

UK Supreme Court Ruling Clarifies Arbitrator Bias Standard

By **Allan Moore and Ramon Luque** (January 20, 2021, 3:15 PM EST)

The legitimacy of arbitration as a dispute resolution process depends on both the appearance and the reality of an impartial and independent tribunal. It is thus vitally important that no party have, or be perceived to have, an unfair advantage in the arbitrator appointment process, particularly in regard to the chair of a tribunal.

In late November, the U.K. Supreme Court issued a decision on this subject that has sent shock waves through the international arbitration community and the insurance bar.

The court held that an arbitrator who was appointed by a London court to chair a tribunal at the request of an insurance company (Chubb), without the concurrence of its policyholder, Halliburton Co., breached a legal duty when he failed to disclose to Halliburton that he was subsequently appointed by Chubb, as its party-appointed arbitrator, to hear a claim brought by a different policyholder involving the same event.

The court unanimously declined, however, to disqualify the arbitrator, thus leaving intact an award that the tribunal proceeded to issue in Chubb's favor, thereby providing no remedy for the breach.

The Supreme Court's judgment in *Halliburton v. Chubb*^[1] is likely the court's most important decision in the area of international arbitration in the past 10 years. It articulates important guidelines for how English courts will police issues of arbitrator disclosure and bias, even as it fuels concerns among insurance policyholders, particularly those with London, or Bermuda, arbitration provisions in their policies.

Background

Halliburton v. Chubb concerned an insurance claim arising from the Deepwater Horizon accident under a so-called Bermuda Form insurance policy. Bermuda Form policies are governed by New York law but provide for arbitration of coverage disputes, without an administering body, in London or, sometimes, Bermuda.

Like most such policies, Halliburton's policy called for arbitration before a three-member tribunal in



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London, with two party-appointed arbitrators, and a chair selected by the party-appointees. In the event of a failure to agree on the chair, either party could ask the London High Court to appoint the chair.

Halliburton rejected Chubb's preferred candidate, Kenneth Rokison QC, to serve as the chair, and Chubb then applied to the London court, which appointed Rokison nonetheless. Rokison subsequently accepted appointments in two other arbitrations arising from the Deepwater Horizon accident involving another insured, Transocean Ltd.

In one, he accepted an appointment by Chubb as its party-appointed arbitrator. In the other, Chubb was not a party, but counsel for the insurer was the same counsel representing Chubb in the other two cases. Rokison disclosed neither of these appointments to Halliburton, and when Halliburton learned of them, it pressed for an explanation.

Rokison acknowledged that disclosure of his related appointments to Halliburton would have been prudent and the failure to disclose was an oversight, but he denied that he owed Halliburton a duty of disclosure. He nonetheless offered to resign if the parties could agree on a substitute chair — that is, he effectively conditioned his withdrawal on Chubb's consent.

Chubb objected to Rokison's withdrawal, citing concerns about cost and delay, and Halliburton then applied to the English High Court to remove him for apparent, not actual, bias.

Halliburton argued that it was reasonable to perceive that Chubb had an unfair advantage, in regard to how Rokison, as chair, might react to evidence and arguments in the case, in light of what he and Chubb might be privy to from the related Deepwater Horizon arbitrations, where Halliburton was not a party.

Halliburton also argued that Chubb might have unfair influence having appointed Rokison in a related case as a party-appointee. The High Court and Court of Appeal rejected its challenge, and Halliburton appealed to the U.K. Supreme Court.

Decision and Reasoning

Duty of Disclosure

The court confirmed that, in all London-seated arbitrations, an arbitrator has a continuous legal duty to disclose facts and circumstances that would or might give rise to justifiable doubts about impartiality in the mind of the "fair-minded and informed observer."^[2] The court held that this duty is a component of an arbitrator's statutory duty to act fairly and impartially under Section 33 of the English Arbitration Act, not merely a matter of good arbitral practice, as Chubb had argued, and as the English High Court had accepted.

The court also acknowledged that an arbitrator's appointment in multiple references concerning the same or overlapping subject matter, with only one common party, may give rise to an appearance of bias. Further, it recognized that there is no accepted practice of nondisclosure of multiple appointments in Bermuda Form arbitrations, which is "unsurprising as the [policyholder] claimant in such an arbitration may often not be a repeat player while an insurance company is much more likely to be."^[3]

The court thus concluded that, in the context of Bermuda Form arbitrations, multiple appointments must be disclosed "in the absence of an agreement."^[4] The court then found that Rokison breached his duty of disclosure by failing to disclose his appointment by Chubb in a subsequent related appointment.

Apparent Bias

Halliburton confirms that the test for apparent bias under English law is whether the "fair-minded and informed observer," an objective standard, would find "a real possibility of bias" sufficient to justify the arbitrator's removal. The test considers the facts of the particular case, within the broader context and circumstances of international arbitration.

The court also ruled that one should assess the possibility of bias by reference to the facts and circumstances known to the objective observer at the date of the hearing to remove the arbitrator, not at the time that the conflict should have been disclosed.

The court declined, however, to remove the arbitrator in question, and thus, to provide a ground for the award in Chubb's favor to be set aside, finding that the record did not indicate apparent bias. The court reasoned that, while the arbitrator's failure to disclose to Halliburton his appointment by Chubb in the *Transocean v. Chubb* arbitration breached a legal duty and may well have given rise to a real possibility of bias as of that date, the appearance of bias must be assessed at the date of the hearing for removal.

By that time, the court reasoned, the arbitrator had explained his nondisclosure and responded temperately to Halliburton's challenge, and an early resolution in the *Transocean* arbitrations reduced or eliminated the possibility for Chubb to obtain an unfair advantage in its arbitration with Halliburton. The court thus rejected Halliburton's challenge and dismissed its appeal.

Comment

Halliburton helpfully clarifies the apparent bias standard under English law for arbitrator disclosures and challenges, and it underscores that an arbitrator's duty of disclosure is both a legal duty and continuous. But the judgment is disappointing, particularly for policyholders in a Bermuda Form context, for at least three reasons.

First, in assessing whether the "fair-minded and informed observer" would find "a real possibility of bias," the court gave no apparent weight to two of the most salient facts in the case, namely that:

- Chubb had secured its preferred candidate's appointment as chair of the parties' tribunal by a lower court, even after Halliburton considered and rejected his suitability for the role, and
- Upon being challenged for apparent bias, the arbitrator in question agreed to resign only if Chubb consented, thereby effectively conditioning his willingness to withdraw on the consent of the party in whose favor it was suggested he had an apparent bias.

By any objective standard, these facts seem more significant and indicative of apparent bias than whether the arbitrator sent a temperately worded email to Halliburton in denying its challenge.

Second, as the court recognized, in a Bermuda Form (or almost any) insurance arbitration, the risks of a repeat arbitrator's bias in favor of an insurer are especially acute, "as the [policyholder] claimant in such an arbitration may often not be a repeat player while an insurance company" — and an arbitrator candidate it proposes — "is much more likely to be."

Insurance programs, particularly for high-value risks, are constructed in multilayer policy towers, with each policy and layer commonly having its own arbitration provision and similar terms and conditions. It is thus typical for a major loss or liability to implicate many policies and closely aligned insurers or, as in Halliburton, the same insurer in multiple arbitrations with different policyholders. Insurers collaborate and arbitrate related cases with enormous frequency.

By contrast, a major loss and related coverage arbitrations are exceedingly rare — and perhaps once-in-a-lifetime — for any policyholder. If insurers can secure the appointment of repeat players whom they have reason to prefer as tribunal chairs, the arbitration process risks losing its legitimacy in the insurance field.

Third, practical realities require an appreciation of the different posture and role of a tribunal chair versus a party appointee. The latter has been chosen by one party, not both, and not by an independent institution or court. It is natural and reasonable for a party to choose a party-appointee that it expects will favor its side of the case, for entirely good and fair reasons and with no improper motive.

Likewise, one can expect a party's appointee to be more inclined toward the positions of that party — again, without any improper motive. The research overwhelmingly supports this self-evident expectation, which experienced parties, counsel and arbitrators all recognize.[5] For this reason, it is particularly problematic to allow a party, Chubb in this case, to secure its preferred candidate as chair in one case, while appointing that same arbitrator as its party-appointee in a related case.

That said, insurers, arbitrators and courts are all now on notice of the Halliburton judgment: The court found the arbitrator in question to have breached his legal duty of disclosure; emphasized that its finding was highly fact-dependent; and recognized that Bermuda Form arbitrations, in particular, warrant heightened scrutiny in respect to issues of arbitrator disclosure and bias.

Against this background, Halliburton will likely invite arbitrator challenges, at least in cases where insurers seek to appoint, as tribunal chairs, candidates who are repeat players for them.

In the meantime, parties to contracts calling for London-seated arbitration, and especially policyholders with Bermuda Form arbitration provisions, should take steps to ensure that they receive impartial justice in the event of a dispute. In particular:

- Policyholders should resist attempts by insurers to require disputes to be resolved by nonadministered arbitration in London or Bermuda, at least where selection of the tribunal chair in the event of a deadlock is a resort to the courts, where an insurer may secure the appointment of its preferred candidate.
- Policyholders with Bermuda Form arbitration provisions should address this issue in their annual policy renewals, as well as in connection with any pending or future Bermuda Form arbitrations.
- And policyholders should bear in mind that more fairly worded arbitration provisions, more active and effective use of arbitral institutions and rules, and more neutral processes for the selection of tribunal chairs are readily available.

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[1] Halliburton Company v. Chubb Bermuda Insurance Ltd. [2020] UKSC 48.

[2] The Court rejected the Court of Appeal's finding that an arbitrator has no positive duty to make reasonable enquiries into potential conflicts of interest, but declined the opportunity to confirm the content and scope of any such duty, deferring this important question to another day.

[3] See paragraph 137 of the Halliburton judgment.

[4] Id.

[5] See, e.g., Albert Jan van den Berg, Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration, in Mahnoush Arsanjani et al (eds.), Looking to the Future: Essays on International Law in Honor of W. Michael Reisman, 2011 (821-843) (observing, in a survey of 150 investment arbitrations overseen by three member tribunals where dissenting opinions were issued, "nearly 100 percent of the dissents favor the party that appointed the dissenter").