High Court appointed Chubb's preferred candidate, Kenneth Rokison QC, whom Chubb had nominated in prior arbitrations, including in two cases that were then pending.

Following Rokison's court appointment as chair, he accepted two further appointments in other Bermuda Form arbitrations in which another insured, Transocean, had also brought claims arising from *Deepwater Horizon* involving similar issues. In one, Chubb appointed Rokison as its *party-appointed* arbitrator. In the other, Rokison was appointed as a substitute appointee on behalf of Transocean and another insurer. Rokison failed to disclose either of these appointments to Halliburton, and when it learned of them, Halliburton pressed Rokison for an explanation.

While Rokison acknowledged that disclosure would have been prudent, he stated that his non-disclosures were inadvertent and denied that he owed a duty of disclosure in any event. He thus concluded that there was no basis for his service to be challenged. He nevertheless offered his resignation, if the parties could agree on a substitute chair—that is, he gave Chubb, the party in respect to which it was suggested he had an "apparent bias," a veto power over his removal or resignation. Chubb withheld its consent to Rokison's withdrawal, citing concerns about cost and delay, and Halliburton then applied to the English High Court for an order of removal for apparent bias. Halliburton argued that one might reasonably perceive that Chubb had an unfair advantage in regard to how Rokison, as the chair in its case, might react to certain issues and arguments in the case, or unfair influence over Rokison financially, and that Rokison's failure to disclose his related appointments established his *apparent* (not actual) bias. After losing at first instance and on appeal, Halliburton appealed to the UK Supreme Court. In light of the significance of the issues for the field of international arbitration, the Court granted permission to the ICC, LCIA, CIArb, LMAA, and GAFTA to intervene and submit their observations.

UK Supreme Court's Decision and Key Principles

The Supreme Court unanimously dismissed Halliburton's appeal, holding that while Rokison breached a legal duty of disclosure by failing to disclose his appointment in the *Transocean v Chubb* arbitration to Halliburton, a fair-minded and informed observer, looking at the facts and circumstances at the time of Halliburton's application for his removal, would not conclude that there was a real possibility of bias. While a disappointing judgment for policyholders, *Halliburton* is now the leading English law case on an arbitrator's duty of disclosure and how to assess "apparent bias." The key principles are that:

- **The duty of impartiality is continuous and applies to all arbitrators.** In English law, the duty of impartiality enshrined in section 33 of the English Arbitration Act applies to all arbitrators, whether party-appointed or not. This has long been English law. But the Court's analysis arguably fails to fully appreciate the practical reality that the tribunal chair has outsized significance (*i.e.*, where the other two tribunal members are party appointees) and thus, could be argued to owe a higher duty of disclosure, impartiality, and independence, particularly where he or she serves as a party appointee in related cases for one of the parties.
- **The duty to disclose and notion of apparent bias are subject to objective standards.** In an English-seated arbitration, whether an arbitrator has a duty to disclose a particular matter (above and beyond what any agreed rules might require) depends on whether a "fair-minded and informed observer" *might* reasonably consider the matter to call into question the arbitrator's impartiality. This differs from the subjective standard imposed by the IBA Guidelines, and the ICC and LCIA Rules, which the Court observed require disclosure "*based on the perceptions of the parties*." The objective standard of the "fair-minded and informed observer" is also used to assess whether there is "a real possibility of bias," which is required to justify removal of an arbitrator under the English Arbitration Act. The objective observer must consider a broad contextual framework, including the facts of the particular case, within the context of international arbitration, when assessing the parties' objective expectations of impartiality.
- **The duty of disclosure is a legal duty under English law.** An arbitrator has a duty to disclose facts and circumstances that would or *might* give rise to justifiable doubts about his or her impartiality. This duty is a component of the arbitrator's statutory duty to act fairly and impartially under section 33 of the Act, *not* merely a matter of good arbitral practice. As the submissions of the LCIA, ICC, and CIArb made clear, this is a welcome clarification following the conflicting decisions of the High Court and Court of Appeal on this point. That said, while the Court was at pains to emphasize the importance of this duty in affording parties like Halliburton the opportunity to know of and address potential conflicts, the Court articulated no necessary remedy or sanction for the arbitrator's breach, and Halliburton did not obtain one. Also, although the Supreme Court rejected the Court of Appeal's finding that an arbitrator has *no* positive duty to make reasonable enquiries into potential conflicts of interest, the Court declined the opportunity to confirm the content and scope of any such duty, deferring this important question to another day.
- **The Supreme Court clarified the relevant time for assessing the duty of disclosure and the possibility of bias.** When assessing an arbitrator's duty of disclosure, a court must consider the facts and circumstances available *at the time of disclosure*, and ignore facts that the arbitrator could not have known at that time. By contrast, a court will assess the possibility of bias by reference to the facts and circumstances known by the

objective observer *at the date of the hearing to remove the arbitrator*. The timing of any arbitrator challenge will likely be an important consideration in future cases.

- **The duty of disclosure does not override an arbitrator's duty of privacy and confidentiality.** An arbitrator may only disclose confidential information with the relevant parties' consent. If not obtained expressly, consent may be inferred from the underlying arbitration agreement in the context of the customs and practice of the arbitration field. In institutional arbitrations (e.g., under the ICC or LCIA Rules), consent can be inferred from the institutional rules. In *ad hoc* arbitrations, the position will vary. In either case, if consent is withheld, and the arbitrator cannot discharge the duty of disclosure, he or she will need to decline the appointment. Issues around consent and disclosure will be a further consideration for parties seeking to remove an arbitrator in future cases.

Application of the Principles to the *Halliburton* Case

Taking into consideration the above-mentioned principles, the Supreme Court considered that an arbitrator's acceptance of appointments in multiple references concerning the same or overlapping subject matter with only one common party may give rise to an appearance of bias, particularly where there is an asymmetry of information and inequality of arms that would exist for the uncommon party (as is typical in Bermuda Form arbitrations). The Court concluded that, going forward, "*under English law multiple appointments … must be disclosed in the context of Bermuda Form arbitrations in the absence of an agreement to the contrary between the parties to whom disclosure would otherwise be made*."[3] The Court noted that "*it has 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. This is unsurprising as the claimant in such an arbitration may often not be a repeat player while an insurance company is much more likely to be*."[4] Accordingly, the Court found Rokison owed and breached his duty of disclosure by failing to disclose a subsequent related appointment.

The Court did not find apparent bias, however. It held that the fair-minded and objective observer would have regard to a breach of the duty of disclosure in assessing whether there was a real possibility of bias, which might be grounds for removal, and at the date of his appointment in the Transocean v Chubb arbitration, Rokison's failure to disclose his appointment to Halliburton may well have given rise to a real possibility of bias. But the Court held the appearance of bias must be assessed at the date of the hearing for removal, and it found this to be an issue of "*central importance to the outcome*" in *Halliburton*, as it resulted in the Court placing significant weight on the facts that emerged after Rokison's breach of duty. This included Rokison's explanation that his failure to disclose was a genuine error, the temperate tone of his reaction to Halliburton's challenge, and the fact that the overlap with the *Transocean v Chubb* arbitration had been significantly narrowed as a result of the early resolution of that arbitration, which suggested to the Court that the risk that Chubb would gain an unfair advantage over Halliburton by being able to test its case before Rokison, without Halliburton's knowledge, was reduced or eliminated.

[3] *See* paragraph 137 of the *Halliburton* judgment.

[4] *Id*.

Key Lessons

The Supreme Court's judgment significantly clarifies the governing standards under English law for arbitrator disclosures and challenges. It also underscores the fact-specific nature of the enquiry and may make the practical application of the Court's articulated principles a matter for future development and discussion, as well as ground for future disputes.

In the specific context of Bermuda Form arbitrations, the judgment is disappointing from a policyholder perspective, as it suggests that the courts may not police issues of apparent bias as robustly as policyholders would reasonably expect in circumstances where, as the Court acknowledged, *"the [policyholder] claimant … may often not be a repeat player while an insurance company"* (and the arbitrators it nominates) "*is much more likely to be."* That said, the Court found the arbitrator in question to have breached his legal duty of disclosure, and insurers and lower courts are now on notice, both of that result and of the Court's appreciation of the need for heightened scrutiny in respect to these concerns in Bermuda Form cases.

Parties in all London-seated arbitrations should actively consider how best to protect and advance their interests in ensuring impartiality and independence in the wake of this judgment, and insurance policyholders with Bermuda Form arbitration provisions should be vigilant to address this issue in their annual policy renewals, as well as in connection with any pending or future Bermuda Form arbitrations. More fairly worded arbitration provisions, more active and effective use of arbitral institutions and rules, and more neutral processes for the selection of arbitrators, are readily available. Given the high stakes involved, we urge policyholders to pay particular attention to this judgment and issue.

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