

English Court of Appeal Rejects High-Profile Challenge to Arbitrator

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Arbitration / Insurance

The Court of Appeal in London has handed down a judgment of significance to both the insurance and international arbitration communities in *Halliburton v Chubb*. The judgment raises serious questions about the apparent reluctance of English courts to police arbitrators for “apparent bias” and to set aside arbitrator appointments and awards in London-seated insurance arbitrations in circumstances which have led a party to have justifiable concerns about the impartiality of an arbitrator.

In *Halliburton*, these concerns arose when the claimant learned that the chair of the arbitral tribunal, who is regularly appointed as a party arbitrator by insurers and who was appointed by a judge of the High Court over Claimant’s objection, failed to disclose that he had been appointed by the respondent insurer and another insurer, in related arbitrations involving the same underlying event and the same or similar coverage issues.

The case, which Halliburton is planning to appeal to the UK Supreme Court, illustrates the difficulties faced by policyholders who are met with repeat appointments of arbitrators in London coverage arbitrations by or at the insistence of the insurance market, which regularly arbitrates the same or similar issues, under follow-form policies, through a small community of counsel and London-based arbitrators, in closely related cases.

Unless the UK Supreme Court allows the appeal, the inescapable lesson for policyholders from the judgment is that they should refuse to purchase or renew insurance policies that contain arbitration clauses providing for non-institutional London arbitration, where the High Court is the designated appointing authority in the event of an impasse on the appointment of the chair. If arbitration is a necessary element of the insurance policy, the policyholder should instead insist that an arbitration institution such as the LCIA or the CPR Institute be named in the policy as the administering and appointing authority for the arbitration. Policyholders, particularly those headquartered outside of the UK, should always consider carefully the designation of the arbitral seat, including options other than London, regardless of whether this judgment is set aside and particularly given the size and significance of the disputes concerned.

The Background

The problem started with the appointment by a judge of the Commercial Court of a well-known London arbitrator as chair of an arbitral tribunal in a London-seated insurance coverage arbitration under a so-called “Bermuda Form” excess general liability policy issued to Halliburton by Chubb

(formerly ACE) for claims arising out of the *Deepwater Horizon* oil spill in the Gulf of Mexico.¹ The arbitrator's name is anonymized and referred to as "M" in the case reports.

The judge's appointment of M followed the failure of the parties to agree on a chair and was made pursuant to the deadlock-breaking procedure laid down in the standard Bermuda Form London arbitration clause. Prior to the parties' deadlock, Chubb had put M forward as its preferred candidate, and Halliburton had opposed his appointment on the basis that it was uncomfortable with the appointment of any retired English judge or English QC in an arbitration concerning an insurance policy governed by New York law.²

On appointment, M disclosed prior appointments, both by Chubb and in other arbitrations involving Chubb, including appointments in two pending arbitrations. Thereafter, M accepted a further party appointment by Chubb in an excess layer dispute with another policyholder, Transocean, also in relation to the *Deepwater Horizon* accident, which involved the same Chubb manager who handled the Halliburton claim. Later, M accepted yet a further party appointment by a different insurer as a substitute arbitrator in another *Deepwater Horizon* arbitration concerning a claim by Transocean on the same layer of insurance. M did not disclose either of these two further appointments to Halliburton.

When Halliburton learned of M's appointment in these two later arbitrations, it sought information from M and subsequently suggested that he resign as chair in the Halliburton arbitration. M refused to resign unless both parties agreed; Chubb declined to agree; and Halliburton therefore sought his removal by the Court. The Commercial Court rejected Halliburton's application for removal³ and Halliburton appealed to the Court of Appeal.

The Arbitration Award Against Halliburton

Following the dismissal of Halliburton's application to remove M, but before the Court of Appeal hearing, the Tribunal issued a final partial award in Chubb's favour in the arbitration from which Halliburton was seeking to remove M. One of the party-appointed arbitrators, N, issued "Separate Observations" in which he wrote that he was unable to join in the award as a result of his "profound disquiet about the arbitration's fairness". The tribunals in the two later arbitrations in which M was sitting had, several months before, already decided a preliminary issue in favour of Chubb and the other insurer, respectively, which also brought those arbitrations to an end in favour of the insurers.

The Court of Appeal's Decision

The Court of Appeal has now unanimously dismissed Halliburton's appeal, holding that:

- As a matter of good practice and as a matter of law, M should have made a disclosure to Halliburton at the time of his appointment in the two later arbitrations.

¹ Covington was lead insurance counsel for BP in connection with the *Deepwater Horizon* accident and related litigation but was not involved in the *H v L* matter.

² To the extent that High Court judges will appoint English candidates favoured by insurers as chairs over the objections of policyholder claimants, such appointments encourage insurers to resist agreement of a compromise candidate in the hope that they may be able to secure judicial appointment of their candidate nonetheless.

³ The decision is reported under the name *H v L*, with many names anonymised, at [2017] 1 Lloyd's Law Reports 553.

- Notwithstanding this failure, a fair-minded and informed observer, having taken account of all of the facts, would not have considered that there was any real possibility that M was biased.

The Court of Appeal thus found that M's failure to disclose his subsequent and related party-arbitrator appointments (which it categorised as inadvertent) was wrong, but it denied Halliburton any remedy for that wrong. The Court also refused Halliburton permission to appeal to the Supreme Court, but Halliburton intends to make a direct application to the Supreme Court for such permission, which the rules allow.

The Court of Appeal's Reasoning

The Legal Test

The Court confirmed that the test for "apparent bias" laid down by the English common law and reflected in section 24 of the UK Arbitration Act 1996 is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the arbitrator or tribunal was biased. However, the Court reasoned that whether there is a risk of *unconscious* bias on the part of an arbitrator is not part of the test for apparent bias, although it is a relevant risk for the fair-minded and informed observer to take into account.

Appointments In Overlapping Arbitrations With One Common Party

The Court considered first whether, in principle, there is any bar to an arbitrator accepting appointments in overlapping arbitrations with only one common party, as had occurred in this case. It held that acceptance of such an appointment does not give rise to justifiable doubts about the arbitrator's impartiality, and that something more is required than the mere repeat appointment in order to give rise to an appearance of bias.

The Court accepted that inside information and knowledge resulting from appointments and overlapping arbitrations with only one common party may be a legitimate concern for the opposing party, but considered that this did not, in itself, justify an inference of apparent bias. It said that the starting point is that an arbitrator should be trusted to decide the case solely on the evidence or other material adduced in the proceedings in question and should understand that he or she should approach every case with an open mind.

The Circumstances In Which An Arbitrator Must Make Disclosure

The Court said that, as a matter of law, disclosure should be given where there are facts and circumstances known to the arbitrator, which would *or might* lead the fair-minded and informed observer, having considered the facts, to conclude that there was a real possibility that the arbitrator was biased — in other words, the test is a slightly less strict version of the test for the existence of apparent bias. The question of whether or not the arbitrator should make, or should have made, a disclosure must be assessed against the background of the prevailing circumstances at the time when the question arose and should not be determined retrospectively by reference to matters known at a later stage. The Court disagreed in this respect with the approach of the first instance Judge, who answered this question with the benefit of hindsight.

The Court appeared to acknowledge that acceptance of a significant number of appointments (whether overlapping or not) involving the same party would give rise to a duty of disclosure, as the Court noted with apparent approval that Chubb's counsel had conceded that ten appointments for one party might objectively give rise to justifiable doubts about the impartiality of the arbitrator.

The Court noted that there are stricter tests for disclosure in some arbitration institution rules, commenting that, while such rules, which import a subjective test giving weight to the objecting party's concerns, may reflect good practice in international commercial arbitration, the English law

authorities make clear that the “more certain” standards of an objective observer apply to the issue of disclosure under English Law. The Court also noted that the arbitrator is under no duty of enquiry under English law, and need only disclose facts or circumstances known to him or her — a view that the Court considered consistent with the LCIA Rules and the IBA Guidelines.

The Consequences Of A Failure To Disclose

The Court commented that, if the arbitrator fails to make a disclosure that he or she ought to have made, such failing will mean that the arbitrator will not have displayed the “badge of impartiality” and the fact of non-disclosure “must inevitably colour the thinking of the observer”. However, such a failure will not have decisive effect, as non-disclosure is no more than one factor to be taken into account in considering the issue of apparent bias: the Court considered that something more is required to establish a risk of such bias.

The Court’s Decision On The Facts

Since the Court had concluded that mere acceptance of an appointment in a related reference with only one common party, in and of itself, does not justify an inference of bias, it went on to consider further factors relied upon by Halliburton.

The Court gave little or no weight to the circumstances of M’s appointment, the financial benefit from the further Chubb appointment, and arbitrator N’s views. It made no mention of the extent to which M might have been appointed by the law firm acting for Chubb or other insurers or their counsel more generally, or even insurers using the same Bermuda Form that Chubb had used for its policy. However the Court accepted, in relation to Halliburton’s reliance on M’s failure to disclose, that M ought to have made disclosure, as a matter of English law. The basis for this decision was that best practice in international commercial arbitration would have required disclosure, taken together with the clear possibility that other factors, such as the actual degree of overlap (about which M knew little at the time) and the nature of other connections, *might* have been argued to combine together to give the fair-minded and informed observer a basis for a reasonable apprehension of lack of impartiality.

The remaining two factors relied on by Halliburton were the degree of overlap (which the Court noted did not in itself give rise to justifiable doubts about impartiality), and M’s response to Halliburton’s concerns, which the Court considered had been appropriate.

Having weighed all these factors, the Court decided that a fair-minded and an informed observer would *not* conclude that there was a real possibility that M was biased. Its reasons were that:

1. The non-disclosed circumstances did not in themselves justify an inference of apparent bias.
2. Although disclosure ought to have been made, the omission was fairly inferred to be accidental rather than deliberate.
3. The degree of overlap between the cases seemed sufficiently limited to the Court to suggest that this was not a case where overlapping issues should give rise to any significant concerns.
4. The fair-minded and informed observer would not consider that mere oversight in such circumstances would give rise to justifiable doubts about impartiality.
5. There was no substance in Halliburton’s criticisms of M’s conduct after the non-disclosure was challenged or any other heads of complaint raised by them.

As a final matter, the Court dismissed Halliburton’s argument that M’s oversight in relation to disclosure might be indicative of unconscious bias.

The Court concluded that it could be *assumed* that M, as a highly respected international arbitrator with extensive experience, would be likely to have done all he could to ensure that nothing that transpired in the other arbitrations influenced his approach. The Court chose to rely on dicta in two recent Privy Council cases to the effect that a person with judicial experience would have their mind conditioned to independence of thought and impartiality of decision. However, it was not influenced by the fact that, in the most recent of those decisions⁴, the Privy Council held that it was inappropriate for a retired English High Court Judge sitting in the Grand Court of the Cayman Islands in a case involving Qatar interests to sit without disclosing that he was also a Judge of the Qatar Civil and Commercial Court, and the renewal of his membership of that court could be affected by one of the Qatar interests.

Lessons For Parties to London Arbitrations

As long as the Court of Appeal judgment in *Halliburton v Chubb* remains good law, and in light of the background to the case set forth above, policyholders and their brokers should resist attempts by insurers to require non-institutional London arbitrations, with no independent arbitrator-appointing or arbitration-administering authority, as a vehicle for resolving insurance coverage disputes.

Policyholders, in particular, should review the arbitration clauses in their insurance policies on renewal in order to assess whether some form of amendment is required in order to give the policyholder greater comfort that its insurer will not, with impunity, appoint as party arbitrator or procure the appointment as Chair, of an arbitrator whom the insurer or the London insurance market has already appointed on multiple occasions. Ways of tackling this issue range from involving an arbitration institution in the appointment as suggested above, to imposing appropriate requirements or qualifications in relation to the tribunal members, and to opting for a different arbitration seat.

All entities intending to enter into contracts containing London arbitration clauses need to be aware that English law does not require arbitrators to make any enquiries whether there are circumstances which an informed party might consider as giving rise to possible bias and should consider including an express duty to enquire in the arbitration agreement.

We will be offering a more detailed client conversation on the material discussed in this advisory and will follow up with further details.

In the meantime, please contact the following members of our Insurance and International Arbitration practices in London and Washington with any questions:

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⁴ *Almazeedi v Penner and Sybermsa* [2018] UKPC 3