HALLIBURTON V. CHUBB: UNLOCKING ARBITRATOR'S BIAS

A Case Note from the 2TG Commercial Group

December 2020

Introduction

1. On Friday, 27 November 2020, the Supreme Court handed down judgment in *Halliburton Company v Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd)* [2020] UKSC 48 ("*Halliburton v Chubb*"), which concerns how an English Court will approach applications to recuse arbitrators on the ground of bias.

2. The Supreme Court has clarified this important issue. The judgment is essential reading for all practitioners involved in the selection of arbitrators.

3. The Supreme Court's judgment addresses, *inter alia*, the scope of an arbitrator's duty of impartiality, the arbitrator's duty to disclose possible conflicts, and when an arbitrator may appear to be biased.

The Facts

4. The facts are of little consequence for this short, practical note. However, in summary, the arbitration arose out of the Deepwater Horizon drilling rig fire and explosion.

5. Halliburton Company ("Halliburton") provided cementing and well-monitoring services to BP. Halliburton had entered into a Bermuda Form liability policy with Chubb Bermuda Insurance Ltd ("Chubb").

Daniel Crowley
dcrowley@2tg.co.uk
+44 (0)20 7822 1216

Tom Fairclough
tfairclough@2tg.co.uk
+44 (0)20 7822 1246

6. Transocean owned the rig and contracted with BP to provide crew and drilling teams. Transocean also had a Bermuda Form policy with Chubb.

7. The Deepwater Horizon disaster resulted in numerous claims against both Transocean and Halliburton, which they settled. Both Halliburton and Transocean sought indemnification from Chubb.

8. Chubb contested the claims under the policy, mainly on the grounds that the settlements were not reasonable.

9. Bermuda Form policies provided for disputes to be resolved by arbitration.

10. Halliburton invoked the arbitration claim in the Policy ("the Halliburton arbitration"). Halliburton and Chubb both nominated arbitrators. However, the party-appointed arbitrators could not agree on the appointment of the third arbitrator/chair of the Tribunal.

11. In June 2015 the Commercial Court chose the third arbitrator, Mr Rokison QC ("Mr Rokison"), a well-known international arbitrator with "*a long-established reputation for integrity and impartiality*".

12. In December 2015, Mr Rokison accepted an appointment by Chubb in an arbitration commenced by Transocean arising out of the Deepwater Horizon disaster.

13. Mr Rokison disclosed to Transocean his appointment in the Halliburton arbitration. Transocean did not object.

14. However, he did not disclose to Halliburton his appointment in the Transocean arbitration. He also did not disclose to Halliburton that he was now appointed arbitrator in a second arbitration by Transocean against a different insurer, which also arose out of the Deepwater Horizon disaster. The failure to disclose was central to the question before the Supreme Court.

15. In November 2016 Halliburton discovered the two Transocean arbitrations. Halliburton immediately raised concerns with Mr Rokison.

16. After correspondence between the parties and the arbitrator, in which Mr Rokison refused to recuse himself, Halliburton applied to the Commercial Court to have Mr Rokison removed as arbitrator in the Halliburton arbitration.

17. On 5 December 2017, the Tribunal in the Halliburton arbitration issued its Final Partial Award on the merits in Chubb's favour.

18. The Commercial Court dismissed Halliburton's application. The Court of Appeal dismissed Halliburton's appeal.

The Supreme Court

19. Lord Hodge gave the lead judgment (with whom Lord Reed, Lady Black and Lord Lloyd-Jones agreed). Lady Arden gave a concurring judgment.

20. The Supreme Court dismissed the appeal.

21. The Supreme Court considered three potentially conflicting duties and obligations:
    (I) The arbitrator's duty of impartiality;

(II) The legal duty to disclose certain matters; and

(III) How far the obligation to respect the privacy and confidentiality of the arbitration constrains the arbitrator's ability to make disclosure. The Supreme Court considered whether a failure to make disclosure can demonstrate a lack of impartiality.

The duty of impartlality

22. Impartiality has always been a cardinal duty of an arbitrator (and judge): see ss.1, 33, 24(1), 68 of the Arbitration Act 1996.

23. The test for apparent bias was set out by Lord Hope in *Porter v Magill* [2000] UKHL 67; (2002) 2 AC 357 at [103]:

> *"The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased"*.

24. Further, adopting the words of Kirby J in the High Court of Arbitration in *Johnson v Johnson* (2000) 201 CLR 488 at [53], *"The fair-minded and informed observer is 'neither complacent nor unduly sensitive or suspicious"*.

25. The duty to act impartially applies to the party-appointed arbitrator.

26. The Supreme Court summarised the position at [69]:

> *"Summarising the position so far, the English courts in addressing an allegation of apparent bias in an English-seated arbitration will (i) apply the objective test of the fair-minded and informed observer and (ii) have regard to the particular characteristics of international arbitration which I have discussed in paras 56 to 68. Those characteristics highlight the importance of proper disclosure as a means of maintaining the integrity of international arbitration, a topic to which I now turn"*.

Duty of disclosure

27. The Supreme Court, at [74] – [76], endorsed the Court of Appeal's formulation of the duty:

> *"the present position under English law to be that disclosure should be given of facts and circumstances known to the arbitrator which, in the language of section 24 of the Act, would or might give rise to justifiable doubts as to his impartiality"*.
>
> *"Under English law this means facts or circumstances which would or might lead the fair-minded and informed observer, having considered the facts, to conclude that there was a real possibility that the arbitrator was biased"*. (Emphasis added by the Supreme Court)

28. However, the duty to disclose does not override the arbitrator's duty of privacy and confidentiality in English law. Disclosure can only be made if the parties to whom the obligations are owed give their consent; at [88] Lord Hodge put it as:

> *"if a person seeking appointment as an arbitrator in a later arbitration does not obtain the consent of the parties to a prior related arbitration to make a necessary disclosure about it, or the parties to the later arbitration do not consent to the arbitrator's disclosure of confidential matters relating to that prospective appointment to the parties to the earlier arbitration, the arbitrator will have to decline the second appointment. Such consent may be express or may be inferred*

from the arbitration agreement itself in the context of the custom and practice in the relevant field".

29. The Supreme Court considered, from [89] onwards, when consent can be inferred.

30. As such, an arbitrator must think carefully about the competing duties of disclosure and confidentiality.

Failure to make disclosure as evidence of lack of impartiality

31. Importantly, however, where an arbitrator fails to disclose despite being under a duty to do so, the same is not necessarily enough to give rise to a finding of apparent bias. Lord Hodge, at [118], put the relationship between a failure to disclose and bias as:

> *"Where an arbitrator has accepted an appointment in such multiple references in circumstances which might reasonably give rise to justifiable doubts as to his or her impartiality, or is aware of other matters which might reasonably give rise to those doubts, a failure in his or her duty to disclose those matters to the party who is not the common party to the references deprives that party of the opportunity to address and perhaps resolve the matters which should have been disclosed. The failure to disclose may demonstrate a lack of regard to the interests of the non-common party and may in certain circumstances amount to apparent bias"*.

32. At [120] Lord Hodge noted that the duty to disclose is a continuing duty and circumstances may change before there is disclosure; such circumstances may aggravate an existing failure to disclose or may render any continuing failure a less potent factor in the Court's assessment of bias.

Time of assessment of the possibility of bias

33. Given that the Supreme Court recognised that the impact of a failure to disclose may change over time, the question arose of at which point in time does a Court assess whether the apparent bias test has been met? At [123], Lord Hodge held that the time to assess the possibility of bias is the time of the hearing to remove the arbitrator.

The decision

34. The Supreme Court held that the arbitrator breached his duty of disclosure (see [147]).

35. However, at the time of the hearing to remove him a fair-minded and reasonable observer would not infer from the failure to make disclosure that there was a real possibility of bias as:
    - (i) At the material time, it had not been clear that there was a legal duty of disclosure.
    - (ii) The Transocean arbitrations commenced several months after the Halliburton arbitration;
    - (iii) The Transocean arbitrations were likely to be decided by preliminary issues and if not the arbitrator said he would consider resigning from the Transocean arbitrations;
    - (iv) There was no secret financial benefit or ill-will by the arbitrator.

Lady Arden

36. Lady Arden in her concurring judgment made a number of insightful and perceptive points:
    - (I) The duty of disclosure is a secondary duty arising from the primary duty to act impartially [160]–[166];
    - (II) The duty of disclosure is vested on both the contract of appointment and s.33 of the 1996 Act [167]–[169];

(III) Disclosure is only an option if the conflict of interest is not one that would prevent the arbitrator from acting altogether [170]; and

(IV) Confidentiality is an important implied term in an arbitration agreement which also binds the arbitrator [173]–[189].

Practical Tips

37. The Supreme Court made a number of astute observations about the nature of arbitral appointments, including the not unnatural desire for the arbitrator to receive further appointments [59]:

> *"There are many practitioners whose livelihood depends to a significant degree on acting as arbitrators. This may give an arbitrator an interest in avoiding action which would alienate the parties to an arbitration, for example by assertive case management against the wishes of the legal teams who are presenting their clients' cases. It also may give those legal teams an incentive to be more assertive of their side's interests in the conduct of the arbitration than might be the case in a commercial court."*

38. Despite those pressures, bearing in mind the duty of impartiality, an arbitrator should be keenly aware of the appearance of bias when acting in connected arbitrations with at least one common party arising out of the same or similar incidents. Whilst the Supreme Court's decision may cause some consternation, it is clear that a feature of the Justices' reasoning is that the duty to disclose was not as apparent at the material time as it is now. As such, one may well expect the Courts to be less forgiving of a failure to disclose than the Supreme Court appears to have been.

39. Whilst the safest course is to disclose all relevant matters to the parties so as to help reduce any future challenge, the arbitrator's duty of confidentiality must also be respected. What *Halliburton v Chubb* demonstrates, *par excellence*, is that the early resolution of issues ought to be at the forefront of every parties' mind so as to avoid unedifying, and costly, litigation.

Daniel Crowley
Tom Fairclough

2 December 2020
2 Temple Gardens

Disclaimer

ABOUT THE AUTHOR

Daniel Crowley
dcrowley@2tg.co.uk
+44 (0)20 7822 1216

Daniel Crowley (1990 call)

Daniel Crowley is a Barrister and Chartered Arbitrator.

To view Daniel's full website profile, please **click here**.

Tom Fairclough
tfairclough@2tg.co.uk
+44 (0)20 7822 1246

Tom Fairclough (2015 call)

Tom Fairclough is a Barrister. He was Judicial Assistant to Lady Arden and Lord Leggatt in the Supreme Court and Privy Council for the legal year 2019 - 2020. Tom returned to 2TG in August 2020.

To view Tom's full website profile, please **click here**.

CONTACT US

Lee Tyler
Senior Clerk
ltyler@2tg.co.uk
+44 (0)20 7822 1203

Paul Cray
Deputy Senior Clerk
pcray@2tg.co.uk
+44 (0)20 7822 1208

"Outstanding service" (Legal 500)

"On the ball, courteous and efficient" (Chambers UK)

"Approachable, modern and commercial in their outlook" (Chambers UK)

FIND US

Address
2 Temple Gardens
London EC4Y 9AY

Telephone
+44 (0)207 822 1200

Fax
+44 (0)207 822 1300

Tube
Temple (Circle & District
Blackfriars (Circle & District and Thameslink rail)

DX
134 Chancery Lane

Rail
Blackfriars
City Thameslink