Halliburton Company *v* Chubb Bermuda Insurance Ltd

Paul Stanley*

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In recent years policyholders and their counsel have expressed increasing concern over the appointment by insurers of the same arbitrator in several arbitrations. The perceived problem with 'frequent flyers', as they are sometimes known, has a number of facets.[1] At its simplest it reflects a fear that a particular arbitrator may, through habitual appointment, have become sufficiently dependent on a particular appointor for repeat business that he or she may be inclined to favour them. But it goes further than that. Bermuda Form[2] arbitrations, even when they spring from different underlying events, often revolve around a fairly small number of disputable points, such as the meaning of the occurrence definition. An arbitrator who has been appointed in many Bermuda Form cases is likely to have decided those points before. It is sometimes suspected that a particular appointee has been chosen because the appointor knows through experience that the arbitrator's convictions align with the case it expects to make.

More rarely, a single set of underlying facts—such as a mass tort with several target defendants—affects several insureds. There is then a more specific concern

*QC, Essex Court Chambers, London. I am grateful to Lorelie Masters and Richard Jacobs QC for helpful comments. The views expressed, and mistakes, are mine.

[1]The concerns are not unique to the insurance market. In *Aldcroft v International Cotton Association Ltd* [2017] EWHC 642 (Comm), [2018] 2 WLR 793 the High Court upheld, against a restraint of trade challenge, a term in the arbitration rules of the International Cotton Association which prohibited more than a certain number of repeat appointments. The court heard evidence that the rule reflected 'perceptions of bias … not limited to … "sore losers"'. Mr David Foxton QC held that 'given the long-standing perception of pro-merchant bias … it was legitimate for the ICA to engage in "virtue signalling", stressing the commitment to impartiality in its arbitration process'. There were also concerns about delay. See also n 43 below.

[2]The Bermuda Form is a family of commonly used liability policies, mostly sold to policyholders based in the US, which generally provide for disputes to be resolved by arbitration in London. See generally Richard Jacobs, Lorelie Masters, and Paul Stanley, *Liability Insurance in International Arbitration* (2nd edn, Hart 2011); David Scorey, Richard Geddes, and Chris Harris, *The Bermuda Form* (OUP 2011).

that an arbitrator who is appointed in all the cases will bring to the hearing room views or assumptions formed in other references, on the basis of other evidence.

These problems, though they seem recently to have been discussed mostly by those who purchase insurance, are not unique to one side. The insurers may also believe that some arbitrators cultivate a 'pro-policyholder' reputation which they may want to preserve. Such people may also have decided the same legal issues in other cases. The opportunity to appoint one arbitrator to hear several references arising from the same facts can also present itself to policyholders, since a classic situation in which this may happen is where a single loss affects several layers in a coverage tower.

The Court of Appeal recently had the opportunity to address these issues in *Halliburton v Chubb Bermuda*.[3] Unfortunately, the decision is confused, and likely to satisfy nobody.

The dispute between Halliburton and Chubb concerned coverage for Halliburton's liabilities arising out of the Deepwater Horizon catastrophe. A dispute over the appointment of a third arbitrator led to the choice, by the High Court, of M to chair the tribunal. M was Chubb's preferred candidate. He had disclosed, prior to his appointment, that he had previously been appointed as an arbitrator by Chubb, and was at the time involved in two pending references to which they were parties. Neither involved the Deepwater Horizon. Halliburton's unsuccessful objection to his appointment was not on grounds of his involvement in those other references.

About six months after his appointment by the Court in Halliburton's reference, M accepted nomination by Chubb, as party-appointed arbitrator in another coverage arbitration involving a different party, Transocean, also arising out of the Deepwater Horizon loss. About six months later, he accepted appointment as a substitute arbitrator by another insurer in a third reference, also involving Transocean. Neither appointment was disclosed to Halliburton, who first learned of the other matters about eighteen months into the reference, and wrote to object. M asserted his independence and impartiality, and rejected the contention that he was under any obligation to make disclosure, although he said that he appreciated 'with the benefit of hindsight, that it would have been prudent for me to have informed your clients'. M said he was willing to resign, either from the other references (after determination of a potentially dispositive preliminary issue which had been argued but not decided), or from the Halliburton case; but he would not resign without Chubb's consent, and Chubb declined to give it.

That led to an application to remove M under Arbitration Act 1996, s 24. The application was rejected by Popplewell J,[4] and an appeal to the Court of Appeal[5]

[3] *Halliburton Company v Chubb Bermuda Insurance Ltd* [2018] EWCA Civ 817.

[4] *H v L* [2017] EWHC 137 (Comm), [2017] 1 WLR 2280.

[5] *Halliburton* (n 3).

also failed, though rather more narrowly.

The Court's essential reasoning seems to be as follows:

- The power to remove an arbitrator under the Arbitration Act 1996 where there are 'justifiable doubts as to his impartiality' is to be equated with the common law test of bias.[6] There is no separate basis upon which an arbitrator can be removed for lack of 'independence' if it does not amount to 'partiality' so understood.[7]

- As a matter of principle an arbitrator can accept appointments in more than one reference with the same or overlapping subject-matter without giving rise to the appearance of bias.[8]

- An arbitrator 'should' disclose circumstances which 'would or might' lead a fair-minded observer to consider there is a real possibility that the arbitrator is biased. That is a broader category of circumstance than those which are, when examined, disqualifying: whether proper disclosure has been given cannot be determined by asking whether the fair minded observer, informed of all the facts, 'would' consider that there is a real possibility of bias: it is enough that there might be.[9]

- However, the test for *removal* under the Arbitration Act 1996, s 24 remains 'would' not 'might', so although arbitrators 'should' disclose facts which only 'might' objectively give rise to doubts, it doesn't necessarily matter they he don't. It will matter only in so far as non-disclosure may tip the balance, effectively deepening the objective observer's doubts to the point that something that would normally be taken as just the right side of the line is regarded as just the wrong side: to 'fortify or even lead to an overall conclusion of apparent bias'.[10]

There are problems with each step of this reasoning.

Background: The distinctive features of arbitration

Given the tendency equate arbitration with litigation it is important to notice that arbitration is *unlike* litigation—or even other non-litigious decision-making

[6] Whether a fair-minded and informed observer, having considered the relevant facts, would conclude that there existed a real possibility of bias: *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357; *Helow v Secretary of State for the Home Department* [2008] UKHL 62, [2008] 1 WLR 2416.

[7] *Halliburton* (n 3) [38]–[39].

[8] ibid [42]–[54].

[9] ibid [55]–[72].

[10] ibid [73]–[76].

of the sort that leads to judicial review—in various ways. Among the relevant differences are the following:

1. Arbitrators are chosen and paid by parties. Whatever may have been the position in the past, 'acting as arbitrator' is now a para-profession, and a well-paid one. It is largely unregulated (arbitrators do not have to be members of any professional body, and Bermuda Form arbitrations have no institutional oversight). In England, commercial arbitration is immune to scrutiny by press or public because of the confidentiality of arbitral proceedings. There is limited judicial recourse in particular cases (see below). Arbitrators enjoy a very broad immunity from suit,[11] and may often remain anonymous even when their decisions are called into question.[12] Arbitrators are therefore entrusted with deciding high-value disputes (in *Halliburton* the claim was for $100 million) in a highly untransparent way and without meaningful regulation.

   This is not to say that arbitrators in general, much less M here, abuse this. But the incentive is clearly present to seek 'repeat business'. It is a reason to require high standards. An activity of this sort ought to arouse a degree of concern. Within the arbitration community, there is a certain ambivalence in the way that party-appointed arbitrators, even distinguished ones, consider their neutrality.[13] One commentator, with wide experience of international arbitration, regards the problem as widespread. 'Many persons serving as arbitrator seem to have no compunction about quietly assisting "their party"; they apparently view the modern international consensus that all arbitrators own a duty to maintain an equal distance to both sides as little more than pretty words.'[14]

2. Arbitration awards are subject to very limited judicial control. There is power to correct serious procedural irregularities after the event,[15] and more

[11] Arbitration Act 1996, s 29(1).

[12] Although the judgment in *Halliburton* (n 3) discloses much about the substance of the case and the parties, M remains anonymous, for reasons that are unexplained. That is typically the case where arbitrators are challenged. It follows that, except occasionally, arbitration users are not even able to use court judgments to learn about the conduct of those who practice in the field—a position which appears highly anomalous.

[13] Jan Paulsson, *The Idea of Arbitration* (OUP 2013) 155, citing a case note by the distinguished French jurist Pierre Bellet (1992 *Revue de l'arbitrage* 572) in which he wrote of 'degrees of impartiality', contrasting the 'sufficient' neutrality of the party-appointee with need for presiding arbitrators to be 'particularly neutral'!

[14] ibid 160.

[15] Arbitration Act 1996, s 68. Arbitrators have a very broad discretion to shape their procedure, including to follow procedures which would not be applied in court: ibid ss 33,34, *Hashwani v Jivraj* [2011] UKSC 40, [2011] 1 WLR 1872 [61]

or less plenary power to deal with a particular sub-category of decision.[16] But there is no power at all to deal with errors of fact, which include errors about law if the law is not English law—or even if it *is* English law, but only because nobody has chosen to plead some other system's rules.[17] Nor, in most cases, will there be any ability to appeal where the issue is characterised as the application of law to the facts.[18] And those rights of appeal can be removed by agreement.[19]

Of course, there are other categories of decision (such as administrative decisions) which are not subject to full appellate review. But even if the only remedy available is judicial review, the grounds for challenge under modern law are more extensive than those offered by the Arbitration Act 1996, comprehensively covering errors of law, errors of procedure, errors of principle in the exercise of discretion and, to a more limited extent, factual errors.[20] There are, by design, few decisions as impregnable as those of arbitrators on the merits.

3. Arbitration is private and confidential.[21] In court proceedings, by contrast, publicity is regarded as essential, and as a guarantee of the integrity of the proceedings and the rule of law.[22] Judgments are delivered in open court, and are (nowadays) readily available. Arbitrations are not subject to such safeguards. Hearings are private; awards are secret. Neither the parties nor the arbitrators are generally at liberty to disclose what happened in them, without consent, except in limited (and ill-defined) circumstances.

4. Arbitration must cater to a wide variety of users from different backgrounds. They cannot be assumed to share a cultural familiarity with the details of the process, or with local ways of working. As Jan Paulsson has noted, in small communities there may be 'unquestioning faith' based on knowledge

[16] Those going to jurisdiction: Arbitration Act 1996, s 67.

[17] *Reliance Industries Ltd v Enron Oil and Gas India Ltd* [2002] 1 All ER (Comm) 59 [27]; *Egmatra AG v Marco Trading Corp* [1999] 1 Lloyd's Rep 862.

[18] Robert Merkin, *Arbitration Law* (Service Issue 78, LLP 2018) para 21.9.

[19] Arbitration Act 1996, s 69(1).

[20] *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] QB 1044.

[21] *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184, [2008] 1 Lloyd's Rep 616 [84] 'a rule of law masquerading as an implied term'; *Ali Shipping Corp v Shipyard Trogir* [1999] 1 WLR 314 (CA).

[22] *Scott v Scott* [1913] AC 417 (HL). And see *R on the application of Guardian News & Media Ltd v Westminster Magistrates' Court* [2012] EWCA Civ 420, [2013] QB 618 [1] (Toulson LJ): 'Open justice. The words express a principle at the heart of our system of justice and vital to the rule of law. The rule of law is a fine concept but fine words butter no parsnips. How is the rule of law itself to be policed? … Open justice lets in the light and allows the public to scrutinise the workings of the law, for better or worse'.

> of a decision-maker, but '[o]n a larger scene any expectation of such mutual confidence in particular persons … may be unrealistic. An Indonesian party is unlikely to have confident knowledge of the community of arbitrators in London'.[23] In this context, the perspective of non-English parties matters. If those outside the still close-knit 'family' that is the London commercial Bar (and bench) perceive London arbitration to be unfair, then London has a problem. This may call for special concern. Why is it that, although in principle a party-appointed arbitrator is bound to be as neutral as the chairman, most arbitration agreements provide for each party to appoint an arbitrator and for a chairman to be neutrally appointed? And why do institutional rules often prevent sole or presiding arbitrators being of the parties' nationalities?[24] Are such rules merely pandering to chimerical fears? Or are they to be understood as indicating the importance that parties (often) attach to a very strict conception of neutrality?

Although components of the arbitral cocktail can be found in other processes (for instance there *are* courts, such as Youth Courts, that sit in private) the particular combination is unique. Moreover, the unique features involve in some respects a departure from the basic rights granted under Article 6 of the European Convention on Human Rights. That is not itself objectionable: the Convention permits waiver of rights under Article 6 so long as it is made without compulsion, is unequivocal, and does not run counter to any important public interests.[25] The Court of Appeal has held that arbitration is consistent with Article 6, but pointed out that this was against the background that the Arbitration Act 1996 provides for a fair hearing by an impartial tribunal and gives the court power to

> put right any want of impartiality or procedural unfairness, so that the only provisions of Article 6 which could arguably be said not formally to be met by the Act are the requirements that the hearing be in public, that the members of the tribunal be independent, that the tribunal be established by law and that the judgment be pronounced publicly.[26]

If that is so then it becomes especially important that the court's power to 'put right any want of impartiality or procedural unfairness' is not diluted. Indeed, in some respects it may need strengthening, precisely because arbitration lacks some of the ordinary safeguards.

[23] Paulsson (n 13) 155.

[24] London Court of International Arbitration, LCIA Arbitration Rules (2014) art 6.1, International Chamber of Commerce, ICC Rules of Arbitration (2017) art 13.5.

[25] See *Håkansson v Sweden* (1991) 13 EHRR 1, para 66, which did not deal with arbitration; *Stretford v Football Association Ltd* [2007] EWCA Civ 238.

[26] ibid [38].

It is convenient at this point to consider 'bias'. What is the purpose of rules against bias (not just in arbitration, but generally)? They serve two functions. First, they are designed to ensure a *correct* result: to improve the substantive quality of decision-making. A decision-maker who arrives at conclusions based on irrelevant considerations may well have reached the wrong result. Certainly, if a judge (or arbitrator) announced that a decision had been reached because one of the parties had provided a bribe, the decision would be overturned quite apart from any question of bias: who pays the judge is irrelevant. Secondly, they serve to protect confidence in the decision-making process. In court proceedings that is sometimes encapsulated in the maxim 'justice must be seen to be done'. That may be a paradoxical way to put things in arbitration, where justice is *never* seen to be done except by the parties and their lawyers. But that would be too glib a dismissal: there remains a public interest in maintaining confidence in arbitration.

In this context, the distinction between 'actual' and 'apparent' bias is easily overdone. It will almost always be impossible to prove that a decision has actually been influenced by extraneous factors. Even a bribed judge might have decided the same way without the bribe. So rather than being seen as some sort of slackening of a rule designed to deal with actual nefarious influence, apparent bias should really be seen as the heart of the doctrine. The essential question in every case is whether the presence of something which might irrelevantly influence the decision-maker gives rise to a sufficient risk that the decision will be based on, or influenced by, impermissible factors.

When one thinks of 'bias' one's thoughts turn first to such paradigm cases as direct pecuniary interest,[27] or being an officer of a party or promoter of a cause espoused by one of the parties.[28] Or one thinks of cases of friendship[29] or hostility.[30] But if one considers the sort of thing that might disqualify a decision-maker in broader terms, the pattern shifts. It is sensitive to context. Would one describe a juror who knows a witness, or who inadvertently learns of inadmissible evidence, or who engages in prohibited internet research,[31] as 'biased'? Perhaps not. But a judge will still discharge that juror, because of the importance of preserving the integrity of a process which is designed to result in a decision based only on evidence adduced at trial. One might well not reach such a conclusion if dealing with a professional judge.

[27] *Dimes v Grand Junction Canal Co Proprietors* (1852) 3 HL Cas 759 (HL).

[28] *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet (No 2)* [2000] 1 AC 119 (HL) 133 (Lord Browne-Wilkinson).

[29] ibid 132–3.

[30] *Howell v Lees Millais* [2007] EWCA Civ 720.

[31] Juries Act 1974, ss 20A, 20B (as amended). One of the main reasons for this prohibition, as jurors are directed, is to prevent jurors using information which the parties to the case before them will not know they are using and cannot address.

Does impartiality mean simply lack of bias?

The court's first assumption is that 'justifiable doubts as to his impartiality' means 'apparent bias at common law'. It is understandable that, in cases where the allegation has in substance been one of bias, the courts should have used the common law test.[32] It would be annoying to have two different tests. But if impartiality is limited to bias in the strict sense, there are some difficulties.

Take for instance the problem of equality of arms. Article 6 of the Convention regards equality of arms, the idea that each party should have a 'reasonable opportunity of presenting his case under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent',[33] as an important aspect of procedural fairness. Now suppose an arbitrator's position is such that it is virtually impossible to afford a hearing in which this can be assured. Is it really the case that the court is powerless to act? Must it wait until an award is published, and then intervene under the Arbitration Act 1996, s 68? Or is this properly to be regarded as a case where there are justifiable doubts as to the arbitrator's impartiality? If so, is 'impartiality' not being understood here in a rather extended sense, as 'ability to provide a fair hearing'?

If one baulks at this, one might prefer to regard 'justifiable doubts as to his impartiality' as a synonym for 'apparent bias', but to apply the test in the particular context of arbitration.[34] That may well involve recognising that some factors which would be seen as 'safe' in a system with more robust safeguards (such as public hearings, and extensive appeal rights covering law and fact) should, for arbitration, be regarded as too risky. In other words, doubts which might not be 'justifiable' in court may be so when dealing with arbitrators.

Similar considerations apply, arguably, when looking at the second aspect of the rules against bias: preserving confidence. Whose confidence falls to be preserved? In court proceedings, where judges are public servants and the hearing takes place in public, it is first and foremost the public's. Is it not arguable, however, that in an arbitration context more importance needs to be attached to the viewpoints of the parties, and of other users of arbitration? That does not mean adopting a merely subjective standard. But if, for instance, the IBA Guidelines[35]

[32] See *R v Gough* [1993] AC 646 (HL), which (albeit before the Arbitration Act 1996) equated the test for bias for all tribunals, including arbitrators.

[33] Richard Clayton and Hugh Tomlinson, *The Law of Human Rights* (2nd edn, vol 1, OUP 2009) para 11.430.

[34] That would not involve posing a different *test* for arbitral bias, but just the obvious recognition that the test must be applied with due regard to the particular characteristics of the decision-making procedure that is involved.

[35] International Bar Association, *IBA Guidelines on Conflicts of Interest in International Arbitration* (IBA 2014) ⟨www.ibanet.org/Document/Default.aspx?DocumentUid=E2FE5E72-EB14-4BBA-B10D-D33DAFEE8918⟩.

reflect the expectations of those who use and participate in arbitration as to the standards to be followed, is there not a strong argument for applying those standards, even if they are more stringent that those characteristically applied to other decisions?

The court was fortified in its view that section 24 has only bias, as understood by the common law, in view, by the fact that 'independence' (a requirement under the UNCITRAL model law) was omitted. But that point does not go far. Lord Mustill, one of the architects of the Act, deprecated too narrow an approach. He suggested that independence might if necessary be addressed under the section 81 of the Act, and expressed the view that the court would be 'strongly inclined to find that there is [room for a concept of independence under the Act], given the assimilation in *AT&T*[36] of arbitration with other forms of judicial process for the purpose of the public interest in maintaining the fair resolution of disputes'.[37] The reasons for omitting independence from the Act were that as a free-standing concept it might go too far.[38] But it does not follow that the concept that does appear in the Act is to be narrowly interpreted.

Are multiple appointments innocuous?

The second respect in which the Court of Appeal is weak is in its attitude to multiple appointments.

The Court does not systematically analyse the problems posed by multiple appointments. There are at least three:

1. Professional arbitrators who accept or seek multiple appointments for one party have an incentive not to bite the hand that feeds them.[39] A rule precluding multiple appointments would reduce that risk, without significantly damaging arbitration (because there are usually reasonably well-qualified candidates available as alternatives; in specialist areas where there are not the parties can agree to alter the default rules).[40] It is hard to assess how common such conduct is in practice. Some experienced commentators are

[36] *AT&T Corp v Saudi Cable Co* [2000] 2 Lloyd's Rep 127.

[37] Michael J Mustill and Stewart C Boyd, *Commercial Arbitration: 2001 Companion* (Butterworths 2001) 101.

[38] In explaining the decision to omit independence, the Departmental Advisory Committee Report (reprinted in ibid 413) said, at para 104, '[w]e should emphasize that we intend to lose nothing of significance by omitting reference to independence. Lack of this quality may well give rise to justifiable doubts about impartiality, which is covered'.

[39] For a rare case in which an arbitrator was removed for such reasons see *Cofely Ltd v Bingham* [2016] EWHC 240 (Comm), [2016] 2 All ER (Comm) 129, where about a fifth of the arbitrator's business came from one party, and there was other circumstantial material pointing towards apparent bias.

[40] The Court of Appeal seems to have thought that this is not a concern, because if it were all

pessimistic[41] and there is some data that supports their pessimism.[42] Others, of course, take a more optimistic view, and the legitimacy of multiple appointments for one party has been contentious in areas such as ICSID arbitration.[43]

2. If an arbitrator has previously decided similar issues in other cases, and that fact is known to one party but not to the other, the party with the relevant knowledge is at an advantage. It knows how the arbitrator thinks on the subject. The other party does not.[44] This is quite different from the position in court, where because judgments are public both parties will have the same knowledge. It is one of the respects in which 'frequent flyers' appointed by insurers present greater difficulty than those appointed by policyholders, because insurers are 'repeat players' who are likely to know more about an arbitrator's previous decisions in cases in which they were parties. That insurers have a deep knowledge of the results of previous cases already gives them a distinct tactical advantage in calibrating their arguments and estimating chances of success. If that knowledge is shared by one member of the tribunal only, the imbalance becomes worse.

3. Arbitrators who have previously decided other cases involving the same factual issues, or are simultaneously engaged in doing so, will have heard and seen evidence which will be known to one party and not the other. There

payments to arbitrators would be disqualifying: *Halliburton* (n 3) [82] (where a heading appears to be missing). That seems to miss the point. The fact that an arbitrator is paid in the particular arbitration is known to both parties. The factor that makes things difficult is gratitude for past business in other arbitrations, and the prospect of future appointments. This must be a matter of degree; but it should be seen against the courts' traditionally firm line on pecuniary benefit: see *Dimes v Grand Junction Canal Co Proprietors* (n 27).

[41] 'The result is an unhappy blurring of ethical lines, and a moral hazard exacerbated by ignorance and hypocrisy. … Here … is surely the worm in the apple'. Paulsson (n 13) 154, 155, discussing party-appointments in general.

[42] Such as the fact that nearly all dissenting opinions are produced by party-appointed arbitrators. See Alan Redfern, 'Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly' (2004) 20 Arbitration International 223.

[43] It has recently been reported that a challenge to an arbitrator in an arbitration between Elitech and Croatia on grounds that she had been too frequently appointed by Croatia failed.

[44] 'Another desirable thing for the advocate is that the members of the tribunal, of their own accord, should carry within them to Court some mental emotion that is in harmony with what the advocate's interest will suggest. For, as the saying goes, it is easier to spur the willing horse than to start the lazy one. …This indeed is the reason why, when setting about a hazardous and important case, in order to explore the feelings of the tribunal, I engage wholeheartedly in a consideration so careful, that I scent out with all possible keenness their thoughts, judgments, anticipations and wishes, and the direction in which they seem likely to be led away most easily by eloquence.' Cicero, *De Oratore* (EW Sutton tr, Harvard UP 1942) II.45.

> is always a risk that their minds may be influenced by that evidence—for instance, by a favourable or unfavourable opinion formed of a witness during cross-examination—but one party to the arbitration may be completely in the dark about that.

In *Halliburton*, the risk of (1) was small, because as it happens M was retiring and therefore unlikely to be looking for further work. (It does not necessarily follow, however, that the reasonable observer, 'neither complacent nor unduly sensitive or suspicious',[45] might not have feared that M might be unconsciously influenced by feelings of gratitude to the party that had been providing him with a steady diet of work.)

The risks of (2) and (3) are harder to gauge. They always will be. The difficulty is well shown in this case by the fact that M originally said that he did not understand that there were any common issues, but that the pleadings when disclosed showed that the issues were substantially similar (albeit the factual background was of course different).[46] Cases develop in unpredictable ways, and the question must always be one of risk.

The positive rationale for holding that multiple appointments are *prima facie* acceptable seems weak. The Court of Appeal records the judge as having relied on a 2004 decision concerning adjudication.[47] In that case, Dyson LJ (as he then was) did indeed say that the 'the mere fact that the tribunal has previously decided the issue is not of itself sufficient to justify a conclusion of apparent bias'.[48] But the context was different. Dyson LJ was considering whether an issue should be remitted to the same decision-maker following an appeal. Such a case does not raise the most acute difficulties that apply in arbitration: for both parties know how the adjudicator had decided the issue before, both can address it on an equal footing, and no question of equality of arms or asymmetry of information applie. Dyson LJ equated adjudicators and judges and placed confidence in the professionalism of both.[49] For the reasons given above, it seems to me to be about much more than that. Judges[50] are in a different position, not merely because of

[45] *Helow v Secretary of State for the Home Department* (n 6) [39].

[46] *Halliburton* (n 3) [21].

[47] *Amec Capital Projects Ltd v Whitefriars City Estates Ltd* [2004] EWCA Civ 1418, [2005] 1 All ER 723; the citation at *Halliburton* (n 3) [28] is incorrect.

[48] *Amec Capital Projects Ltd v Whitefriars City Estates Ltd* (n 47) [20].

[49] ibid [21].

[50] For the position of judges see, eg, *Otkritie International Investment Management Ltd v Urumov* [2014] EWCA Civ 1315, [2015] CP Rep 6 [22]: 'There is … a consistent body of authority to the effect that bias is not to be imputed to a judge by reason of his previous rulings or decisions in the same case (in which a party has participated and been heard) unless it can be shown he is likely to reach his decision "by reference to extraneous matters or predilections or preferences".' But even that is not an iron-clad rule: compare *Dar Al Arkan Real Estate Development Co v Al Refai* [2014] EWHC (Comm).

professionalism, but because of an institutional system (public justice, appeals) by which they are scrutinised and supervised. The question, properly analysed, is not simply whether an arbitrator can keep an open mind about a point that he or she has previously decided (perhaps more than once). It is whether such an arbitrator can be regarded as even-handed when one party knows of the previous conclusion, shake-able as it may be, and the other does not know that there is anything to shake, and when he has heard evidence and submissions in a previous case from one party which the other did not participate in and cannot know about.

Apart from *Amec*, the Court of Appeal mentioned two other cases. One, *Beumer*,[51] was a decision which it implicitly overruled. In that case, Fraser J pointed out that conducting two adjudications involving the same parties would undoubtedly involve communications which are, so far as one party is concerned, ex parte. In the other, *Guidant*,[52] while expressing disquiet about simultaneous appointments (and therefore declining to make one), Leggatt J expressly accepted that it would not 'justify an inference of apparent bias'.[53]

The Court of Appeal also referred with apparent approval to a lecture by Jeffrey Gruder QC—in which he had referred to the problem being 'inside information'—and to a passage in the second edition of a textbook, of which I was an author, which referred to two cases as establishing that successive appointments are not regarded as bias.[54] In the light of further experience, that passage is too broadly stated, and does not make the right connection to the equality of arms problem.[55]

In my view, it would be better to say that although multiple appointments do not *necessarily* constitute bias, they often will give rise to 'justifiable doubts' about an arbitrator's impartiality. This is particularly so when there is a lack of confidence that both sides have access to the same information about cases in which the arbitrator has participated and decisions that have been made in them. The court should not start with a presumption that they are acceptable. Unless the cases concerned are completely unrelated, or unless the parties have agreed to the multiple appointments, or unless the problems of unequal knowledge are resolved, the arbitrator is not in a secure position to decide the case fairly, and the process will not be regarded by both parties as fair. That is not so much because the arbitrator cannot bring an open mind to the problem: it is because one party can bring its own knowledge, which the other lacks, to bear, and because the other party is not in a position to judge whether the arbitrator is

[51] *Beumer Group UK Ltd v Vinci Construction UK Ltd* [2016] EWHC 2283 (TCC).

[52] *Guidant LLC v Swiss Re International SE* [2016] EWHC 1201 (Comm).

[53] ibid [10].

[54] Jacobs, Masters, and Stanley (n 2) para 14.32, citing *Amec Capital Projects Ltd v Whitefriars City Estates Ltd* (n 47) and *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451.

[55] Which is discussed in Jacobs, Masters, and Stanley (n 2) paras 14.30–14.31.

open-minded. It is a construction of the Act that is necessary to give proper effect to the over-arching need to ensure a fair procedure, which is itself critical to the legitimacy of the departures from Article 6 that arbitration requires. If the arbitrator's position puts one party at a relative disadvantage, it is reasonable to describe that as an absence of impartiality. That is certainly how it looks to the disadvantaged party. Either way, the correct *prima facie* position is the reverse of that assumed by the Court of Appeal in *Halliburton*: multiple overlapping appointments which produce an asymmetry of information should be regarded as prima facie disqualifying, although there may be particular cases in which they are not, because the difficulties can be appropriately handled.

One may suspect that the real rationales for allowing multiple appointments are an analogy to the position in court, and practice, and convenience. They are weak points. An arbitrator is not like a judge in this respect, because judges are subject to extensive external safeguards and controls, and it will rarely be that their previous views, the evidence and argument they have heard in another case, are known to only one party.[56] The same was true of the adjudicator in *Amec*, or of an arbitrator after an appeal. So far as practice and convenience are concerned, it is well known that confidentiality and privacy can preclude, in arbitration, various practices (such as consolidation) that are convenient in court. It seems well arguable that permitting an arbitrator to conduct two references in plain view to one party, but with the other parties ignorant of developments in each, is a *worse* thing than forced consolidation, because it undermines the proceedings' fairness. However common it may be, the arguments in *Beumer Group UK Ltd v Vinci Construction UK Ltd*[57] as to its problems are sound.

The duty to disclose

Much of what the Court of Appeal says about disclosure is common sense. The court was, in effect, quite clear that the requirements of arbitration mean that an arbitrator is under a duty to disclose matters which would, if analysed, fall short of grounds for removal. Under the heading 'When should an arbitrator make disclosure of circumstances which may give rise to justifiable doubts as to his or her impartiality' it analysed various cases, institutional rules, and the IBA Guidelines.

The real difficulty with this passage is not its content, but how it relates to the next step in the court's argument. It is not clear in what sense the court uses the word 'should'. If it intends to mean that there is a legal obligation to disclose (and that looks to be what it is saying), then it ends up in a cul-de-sac, because it

[56] If it were the case then that might, even for a judge, present difficulties.

[57] n 51 [11].

promptly decides that breach of the obligation has no consequences. If it means simply that it is good practice, then 'should' (and other words used by the court such as 'required'[58]) seems too strong. It would be odd, too, to cite various cases in support of a mere counsel of prudence. The conclusion ultimately reached is expressed in terms of English law.[59] So it looks as if the court meant 'should' in the strong sense of 'is legally obliged'. But if, as the court goes on to hold, this is a legal rule with no consequences, how does that work?

One might also quibble with the Court's approach to the IBA Guidelines. It seemed to think that they posit a subjective test, contrasting it to the English test of the 'objective observer'.[60] But that seems doubtful. When the IBA Guidelines refer to the 'eyes of the parties' they focus on a distinctive characteristic of arbitration. In a private arbitration, the only observers *are* the parties. That arbitration is a private and consensual procedure ought to cut both ways, and shaping a procedure that meets the legitimate expectations of the parties is important. Since arbitrators are appointed by the parties to resolve their dispute, they owe a form of allegiance to them which is distinct from that of the judge. Where, in a judicial context, it is *public* confidence that matters most, in an arbitration context it is *party* confidence. Might it not be appropriate, given the high stakes in an arbitration, particularly because of the absence of appeal, to take this into account? In other contexts, the Supreme Court has endorsed the view that party confidence is critical:

> The raison d'être of arbitration is that it provides for final and binding dispute resolution by a tribunal with a procedure that is acceptable to all parties, in circumstances where other fora (in particular national courts) are deemed inappropriate (eg because neither party will submit to the courts or their counterpart; or because the available courts are considered insufficiently expert for the particular dispute, or insufficiently sensitive to the parties' positions, culture, or perspectives).[61]

That is not an invitation to subjectivism; but even an objective approach can be sensitive to the context, which is not that of litigation.

[58] *Halliburton* (n 3) [70].
[59] ibid [71].
[60] ibid [68].
[61] *Hashwani v Jivraj* (n 15) [61], quoting with approval submissions made by the ICC.

What if the duty is breached?

I have already commented on the peculiarity that the duty of disclosure identified by the court[62] seems toothless. The reasoning here is hard to follow:

- If a given fact does not give rise to justifiable doubts as to impartiality, how much further does its non-disclosure go? This amounts to saying that unjustifiable doubts can become justifiable because they have not been disclosed. But when, in concrete terms, could that ever happen, unless there was some specific evidence showing that the reason the information was suppressed was itself partisan? In practical terms, however, that takes matters no further at all, since even (especially?) the most partisan arbitrator will be ready with an excuse, and the procedure for removal affords no way of testing it.

- There appear to be internal contradictions in the court's statements. At one point it says that non-disclosure may 'fortify, *or even lead to* an overall conclusion of apparent bias'.[63] But in the next paragraph it says that such non-disclosure '*cannot* … in and of itself justify an inference of apparent bias. *Something more is required*.'[64] There is no indication, even by way of example, of what that 'something more' would be.

- The judgment never really grapples with the Privy Council's decision in *Almazeedi v Penner*.[65] In that case the Cayman Islands Court of Appeal had concluded that a first instance judge had been apparently biased because he had heard a case where one party was connected to the Qatari Minister of Finance, and the judge also held a part-time appointment in Qatar, in relation to which the Minister had decision-making power. In reaching its conclusion, the Cayman Court of Appeal had attached importance to the fact that the judge had not disclosed his Qatari connection. A majority of the Privy Council upheld the Court of Appeal's decision. Did that mean that they endorsed the decisive importance of disclosure? It seems doubtful. They effectively put the matter the other way round: the judge was in a position where the fair and informed observer would not have regarded him as impartial, but that concern might have been dispelled if disclosure had been made.[66]

[62] *Halliburton* (n 3) [71], [94].
[63] ibid [75], emphasis added.
[64] ibid [76], emphasis added.
[65] *Almazeedi v Penner* [2018] UKPC 3.
[66] ibid [34].

- The court did not pay much attention to the consequences of non-disclosure. Those were asymmetric. They left one party in a position of knowledge, and the other in a position of ignorance. Although the court said it would address this issue,[67] it never really did so, instead making merely general comments on the consequences of non-disclosure. Here, perhaps, *Almazeedi* might have had something more useful to say, since it drew the important distinction between situations of potential conflict that are general and known to both parties, and situations that are specific to the individual concerned and known only to one.[68]

In a sense, however, those points follow from the fundamental problem: a rule that mandates disclosure of matters which would not disqualify is fool's gold if the only relevant question is whether there exists a disqualifying interest. Either one must extend the notion of 'absence of impartiality' to include a failure to disclose matters which are on the periphery of relevance, in which case one will have altered and extended the test for bias. Or one might as well ignore non-disclosure, since it is hard to see how anyone who is unbiased can become biased by failing to disclose facts which do not amount to bias. One is left with non-disclosure being relevant only, effectively, if it gives rise to an inference that the non-disclosure was deliberate and that it showed that the arbitrator's mind was in fact not open. That seems to give very little scope for any non-disclosure rule. It is hard to conceive of any case where the inference could be drawn unless other facts already demonstrated bias.

One possibility, of course, is that the court's error occurred not here but at the earlier stage, in its conclusion that there is any legal duty of disclosure at all. One could take the view that disclosure is of merely negative and factual significance. It is prudent to disclose. If disclosure is made, and produces no objection, it will waive any complaint. And if disclosure is made and does produce an objection, the fact that it was made at all demonstrates what may be a disarming candour. This could certainly be argued. If so, disclosure or non-disclosure has no normative force; it is just a fact that may or may not be relevant; and it would be misleading to posit any 'duty' of disclosure. But what looks very odd is the idea that there is a positive obligation, imposed by law, to disclose, but that its breach is mostly inconsequential.

Overall assessment

By focusing on the common law test of bias, and applying instincts and even cases which derive from different contexts, the Court of Appeal arguably has not

[67] *Halliburton* (n 3) [72].
[68] *Almazeedi v Penner* (n 65) [19].

done justice to the particular concerns of arbitration. Whether or not, in this case, there would ultimately have turned out to be a significant overlap of issues between the arbitrations, the following facts were clear:

- The two arbitrations between Chubb and its policyholders raised similar legal issues in relation to the same underlying event. It could not be said with any confidence that there would *not* be overlap (for instance in relation to Mr Trimarchi, Chubb's claims manager).[69] To take another example, although the factual case against Transocean and Halliburton was different, M might have been exposed in the Transocean reference to material or argument about the law or the local court, the lawyers for the plaintiffs, or even the views of Transocean's lawyers, which could have influenced his judgment about whether Halliburton's settlements had been reasonable, which seems to have been a central issue.

- That fact was known to one party and M, but not to Halliburton and the other arbitrators. They could not even address it.

- M's appointment by Chubb came hard on the heels of his appointment by the court, on Chubb's application, and in circumstances where he had a (disclosed) history of appointment by Chubb on other occasions, and none of appointment by Halliburton. He was thereafter appointed by 'the market' in another reference. Any policyholder would have drawn the conclusion that he was, at the least, seen by the insurers as a solid likely vote for them.

- The appointment in the Transocean reference was one which ought to have been disclosed but was not. There were other aspects of M's communications which,[70] were not always happily phrased and could easily have caused concern.

Still, if one looks at this narrowly through the lens of bias, one might hesitate to call it that. Those facts could not objectively be said to have had a very large chance of predisposing M towards Chubb. But if one understands impartiality more broadly, as connoting an unacceptable degree of risk that an arbitrator will be unable to reach decisions that will be and appear fair, there was a real problem. In the arbitration context, without suitable party agreement, the starting point ought to be that impartiality is understood broadly, and that it is absent both where there is a real risk that the arbitrator may favour one party *and* where there

[69] *Halliburton* (n 3) [13].

[70] Such as his assertion that issues were quite different, and the apparent inconsistency of offering to resign appointment in the Transocean references, on the face of it whether or not the parties there wished him to continue, while considering that he was duty bound to continue with the Halliburton reference unless both parties agreed.

is a real risk that one party may be advantaged by the arbitrator. Where one party has information about facts and arguments known to the arbitrator and directly relevant to the case, the impartial observer would say that is an advantage, and it is an unfair advantage.

The problem is particularly acute with confidential information. In other contexts, the courts *do not* generally assume that even 'professionals' will be able to put information 'out of their minds'. In applications to prevent a firm from acting against a former client, for instance, they are sensibly reluctant to accept such assurances. In ordinary litigation this probably matters little: if both sides know what the judge knows, the only question is whether the judge can *reason* about it, not forget it. In a case where one party knows (and has every incentive to exploit) the confidential information itself, and the other party does not, the position seems rather more troublesome.

Where next?

In practical terms, the most fundamental objection to *Halliburton* is that it produces uncertainty of the worst sort.

On the one hand, those who are concerned about subjecting themselves to an untransparent and largely unsupervised regime have no assurance of high standards. This matters. An English lawyer, even one who does not know who M was, may accept assurances that he is a person known to have the highest integrity. A corporation in Texas may be less sanguine. To be told that an English judge has appointed the preferred candidate of one's adversary, who has soon afterwards secretly added a further reference relating to the same matter, might invite scepticism. It was one of the purposes of the Arbitration Act 1996 to reassure those unfamiliar with English ways that London is an arbitration centre that can be trusted. One might think that it is important to be sensitive to appearances, and to bear in mind that arbitration users may come from backgrounds where, as in some US domestic arbitration, the line between party-appointed arbitrator and advocate is often difficult to see. In bias cases the common law itself has never allowed confidence, no matter how strong and widespread, in the individual integrity of a decision-maker to count for much. Nobody would doubt the integrity of Lord Hoffmann,[71] or Sir Peter Cresswell.[72] But part of the function of rules guaranteeing impartiality is to reassure outsiders. That matters all the more in arbitration.

From a US vantage point, lawyers and brokers, facing what they see as an unlevel playing field, will increasingly advise policyholders to avoid, where possible,

[71] *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet (No 2)* (n 28).
[72] *Almazeedi v Penner* (n 65).

insurance policies which require binding arbitration generally, and London arbitration in particular. The lack of transparency, a perception of complacency in the world of London arbitration, and weak policing of disclosure, all risk undermining the confidence that the Arbitration Act 1996 was intended to instil. If, as many (perhaps most) experienced parties believe, arbitration is not cheaper, or faster, or more convenient than litigation, it must above all be fair and be perceived to be fair. Another possibility, less unpalatable, is that parties will increasingly insist on institutional rules which will place challenges in the hands of bodies which are better attuned to the standards expected by those who use arbitration than the English courts are perceived to be.

On the other hand, those who are more concerned to deal robustly with challenges to arbitrators, which can simply be vexatious tactics designed to derail proceedings or raise spurious objections to awards, can take no comfort either. Applying the common law rules for bias can, as Lord Sumption's dissent in *Almazeedi*[73] shows, be difficult. All the more difficult when there is super-added a duty to disclose circumstances which are not disqualifying, and where the relationship between that duty and the power of removal is left shrouded in mystery. So much seems to depend on facts, including facts which can only be investigated after a challenge is brought (such as 'why was there non-disclosure?') and inferences which may depend on such imponderables as the number of appointments an arbitrator has received, whether he or she is retiring, the precise overlap of issues in other cases, and his or her standing or reputation with the bench.

Clarification, one way or another, seems needed. Either the Supreme Court should robustly reject the idea that there is a duty of disclosure, as such, and make it clear that the fact of disclosure is at most a factor of limited weight in marginal cases, a counsel largely of prudence. Or, as I think preferable, it should maintain that impartiality in the arbitral context calls for rather rigorous supervision, that multiple appointments should generally be regarded as impermissible, and that full disclosure will in most cases be the only remedy. That solution would give greater and more appropriate weight to the fact that arbitration, if it is to be effective, must above all be fair and that parties must have a reasonable assurance that it is. It is not cost free, because it will require more extensive disclosure, it may lead to removal in cases where non-disclosure has been inadvertent, and it may therefore encourage marginal challenges. But either solution would be superior to the confusion that *Halliburton* has created.

[73] *Almazeedi v Penner* (n 65).