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SUPREME COURT DECISION IN HALLIBURTON V CHUBB: NO UNIVERSAL APPLICATION OF ARBITRATOR'S "GOLD STANDARD" DISCLOSURE

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The UK Supreme Court has released its much-anticipated decision in the Deepwater Horizon case between Halliburton v Chubb. The appeal concerns the arbitrator's duty of impartiality, the duty to give disclosure of other appointments, and the extent to which an arbitrator may accept appointments in multiple references concerning the same or overlapping subject matter with only one common party without giving rise to the appearance of bias.

The case involved claims under a Bermuda form insurance policy which were referred to arbitration in London. The party-nominated arbitrators were unable to agree the chairman and the English Commercial Court appointed Ken Rokison QC ("M") who had been Chubb's preferred candidate. Before appointment, M disclosed that he had previously acted as arbitrator in a number of arbitrations in which Chubb was a party, including arbitrations in which he had been appointed by Chubb, and was currently appointed in two references in which Chubb was involved. After appointment, M accepted appointment as arbitrator in two further references involving claims against insurers also in connection with Deepwater Horizon. The appointments were not disclosed to Halliburton. Halliburton, when it discovered M's other Deepwater claim appointments, applied to the court under section 24(1)(a) of the Arbitration Act to remove M as arbitrator.

The application was dismissed by the Commercial Court, in a judgment of Mr Justice Popplewell. Halliburton appealed that decision to the Court of Appeal. At the heart of the appeal was a contention that the judge failed to have proper regard to the unfairness which may arise where an arbitrator accepts repeat appointments in overlapping references with only one common party; the essence of that unfairness being information and knowledge which the common party acquires unknown to the other party. The Court of Appeal accepted that disclosure of the appointments should have been made to Halliburton, and in doing so the Court developed English law on arbitrator disclosure obligations, but it did not accept that the non-disclosure would have led a fair-minded and informed observer to conclude that there was a real possibility that the arbitrator was biased. Halliburton's appeal was dismissed, and it submitted a further appeal, to the Supreme Court.

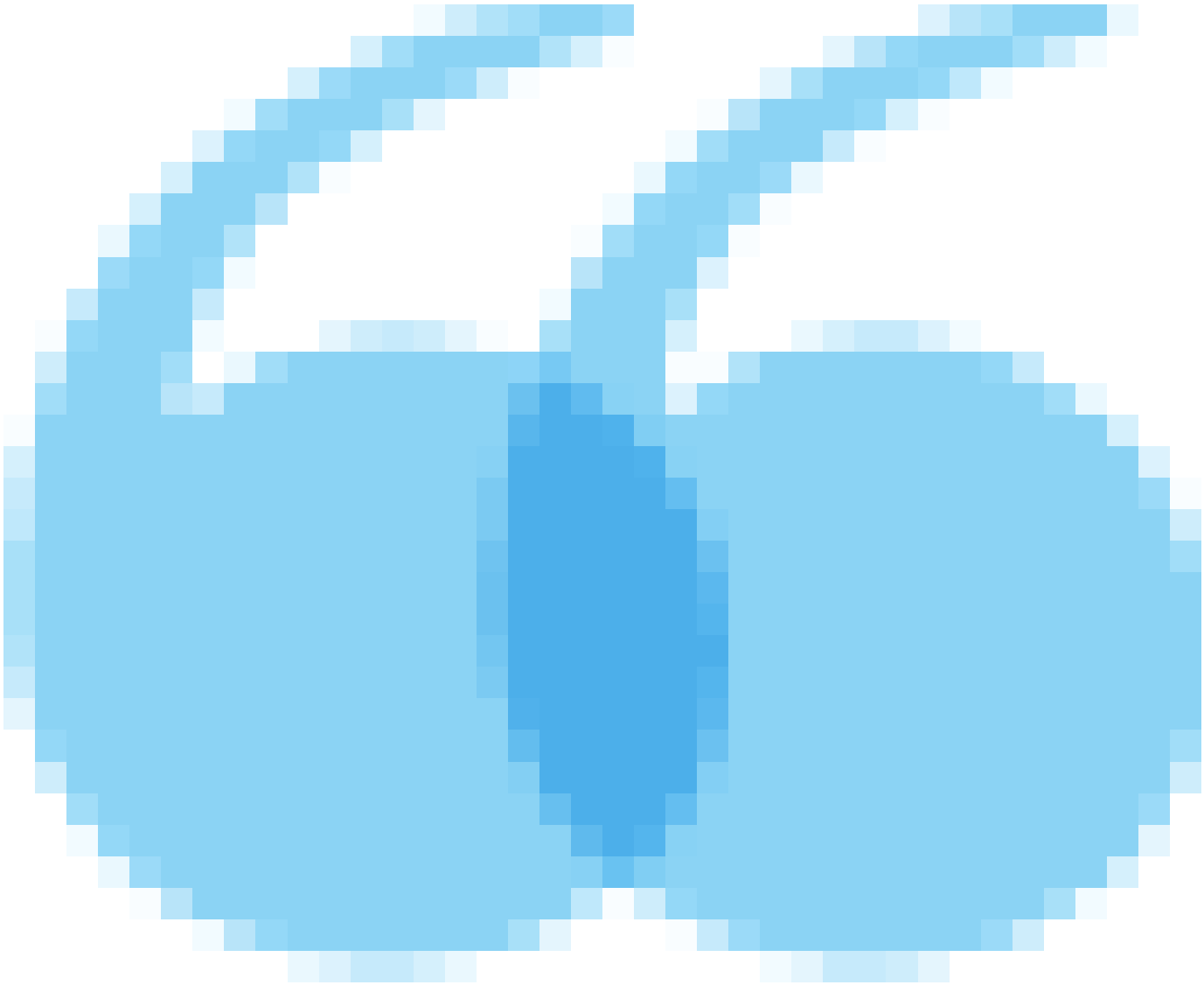
In the Supreme Court, Halliburton argued that, to protect the reputation of London arbitration, English law should apply a "gold standard" to the disclosure given by arbitrators. They argued in favour of a presumption that an arbitrator should never accept appointments in multiple references involving overlapping issues and only one common party without giving disclosure.

Intervenor submissions from the LCIA and ICC (whose arbitration rules require arbitrators to give such "gold standard" disclosure) supported the imposition of more robust disclosure in English law. They referred to an "international pro-disclosure consensus" and reflected concerns of the international arbitration community that the approach of the English courts to arbitrator impartiality is insufficiently strict.

Chubb, in defending the earlier court judgments, argued that the power to remove an arbitrator under section 24(1)(a) of the Arbitration Act applies if there are justifiable doubts as to impartiality. It does not refer to independence. This is deliberate and recognises that in specialist fields, parties may choose to appoint arbitrators with specific expertise – which may have an impact on the links between a party and an arbitrator. It is common in insurance, maritime and commodity disputes for arbitrators to sit in multiple arbitrations. Repeat appointments are regarded as a positive and parties may consequently have different expectations of disclosure. This, they argued, runs contrary to the suggestion that there should be a presumption that concurrent appointments in related arbitrations are not allowed without disclosure.

The Supreme Court has unanimously dismissed Halliburton's appeal. It has held that an arbitrator is under a legal duty to disclose such appointments, and the Supreme Court's judgment, in the main opinion from Lord Hodge, sets out in detail an analysis on the disclosure obligations expected of arbitrators sitting in arbitrations in England. That analysis confirms the Court of Appeal's view that there are high expectations on disclosure. However, the test for apparent bias is to ask whether "at the time of the hearing to remove" the circumstances would have led the fair-minded and informed observer to conclude that there was in fact a real possibility of bias. In looking at this case, the Supreme Court held that, having regard to the circumstances known at the time of the application to remove the arbitrator, it could not be said that the fair minded and informed observer would infer from the failure to make disclosure that there was a real possibility of bias. A failure to disclose, whilst a relevant factor, is not sufficient on its own to found an application to remove an arbitrator, especially in circumstances in which the non-disclosure was inadvertent.

In reaching its decision, the Supreme Court recognised that the fair minded and informed observer will take account of the fact that in certain subject matter fields of arbitration there are different expectations as to the degree of independence of an arbitrator and as to the benefits to be gained by having an arbitrator who is involved in multiple related arbitrations.



The objective observer will appreciate that there are differences between, on the one hand, arbitrations, in which there is an established expectation that a person before accepting an offer of appointment in a reference will disclose earlier relevant appointments to the parties and is expected similarly to disclose subsequent appointments occurring in the course of a reference, and, on the other hand, arbitrations in which, as a result of relevant custom and practice in an industry, those expectations would not normally arise. The objective observer will consider whether in the circumstances of the arbitration in question it would be reasonable to expect the arbitrator not to have the knowledge or connection with the common party which the multiple references would give him or her.

The decision sees a rejection of the universal application of a “gold standard” approach to disclosure – argued for Halliburton – in favour of a more nuanced approach that reflects differing practices in different fields of arbitration. The decision will prompt considerable debate in the UK and beyond.

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