HALLIBURTON V CHUBB

A DISCUSSION FROM A MALAYSIAN PERSPECTIVE

By Clive Navin Selvapandian[1]

1. Introduction

An appearance of bias could result in the disqualification of an arbitrator in international arbitrations. It is controversial whether repeat appointments of an arbitrator give rise to an appearance of bias due to issue conflict.

Halliburton Company v Chubb Bermuda Insurance Company [2020] UKSC 48 ("Halliburton") revolves around repeat appointments of the same arbitrator in multiple references relating to the same factual matrix. In addition, all these arbitrations share one common party. This Supreme Court decision sheds light on two main issues:

(i) whether repeat appointments of the same arbitrator in this context give rise to an appearance of bias; and
(ii) whether the arbitrator has the duty to disclose his/her repeated appointments, if in the affirmative, whether the failure to disclose justifies the disqualification of the arbitrator.

This decision:

(i) clarifies the test to determine an arbitrator's impartiality or apparent bias;
(ii) classifies as a question of fact whether repeat appointments in multiple references arising from the same factual matrix and involving a common party give rise to apparent bias;
(iii) clarifies an arbitrator's duty of disclosure; and
(iv) reconciles the competing tensions of party confidentiality and the duty to disclose repeated appointments.

2. Brief Facts

In Halliburton, Mr. Rokison was appointed as an arbitrator in three parallel references stemming from the Deepwater Horizon Incident. All three references concern claims made by the insureds against the same insurer, which is Chubb Bermuda Insurance Company ("Chubb"). The Claimant in the first reference was Halliburton, whereas Transocean Holdings LLC ("Transocean") initiated the subsequent two references.

Halliburton challenged the appointment of Mr. Rokison for his repeat appointments in references involving the same factual matrix and a common party, which is Chubb. Halliburton alleged that there was an appearance of bias on Mr. Rokison's part in favour of the insurer. Halliburton further based its challenge on Mr. Rokison's failure to disclose to Halliburton his appointments in the other two references.

3. Apparent Bias

3.1 The Test of Apparent Bias

The test of apparent bias is an objective one. The presence of apparent bias is determined by whether a fair-minded and well-informed observer would consider that there is justifiable doubt about an arbitrator's impartiality. To quote the House of Lords in *Halliburton*,

> *"The question 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."*

This test is adopted in the UNCITRAL Model Law, which Malaysia is a signatory to. It has been incorporated in **Section 14 of the Arbitration Act 2005** and **Rule 5 of the AIAC Arbitration Rules**. Malaysian Courts have also consistently applied the same test, for instance, in the Court of Appeal decisions in *Federal Flour Mills Bhd v Fima Palmbulk Services Sdn Bhd and another appeal* [2005] 6 MLJ 525, *Future Heritage Sdn Bhd v Intelek Timur Sdn Bhd* [2003] 1 MLJ 49, *Hartela Contractors Ltd v Hartecon FV Sdn Bhd & Anor*, the High Court decision in *Kuala Ibai Development Sdn Bhd v Kumpulan Perunding (1988) Sdn Bhd & Anor* [1999] 5 MLJ 137 and by Raja Azlan Shah J (as he then was) in *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210.

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3.2. Do repeated appointments in multiple references involving the same or overlapping subject matter give rise to justifiable doubt?

The House of Lords in Halliburton laid down factors to be taken into account in determining whether the repeat appointments of an arbitrator give rise to apparent bias, which justifies disqualification.

(i) Arbitration is a consensual form of dispute resolution. Section 1(c) of the UK Arbitration Act 1996 seeks to limit the intervention of the court in arbitral proceedings. The principle of party autonomy should be given priority. Therefore, as a general rule, a challenge against an arbitrator would be dismissed unless the party making the challenge can prove apparent bias.
(ii) There is no avenue to appeal in arbitration.
(iii) An arbitrator is appointed by parties and has a financial interest in obtaining further appointments as an arbitrator. Therefore, the court shall keep an eye out for relationship conflict between the parties and the arbitrator, in addition to issue conflict.
(iv) There might be inequality of knowledge in favour of a common party or a repeat arbitrator. This gives the common party or repeated arbitrator an unfair advantage from the knowledge acquired from another reference.

In short, the courts must take into account the factual circumstances in its entirety and evaluate whether there is a justifiable basis to disqualify a repeated arbitrator. The Malaysian Court takes a consistent position, as evident in Tan Sri Dato' Professor Dr Lim Kok Wing v Thurai Das a/l Thuraisingham & Anor [2011] 9 MLJ 640 [HC].[2]

3.3 The Roles of Party-Appointed Arbitrators

There is a common misconception that in an arbitration panel of three, the president is neutral, whereas the party-appointed arbitrators represent the interests of their appointing parties. The House of Lords clarified that under English law, a party-appointed arbitrator is expected to come up to precisely the same high standards of fairness and impartiality as the person chairing the tribunal. In other words, a party-appointed arbitrator does not serve as a *de facto* advocate for the appointing party.

4. The Duty of Disclosure

In *Halliburton*, Lady Arden, who is also a Member of the Permanent Court of Arbitration in The Hague, clarified that the primary duty of an arbitrator is to act fairly and impartially. The duty to disclose is a secondary obligation which arises if the arbitrator wants to take a further appointment in a different arbitration.

4.1 When does the duty to disclose arise?

Section 24 of the UK Arbitration Act 1996 stipulates that "*disclosure should be given of facts and circumstances known to the arbitrator which would or might give rise to justifiable doubts as to his impartiality*". Similarly, in Malaysia, the **Arbitration Act 2005, Section 14(1)** mandates an arbitrator to "*disclose any circumstances likely to give rise to justifiable doubts as to that person's impartiality or independence*". **Article 11 of the AIAC Arbitration Rules** incorporates an identical standard.

In other words, there is no duty to disclose if the circumstances are not likely to give rise to justifiable doubts about an arbitrator's impartiality. As put by Mary Lim J in the High Court decision *MMC Engineering Group Bhd & Anor v Wayss & Freytag (M) Sdn Bhd & Anor* [2015] MLJU 477, there must be a causal link between an arbitrator's alleged non-disclosure and his/her ability to deal impartially and independently with the claims and issues in the present arbitration.

The **IBA Guidelines on Conflicts of Interest in International Arbitration** illustrates circumstances that give rise to justifiable doubts in its Red List, which might give rise to justifiable doubts in its Orange List and circumstances which do not give rise to justifiable doubts and hence require no disclosure in its Green List. Although the IBA Guidelines is not binding, it is highly persuasive and has constantly been referred by tribunals and courts in challenges against arbitrators.

4.2 When does a breach of the duty to disclose justify disqualification of an arbitrator?

As a general rule, a breach of duty to disclose does not give rise to a real possibility of apparent bias. It requires something more. Factors which are to be considered in determining whether the failure to disclose gives rise to justification to disqualify an arbitrator are:

(i) Whether the non-disclosed circumstances justify an inference of apparent bias;
(ii) Whether the failure to disclose was accidental or deliberate;
(iii) The degree of overlap between the arbitrations; and
(iv) The deprivation of opportunity for the other party to address potential unfairness in such appointment, as added by Lady Arden.

To exemplify the application of these factors, in *Halliburton*, Lady Arden opines that Mr. Rokison has breached his duty to disclose. However, the House of Lords decided that such breach of duty did not justify disqualification because:

(i) There was an uncertainty under the English law on the existence and scope of an arbitrator's duty of disclosure at the time the duty of disclosure by Mr. Rokison arose;
(ii) The time sequence of the arbitrations may have been an explanation for the non-disclosure to Halliburton of the two references involving Transocean;
(iii) Mr. Rokison had explained that both the subsequent overlapping references would be resolved by way of preliminary issue, which meant there would, in fact, be no overlapping evidence or submissions. Furthermore, Mr. Rokison had offered to resign from the subsequent references if they were not resolved at the preliminary stage. Hence, it was unlikely that Chubb or Mr. Rokison would benefit as a result of the overlapping references;
(iv) Mr. Rokison did not receive any secret financial benefit; and
(v) Mr. Rokison's conduct revealed no subconscious ill-will. His response to the challenge had been "*courteous, temperate and fair…and there is no evidence that he bore any animus towards Halliburton as a result*".

[2] Here, an arbitrator was appointed in two arbitral proceedings involving a common party and partially overlapping subject matter. The Malaysian High Court decided that there was no **justifiable basis** to remove the arbitrator on the ground that both proceedings were at different stages. The applicant's contention that the arbitrator would be influenced by the second proceedings in determining the first proceedings was baseless because the trial date had been fixed for the first proceedings whereas the second proceedings was still at its preliminary stage where the procedure has not yet been set.

It is unclear whether the challenge against the arbitrator would have succeeded had the arbitrator's appointment in the second proceedings been challenged rather than the first proceedings. However, what is clear is that Malaysian courts have consistently applied the threshold of justifiable doubt in determining challenges, this case dealing with the specific context of repeat appointments involving a common party.

4.3 How to reconcile an arbitrator's duty to disclose with his/her duty of confidentiality?

In the confine of both the duty of confidentiality and the duty to disclose, an arbitrator usually discloses his/her involvement in other arbitrations involving a common party without disclosing the identity of the other party or details concerning the arbitration. This is common practice for arbitrators in Bermuda Form arbitrations, such as in this case. This is also common practice in the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) and the Chartered Institute of Arbitrators (CIArb) arbitrations.
However, if the situation requires the disclosure of the other party's identity or further details of the reference, express consent from the parties of the other references should be obtained prior to such disclosure. If the arbitrator is unable to obtain the consent of the other party, the arbitrator should decline the subsequent appointments.

4.4 How does this decision impact arbitrators in international arbitrations?

This decision cautions arbitrators that it is better to be safe than sorry in relation to the duty of disclosure. Apart from the factual circumstances of each appointment, the customs and practice of a particular area of laws also impact the threshold for disclosure.
Repeat appointments are common occurrences in specialised areas due to a limited pool of specialist arbitrators, such as in treaty reinsurance arbitrations and maritime claims. Due to its prevalence, there is generally no duty to disclose. The Grain and Feed Trade Association and the London Maritime Arbitrators Association agreed with the approach of the House of Lords in Halliburton, which is a higher threshold has to be met before an arbitrator can be deemed to appear biased from his/her breach of duty to disclose.

On the other hand, the London Court of International Arbitration and the International Chamber of Commerce questioned the approach taken by the House of Lords. They opined that the test propounded is not sufficiently strict in comparison with international norms. They put forward that the acceptance by an arbitrator of multiple appointments in related references without full disclosure to all parties may, without more, give rise to justifiable doubts as to his/her impartiality.

5. Key Takeaways

To conclude, there is no "one size fits all" solution. Both the duty of disclosure and the test of apparent bias are highly fact-dependent. To recapitulate, the following are the key points derived from the House of Lords' landmark decision in *Halliburton*.

1. It is established that the objective test of apparent bias is the applicable standard in an arbitrator's challenge in Malaysia. The application of such test is highly facts specific.

2. A party-appointed arbitrator is expected to be neutral and impartial, like the chair of the tribunal.

3. It is always good practice for an arbitrator to make disclosure in appointments which are of potential interest to the parties. In the context of repeat appointments involving a common party and stemming from the same factual matrix, it is prudent for an arbitrator to disclose his/her appointments to prevent future challenges.

4. In reconciling an arbitrator's duties of confidentiality and disclosure, it is recommendable for an arbitrator to disclose his/her repeat appointments in multiple references involving a common party. The identity of the other party and further particulars of the other references should be left out due to confidentiality. However, if these details are required, express consent from the parties of the other references should be obtained prior. If such consent is not obtainable, the arbitrator should decline the subsequent appointments.