Arbitral appointments: broadening horizons or getting into deep water?

Five questions for London arbitration following the Court of Appeal's decision in *Halliburton v Chubb*

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The recent decision in *Halliburton v Chubb* is of great interest for its treatment of an application to remove an arbitrator under s 24 of the Arbitration Act 1996, in the common situation where the same arbitrator is appointed in overlapping references with only one common party, on the basis this gave rise to justifiable doubts about the arbitrator's impartiality.

The case has the potential to become the leading authority on an arbitrator's duty of disclosure. The result, at both first instance and in the Court of Appeal, was that the application to remove the arbitrator failed.

In this article we identify and address five broader inter-connected questions which the decision raises for London arbitration:

1. **Does the Arbitration Act 1996 adequately cater for concerns that can arise when the same arbitrator is appointed in overlapping references?**
2. **Does the decision only deepen the dilemma for arbitrators 'caught between a rock and a hard place' when it comes to disclosure of appointments?**
3. **Is there a limit on the number of appointments that may be accepted by an arbitrator before there is an appearance of bias?**
4. **Is English law in this area itself infected with "unconscious bias"?**
5. **Does the case reflect a divide between English law and good practice in international arbitration?**

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Background

The background to the case is typical of Bermuda form disputes, and has a distinctly international flavour. The arbitration featured a claim by a large US multinational corporation, Halliburton, instructing a major US law firm in respect of an insurance claim under a policy governed by New York law against Chubb, arising out of the Deepwater Horizon incident, which caused extensive environmental damage along the US Gulf coast. However, the seat of the arbitration was in London, and hence the curial law was English law.

Each party was to appoint its own arbitrator, with a third arbitrator to be appointed by the English High Court in default of agreement by the two party appointed arbitrators, who could not agree. Accordingly, there was a contested application in the High Court, in which Halliburton objected to Chubb's preferred candidates because they were all English lawyers. Flaux J appointed M, one of Chubb's preferred candidates, who had disclosed that he had previously received several appointments by Chubb, and was currently arbitrator in two pending references in which Chubb was a party.

Following pleadings in the arbitration, Halliburton's US lawyers took strenuous objection when they later discovered M had failed to disclose his subsequent appointment in another Deepwater Horizon reference by Chubb, in which Transocean claimed under materially the same policy terms, and also in another Deepwater Horizon reference in which Transocean claimed against a different insurer.

Before Halliburton's challenge to M was determined, the tribunal issued an award in favour of Chubb. The arbitrator appointed by Halliburton refused to participate in the award and issued separate observations expressing his *"profound disquiet about the arbitration's fairness"*, since in his view the lack of disclosure was of special concern in the circumstances, and contrary to expectations of impartiality and even-handedness.

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(1) Does the Arbitration Act 1996 adequately cater for concerns that can arise when the same arbitrator is appointed in overlapping references?

It is commonplace in string arbitrations for the same arbitrator to be appointed in several references in the chain, because of the obvious advantages that may bring in terms of efficient conduct of the references and reducing the risk of inconsistent decisions. But negative consequences can also sometimes be perceived to arise where an arbitrator is appointed in overlapping references with only one common party. Take the situation where an arbitrator is appointed in two references with overlapping issues, one between A and B, and one between A and C. C may not even know of the existence of the reference between A and B. The arbitrator and A will know the evidence and submissions on an issue in the arbitration between A and B. But in the arbitration between A and C, A may tailor its submissions according to the arbitrator's views expressed in another arbitration, whilst C may make submissions on the same issue, ignorant not only of the evidence and arguments the arbitrator has already received, but potentially even of the fact the arbitrator has received them.

However, the problem is not one of bias, but of equality of arms and procedural fairness; we term this for ease of reference in this article "the multiple appointment concern". This problem stems from *the knowledge and position* of the particular arbitrator and the common party, which gives rise to "inside information", but *not* necessarily bias. Although this is a form of procedural concern, it cannot easily be fully catered for by procedural adjustments, particularly because of the confidentiality of separate arbitral proceedings. It may be noted that the problem being identified here exists irrespective of whether or not it is the common party who appointed the arbitrator in further references.

The Court of Appeal's judgment accepts that the multiple appointment concern is a legitimate one, and refers to the relatively recent decisions in *Guidant LLC v Swiss re International SE* [2016] EWHC 1201 and *Beumer Group UK Ltd v Vinci Construction UK Ltd* [2016] EWHC 2283. The Court of Appeal also noted that it is good practice in international arbitration

to make disclosure of appointments in overlapping arbitrations because of the multiple appointment concern, particularly as practical steps may be suggested and taken to meet the concern once disclosure is given.

Nevertheless, the Court of Appeal held this is not a concern justifying an inference of apparent bias; the multiple appointment concern does not fit in the only available box under the Arbitration Act 1996, which is the impartiality box under s 24. This also means that whilst the multiple appointment concern may militate against the appointment of a particular arbitrator where the court or an institution is exercising a discretion in appointing, the same concern cannot of itself lead to the removal of an arbitrator once appointed. There may be some unease about such differing results, although we recognise these are not quite opposite sides of the same coin.

Does this expose a deficiency in the Arbitration Act 1996? If so, whilst there is no prospect of a legislative solution on the horizon, do arbitral institutions and indeed, individual arbitrators, need to give greater consideration to this problem?

(2) Does the decision only deepen the dilemma for arbitrators 'caught between a rock and a hard place' when it comes to disclosure of appointments?

The Court of Appeal's judgment identifies a duty of disclosure even where the matters to be disclosed do not themselves give rise to an appearance of bias. We make the following observations about the decision:

1. Section 24 reflects the common law test for apparent bias, namely whether the fair-minded and informed observer *would* conclude there was a real possibility the arbitrator was biased. It is important to note that the test is not whether the informed observer would conclude the arbitrator *was* biased, only that there was a *possibility* the arbitrator was biased.
2. The Court of Appeal held the circumstances in which an arbitrator should make disclosure are broader, namely where the fair-minded and informed observer *would or might* conclude there was a real possibility the arbitrator was biased. The addition of "might conclude", in addition to "would conclude",

introduces the *possibility* of a particular conclusion. It seems this effectively makes the disclosure test referable to the fair-minded observer's *possible* thinking about the *possibility* of bias. This test may not be thought easily applicable by arbitrators.

3. If disclosure should be given because a fair-minded observer could *possibly* think bias was possible, then the Court held that a failure to disclose will itself be a factor, but not a sufficient one alone, in determining whether the fair-minded observer *would* conclude there was a real possibility the arbitrator was biased. How the arbitrator responds to any concerns expressed by the parties following disclosure or non-disclosure will however also be a relevant factor. It follows that circumstances which do not of themselves justify an inference of apparent bias, may, when taken together with an arbitrator's subsequent conduct, make the overall circumstances sufficient to justify a finding of apparent bias. The judgment and result may be entirely logical and correct as a matter of English law, but the reasoning is, to say the least, involved.
4. The resulting difficulty for arbitrators is compounded by the Court's apparent approval in the arbitral context of the statements of Lord Woolf in *Taylor v Lawrence* [2003] QB 528 relating to judicial disclosure. These include a warning that disclosure should *not* be given of circumstances where, *"there is no real possibility of it being regarded by a fair-minded and informed observer as raising a possibility of bias"*, but also directed that disclosure be given in "*borderline*" cases. In substance, the guidance being given to arbitrators may be no more useful than: "be careful not to disclose when you do not need to, but also be careful to disclose when you do need to".

We therefore sympathise with an arbitrator wrestling with the application of their disclosure obligations in practice, particularly as the Court made clear that their obligations as a matter of law may differ from their obligations as a matter of institutional rules, and from what is

regarded as good international practice. However, it is notable that the Court considered that best practice in international commercial arbitration, and the existence of the multiple appointment concern, were relevant factors in its conclusion that the arbitrator M failed to disclose appointments which he should have disclosed as a matter of law. Was the Court's seemingly broader approach to the arbitrator's legal duty of disclosure influenced by the apparent gap in the Arbitration Act 1996 identified in our first question above, and a means of mitigating the impact of such a gap?

(3) Is there a limit on the number of appointments that may be accepted by an arbitrator before there is an appearance of bias?

The multiple appointment concern is different from the concern that can arise where an arbitrator accepts multiple appointments from the same party. The latter concern may be exacerbated by the existence of overlap between references, but will not depend on it, whilst the former concern does not depend on which party is doing the appointing.

In relation to the concern in accepting multiple appointments from the same party, it is notable that counsel for Chubb conceded that accepting ten appointments from the same party could give rise to justifiable doubts about impartiality. Even though Halliburton was not relying on the *number* of appointments, the Court of Appeal regarded this as a factor relevant to whether disclosure of further appointments should have been made. However, it would be going too far to suggest that ten will now become the magic number in setting the threshold for apparent bias. Doubtless an argument based on the number of appointments accepted by the same party will turn on all the circumstances and not only the number of appointments, including, for instance, the timescale of the appointments, the nature of the references, and the financial implications of the appointments. But the decision serves as a reminder that past appointments by the same party can be a sound basis for objecting to an arbitrator.

(4) Is English law in this area itself infected with "unconscious bias"?

A failure to have sufficient regard to the risk of "unconscious bias" was one of the central planks of the appellant's attack on Popplewell J's judgment at first instance. The Court of Appeal recognised that "unconscious bias" was a kind of bias which the fair-minded and informed observer would consider. This would include considering the risk that unconsciously an arbitrator might be influenced by evidence and submissions in a different reference which he or she ought not to consider.

The Court stressed that the starting point, in line with Dyson LJ's observations in *AMEC Capital Projects Ltd v Whitefriars City Estates Ltd* [2005] 1 WLR 723, was that *"arbitrators are assumed to be trustworthy and to understand that they should approach every case with an open mind."* The Court also took into account that the arbitrator was a well-known and highly respected international arbitrator with very extensive experience. These factors militated against the risk of unconscious bias.

However, it must be recalled that the issue is not whether there is any actual bias. The issue is whether there is a possibility of bias being perceived by the fair-minded observer. Where there is something which a decision maker should somehow put out of their mind, although their memory cannot be erased, is the fact that they can be trusted to strive to put it out of their mind enough to eliminate the *possibility* of bias? If not, should that be a relevant factor at all?

There is a danger here that the court will have difficulty in truly adopting the thinking of a fair-minded observer, because judges by dint of their own experience are liable to have more confidence than an external observer may have in an arbitrator's ability to insulate himself or herself from the risk of "unconscious bias". The professional background of a judge may naturally render he or she more impressed by the reputation and experience of an arbitrator than a truly outside observer, also keeping in mind that judges may formerly have accepted appointment as arbitrators, and upon retirement from judicial office, may well do so again in the future. Therefore, judges may

themselves be at risk of "unconscious bias" in this territory. Furthermore, the implication is that the risk of unconscious bias will be regarded as greater for an arbitrator at an earlier stage of their career, which seems unfair.

In short, does English law take too parochial a view of the issue? Where the relevant risk is that a person will be *unconsciously* influenced by a matter, isn't that really saying that the person will not be able to help being influenced in that way? In which case, is the arbitrator's reputation, integrity or experience really to the point?

The judgment also suggests that where the arbitrator's attention is specifically drawn to the relevant risk of unconscious bias before reaching a decision, the arbitrator will be made conscious of matters about which they may otherwise have been unconscious. This seems to obscure the real concern, which is not that an arbitrator may be unaware of the risk of being unintentionally influenced by matters which they ought to disregard, but that they may in fact be unintentionally influenced notwithstanding their appreciation of that risk. It is not easy to see how making an arbitrator more aware of something which, by definition, may be *unconsciously* influencing them, can lead to a conclusion that the fair-minded observer would not regard it as a *real possibility* that the arbitrator was being unconsciously influenced.

(5) Does the case reflect a divide between English law and good practice in international arbitration?

The judgment highlights that many institutional rules, and the IBA Guidelines on Conflicts of Interest, impose a stricter subjective test of disclosure than the objective test under English law. Arguably, a subjective approach to disclosure is more likely to engender party confidence in the process than English law's purely objective approach. To the extent the IBA Guidelines are reflective of good international practice, it is important to note that they are not binding as a matter of English law. Whilst often regarded as a useful reference by the English courts, the case of *W Ltd v M SDN BHD* [2017] 1 All ER (Comm) 981 is a relatively recent example of the court not hesitating to depart from the IBA Guidelines.

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However, in common with the Court of Appeal's approach:

1. The IBA Guidelines adopt a lower threshold for disclosure than for disqualification of an arbitrator.
2. The standard for disqualification is an objective one.
3. A failure to disclose does not of itself imply doubts as to impartiality, and is therefore not on its own a basis for disqualification.

It will be recalled that the context for the decision had many international elements, and it is interesting to consider more broadly whether any division between English law and international practice and attitudes clearly emerged from the dispute. Did it make a difference to Halliburton's approach that it was a US corporation instructing a US law firm, noting also that prior to launching its s 24 challenge Halliburton was already aggrieved by the English court's appointment of an English lawyer as chair of the tribunal? We also infer that the arbitrator appointed by Halliburton was not an English lawyer. Did his strongly worded criticism of the arbitration's fairness owe more to international practice than English law?

Comment

Whilst the attitudes of Halliburton's lawyers and appointed arbitrator may reflect international, and more specifically US views more broadly, that conclusion cannot safely be reached based anecdotally on this case alone. It may disclose no more than the views of one party, and the individual perspective of a particular arbitrator. Nevertheless, we would suggest that in these times of ever increasing global competition between dispute resolution centres, and with Brexit on the horizon, the London arbitral community should do its utmost to pick up on concerns in other jurisdictions. That will include an awareness of any arguably parochial approach in this jurisdiction, such as that identified in this article. The multiple appointment concern is one that deserves close monitoring, and the attention of arbitral institutions and the IBA.

Meanwhile, it remains to be seen whether the Court of Appeal's judgment will represent the last word as a matter of English law, or whether the important issues raised will soon be troubling the Supreme Court.

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If you require advice on any of the topics discussed in this report from Christopher or Daniel, or any member of 20 Essex Street please contact: clerks@20essexst.com

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