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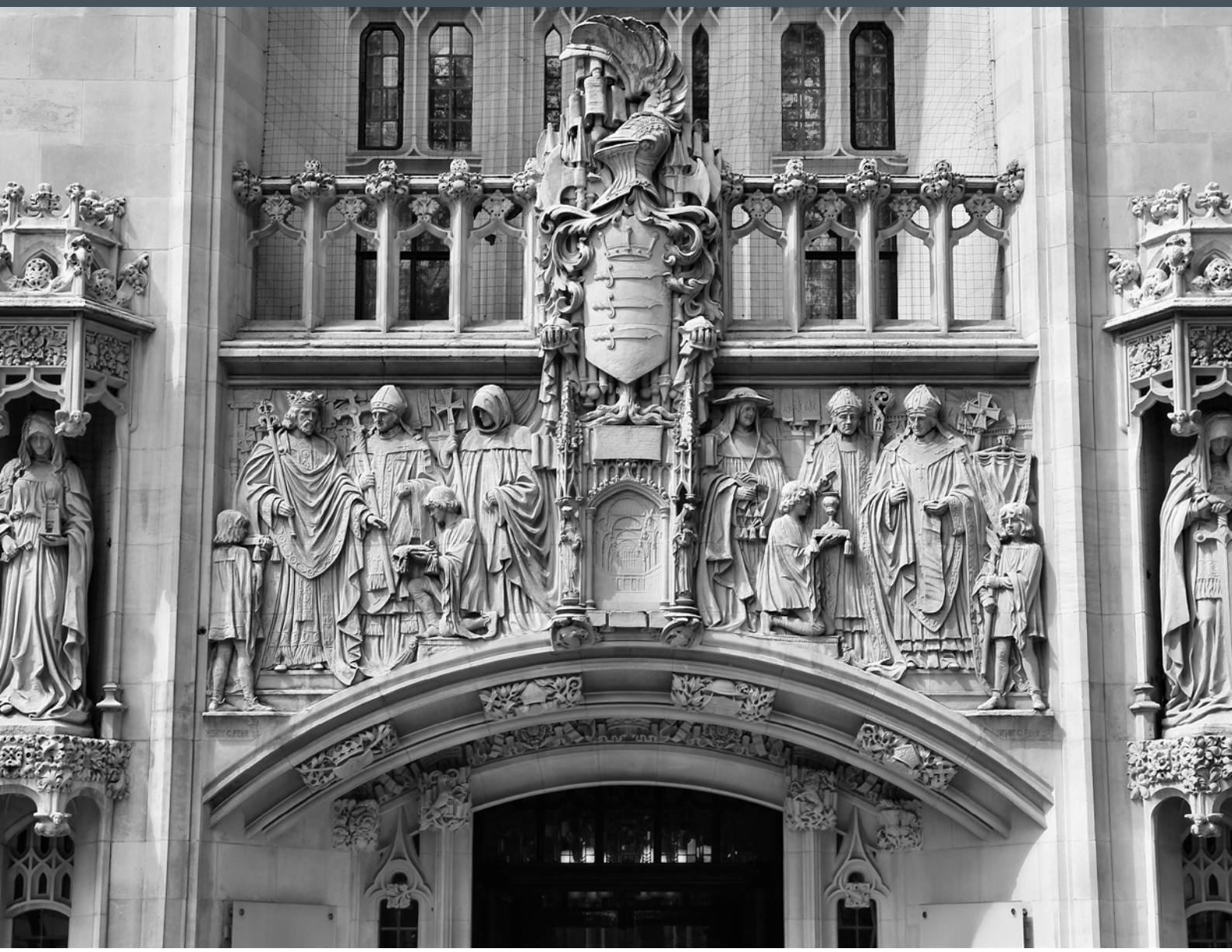

OPTICS AND CONTEXT IN ARBITRAL APPOINTMENTS: A REVIEW OF THE UK SUPREME COURT JUDGMENT IN *HALLIBURTON COMPANY V CHUBB BERMUDA INSURANCE LTD*

In its landmark decision the UK Supreme Court has confirmed and clarified the obligation on arbitrators to make disclosures in overlapping multiple appointment situations to avoid doubts as to their impartiality while highlighting and distinguishing the unique characteristics of sector-focussed arbitration.

In Brief

In what has been one of the most eagerly awaited judgments of 2020, the UK Supreme Court in *Halliburton Company v Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd)*[1] has clarified the law on arbitrator appointments and apparent bias in situations of multiple overlapping appointments. The judgment confirms that arbitrators are under a legal obligation to disclose circumstances which might give rise to justifiable doubts as to their impartiality.

In this briefing we review and analyse the judgment and consider its implications for international arbitration generally and also for more sector-focussed arbitration, including the international maritime and commodities sectors, where the Supreme Court has recognised the distinct characteristics of arbitrations arising in these areas, and their exemption from the scope of the disclosure requirements set out in the judgment.

HFW's team which successfully represented the London Maritime Arbitrators Association as an intervening party in the Supreme Court proceedings heard in November 2019 included partner George Eddings, who has since retired from the firm to become an arbitrator, associate Cecilie Rezutka and trainee Eleanor Duprez, with partners Craig Neame and Jonathan Webb supervising after George's retirement. The firm instructed Nick Vineall QC and Andrew Stevens at 4 Pump Court.

Conflict Issue in Context

In assessing the judgment and its implications, it is helpful to first understand the four main situations in which potential appointment conflict can arise in international arbitration, namely:

(i) "arbitrations with overlap": where two or more arbitrations arise out of the same incident or subject matter;

(ii) "multiple appointments": where a party suspects an arbitrator of being too closely allied or associated with its opponent; a common example is where the arbitrator is repeatedly appointed by the same party or firm of solicitors;

(iii) "multiple appointments with overlap": a hybrid between (i) and (ii), where one party is arbitrating against one or more opponents in separate arbitrations where there is some overlap between the subject matter of the arbitrations or the arbitrations arise out of the same facts, and the common party appoints a common arbitrator in the various references; and

(iv) "string arbitration": where a dispute arises out of a chain of contracts with liability passing through the chain, this being a scenario most commonly encountered in shipping, commodities, construction and reinsurance sectors.

The judgment in Halliburton is confined to the third scenario, that is "multiple appointments with overlap".

The Facts – Deepwater Horizon Oil Spill 2010

Halliburton v Chubb arose from an arbitration under a Bermuda Form liability policy involving oil field service company Halliburton Company (**Halliburton**) and its insurer Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd) (**Chubb**) in relation to the Deepwater Horizon oil spill in the Gulf of Mexico in 2010.

BP Exploration and Production Inc (**BP**) was the lessee of the Deepwater Horizon rig, which was owned by Transocean Holdings (**Transocean**). Transocean and Halliburton, who had each respectively taken out insurance with Chubb on substantially the same policy terms, were engaged by BP to provide crew and drilling teams and cementing and well-monitoring services respectively on the rig.

Numerous claims were brought against BP, Halliburton and Transocean arising out of the oil spill incident, most of which were consolidated into a single US Federal Court proceeding, which led to a settlement and subsequently to the claim that Halliburton made against Chubb under its liability insurance. Chubb declined to pay Halliburton's claim on the basis that the settlement of the US Federal Court claim was unreasonable and/or that Chubb had not consented to the settlement. Transocean, having also settled claims after the US Federal Court judgment was handed down, found itself in a similar position to Halliburton under its policy with Chubb.

Arbitration

Halliburton commenced arbitration against its insurer, Chubb. Each party appointed their own arbitrator, and the High Court appointed Kenneth Rokison QC[2], one of Chubb's proposed candidates, as the chair.

Prior to accepting his appointment as chair, Mr Rokison disclosed to Halliburton that he had previously been involved in a number of arbitrations involving Chubb, including as Chubb's appointed arbitrator, and that he was at the time appointed as arbitrator in two pending references involving Chubb.

The Dispute

During the course of the arbitration, Halliburton learnt of Mr Rokison's subsequent appointment in two overlapping arbitrations, both arising from the Deepwater Horizon incident, including one appointment by Chubb in relation to an excess liability claim brought against Chubb by Transocean. Mr Rokison had disclosed previous appointments by Chubb's solicitors, including his involvement in the Halliburton reference, to Transocean in the subsequent arbitration involving Chubb, but he did not disclose to Halliburton his involvement in the Transocean reference.

Halliburton questioned the arbitrator's impartiality and requested his resignation. Mr Rokison did not accept that disclosure was required as, in his view, there was no real overlap between the issues and he was not privy to any

1 [2020] UKSC 48.

2 Until the judgment of the UK Supreme Court, the names of the arbitrators had not been disclosed and the arbitrator had only been known under the alias "M" in the proceedings, in order to protect his reputation. The Supreme Court made it clear that the dispute was not concerned with bias but with the assertion of an objective appearance of bias. It did not see any grounds for continuing to maintain the arbitrator's anonymity.

information not also available to Halliburton. He nevertheless agreed to resign on the condition that Chubb consented. Chubb refused and Halliburton commenced court proceedings to remove Mr Rokison, which were defended by Chubb and the other arbitrators involved.

First Instance Decision

The Judge applied the common law test for apparent bias to determine whether there were *justifiable doubts* about the chair's impartiality. Adopting the view that experienced arbitrators should be able to sit in different arbitrations, which arise out of the same factual circumstances or subject matter, the Judge held that the fair-minded and informed observer, having considered the facts, would not conclude that there was a real possibility that the tribunal was biased. Since the circumstances did not give rise to any proper concerns about the chair's impartiality, there was nothing which he should have disclosed. Halliburton's claim was accordingly dismissed by the High Court.

Court of Appeal Decision

The Court of Appeal affirmed the first instance decision, but developed the law on multiple appointments with overlap, holding that it was an arbitrator's legal obligation, rather than merely good practice, to disclose facts and circumstances which would or might give rise to justifiable doubts as to their impartiality. Whilst regard should be had to the risk of unconscious bias, multiple appointments with overlap did not, as such, give rise to apparent bias because *"something more"* was required (although the Court did not elaborate further on what this might be).

The Court of Appeal found that Mr Rokison did not act improperly in discharging his duties, but held that he should, as a matter of law, have disclosed his subsequent appointment to Halliburton at the time, albeit that this failure to disclose was not sufficient to justify his removal.

Grounds of Appeal to the Supreme Court

Halliburton, on appeal, asked the Supreme Court to rule on two questions, namely:

- *"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*
- *whether and to what extent the arbitrator may do so without disclosure"*[3].

The Interveners

The case concerned questions of law of general importance to the integrity and reputation of English-seated international and trade and sector specific arbitrations. As such, it attracted the attention of various international arbitration bodies, which appeared as Interveners (interested bodies) in the proceedings, and who filed submissions[4] on the wider issues raised by the appeal. The Interveners were:

- International Court of Arbitration of the International Chamber of Commerce (ICC);
- London Court of International Arbitration (LCIA);
- Chartered Institute of Arbitrators (CIArb);
- London Maritime Arbitrators Association (LMAA); and
- Grain and Feed Trade Association (GAFTA).

The Interveners found themselves split into two opposing "camps": The ICC, LCIA, and CIArb supported Halliburton's appeal that Mr Rokison had displayed apparent bias and called for more extensive disclosure obligations to apply to arbitrators and more scrutiny by the courts in line with international institutional standards and practice.

The LMAA and GAFTA, on the other hand, intervened in support of Chubb's position, seeking to dismiss the appeal on the basis of the inherently specialised characteristics of shipping and commodities arbitrations, which resulted in the need for arbitrators in those fields to accept repeat appointments from the same party without disclosure being given.

The LMAA's Submissions

HFW acted for the LMAA who, in its submissions, highlighted the special characteristics of arbitration practice related to the maritime industry, in which multiple appointments with overlap are common because disputes frequently arise out of the same incident. Its submissions emphasised that:

- Overlapping strings of disputes through which liability passes are common;
- In the interest of efficiency and facilitating quick resolution, tribunals in maritime arbitration have the power to order concurrent hearings where two or more arbitrations raise common issues of fact or law, without requiring the consent of the parties, and this does not raise any appearance of bias;
- There is a relatively limited pool of specialist arbitrators, making it more likely that there will be an overlap in the subject matter and possibility that an arbitrator will have been appointed on multiple occasions by the same party;
- An inherent characteristic of maritime disputes is tight limitation periods, meaning that parties must be able to appoint their arbitrator swiftly without the arbitrators having to go through a lengthy disclosure process first. Party autonomy should be respected; and
- Even IBA Guidelines recognise that in certain types of arbitration, such as shipping, no disclosure of multiple appointments is required if parties are familiar with that custom and practice.

3 At [2]

4 The ICC and LCIA made both written and oral submissions before the Court whereas the CIArb, the LMAA and GAFTA intervened on the basis of written submissions only.

> **"The Supreme Court was careful to qualify its ruling and withstood the pressure to re-write the general law on arbitrator appointments or the scope of the duty of disclosure in arbitral appointments generally."**

The Supreme Court's Judgment

The Supreme Court unanimously upheld[5] the Court of Appeal's decision, albeit for slightly different reasons. Looking at each of the issues in turn:

Impartiality

As regards the first ground of appeal, the Supreme Court held that there may be circumstances in which the acceptance of multiple appointments with overlap with only one common party *"might reasonably cause the objective observer to conclude that there is a real possibility of bias"*[6]. To determine whether or not an arbitrator is impartial, which the Supreme Court said was "axiomatic"[7], the Court (i) applied the objective common law test of the fair-minded and informed observer for apparent bias, recognising that this *"requires objectivity and detachment in relation to the appearance of bias"*[8]; and (ii) took into account the facts of the particular case and the particular characteristics, custom and practices of the relevant field of international arbitration known at the date of the hearing of the application to remove the arbitrator, which could include:

- the fact that parties and their legal advisers may often have only limited knowledge of the reputation and experience of a professional; and
- the expertise or professional reputation of an individual arbitrator; this is a relevant consideration when assessing whether there is apparent bias – an established reputation for integrity will mean bias is more difficult to establish, but the weight attributed to it depends on the type of arbitration.

Disclosure

As regards the second ground, the Supreme Court agreed with the Court of Appeal that where the hypothetical observer would conclude that circumstances as at and from the date when the duty arose might reasonably give rise to a real possibility of bias, the arbitrator will be under a legal duty to disclose such appointments. A failure to make disclosure does not necessarily lead to a removal of the arbitrator, but is a factor that the fair-minded and informed observer would consider when making a determination. Equally, if a matter would give rise to justifiable doubts as to an arbitrator's impartiality, the disclosure of that matter would not, as a general rule, remove this conflict.

The Supreme Court recognised a tension between the duty of disclosure and the duty of privacy and confidentiality of arbitrations. It held, however, that the duty to safeguard privacy and confidentiality in English law ranks before the legal duty of disclosure which arises under the statutory duty to act fairly and impartially, and does not override the confidentiality obligation. Accordingly, in such situations the consent of the parties to disclose an existing appointment in a subsequent appointment must be sought, unless it can be inferred from industry market practice.

The Supreme Court then went on to set out when consent can be inferred. Where the parties submit to an arbitration under the rules of a specific institutional body, and where the rules include an obligation of disclosure, the parties implicitly consent to a qualification or limitation of the privacy and confidentiality obligations – constituting a basis for the inference that the parties to that arbitration consent to disclosure of such information about

5 The leading judgment was delivered by Lord Hodge with whom Lord Reed, Lady Black and Lord Lloyd-Jones agreed. Lady Arden also agreed, albeit for slightly different reasons.

6 At [152].

7 At [1].

8 At [54].

that arbitration to the parties in a potential subsequent arbitration under those rules. Similarly, the submission of the parties in a subsequent arbitration under those rules can be taken to mean that they have consented to disclosure to the parties in the previous arbitration. If consent cannot be inferred or obtained, an arbitrator may have to decline a later appointment because they will not be in a position to make the requisite disclosure.

The Supreme Court recognised that the best way to safeguard against giving the appearance of bias is to disclose any matters which could arguably be said to give rise to a real possibility of bias – such duty to disclose continues throughout the proceedings.

The Decision

The Supreme Court found Mr Rokison QC to have breached his legal duty of disclosure of the subsequent arbitrations in the first reference between Halliburton and Chubb, stating that he should have disclosed (i) Chubb's identity as the common party in the arbitrations; (ii) the nature of the appointment in the subsequent references (whether it was to be a party-appointment or a nomination for appointment by a court or a third party); and (iii) a high-level statement that the subsequent references arose out of the same incident[9].

When it came to the question of removal, the Court applied the common law test, taking into account the relevant facts known at the time of hearing the application for removal, and refused to hold that the arbitrator should be removed on the basis that:

- The law was unclear;
- The time sequence of the three references did not justify the need for disclosure;
- On the facts, it was likely that there would not be any overlap between the references; and
- There was *"no question"* of Mr Rokison having received any secret financial benefit, and to find otherwise would result in every party-appointed arbitrator receiving a disqualifying benefit[10].

Special Characteristics of LMAA and other Industry Specific Arbitration Recognised

In its judgment the Supreme Court expressly acknowledged the existence of a myriad of arbitral practices, such as LMAA arbitration, and held that *"what is appropriate for arbitration in which the parties have submitted to institutional rules, such as those of ICC and LCIA, differs from the practice in GAFTA and LMAA arbitrations. There are practices in maritime, sports and commodities arbitrations… in which 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"*[11].

The Supreme Court further acknowledged that in trade specific arbitrations *"it is an accepted feature of their arbitrations that arbitrators will act in multiple arbitrations, often arising out of the same events. Parties which refer their disputes to their arbitrations are taken to accede to this practice and to accept that such involvement by their arbitrators does not call into question their fairness or impartiality. In the absence of a requirement of disclosure of such multiple arbitrations, the question of the relationship between such disclosure and the duty of privacy and confidentiality does not arise"*[12].

By contrast, the Court expressly recognised that it has not been "shown that there is an established custom or practice in Bermuda Form arbitrations by which parties have accepted that an arbitrator may take on such multiple appointments without disclosure"[13].

Analysis and Comment

It needs to be borne in mind that the judgment focuses on multiple appointments with an overlap, i.e. its scope is limited to a very specific type of situation. The Supreme Court was careful to qualify its ruling and withstood the pressure to re-write the general law on arbitrator appointments or the scope of the duty of disclosure in arbitral appointments generally. The nature and scope of the arbitrator's disclosure obligations in other potential conflict situations remains unclear.

The fact that arbitrators can be in breach of their disclosure obligations (applied at the time of the subsequent appointment), but that such breach may nevertheless be insufficient to justify their removal (considered at the time of the application for removal, which might mean that subsequent factors materialise that can be taken into account), may not sit easily with commercial parties. This is however best understood, as the Court highlighted, by analogy to situations in which *"a person may commit a breach of contract but incur no liability as a result"*.[14]

That said, given the attention this case has received, in practical terms it is nevertheless expected to result in greater transparency and disclosure by arbitrators, with arbitrators and parties choosing a cautious approach to avoid the risk of finding themselves caught up in *Halliburton*-style proceedings with the potential risk of having arbitrators removed or Awards challenged.

The Court took the view that its ruling will not increase the number of challenges to appointment[15] but it remains to be seen how this plays out in reality and there is a view that it could encourage satellite litigation in International Arbitration and potentially also in trade specific arbitration.

9 At [146].
10 At [150].
11 At [87].
12 At [91].
13 At [137].
14 At [170].
15 At [106].

Of great importance to the London maritime arbitration community and other trade specific arbitration sectors is the fact that the Supreme Court was at pains to emphasise that its ruling in relation to the legal duty of disclosure in multiple overlapping arbitrations does not impact on these sectors because it is not generally perceived, in the trade specific context, that overlapping appointments, per se, cast any doubt on an arbitrator's impartiality or give rise to unfairness. Such sectors therefore fall outside of the strict ambit of the Supreme Court's ruling.

The judgment is powerful in recognising and helping to safeguard the special status and specific characteristics of London maritime and other sector specific arbitration platforms such as LMAA arbitration whose rules and regulations are left to the relevant arbitral bodies and trade organisations (or the parties themselves in their contracts) to reflect the requirements of their stakeholders and evolve accordingly. This reinforces their bespoke nature and the continued attraction to industry stakeholders of arbitration under the auspices of such international trade bodies and sector-focussed platforms, in preference to institutional arbitration. That said, it may be expected that the Haliburton judgment may cause all engaged in London arbitration, in its multiplicity of forms, to reflect on the importance of arbitrator impartiality as a fundamental bedrock of the service being offered to global commerce.

Indeed, the Supreme Court cautioned that *"rather than having disputes about the existence or absence of such a duty by proof of a general custom and practice in a particular field of arbitration, there may be merit in putting the matter beyond doubt by express statement in the rules or guidance of the relevant institutions"*[16] – effectively leaving it to the institutions to adjust their regulations as they deem necessary.

While it remains to be seen how the law governing arbitrator appointments develops going forward, it seems unlikely that the Supreme Court's decision in Halliburton, with its narrow focus, will be the final word on the matter.

16 At [136].

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