

The Cassandra of the Caymans ? Testing the Limits of an Arbitrator's duty of Impartiality

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PRACTICES Litigation, International Arbitration

Introduction

The Arbitration Act 1996 imposes upon arbitrators a duty to act “*impartially*” (section 33) and empowers the court to remove an arbitrator if “*circumstances exist which give rise to justifiable doubts as to his impartiality*” (section 24(a)) and to set aside an award by a tribunal which failed to comply with the duty to act impartially (section 68(2)(a)).

It has repeatedly been held that the question of whether circumstances exist which give rise to justifiable doubts as to an arbitrator’s impartiality is equivalent to the test for ‘apparent bias’ which the common law applies to judges and other tribunals (*Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at 17, *A v B* 2011 2 Lloyd’s Rep 591 at 22, *Sierra Fishing Co v Farran* [2015] EWHC 140 at 51) and, latterly, *Halliburton Company v Chubb Bermuda Insurance Ltd* [2018] EWCA Civ 817 at 39). The common law test for apparent bias was laid down by the House of Lords in *Porter v Magill* [2001] UKHL 67 (at paragraph 103). It is whether a “*fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased*”.

In 2018 appellate courts were called upon to apply that test on two occasions. In each case the result has proved divisive, illustrating the difficulty courts face in deciding what a “*fair minded observer*” would think and, by extension, the difficulty practitioners and prospective arbitrators face in making predictions about what a court will decide regarding the same. The first of those cases is *Almazeedi v Penner and Another (Cayman Islands)* [2019] UKPC 3, a decision of the Privy Council from 26 February 2019. The second is *Halliburton Company v Chubb Bermuda Insurance Ltd* [2018] EWCA Civ 817, a decision of the Court of Appeal from 19 April 2018. Of the two decisions *Almazeedi*, being a decision of the Privy Council, is presently the more significant. More ink has been spilled, however, over the Court of Appeal’s decision in *Halliburton* because the Supreme Court is due to hear an appeal in that case in November 2019 (Brexit-related appeals permitting). Given that a decision in the *Halliburton* appeal may be imminent, any detailed analysis of that case is liable to be immediately superseded. This article therefore focuses instead on *Almazeedi*, which has attracted less commentary, and addresses *Halliburton* more briefly.

Independence

Before turning to *Almazeedi* and *Halliburton*, it is worth acknowledging (though very much as an aside) that the Arbitration Act 1996 might not be an exhaustive statement of the law with respect to arbitral bias.

To read the full article, see the PDF linked below.

[Cassandra-of-the-Caymans-Testing-Limits-of-Arbitrators-Duty-of-Impartiality.PDF](#)