Halliburton – was it worth the wait?

COMMENTARY BY STUART ISAACS QC, 16TH DECEMBER 2020

More than one year after the oral hearing took place, the Supreme Court on 27 November 2020 handed down its judgment *in Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48. In the weeks immediately following the decision, a large volume of material rapidly appeared online from various law firms and others active in the field of international commercial arbitration. The decision was much awaited, all the more so with the passage of time since the hearing took place without a judgment having been delivered. But one question which remains unanswered is whether, on analysis, the decision really was worth the wait. This article looks not only at the key points in the decision but also at its potentially limited impact in the sphere of international arbitration.

The case concerned one of the several insurance claims brought by insured against insurers under a Bermuda Form liability policy. The claims arose out of the damage caused by the explosion and fire on the Deepwater Horizon drilling rig in the Gulf of Mexico in 2010. In accordance with the dispute resolution provisions in the policy, the English High Court appointed as the presiding arbitrator Mr Kenneth Rokison QC, an arbitrator whom the Supreme Court rightly described as having a long-established reputation for integrity and impartiality. Prior to his appointment, he had disclosed to Halliburton and the court that he had previously acted as an arbitrator in arbitrations to which Chubb was a party, including as a party-nominated arbitrator appointed by Chubb, and that he was currently involved in two pending arbitrations involving Chubb. He did not, however, disclose to Halliburton his proposed nomination by Chubb as its arbitrator in a subsequent arbitration concerning an excess liability claim arising out

of the same incident brought against Chubb by Transocean, the rig's owner, under another Bermuda Form policy or his acceptance of an appointment as a substitute arbitrator on the joint nomination of the parties in a claim made by Transocean against another insurer on the same excess layer. Halliburton sought the removal of the arbitrator under section 24(1)(a) of the Arbitration Act 1996 on the ground that circumstances existed that gave rise to justifiable doubts as to his impartiality.

The key issue before the Supreme Court concerned the circumstances in which an arbitrator in an international arbitration may give the appearance of bias, even though not guilty of any actual bias or deliberate wrongdoing. The case raised questions about the requirement that there should be no apparent bias and the obligation of arbitrators in international arbitrations to make disclosure. The court held that, unless the parties to an arbitration otherwise agreed, arbitrators had a legal duty to make disclosure of facts and circumstances which would or might reasonably give rise to the appearance of bias.

An important feature of the case is that arbitrations under the Bermuda Form are ad hoc arbitrations which by definition are not subject to the rules of any arbitral institution. In institutional arbitrations, the duty to make disclosure is nothing new and so the Supreme Court's decision in the context of an ad hoc arbitration is unsurprising. The LCIA and the ICC Court of Arbitration were given permission by the Supreme Court to intervene and make submissions, along with the CIArb, the LMAA and GAFTA. The particular interest of the LMAA and GAFTA was that in arbitrations conducted under their auspices multiple references frequently arise from the same incidents.

In institutional arbitrations, arbitrators are under a continuing duty to give such disclosure as a condition of his or her appointment. For example, the LCIA requires prospective arbitrators to make a declaration that they are impartial, independent of each of the parties, and intend to remain so and that there are no circumstances currently known to them (other than any which are expressly disclosed) likely to give rise in the mind of any party to any justifiable doubts as to their impartiality or independence. Similarly, the ICC Court of Arbitration requires prospective arbitrators to state that they are impartial and independent and intend to remain so and either

that, to the best of their knowledge, and having made due enquiry, there are no facts or circumstances, past or present, that they should disclose because they might be of such a nature as to call into question their independence in the eyes of any of the parties and no circumstances that could give rise to reasonable doubts as to their impartiality; or else, mindful of those obligations, to draw specific attention to any particular matters. The SIAC's Code of Ethics for an Arbitrator requires a prospective arbitrator to confirm that, to the best of his or her knowledge, there are no facts or circumstances that may give rise to justifiable doubts as to their impartiality or independence except as may be expressly disclosed.

The SIAC's Code of Ethics is interesting as it expressly identifies the criteria for assessing questions relating to bias as impartiality and independence. "*Partiality arises when an arbitrator favours one of the parties or where he is prejudiced in relation to the subject matter of the dispute. Dependence arises from relationships between an arbitrator and one of the parties, or with someone closely connected with one of the parties*" (paragraph 3.1).

In *Halliburton*, the Supreme Court concluded, after an extensive review of the authorities, that in 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 such an observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased (see *Porter v Magill* [2001] UKHL 67 at [103]), and will have regard to the particular characteristics of international arbitration, such as the facts that it is a consensual and confidential form of dispute resolution, that the decisions of tribunals are subject to limited powers of review and that arbitrators are drawn from a wide and varied pool of people from different jurisdictions and legal traditions with different understandings of their role and obligations.

Against the background of those characteristics, the Supreme Court went on to consider an arbitrator's duty to make proper disclosure. The IBA Guidelines on Conflicts of Interest in International Arbitration 2014 are widely used by international arbitrators when deciding on the necessity or desirability of making disclosures, but

they have no legal force. In contrast, in institutional arbitrations, the duty of disclosure provided for has contractual effect. In *Halliburton*, the court held that under English law, a legal duty of disclosure exists which is encompassed within the statutory duty of an arbitrator under section 33 of the 1996 Act to act fairly and impartially as between the parties.

Perhaps the most interesting aspect of the Supreme Court's decision is its discussion of the relationship between the duty of disclosure and the duty of privacy and confidentiality in an English-seated arbitration in circumstances where an arbitrator is appointed in several arbitrations concerning the same or overlapping subject matter with only one common party. In that situation, there is, on the face of it, an apparent conflict between an arbitrator's duty of disclosure and his or her duty to uphold the privacy and confidentiality of each of the arbitrations. The Supreme Court recognised that there is a variety of arbitral practices in relation to the disclosure of multiple appointments in different contexts. It 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 give their consent but, importantly, that such consent need not always be express but "*may be inferred from the arbitration agreement itself in the context of the custom and practice in the relevant field*" (see at paragraph [88]). In that way, the court was able to conclude that the fact that an arbitrator had accepted appointments in multiple references concerning the same or overlapping subject matter with only one common party was a matter which might have to be disclosed, depending upon the customs and practice in the relevant field.

The acceptance by an arbitrator of appointments in multiple references concerning the same or overlapping subject matter with only one common party might, depending on the relevant custom and practice, give rise to an appearance of bias. The facts or circumstances to be disclosed are those which might reasonably cause the fair-minded and informed observer to conclude that there was a real possibility that the arbitrator was biased. The arbitrator's failure to disclose such facts and

circumstances was itself a factor to which the fair-minded and informed observer would have regard in reaching a conclusion as to whether there was a real possibility of bias.

The Supreme Court held that, in Bermuda Form arbitrations, an arbitrator was not only entitled, in the absence of agreement to the contrary by the parties to the relevant arbitration, to make disclosure of the existence of that arbitration and the identity of the common party, without obtaining the express consent of the relevant parties but also was required to disclose multiple appointments, in the absence of agreement to the contrary between the parties to whom disclosure would otherwise be made.

However, on the facts in *Halliburton*, the court determined that the fair-minded and informed observer would not have concluded that there was any apparent bias on the part of the arbitrator. It accordingly dismissed Halliburton's appeal against the Court of Appeal's decision (upholding the decision of Popplewell J at first instance) refusing Halliburton's application to remove the arbitrator.

Was the Supreme Court's decision worth the wait? It is suggested that the answer is a qualified yes. The decision undoubtedly provides important clarification on a number of aspects of the law relating to an arbitrator's duty of disclosure. It contains a valuable, if not exhaustive, review of various international comparators and the customs and practices of several arbitral institutions and the sectors which they serve. It demonstrates the strong support of the English courts towards arbitration in England. It will no doubt be considered and applied in other common law jurisdictions.

However, despite its comprehensive analysis, the positive impact of the decision may in practice be limited. Arbitrators already almost invariably err on the side of caution when considering the making of any disclosures, although the decision may lead prospective arbitrators to agonise more when deciding whether and, if so, what matters to disclose. So too do the arbitral institutions adopt a cautious approach when deciding whether or not to make appointments in the light of any disclosures made. The disclosure requirements of many arbitral institutions are in fact stricter than those required under English law. While the disclosure obligations in respect of Bermuda Form arbitrations are now clear, whether or not they have been breached in any

particular case will remain fact-specific. The decision also leaves open the position in respect of other *ad hoc* arbitrations and expands the scope for potential challenges to the appointment of arbitrators. Unmeritorious challenges to arbitral appointments have become an increasing feature of arbitration in recent years and *Halliburton* may provide fertile ground for that trend to continue. In that regard, it is reassuring that the Supreme Court was astute to note (at paragraph [68]) that "*the objective observer is alive to the possibility of opportunistic or tactical challenges*".

The full judgment of *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48 can be found here.

For more information on our International Arbitration practice, please click here.

If you are viewing this document on LinkedIn, you can download it by clicking on the  *icon in the top-right-hand corner when in full screen view.*