ISSN : 1875-4120
Issue : Vol. 17, Issue 2
Published : February 2020

Transnational Dispute Management
www.transnational-dispute-management.com

Resignation in the Face of Confidentiality?

by J. Dias Q.C.

About TDM

TDM (Transnational Dispute Management): Focusing on recent developments in the area of Investment arbitration and Dispute Management, regulation, treaties, judicial and arbitral cases, voluntary guidelines, tax and contracting.

Visit www.transnational-dispute-management.com
for full Terms & Conditions and subscription rates.

Open to all to read and to contribute

TDM has become the hub of a global professional and academic network. Therefore we invite all those with an interest in Investment arbitration and Dispute Management to contribute. We are looking mainly for short comments on recent developments of broad interest. We would like where possible for such comments to be backed-up by provision of in-depth notes and articles (which we will be published in our 'knowledge bank') and primary legal and regulatory materials.

If you would like to participate in this global network please contact us at info@transnational-dispute-management.com: we are ready to publish relevant and quality contributions with name, photo, and brief biographical description - but we will also accept anonymous ones where there is a good reason. We do not expect contributors to produce long academic articles (though we publish a select number of academic studies either as an advance version or an TDM-focused republication), but rather concise comments from the author's professional 'workshop'.

TDM is linked to **OGEMID**, the principal internet information & discussion forum in the area of oil, gas, energy, mining, infrastructure and investment disputes founded by Professor Thomas Wälde.

Resignation in the Face of Confidentiality?

Julia Dias QC[*]

Abstract

Confidentiality and party autonomy are generally regarded as hallmarks of commercial arbitration. However, the Court of Appeal's judgment last year in Halliburton v Chubb[1] *has created a serious tension between these concepts in the context of an arbitrator's duty to disclose circumstances which might give rise to a possibility of bias. The decision has, moreover, highlighted a divergence between English law and the major sets of institutional rules regarding the duty of disclosure and the consequences if it is breached. The decision is currently under appeal to the Supreme Court. This article discusses some of the problems with which their Lordships will need to grapple at the forthcoming hearing due to take place in November this year. It also highlights the need to undertake a fundamental reassessment of what arbitration should entail if competing interests are to be appropriately balanced and trust in London international commercial arbitration as a fair and impartial means of dispute resolution is to be maintained.*

Introduction

Practitioners in commercial arbitration over recent years cannot have failed to notice the proliferation of challenges to the appointment or continuation of a particular arbitrator on grounds of apparent bias. It is possible, of course, that such challenges may be justified. However, the available statistics suggest that this is in fact extremely rare[2] and there is a perception that challenges of this nature are increasingly being deployed proactively as weapons in a party's tactical armoury designed to secure a forensic advantage, perhaps by getting rid of an arbitrator who is thought to be potentially adverse, or to put the other party on the back foot, or, if all else fails, to waste time and costs and thereby put pressure on an economically weaker opponent. Indeed attention was drawn to this very problem nearly two years ago by the late Sir Anthony Colman in his keynote address to the Chartered Institute of Arbitrators on 26 April 2017, in which he stated:

> *"As we are discussing the qualifications of arbitrators, let me come to a deeply disturbing feature of the modern arbitration scene. I am referring to the whole morass, I choose the word deliberately, of conflict of interest, and in particular perceived or "imputed" bias. This provides an almost limitless opportunity for obstruction of the arbitral process. The bottom line is that particular circumstances relating to an arbitrator might be considered by an outside observer to be likely to cause that arbitrator to lose his impartiality.*

* Julia Dias is a practising barrister in commercial chambers at 7 King's Bench Walk. She also sits as a Deputy High Court Judge. Email: jdias@7kbw.co.uk.

[1] *Halliburton Company v Chubb Bermuda Insurance Ltd,* [2018] EWCA Civ. 817; [2018] 1 WLR 3361.

[2] The LCIA's database of challenge decisions shows that in the period 2010-2017, over 1,600 cases were registered with the LCIA. Challenges were heard by the LCIA Court in fewer than 2% of these cases and only one-fifth of those challenges were successful, i.e. about 0.4% of the total caseload.

> *I suggest that this has now become an obsession in the field of international arbitration at least. It is not only an obsession but a particularly pernicious obsession…"*

An egregious example of such tactical manoeuvring takes the form of the deliberately unmeritorious challenge. This is made in the hope of provoking an unjudicial or intemperate response from the arbitrator which can itself then be relied upon as evidence that, whatever his previous views, he is now inevitably likely to be predisposed – if only subconsciously – against the challenging party. So far the courts have stamped hard on such attempts to conjure an appearance of bias out of thin air and have rightly been resistant to allowing one party to de-rail an arbitration by forcing a resignation merely on the basis of having made a challenge, particularly where the challenge is unmeritorious. As Popplewell J noted in *H v L & Others:*

> *"If there are no circumstances which objectively give risk to the possibility of an appearance of bias, it can never be a proper ground for removal of an arbitrator that the process of unsuccessfully advancing misconceived submissions to the contrary has of itself created such a possibility. The argument is in effect that the possible offence taken by an arbitrator at an unmeritorious attempt to remove him should itself raise justifiable doubts as to his future conduct of the reference, with the paradoxical result that the more obnoxious the challenge the stronger this ground will be. It is self-evidently misguided."*[3]

However, there is a particular aspect of apparent bias which has come before the courts on several occasions in the past few years and which raises rather more difficult and fundamental issues. This concerns multiple appointments. Multiple appointments can pose different problems depending on the context. One is where a particular arbitrator is repeatedly or regularly appointed by one party. The obvious danger here is the perception that the arbitrator will be reluctant to bite the hand that feeds him and thus be *parti pris*, whether consciously or not. This is a fairly straightforward situation which is not considered further in this article. It is addressed in many sets of institutional rules by the simple, if somewhat arbitrary expedient, of limiting the number of times that a party can appoint the same arbitrator within a particular period of time. [4]

But multiple appointments can also give rise to a rather different problem of inequality of arms. For example, the arbitrator may have made a series of decisions on a particular issue in the past (perhaps on the construction of a standard contract wording) which, because of the implied duty of confidentiality surrounding arbitration proceedings, will be known to the party who regularly appoints the arbitrator, but not necessarily to its opponent.

A similar problem of "inside information" can arise when an arbitrator accepts appointment in two contemporaneous references involving the same or overlapping subject matter and one

---

[3] *H v L & Others,* [2017] EWHC 137 (Comm); [2017] 1 WLR 2280 (not reversed by the Court of Appeal on this point).

[4] See the IBA Guidelines on Conflict of Interest which make reference to multiple appointments in the "Orange List" in paragraph 3.1.3 but also acknowledge (footnote 5) that it may be the practice in certain types of arbitration, such as maritime, sports or commodities arbitration, to draw arbitrators from a smaller or specialised pool of individuals and that *"If in such fields it is the custom and practice for parties to frequently appoint the same arbitrator in different cases, no disclosure of this fact is required, where all parties in the arbitration should be familiar with such custom and practice"*.

party is common to both references. A typical example might involve an XL insurance programme which is placed in several layers on the same terms, but with different insurers on each layer. One catastrophe may spawn several arbitrations between the insured and one or more insurers at each level. The insured may wish to appoint the same specialist arbitrator in each arbitration, and indeed there may be many good reasons to do so – for example, in the interests of efficiency, minimising costs, and avoiding the risk of inconsistent judgments. The fact remains, however, that the insured in this situation will have the opportunity to gauge the arbitrator's reactions to the evidence and arguments in the first arbitration and thus tailor its submissions appropriately in any subsequent arbitration – an advantage denied to its opponents in those other arbitrations, whose knowledge would necessarily be limited to the references in which they were involved.

Halliburton v Chubb

The problem of multiple appointments has been brought very much to the fore by the case of *Halliburton v Chubb*,[5] which illustrates the very real difficulties to which it can give rise and the tensions which it can create between party autonomy on the one hand (in the form of a party's right to choose its arbitrator) and the duty of confidentiality on the other.

For present purposes, the facts of the case can be summarised as follows. In April 2010, a massive explosion occurred on the Deepwater Horizon drilling rig in the Gulf of Mexico following a blowout which ruptured a concrete core intended to seal the oil well beneath the rig. As a result of the incident, 11 people died, the rig was completely destroyed and there was a massive oil spill. Claims were brought against, amongst others, Transocean (the owner of the rig) and Halliburton (the contractor responsible for installing the concrete core whose rupture allowed the explosion to take place). Halliburton and Transocean each settled the claims against them and sought to recover the amount of the settlement from their insurers under their respective policies of liability insurance. One of Halliburton's insurers was Chubb, while Transocean was insured by Chubb and L on materially identical terms. Both policies were on the Bermuda Form and both insurers denied liability on the grounds that the settlements had been unreasonable.

These policy disputes gave rise to three separate references to arbitration.

Reference 1 involved Halliburton's claim against Chubb. Although each party appointed an arbitrator, the two party-appointed arbitrators could not agree on a chairman, principally because Chubb's nominees were all English lawyers and Halliburton objected in principle to an English lawyer adjudicating on a policy governed by New York law. An application was therefore made to court which, in the event, appointed M who was in fact Chubb's preferred nominee. M was a very eminent and highly respected English lawyer and an arbitrator of considerable experience and repute. Prior to accepting appointment, M disclosed that he had been appointed as an arbitrator by Chubb on several previous occasions and further that he was currently sitting as an arbitrator in two references involving Chubb. No objection to his appointment was taken on these grounds.

[5] *Halliburton Company v Chubb Bermuda Insurance Ltd,* [2018] EWCA Civ. 817; [2018] 1 WLR 3361. The case is currently awaiting hearing before the Supreme Court.

Subsequently, however, two further arbitrations were commenced, this time by Transocean. Reference 2 concerned Transocean's claim against Chubb, which nominated M as its party-appointed arbitrator. Reference 3 concerned Transocean's claims against Chubb's co-insurer, L. M originally had no involvement in Reference 3 but the chairman was forced to resign after several months due to ill-health and Transocean and L agreed to appoint M as substitute chairman.

Thus, M acquired a triple role: he was the court-appointed chairman in Reference 1 brought by Halliburton; he was Chubb's party-appointed arbitrator in Reference 2 brought by Transocean; and he was the substitute chairman in Reference 3 brought by Transocean against L. Halliburton was party only to Reference 1 while Chubb was party to References 1 and 2 and Transocean to References 2 and 3.

Before accepting appointment in Reference 2 as Chubb's party-appointed arbitrator, M had disclosed his involvement in Reference 1 to Transocean. However, M did not disclose to Halliburton his subsequent involvement in either of the Transocean references and it only came to Halliburton's attention following the hearing of a preliminary issue of construction in those references. Halliburton immediately objected on the basis that M might have been privy to information and knowledge which was not available to Halliburton but which was of relevance to the Halliburton arbitration and which might influence his views. Given the nature of the disclosure which M had made of his previous appointments by Chubb, it might be thought that the challenge was more than a little opportunistic. However, the complaint was presented, not as a straightforward lack of impartiality and independence, but on the basis that M was privy to inside information from which Halliburton was excluded, and that this should have been disclosed.

M's response was that he did not believe that he had been under any duty of disclosure as References 2 and 3 raised different issues to those in Reference 1. Moreover, he was not privy to any information which would not equally have been available to Halliburton, its advisers and his co-arbitrators in Reference 1. M reaffirmed his complete independence and impartiality and offered to resign from References 2 and 3 if they were not finally determined by the outcome of the preliminary issue (which was still pending at that stage). This did not satisfy Halliburton who continued to object, stating that in its view M's only proper course was to resign from Reference 1. This M declined to do, on the basis that although his personal preference would have been to resign if his continued participation was thought to be objectionable by one of the parties, having accepted appointment as chairman he now owed duties to both parties and Chubb had made it clear that it did not want him to recuse himself. He therefore invited the parties either to agree a replacement chairman or to let the court determine the matter.

In these circumstances, Halliburton applied to court under section 24(1)(a) of the Arbitration Act 1996 (the "**Arbitration Act**") to have M removed for apparent bias. Three grounds were advanced:

(1) M should not have accepted the appointments in References 2 or 3. Doing so gave the appearance of bias against Halliburton because: (a) he would be receiving a secret benefit from Chubb in the form of his remuneration for Reference 2; and (b) he would be privy to inside information which was not available to Halliburton but which was pertinent given the substantial overlap between the references, in particular regarding

the reasonableness of the settlements entered into by Halliburton and Transocean respectively;

(2) M's failure to disclose the subsequent appointments was in itself indicative of apparent bias; and

(3) M's response to the challenge gave rise to an appearance of bias.

Apparent Bias in English law

Section 33 of the Arbitration Act 1996 imposes a duty on an arbitrator to act fairly and impartially as between the parties. This has been held to reflect the common law test for apparent bias with the result that the existence or otherwise of justifiable doubts as to an arbitrator's impartiality is to be determined by applying the common law test for apparent bias. As authoritatively stated by the House of Lords in *Porter v Magill*,[6] the question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. The characteristics of this fictional paragon have been further elucidated by the House of Lords in *Helow v Secretary of State for the Home Department*[7] and by Flaux J in *A v B.*[8] In short, the fair-minded observer is gender neutral, reserves judgment on every point until he or she has fully understood both sides of the argument, is not unduly sensitive or suspicious, but is equally not complacent and is aware that judges and other tribunals have their weaknesses. The informed observer is informed on all matters which are relevant to put the matter into its overall social, political or geographical context, including the local legal framework, and the law and practice governing the arbitral process and the practices of those involved as parties, lawyers and arbitrators.

Two points should be noted about this test. First, it requires the fair-minded and informed observer to conclude that there *is* a real possibility of bias, not that there might be such a possibility. Secondly, the test is purely objective, being approached from the standpoint of the hypothetical fair-minded and informed observer and not from the subjective viewpoint of the actual parties.

The distinction between an objective and a subjective approach is well illustrated by *Guidant LLC v Swiss Re International SE.*[9] In this case, the claimant had commenced two arbitrations against Swiss Re and a third arbitration against another insurer, Markel. There was a close overlap between the issues in the three arbitrations and Guidant wished to appoint the same third arbitrator in the Swiss Re arbitrations as had been appointed in the Markel arbitration. Swiss Re objected on the basis that it was not party to the Markel arbitration and that it would therefore have no opportunity to be heard in that arbitration or to influence its outcome. Moreover, the arbitrator in question might acquire inside information and knowledge to which, unless confidentiality were waived, Swiss Re was not privy, and might form views on the basis of that information and knowledge which might not easily be changed thereafter. Mr Justice Leggatt held that these were legitimate subjective concerns which justified him in refusing to make the appointment which Guidant sought. Nevertheless, although *subjectively*

[6] *Porter v Magill,* [2002] 2 AC 357 at [103].
[7] *Helow v Secretary of State for the Home Department,* [2008] UKHL 62; [2008] 1 WLR 2416 at [1]-[3].
[8] *A v B,* [2011] EWHC 2345 (Comm); [2011] 2 Lloyd's Rep. 591 at [28]-[29].
[9] *Guidant LLC v Swiss Re International SE,* [2016] EWHC 1201 (Leggatt J).

valid and sufficient to provide a basis for refusing to appoint an arbitrator in the teeth of Swiss Re's objections, he held that they were not concerns which *objectively* justified an inference of apparent bias.

By contrast, there was held to be a clear breach of natural justice in *Beumer Group UK Ltd v Vinci Construction UK Ltd.*[10] This case concerned two construction adjudications by the same adjudicator arising from the same underlying dispute. The claimant, Beumer, was party to both adjudications. Vinci was party only to the second. Unbeknownst to Vinci, but necessarily known full well to the adjudicator, Beumer had advanced mutually inconsistent cases in each adjudication. When Beumer sought to enforce the second adjudication against Vinci, Vinci resisted on the grounds that the adjudicator would have acquired background knowledge from the first adjudication which was plainly relevant to the second adjudication but which Vinci had had no opportunity to consider. Furthermore, there had not been any disclosure of the material deployed in the first adjudication or of the fact that Beumer was running diametrically opposed cases. Fraser J held that the adjudicator should have disclosed his involvement in the first adjudication. In his view, the adjudicator's access to inside information, including the inconsistency of Beumer's position, meant that the fair-minded and informed observer would conclude that there was a plain breach of natural justice.

The First Instance Decision: Popplewell J

Against this background, Mr Justice Popplewell determined the arguments in *Halliburton v Chubb* as follows.

In relation to the first ground, he rejected both the "secret benefit" and the "inside knowledge" limbs of the argument. In relation to secret benefit, he pointed out that under English law an arbitrator is not a representative of the appointing party but is bound to act fairly and impartially. M, as an experienced arbitrator of the utmost integrity, would have regarded this as second nature. In any event, he held that there was no question of M receiving any immediate benefit in relation to fees. Fees in arbitration proceedings are determined by the tribunal as a whole, both as to the amount payable and the party who is to pay them. If the mere fact of being paid for acting were sufficient to constitute apparent bias then, self-evidently, no arbitrator could ever safely accept an appointment.

The judge also rejected the argument based on the risk of acquiring inside knowledge. He found that there was in fact no substantial overlap between the issues in the references and, moreover, there was minimal risk, given the timings, of M having to determine any issue in the Halliburton arbitration which coincided with issues on which he had seen evidence or heard submissions in the Transocean arbitrations. However, irrespective of any overlap, he pointed out that it was frequently the case in international arbitration that the same events would give rise to several arbitrations involving different parties. This was especially common in large insurance/reinsurance arbitrations or in string contracts in maritime cases. It was therefore not unusual for specialist arbitrators to be appointed in multiple arbitrations arising out of the same factual circumstances. Indeed, in the judge's view, this was positively desirable rather than a cause for complaint, on grounds both of party autonomy and efficiency. As to the first, an arbitral party should be entitled to choose its arbitrator. Such choice would very often be dictated by the arbitrator's specialist knowledge. Where there was

[10] *Beumer Group UK Ltd v Vinci Construction UK Ltd,* [2016] EWHC 2283 (Fraser J).

a relatively small pool of suitably experienced arbitrators, it would be impossible to draw on that pool if an arbitrator was automatically disqualified because of his involvement in a related matter. As to the second, a degree of familiarity on the part of the arbitrator with the background and the issues would clearly promote the more efficient and speedy conduct of the arbitration.

Finally Mr Justice Popplewell pointed out that an arbitrator is obliged to make a decision on the basis of the evidence and argument in the particular case before him, which may not be the same as the evidence and argument in a related or similar case. Arbitrators were accustomed to this situation and capable of putting irrelevant matters out of their minds. Thus the mere fact that M might have acquired knowledge of other material from the Transocean references was not inconsistent with his ability to arrive at a fair decision on the basis of the evidence in the Halliburton reference.

The judge accordingly concluded that acceptance of the subsequent appointments did not objectively give rise to any appearance of bias.

Turning to the second ground of challenge, namely M's failure to disclose the subsequent appointments, this too was rejected. M had concluded, correctly, that there was no apparent bias in accepting the subsequent appointments and accordingly there was nothing to disclose. He might have wished to make a disclosure out of an abundance of caution, but was under no obligation to do so. The IBA Guidelines were irrelevant in this respect since they do not, and do not purport, to override national law. In any event, even if M was wrong and should have disclosed the appointments, his non-disclosure did not create any real possibility of apparent bias against Halliburton, since he had explained his belief that disclosure was unnecessary and his honesty in this regard was expressly not challenged. M may have been mistaken in his conclusion but an honest mistake could not conceivably amount to apparent bias.

The third argument based on M's response to the complaint was likewise given short shrift. In this regard Halliburton's main argument was that M had failed to recognise that there was in fact a substantial overlap between the issues in the references. This submission was rejected on the basis of the judge's findings that M was correct in concluding that any overlap was very minor at best. Moreover, since there was no challenge to M's honesty, his failure to analyse the issues correctly (if such it was) could not possibly be evidence of apparent bias.

As to the further suggestion that M had overreacted to a complaint which he had categorised as "offensive" and was therefore bound, at least sub-consciously, to be hostile to Halliburton, the judge deplored this type of challenge in the terms set out above and held that in any event M's response had been measured and temperate.

Court of Appeal

The matter then progressed to the Court of Appeal where Popplewell J's judgment was substantially upheld, albeit with one significant difference.

In a unanimous judgment, the Court of Appeal reaffirmed the objective test for apparent bias and upheld the distinction between subjective concerns and an objective appearance of bias. The risk that an arbitrator might acquire inside information or knowledge in the course of a related arbitration might well be a legitimate subjective concern, but in the court's view something more is required in order to establish apparent bias, specifically "something of

substance".[11] This is because the fair-minded and informed observer is entitled to assume that the arbitrator in question is trustworthy and will consider each case on its own facts. Accordingly, the mere acceptance by an arbitrator of appointments in overlapping references with only one common party does not, of itself, create a real possibility of bias.

The obvious question for the challenging party, however, is how it can ever know whether or not that elusive "something more" exists. This leads naturally to the second question considered by the Court of Appeal, namely the scope of the arbitrator's duty of disclosure. The Court held that the duty of disclosure is not limited to disclosure of situations which in fact supported a finding of apparent bias, but extends to *"circumstances 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 tribunal was biased."*[12] For this purpose the matter is to be judged prospectively as at the time that disclosure is potentially required and not retrospectively with the benefit of hindsight.[13]

It can be seen that, as with the test for apparent bias itself, the test for disclosure is also an objective test in the sense that it approaches the matter from the viewpoint of the fair-minded and informed observer. However, it is wider than the test for apparent bias in that it is not limited to circumstances which *would* lead the fair-minded and informed observer to conclude that there was a real possibility of bias, but also includes circumstances which *might* lead the fair-minded and informed observer so to conclude. Applying this test, therefore, an arbitrator might well be obliged to disclose matters which were ultimately not found to be objectionable. In this respect, the Court of Appeal went further than Popplewell J, deriving support from the decision of the Privy Council in *Almazeedi v Penner*[14] which approved the view that the test for disclosure was not co-extensive with the test for the existence of apparent bias.

The Court of Appeal then turned its attention to the consequences of a failure to disclose. Its conclusion was that a failure to disclose something which ought to have been disclosed is not determinative of apparent bias but is simply a factor to be taken into account. Its weight in any particular case will depend on the circumstances. For example, a failure to disclose through inadvertence, forgetfulness or ignorance is very unlikely to be sufficient basis for a finding of apparent bias. Likewise, a genuine belief that the circumstances in question were not objectionable. On the other hand, a deliberate non-disclosure of obviously questionable circumstances will be a different matter.

In this context, the court referred to the Privy Council decision in *Almazeedi v Penner,*[15] in which a retired English High Court Judge had sat in the Financial Services Division of the Grand Court of the Cayman Islands hearing a dispute which involved Qatari state interests. The judge had not disclosed that during the material time period he had also been appointed as a Supplementary Judge of the Civil and Commercial Court of the Qatar Financial Centre. Two of the key players involved in the Cayman Islands litigation were at different times

[11] *Halliburton Company v Chubb Bermuda Insurance Ltd,* [2018] EWCA Civ. 817; [2018] 1 WLR 3361 at [53].
[12] *Halliburton Company v Chubb Bermuda Insurance Ltd,* [2018] EWCA Civ. 817; [2018] 1 WLR 3361 at [65], [71].
[13] *Halliburton Company v Chubb Bermuda Insurance Ltd,* [2018] EWCA Civ. 817; [2018] 1 WLR 3361 at [70].
[14] *Almazeedi v Penner,* [2018] UKPC 3 at [21]. This decision was handed down after the conclusion of the argument before the Court of Appeal and was the subject of written submissions.
[15] S*upra.*

members of the Qatari government and concerned, to an extent which was somewhat obscure, in aspects of the arrangements by which the judge was to be appointed in Qatar. In these circumstances, while accepting that the non-disclosure was wholly innocent, the Privy Council held that it was nonetheless inappropriate for him to have sat in the Cayman Islands without disclosing his position in Qatar, finding that: *"In the Board's view, and at least in the absence of any such disclosure, a fair-minded and informed observer would regard him as unsuitable to hear the proceedings from at least 25 January 2012 on. The fact of disclosure can itself serve as the sign of transparency which dispels concern, and may mean that no objection is even raised."*

The Court of Appeal in *Halliburton* thus concluded that where the circumstances give rise to an actual appearance of bias as in *Almazeedi v Penner*, a disclosure should be made. However, where this is not the case, something more is needed before the mere failure to disclose can itself be relied upon to support a finding of apparent bias.

Finally, the Court of Appeal applied its analysis of the law to the facts of the case. It accepted that the matters complained of by Halliburton were legitimate concerns from its subjective point of view but substantially agreed with Popplewell J's analysis that, upon examination of all the relevant circumstances, none of them gave rise to any real possibility of bias.

Nonetheless, the circumstances were such as *might* have led the fair-minded and informed observer to conclude that there was a real possibility of bias. They should therefore have been disclosed *as a matter of law*, not simply as a matter of good practice. In this connection, it was irrelevant that it could be seen with the benefit of hindsight that there was in fact no possibility of bias; the position had to be assessed at the relevant time.

However, M's failure to disclose did not in itself create an appearance of bias. Not only was it not deliberate, but in the Court of Appeal's view M had been correct to conclude that there was only a limited overlap of issues in the references and that there was accordingly no real possibility of bias. Nor was any appearance of bias created by M's response to Halliburton's challenge which was moderate and appropriate.

Questions, Questions…

The Court of Appeal's decision gives rise to a number of points of interest and, in the author's view, a number of difficulties.

(1) Inequality of Arms

As noted above, the main vice of an arbitrator accepting multiple appointments in arbitrations involving only one common party is twofold. It is not just the risk that the arbitrator may somehow be "tainted" by what he has seen and heard in the first reference,[16] but there is also the potential for asymmetry of information leading to an inequality of arms. The common party will have had the opportunity to assess the arbitrator and his reaction to certain witnesses and lines of argument in the first reference and will thus be able to tailor its submissions and evidence in a way which is likely to appeal to the arbitrator. This is a

[16] Although this could cut both ways. For example, it could conceivably be to the advantage of a respondent in one arbitration for the arbitrator to have been alerted to the defences of other respondents in related arbitrations.

potential advantage wholly denied to its opponent unless an order for consolidation can be obtained.

The Court of Appeal recognised this to the limited extent of stating the problem but then dismissing it by saying that one should start from the assumption that an arbitrator, like a judge, can be trusted to put all extraneous matters out of his mind and to decide a dispute solely on the evidence in the particular case. However, there is a huge difference between arbitration and litigation in this respect. The judicial process is open and transparent. Both parties can read the cases that a judge has previously decided and see for themselves the basis on which he has arrived at his conclusions. By contrast, arbitration takes place behind closed doors. It is all very well for the courts to say that the starting assumption should be one of impartiality and independence. But where does one go from there? Even if one starts with that assumption, arbitrators are only human. They are not regulated and do not need to be professionally qualified (although many of them are). The possibility can therefore never be altogether excluded that some of them, whether by accident or design, do not always conform to the required standards of conduct. However, since, unlike judges, they operate in private, outsiders can never know which they are. In *Halliburton,* M was held in the highest regard and his integrity was beyond question but with a less well-known arbitrator the position might have been different. More fundamentally, even if the arbitrator in question is beyond reproach, *the process itself* gives the impression of being unfair in so far as it permits the party "in the know" to acquire relevant knowledge and experience which is unavailable to the other.

It is more than arguable that the Court of Appeal failed to give sufficient, or indeed any, weight to this critical distinction between the arbitral and the judicial processes and its inevitable impact on an outsider's perception of fairness.

(2) Disconnect Between English law and Institutional Rules as to the Ambit of the Duty of Disclosure

Many sets of institutional rules attempt to grapple with the duty of disclosure, notably the IBA Guidelines, the LCIA Rules and the ICC Rules. All of them draw a similar distinction to that drawn by the Court of Appeal between a narrower test for apparent bias in fact and a wider test for the duty of disclosure.

However, while English law continues to define the duty of disclosure by reference to the objective viewpoint of the fair-minded and informed observer, a different approach is adopted by these institutional rules. Thus:

- The IBA Guidelines require disclosure of facts or circumstances *"that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence"*;[17]
- The LCIA Rules require a prospective arbitrator to declare whether there are any circumstances *"which are likely to give rise in the mind of any party to any justifiable doubts as to his or her impartiality or independence"*;[18]

[17] General Standard 3(a).
[18] 2014 Rules, Article 5.4.

- The ICC Rules likewise impose a duty on a prospective arbitrator to disclose *"any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality"*.[19]

It will immediately be appreciated that under each of these sets of rules, the ambit of the duty of disclosure is determined by reference to the *subjective* viewpoint of the parties themselves. However, the Court of Appeal in *Halliburton* expressly rejected such an approach and refused to countenance a requirement for disclosure *as a matter of law* merely because one of the parties may have had legitimate subjective concerns. While recognising that disclosure on this basis might be good practice, it nonetheless held that it was not a legal obligation unless the circumstances in question might *objectively* have given rise to justifiable doubts as to the arbitrator's impartiality or independence.

It therefore appears that there is a clear tension between English law and commonly used sets of institutional rules regarding the duty of disclosure. However, an illuminating case note by Paul Stanley QC[20] suggests that it may be possible to square this rather unpromising circle by adopting a contextual approach to the objective English law test. Such an approach distinguishes between litigation on the one hand and the arbitral process on the other. The courts serve the public. They are open and accessible to all (confidentiality and secrecy being the exception, not the rule) and there is a recognised appeals procedure under which errors of fact and law can be corrected. By contrast, arbitration is a closed and non-transparent process, visible only to the actual participants. Confidentiality is the rule and, without a waiver of that confidentiality, a non-party can never know what takes place during an arbitration or (with limited exceptions) access any of the material placed before the tribunal. Indeed, this is one of the reasons why many commercial parties prefer the privacy of arbitration to the publicity of litigation. Moreover, there is only limited opportunity for judicial scrutiny of arbitral awards and, generally speaking, it is only possible to appeal on questions of law. Given this distinction, it would be logical, as Paul Stanley suggests, for the duty of disclosure to take this into account by regarding the fair-minded and informed observer in an arbitration context, not simply as an ordinary member of the public (as he or she would be in an equivalent litigation context), but as a fair-minded and informed user of arbitration services. In this way, the objective nature of the English law test could be preserved while nonetheless endowing the fair-minded and informed observer with at least the spectacles, if not the actual eyes, of the parties.

(3) Is the Duty of Disclosure Toothless?

As articulated by the Court of Appeal, the duty of disclosure arises as a matter of law, not just as a matter of good practice. However, it is extremely difficult to see from the judgment what practical consequences flow from a breach and one is tempted to query the point of the duty if it is not backed up by any effective sanction. An example will illustrate the point.

Suppose that the facts which have not been disclosed are sufficient in themselves to constitute apparent bias. In this case there is no difficulty. The arbitrator is tainted by apparent bias and the fact that he did not disclose the circumstances in question adds nothing.

[19] 2012 Rules as amended in 2017, Article 11.2.
[20] Of Essex Court Chambers. Case note dated 9 May 2018.

But what if the facts are not in fact sufficient to satisfy the test for apparent bias but *might* have led a fair-minded and informed observer to conclude that there was a possibility of bias? Here a conceptual difficulty arises. The Court of Appeal said, correctly, that if the facts on examination do not give rise to apparent bias, then the arbitrator does not become biased solely by virtue of having failed to disclose them. However, if that is right, how can the non-disclosure of facts which the arbitrator correctly assesses as falling short of apparent bias ever in itself amount to apparent bias? The Court of Appeal said simply that mere non-disclosure was insufficient *per se* and that "something more" was required, while leaving it wholly unclear whether anything short of deliberate non-disclosure would be sufficient. One has to wonder how an aggrieved party can ever be expected to prove that an arbitrator deliberately concealed wholly innocent circumstances knowing that they ought to be disclosed, rather than (as a dishonest arbitrator will doubtless claim) simply making an honest error. In practical terms, therefore, the duty appears to be completely without sanction.

(4) Catch 22: Confidentiality vs Party Autonomy

The tension which the decision creates between confidentiality on the one hand and party autonomy on the other is perhaps the most interesting and important consequence of the judgment.

As discussed above, one of the main reasons why a fair-minded and informed observer *might* conclude (for the purposes of disclosure) that there was a real possibility of bias in a multiple-appointment case is the risk of the arbitrator acquiring inside information and knowledge which is denied to one of the parties. But whether there is *in fact* a real possibility of bias depends on matters such as the identity of the parties to the two arbitrations, the nature of the subject-matter, the degree of overlap between the issues and the type of evidence adduced. The problem is that none of this can be explored without disclosing in the first arbitration matters relating to the second arbitration which in principle should be confidential to that arbitration. Indeed, it is impossible to see how the confidentiality of the second arbitration would not be compromised by the need to investigate whether there is an overlap between the two references in relation to subject-matter, issues etc.

The Court of Appeal's answer to this conundrum was uncompromising: *"In so far as [the duty of disclosure] impacts on the arbitrator's duty of confidentiality in relation to the other arbitration, it must be regarded as being an exception to that duty, a duty which is recognised not to be absolute."*

This is in stark contrast with the IBA Guidelines which state that an arbitrator should resign rather than breach confidentiality: *"[i]f an arbitrator finds that he or she should make a disclosure, but that professional secrecy rules or other rules of practice or professional conduct prevent such disclosure, he or she should not accept the appointment or should resign."*

This poses a real dilemma. Taking the facts of *Halliburton* as an example, an innocent arbitrator would appear to have two options. Either he can resist resignation in Reference 1 but will have to breach confidentiality in Reference 2 in order to demonstrate the absence of any grounds for suspecting bias (the Court of Appeal solution)., or he can uphold the confidentiality of Reference 2 and resign from Reference 1 notwithstanding that examination of the facts would exonerate him (the IBA solution).

There are difficulties with both approaches. On the one hand, there is no obvious justification for breaching the confidentiality of the parties to Reference 2, particularly that of the party in Transocean's position who, *ex hypothesi*, is completely unconnected with Reference 1. Why should such a party be placed in a situation where the confidentiality for which it thought it had bargained is overridden as a result of circumstances for which it bears no responsibility?

However, upholding the confidentiality of Reference 2 is not without undesirable consequences of its own if resignation from Reference 1 is the only alternative. Once an arbitrator has accepted appointment in Reference 1, he owes duties to *both* parties and the non-challenging party may not want the arbitrator to resign, especially if he is its party-appointed arbitrator. Resignation in such a situation therefore inevitably cuts across the freedom of a party to appoint an arbitrator of its choice, particularly where the dispute would benefit from specialist knowledge and there is only a limited pool of suitable arbitrators. It also has other implications, as succinctly pointed out by Rix LJ:

> *"Arbitration is a consensual process and therefore it is perhaps particularly unfortunate that one party should feel any apprehension about the impartiality of an arbitrator. Nevertheless, arbitration would become impossible if one party could require an arbitrator to retire by making unjustified allegations about impartiality or bias."*

Resignation from Reference 2 would not appear to be the answer either. Not only may neither of the parties to Reference 2 want the arbitrator to resign, but he may already be "tainted" by what he has seen or heard in Reference 2 and would be unable to refute the challenge without breaching confidentiality in that reference.

In the result, therefore, the Court of Appeal may well have brought us back full circle to the very situation which the courts have always striven to avoid, and against which Rix LJ warned nearly 20 years ago.

Whither London Arbitration Now?

Undoubtedly the decision of the Court of Appeal in *Halliburton* will be unsettling for some foreign users of London arbitration. The unhesitating endorsement of the impartiality and independence of commercial arbitrators by Popplewell J and the Court of Appeal is unsurprising to English lawyers and litigants, familiar as they are with the way in which the legal profession in England is structured and operates and with many of the arbitrators who regularly accept appointments. However, it is less obvious for international users who may justifiably be sceptical of accepting such an assurance when they have no personal experience against which to test it and no obvious means of independent verification.

Such users may also be perturbed by the fact that the duty of disclosure under English law is apparently less wide than under many institutional rules. And they will certainly not be reassured by the fact that the Court of Appeal has espoused a duty of disclosure which attracts no practical sanction for breach. We may well therefore see a future increase in the use of institutional rules with wider subjective duties of disclosure as opposed to reliance on the Arbitration Act 1996 and the common law. In that event, the location of the arbitral seat will be of far less significance and such parties may choose to arbitrate their disputes elsewhere under different systems of law.

Widespread adoption of institutional rules such as the IBA Guidelines will also give unscrupulous parties *carte blanche* to force a resignation in a multiple-appointment case by simply alleging inside knowledge, since the arbitrator will be unable to counter the allegation without breaching confidentiality in the second arbitration and will therefore be forced to resign. Such a development would be unwelcome and should not be encouraged.

Happily, there has so far been no adverse effect on maritime arbitration in London as a result of the decision. No doubt this is partly because this particular type of situation does not occur very often and, when it does, it can often be dealt with by an order for consolidation or concurrent hearings under LMAA Rules. However, there is no room for complacency and, to the extent that multiple-appointment situations create a problem, there appears to be a stark choice facing English arbitration. One possibility is to accept that the risk of inside information in a multiple appointment situation *is* sufficient in itself to give rise to an appearance of bias. An arbitrator finding himself in this situation will therefore have to decline the second appointment or resign unless all parties consent to him acting. Confidentiality will thereby be preserved but at the expense of party autonomy, efficiency, expertise and costs saving and will increase the risk of inconsistent decisions. Another possibility is to sacrifice confidentiality in multiple appointment cases (as the Court of Appeal was prepared to do) in order to allow arbitrators to defend unmeritorious challenges. However, while this avoids forced resignations on spurious grounds, it overrides the confidentiality of the other party to the second reference – very possibly against its will. The final possibility is simply to concede that the price of upholding confidentiality is that the mere making of a spurious challenge will be sufficient to force a resignation.

It may be, as some have suggested,[21] that we need to take a long hard look at confidentiality and reassess its place in arbitration proceedings. Is it really so important to users of international commercial arbitration?[22] Should there be a statutory default position? If so, should that default position be one of confidentiality or non-confidentiality? These are large questions beyond the scope of this paper. Nonetheless, they are highly pertinent and will have to be addressed, preferably sooner rather than later. Whether the Supreme Court is prepared to take a wider look at both these and the other broader issues that the appeal raises, rather than simply concentrating on the narrow facts of the particular case, remains to be seen. However, it is clearly important for the future of London arbitration that a solution is found which pays sufficient regard to both confidentiality on the one hand and party autonomy on the other, while still providing a flexible and efficient service in whose impartiality all users, whether domestic or foreign, can have implicit trust.

[21] Notably at a debate entitled "Lifting the Veil" held at the Grocers' Hall on 22 February 2018.

[22] Interestingly, only 33% of respondents to the White & Case International Arbitration Survey 2015 put confidentiality in their top three most valued characteristics of arbitration – in fifth place out of ten.