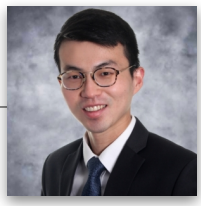
# *Halliburton v Chubb*: What does it mean for shipping and commodity arbitrations?



Charles Debattista & Andrew Ng

The UK Supreme Court has just handed down, on 27 November 2020, the long-awaited judgment in *Halliburton v Chubb* [2020] UKSC 48. The judgment clarifies the law on whether an arbitrator can accept multiple arbitral appointments in related references and the extent to which (if at all) the arbitrator may do so without disclosure. The judgment spans 190 paragraphs in which the message is rung loud and clear that the answers to these issues turn to a large degree on the accepted customs and practice of the relevant field of arbitration. The purpose of this Note, coming as it does from a set that practises particularly in arbitrations in the shipping and commodities markets, is to examine what *Halliburton* means in the context of those sectoral references, most of which are subject to the arbitral rules of the LMAA, of GAFTA and of FOSFA.

*Halliburton* is of particular interest to – and was particularly influenced by – practice in these areas because what may be less frequent in other areas of commercial arbitration is common or garden in commodities and shipping, where lateral strings and upward chains abound. A seller sells to a buyer that itself sells to another buyer and so on down a string. Disputes arise down one length of the string which is then replicated or passed up the string. Depending in part on whether all the sales in the string are truly back-to-back, and in part on the practical dynamics between the parties, the references may be consolidated or, rather more commonly, not, in which case each reference will have its own tribunal, the membership of which may overlap, in full or in part, the one with the other. In shipping too, one charterparty may spawn another, sub-charterparty, which may itself generate another, and somewhere in the narrative bills of lading will be issued. Inevitably an upward chain of rights, liabilities – and arbitrations – will be generated, with the added reality here that it is far less likely than in commodities that there will be back-to-back replication. Time head-charters will spawn voyage charters, and so on down the chain, with arbitration clauses incorporating different rules and saying quite different things. Just to add some spice to the mix, trouble with the same cargo may – and frequently does – raise disputes both on the string and in the chain, with the same incident giving rise to both a commodity arbitration and a shipping arbitration, with appointments sought for both, sometimes of the same candidate. The UK Supreme Court having listened to GAFTA and the LMAA as interveners in the case, what then does *Halliburton* now mean for arbitrators who are appointed under the Rules of those Associations?

The dispute in Halliburton arose from the Deepwater Horizon oil spill where Halliburton and Transocean incurred civil penalties at the behest of the US Government for their role in the accident. Each claimed against their insurer, Chubb, under their respective insurance policies. Mr Kenneth Rokison QC was first appointed as an arbitrator in the Halliburton-Chubb reference ("**Reference 1**") and later as an arbitrator in the Transocean-Chubb reference ("**Reference 2**"). Prior to accepting his appointment to Reference 2, Mr

**Paul Martenstyn**
Director of Clerking
0207 440 6900
paul@36stone.co.uk

**Mike Wright**
First Junior Clerk
0207 440 6900
mike@36stone.co.uk

Rokison QC disclosed his appointment on Reference 1 to Transocean. However, and in an omission that was central to Halliburton's case, Mr Rokison QC did not disclose to Halliburton his proposed appointment to Reference 2. In other words, Transocean knew of the Halliburton appointment, but not Halliburton of the Transocean appointment.

Upon learning of Mr Rokison QC's appointment in Reference 2, Halliburton sought an order under s. 24(1)(a) Arbitration Act 1996 to remove Mr Rokison QC as an arbitrator. This was refused by Popplewell J, a refusal upheld by the Court of Appeal. Halliburton then appealed to the UK Supreme Court on two issues: (i) whether and to what extent an arbitrator may accept appointments in multiple references, concerning the same or overlapping subject matters and with only one common party, without giving rise to an appearance of bias ("**Issue 1**") and (ii) whether and to what extent the arbitrator may do so without disclosure ("**Issue 2**").

In deciding Issue 1, the UK Supreme Court held that the question whether such appointments will give rise to an appearance of bias requires an objective assessment having regard to (a) the realities of arbitration and (b) the customs and practices of the relevant field of arbitration. Accordingly, whether such appointments are permitted depends on the facts of the relevant case and "*especially*" upon the custom and practice in the relevant field of arbitration (see [152]). As for Issue 2, whether multiple arbitral appointments in related references had to be disclosed would likewise depend upon the customs and practices in the relevant field. In cases in which disclosure is called for, the acceptance of those appointments and the failure to disclose the related appointments might well give rise to the appearance of bias (see [136]).

What then do these answers to the two issues mean for LMAA and GAFTA arbitrations going forward? What do these answers mean in particular for a jobbing arbitrator at the wrong end of an urgent email asking "will you accept appointment?". That email frequently requires a quick and peremptory answer because it frequently lands in your inbox just before, sometimes just with hours to spare before the lapse of a time-bar for the notification of arbitral appointments to the other party. Perhaps irritatingly for our jobbing arbitrator, the answer from the UK Supreme Court is, when you come down to it, an "it depends." Fortunately, and wisely given the pole position these institutions have in global commodity and shipping arbitrations, the UK Supreme Court had the benefit of interventions both by the LMAA and by GAFTA. The intervening associations explained that multiple appointments were relatively commonplace because they frequently arose out of the same incident or 'string' supply contracts. Each association also noted that their rules did not require its arbitrators to disclose multiple related appointments and submitted that disclosure of multiple appointments should be required only when it is arguable that the matters to be disclosed would give rise to the appearance of bias. The UK Supreme Court was persuaded and ultimately accepted that there was an established custom and practice within LMAA and GAFTA arbitrations that an arbitrator may take on multiple related appointments without disclosure (see [87], [91] and [137]). As such, an LMAA arbitrator is likely free, despite or perhaps because of *Halliburton*, to accept multiple related LMAA appointments (and likewise for a GAFTA arbitrator) without coming under an express duty to disclose them.

The result, at any rate for these sectoral arbitrations, is, we believe, a victory for common sense. On the one hand, the UK Supreme Court robustly upheld the integrity (and impartiality) of London as a global arbitration hub, clearly stating the principle that an arbitrator ought to reflect carefully and disclose prudently before accepting multiple appointments in related references. On the other hand, the UK Supreme Court sought to square an apparent circle by at the same time taking into account and accommodating the customs and practice special to each field of arbitration.

Returning to our busy shipping or commodity arbitrator at the urgent end of an email, what do you do, accept, refuse or disclose? Although GAFTA, FOSFA and the LMAA are all associations with their own arbitral rules, they are not "institutions" in the same way that, say the ICC or the LCIA are, with secretariats monitoring and indeed making appointments, in the process requesting information which can, prior to

**Paul Martenstyn**
Director of Clerking
0207 440 6900
paul@36stone.co.uk

**Mike Wright**
First Junior Clerk
0207 440 6900
mike@36stone.co.uk



**The 36 Group,** 4 Field Court, Grays Inn, London WC1R 5EF

appointment, flag up possible areas of difficulty. Shipping and commodity arbitrations are essentially "*ad hoc – plus*": by and large, arbitrators are selected and appointed by the parties, without prior recourse to the institutions, whose interventions in the process have been traditionally light of touch. So, without a guiding hand but with an urgent email to answer, what do you do? Does the little *sui generis* enclave wisely carved out by the UK Supreme Court apply? Do you just say Yes and (or is it "but"?) throw caution to the winds?

Our answer lies in that bracket. The conflict check does, we think, need to be even more rigorous and reflective after *Halliburton*; and while there is in these sectors no certificate of disclosure to fill in and to sign, as was explicitly recognised by the UK Supreme Court at [91], it might be best to *think* as though there were – and in case of doubt, disclose. While one always wants to oblige a party and accept an appointment, what good is served if costs are racked up exponentially for the parties at a later challenge stage which might have been avoided through judiciously declining, or at least pre-emptively but carefully disclosing? The message for maritime and commodity arbitrators is, we think, "steady as she goes" but keep *Halliburton* in mind.

**Charles Debattista**
**Andrew Ng**

*Charles Debattista has had an advisory, advocacy and arbitral practice for twenty years in the areas of dry shipping and commodities. Charles is Head of 36 Stone, a set specialising in shipping, international trade and international arbitration. The fourth edition of his book Debattista on Bills of Lading in Commodity Trades, with Francis Hornyold-Strickland, is due out in February 2021.*

*Andrew Ng is developing a broad commercial and international arbitration practice with a particular focus on shipping, commodities and international trade law. A Mandarin Chinese speaker, he was born and raised in Singapore and is familiar with the East Asian and Southeast Asian region.*

*Charles and Andrew can be contacted at cdebattista@36stone.co.uk, ang@36stone.co.uk or at clerks@36stone.co.uk*