International Arbitration Alert

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UK Supreme Court Confirms That Arbitrators Are Under a Legal Duty to Disclose Matters Which Would or Might Create an Appearance of Bias

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In a landmark decision handed down on November 27, 2020, the U.K. Supreme Court has confirmed that the English law of arbitration imposes a duty on arbitrators to disclose matters which would or might lead to the conclusion that there is a real possibility that they are biased. This welcome development in English law reinforces the integrity and reputation of English-seated arbitration, and is consistent with best practice seen in the International Bar Association (IBA) Guidelines on Conflict of Interest and leading institutional rules.

Factual Background

The underlying arbitration between Halliburton and Chubb that gave rise to the issue of arbitrator disclosure concerned a coverage dispute relating to the explosion and fire on the Deepwater Horizon drilling rig in the Gulf of Mexico in 2010. The relevant insurance policies were governed by New York Law, but provided for arbitration in London. Following the commencement of the arbitration in 2015, both Halliburton and Chubb each selected one arbitrator but were unable to agree on the appointment of the third, who would sit as chairman. After a contested hearing in the English Commercial Court, Mr. Kenneth Rokison QC, who had been proposed to the Court by Chubb, was appointed. Subsequently, and without Halliburton's knowledge, Mr. Rokison accepted arbitral appointments in two separate references also arising from the Deepwater Horizon explosion, one of which was made by Chubb.

On discovering Mr. Rokison's appointment in the later references, Halliburton applied to the Court under section 24(1)(a) of the English Arbitration Act 1996 (the "Act") to remove him as an arbitrator on the basis that there were "justifiable doubts as to his impartiality". The two grounds for the application were that (a) he had been appointed as an arbitrator in two other disputes also arising out of the Deepwater Horizon explosion (one of which involved Chubb, but not Halliburton, as a party); and (b) he had not disclosed the fact of those overlapping appointments. That application was refused.

On appeal, the Court of Appeal found that whilst the Act is silent as to an arbitrator's duty of disclosure, nevertheless English law imposes a duty to disclose circumstances

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that would or might lead a fair-minded and informed observer, having considered the facts, to conclude that there was a real possibility of bias. In determining whether apparent bias exists, it is relevant to consider an arbitrator's failure to disclose and how he or she deals with concerns raised by a party; such factors will inevitably "colour the thinking of the observer and may fortify or lead to an overall conclusion of apparent bias". The Court of Appeal found that Mr. Rokison should have disclosed his proposed appointment in the subsequent references, but that his failure to do so had been accidental and that he had acted appropriately once concerns were raised. On that footing, the Court found there was no apparent bias. The appeal was therefore dismissed. Halliburton appealed to the Supreme Court.

The Supreme Court ruling

The key issues before the Supreme Court were the following:

- Whether and to what extent an arbitrator may accept "overlapping appointments" (appointments in multiple references concerning the same or overlapping subject matter with only one common party) without giving rise to an appearance of bias.
- Whether and to what extent an arbitrator may accept the multiple references described in the first issue without making a disclosure to the party who is not the common party.

Legal duty of disclosure

The Supreme Court upheld the decision of the Court of Appeal that arbitrators have a **legal duty** to disclose facts or circumstances that would **or might** reasonably give rise to the appearance of bias, unless otherwise agreed between the parties, and that this duty was breached by Mr. Rokison in his failure to disclose his subsequent appointments. The Supreme Court left it open whether the duty extends only to facts "known to the arbitrator" (as suggested by the Court of Appeal) or whether there may be circumstances in which the arbitrator may be under a duty to make reasonable inquiries as to whether there are facts or circumstances which ought to be disclosed.

However, the Supreme Court also clarified that the legal duty of disclosure 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 of privacy and confidentiality are owed give their consent, expressly or impliedly. Consent may be implied by custom or practice and the Supreme Court accepted that, by agreeing to arbitrate in accordance with the terms and practice of particular arbitral institutions parties may implicitly consent to the qualification or limitation of the obligations of privacy and confidentiality. It appears therefore that an arbitrator will have to decline a subsequent appointment if the arbitrator 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".

That said, the Supreme Court expressly recognized that there are a variety of practices in relation to the disclosure of overlapping appointments, noting in particular that under certain institutional rules such as those of the London Maritime Arbitrators Association (LMAA) and the Grain and Feed Trade Association (GAFTA) dealing with specialist fields, engagement in multiple overlapping arbitrations does not need to be

disclosed because it is not generally perceived as calling into question an arbitrator's impartiality or giving rise to unfairness.

Possibility of bias

The Supreme Court restated that the scope of the test for apparent bias under Section 24(1)(a) of the Act is the same as the common law test, which requires a party to show that a fair-minded and informed observer, having considered the facts, would or might conclude that there was a real possibility of bias. This is an objective test, in contrast with many institutional rules which impose a subjective test, and falls to be determined on the specific facts of an individual case.

Whilst finding that Mr. Rokison was under a legal duty to disclose his appointment in the subsequent references, the Court found that a fair-minded and informed observer would not infer from Mr. Rokison's failure to disclose the appointments that there was a real possibility of apparent bias, particularly given that:

- By the date of the hearing for his removal, Mr. Rokison had provided an explanation of his oversight to disclose his subsequent appointments, which was accepted by Halliburton.
- The arbitrations in respect of which he was subsequently appointed arbitrator commenced several months after the Halliburton arbitration and were considered at the time of Mr. Rokison's appointment likely to be resolved by way of preliminary issue (as they ultimately were).
- The Court accepted what it described as Mr. Rokison's "measured" view that the subject matter of the subsequent appointments would not overlap in legal evidence or submissions with the Halliburton arbitration and so there was no likelihood of Chubb gaining an advantage.
- Mr. Rokison had received no secret financial benefit from his subsequent appointments.

The Court also clarified that any such analysis must take place at the date of the relevant hearing and should not be analyzed from the perspective of an overly sensitive litigant.

Significance

The importance of the case to arbitration users and practitioners is illustrated by the intervention of a number of organizations to make representations: the International Court of Arbitration of the International Chamber of Commerce (ICC); the London Court of International Arbitration (LCIA); the Chartered Institute of Arbitrators (CIArb); the LMAA and GAFTA.

The Supreme Court's decision supports the integrity and transparency of the arbitral process, and provides helpful clarity as to the low bar for disclosure by arbitrators in English-seated arbitrations.

The Supreme Court was unconvinced by arguments that imposing the legal duty of disclosure could lead to increased challenges to arbitrator appointments and arbitral awards. In terms of arbitrators' personal liability, the Court noted that some arbitral rules include provisions excluding personal liability of arbitrators, and that parties, arbitrators and institutions who have not already done so can adapt their contracts or

rules to convey a wider immunity against personal claims which may result from this ruling.

One area that will bear further consideration is the requirement of privacy and confidentiality in certain agreements to arbitrate and the reconciliation of that requirement with the duty of disclosure. The Supreme Court recognized that there are varying approaches both to confidentiality and to disclosure as between institutional arbitration and ad hoc arbitration, as well as in certain specialist areas of practice. This may prove to be an area that gives rise to future disputes.

Halliburton v. Chubb Bermuda Insurance Ltd **[2020] UKSC 48** (November 27, 2020)

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