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The UK Supreme Court to Hear Deepwater Horizon Appeal Seeking Removal of an Arbitrator

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The UK Supreme Court will hear an appeal from *Halliburton Company v Chubb Bermuda Insurance Ltd* [2018] EWCA Civ 817 on whether an arbitrator may accept appointments in multiple references concerning the overlapping subject matter with only one common party, without giving rise to an appearance of bias and without disclosure. As it stands, the decision of the Court of Appeal means that arbitrators ***can*** accept multiple appointments in arbitrations with overlapping subject matters, without disclosure, and without necessarily giving rise to doubts about their impartiality.

The Factual and Procedural Background of the Case

The factual backdrop to this case is the BP oil spill in the Gulf of Mexico. Transocean was the owner of the Deepwater Horizon oil rig. Halliburton was engaged to provide cementing and other services in relation to the abandonment of the well. Both settled claims against it arising from the oil spill.

Halliburton made a claim on its insurance policy with Chubb, who refused to pay. Halliburton commenced an arbitration against Chubb in London under the insurance policy. Both parties appointed an arbitrator but, unable to agree on the chairman, the English High Court appointed 'M' as chairman.[1)]

Subsequent to his appointment, M accepted appointments as an arbitrator in two other references arising out of the oil spill. First, a claim by Transocean against Chubb in relation to the settlement of its claims; secondly, a claim by Transocean against another insurer. In the first reference, M was appointed by Chubb. In the second reference, M was appointed as chairman by agreement of the parties. M failed to disclose these appointments to Halliburton.

When Halliburton learned of the appointments and challenged M's impartiality, M said that it had not occurred to him that he had a duty to disclose the appointments but offered to resign if Chubb agreed.[2)] Chubb did not agree so Halliburton sought to have M removed as an arbitrator under section 24(1)(a) of the *Arbitration Act 1996* (UK)

which provides that a party may apply to the court to remove an arbitrator if "*circumstances exist that give rise to justifiable doubts as to his impartiality*". The application was founded on a submission that M's conduct (in accepting and not disclosing the appointments, and then not resigning) gave rise to an appearance of bias.

First Instance Decision

In the Commercial Court, Popplewell J said that whether circumstances exist which give rise to justifiable doubts as to an arbitrator's impartiality is determined by applying the common law test for *apparent bias*. The test 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.[3)]

Popplewell J concluded that there was nothing in M's acceptance of the appointments which gave rise to an appearance of bias.

His Honour considered that experienced arbitrators should be able to sit in different arbitrations which arise out of the same factual circumstances or subject matter. Party autonomy, which underpins arbitration, dictates that parties should be free to appoint their chosen arbitrator and, as part of that freedom, parties want their tribunal to have particular knowledge and expertise:

> *[i]t is undesirable that parties should be unnecessarily constrained in their ability to draw on this pool [of talent] if there are multiple arbitrations arising out of a single event or overlapping circumstances. (Popplewell J)*

Popplewell J further reasoned that arbitrators are able to put out of their minds material they may have encountered in another reference if it is not introduced as material in the case they are deciding. He concluded that the informed and fair-minded observer would not regard M as being unable to act impartially because "*his experience and reputation for integrity*" would enable him to approach the evidence and argument with an open mind.

Having found that M's acceptance of the appointments did not give rise to any justifiable concerns over his independence, it followed, Popplewell J said, that he was under no obligation to disclose the appointments.

Court of Appeal's Decision

The Court of Appeal upheld the judgment. The Court agreed that the mere fact that an arbitrator accepts appointments in multiple references concerning the overlapping subject matter with only one common party does not, of itself, give rise to an

appearance of bias.

As to whether M should have made the disclosure to Halliburton of the appointments, the Court concluded that, as a matter of good practice and as a matter of law, *M ought to have disclosed the appointments*.

The Court referred to the *IBA Guidelines on Conflicts of Interest in International Arbitration 2014*, Orange List 3.1.5, which calls for disclosure where an arbitrator serves in an arbitration on a related issue involving one of the parties. Under English law, disclosure is required of facts and circumstances known to the arbitrator which might give rise to justifiable doubts as to his impartiality (i.e. facts or circumstances which might lead the fair-minded and informed observer to conclude that there was a real possibility the arbitrator was biased). Whether disclosure should be made depends on the prevailing circumstances at that time.

Notwithstanding that M ought to have made the disclosure, the Court concluded the non-disclosure alone would not have led the fair-minded and informed observer to conclude that there was a real possibility that M was biased. This was because, among other things, the non-disclosed circumstance (the appointment) did not justify an inference of apparent bias, the failure to disclose was not deliberate, and there was a limited degree of overlap between the arbitrations.

The Court stressed that although in the eyes of a party, an appointment in related references may be a cause for concern or uneasiness, it was another step to conclude that the common arbitrator lacked impartiality. The arbitrator should be trusted to decide the case solely on the evidence or other material adduced in the proceedings in question.

Comment

As it stands, the *Deepwater Horizon* case means that arbitrators can accept more than one appointment in arbitrations with overlapping subject matters, without necessarily giving rise to doubts about their impartiality.

The IBA Guidelines already provide that any doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favor of disclosure. It is clear from this case, however, that arbitrators need more guidance.

The ICC recently issued a revised note to parties and arbitral tribunals on the conduct of arbitrations under the ICC Rules, which applies from 1 January 2019. This note extends the existing disclosure obligations of arbitrators and prospective arbitrators to "*non-parties having an interest in the outcome of the arbitration*". Therefore, arbitrators are now required to consider relationships with interested non-parties which may give rise to doubts as to impartiality.

Thus, even if the Supreme Court agrees with its lower courts and finds that, on the facts, the circumstances do not give rise to justifiable doubts as to M's impartiality justifying removal, the Supreme Court has an invaluable opportunity to provide

guidance on disclosure duties and obligations.

First, the Supreme Court should take the opportunity to clarify disclosure obligations and clearly opine that disclosure must include disclosure of related arbitrator appointments, irrespective of the extent of factual overlap between the cases. It may then fall to arbitral institutions to pick up and incorporate this extension in their rules.

Second, it is important that the Supreme Court provides this guidance since it is not clear currently whether such disclosure must be made. Notwithstanding the IBA Guidelines Orange List 3.1.5, M, an experienced arbitrator, said that "*it had not occurred to him*" to disclose the appointments. The Court of Appeal said M ought to have disclosed the appointments as a matter of good practice and as a matter of law. Yet, Popplewell J said M was under no such obligation.

Third, it is equally important that the Supreme Court offers guidance because where arbitrators fail to abide by the requisite standards, often unintentionally, it imposes significant costs on the parties. Proceedings on challenging arbitrator appointments or on the annulment of arbitral awards can leave the parties with the prospect of having to start proceedings afresh. A failure to abide by requisite standards also undermines public confidence in arbitration. To maintain its legitimacy, international arbitration must ensure that its decision makers are *and are perceived to be* impartial.

The outcome of the appeal will impact the elements critical to preserving the legitimacy and integrity of the arbitral process – arbitrators' trustworthiness and reliability. Ideally, the Supreme Court should confirm that arbitrators are required to disclose, at any stage of the proceedings, related arbitrator appointments, irrespective of the extent of the relation. We, in any event, look forward to the Supreme Court's further guidance on the issue.

References

↑**1** Exercising its powers under section 18 of the Arbitration Act 1996 (UK).

↑**2** M considered that, given he had been appointed by the Court following a contested hearing, resignation should be conditional on the consent of Chubb.

↑**3** Porter v Magill [2002] 2 AC 357, [103].

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