ARIAS U.S.

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A TALE OF THREE JURISDICTIONS

RECENT JUDICIAL DECISIONS ON ARBITRATOR DISCLOSURE IN ENGLAND, THE CAYMAN ISLANDS AND THE UNITED STATES

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English Law

- *Not* British or UK law
- Arbitration Act 1996
- 1996 Act extends to England and Wales (and Northern Ireland) but not Scotland

Four Questions

1. What is the scope of the duty of disclosure by a potential arbitrator?
2. What are the consequences of a failure by an arbitrator to disclose; in particular, does it automatically lead to disqualification?
3. What are the grounds for removal of an arbitrator following disclosure?
4. Whether and to what extent an arbitrator may accept appointments in multiple arbitrations concerning the same or overlapping subject matter with only one common party and whether there is a duty of disclosure?

Two Recent English Cases

1. *Halliburton Company v Chubb Insurance*
[2018] EWCA Civ 817 (Court of Appeal)

2. *Guidant LLC v Swiss Re International LLC*
[2016] EWHC 1201 (Commercial Court)

Question 1

What is the scope of the duty of disclosure by a potential arbitrator under English law?

- No express statutory duty of disclosure
- Common law duty to disclose
- Test same as for judges

Halliburton v Chubb

- "… 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."
- "…this means facts or circumstances which would or might lead the fair-minded and informed observer … to conclude that there was a real possibility that the arbitrator was biased."

Halliburton v Chubb

- The common law test for what must be disclosed ("circumstances which would, or might, give rise to an arbitrator's impartiality") is therefore wider than the statutory test under Arbitration Act 1996, s. 24 for disqualification of an arbitrator ("circumstances exist that give rise to justifiable doubts as to his impartiality").
- The Court of Appeal emphasised that the common law test for disclosure was to be applied objectively.
- Compare: "eyes of the parties" (IBA Guidelines and the ICC Rules); "in the mind of any party" (LCIA Rules).

Question 2

What are the consequences of a failure to disclose on the part of the arbitrator?

- *Haliburton v Chubb:* two distinct questions arise when an allegation of non-disclosure is made.
  1. Whether the disclosure ought to have been made?
  2. If there ought to have been disclosure, what is the significance of that non-disclosure in the context of an application to remove an arbitrator?

Halliburton v Chubb

- "Non-disclosure is … a factor to be taken into account in considering the issue of apparent bias. An inappropriate response to the suggestion that there should be or should have been disclosure may further colour the thinking of the observer and may fortify or even lead to an overall conclusion of apparent bias …"
- However: "Non-disclosure of a fact or circumstance which should have been disclosed, but does not in fact, give rise to justifiable doubts as to the arbitrator's impartiality, cannot … in and of itself justify an inference of apparent bias. Something more is required"

Question 3

What are the grounds for removal of an arbitrator following disclosure?

- Section 24(1)(a) of the 1996 Act: 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 English courts have adopted the common law test applicable to the recusal of judges, namely “apparent bias”, to the disqualification of arbitrators.

The Facts of *Halliburton v Chubb* (1)

- "M", a "well-known and highly respected international arbitrator", had been appointed by the High Court as the chairman of a tribunal in a Bermuda form arbitration with a London seat.
- The dispute concerned insurance coverage for Halliburton's liabilities arising out of the Deepwater Horizon disaster.

The Facts of *Halliburton v Chubb* (2)

- M had disclosed to the High Court that he had previously sat in a number of arbitrations in which Chubb (formerly ACE) was a party, including:
  - appointments on behalf of Chubb/ACE;
  - current appointments in two arbitrations in which Chubb was a party, neither of which related to the Deepwater Horizon.

The Facts of *Halliburton v Chubb* (3)

- Six months later, M was appointed by Chubb in a second coverage arbitration, arising out of Deepwater Horizon, in which Transocean, an affiliate of Halliburton, was party.
- M subsequently accepted a third appointment on behalf of another insurer in an arbitration involving Transocean in a dispute arising out of Deepwater Horizon claims.

The Facts of *Halliburton v Chubb* (4)

- M did not disclose his two subsequent appointments to Halliburton.
- When Halliburton learned of them, about eighteen months into the reference, its counsel wrote to M and raised an objection to his continuing to sit as chairman.
- M maintained that the subsequent appointments did not affect his impartiality or independence, and denied that he was under any obligation to disclose them; although, in hindsight, it would have been prudent to do so. M offered to resign, provided Chubb consented. Chubb declined to so, and Halliburton applied to the Court to remove M on the grounds of apparent bias.

Halliburton v Chubb: The Test

The Court of Appeal formulated the question as follows:

- "whether, at the time of the hearing to remove, the non-disclosure taken together with any other relevant factors would have led the fair-minded and informed observer, having considered the facts, to conclude that there was in fact a real possibility of bias."

Question 4

Whether and to what extent an arbitrator may accept appointments in multiple arbitrations concerning the same or overlapping subject matter with only one common party and whether there is a duty of disclosure?

This question was considered in *Halliburton v Chubb.* The Court of Appeal approved the decision of Leggatt J in *Guidant v Swiss Re.*

Guidant v Swiss Re

- Another an insurance coverage dispute under the Bermuda form
- Three separate arbitrations commenced by Guidant against Markel and two Swiss Re entities.
- Guidant had appointed the same arbitrator in all three; each of the three insurers had appointed a different arbitrator in their respective arbitrations.
- The two party-appointed arbitrators in the Markel arbitration had agreed upon a third arbitrator.
- Guidant applied to have the same third arbitrator appointed in the two Swiss Re arbitrations.

Guidant v Swiss Re

- **The Court of Appeal:** "the appointment of a common arbitrator does not justify an inference of apparent bias. The fact that the same person has been appointed by Guidant … in the Markel arbitration is not, therefore, a ground … to disqualify him from acting in the Swiss Re arbitrations."
- **BUT:** Leggatt J declined to appoint the same third arbitrator in the Swiss Re arbitrations.

Guidant v Swiss Re

- The problem: "If the same person were to be appointed, there would be a legitimate concern that that person would be influenced in deciding the Swiss Re arbitrations by arguments and evidence in the Markel arbitration"
- "Swiss Re is not a party to the Markel arbitration and will have no opportunity to be heard in that arbitration or to influence its outcome."
- "If the Markel arbitration were to be heard first, the members of the tribunal … would form views, without any input … from Swiss Re, from which they may afterwards be slow to resile."

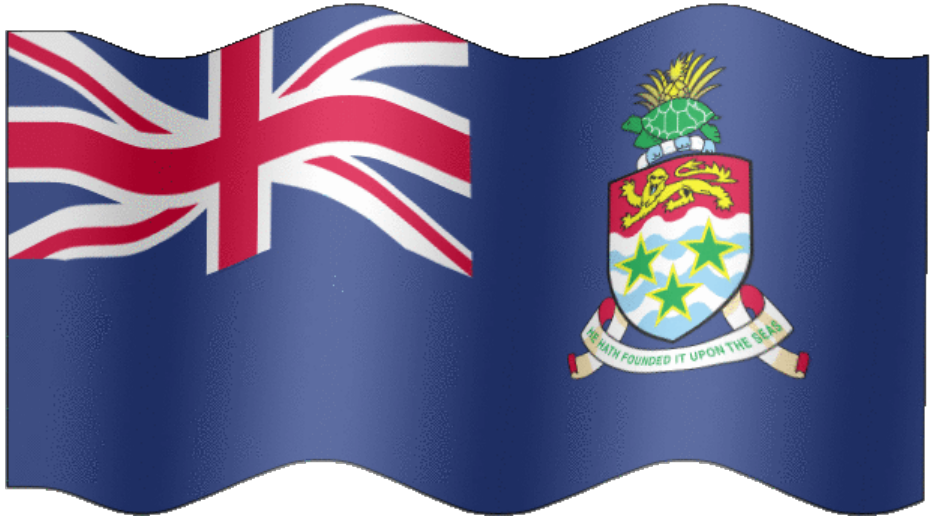
Are *Halliburton* and *Guidant* Consistent?

- In *Halliburton,* the Court of Appeal noted Leggatt J's distinction between the concern which Swiss Re "were entitled to feel" and concern which would justify an inference of apparent bias.
- However, if Swiss Re had a legitimate concern about the appointment of the same chairman in all three arbitrations, then it was surely also legitimate for Halliburton to feel the same concern about M.
- If M had been appointed as an arbitrator in the other two Deepwater Horizon arbitrations before his appointment in the Halliburton arbitration, then following the *Guidant* approach, M ought not to have been appointed as chairman, even though there was no apparent bias.

Conclusion

- The problem is not one of partiality or impartiality. It is about basic fairness.
- The hearing is not fair because one arbitrator is receiving information from the other two Deepwater Horizon arbitrations which the other two arbitrators in *Halliburton v. Chubb* do not have.
- However, he cannot put out of his mind what he knows from the other two arbitrations, and may decide on the basis of facts and arguments which are not before the tribunal in the third arbitration.

CAYMAN ISLANDS



Almazeedi v Penner [2018] UKPC 3

Key factual question: whether the decisions of an additional judge of the Financial Services Division of the Cayman Islands Grand Court were vitiated by apparent bias because, when dealing with an insolvency case involving a company controlled by the Qatari State, he failed to disclose the fact that he was also selected for appointment as a supplementary judge of the Qatar Civil and Commercial Court.

ALMAZEEDI v PENNER [2018] UKPC 3

Legal test for apparent bias: (Lord Mance, for the majority) whether the "*fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased*" (*Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357)

ALMAZEEDI v PENNER [2018] UKPC 3

- **Majority finding**: "*The circumstances in which the challenge arises are unusual… In the Board's view, and at least in the absence of any such disclosure, a fair-minded and informed observer would regard him as unsuitable to hear the proceedings from at least 25 January 2012 on. The fact of disclosure can itself serve as the sign of transparency which dispels concern, and may mean that no objection is even raised*"

Almazeedi v Penner [2018] UKPC 3

Lord Sumption (dissenting): "*The present dispute, however, is not about the legal test, but about its application to the facts, and for my part I would have held that the test was not satisfied …The law is exacting in this area, but it is also realistic. …The many decisions in this field are generally characterised by robust common sense…*"

UNITED STATES

United States

The Federal Arbitration Act

The "evident partiality" standard:

- The court may vacate the award "where there was evident partiality or corruption in the arbitrators …." 9 U.SC. § 10(a)(2)

United States

What Is Evident Partiality?

- "'[E]vident partiality' within the meaning of 9 U.S.C. § 10 will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration."
- Between "appearance of bias" and "actual bias"

Morelite Consruction Corp. v. N.Y.C. Dist. Council of Carpenter Benefit Funds, 748 F.2d 79, 84 (2d Cir. 1984).

United States

The Interplay Between Disclosure and Evident Partiality.

- "The nondisclosure does not by itself constitute evident partiality. The question is whether the *facts* that were not disclosed suggest a material conflict of interest."

Scandinavian Re Co. Ltd. v. St. Paul Fire and Marine Ins. Co., 668 F.3d 60, 77 (2d Cir. 2012).

United States

Is Disclosure Enough?

- No.
- Thomas Kincade Co. v. White, 711 F.3d 719 (6th Cir. 2012)
- A party "began showering [the neutral arbitrator's] law firm with new business."
- Award vacated: "It is no answer to assert … that [the neutral] fully disclosed these arrangement to the parties. Five years into an arbitration, those disclosures were little better than no disclosure at all."

United States

What About Party Arbitrators?

- "Expecting of party-appointed arbitrators the same level of institutional impartiality applicable to neutrals would impair the process of self-governing dispute resolution."
- "That said, a party-appointed arbitrator is still subject to some baseline limits to partiality."

Certain Underwriting Members of Lloyds of London v. Florida, Department of Financial Services, 892 F.3d 501, 510 (2d Cir. 2018) (citation omitted).

Criticisms of *Halliburton v Chubb* and Questions: Panel Discussion

1. Will *Halliburton v Chubb* have a negative impact on London as a seat for international arbitration?
2. Is the pragmatic (American) approach that chairpersons should be held to a higher standard of disclosure and impartiality to be preferred to the Anglo-Bermudian mantra that all arbitrators are impartial?
3. What approach should be followed in offshore jurisdictions?