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UK Supreme Court Delivers Landmark Judgment on Arbitrator Bias and Duty of Disclosure

by Ema Vidak Gojkovic

Summary

The U.K. Supreme Court delivered on 27 November 2020 its much-awaited decision in *Halliburton v. Chubb*.[1] The case analyzes an arbitrator's duty to disclose multiple appointments in related arbitrations. Given the importance of the question before the Court, five arbitral institutions and associations intervened in the case (ICC, LCIA, CIArb, GAFTA, LMAA).

The *Halliburton* decision clarified that any arbitrator in English-seated arbitrations is under a statutory duty to disclose circumstances that may give rise to bias. While a similar (or stricter) duty already applies in most institutional arbitrations under their arbitration rules, the *Halliburton* decision extended the duty as a matter of law to ad hoc arbitrations seated in England as well.

Arbitrators are required to disclose any facts or circumstances which "might" give rise to "justifiable doubts" of bias. This test is significantly broader than the test required for removing an arbitrator for apparent bias, where an applicant must show that a fair-minded and informed observer at the date of the removal hearing "would" infer a "real possibility" of bias.

The Court also confirmed that a duty to disclose might include the fact of multiple appointments in related arbitrations. It will depend on the circumstances of the case and the type of arbitration. In maritime, sports, and commodities arbitrations, for example, it is customary to engage the same arbitrator in multiple overlapping arbitrations and would not require disclosure.

However, suppose an arbitrator fails to disclose multiple appointments that ought to have been disclosed. In that case, the failure to disclose will in itself be a relevant consideration when an arbitrator is challenged for bias. It may therefore be prudent for arbitrators to err on the side of disclosure, including ongoing disclosure in pending cases.

Another welcomed feature of the *Halliburton* decision is the Court's guidance on how the arbitrators should navigate and reconcile their duty of confidentiality and duty of disclosure, which sometimes may compete. The Court provided a roadmap that helps the arbitrators make relevant disclosures under the implied consent theory, applicable to any LCIA, ICC and ICSID arbitrations.

Finally, the Court took a firm stance on treating wing arbitrators identically to chairs when it comes to the standard of impartiality. The Court refused to grant more leniency to party-appointed arbitrators. The objective test for apparent bias applies with the same force to both.

Factual Background

After the explosion of the Deepwater Horizon oil rig in the Gulf of Mexico in 2010, Halliburton and Transocean raised claims under their respective insurance policies with Chubb. Chubb refused the claims. The policies directed any dispute to an *ad hoc* arbitration in London.

Halliburton initiated the first arbitration against Chubb in January 2015 (first arbitration). Since the two wing arbitrators could not agree on the chair, the English High Court appointed Kenneth Rokison QC.

Following his appointment, Mr. Rokison accepted a second appointment in an arbitration between Chubb and Transocean, which also related to the Deepwater Horizon explosion (second arbitration). In the second arbitration, Mr. Rokison disclosed to Transocean his role in the first arbitration. However, he did not disclose his appointment by Chubb in the second arbitration to Halliburton.

Mr. Rokison also subsequently accepted joint appointment in an insurance arbitration brought by Transocean against a different insurer, also related to the Deepwater Horizon explosion (third arbitration). This appointment was also not disclosed to Halliburton, but it was not the focus of the two appeals.

Halliburton applied to the High Court under section 24(1)(a) of the Arbitration Act 1996 to remove Mr. Rokison as chair in the first arbitration. It alleged that Mr. Rokison's appointment in the second arbitration, and the lack of related disclosure, gave rise to justifiable doubts as to his impartiality. The High Court rejected Halliburton's application.

Halliburton then appealed the High Court decision to the Court of Appeal, which also dismissed the appeal. The case reached the Supreme Court in November 2019.

Given the importance of the issues addressed, the Court allowed intervention from the ICC, the LCIA, the CIArb, the LMAA, and the GAFTA. The ICC, LCIA and CIArb advocated for a clear legal duty of disclosure and

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argued that a failure to disclose should be treated as giving rise to an appearance of bias.[2] The LMAA and GAFTA took a contrary position, and argued that in their specific field, it is normal for arbitrators to be appointed in multiple disputes with overlapping subject matter, and that there was no need to impose a blanket disclosure obligation on them too.[3] Balancing both approaches led the Court to make a strongly fact-driven decision.

Key Takeaway Points

The *Halliburton* decision sheds light on a number of points that will matter to practitioners, including, in particular, arbitrators in English-seated arbitrations:

(1) Unless the parties agree otherwise (implicitly or explicitly), an arbitrator is subject to a *legal duty* under English law to disclose facts and circumstances which "would or might reasonably give rise to justifiable doubts as to his or her impartiality."[4] The duty to disclose such facts forms part of the statutory duty of impartiality.

It is important to note that the Halliburton arbitrations were all *ad hoc* arbitrations, not subject to any institutional rules. While the duty to make disclosure is well-established in institutional arbitrations, prior to the Halliburton decision it was not clear if the same duty would apply in ad hoc arbitrations. In Halliburton, the Court confirmed that the duty to disclose exists as an independent statutory duty under English law, and is not a mere good arbitral practice.

Lord Hodge noted that there is indeed an implied contractual term between the arbitrator and the parties that the arbitrator will be impartial.[5] An arbitrator would breach that duty if she knew of circumstances that might subject her to removal but failed to disclose them.[6] Unless the parties have expressly or implicitly waived the right to disclosure, such disclosure is a legal obligation.[7]

Moreover, the Court recognized that while the failure to disclose will not necessarily suffice to remove an arbitrator for bias, it will be a factor that the "fair-minded and informed observer" would consider when deciding on apparent bias in considering arbitrator removal.[8]

(2) When addressing an allegation of apparent bias in an English-seated arbitration, the English courts will apply the *objective test* of the fair-minded and informed observer, namely, "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."[9] The Courts will have regard to the particular characteristics of international arbitration.

The test for apparent bias under English law is an objective test, and it does not turn on the subjective views of parties. The Court's view contradicts the approach taken by many institutional arbitration rules, which favor a subjective test as "in the eyes of the parties."

In explaining the applicable test, the Court emphasized that an "informed" and "fair-minded" observer will naturally appreciate the importance of the context of international arbitration.[10]

"Under this decision, in ad hoc proceedings seated in the U.K. : 'Arbitrators are required to disclose any facts or circumstances which "might" give rise to "justifiable doubts" of bias.'"

The Court recognized that there are differences between court resolution of disputes and arbitration which may affect the bias analysis, including that: (i) judges resolve civil disputes in open court, whereas arbitration is often private and confidential;[11] (ii) unlike at court, awards are typically subject to no or only a very limited review;[12] (iii) unlike judges, arbitrators are paid by the parties and therefore derive a financial benefit from appointments, which may make them reluctant to alienate parties and risk future appointments;[13] (iv) arbitrators come from different backgrounds, legal traditions and ethical norms, and may have divergent views on impartiality and independence;[14] (v) in multiple arbitrations concerning an overlapping subject matter and one common party, a non-common party has no way of knowing of the submissions and evidence submitted to other tribunals—unlike court where any party can sit in on proceedings or demonstrate legal interest to be granted access to case documents.

(3) The objective test for apparent bias applies equally to wing arbitrators and to chairs, regardless of how they were appointed. All arbitrators are subject to the same disclosure obligations and the same standard of impartiality.

The court rejected the suggestion that when it comes to disclosures, a party-appointed arbitrator should be afforded

greater leniency than the chair. The Court confirmed:

> that is not a distinction which English law would recognize as a basis for a party-appointee avoiding the obligation of disclosure. The disagreement among people involved in international arbitration as to the role of the party-appointed arbitrator is a circumstance which points to the disclosure of such multiple nominations; it does not provide a ground for nondisclosure.[15]

While there has been a considerable debate between the practitioners as to the role and reality of "gun for hire" arbitrators, the Court's view echoes the position of most other courts and arbitral institutions around the world: party-appointed arbitrators are subject to strict disclosure obligations, to the same extent as chairs.

(4) The Court recognized that there might be circumstances in which the acceptance of multiple appointments with overlap with only one common party "might reasonably cause the objective observer to conclude that there is a real possibility of bias."[16] However, there are some arbitration practices for which multiple appointments on related arbitrations are standard and expected. There, this rule would not apply.

The result of this query will be fact-driven, and will depend on the custom and practice in the relevant field of arbitration. For example, Lord Hodge acknowledged that there are practices in maritime, sports, and commodities arbitrations in which engaging the same arbitrator in multiple overlapping arbitrations does not need to be disclosed because the parties expect it and do not generally perceive it as questioning arbitrator's impartiality.[17] Accordingly, parties who refer their disputes to institutions with such practice accede to this practice and accept it.

Disclosure is subject to an arbitrator's privacy and confidentiality obligations. Where such obligations apply, the parties' express or inferred consent is required for disclosure. The ICC Rules, LCIA Rules and ICSID Rules all provide a basis for consent to be inferred.

One of the most intriguing aspects of the *Halliburton* decision is its discussion of the relationship between the duty of disclosure and the duty of privacy and confidentiality. The Court stated that where disclosure is required and the information to be disclosed is subject to the duty of privacy and confidentiality, disclosure can only be made if the parties to whom the duty is owed consent. However, and importantly, such consent need not always be express. It may also "be inferred from the arbitration agreement itself in the context of the custom and practice in the relevant field."[18]

"The Court also acknowledged that the ICC Rules, LCIA Rules and ICSID Rules all provide a basis for the inference that parties to arbitrations under those rules consented to disclosure of information to parties in prospective arbitrations with the same arbitrator."

The Court also acknowledged that the ICC Rules, LCIA Rules and ICSID Rules all provide a basis for the inference that parties to arbitrations under those rules consented to disclosure of information to parties in prospective arbitrations with the same arbitrator.[19] However, in the absence of consent (expressed or implied), the arbitrator will have to decline the new appointment.[20]

Case Outcome

Ultimately, applying the principles discussed above, the Court held that Mr. Rokison had been under a legal duty to disclose his appointment in the second (Transocean) arbitration to Halliburton because, at the time of that appointment, the existence of potentially overlapping arbitrations with only one common party was a circumstance that might reasonably give rise to a possibility of bias. The arbitrator's failure to disclose that information constituted a breach of his legal duty.

However, and taking into account all the circumstances of the case, the Court concluded that the fair-minded and informed observer *at the date of the removal hearing* would not infer a real possibility of bias.[21] Mr. Rokison explained that he had failed to disclose the appointments due to an honest oversight. The parties did not challenge his explanation.[22] The Court concluded that an objective observer would not have inferred a "real possibility" of bias based on Mr. Rokison's oversight for six key reasons: First, the time sequence of the three arbitrations (with the second and third arbitrations following the first arbitration) explained why Mr. Rokison did not identify the need for disclosure in the first arbitration of his appointments in the second and third arbitrations. Second, it was unlikely that there would be any overlap in evidence or legal submissions in the arbitrations in question, and Chubb was therefore not likely to gain any unfair advantage by virtue of participating in arbitrations where Halliburton was not present. Third, Mr. Rokison did not receive any secret financial benefit through his appointments. Fourth, the Court did not believe that Mr. Rokison has subconscious ill-will in respect of the robust challenge made by Halliburton.[23] Finally, Lord Hodge highlighted that there had been a lack of clarity at the time on whether disclosure was a legal duty under English law. Given that the *Halliburton* decision has now clarified that standard, this criterion will not apply to bias analysis of decisions after *Halliburton*.

The Impact of the *Halliburton* Decision on Future Arbitrations

In the aftermath of *Halliburton*, some arbitrators may be even more inclusive and expansive when deciding what to disclose. However, for most arbitrators, the *Halliburton* decision will not significantly change their practice. Arbitrators already tend to err on the side of disclosure. And the disclosure requirements of many arbitral institutions are stricter than those under English law.

Regretfully, the *Halliburton* decision left some questions open. To name some, the Court did not provide guidance on how repeat appointments by the same parties should be treated in impartiality analysis as opposed to disclosure requirements. How many repeat appointments are too many? Another intriguing question is whether the parties will trust the arbitrators to take the role of the "fair-minded and informed observer" and to evaluate their own bias. Some parties may feel that it is they who are best placed to flag if a fact raises questions for appearance of bias. But if the decision on disclosure rests solely with the arbitrator, and the arbitrator decides not to disclose, how can the parties challenge that decision?

The solution might be to ask of the arbitrators to do more than is required under the English statutory law. As one commentator stated, even if not required, the arbitrator evaluating what to disclose should "stretch" his or her mind to see the facts from the "eyes of the parties."[24] After all, in the system built on party consent, it is their expectation that matters most.

Endnotes

1. *Halliburton Company v. Chubb Bermuda Insurance Ltd* [2020] UKSC 48.
2. *Halliburton Company v. Chubb Bermuda Insurance Ltd* [2020] UKSC 48, at para. 42.
3. *Id.* at para. 45.
4. *See* Section 24(1)(a) of the English Arbitration Act (1996).
5. An arbitrator's statutory duties under section 33 of the 1996 Arbitration Act. *See Halliburton Company v. Chubb Bermuda Insurance Ltd* [2020] UKSC 48, at para. 76.
6. *Id.* For an arbitrator's removal, see section 24 of the 1996 Arbitration Act.
7. *Id.* at para. 78.
8. *Id.* at para. 155.
9. *Porter v. Magill* [2001] UKHL 67, at para. 103.
10. *Helow v. Secretary of State for the Home Department* [2008] UKHL 62. *See also Halliburton Company v. Chubb Bermuda Insurance Ltd* (formerly known as Ace Bermuda Insurance Ltd) [2020] UKSC 48, at paras. 56-63.
11. *Halliburton Company v. Chubb Bermuda Insurance Ltd* (formerly known as Ace Bermuda Insurance Ltd) [2020] UKSC 48, at para. 56.
12. *Id.* at para. 58.
13. *Id.* at para. 59.
14. *Id.* at para. 60.
15. *Id.* at para 144.
16. *Id.* **at para. 152.**
17. *Id.* at para. 87.
18. *Id.* at para. 88.
19. *Id.* at para. 90.
20. *Id.* at para. 88.
21. *Id.* at para. 149.
22. *Id.* at para. 149.
23. *Id.* at para. 149.
24. Stephen R. Bond, *The Selection of ICC Arbitrators and the Requirement of Independence*, Arbitration International, Kluwer Law International, 1988, v. 4, at pp. 303-304.