Quadrant
CHAMBERS

Halliburton v Chubb: is timing everything?

Simon Rainey QC and Gaurav Sharma

29 November 2020

On 27 November 2020, the Supreme Court handed down its highly anticipated judgment in ***Halliburton Company v Chubb Bermuda Insurance Ltd*** [2020] UKSC 48, unanimously dismissing Halliburton's appeal. In doing so, it found that, at the relevant time of assessment, a fair-minded observer would not have considered that the circumstances gave rise to reasonable doubts as to the impartiality of the chairman of the tribunal hearing the parties' dispute arising out of the Deepwater Horizon incident in 2010.

Critics of the decision will undoubtedly focus on the consequences of the court's view that the "relevant time" was the time of the *hearing* to remove chairman under section 24(1)(a) of the Arbitration Act 1996 (the **Act**), rather than the time of his *acceptance* of an appointment by Chubb in a separate arbitration – also relating to non-payment by Chubb under an insurance policy related to the Deepwater Horizon incident – around six months after his appointment in the arbitration between Halliburton and Chubb.

However, the decision brings finality to a key issue in the English law of arbitration, namely the existence of a legal duty to disclose an arbitrator's participation in other arbitrations involving the same subject matter and a common party. In addition, it delivers clarity in relation to certain other aspects of disclosure and arbitral practice more generally – notably including the interaction between the duty of disclosure on one hand and the obligation of confidentiality on the other, and the application of the English rules on disclosure just as equally to party-appointed arbitrators as to tribunal chairs.

The Disputes, The Arbitrations, The Appeals

The Deepwater Horizon was an offshore oil and gas drilling rig leased by BP and operated by Transocean at BP's Macondo Prospect in the Gulf of Mexico. Cementing and well monitoring services were provided by Halliburton. On 20 April 2010, the rig experienced a major blowout in the course of the temporary abandonment and plugging of a well, resulting in the tragic loss of several rig workers' lives, significant oil spills and environmental damage, and the sinking of the rig on 22 April 2010.

The US Government brought proceedings against BP, Transocean and Halliburton in relation to the damage caused by the incident. A trial to determine liability before the Federal Court for the Eastern District of Louisiana resulted in a judgment on 4 September 2014 apportioning blame in percentage terms as between the three defendants. Halliburton settled certain of the US Government's claims against it in the amount of US$1.1 billion, but its liability insurer, Chubb, resisted its subsequent insurance claims on the basis that the settlement amount was not reasonable. Accordingly, Halliburton commenced London arbitration proceedings against Chubb under its Bermuda Form policy, resulting in the High Court's appointment on 12 June 2015 of Mr Kenneth Rokison QC as chair of the tribunal in default of agreement by the two party-appointed arbitrators.

Mr Rokison subsequently accepted an appointment by Chubb in December 2015 in its separate arbitration with Transocean arising out of the same incident following Transocean's settlement of claims with the US Government; and an appointment in a third arbitration arising out of the same incident between Transocean and another insurer in August 2016.

At the time, Mr Rokison made no disclosure in the arbitration between Halliburton and Chubb of his appointment in the other two references. In November 2016, Halliburton became aware of these appointments and applied to the court pursuant to section 24(1)(a) of the Act to remove him as chair of the tribunal on the grounds of perceived bias. The High Court dismissed the application following a hearing on 12 January 2017 and Halliburton appealed against this decision. The Court of Appeal dismissed Halliburton's appeal, resulting in Halliburton's appeal to the Supreme Court.

The Legal Duty To Disclose Multiple Appointments With A Common Party

The issues before the Supreme Court were (i) whether and to what extent an arbitrator may accept appointments in multiple references concerning the same or overlapping subject matter with only one common party without thereby giving rise to an appearance of bias, and (ii) whether and to what extent the arbitrator may do so without disclosure.

Giving the leading judgment, Lord Hodge made clear that in cases of apparent bias such as the present, the court was not concerned "to 'make windows into men's souls' in search of an animus against a party or any other actual bias, whether conscious or unconscious." Instead, its task was to examine "how things appear objectively". [Para. 52]

The analysis was done in the context of section 24(1)(a) of the Act which allows for the removal of an arbitrator where "circumstances exist that give rise to justifiable doubts" as to the arbitrator's impartiality. The court considered that this could be the case "if the arbitrator at and from the date of his or her appointment had such knowledge of undisclosed circumstances as would, unless the parties waived the obligation, render him or her liable to be removed under section 24 of the 1996 Act". Agreeing with the Court of Appeal, the Supreme Court affirmed that this gave rise to a legal duty to make a disclosure of such matters which would otherwise cause the arbitrator to be in breach of their "statutory obligation of fairness". In other words, "an arbitrator who knowingly fails to act in a way which fairness requires to the potential detriment of a party is guilty of partiality". [Para. 78]

The court accepted the submissions of the ICC, LCIA and CIArb who favoured the recognition of such a legal duty in international arbitration proceedings; and those of the GAFTA and the LMAA to the effect that parties who chose to arbitrate their commodities and shipping disputes under those specialist rules understood that the smaller pool of specialist arbitrators involved might well act in multiple arbitrations arising out of the same subject matter, without needing to disclose that fact. Lady Arden reinforced the importance of having clear evidence of a practice of dispensing with parties' consent for arbitrators to appear in multiple arbitrations: while the English courts might trust arbitrators to decide cases on the basis of the evidence before them and set aside any inequality of arms and material asymmetry of information, this was something that "may not translate easily for the many parties to arbitrations who are familiar with different legal systems". [Para 164]

Right Place, Wrong Time

The question therefore arose whether participants in Bermuda Form arbitrations would typically expect disclosure of an arbitrator's involvement in related arbitrations. The court found no evidence of parties acceding to a general practice of non-disclosure, which was also consistent with the fact that Mr Rokison had made disclosures to the parties in the other two arbitrations that arose out of the present subject matter of his role in the arbitration between Halliburton and Chubb. Accordingly, the court found that Mr Rokison's appointment in the second and third arbitrations should have been disclosed to Halliburton, and his failure to do so was a breach of legal duty which meant that a fair-minded and informed observer may well have concluded that there was a real possibility of bias. [Para 147]

Ultimately this was of little consequence, however, as the court ruled that the relevant time for the determination of possible bias was not when he was appointed in the second reference (December 2015) – but the date of the hearing of the application to remove him as an arbitrator (January 2017).

This, said the court, was because of section 24(1)(a) of the Act's use of the present tense requiring an examination of whether circumstances "exist" when the issue of an arbitrator's removal arises for determination by the court. By the time of the removal hearing concerning Mr Rokison, Halliburton had discovered his appointment in the other arbitrations and questioned him about that in correspondence, resulting in him providing an explanation for his failure to disclose – based on an oversight and belief that there would not be material overlap between the different sets of proceedings. Halliburton accepted this explanation as being truthful, and the court was not persuaded that a fair-minded and informed observer assessing the situation at the date of the removal hearing – having the benefit of Mr Rokison's explanation for his failure to disclose – would infer that there was a real possibility of bias on Mr Rokison's part. [Para 149]

So, Arbitrators Have A Statutory Duty to Disclose. But What If They Don't?

In their judgments, both Lord Hodge and Lady Arden recognised the risk of affirming the existence of the legal duty to make a disclosure which might not lead to an arbitrator's disqualification or removal if not complied with. Lady Arden acknowledged that "There is a concern that the duty of disclosure carries no sanction if an application is made to the court about a non-disclosure by the arbitrator and fails." But in her view, this missed the point, which was that "it would

still be a breach of the terms of appointment with such consequences, if any, as the law of contract prescribes. In addition, a person may commit a breach of contract but incur no liability as a result, and the situation postulated falls into that category." [Para 169]

Lord Hodge explained how in circumstances of a breach of the legal duty to disclose, an "arbitrator might, depending on the circumstances, face an order to meet some or all of the costs of the unsuccessful challenger or to bear the costs of his or her own defence." [Para 111]

In other words, the failure would amount to a breach of a strictly legal obligation with the usual consequences associated with such a breach – though it would have no bearing on the situation obtaining at the date of a removal hearing and the assessment to be carried out then.

Conclusion

The Supreme Court's decision may cause disquiet in some quarters, especially amongst those who expect a failure to make a material disclosure to have more significant consequences – notably disqualifying an arbitrator from acting, or continuing to act, altogether. The fact that the disclosable information in this case came to light by chance will only reinforce the sense of arbitrariness that some observers may have in the idea of assessing the issue at some point in time after the disclosure should have been made, but was not. This in turn risks perpetuating any concerns participants in international arbitration proceedings may have as to the willingness and ability of English law to police the conduct of those who decide their disputes and their failure to make material disclosures affecting the fairness of proceedings.

More generally, one cannot help but wonder whether the court's decision might result in some arbitrators showing less concern for their duty to make disclosures of relevant information in English-seated arbitrations in future. This would be a shame, especially in light of the highly confidential nature of commercial arbitration and the difficulty of obtaining credible information as to the reliability and trustworthiness of arbitrators in advance of appointment as things stand.

However, it is not a given, and we must hope that it will not be the case. Further, we should welcome the fact that the court's decision brings clarity as to the nature of an arbitrator's legal duty of disclosure, and how and when the examination of apparent bias will fall to be conducted.

Equally, we should be thankful for the court's clarification as to the interaction between the duty to disclose involvement in multiple proceedings and any duties of confidentiality owed by that arbitrator to the various parties involved across the disputes. Lady Arden explained that "the implied term as to confidentiality is independent of the implied term that the arbitrator should comply with his impartiality duty. It is truly a self-standing term". [Para 175.] A customary high-level disclosure made on an anonymised basis will usually suffice to provide a party with the necessary information to enable it to assess whether or not it wishes to object to an arbitrator's appointment. However, if further information that is confidential is reasonably required by a party to make that assessment and would require another party's consent in order to be divulged, then "if consent is not forthcoming, the arbitrator will have to decline the proposed appointment". [Para. 188] It is not hard to appreciate the reasonableness of Lady Arden's logic: arbitrators are, for better or worse, private judges who undertake paid appointments on a commercial and contractual basis. If a request for consent to provide detailed information is made in the context of "the voluntary decision of the arbitrator to pursue a further appointment" (para. 180) and refused, then that is tough luck for the arbitrator in question who will simply "have to decline the proposed appointment". (Para. 188).

Finally, we should congratulate the Supreme Court for spelling out in terms that party-appointed arbitrators are subject to precisely the same obligations, and precisely the same standards, as tribunal chairs when it comes to impartiality and considerations of fairness. This point was made in passing in reference to Halliburton's appointment of Mr William Park as its arbitrator in three references against different insurers in insurance claims arising out of the Deepwater Horizon disaster, without any disclosure; juxtaposed with Mr Park's statement of "profound disquiet about the arbitration's fairness" made when the award was rendered in the Halliburton v Chubb arbitration, based on Mr Rokison's non-disclosure of other appointments (Para. 26). The court was, understandably, unimpressed by the suggestion that a party-appointed arbitrator should be afforded greater leniency in respect of his or her choice of disclosures compared with a chair, since

"that is not a distinction which English law would recognise 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". (Para 144). This view echoes the position taken by the courts of other major arbitral centres around the world in relation to the strict disclosure obligations of party-appointed arbitrators (see for example the 25 February 2020 decision International Commercial Chamber of the Paris Court of Appeal in Dommo v Barra y Enauta). Moreover, it is hugely reassuring to hear the court reaffirm what all participants in international arbitration proceedings hope and expect to be the case in respect of each and every one of the arbitrators mandated with the resolution of their legal dispute.

SIMON RAINEY QC and GAURAV SHARMA

JOIN OUR MAILING LIST

Simon Rainey QC

"Truly a super silk - devastatingly sharp and exceptional on his feet." (Legal 500 UK, 2020)

Simon Rainey QC is one of the best known and most highly regarded practitioners at the Commercial Bar. He has a reputation which is second to none for his intellect and legal analysis ("fantastically intelligent and tactically astute"). He is acclaimed for his advocacy skills ("a stunning advocate") and his cross-examination ("excruciatingly superb"). But he is equally well known to his clients as a cheerful team player, who rolls up his sleeves in long and complex trials and arbitrations and who prides himself on high standards of client care ("incredibly user friendly" and "lovely to work with").

Winner: International Arbitration QC of the Year 2020, Legal 500 (and shortlisted 2017 and 2019). Winner: Shipping and Commodities QC of the Year 2017, both Chambers & Partners and Legal 500 (and shortlisted 2018; 2019; 2020). Winner: Top 10 Global Maritime Lawyers of 2017 (Lloyd's List); and again in 2019.

> view Simon's full profile simon.rainey@quadrantchambers.com

Gaurav Sharma

"User-friendly, thoughtful and measured in everything he does, he brings invaluable commercial experience and insight to the table." (Legal 500 2021)

Gaurav is an international arbitration specialist with particular expertise acting in disputes in the energy industry. He is a highly accomplished advocate having appeared as lead counsel in international arbitrations throughout his career. He is dual-qualified, having passed the Paris bar exams in 2008 to become an avocat. As such, he is equally adept at handling civil and common law disputes. Gaurav is recommended as a leaidng barrister in the Legal 500.

Before joining Quadrant, Gaurav was "Counsel" at the specialist international arbitration law firm Three Crowns LLP.

> view Gaurav's full profile gaurav.sharma@quadrantchambers.com