# Kluwer Arbitration Blog

## Halliburton v. Chubb: Waiving a Mandatory Duty

Jayavardhan Singh · Wednesday, April 28th, 2021 · YIAG

In November last year, the UK Supreme Court (the "Court") pronounced judgment in *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48. It held, among other things, that there was a duty of disclosure for arbitrators in English law. Recognizing the importance of the principle of party autonomy, the Court concluded that parties could, by agreement, waive this duty. This presents a problem since the duty itself has been implied in a mandatory provision of the English Arbitration Act 1996 (the "1996 Act") and thus ought to, by definition, be beyond waiver.

In brief, *Halliburton* concerned an *ad hoc* arbitration governed by the laws of New York and seated in London. Halliburton sought the removal of the presiding arbitrator before the High Court on various grounds, including that his failure to disclose certain appointments had given rise to justifiable doubts as to his impartiality. A useful overview of the underlying facts and the Supreme Court's judgment may be found here. The decisions of the High Court and the Court of Appeal have been discussed here. This post discusses the role disclosure plays in arbitration. It notes the Court's decision to base the duty of disclosure in a mandatory provision of the 1996 Act before examining whether the duty should, as a consequence, be capable of waiver.

### The role of disclosure

Arbitrators perform a judicial function. They are required to act as judges would, without fear or favour, affection or ill-will. One way of satisfying the parties as to an arbitrator's impartiality is disclosure. The role of disclosure was neatly summarised in the decision by Lord Hodge in *Halliburton*, who delivered the opinion of the Court:

> "70. An arbitrator, like a judge, must always be alive to the possibility of apparent bias and of actual but unconscious bias. … One way in which an arbitrator can avoid the appearance of bias is by disclosing matters which could arguably be said to give rise to a real possibility of bias. Such disclosure allows the parties to consider the disclosed circumstances, obtain necessary advice, and decide whether there is a problem with the involvement of the arbitrator in the reference and, if so, whether to object or otherwise to act to mitigate or remove the problem…"

**Locating the duty of disclosure**

Unlike arbitration laws in France, Singapore or India, the 1996 Act places no express obligation on potential or serving arbitrators to make disclosures to parties regarding matters that concern their independence or impartiality. Further, such a duty had not been previously established by the courts in England. The Supreme Court in *Halliburton* was thus required to determine where such a duty existed in English law.

The Court found that the duty of disclosure for arbitrators was implicitly based in section 33 of the 1996 Act, which provides that arbitral tribunals shall act fairly and impartially as between the parties. As the Court said at [78], the legal obligation to disclose matters that could give rise to justifiable doubts as to an arbitrator's impartiality was *"encompassed within the statutory obligation of fairness."* It was *"also an essential corollary of the statutory obligation of impartiality."* Further, while discussing the duty, the Court considered at [77] the example of an arbitrator who had a financial relationship with a party to the dispute in which he or she was appointed. It found that in such cases it would *"be incumbent on the arbitrator to disclose the relationship in order to comply with his statutory duty of fairness under section 33 of the 1996 Act."* The Court concluded at [81] that there was a legal duty of disclosure in English law which was *"encompassed within the statutory duties of an arbitrator under section 33,"* while adding at [154] that this duty, which was *"a component of the arbitrator's statutory duty to act fairly and impartially,"* did not override the separate duty of privacy and confidentiality.

The nature of the duty is thus clear. The duty is implicit in or *"encompassed within"* section 33. The Court has read into that provision a duty that requires arbitrators to disclose matters that would or might give rise to justifiable doubts as to their impartiality. It follows that this obligation, though termed a *"legal duty"* by the Court, is in fact a statutory duty. Once found encompassed within section 33, the duty is as much a part of that provision as its express words. There is, then, no difference between the express and the implied. As Francis Bennion wrote in his seminal work on statutory interpretation, *"neither portion is more compelling than the other."* For the courts, they are of equal force.

**Can the duty be waived?**

Section 33 of the 1996 Act is a mandatory provision. By virtue of section 4 and Schedule 1 of the Act, it applies to all arbitrations seated in England and Wales or Northern Ireland *"notwithstanding any agreement to the contrary."* Parties cannot contract out of section 33.

Thus, with the decision in *Halliburton,* it ought to have followed that parties could not opt-out of an arbitrator's duty of disclosure. As a necessary consequence of implying the duty in section 33, it ought to have been incapable of waiver. And yet, it is not. The court held that parties can expressly or implicitly waive the disclosure requirement (See [78] and [154]).

A likely justification for this conclusion is a single sentence in the judgment which proposes that the duty lies in contract. The Court said at [76] that the statutory duty of arbitrators to act fairly and impartially *"gave rise to an implied term in the contract between the arbitrator and the parties that the arbitrator will so act."* How this leap from statute to contract occurs is hard to see. Regrettably, the judgment is bereft of any reasoning on this point. It provides little guidance for future courts faced with similar questions. This problem is only aggravated in light of the several instances

where the duty of disclosure is described as one encompassed within statute.

Notably, Lady Arden concludes in a separate opinion that the duty of disclosure is rooted in both section 33 *and* the contract of appointment between the arbitrator and the parties. This, she said, was also the opinion of the majority. Even if this were the case, waiver would remain impermissible. Once found encompassed within a mandatory provision, the duty is mandatory. In fact, while speaking of the obligation to disclose, the Court itself said that *"an arbitrator who knowingly fails to act in a way which fairness requires to the potential detriment of a party is guilty of partiality."* In other words, by failing to make necessary disclosures, an arbitrator would be violating his express duty under section 33. There should, therefore, be no possibility of waiver.

**Conclusion**

Principally, the duty of disclosure does not exist for the benefit of the parties and, therefore, it is not for the parties to waive any right to it. The duty exists because adjudication by a fair and impartial tribunal is an element of public policy and an indispensable requirement of the Rule of Law. Any benefit to the parties is incidental. This is, however, not the position the Court adopted.

We are left then with the most peculiar of situations. A duty of disclosure has been declared waivable despite it forming part of a mandatory provision in the 1996 Act. It seems to me that deference to the parties' choice has been stretched too far in *Halliburton.* Among the principles on which Part I of the 1996 Act is founded is that *"the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest"* (section 1(b)). These safeguards include the mandatory provisions of Part I. While party autonomy is unquestionably important, judicial reasoning cannot always mould itself to support it, ignoring the language and purpose of legislation. What appears to be a victory for party autonomy comes at the cost of supporting an untenable legal proposition.

Another approach available to the Court in *Halliburton* would have involved holding that the duty was mandatory while leaving its precise contours to be determined by the parties. Parties (through contract or institutional rules) could then address matters such as the form in which disclosures should be made and the detail with which arbitrators should disclose relationships and appointments. Parties could even be permitted to limit the matters that an arbitrator ought to disclose, though they would not be able to waive or abandon the duty in its entirety. This approach would have paid sufficient service to the principle of party autonomy and maintained the sanctity of mandatory provisions.

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uncover potential conflicts of interest.



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