ARBITRATOR BIAS: THE ENGLISH COMMERCIAL COURT OFFERS FURTHER GUIDANCE ON DISQUALIFICATION OF ARBITRATORS

Date: 8 March 2024

International Arbitration and Dispute Resolution Alert

The leading English authority on arbitrator impartiality is the case of *Halliburton Co v. Chubb Bermuda Insurance Ltd [2021] AC 1083*, a well-known case in which K&L Gates acted for Halliburton. *Halliburton v. Chubb* clarified how apparent bias will be assessed by the courts and set an arguably high bar for arbitrator removal. The Supreme Court confirmed that the relevant test for arbitrator bias was objective and involved determining whether a fair-minded and informed observer would conclude that there was a real possibility of bias. So how is this applied in practice?

In the recent case of *H1 & Anor v. W & Ors [2024] EWHC 382 (Comm)*, the English Commercial Court removed a sole arbitrator under section 24 of the Arbitration Act 1996 due to justifiable doubts about his impartiality and a real possibility of bias, offering further guidance on the disqualification on arbitrators.

In *Halliburton*, the Supreme Court set out a number of relevant factors that should be taken into account when assessing potential arbitrator bias, some of which were helpfully summarised by Mr. Justice Calver in *H1 v. W*, namely:

- The private and confidential nature of arbitration and limited discovery means there is a premium on frank disclosure;
- An arbitrator is not subject to appeals on issues of fact nor often on issues of law in the same way that a judge may be;
- There is a difference between a judge, as a holder of public office funded by taxation, and an arbitrator who has a financial interest in obtaining income from arbitral appointments and may therefore be more wary of taking actions that would alienate parties to an arbitration;
- Arbitrators may have limited involvement or experience of arbitration; and
- The professional reputation and experience of an arbitrator is relevant when assessing whether there is apparent bias (an established reputation for integrity and wide experience in arbitration may make any doubts harder to justify).

Clearly, potential arbitrator bias is not assessed in a vacuum, and parties should consider an arbitrator's experience (or inexperience) against the context they find themselves in before seeking to remove an arbitrator.

Given the popularity of arbitration as a method of dispute resolution, arbitrator impartiality is essential. Whilst the bar may be high, the case of *H1 v. W* reaffirms some of the key practical considerations that need to be taken into

©2005-2026 K&L Gates LLP. All Rights Reserved.

account when assessing arbitrator bias and highlights how an arbitrator's ill-chosen words can clear that bar, leading to court removal under section 24.

H1 & ANOR V. W & ORS

The Facts

The underlying arbitration involved a dispute between a film company and an insurer arising from an accident that happened on set during filming. Filming was delayed after the lead actor suffered injuries. The film company submitted a claim to its insurer seeking indemnity for the added expense arising from the delay, which amounted to around £3 million. The insurer denied the claim, arguing that the insured was responsible for safety on the set. The sole arbitrator, a well-known film producer and industry specialist, was nominated by the British Film Institute.

At a procedural hearing, the sole arbitrator made statements regarding the expert witnesses that gave the insurer cause for concern. The arbitrator said that he did not need to hear from expert witnesses as the insured's experts were “exceptional people in their fields” and that he knew “them all personally extremely well” and was “good friends with them” but did not know the insurer's expert who he did not think added much. In respect of one of the insured's experts, the arbitrator added “what he says is what I will believe” despite not having heard any evidence or submissions.

The insurer applied to the court for an order removing the sole arbitrator under section 24(1) due to concerns about the arbitrator's statements, which suggested a lack of impartiality and an apparent bias towards the insured and its experts.

Decision

In making his decision, Mr. Justice Calver confirmed that removing an arbitrator for apparent bias is not a discretionary matter but rather an objective assessment of whether there is either a “real possibility of bias or not.” He added that, if there was a real possibility that an arbitrator's decision was influenced by factors that should not have been part of the decision-making process, there was a real possibility of bias.

Mr. Justice Calver found that:

- The fact that the arbitrator was professionally acquainted with the insured's experts did not give rise to justifiable doubts about his impartiality. It was not surprising that there was familiarity between experienced practitioners in the television production industry;
- The suggestion that the arbitrator did not need to hear the expert evidence because he knew the insured's experts extremely well and they were exceptional people in their fields indicated that he would accept the insured's experts' evidence at face value. Pre-judging the merits of the dispute in this way suggested a prejudice in favour of the insured's experts that would prevent an impartial assessment of the evidence; and
- By saying that he would believe what the insured's expert said before any evidence was presented, the arbitrator gave an appearance of bias that suggested he did not have an open mind and would judge the evidence by reference to his personal knowledge of the insured's expert's status.

©2005-2026 K&L Gates LLP. All Rights Reserved.

Mr. Justice Calver determined that the statements made by the arbitrator would lead a fair-minded and informed observer to conclude that there was justifiable doubt as to his impartiality and a real possibility of bias. The insurer's application was therefore granted and the arbitrator was removed.

Comment

The independence and impartiality of arbitrators is of the utmost importance, especially given the limited avenues of appeal in arbitration when compared with court litigation. Arbitrators need to be carefully selected, giving consideration to their professional qualification, and in some circumstances, arbitration experience.

As arbitrators (as distinct from judges) are commonly nominated by the parties, there is an increased risk of lack of impartiality or bias impacting the decision-making process. When faced with apparent bias, parties need to be aware of the relevant factors that a court might take into consideration when considering the removal of an arbitrator.

In this case, the Court's job may have been made easier by the ill-chosen and blatant language of the arbitrator, but the case acts as a helpful reminder of the relevant considerations when faced with potential arbitrator bias.

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.

©2005-2026 K&L Gates LLP. All Rights Reserved.