HALLIBURTON v CHUBB:

A VALUABLE INSIGHT INTO THE APPROACH TO ARBITRATOR BIAS TAKEN BY DIFFERENT INDUSTRY SECTORS

Paul Buckingham and James Thompson review the long awaited decision by the Supreme Court on the question of arbitrator bias or, more accurately, the appearance of bias.

The recent decision of the Supreme Court in Halliburton Company v Chubb Bermuda Insurance[1] raises important issues concerned not just with the domestic arbitration practice but with the approach of English law to an arbitrator's obligations of disclosure from an international perspective.

The facts of the case are quite complex and the principles to be drawn from the decision require an understanding of the underlying procedural history.

Factual Background

The proceedings concerned a dispute arising out of the explosion and fire on the Deepwater Horizon oil rig in the Gulf of Mexico in 2010. The disaster occurred when a well, which was in the process of being plugged and temporarily abandoned, suffered a blow out.

Transocean Holdings LLC ("Transocean") was the owner of the rig, which was leased to BP Exploration and Productions Inc ("BP"). Transocean had been engaged by BP to provide crew and drilling teams, while Halliburton provided cementing and well-monitoring services to BP in relation to the temporary abandonment of the well.

Both Transocean and Halliburton purchased liability insurance on the Bermuda Form from ACE Bermuda Insurance Ltd, now called Chubb Bermuda Insurance Ltd ("Chubb"). The Bermuda Form policy was created in the 1980s to provide high excess commercial general liability insurance to companies in the United States after the market for such insurance had collapsed. Such policies usually contain a clause providing for disputes to be resolved by ad hoc arbitration not subject to institutional rules. The policies purchased by Transocean and Halliburton were on materially similar terms including an arbitration clause.

The arbitration clause in the policy taken out by Halliburton provided for arbitration in London by a panel of three arbitrators, one appointed by each party and the third to be agreed by the two nominated arbitrators. In default of agreement, the appointment of the third was to be made by the High Court in London. Since the seat of the arbitration was London, English law governed the procedure (albeit the substantive law of the contract was New York law).

A dispute arose between Halliburton and Chubb which Halliburton referred to arbitration ("Reference 1"). Halliburton and Chubb each appointed an arbitrator. However, the party-appointed arbitrators were not able to agree on the appointment of the chairman and there was therefore a contested High Court hearing in the summer of 2015 before Flaux J in which each party put forward several candidates. Flaux J appointed one of those put forward by Chubb, Mr Kenneth Rokison QC, an arbitrator with (as the Supreme Court subsequently noted) *"a long-established reputation for integrity and impartiality"*.

Prior to accepting the appointment, Mr Rokison disclosed that he had previously acted as arbitrator in several references in which Chubb was a party, including as Chubb's nominated arbitrator, and was currently appointed in two pending references involving Chubb. The High Court did not consider these to preclude Mr Rokison from being appointed in the present reference.

Thereafter, Mr Rokison was appointed in two further arbitrations as follows:

a. In December 2015, he accepted an appointment by Chubb in relation to a claim by Transocean also arising out of the Deepwater Horizon Incident ("Reference 2");

b. In August 2016, he accepted an appointment in a further arbitration arising out of the Deepwater Horizon Incident involving a claim by Transocean against a third party insurer ("Reference 3").

Before his appointment in Reference 2, Mr Rokison disclosed his appointment in Reference No. 1 and the other Chubb arbitrations to Transocean, who did not object. However, Mr Rokison did not disclose his proposed appointment in Reference 2 to Halliburton, nor was there disclosure of Mr Rokison's appointment in Reference 3 to Halliburton.

1 [2020] UKSC 48

The overall position is set out in the table below:

Reference	Appointing party	Claimant	Respondent	Disclosure?
1	Court (Chubb's proposed candidate)	Halliburton	Chubb	Previously acted as arbitrator in several arbitrations to which Chubb was a party, including as party-appointed arbitrator nominated by Chubb, and two pending references in which Chubb involved
2	Chubb	Transocean	Chubb	Disclosure of Reference 1 and others disclosed to Halliburton in Reference 1.
3	Joint	Transocean	3rd party insurer	Did not disclose to Halliburton in Reference 1.

When Halliburton discovered Mr Rokison's appointments in References 2 and 3, it wrote to him raising its concerns and asking for an explanation. Mr Rokison replied stating that, whilst he was under no obligation to disclose the appointments under the IBA guidelines referred to by Halliburton, it would have been prudent to do so and apologised, offering to resign. However, Chubb objected to Mr Rokison's resignation on the basis that it would cause delay and wasted costs.

Mr Rokison wrote again to the parties, making clear that he had not learned anything about the Deepwater Horizon Incident from the other two references that was not already public knowledge, but recognising the fundamental importance of the parties' confidence in the Tribunal and its chairman said that he would resign if the matter were left to him to decide. He invited the parties to agree a replacement chairman who would be available for the forthcoming hearing.

Court Applications

Halliburton issued a claim form in the High Court seeking an order that Mr Rokison be removed as arbitrator pursuant to section 24(1)(a) of the Arbitration Act 1996 ("the 1996 Act").

Section 24(1)(a) of the 1996 Act provides as follows:

24 *Power of court to remove arbitrator.*

(1) A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds—

(a) that circumstances exist that give rise to justifiable doubts as to his impartiality;

In the High Court, Halliburton's application was dismissed in early 2017. Popplewell J held that there were no justifiable concerns regarding Mr Rokison's acceptance of the appointments in References 2 and 3 and there was therefore nothing to be disclosed.

Later that year, the Tribunal issued their award on the merits in Reference 1 in Chubb's favour. However, Halliburton's nominated arbitrator, Professor Park, issued *"Separate Observations"* saying that he could not join in the award due to *"profound disquiet about the arbitration's fairness"*. As a result, the award was rendered as a majority award.

Halliburton then appealed the rejection of its Section 24 application to the Court of Appeal. Whilst the appeal was dismissed, the Court of Appeal said that it was good practice in international arbitration to disclose multiple appointments and, given the overlap between the references, that Mr Rokison was under a duty to disclose them to Halliburton.

However, in the Court of Appeal's view, the fact of multiple appointments did not of itself justify an inference of apparent bias. The fact that the failure was accidental rather than deliberate and the limited degree of overlap between the references meant that there was no real possibility of bias on the facts objectively judged.

Halliburton appealed to the Supreme Court.

Supreme Court decision

The hearing took place in November 2019 and the decision was handed down a year later, in November 2020.

The case is notable in that by the time the matter reached the Supreme Court there were five intervening parties, being:

a. The International Court of Arbitration of the International Chamber of Commerce (the "ICC");

b. The London Court of International Arbitration (the "LCIA");

c. The Chartered Institute of Arbitrators (the "CIArb");

d. The London Maritime Arbitrators Association (the "LMAA");

e. The Grain and Feed Trade Association (the "GAFTA").

Interveners are parties not connected with the dispute itself but official bodies who were given permission to make submissions in the public interest. In addition to written submissions from all interveners, the ICC and LCIA were permitted to make oral representations at the hearing.

The Supreme Court held as follows:

a. English law imposes a legal duty of disclosure on arbitrators, which derives from the statutory duty to act fairly and impartially in section 33 of the 1996 Act.

b. The duty of disclosure in English law requires the fact of multiple appointments involving the same or overlapping subject matter to be disclosed in the absence of contrary agreement between the parties. That includes circumstances such as the present case, in a field of arbitration in which multiple appointments occur but where there is no common understanding that disclosure is not required.

c. Mr Rokison should have disclosed the appointment in Reference 2 and his failure to do so was a breach of that duty.

"The Supreme Court's decision draws into focus the diverse approaches within different industry sectors to arbitration and the approach to arbitration more globally."

d. However, on the facts, and in particular Mr Rokison's explanation of the failure he gave to the parties by the date of the hearing to remove him, the objective test for bias was not satisfied. The fair-minded observer would not have concluded that there was a real possibility of bias, despite the fact of non-disclosure.

Those principles should be read in light of two specific points which underly the Supreme Court decision:

a. The case concerned an ad hoc arbitration with a London seat and no applicable institutional rules. Accordingly, the objective English law test for apparent bias applied. However, many institutional rules adopt a subjective test, such as the IBA Guidelines, ICC Rules and LCIA Rules which all focus on the perceptions of the parties themselves. This is a fundamental difference in approach that must be borne in mind when considering the possible application of the decision in other cases.

b. The issue in the case concerned the appointment of the same arbitrator in multiple references involving the same or overlapping subject matter. It is not a decision on the subject of repeat appointments in general. The potential problem at the heart of the case is the possibility that one party may obtain an advantage over the other by having access to information about the common arbitrator's responses to the evidence or arguments in the related arbitration. It is essentially a problem of equality of arms, rather than bias per se (and there is a legitimate question as to whether section 24(1)(a) of the 1996 Act in fact is intended to address this issue at all).

Implications of the Decision

The Supreme Court's decision draws into focus the diverse approaches within different industry sectors to arbitration and the approach to arbitration more globally.

In terms of the industry sectors, construction lawyers would expect an arbitral tribunal to approach each dispute from an objective basis without any preconceptions about the issues. This is usually the case in any event because construction projects are invariably bespoke and the issues on each project are specific to their particular facts or the precise contractual terms negotiated by the parties. It is rare for different projects to be implemented on identical contractual terms or constructed to identical technical specifications. Internationally, the position is even more diverse with projects executed on a very wide variety of contractual terms, differing technical standards and subject to country specific rules and regulations. The scope for common or overlapping issues is often rare.

This is perhaps reflected in the fact that the ICC, LCIA and CIArb all expressed concerns that the Court of Appeal's decision was out of step with internationally accepted standards and practices:

a. The LCIA was concerned that the tests set out by the Court of Appeal were not sufficiently strict compared with international norms, arguing that the context of the arbitration was important and much depended upon the facts.

b. The ICC submitted that the fact of multiple overlapping appointments with only one or some common parties concerning the same or overlapping subject matter could, depending on the circumstances, give rise to reasonable doubts as to the arbitrator's impartiality.

c. The CIArb's view was that the acceptance by an arbitrator of multiple appointments in related references without full disclosure to all parties may, without more, give rise to justifiable doubts as to impartiality.

"From a construction perspective, confirmation that the duty of disclosure in English law requires the fact of multiple appointments involving the same or overlapping subject matter to be disclosed, in the absence of contrary agreement between the parties, is to be welcomed."

The approach of these three bodies can be contrasted with the position in maritime and commodities arbitrations, as explained by the interveners GAFTA and the LMAA, because it is an accepted feature of such arbitrations that arbitrators will act in multiple references without calling into question their fairness or impartiality:

a. GAFTA submitted that disputes often arise in chain or string supply contracts and that arbitrations in such contracts, which often involve common issues of law or fact, are regularly referred to the same arbitrator or arbitrators. Its rules do not require its arbitrators to disclose multiple appointments in relation to the same event or issue.

b. LMAA similarly explained that multiple appointments were relatively common under their procedures because they frequently arose out of the same incident. It said that speed and simplicity were necessary because of the tight limitation periods in maritime claims, and there is a relatively small pool of specialist arbitrators whom parties use repeatedly.

It is clear that there were legitimate views on both sides as to the impact of the decision on commercial arbitrations. From a construction perspective, confirmation that the duty of disclosure in English law requires the fact of multiple appointments involving the same or overlapping subject matter to be disclosed, in the absence of contrary agreement between the parties, is to be welcomed. The existence of a legal duty promotes transparency in arbitration and is consistent with the best practice inherent within many international institutional rules and guidelines.

Nonetheless, and whilst rare, there can be instances of overlapping subject matter in construction projects. For example, the deficiency in the DNV J101 design code, which was used extensively in the offshore windfarm industry over an extended period of time, is an example of a technical issue that affected the operational fitness for purpose of numerous offshore windfarms (see the Supreme Court decision of MT Højgaard v E.On[2]). The acknowledged error in the code meant that there was a common problem inherent in numerous windfarms. Full disclosure of an arbitrator's prior involvement in any such disputes would promote transparency and guard against any party seeking to gain an advantage through the repeated appointment of the same arbitrator with a known view on the issue.

However, there had been criticism of the lower courts' decisions on the basis that they did not give sufficient weight to international norms. Perhaps with these criticisms in mind, the Supreme Court recognised that the common law objective test should be applied with regard to *"the particular characteristics of international arbitration"* and noted that the fair-minded observer should have knowledge of the *"debate within the international community as to the precise role of the party-appointed arbitrator"*.

With those caveats in mind, and mindful of the ongoing debate within the international community and the divergent views between the different trade bodies and industry sectors, it is suggested that this decision might not be the last word on the matter.

2 [2017] UKSC 59