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"TO SAY OR NOT TO SAY?"

AN ANALYSIS OF THE UK SUPREME COURT DECISION IN HALLIBURTON V CHUBB

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Introduction

A historically contentious subject in international commercial arbitration is the knotty question of when, and to what extent, an arbitrator owes a duty of disclosure to the disputing parties in the proceedings. The duty to disclose flows from an arbitrator's obligation to not only be impartial and unbiased, but also to be manifestly seen to be impartial and unbiased. This in turn stems from the twin principles of natural justice and procedural fairness, which are the hallmarks of the arbitral process. In the recent case of ***Halliburton v Chubb***[1] delivered on 27 November 2020, the UK Supreme Court was presented with an opportunity to determine the circumstances in which an arbitrator is required to make conflict of interest disclosures. This article examines whether (and the extent to which) the Supreme Court succeeded in doing so, as well as the decision's potential impact on the practice of international commercial arbitration in general and in Nigeria in particular.

Facts of the Case

The appellants, Halliburton Company ("Halliburton") entered into a Bermuda Form liability policy ("the Policy") with ACE Bermuda Insurance Limited, now called Chubb Insurance Ltd ("Chubb") in 1992 (which was renewed annually). BP Exploration and Production Inc ("BP") was the lessee of Deepwater Horizon drilling rig in the Gulf of Mexico. The rig was owned and operated by Transocean Holdings LLC ("Transocean"). BP was contracted to provide crew and drilling teams while oil services giant, Halliburton provided cementing and well-monitoring services to BP in relation to the plugging of the well.

In April 2010, there was an explosion on the drilling rig when a well ruptured and caused arguably the largest oil spill in the history of marine oil drilling operations. The explosion caused extensive damage and resulted in 11 deaths and over 200 million gallons of oil spilling out of the ruptured well into the Gulf, sparking off numerous legal claims by the US Government as well as individual and corporate claimants. In one of such cases brought against BP, Transocean and Halliburton, the Federal Court for the Eastern District of Louisiana, in a judgment delivered on 4 September 2014, apportioned liability amongst the defendants in the following proportion: BP 67%, Transocean 30% and Halliburton 3%.

However, before the judgment was delivered, Halliburton had settled the claims against it by paying approximately US$1.1 billion. After the judgment, Transocean settled the claims against it for about US$ 212 million and paid civil penalties to the US Government of about US$1 billion. Thereafter, Halliburton claimed the amount from Chubb under the Policy, but Chubb refused to settle the claim contending amongst other things that Halliburton's settlement payment was unreasonable and it was reasonable for it (Chubb) not to have consented to the settlement.

As stated earlier, the Policy between Halliburton and Chubb was a Bermuda Form policy, a type of policy created in the 1980s to provide high excess commercial general liability insurance to companies operating in the United States. Bermuda Form policies usually contain a clause providing for disputes to be resolved by arbitration. Bermuda Form arbitrations are ad hoc arbitrations which are not subject to the rules of an arbitral institution.

[1] Halliburton Company v Chubb Bermuda Insurance Ltd [2020] UKSC 48

This particular policy was governed by the laws of the State of New York and contained a standard arbitration clause which provided for the seat of the arbitration to be in London by a tribunal of three arbitrators, one each appointed by each party and the third by the two arbitrators chosen by the parties. The Policy further provided that if the party-appointed arbitrators could not agree on the appointment of the third arbitrator, the High Court of Justice in London would make the appointment. This is exactly what happened as Halliburton and Chubb appointed Professor William W. Park and Mr. John D. Cole respectively and these two were unable to agree on the appointment of the third arbitrator.

In June 2015, Mr. Justice Flaux of the High Court of Justice appointed Mr. Kenneth Rokison, QC who incidentally was one of the arbitrators proposed to the court by Chubb, for appointment as the third arbitrator. Although Halliburton objected to the appointment of Mr. Rokison as well as the other candidates proposed by Chubb, upon his appointment by Flaux J., Halliburton did not appeal against the order.

Before expressing his willingness to be appointed, Mr. Rokison disclosed to Halliburton and the court that he had previously acted as an arbitrator in several arbitrations in which Chubb was a party, including as party-appointed arbitrator nominated by Chubb. He also disclosed that he was currently appointed as arbitrator in two pending references in which Chubb was involved. The court did not deem these disclosures as impediments to his appointment and went ahead to appoint him.

While the parties to this arbitration were still exchanging pleadings, Mr. Rokison accepted another appointment in December 2015, as an arbitrator in relation to a claim by Transocean against Chubb arising out of the same incident. He was appointed by Chubb. Before accepting his appointment in this second reference, Mr. Rokison disclosed to Transocean his appointment in the first reference in which Haliburton was the Claimant against Chubb. Transocean did not object to his appointment. In August 2016, he also accepted a third appointment arising out the same Deepwater Horizon incident. This time he was appointed as a substitute arbitrator on the joint nomination of the parties to the claim, Transocean and a different insurer. However, Mr. Rokison did not disclose these two subsequent appointments to Halliburton, the Claimant in the first reference.

It so transpired that in the second and third references, there was a preliminary issue which was potentially dispositive of the claims in those arbitrations if the tribunals decided in favour of the insurers. The issue was whether the fines and penalties that Transocean had paid to the US Government should be taken into consideration in these two references. Ultimately, the tribunals issued awards on the preliminary issues on 1 March 2017 and decided in favour of Chubb and the other insurer. The awards brought the two references to an end without either tribunal having to consider questions as to the reasonableness of Transocean's settlement, which was the major issue in the first reference at issue.

Haliburton discovers Mr. Rokison's appointments

On 10 November 2016, Halliburton discovered Mr. Rokison's appointments in the two subsequent references and their lawyers wrote to him expressing their concerns. In response, Mr. Rokison informed the parties that he had not disclosed those appointments because it had not occurred to him at the time of those appointments that he

was under any obligation to disclose them under the IBA Guidelines. He then admitted that, with the benefit of hindsight, it would have been prudent for him to have disclosed those appointments and apologised for not having done so. Nevertheless, despite being invited by Halliburton's lawyer to resign, he did not do so, as a result of which Halliburton issued a Claim Form in the High Court seeking an order under section 24(1)(a) of the English Arbitration Act 1996 that Mr. Rokison be removed as an arbitrator.

Mr. Justice Popplewell of the High Court heard Halliburton's application and, in a judgment delivered on 3 February 2017, dismissed the application. In his judgment, Popplewell J. rejected Halliburton's contentions that - (i) Mr. Rokison would derive a secret benefit in the form of the remuneration which he would receive from the arbitrations; (ii) the overlap between the three references, which meant that Mr. Rokison would learn information in the Transocean references, which information would be available to Chubb but not to Halliburton, gave rise to justifiable concerns; and (iii) the chairman of a tribunal had an enhanced duty [beyond that of party appointed arbitrators] to maintain demonstrable impartiality and fairness. The judge held that the arbitrator's failure to disclose the subsequent appointments did not give rise to a real possibility of bias against Halliburton. Aggrieved, Halliburton appealed to the Court of Appeal.

Reasoning & Decision of the Court of Appeal

In a judgment delivered on 19 April 2018, the Court of Appeal recognised that the existence of multiple appointments of an arbitrator in related arbitrations concerning the same or overlapping subject matter with only one common party could cause the party that was not involved in the related arbitrations to be concerned and could be a good reason for a judge to decline to appoint a person as an arbitrator in the face of objection by that concerned party. However, the court nevertheless held that the appointment of a common arbitrator did not justify the inference of apparent bias; and that something more substantial was required to infer apparent bias. Applying the above conclusion to the facts of the case, the Court of Appeal held that the degree of overlap between the arbitration between Halliburton and Chubb and the subsequent references, in which Mr. Rokison was also appointed, was very limited.

Further, the court, after stating the law on the circumstances in which an arbitrator should make disclosures, proceeded to hold that while a failure to make a disclosure when it should be made is itself a factor which the courts should take into account in considering whether there was a real possibility that the arbitrator was biased, non-disclosure of a matter which should have been disclosed but was not, did not on examination give rise to justifiable doubts as to the arbitrator's impartiality, and could not in and of itself justify an inference of apparent bias without more.

The Court of Appeal disagreed with Mr. Justice Popplewell and held that Mr. Rokison ought as a matter of law to have made disclosures to Halliburton at the time of his appointment in the subsequent references. Nonetheless, the court agreed with his overall conclusion that a fair-minded and informed observer, having considered the facts, would not conclude that there was a real possibility that Mr. Rokison was biased. Consequently, the Court of Appeal dismissed the appeal. Halliburton appealed to the Supreme Court.

Reasoning & Decision of the Supreme Court

The principal issues presented to the UK Supreme Court for determination were the following two questions: (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.

It must be noted that Halliburton's case before the Supreme Court was not that the arbitrator, Mr. Rokison was guilty of any deliberate wrongdoing or actual bias. Instead, they founded their case on apparent unconscious bias on the basis of five interrelated grounds. Such was the importance that the questions in the appeal raised, that the Supreme Court allowed and received written and oral representations from the International Court of Arbitration of the International Chamber of Commerce ("ICC") and the London Court of International Arbitration ("LCIA"), and written submissions from the Chartered Institute of Arbitrators ("CIArb"), the London Maritime Arbitrators Association ("LMAA") and the Grain and Feed Trade Association ("GAFTA"). Halliburton and three of the interveners; ICC, LCI and CIArb, contended that the judgment of the Court of Appeal was out of step with internationally accepted standards and practices in international arbitration.

In its judgment, the Supreme Court clarified the legal test that applies to the duty of disclosure. It confirmed that even if an objector has not established a real possibility of bias on the facts of a case, an arbitrator nevertheless has a duty to make the disclosure if non-disclosure might "reasonably" give rise to such doubt. The Supreme Court also explained that the legal test, and the assessment of the possibility of apparent bias following disclosure, should be applied through the eyes of a "fair minded and informed observer", and that in arriving at a conclusion, regard must be had to "the particular characteristics of international arbitration" and the "custom and practice in the relevant field of arbitration".

One of the factors that the UK Supreme Court considered in arriving at its decision was the interplay between the duty of disclosure on the part of an arbitrator in a first reference and the corresponding duty of privacy and confidentiality which he owes to the parties in the subsequent reference(s). The court held that where information that needs to be disclosed is subject to a duty of privacy and confidentiality, an arbitrator can only make such disclosure with consent from the parties to whom the duty of confidentiality is owed. Such consent may be express or inferred from the arbitration agreement in the context of the custom and practice in the relevant field of arbitration.

After hearing from the parties and the interveners, the Supreme Court recognised that there was a variety of practices in relation to the disclosure of multiple appointments and that what is appropriate for arbitrations under institutional rules such as those of the ICC and LCIA, differed from the practice in GAFTA and LMAA arbitrations and their relevant industries.

Under ICC and LCIA arbitrations, parties are taken to implicitly consent to the disclosure of limited information regarding their arbitrations. Unless the parties to an arbitration have agreed to prohibit disclosure, an arbitrator may therefore, without express consent, disclose information such as the existence of a current or a past

arbitration involving a common party, the identity of the common party, whether the proposed appointment in the other reference was to be party-appointed or a nomination for appointment by a court or a third party, and the fact that the other reference arises from the same incident. On the other hand, parties to GAFTA and LMAA arbitrations are taken to accept that the involvement of arbitrators in multiple arbitrations does not call the arbitrator's impartiality into question. Bermuda Form policies, which was the policy entered into by the parties to this reference, are ad hoc arbitrations and the Supreme Court found that there is no established custom or practice in Bermuda Form policies by which parties have accepted that an arbitrator may take on multiple appointments without disclosure unlike GAFTA and LMAA arbitrations.

On the first issue the Supreme Court agreed with the LCIA's submission that where an arbitrator accepts appointment in multiple references concerning the same or overlapping subject matter with only one common party, this may, depending on the relevant custom and practice, give rise to an appearance of bias.

In respect of the second issue however, the Supreme Court agreed with Halliburton that the failure to give a party the relevant information and opportunity for communication with the common arbitrator that is available to the other party in the subsequent reference(s), had the potential to give rise to unfairness and might amount to apparent bias. The court also agreed that Mr. Rokison was under a legal duty to disclose his appointment in the subsequent reference to Halliburton because of the existence, at the time of the appointment, of potentially overlapping arbitrations with only one common party, which was a circumstance that might reasonably give rise to a real possibility of bias. The Supreme Court made it clear that this legal duty arises from both an arbitrator's statutory duty to act fairly and impartially under section 33 of the English Arbitration Act and an implied term in the contract between the arbitrator and the parties that the arbitrator will so act. The Supreme Court also agreed that Mr. Rokison had breached this legal duty of disclosure.

Nevertheless, the Supreme Court, in upholding the decisions of both the Court of Appeal and the High Court, albeit for different reasons, held that on the facts of the case, a fair-minded and informed observer, looking at the facts and circumstances that existed at the time of the hearing to remove the arbitrator, would not conclude that there was a real possibility of bias or that circumstances existed that gave rise to justifiable doubts about Mr. Rokison's impartiality. Ultimately, the Supreme Court held that there was no apparent bias and therefore no grounds for removing Mr. Rokison as an arbitrator.

Analysis of the UK Supreme Court Decision

The arbitrator's obligation to act independently, fairly and impartially is one of the core principles of arbitration law. It is from that obligation that the consequential duty arises, to disclose circumstances that may render the arbitrator susceptible to the appearance of bias to a fair-minded and informed observer. This case brought the issue into sharp focus.

On one hand, it is clear that the Supreme Court clarified the law on the apparent bias test as being "*whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased*", thereby clearing any doubt as to what the position under English law is. On the other hand, however, to the

extent that the court left the question of the *extent* of disclosure required in each given case to be determined by having regard to "*the particular characteristics of international arbitration*" and "*the custom and practice in the relevant field of arbitration*", the Supreme Court (most unusually) left the law in a state of flux. This will undoubtedly lead to extensive practical concerns not just for English law but by extension, Nigerian law which relies heavily on English law positions especially in areas of the law that are untested in the Nigerian justice system.

Incidentally, the High Court of Lagos State had early last year reignited the controversy surrounding the extent of the duty of disclosure, when it set aside an ICC Arbitration Award on the grounds of the failure of the Chair of the tribunal to make certain disclosures[2]. The ruling elicited sharply divergent interventions by different legal commentators including two distinguished Senior Advocates of Nigeria.[3] Hopefully the UK Supreme Court's decision will provide some persuasive authority in the determination of the appeal that is likely to arise or has arisen from the ruling.

Final Words

In the final analysis, the number of interveners (five in total) the UK Supreme Court allowed and received oral and written representations from is clearly demonstrative of the importance of this case to the practice of international arbitration and the legal questions of wide and general importance raised in the case. It is in this respect that that the eagerly anticipated decision must be seen for what it truly is, an ultimately underwhelming decision and a missed opportunity to bring clarity to this fundamental issue. It is also difficult to rationalise the Supreme Court's decision not to remove an arbitrator despite finding that the arbitrator had breached a statutory and contractual duty of disclosure. It remains to be seen what impact the court's decision to leave the vexed issues of disclosure and apparent bias to fact-specific circumstances will have on future arbitrations.

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[2] Global Gas and Refinery Limited v. Shell Petroleum Development Company unreported ruling of the High Court of Lagos State delivered on 25 February 2020 in Suit No. LD/1910/GCM/2017 *Coram* Oyekan-Abdullahi J.

[3] See Funke Adekoya, SAN https://legal.businessday.ng/2020/03/26/global-gas-and-refinery-limited-v-spdc-is-lagos-pro-or-anti-arbitration/ and Odein Ajumogobia, SAN https://www.pressreader.com/nigeria/business-day-nigeria/20200423/281633897381837.