CHAPTER 4

# Arbitrations, Multiple References and Apparent Bias: A Case Study of *Halliburton Co v. Chubb Bermuda Insurance Ltd* (2018)

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To state that the future of arbitration in Europe depends upon the quality of arbitrators sitting in the various arbitral centres in Europe and of their awards may strike many as something of an over-statement. The popularity of arbitration as a means of dispute resolution depends upon a range of factors. But the quality of arbitrators must surely weigh heavily in the scales. As Jan Paulsson has observed, 'confidence in the ethical standards of arbitrators and arbitral institutions is the Alpha and Omega of the legitimacy of the process'.[1] A warning note on this issue has also been sounded by Professor Catherine Rogers in her authoritative monograph on the subject of ethics in international arbitration when she observed that 'the lack of ethical regulation is regarded as a potential crisis that can threaten the legitimacy of international arbitration'.[2] Were the market to lose confidence in the quality of European arbitrators and their ethical standards, there are many other arbitral centres around the world who would look to seize the opportunity and acquire a greater share of the potential case load.

One of the principal advantages of arbitration is the ability of parties to choose, or to have a say in, the appointment of the arbitrators who are to decide their case. In the case of litigation, the judge is appointed typically by the nation state which has jurisdiction over the matter to be decided and it is not for the parties to choose who is to be the judge. The parties may have doubts about the experience of the judge who has been assigned to deal with the case or, more seriously, may have concerns about his or

1. J. Paulsson, *The Idea of Arbitration* (Oxford: Oxford University Press, 2013), 147.
2. Catherine A. Rogers, *Ethics in International Arbitration* (Oxford: Oxford University Press, 2014), 4.

her impartiality. But, in general, they must accept the judge who has been assigned to hear their case.

In the case of arbitration some, but by no means all, of these difficulties can be avoided. The parties may be able to choose an arbitrator who has substantial experience in the matter to be decided. While this has its benefits (in terms of familiarity with the issues), it can have its drawbacks. What is to be done in the situation where the arbitrator has previously decided a case to which one or other of the parties to the arbitration was a party? Or the case where the arbitrator subsequently accepts appointment as an arbitrator in a case which involves one of the parties to the arbitration but does not inform the other party of his or her acceptance of the appointment? The problem can be particularly acute in those cases where the pool of arbitrators who have expertise to hear the case is very small and where the likelihood of a previous or future dealing between the parties and the potential arbitrator is high. In such a case how does one balance the wish to have the case decided by a suitably expert panel against the need to ensure that the arbitrators are impartial and are not perceived to hold a bias, actual or perceived, against one of the parties to the arbitration? And if the choice is between an expert, but potentially conflicted, arbitrator and an arbitrator who has no experience of dealing with the subject matter of the arbitration but has no conflict of interest, how is that choice to be made? Must it point inevitably in the direction of the arbitrator who has no conflict of interest? As Professor Park once put it, 'if arbitrators must be completely sanitized from all possible external influences on their decisions, only the most naïve or incompetent would be available'.[3] The difficulty, as in so many areas of law, lies in striking an appropriate balance.

A recent case in which the court sought to strike that balance is the decision of the English Court of Appeal in *Halliburton Co v. Chubb Bermuda Insurance Ltd*.[4] Hamblen L.J., giving the judgment of the court, observed that the appeal raised 'issues of importance in relation to commercial arbitration law and practice'.[5] The specific issues on which the court was asked to rule were: (i) whether and to what extent an arbitrator may accept appointments in multiple references concerning the same or overlapping subject matter with only one common party without thereby giving rise to an appearance of bias; and (ii) whether, and to what extent, he or she may do so without disclosure. The Supreme Court has subsequently given leave to appeal from the decision of the Court of Appeal and the appeal is currently scheduled to be heard towards the end of 2019. The decision of the Court of Appeal will not, therefore, be the last word on the issues raised by the case but, given the significance of the issues raised and the controversy which the decision of the Court of Appeal has generated, it is important to give careful consideration to the judgment of the court and to assess its implications.

3. William W. Park, 'Arbitrator Integrity: The Transient and the Permanent', in William W. Park, *Arbitration of International Business Disputes: Studies in Law and Practice* (Oxford: Oxford University Press, 2nd edn, 2012) 29, 32.
4. [2018] EWCA Civ 817, [2018] 1 WLR 3361.
5. *Supra* n. 4, at [2].

## §4.01 *HALLIBURTON CO V. CHUBB BERMUDA INSURANCE LTD*: THE FACTS

The case arose out of the litigation generated by the explosion and fire on the Deepwater Horizon oil rig in the Gulf of Mexico in 2010. A number of claims were brought against BP Exploration and Production Inc (the lessee of the rig), Transocean Holdings LLC (the owner of the rig) and Halliburton Co (who provided cementing and well-monitoring services to BP in relation to the temporary abandonment of the well) by various parties who suffered loss in the incident. Both Transocean and Halliburton purchased liability insurance from Chubb Bermuda Insurance Ltd on the Bermuda form which provided Halliburton with cover of USD 100 million excess USD 500 million. Following a settlement of the claims brought against it by a group of plaintiffs in which Halliburton agreed to pay approximately USD 1.1 billion,[6] Halliburton made a claim on its liability insurance against Chubb. The latter declined to meet the liability and cited as one of the reasons for declining to do so that Halliburton had not reached a reasonable settlement and/or that Chubb had reasonably not consented to the settlement.

Halliburton then commenced arbitration proceedings against Chubb in respect of the claim. The policy was governed by New York law and contained an arbitration clause in standard Bermuda Form terms[7] which provided that the arbitration was to take place in London under the provisions of the Arbitration Act 1996. The tribunal was to consist of three arbitrators, one appointed by each party, and the third appointed by the two arbitrators chosen by the parties. In the event of the failure of the two chosen arbitrators to reach agreement on the appointment of a third arbitrator the appointment was to be made by the English High Court. The parties appointed their arbitrators but failed to reach agreement on the appointment of the third arbitrator. The appointment of the third arbitrator was only resolved after a hearing before the High Court at which 'M' (who happened to be Chubb's preferred candidate) was appointed as the third arbitrator. Halliburton did not appeal against the court order appointing M in this capacity.

Prior to his appointment, M disclosed that he had previously acted as arbitrator in a number of arbitrations in which Chubb was a party, that in some of these cases he had been appointed by Chubb, and that he was at that time also appointed in two pending references to arbitration in which Chubb was involved. Subsequently M accepted appointment in two further arbitrations. The first was an appointment by Chubb in relation to an excess liability claim arising out of the same incident made by Transocean under its liability insurance policy with Chubb and in which the same

6. The settlement was entered into prior to judgment being entered against Halliburton. When judgment was subsequently given by the court against BP, Transocean and Halliburton, the latter was found to be 3% to blame with BP being held 67% responsible and Transocean 30%. Following judgment, Transocean settled the claims against it for USD 212 million and paid civil penalties of approximately USD 1.1 billion to the US government.
7. On which *see* generally, D. Scorey, R. Geddes and C. Harris, *The Bermuda Form: Interpretation and Dispute Resolution of Excess Liability Insurance* (Oxford: Oxford University Press, 2nd edn, 2018), Chs 16–24 of which deal with dispute resolution under the Bermuda Form.

employee of Chubb had declined to meet the claim made. The second was as a substitute arbitrator in another claim by Transocean against a different insurer on the same layer of insurance. In both instances, M failed to disclose his appointment to Halliburton. When Halliburton discovered the existence of these two appointments, it wrote to M, drawing his attention to the International Bar Association Guidelines on Conflicts of Interest in International Arbitrations, and sought 'clarifications and explanations'. M responded by apologising for the oversight in failing to disclose his appointment to Halliburton but maintained that the issues in the cases were 'totally different' and gave an assurance that he had at all times remained independent and impartial and would continue to be such in the future. This assurance failed to satisfy Halliburton who suggested that he resign, a proposition with which, not surprisingly, Chubb did not agree. M was now in a very difficult position, having apparently lost the trust of one party, but not the other. M recognised that he owed duties to both parties and could not simply act in what he perceived to be his own self-interest and resign his appointment. He expressed the hope that both parties would find a mutually acceptable alternative to him but, in the event of them being unable to do so, he stated that he feared that he would have 'no alternative but to leave my fate in the hands of the court'. The parties failed to reach agreement on the appointment of a replacement arbitrator, and Halliburton issued a claim form in which it sought to remove M as an arbitrator pursuant to section 24(1)(a) of the Arbitration Act 1996 on the ground that there were 'justifiable doubts' as to M's impartiality.[8] Popplewell J dismissed the application in robust terms[9] and so the arbitration continued.

Halliburton appealed to the Court of Appeal but, prior to the hearing in the Court of Appeal, the arbitral tribunal issued its Final Partial Award on the merits, and it decided the case in favour of Chubb. Although the arbitral tribunal was agreed in terms of the substantive outcome of the case, one of the arbitrators, referred to as 'N', issued what he termed 'Separate Observations' in which he stated that he was unable to join in the award as a result of his 'profound disquiet about the arbitration process', in particular the failure of M to disclose his subsequent appointment by Chubb in relation to the excess liability claim arising out of the same incident.[10]

## §4.02 THE 'HEART' OF THE APPEAL

The Court of Appeal dismissed Halliburton's appeal. Hamblen L.J. stated that 'at the heart' of Halliburton's appeal was its concern about the unfairness which may arise where an arbitrator accepts appointments in overlapping references with only one

8. Section 24(1)(a) provides that a party to arbitral proceedings may apply to the court to remove an arbitrator if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality.
9. *H v. L* [2017] EWHC 137 (Comm), [2017] 1 WLR 2280.
10. *Supra* n. 4, at [24]. The view of N did not, however, carry much weight with the Court of Appeal for two reasons. First, it was for the court to form its own judgment on the view that would be taken by the fair-minded and informed observer. Second, N had not expressed his concerns prior to the issue of the Award and in any event he did not dissent from the substantive decision in the Award (*see* [93]).

common party. By reference to a number of authorities,[11] he concluded that the mere fact that an arbitrator accepts appointments in multiple references concerning the same or overlapping subject matter with only one common party does not of itself give rise to an appearance of bias.[12] The Court of Appeal concluded that an arbitrator should be trusted to decide the case solely on the evidence or other materials adduced in the proceedings in question. In order to give rise to an appearance of bias there must be 'something more' and that something more must be 'something of substance'.[13] The Court of Appeal acknowledged that 'inside information' and 'inside knowledge' may be 'a legitimate concern' for the parties to have in relation to overlapping arbitrations involving a common arbitrator but only one common party. However, it concluded that, in itself, this concern did not justify an inference of apparent bias.[14] The starting point for the court in such a case was not one of an assumption of bias but rather that the arbitrator should be 'assumed to be trustworthy and to understand that they should approach every case with an open mind'.[15]

## §4.03 THE OBLIGATION TO MAKE DISCLOSURE

The Court of Appeal then turned to consider the circumstances in which an arbitrator should make disclosure of circumstances which may give rise to justifiable doubts as to his or her impartiality. The Arbitration Act 1996 makes no express provision for an obligation of disclosure and so, in the absence of a provision in the Act, the Court of Appeal turned to the common law rules where the courts have held that 'judges should disclose facts or circumstances which would or might provide the basis for a reasonable apprehension of lack of impartiality'.[16] The same approach was held to be applicable to arbitrators[17] so that the Court of Appeal held that disclosure should be given by an arbitrator of 'facts or 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 arbitrator was biased'.[18]

Four features of this definition of the duty of disclosure should be noted. First, the test to be applied is an objective one[19] so that the reference point is what the fair-minded and informed observer would or might conclude. It is not a subjective test. The Court of Appeal contrasted[20] this objective approach with what it perceived to be a stricter, subjective test to be found in some of the rules drawn up by arbitral

11. *Guidant LLC v. Swiss Re International SE* [2016] EWHC 1201 (Comm), [2016] 1 CLC 767; *Beumer Group UK Ltd v. Vinci Construction UK Ltd* [2016] EWHC 2283 (TCC), [2017] BLR 53 and *AMEC Capital Projects Ltd v. Whitefriars City Estates Ltd* [2014] EWCA Civ 1418, [2005] BLR 1.
12. *Supra* n. 4, at [53].
13. *Ibid*.
14. *Ibid*., at [49].
15. *Ibid*., at [51].
16. *Ibid*., at [56].
17. *Ibid*., at [66].
18. *Ibid*., at [71].
19. *Ibid*., at [68].
20. *Ibid*., at [67].

institutions where the position is viewed through the 'eyes of the parties'[21] or via 'the mind of any party'.[22] Second, the duty of disclosure 'depends on what the arbitrator knows'[23] and, importantly in this connection, 'there is no duty of inquiry'[24] on the part of the arbitrator. Third, the question of what is to be disclosed is to be considered prospectively, and not with the benefit of hindsight.[25] In other words, the court should focus its attention on the circumstances prevailing at the time at which it is alleged that the arbitrator should have disclosed the information in question. Fourth, in borderline cases, where it is not clear what the fair-minded and informed observer would conclude, the arbitrator should make an appropriate disclosure.[26] But where the circumstances are such that there is no real possibility that a fair-minded and informed observer would raise a possibility of bias, no useful purpose is served by disclosure and so the arbitrator is entitled to keep the information to himself or herself.

What is to be done in the case where the arbitrator has failed to disclose a matter which he or she should have disclosed? The Court of Appeal held that, in such a case, the arbitrator will have failed to display the 'badge of impartiality' which he or she should have displayed.[27] However, the consequences of this failure to display the badge will depend upon the context in which the issue comes before the court. If, as in the present case, the context is an application to remove the arbitrator, non-disclosure will be a factor to be taken into account when considering whether or not to remove the arbitrator for apparent bias. But non-disclosure will not of itself make good that case. Thus the Court of Appeal concluded that non-disclosure of a fact or circumstance which should have been disclosed, but which does not in fact, on examination, give rise to justifiable doubts as to the arbitrator's impartiality cannot in and of itself justify an inference of apparent bias.[28]

## §4.04 APPLICATION TO THE FACTS

Applying these principles to the facts of the present case, the Court of Appeal concluded that, although M's acceptance of his appointment in the two subsequent arbitrations could be said to have given rise to 'legitimate concerns'[29] in the eyes of Halliburton, it did not in and of itself justify an inference of apparent bias. In so far as Halliburton complained about the initial appointment of M by the High Court, the alleged degree of overlap between the present case and the two subsequent cases in which M had been appointed as arbitrator, the fact that M was paid for accepting appointment in the

21. *See*, for example, General Principle 3(a) of the IBA Guidelines on Conflicts of Interest in International Arbitration General Principle 3 and Article 11(2) of the Rules of Arbitration of the International Chamber of Commerce, 2017.
22. *See*, for example, Article 5.4 of the LCIA Arbitration Rules 2014.
23. *Supra* n. 4, at [70].
24. *Ibid*., at [69].
25. *Ibid*., at [70].
26. *Ibid*., at [65].
27. *Ibid*., at [74].
28. *Ibid*., at [76].
29. *Ibid*., at [77].

subsequent arbitrations and the nature of M's responses to the concerns raised by Halliburton, these complaints were all dismissed by the Court of Appeal.

But the Court of Appeal did conclude that M should have disclosed to Halliburton the two subsequent appointments which he had accepted. This was held to be not only consistent with 'best practice in international commercial arbitration'[30] but also to be required by law,[31] given that the facts and circumstances of the case might have combined to give the fair-minded and informed observer a basis for reasonable apprehension of a lack of impartiality. International standards played an important role in enabling the Court of Appeal to reach this conclusion. Thus Hamblen L.J. noted that the present case 'may be said' to fall within the Orange List of the IBA Guidelines on Conflicts of Interest in International Arbitration as being an event which 'in the eyes of the parties may give rise to doubts as to the arbitrator's impartiality or independence'.[32]

However, the fact that M had failed to disclose his appointments was not sufficient to lead to the conclusion that the fair-minded and informed observer would have decided that there was a real possibility that M was biased. On the contrary, the Court of Appeal held that the fair-minded and informed observer would not have so concluded. This was so for a number of reasons: (i) the non-disclosed circumstance did not of itself justify an inference of apparent bias; (ii) disclosure ought to have been made, but the omission was accidental rather than deliberate; (iii) the very limited degree of overlap between the cases meant that this was not a case where the overlapping issues should give rise to any significant concerns; (iv) the fair-minded and informed observer would not consider that mere oversight in such circumstances would give rise to justifiable doubts as to impartiality; and (v) there was no substance in Halliburton's criticisms of M's conduct after the non-disclosure was challenged or in the other heads of complaint which it raised. This being the case, it was held Halliburton was not entitled to succeed with its application to remove M as an arbitrator.

## §4.05 ASSESSMENT

The decision of the Court of Appeal has received some support. Five principal arguments can be advanced in its favour. First, the conclusion that acceptance by an arbitrator of appointments in multiple references concerning the same or overlapping subject matter with only one common party does not of itself give rise to an appearance of bias is a helpful one in those areas of law or business where there is a limited number

30. *Ibid*., at [91].
31. *Ibid*.
32. The provision cited by Hamblen L.J. is Guideline 3.1.5 of the Orange List which states that 'the arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties'. However, the guideline appears to be directed towards service by the arbitrator prior to appointment (*see* to similar effect Guideline 3.1.3), whereas the present case is concerned with future appointments. It is worth noting in this respect that a number of arbitral rules now make clear that the arbitrator's duty of disclosure is a continuing one and not one which applies only at the time of appointment: *see*, for example, International Centre for Dispute Resolution International Arbitration Rules, 2014, Article 13(3).

of arbitrators who have the necessary expertise to decide the point in dispute and are available to act as arbitrators. A more restrictive approach to the ability of arbitrators to accept multiple appointments would likely have resulted in the unavailability of a greater number of arbitrators whom the parties might have wished to act as arbitrators and thus impinged upon the autonomy of the parties to the arbitration in terms of their ability to select arbitrators of their own choice. It could also lead to the appointment of individuals who are not as well qualified and may not, indeed, be up to the task. Second, in the particular context of Bermuda Form arbitrations, there is said to be a practice 'for the same individual to be appointed in various arbitrations in respect of an insurance "tower" implicated in a claim' and 'likewise, that same individual may be appointed in multiple arbitrations in respect of different insurance towers for different policyholders (or indeed insurers) in respect of claims arising from the same underlying catastrophe'.[33] The reason for this practice is said to be the practical advantages which follow from appointing the same arbitrator for more than one dispute which arises from the same underlying incident or the same subject matter.

Third, the objective standard recognised by the court is not a lax one, and the clear steer that is given to arbitrators by the Court of Appeal is that, in cases of doubt, they should disclose potential conflicts of interest to the parties. The sanction applied by English law in the event of a failure to disclose may be limited, but the expectation of the court has been set and arbitrators who fail to conform to that expectation may be exposed to criticism, if not to other forms of legal sanction. To this extent, the effect of the decision may be genuinely to encourage more disclosure by arbitrators. Fourth, the conclusion that multiple appointments and a failure to disclose do not, of themselves, give rise to an appearance of bias may act as a disincentive to a disgruntled party who is simply aggrieved at the outcome of the case and wishes to use the allegation of a conflict of interest as a way in which to voice his or her frustration and challenge the award. Fifth, on the facts as they turned out, the decisions in the two arbitrations to which Halliburton had objected to M's appointment were reached on preliminary grounds which removed any need for the tribunal to consider the reasonableness of the settlement reached by Halliburton. Thus, the degree of overlap between the cases turned out to be 'very limited'.[34]

While accepting that these arguments have a degree of force, it is nevertheless suggested that the decision of the Court of Appeal was wrong and that it was wrong for a number of reasons.

First, acceptance by the Court of Appeal of the proposition that an arbitrator can in principle accept appointments in multiple references concerning the same or overlapping subject matter with only one common party reposes a greater degree of trust in arbitration than is perhaps merited. The essential point made by the Court of Appeal is that arbitrators should be trusted to decide cases on the basis of the material before them. This may be a fair assumption in relation to litigation before national courts where the case is heard in open court, the court must give a reasoned judgment

33. Scorey, Geddes and Harris, *supra* n. 7, para. 24.33. A similar point was made by Popplewell J. at first instance: *supra* n. 9, at [21].
34. *Supra* n. 4, at [23] and [81].

in support of its decision and the judge is publicly accountable to the State for the way in which he or she conducts judicial business. Arbitrations by contrast are not heard in public, are generally subject to obligations of confidentiality, the awards themselves are not generally made public (at least in full) and the accountability of the arbitrator to any higher authority is very limited, if not non-existent. The lack of transparency surrounding arbitration suggests that more careful consideration should be given to the question whether such multiple appointments should be acceptable in the absence of full disclosure to all parties to the arbitration.

Second, and elaborating further on the first criticism, the Court of Appeal failed sufficiently to distinguish between litigation, which is public and transparent, from arbitration, which is private and confidential. It is all very well for the Court of Appeal to say that an arbitrator should be 'trusted'[35] but that trust has to be both earned and retained: once lost, it is very difficult to restore. In a private, confidential forum with limited accountability and no requirement to publish a reasoned award, maintaining trust in arbitration requires a strong commitment to justice not only being done but being seen to be done. The stance of the Court of Appeal appears to take that trust for granted and in that sense can be said to be somewhat complacent, particularly given the challenges that now confront international arbitration in terms of its ethical regulation. No longer can arbitrators be described as a 'small cluster of professionals' who have 'shared understandings' about what it means 'to act honourably and behave ethically'.[36] The growth and diversification of international arbitration has 'broken down traditionally shared assumptions about professional conduct'[37] and has led to what Professor Rogers calls 'an ethical no-man's land'.[38] In these shifting sands, 'practices that seem reasonable and normal one day can quickly become outdated, counterproductive, or subject to radically different ethical expectations'.[39] The solution favoured by Professor Rogers to these difficulties is ethical self-regulation in which arbitral institutions would have a prominent role to play in determining and policing the applicable standards. She also advocates the provision of more information about arbitrators which would render the selection process for arbitrators more transparent.[40] Clearly, the creation of a new system of this type is not a matter for the Court of Appeal. But the broader concerns raised by Professor Rogers suggest that the Court of Appeal underestimated the ethical challenge that is currently facing international arbitration. The judgment of Popplewell J is also open to criticism on the ground that it placed undue emphasis on the position of M who was described as someone who 'enjoys a reputation as an international arbitrator of the highest quality and integrity'.[41] But it is

35. *Ibid*., at [50], [51] and [86].
36. Rogers, *supra* n. 2, at 1.19.
37. *Ibid.*, at 2.49.
38. *Ibid.*, at 1.03.
39. *Ibid.*, at 10.10.
40. *Ibid.*, at Ch. 8 and note in particular her proposal for the development of a new *Arbitrator Intelligence* which would create 'an information resource about arbitrators that is equally accessible, comprehensive, substantive, and reliable' (on which *see* 8.94–8.107).
41. *Supra* n. 9, at [9].

not the personal standing of M that is critical here.[42] The standing of M as an international arbitrator is not challenged. Rather, the challenge is to the standing of international arbitration in general and of arbitrations in London in particular. This point is one of some significance for Bermuda Form arbitrations which, as Jonathan Sumption QC (as he then was) has pointed out, are a 'remarkable hybrid, governed by New York law but providing for London arbitration' and, crucially in this context, 'its very existence is a tribute to the reputation of London arbitration for efficiency, experience and objectivity'.[43] It would be going too far to say that the decision of the Court of Appeal has undermined the reputation of London arbitration for efficiency, experience, and objectivity but it is unlikely to help in the maintenance of that reputation.

Third, there have been recent, influential expressions of concern about the standard of conduct of certain arbitrators, most notably party-appointed arbitrators.[44] Some have gone so far as to question the acceptability of the practice of enabling or entitling parties to nominate arbitrators and have suggested that party-appointed arbitrators be replaced by a system of appointment by arbitral institutions. A particular difficulty with repeat appointments of the same arbitrator by a party to an arbitration is that the arbitrator may become financially dependent on the appointing party and the inference which can be drawn is that the principal reason for the continuing appointments is that the arbitrator has produced awards which are favourable to, or at least acceptable to, the appointing party.[45] In the present case M had been appointed on a number of occasions by Chubb, although the objection taken by Halliburton in the present case was to the performance of his role as chair of the arbitral tribunal, a role to which he was appointed by the High Court. In the eyes of some,[46] there is a greater expectation of neutrality on the part of the chair of an arbitral panel. This perception tends to be vigorously resisted today on the ground that the same standards are

42. In this respect contrast the approach taken by the Privy Council in *Almazeedi v. Penner* [2018] UKPC 3 where the challenge was to the independence of Cresswell J. who was described by Lord Mance as a 'distinguished' and 'experienced' former judge who, like M, was near the end of his career (*see* [2] and [32] and note also to almost identical effect the dissenting judgment of Lord Sumption at [38]). The Privy Council concluded, by a majority, that the fair-minded and informed observer would regard Cresswell J. as 'unsuitable to hear the proceedings' given that his failure to disclose an appointment as a Supplementary Judge of the Qatar International Court and Dispute Resolution Centre amounted to 'a flaw in his apparent independence' since one of the parties to the litigation was a Qatari party with strong state connections. Lord Mance, giving the majority judgment, expressed his discomfort in reaching such a conclusion in relation to Cresswell J. himself but rightly gave greater weight to the need to preserve the integrity of the judicial system.
43. D. Scorey, R. Geddes and C. Harris, *The Bermuda Form: Interpretation and Dispute Resolution of Excess Liability Insurance* (Oxford: Oxford University Press, 2011), p. vii.
44. *See*, for example, Sundaresh Menon, 'Adjudicator, Advocate or Something in Between? Coming to Terms with the Role of the Party-Appointed Arbitrator' (2017) *Arbitration* 185 and J. Paulsson, *supra* n. 1, Ch. 5.
45. *See*, for example, M. Hunter 'Ethics of the International Arbitrator' (1987) 53 *Arbitration* 219.
46. But not in the eyes of Popplewell J. who stated (*supra* n. 9 at [30]) that 'being chairman has no special status so far as impartiality is concerned' and that the duty to act fairly and impartially 'rests in equal measure on all arbitrators'.

expected of all arbitrators, whether party-appointed or not.[47] The latter expectation is a fair one in the sense that there is a minimum requirement which all arbitrators must meet. But, nevertheless, as a matter of practical reality, one can see that parties to an international arbitration may have a legitimate expectation that the chair of the panel will adhere to the highest standards of conduct and be seen to do so. If one views the present case through the lens of Halliburton, it is unlikely that they would have a great deal of confidence in the fairness of a procedure which resulted in the appointment by the court of its opponent's preferred candidate as the chair of the arbitral tribunal who then failed to disclose two appointments in related matters, including one in which he had been appointed by its opponent. Halliburton would not know, and could not have access to, the materials seen by M in the subsequent arbitrations nor could it be present when submissions were made by the parties to these arbitrations. In short, it was in the dark as to what happened in these subsequent arbitrations. The appearance is very poor. This takes us back to the impact of the decision on the perception of London as an arbitral centre. As one commentator rather colourfully remarked, 'it is unclear what exactly the "something more" of "substance" must be if a history of numerous appointments by the same party in disputes involving the same policy language in exchange for money and then failing to disclose contemporaneous appointments by an opposing party in connection with the same underlying incident are not enough'.[48] It is not difficult to see why parties in receipt of such treatment might seek to avoid London as an arbitral centre in future.

Fourth, the conclusion of the Court of Appeal that M breached his duty of disclosure seems to have been a breach which was devoid of consequences. Normally one would expect a breach of duty to have remedial consequences. Had the court concluded that there is no legal duty to disclose but only a practice of making disclosure or that there was only a legitimate expectation that a party in the position of M would make disclosure, it would have been easier to explain the outcome that the failure to disclose could expose the arbitrator to legitimate criticism but not to legal sanction. As it is, the court seems to have created a duty but one with little or no sanction if breached. The duty of disclosure would thus appear to be a rather toothless creature. But, perhaps, too much should not be made of this point. It is not uncommon for the rules of an arbitral institution to require disclosure by an arbitrator in a circumstance which would not constitute a ground for removal. It is here important to emphasise that disclosure does not constitute an admission by an arbitrator that he or she is not impartial. In making disclosure, the arbitrator is giving the parties the opportunity to comment on his or her own assessment of the potential for the disclosed information to create a conflict of interest such that he or she should resign. If the arbitrator has concluded that he or she does have a serious conflict of interest, he or she should resign, not simply disclose the interest. Disclosure of the information, without an offer

47. Although this perception has been challenged by Professor Rogers, *supra* n. 2, whose functional analysis leads her to draw a distinction between the ethical standards expected of a party-appointed arbitrator and those expected of the chair of the arbitral tribunal (*see* paras 7.86–7.91).
48. Christopher C. French, 'English Justice for an American Company?' 97 *Texas Law Review Online* (2018), p. 9 (*see* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3198353, last accessed 25 Mar. 2019).

to resign, should be understood as an assessment by the arbitrator that he or she remains capable of discharging the duties of an arbitrator. There is also a need to avoid what may be termed 'over-disclosure' where arbitrators feel obliged to disclose all kinds of matters even though they are peripheral to, or even irrelevant to, the dispute in respect of which the arbitrator has been appointed. Rather than giving rise to an immediate right to remove the arbitrator, it may be that the better approach is to conclude that a failure to disclose is a factor that can be taken into account by a court when deciding whether or not, in the light of all the facts and circumstances of the case, there is a case of apparent bias. In other words, the failure to disclose may not only expose the arbitrator to legitimate criticism by the parties and, perhaps more importantly by the arbitral institution under whose auspices the arbitration is being conducted, but it may be used as evidence from which the court may infer apparent bias on the part of the arbitrator. The combination of informal sanction and the possibility that a court may infer apparent bias may be sufficient to incentivise most arbitrators to make disclosure should there be a recurrence of the facts of the present case.

Fifth, as has been noted, the Court of Appeal attached some importance to the fact that the degree of overlap between the cases proved to be not as great as it might have been as a result of the outcome of the preliminary rulings in the subsequent arbitral awards. The difficulty with this argument, however, is that it depends upon the use of a degree of hindsight. When M accepted appointment as arbitrator in the subsequent cases he could not have known the outcome of the preliminary rulings and, if these rulings had gone the other way, the degree of overlap would have been much greater, and would surely have led to further questions as to whether or not M could continue to hear all of the cases.

Sixth, to the extent that there is a practice in Bermuda Form arbitrations to appoint a single arbitrator in various arbitrations in respect of an insurance tower implicated in a single claim or catastrophe, a distinction must be drawn between those cases where the appointment is made with the knowledge of all of the parties to the arbitration (to which appointment there can be no objection) and a case such as the present where the appointment was made without the knowledge of Halliburton (to which Halliburton is entitled to object). The advantages of multiple appointments may be substantial but the point is that this assessment is one that should be carried out by all parties to the arbitration, not by one of them.

Finally, M recognised the need for disclosure of his appointments by Chubb at the time of his appointment by the High Court and, after the event, he recognised it would have been 'prudent' to disclose his subsequent appointments. Accepting that his failure to disclose was accidental, it was a significant failure given the factors outlined above, and it should have led to the removal of M as arbitrator.

## §4.06 CONCLUSION

Removal of an arbitrator is an outcome that no one desires, particularly in the case where the arbitration has been fully or partially heard. Even worse is the case where, as happened on the present facts, the arbitration is carried through to its conclusion

and a Final Partial Award is issued.[49] Nevertheless, it is vital that the integrity of the arbitral process is upheld and that justice is not only done but seen to be done. Trust in the system must be actively maintained and not taken for granted. The decision of the Court of Appeal in the present case is open to criticism on the ground that it did take that trust for granted in its approach to the acceptability of appointments in multiple references concerning the same or overlapping subject matter with only one common party, in finding that there was no apparent bias and its conclusion that there were no 'justifiable doubts' as to M's impartiality. It is to be hoped that the Supreme Court will allow Halliburton's appeal and conclude that there were justifiable doubts as to M's impartiality such that he should not have been permitted to chair the arbitral tribunal and should be removed as an arbitrator.

49. Albeit one which was accompanied by a serious express of concern by one of the arbitrators in relation to M's failure to disclose his subsequent appointment by Chubb.