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Halliburton v Chubb - UK Supreme Court Hearing Report (November 2019) by L. Winnington-Ingram and E. Litina

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Halliburton v Chubb - UK Supreme Court Hearing Report (November 2019)

Lucy Winnington-Ingram¹ and Eva Litina²

1. Background to the Dispute

The dispute before the Supreme Court has its beginnings in the Deepwater Horizon incident in the Gulf of Mexico. In April 2010 a blowout caused an explosion on the Deepwater Horizon offshore drilling rig. 11 crewmembers were killed in the explosion. A resultant fire caused the rig to sink two days later, leaving oil flowing from the well at the seabed and into the ocean. The Deepwater Horizon incident is reported to have given rise to the largest oil spill in United States' waters.

The rig was owned by Transocean Holdings LLC ("Transocean"). Transocean had leased the rig to BP Exploration and Production Inc ("BP") and, at the same time, had been engaged by BP to provide crew and drilling teams. Halliburton Company ("Halliburton" or the "Appellant" in the English Court proceedings) had also been engaged by BP to provide cementing and well-monitoring services.

The Deepwater Horizon incident gave rise to numerous claims against all three entities by the US Government as well as corporate and individual claimants. The US Government's claims were for civil penalties under various federal statutes. The liability issues related to private claims, as well as certain damage claims, were pursued through a Plaintiffs' Steering Committee ("PSC") following consolidation of the individual claims into a single Multi District Litigation proceeding.

On 4 September 2014, following a liability trial in the Federal Court for the Eastern District of Louisiana, findings of fact and conclusions of law were issued apportioning blame between the parties as: BP 67%; Transocean 30% and Halliburton 3%. Halliburton had previously settled, and Transocean went on to settle, their liability under the PSC claims in the amounts of USD 1.1 billion and USD 212 million respectively. Transocean also paid civil penalties to the United States' Government in the sum of approximately USD 1 billion.

Transocean and Halliburton had both purchased liability insurance on the Bermuda Form from Chubb (the "First Respondent" in the English court proceedings). Bermuda Form liability insurance typically operates as a continuous umbrella policy covering corporate policyholders. It operates above the primary layers of insurance. Both policies provided for New York law as the governing law and that disputes be referred to a three member tribunal seated in London.

Halliburton made a claim on its liability insurance against Chubb which Chubb refused on the basis that Halliburton's settlement of the PSC claims was not a reasonable settlement and/or that Chubb had not consented to the settlement. Transocean's claims under its liability insurance against Chubb were similarly refused.

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In January 2017, Halliburton commenced an arbitration against Chubb under the Bermuda Form (“Halliburton v Chubb Reference”). Having each appointed their respective arbitrators to the Tribunal, Chubb and Halliburton were unable to agree on the third arbitrator. An application was accordingly made to the High Court to make the necessary appointment pursuant to s. 18(3)(d) of the English Arbitration Act 1996 (the “English Arbitration Act”). A number of candidates were put forward by each party at the hearing, with Chubb’s preferred arbitrator, M, ultimately appointed by order of Flaux J. During the hearing Halliburton objected to the appointment of (inter alia) M on the ground that he was an English lawyer and their liability insurance policy was governed by New York law. The appointment was not appealed.

Prior to accepting his appointment, M disclosed that he had previously acted in arbitrations to which Chubb was a party and that he was currently appointed as arbitrator in two pending references in which Chubb was involved. Halliburton did not object to the appointment on these grounds.

In December 2015, M accepted an appointment by Chubb in a claim brought by Transocean relating to Chubb’s refusal of its claim under its liability insurance policy (“Reference 2”). Thereafter, in August 2016 M accepted an appointment as a substitute arbitrator in another claim by Transocean against a different insurer on the same layer of insurance (“Reference 3”).

M did not disclose either of these appointments (Reference 2 or Reference 3) to Halliburton, although the fact of his appointment by the court in the Halliburton v Chubb Reference was disclosed to Transocean in Reference 2.

In November 2016, Halliburton learned of M’s appointments in References 2 and 3 and, relying on the IBA Guidelines on Conflicts of Interest in International Arbitration (the “IBA Guidelines”), sought clarification from M. In response M stated that he did not believe that the circumstances put any obligation upon him to make disclosure, but “*with the benefit of hindsight, that it would have been prudent*” for him to have done so. M further claimed that, whilst all three References arose from the Deepwater Horizon incident, they did not raise the same or even similar issues.

Further correspondence between Halliburton, Chubb and M ensued in which Halliburton proposed the resignation of M, a proposal to which Chubb indicated that it was not prepared to agree.

On 21 December 2016, Halliburton issued a Claim Form seeking an order pursuant to s. 24(1)(a) of the English Arbitration Act that M be removed as arbitrator.

On 5 December 2017 the Tribunal in the Halliburton v Chubb Reference issued its Final Partial Award on the Merits in Chubb’s favour. Notably, Halliburton’s appointed arbitrator, N, issued “Separate Observations” in which he explained that he was unable to join in the award as a result of his “*profound disquiet about the arbitration’s fairness*”. In relation to M’s failure to disclose his appointments in References 2 and 3, N opined “[t]he lack of disclosure, which causes special concern in the present fact pattern, cannot be squared with the parties’ shared ex ante expectations about impartiality and even-handedness.”

Regarding the Second and Third References, it was noted during the Supreme Court Hearing by the Respondent that the pleadings closed in early July 2016. Towards the end of July 2016 the first procedural meeting took place at which an order for a trial of a preliminary issue was made with the consent of the parties. The preliminary issue was heard in November 2016.

On 1 March 2017 the Tribunals in References 2 and 3 issued awards deciding in Chubb's favour on the preliminary issue. These awards were dispositive of the References.

2. The Judgments of the Lower Courts

In the first instance decision of the Commercial Court dated 12 January 2017,³ Popplewell J rejected the contention that the overlap between the references was a matter of concern on the basis that M would be privy to information during the course of References 2 and 3 which was relevant to the issues in the Halliburton v Chubb Reference.

Popplewell J specifically observed that “*it is a regular feature of international arbitration in London that the same underlying subject matter gives rise to more than one claim and more than one arbitration without identity of parties.*” This is common in insurance and reinsurance claims where there has been a large casualty, as well as in maritime and commodity disputes with string contracts. Popplewell J considered that this is also desirable because arbitrators are often chosen for their particular expertise.

Popplewell J further highlighted that M's experience and reputation for integrity would, in keeping with the usual practice of London arbitrators, enable him to observe his duties under s. 33 of the English Arbitration Act by approaching the evidence and arguments with an open mind. It was also noted that, although the IBA Guidelines may provide some assistance on what may constitute an unacceptable conflict of interest and what matters may require disclosure, they are not legal provisions and do not override the applicable legal principles. If there is no apparent bias in accordance with the legal test, compliance with the IBA Guidelines is irrelevant.

Popplewell J concluded that there was nothing in the acceptance of appointments in References 2 and 3 by M which gave rise to an appearance of bias against Halliburton, even if the issues which had to be decided in the References were identical or overlapping, which he found they were not. Therefore, Popplewell J held that there was nothing to disclose. Even (*arguendo*) if disclosure had to be made, the failure to do so did not give rise to a real possibility of apparent bias.

On appeal by Halliburton,⁴ the Court of Appeal held that the appointment of an arbitrator in overlapping or related arbitrations will not itself give rise to a conflict. However, the Court noted that M ought as a matter of good practice and, in the circumstances of this case, as a matter of law to have made disclosure to Halliburton of his appointments in References 2 and 3.

In answering the question whether the fair-minded and informed observer, having considered the facts, would conclude that there was in fact a real possibility that M was biased, the

³ *H v L & Ors* [2017] EWHC 137 (Comm).

⁴ *Halliburton Company v Chubb Bermuda Insurance Ltd & Ors* [2018] EWCA Civ 817.

following factors are taken into account from the perspective of the fair-minded and informed observer: (1) the non-disclosed circumstance does not in itself justify an inference of apparent bias; (2) disclosure ought to have been made, but the omission was accidental rather than deliberate; (3) the very limited degree of overlap means that the overlapping issues should not give rise to any significant concerns; (4) the fair-minded and informed observer would not consider that mere oversight would give rise to justifiable doubts as to impartiality; and (5) there is no substance in Halliburton's criticisms of M's conduct after the non-disclosure was challenged. On account of these factors, the Court of Appeal concluded that, at the time of the hearing on Halliburton's application to remove M as arbitrator, the non-disclosure would not have led the fair-minded and informed observer to conclude that there was in fact a real possibility that M was biased.

3. The Grounds for Appeal

The specific grounds for appeal may be summarised as follows:

- (1) Whether and to what extent an arbitrator may accept appointments in multiple references concerning the same or overlapping subject matter with one common party without giving rise to an appearance of bias.
- (2) Whether and to what extent he may do so without disclosure.

Regarding the second issue of disclosure, two further general issues arise:

- (1) When should an arbitrator make disclosure of circumstances which may give rise to justifiable doubts as to his impartiality?
- (2) What are the consequences of failing to make such disclosure?

4. Summary of the Supreme Court Hearing on 12 to 13 November 2019

Lord Reed began by noting that the Court had received a draft order providing for anonymity of some of the parties and that the Court was not immediately persuaded that there are grounds for anonymity in this case. The parties were directed to address the Court on this in their submissions.

It was further noted that the ICC and the LCIA are both intervening and will be making oral submissions. The LMAA, GAFTA and CIArb also intervened, making written submissions.

(a) Submissions by the Appellant

Lord Grahame QC opened his submissions by posing a question to the Court which, in the Appellant's view, reflects the issues: does English law require a party to submit its disputes to an arbitrator who has breached its obligations to that party and whose conduct has given rise to legitimate concerns in the eyes of the Court of Appeal? In determining the issues, the Court should apply a "gold standard" for arbitrations governed by English law.

Lord Grahame QC noted that the Court of Appeal's judgment has been the subject of criticism from across the international arbitration community and that virtually all

commentators have pointed out that the decision appears to be based on the fact that the parties should trust arbitrators (including M) to comply with their statutory duties. This is in part due to M's local reputation which was emphasised in the Court of Appeal's judgment. In the submission of the Appellant, English law does not require a party to trust an arbitrator where that arbitrator's conduct has given rise to legitimate concerns.

Arbitrations conducted pursuant to the LMAA and GAFTA rules were carved out as examples where multiple appointments in overlapping references may be acceptable. It was noted that there are specific safeguards contained within those rules so that unfairness does not arise.

The Appellant summarised the "two key issues for the Court to consider" as follows:

(a) Can an arbitrator accept appointments in multiple references involving overlapping issues and only one common party without giving rise to justifiable doubts as to their impartiality? In the Appellant's submission, the answer to this will depend on the specific facts of the case. In particular, if disclosure is made then certain concerns which may arise can be mitigated.

(b) Whether without disclosure an arbitrator can accept appointments in multiple references involving overlapping issues and only one common party without giving rise to justifiable doubts as to their impartiality. The Appellant's short answer to this is "never".

Lord Gribner QC made submissions on the legal standard to be applied and, in particular, the effects of unconscious bias. The law is required to guard against the "insidious" effects of unconscious bias and there is no reason to believe that an eminent person is immune to unconscious bias. By contrast the Court of Appeal assumed (incorrectly in the Appellant's submission) that M was entitled to the unqualified trust of the parties. Lord Gribner QC went on to consider the cases which, in the Appellant's submission, weigh in favour of the disqualification of M (*Wael Almazeedi v Michael Penner and Stuart Sybermsa* [2018] UKPC 3; *Guidant LLC v Swiss Re International SE* [2016] EWHC 1201; *Beumer Group UK Ltd v Vinci Construction UK Ltd* [2016] EWHC 2283).

Lord Hodge noted in relation to the arbitrators' Terms of Appointment (as relied on by the Appellant as a source of M's duty of disclosure) that Clause 26 imposed an obligation of confidentiality save to the extent that disclosure may be required by a legal duty. It was posited that this clause accommodated a potential clash between an arbitrator's concurrent duties of disclosure and confidentiality. Lord Gribner QC stated that this clause did not go far enough – it did not allow an arbitrator to go into the details of the issue, only to identify that an issue had arisen. In response to Lord Hodge, Lord Gribner QC confirmed that the Appellant was asking the Court to confirm the precise nature of the legal duty of disclosure.

Lady Black noted that one of the foundations of the Appellant's arguments appeared to be that secrecy in arbitration is not replicated elsewhere in the legal system i.e. in court proceedings. Lady Black noted that such secrecy does arise in local authority proceedings relating to a child that the local authority is seeking to place into care, and that if the Appellant was correct as to the implications of secrecy in arbitration then that could have implications for those types of cases as well. Lord Gribner QC noted that he presumed that there was a special reason for this type of regime and that the secrecy did not give rise to bias.

This question was also addressed by the LCIA during their intervening submissions. Here, local authority proceedings were distinguished from arbitral proceedings on the basis that, in the latter, arbitrators are appointed by the parties and have a direct financial interest in being appointed.

(b) Intervening Submissions by the LCIA

The LCIA, represented by Mr Charles Kimmins QC, first noted that, in its view, there is a feeling in the international arbitration community that the approach of the English courts to arbitrator's impartiality is insufficiently strict. The LCIA, the ICC and CIArb are accordingly advocating for a more robust approach. Again, arbitrations conducted under LMAA and GAFTA rules were distinguished as specialist categories of arbitration with separate and distinct safeguards.

Mr Kimmins QC stated that the test under s. 24(1) of the English Arbitration Act is the common law test, but its application should take into account the distinctive characteristics of arbitration which militate towards a stricter approach.

As to the first question of whether an arbitrator can accept appointments in multiple references involving overlapping issues and only one common party without giving rise to justifiable doubts as to their impartiality, Mr Kimmins QC noted that it "*might*" do. Multiple appointments can give rise to the "*vices*" of secret communications and inside knowledge. An arbitrator can essentially have a "*secret dress rehearsal*" of the claim, where they are sitting in a different case which is heard first.

Lady Black noted that "*if the vice is a 'dress rehearsal' that won't always affect the first arbitration*". The LCIA responded noting that the vice is the acceptance of an appointment which has the potential to give rise to a dress rehearsal.

As regards the proper test, Mr Kimmins QC submitted that little or no weight should be given to reputation or experience and, contrary to the submissions of the Appellant in this respect, the chair and the party-appointed arbitrators should be held to an identical standard. Arbitrators are not appointed with the expectation that they will confer advantages on the party appointing them.

Lord Reed noted that it appeared that the exercise of appointing an arbitrator isn't to do with bias, even unconscious bias, but to do with the fact that different people look at things in different ways. For example, if you were trying to choose a panel of the Supreme Court, and you were acting for the Government you might choose a different panel than an asylum seeker. However this would not mean that anybody on the panel was biased or not biased, but they might have a different approach to the principles of judicial review.

Lord Hodge queried whether, in maintaining standards, different types of arbitrators come under different pressures. Mr Kimmins QC noted that they were troubled by this proposition and they cannot see that it goes anywhere unless it carries with it an inference that a party-appointed arbitrator is to be approached differently and that would open a "Pandora's Box".

Lady Black noted that that you have to concentrate on the mind of the fair-minded observer and their perspective may not be the same.

Lord Reed commented that in his experience arbitrators are appointed on the basis that they will bring different expertise. For example, in a case where one party appointed a civil lawyer, the other a common law lawyer and the chair was to be from a mixed system.

Mr Kimmins QC concluded by touching briefly on the legal duty of disclosure noting that, in its submission, the source of this obligation arises from s. 33 of the English Arbitration Act and that a breach of this section does not necessarily shoehorn a party into making arguments under s. 24(1)(d) of the same act. It must be the position that a breach of s. 33 of the English Arbitration Act is capable of giving rise to disqualification of the offending arbitrator.

(c) Intervening Submissions by the ICC

The ICC, represented by Mr Constantine Partasides QC, began their submissions by noting that the ICC represents a broad range of arbitration users.

Noting that the Court of Appeal's judgment was handed down in February 2018, Lord Reed asked whether that judgment had had any practical effects on international arbitration in London. Mr Partasides QC responded that he was not aware of any effects, but it may be that "*people are holding their breath*".

Starting with consideration of the first question (whether an arbitrator can accept appointments in multiple references involving overlapping issues and only one common party without giving rise to justifiable doubts as to their impartiality), Mr Partasides QC stated that the Court of Appeal's judgment gave rise to uncertainty. If the Court of Appeal held that multiple appointments of this nature can give rise to justifiable doubts, then clarification of the judgment is required. Alternatively, if the Court of Appeal held that such appointments could never give rise to justifiable doubts, then this would be out of step with the international arbitration community. This appears to be a reference to the conclusion at paragraph 53 of the Court of Appeal's judgment which states:

"[w]e accordingly agree with the judge that the mere fact that an arbitrator accepts appointments in multiple references concerning the same or overlapping subject matter with only one common party does not of itself give rise to an appearance of bias. As Dyson LJ said '[s]omething more is required' and that must be 'something of substance'."

Mr Partasides QC noted that outside of particular specialised arbitrations such as LMAA and GAFTA, multiple appointments are not common and they give rise to certain understandable concerns which can make them objectionable to the international arbitration community. The ICC's position is that multiple appointments may (without more) give rise to justifiable doubts as to an arbitrator's impartiality, and that whether they will give rise to such doubts will depend on the specific circumstances.

As to the question of M's non-disclosure of his appointments in overlapping references, Mr Partasides QC spoke of an "international pro-disclosure consensus". The ICC's position is that the failure of an arbitrator to disclose an appointment in an overlapping reference can, without more, justify the disqualification of that arbitrator. This is reflected in ICC literature and challenge decisions of the ICC Court, which give substantial weight to non-disclosure by an arbitrator in this context.

Mr Partasides submitted that the Court of Appeal had emphasised the accidental nature of M's non-disclosure and that too much significance had been attached to this. The international pro-disclosure consensus would be significantly weakened if an arbitrator could rely on their honest but wrongful failure to make disclosure.

(d) Submissions by the Respondent

On behalf of the Respondent, Mr Crane QC opened his submissions by noting that, in order to properly set the context for the issues to be decided by the Court, it was necessary to consider the facts.

By way of clarification, Mr Crane QC started by noting that, as the Court of Appeal made clear in its judgment (at [73]), there are two distinct questions with distinct temporal scopes. As regards whether disclosure of M's other appointments should have been made, this needs to be assessed at the time when that disclosure (if it was required) should have been made. As regards the significance of the non-disclosure and, in particular, whether it can give rise to justifiable doubts as to M's impartiality, this must be assessed by the Court on the basis of all of the materials before it at the date it is determining the application. Mr Crane QC submitted that this does not mean, as has been submitted by the Appellant, that the Court of Appeal used hindsight to exculpate M.

Mr Crane QC's submissions focused on the factual question of whether there were overlapping issues across the References in which M was appointed, and whether this could give rise to justifiable doubts as to M's impartiality. In this regard it was noted that the timing of the References militated against any disadvantage to the Appellant (since the Halliburton v Chubb Reference was to be determined first). In his submission, it therefore made sense that M chose to disclose the fact of his appointment by the Respondent in the Halliburton v Chubb Reference to Transocean in Reference 2 as this Reference was to run behind the Halliburton v Chubb Reference.

Mr Crane QC went on to distinguish between *ad hoc* arbitrations and arbitrations conducted pursuant to institutional rules such as the ICC and LCIA. In this regard, Mr Crane QC noted that both the LCIA and ICC rules impose a different party focussed standard for disclosure requiring disclosure of anything that might call into question the arbitrator's impartiality in the eyes of the parties. Further, both the ICC and LCIA rules require disclosure following a fairly full exchange of documents, and prior to appointment. This is contrasted to the position under Bermuda Form whereby the request for arbitration involves the nomination of the claimant's arbitrator, and the respondent's arbitrator is nominated in its response to that request. It follows that whilst the "wait and see" approach adopted by M might not be appropriate in the context of an ICC or LCIA arbitration, it may be so in an *ad hoc* arbitration.

According to Mr Crane QC, having properly adopted the "wait and see" approach, it would have become apparent to M on his review of the pleadings that there was a preliminary issue to be determined first. The preliminary issues were heard in November 2016, prior to the hearing of the Halliburton v Chubb Reference which was fixed for January 2017. There was accordingly no overlap and no risk that M would acquire inside knowledge. Mr Crane QC suggested that there was accordingly no clear basis for disclosure.

Lady Arden enquired as to whether these submissions amounted to a challenge of the Court of Appeal's finding that disclosure ought to have been made. Mr Crane QC responded in the affirmative noting that the Respondent challenged the Court of Appeal's conclusion that disclosure was required as a matter of law and good practice.

Mr Crane QC went on to submit that Bermuda Form arbitration is closer to LMAA and GAFTA arbitration than to arbitration under institutional rules such as the ICC and the LCIA. In such specialised forms of arbitration, it is recognised that the parties may want to appoint arbitrators of a certain area of expertise even where this could infringe on a freestanding right to independence. Lady Arden queried whether there was specific evidence on the record which supported this ("*You have told us that Bermuda Form is closer to the specialist arbitrations, but I don't think there is any evidence on this?*"). Mr Crane QC noted that this was evidenced by way of commentary rather than by witness evidence.

Continuing on the point of overlapping issues, Mr Crane QC also noted that the Appellant's arbitrator N had also been appointed in other references arising out of the Deepwater Horizon incident and that, whilst this did come to light at an early stage of the arbitration proceedings, this was not a set of circumstances which N felt compelled to disclose.

Lord Reed noted that there are three concerns about impartiality raised. The first, which Mr Crane QC had focused on, is the question of the "dress rehearsal" where there are overlapping issues. The second is whether it's not "playing the game" for a chairman in one reference to accept an appointment by a party to that reference in another reference. The third is that arbitrators have to earn a living - we have arbitrators earning a living through their appointments by either insurers' lawyers or policy holders' lawyers and here we have someone who is appointed as chair (a critically neutral position) becoming financially beholden to the insurers' lawyers. Lord Reed stated that "*we perhaps need to look at that aspect more carefully.*"

Responding briefly, Mr Crane QC noted that this goes to the issue of independence. There may become a stage where financial dependence of an arbitrator is established, but there is no suggestion that this is one of those cases. The fact that an arbitrator is repeatedly appointed is a credit to his expertise and his skill as perceived by the market. In any event, there is joint and several liability for fees and the standard procedure in *ad hoc* arbitrations is for deposits to be created by the parties and for costs to be awarded out pursuant to any costs award.

Mr Crane QC made submissions on the issue of whether financial dependence or any other type of dependence is established. The expectations of the parties are of particular importance in this regard. Mr Crane QC stressed the special characteristics of insurance and reinsurance markets, in which a limited number of specialised arbitrators are available and submitted that this reality would be acknowledged by a fair-minded and informed observer (with further references to the fact that the LCIA and ARIAS recognise such special characteristics, as well as a US case of the 2nd Circuit: *Certain Underwriting Members of Lloyds of London v Insurance Company of the Americas*). Lord Reed noted that this case is the clearest possible explanation of the American party-appointed arbitrator.

Mr Crane QC continued by stressing that a clear line has to be drawn on when a presumption that accepting overlapping references is unacceptable is triggered. He suggested that in this case, there is no clear connection between the Halliburton v Chubb Reference and Reference 2 and the degree of overlap is insignificant.

At this point, Lord Lloyd-Jones asked to what extent these features were known to M. Mr Crane QC answered that what M knew is contained in his disclosure to Transocean, in which he covered his disclosure obligation, if any. He further stressed that the starting point should be the presumption that a professional arbitrator will act in accordance with his duties under s. 33 of the English Arbitration Act. This is also true for M, who is an eminent arbitrator.

Furthermore, Mr Crane QC compared the UNCITRAL Model Law art. 12 with s. 24(1)(a) of the English Arbitration Act. Lord Reed noted that for an American company like Halliburton, it would be outrageous if a neutral tribunal chair could accept a later appointment by one of the parties in a different reference. In this context, Mr Crane QC distinguished between the subjective standard of doubt through the eyes of a party, and the objective standard of the fair-minded and informed observer. Lord Reed then asked, whether the fair-minded and informed observer would be American and Mr Crane QC replied that the fair-minded and informed observer should be nationality blind.

Mr Crane QC further submitted that the omission of a statutory rule of disclosure in English law (in contrast to the UNCITRAL Model Law) was deliberate. The common law test is broader and more demanding in this regard. Lady Arden noted that the reason for such an omission was to ensure that common law continues to develop. Mr Crane QC cited the example of the Scottish Arbitration Act, in accordance with which the breach of a legal rule of disclosure leads to removal of arbitrators. Finally, he elaborated on the fact that the non-disclosure by M was innocent and inadvertent and did not cause injustice to Halliburton.

Lord Reed then focused on the critical issue of time. He stressed that even if there is a reasonable apprehension of bias at the time of appointment, this could change by the time that the court is seized with deciding an application to remove an arbitrator. Lady Arden noted that this could create an incentive for an arbitrator not to disclose potentially relevant information in the hope that the circumstances will change by the time of any such determination by the court. Mr Crane QC noted that the reputation of the arbitrator is important in this regard.

Later in the session, Mr Landau QC analysed the presumption that accepting overlapping appointments will give rise to justifiable doubts in light of the IBA Guidelines, stressing footnote 5 which refers to specialised arbitrations (such as LMAA and GAFTA) and further referred to other sources on the issue.

(e) Reply submissions by the Appellant

Lord Gabor QC submitted that the timing issue is not important for disclosure. Prompt disclosure is critical. Whether disclosure is necessary can only be judged after disclosure is made, while the “wait and see” approach is obviously wrong and can lead to significant expense and delay. Lady Arden asked whether we have to enquire what a reasonable and informed observer would do. Lord Gabor QC answered that he does not think so but he needs to think about it.

Lord Gabor QC analysed the Bermuda Form and stressed that there is no evidence to support that it is a special case and that it is closer to arbitration under LMAA and GAFTA rules. He further referred to the specific provisions of the LMAA Terms regarding disclosure and suggested that footnote 5 of the IBA Guidelines does not mention insurance arbitration as

an exception. He also stressed that party nominees and chairs come from different directions and this should not be overlooked by the fair-minded and informed observer.

Regarding the issue of whether there is evidence that parties might start avoiding London as a seat of arbitration, Lord Grabiner QC mentioned that he has noticed a shift but it may take years to materialise. The mere possibility of an impact to London arbitration is important. Mr Kitchener QC stressed that Halliburton could have discussed any issues as to the risk of overlap but it was deprived of this opportunity.

Finally, Lord Reed stressed the importance of the appeal and said that the court will take time to consider its decision.

5. Concluding Remarks

This appeal raises significant issues for international commercial arbitration law and practice. This has been stressed by both the Court of Appeal and by Lord Reed at the end of the Supreme Court hearing. One of the most important concerns is the impact of the Court of Appeal's judgment on international arbitration in London. Criticism from across the international arbitration community has pointed out that the Court of Appeal's judgment appears to be based on the fact that parties should trust arbitrators to comply with their statutory duties. The LCIA, the ICC and CIArb, call for a more robust approach with the ICC criticising London for being "out-of-step" with the rest of the world. Notably, the special features of arbitrations conducted under LMAA and GAFTA rules were distinguished.

This case presents an important opportunity for further guidance on an arbitrator's duty of impartiality and disclosure, and the award will be keenly awaited by the international arbitration community. Observers estimate that the Supreme Court may issue its ruling in the next four to six weeks. In any event, the Supreme Court's website notes that, as a very broad indication, judgments tend to follow approximately 12 weeks (excluding vacation) after the conclusion of the appeal hearing. Although this is by no means binding on the court, it follows that a judgment may be expected towards the end of February 2020, if not before.⁵

⁵ This accounts for a three week vacation over Christmas.

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