**ARIAS US 2018 Fall Conference**

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**Disclosure obligations of arbitrators and grounds for removal**

**A review of recent judicial decisions in England and a comparison with Bermuda, the Cayman Islands and the United States**

1. **England (Jan Woloniecki, Head of Litigation, ASW Law Limited, Bermuda, and international arbitrator, Brick Court Chambers, London)**

Summary of two decisions of the English Courts:

*Halliburton Company v Chubb Insurance* [2018] EWCA Civ 817

*Guidant LLC v Swiss Re International LLC* [2016] EWHC 1201

1. **Bermuda and the Cayman Islands: A view from the offshore bench (Dr Ian R.C. Kawaley, retired Chief Justice of Bermuda, Justice of the Grand Court of the Cayman Islands, Financial Services Division)**

Summary of decision of the Privy Council (on appeal from the Court of Appeal for the Cayman Islands):

*Almazeedi v Penner* [2018] UKPC 3

1. **Comparison with the United States (Steve Schwartz, Partner, Chaffetz Lindsey, New York)**

Summary of key statutory and case authority:

Federal Arbitration Act, 9 U.S.C. § 1 et seq.

Cases regarding evident partiality and disclosure.

1. **Criticisms of *Halliburton v Chubb* and Questions: Panel Discussion**
2. Will *Halliburton v Chubb* have a negative impact on London as a seat for international arbitration?
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4. What approach should be followed in offshore jurisdictions?
5. **England**

This first section discusses four questions regarding the duty of disclosure and disqualification of arbitrators under English law:

1. What is the scope of the duty of disclosure by a potential arbitrator?
2. What are the consequences of a failure by an arbitrator to disclose; in particular, does it automatically lead to disqualification?
3. What are the grounds for removal of an arbitrator following disclosure?
4. Whether and to what extent an arbitrator may accept appointments in multiple arbitrations concerning the same or overlapping subject matter with only one common party and whether there is a duty of disclosure?

Question 1

What is the scope of the duty of disclosure by a potential arbitrator under English law?

Two important points should be noted at the outset of any discuss of English arbitration law.

First, there is no such thing as “UK law” or “British law”. The United Kingdom of Great Britain and Northern Ireland consists of three separate jurisdictions: England and Wales (together comprising “English law”); Scotland; and, Northern Ireland. English arbitration law is contained in the Arbitration Act 1996 (“the 1996 Act”), which applies to England and Wales, and to Northern Ireland. Scotland has a separate arbitration statute, the Arbitration (Scotland) Act 2010.

Second, although the 1996 Act is comprehensive and sets out in detail the respective powers of arbitral tribunals and the courts, it is not a complete code of English arbitration law. Certain important matters are governed by common law as stated in decisions of the English courts.

For example, there is no statutory duty of disclosure imposed upon arbitrators under the 1996 Act , “but many institutional rules governing arbitration include provisions requiring disclosure to be made of facts or circumstances which may give rise to justifiable doubts as to an arbitrator’s impartiality.”[[1]](#footnote-1) In *Halliburton Company v Chubb Bermuda Insurance Ltd*[[2]](#footnote-2) the Court of Appeal noted that “under the common law, judges should disclose facts which would or might provide the basis for a reasonable apprehension of lack of impartiality.”[[3]](#footnote-3) The Court of Appeal[[4]](#footnote-4) held that the same principle applies to arbitral tribunals.

“In summary, we consider the present position under English law to be that disclosure should be given of facts and circumstances known to the arbitrator which, in the language of section 24 of the Act, would or might give rise to justifiable doubts as to his impartiality. Under English law this means 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.”[[5]](#footnote-5)

The common law test for what must be disclosed (“circumstances which would, or might, give rise to an arbitrator’s impartiality”) is therefore wider than the statutory test for disqualification of an arbitrator (“circumstances exist that give rise to justifiable doubts as to his impartiality”). The Court of Appeal emphasised that the common law test for disclosure was to be applied objectively, looking at the matter from the point of view of a hypothetical “fair-minded and informed observer”, as opposed to the “eyes of the parties”, which is the test under the IBA Guidelines and the ICC Rules.[[6]](#footnote-6) Similarly, the LCIA Rules require disclosure of “circumstances currently known to the candidate which are likely to give rise in the mind of any party to any justifiable doubts as to his or her impartiality or independence.”[[7]](#footnote-7)

Question 2

What are the consequences of a failure to disclose on the part of the arbitrator?

The Court of Appeal emphasised that two distinct questions arise when an allegation of non-disclosure is made. First, the court had to consider whether the disclosure ought to have been made. Second, if the court finds that there ought to have been disclosure, it must then consider the significance of that non-disclosure in the context of an application to remove an arbitrator. The Court of Appeal stated, as a general proposition, that, “[n]on disclosure is … a factor to be taken into account in considering the issue of apparent bias. An inappropriate response to the suggestion that there should be or should have been disclosure may further colour the thinking of the observer and may fortify or even lead to an overall conclusion of apparent bias …”[[8]](#footnote-8) However, the Court of Appeal immediately went on to say, “[n]on-disclosure of a fact or circumstance which should have been disclosed, but does not in fact, give rise to justifiable doubts as to the arbitrator’s impartiality, cannot, however, in and of itself justify an inference of apparent bias. Something more is required …”[[9]](#footnote-9)

The facts of *Halliburton v Chubb* are discussed in the next section (under Question 3). Although the Court of Appeal disagreed with the judge[[10]](#footnote-10), who had held the matters in question did not have to be disclosed, they nonetheless concluded that the matters which should have been disclosed did not give rise to apparent bias and rejected the application to remove the arbitrator.

Question 3

What are the grounds for removal of an arbitrator following disclosure?

Section 24(1)(a) of the 1996 Act provides that a party may apply to the court to remove an arbitrator if, “circumstances exist that give rise to justifiable doubts as to his impartiality.” The English courts have adopted the common law test applicable to the recusal of judges, namely “apparent bias”, to the disqualification of arbitrators. The practical difficulties of applying the test of apparent bias in the context of international arbitration are illustrated by the recent decision of the Court of Appeal in *Halliburton v Chubb*[[11]](#footnote-11)*.*

The facts of *Halliburton v Chubb* were as follows. “M”, a “well-known and highly respected international arbitrator”[[12]](#footnote-12), had been appointed by the High Court as the chairman of an arbitral tribunal in a Bermuda form arbitration with a London seat. The dispute concerned insurance coverage for Halliburton’s liabilities arising out of the Deepwater Horizon disaster. M had disclosed to the High Court that he had previously sat in a number of arbitrations in which Chubb (formerly known as ACE) was a party, including appointments on behalf of Chubb/ACE; and that he was currently appointed as arbitrator in two arbitrations in which Chubb was a party, neither of which related to the Deepwater Horizon. About six months after his appointment as chairman by the High Court, M was appointed by Chubb as an arbitrator in a second insurance coverage arbitration, arising out of Deepwater Horizon, in which Transocean, an affiliated company of Halliburton, was party. He subsequently accepted a third appointment on behalf of another insurer in an arbitration involving Transocean which was also an insurance coverage dispute arising out of Deepwater Horizon. M did not disclose these two subsequent appointments to Halliburton, who learned of them about eighteen months into the reference, at which point Halliburton’s counsel wrote to M and raised an objection to his continuing to sit as chairman. M maintained that the subsequent appointments did not affect his impartiality or independence, and denied that he was under any obligation to disclose them; although, he accepted that, with the benefit of hindsight, it would have been prudent to do so. M offered to resign, provided Chubb consented to his resignation.[[13]](#footnote-13) Chubb declined to so, and Halliburton applied to the Court to remove M on the grounds of apparent bias.

The Court of Appeal formulated the question as follows: “whether, at the time of the hearing to remove, the non-disclosure taken together with any other relevant factors would have led the fair-minded and informed observer, having considered the facts, to conclude that there was in fact a real possibility of bias.”[[14]](#footnote-14) The Court of Appeal continued:

“In answering this question we would in particular take the following factors into account from the perspective of the fair-minded and informed observer: (1) the non-disclosed circumstance does not in itself justify an inference of apparent bias; (2) disclosure ought to have been made, but the omission was accidental rather than deliberate; (3) the very limited degree of overlap means that this is not a case where overlapping issues should give rise to any significant concerns; (4) 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 (5) there is no substance in Halliburton’s criticisms of M’s conduct after the non-disclosure was challenged or in the other heads of complaint raised by them.”[[15]](#footnote-15)

The Court of Appeal agreed with the judge that there was no such possibility.

Question 4

Whether and to what extent an arbitrator may accept appointments in multiple arbitrations concerning the same or overlapping subject matter with only one common party and whether there is a duty of disclosure?

In *Halliburton v Chubb* the Court of Appeal addressed the question 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. This is a situation which arises, typically, in Bermuda form arbitrations. The Court of Appeal cited, with approval, the following passage from a leading work on the Bermuda form:

“14.32 Commencing a Bermuda Form Arbitration

The decision in *Locabail*, and the foregoing discussion, is also relevant in the fairly common situation where a loss, whether from boom or batch, gives rise to a number of arbitrations against different insurers who have subscribed to the same programme. A number of arbitrations may be commenced at around the same time, and the same arbitrator may be appointed at the outset in respect of all these arbitrations. Another possibility is that there are successive arbitrations, for example because the policyholder wishes to see the outcome of an arbitration on the first layer before embarking on further proceedings. A policyholder, who has been successful before one tribunal, may then be tempted to appoint one of its members (not necessarily its original appointee, but possibly the chairman or even the insurer’s original appointee) as arbitrator in a subsequent arbitration. Similarly, if insurer A has been successful in the first arbitration, insurer B may in practice learn of this success and the identity of the arbitrators who have upheld insurer A’s arguments. It follows from *Locabail* and *AMEC Capital Projects Ltd v Whitefriars City Estates Ltd* [2005] 1 All ER 723 that an objection to the appointment of a member of a previous panel would not be sustained simply on the basis that the arbitrator had previously decided a particular issue in favour of one or other party. It equally follows that an arbitrator can properly be appointed at the outset in respect of a number of layers of coverage, even though he may then decide the dispute under one layer before hearing the case on another layer.”[[16]](#footnote-16)

The Court of Appeal considered and approved the decision of Leggatt J (as he then was) in *Guidant LLC v Swiss Re International SE*[[17]](#footnote-17). In that case, which was also an insurance coverage dispute under the Bermuda form, three separate arbitrations had been commenced by the policyholder, Guidant, against Markel, and two Swiss Re entities respectively. Guidant had appointed the same arbitrator in all three references; each of the three insurers had appointed a different arbitrator. The two party-appointed arbitrators in the Markel arbitration had agreed upon a third arbitrator. Guidant applied to have the same third arbitrator appointed in the two Swiss Re arbitrations. The Court of Appeal agreed with Leggatt J (as he then was) that, “the appointment of a common arbitrator does not justify an inference of apparent bias. The fact that the same person has been appointed by Guidant as its arbitrator in the Markel arbitration is not, therefore, a ground on which an application could be made to seek to disqualify him from acting in the Swiss Re arbitrations.”[[18]](#footnote-18) However, Leggatt J declined to appoint the same third arbitrator in the Swiss Re arbitrations:

“If the same person were to be appointed, there would be a legitimate concern that that person would be influenced in deciding the Swiss Re arbitrations by arguments and evidence in the Markel arbitration … Swiss Re is not a party to the Markel arbitration and will have no opportunity to be heard in that arbitration or to influence its outcome. Indeed, without a waiver of confidentiality, they will not be privy to the evidence adduced or the submissions made in the Markel arbitration. If the Markel arbitration were to be heard first, the members of the tribunal in that arbitration would form views, without any input or opportunity for input from Swiss Re, from which they may afterwards be slow to resile.”[[19]](#footnote-19)

The Court of Appeal noted that Leggatt J drew a distinction between the concern which Swiss Re “were entitled to feel” and concern which would justify an inference of apparent bias.[[20]](#footnote-20) However, if Swiss Re had a legitimate concern about the appointment of the same individual as third arbitrator and chairman in all three arbitrations, then it was surely also legitimate for Halliburton to feel the same concern about the position M. If M had been appointed as an arbitrator in the other two Deepwater Horizon arbitrations before the application to the High Court was made to appoint him in the arbitration against Halliburton, then, following the approach of Leggatt J in *Guidant v Swiss Re*, M ought not to have been appointed by the Court as chairman, even though there was no apparent bias. The problem is not one of partiality or impartiality. It is about basic fairness. The hearing is not fair because one arbitrator is receiving information from the other two Deepwater Horizon arbitrations which the other two arbitrators in Halliburton v. Chubb do not have; indeed, he is under a duty to keep whatever learns in the other arbitrations confidential from his co-arbitrators in the third arbitration. However, he cannot put out of his mind what he knows from the other two arbitrations and may decide the matter on the basis of facts and arguments which are not before the tribunal in the third arbitration.

1. **Bermuda and the Cayman Islands**

Bermuda

Bermuda has two statutory regimes for arbitration: the Bermuda International Conciliation and Arbitration Act 1993 (“the 1993 Act”), which gives legal effect in Bermuda to the UNCITRAL Model Law and applies to any international commercial arbitration the seat of which is Bermuda; the Arbitration Act 1986 (which applies to domestic arbitrations and to international arbitrations where the parties have opted out of the 1993 Act). In contrast to the position in England there is a specific statutory duty of disclosure in Bermuda under the Model Law. Article 12(1)[1] provides:

“When a person is approached in connection with his possible appointment as arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.”

The obligation to disclose continues throughout the course of the arbitral proceedings.[[21]](#footnote-21) Article 12(2) provides:

“An arbitrator may be challenged only if circumstances exist that give rise to his impartiality or independence, or he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.”

The challenge procedure is set out in art. 12(3). The parties are free to agree upon a procedure. In the absence of an agreed procedure the challenge must be made to the arbitral tribunal within 15 days of the challenging party becoming aware of the grounds for challenge. If the challenge is not successful the challenging party may apply to the Supreme Court of Bermuda[[22]](#footnote-22) within 30 days of the decision rejecting the challenge. The decision of the Supreme Court of Bermuda is not subject to appeal. There is no Bermudian authority as yet on art. 12.[[23]](#footnote-23)

 Cayman Islands

The Caymanian Arbitration Law 2012 is derived in part from the UNCITRAL Model Law (2006 revision – Bermuda has the original 1985 version, which it has not amended) and in part from the English Arbitration Act 1996. Sections 18 and 19 of the Arbitration Law 2012 are derived from art. 12 of the Model Law. Under section 18 of the Arbitration Law, prospective arbitrators must disclose any matters likely to be relevant to their impartiality or independence and appointed arbitrators are under similar continuing disclosure duties. For practical purposes therefore the law of the Cayman Islands and that of Bermuda appear to be identical. There is no Caymanian authority on disclosure and challenge to arbitrators under the Arbitration Law 2012. However, a recent decision of the Privy Council on an appeal from the Court of Appeal of the Cayman Islands, concern apparent bias and the disclosure obligations of judges, is of great importance. As a decision of the Privy Council it is also binding on the Bermudian courts.

In *Almazeedi v Penner*[[24]](#footnote-24)*,*  the Judicial Committee of the Privy Council found itself, “in the invidious position of having to decide whether the fair-minded and informed observer, would see a real possibility that the judgment in the Cayman court of an experienced judge near the end of his career would be influenced, albeit sub-consciously, by his concurrent appointment to a Qatari court which was at the outset still awaiting its completion by swearing in.”[[25]](#footnote-25) The judge in question, Sir Peter Cresswell, sitting in the Financial Services Division of the Grand Court of the Cayman Islands, had determined certain applications in winding-up proceedings which were challenged by Mr Almazeedi. The judge had failed to disclose the fact of his appointment to the Civil and Commercial Court of the Qatar Financial Centre (“QICDRC”). The gravamen of Mr Almazeedi’ s complaint was that the Qatari Minister of Finance, a Mr Al-Emadi, who effectively controlled the appointment of judges of the QICDRC, and who was involved in a bitter commercial dispute with Mr. Almazeedi, was in a position to influence Sir Peter Cresswell. The majority of the Judicial Committee[[26]](#footnote-26) held as follows:

“33. The key to the resolution of this appeal is not simply that the proceedings in which the judge sat concerned issues arising between investors belonging or close to the Qatari state and the appellant. It is, in the Board’s view, that the disputes involved in such proceedings concerned two personalities, Mr Al-Emadi and Mr Kamal [Mr Al-Emadi’s father-in-law] who were so closely connected with each other as to make it readily appear unrealistic to distinguish their respective attitudes; that the disputes in which the appellant was engaged up to the date of the winding-up order took place against a background of personal threats, one of which … associated the appellant’s resistance to the winding-up order with a challenge to the state of Qatar itself; and that first Mr Kamal and then from 26 June 2013 Mr Al-Emadi, was closely concerned, to an extent which remains opaque, in at least some aspects of the arrangements by or under which the judge was in the process of becoming a new part-time judge of the relatively new Qatar Civil and Commercial Court.

34.              In the result, the Board, with some reluctance, has come to the conclusion that the Court of Appeal was right to regard it as inappropriate for the judge to sit without disclosure of his position in Qatar as regards the period after 26 June 2013 and that this represented a flaw in his apparent independence, but has also come to the conclusion that that the Court of Appeal was wrong to treat the prior period differently. The judge not only ought to have disclosed his involvement with Qatar before determining the winding-up petition. In the Board’s view, and at least in the absence of any such disclosure, a fair-minded and informed observer would regard him as unsuitable to hear the proceedings from at least 25 January 2012 on. The fact of disclosure can itself serve as the sign of transparency which dispels concern, and may mean that no objection is even raised. An alternative to disclosure might have been to ask the Chief Justice to deploy another member of the Grand Court, to which there would, so far as appears, have been no obstacle.”[[27]](#footnote-27)

The application by the majority in *Almazeedi* of the test of apparent bias appears at first blush to be inconsistent with the approach of the Court of Appeal in *Halliburton v Chubb*.[[28]](#footnote-28) We note the dissenting opinion of Lord Sumption:

“The common law rightly imposes high standards of independence on judges at every level. The present dispute, however, is not about the legal test, but about its application to the facts, and for my part I would have held that the test was not satisfied. In the ordinary course, I would not have thought it right to dissent on such a question. But applications based on apparent bias are open to abuse, and the particular problem which arises in this case is not uncommon. Retired judges from Commonwealth jurisdictions commonly sit on an occasional basis in other Commonwealth jurisdictions and in tribunals of international civil jurisdiction. The law is exacting in this area, but it is also realistic. The notional fair-minded and informed observer whose presumed reaction is the benchmark for apparent bias, has only to be satisfied that there is a real risk of bias. But where he reaches this conclusion, he does so with care, after ensuring that he has informed himself of all the relevant facts. He is not satisfied with a look-sniff impression. He is not credulous or naïve. But neither is he hyper-suspicious or apt to envisage the worst possible outcome. The many decisions in this field are generally characterised by robust common sense … Sir Peter Cresswell is not alleged to have done anything which could raise doubts about his independence. The case against him rests entirely on the notion that he might be influenced, possibly unconsciously, by the hypothetical possibility of action being taken against him in Qatar as a result of any decision in the Cayman Islands which was contrary to the Qatari Government’s interests. Hypothetical possibilities may of course found a case of apparent bias, but since there are few limits to the possibilities that can be hypothetically envisaged, there must be some substance to them. There is no suggestion that Mr Al-Emadi was in a position to influence the assignment of work to judges within the QICDRC. Instead, the suggestion is that the notional fair-minded and informed observer would anticipate a real risk of bias because Sir Peter Cresswell might be influenced by the thought that if he made decisions adverse to the interests of the influential persons in Qatar, in particular Mr Al-Emadi, his appointment might not be renewed after his first five-year term or his terms of service might be adversely affected by a decision of the Council of Ministers on the proposal of Mr Al-Emadi. That really is all that it amounts to. In my opinion, this suggestion lies at the outer extreme of implausibility. I am prepared to assume that Mr Almazeedi, who appears to be possessed by a sense of persecution, takes it seriously. But the notional fair-minded and informed observer would not regard it as amounting even to a serious working hypothesis.”[[29]](#footnote-29)

1. **United States**
2. **The Federal Arbitration Act**

The “evident partiality” standard:

The court may vacate the award “where there was evident partiality or corruption in the arbitrators ….” 9 U.SC. § 10(a)(2)

1. **What Is Evident Partiality?**

“If the standard of ‘appearance of bias’ is too low for the invocation of Sectionf 10, and ‘proof of actual bias’ too high, with what are we left? … we hold that ‘evident partiality’ within the meaning of 9 U.S.C. § 10 will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.”

*Morelite Consruction Corp. v. N.Y.C. Dist. Council of Carpenter Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984).

1. **The Interplay Between Disclosure and Evident Partiality.**

“The nondisclosure does not by itself constitute evident partiality. The question is whether the *facts* that were not disclosed suggest a material conflict of interest.”

*Scandinavian Re Co. Ltd. v. St. Paul Fire and Marine Ins. Co.*, 668 F.3d 60, 77 (2d Cir. 2012).

1. **Is Disclosure Enough?**

No. In one extreme case, a party to an arbitration “began showering [the neutral arbitrators’s] law firm with new business.” The court vacated the award, holding:

“It is no answer to assert … that [the neutral] fully disclosed these arrangement to the parties. Five years into an arbitration, those disclosures were little better than no disclosure at all.”

*Thomas Kinkade Co. v. White*, 711 F.3d 719 (6th Cir. 2012).

1. **What About Party Arbitrators?**

“Expecting of party-appointed arbitrators the same level of institutional impartiality applicable to neutrals would impair the process of self-governing dispute resolution.

“That said, a party-appointed arbitrator is still subject to some baseline limits to partiality. We decline to catalogue all ‘material relationship[s]’ that may bear upon the service of a party-appointed arbitrator. … But it can be said that an undisclosed relationship is material if it violates the arbitration agreement.”

*Certain Underwriting Members of Lloyds of London v. Florida, Department of Financial Services*, 892 F.3d 501, 510 (2d Cir. 2018) (citation omitted).

1. **Criticism of *Halliburton v Chubb***

Paul Stanley QC has described the decision in *Halliburto**n v Chubb* as “confused, and likely to satisfy nobody”.[[30]](#footnote-30) In our view *Halliburton v Chubb* is a classic example of the maxim that “hard cases make bad law”. Whilst we share the very high regard of Popplewell J and the Court of Appeal for M, and agree that on a narrow application of the objective test of a hypothetical “impartial and informed observer”, there was, strictly speaking, no case of apparent bias as a matter of English law; we also think that the concerns expressed by Halliburton’s US counsel regarding the appearance of impartiality of M were legitimate and not fanciful. It would, in our view, have been preferable for the Court of Appeal to have held that where, in the exceptional circumstances of that case, legitimate concerns have arisen as to the impartiality of a court-appointed chairman by reason of his accepting additional and undisclosed appointments in related arbitrations after his appointment by the Court, and the chairman had himself expressed a willingness to resign provided both parties agreed, it was appropriate to appoint a new chairman. We think that, as a matter of principle, the chairman of an international arbitral tribunal, ought to be held to a higher standard of impartiality than a party-appointed arbitrator.[[31]](#footnote-31) If, as Leggatt J held in *Guidant v Swiss Re*, the Court should not appoint a chairman, notwithstanding the absence of apparent bias, where one party has good reason to question his impartiality, the Court should also be prepared to remove a chairman if circumstances arise after his appointment which might reasonably suggest to one party a lack of impartiality. Moreover, the Court should have had regard to the fact that M had been Chubb’s preferred candidate for chairman, and that Chubb had refused to consent to his offer to resign. As Mr Stanley QC observes:

“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[[32]](#footnote-32), or Sir Peter Cresswell[[33]](#footnote-33). But part of the function of rules guaranteeing impartiality is to reassure outsiders. That matters all the more in arbitration.”[[34]](#footnote-34)

The Court of Appeal also addressed the issue of multiple appointments of the same arbitrator by one party in unrelated arbitrations. Counsel for Chubb had conceded, “that 10 appointments for one party might objectively give rise to justifiable doubts as to the impartiality of the arbitrator.”[[35]](#footnote-35) This was not the case in relation to M, who had, in any event, disclosed his previous appointments as a party-appointed arbitrator on behalf of Chubb/ACE. The problem of “frequent flyers” – to use Mr Stanley’s term – is that the same individuals tend to be appointed, repeatedly, in Bermuda form arbitrations on behalf of insurers, by a handful of law firms.[[36]](#footnote-36) The practice of perpetuating a small pool of arbitrators in the London market, in particular in the narrow field of Bermuda form arbitrations, was not discussed by the Court of Appeal in *Halliburton v Chubb*. However, it was expressly approved by Popplewell J at first instance, for whom it was not merely to be tolerated as a common practice that is, perhaps, inevitable in a specialised market, but was said to be “desirable”.[[37]](#footnote-37) At a time when international arbitral institutions and leading law firms are seeking to promote diversity in arbitral appointments[[38]](#footnote-38), some international observers of the English arbitral scene, who by definition would not be regarded by Popplewell J as either “objective” or “fair-minded”, may well find the learned judge’s approach undesirable. Moreover, while English judges take an Olympian view of what they consider to be objective and fair, as Mr Stanley QC points out:

“From a US vantage point, lawyers and brokers, facing what they see as an un-level playing field, will increasingly advise policyholders to avoid, where possible, 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.”

**APPENDIX**

**SUMMARY OF ENGLIGH LAW ON DISCLOURE OBLIGATIONS AND DISQUALIFICATION OF ARBITRATORS**

The current state of English law relating to disclosure and disqualification of arbitrators may be summarised as follows.[[39]](#footnote-39)

1. Section 33 of the1996 Act requires the tribunal to act fairly and impartially between the parties. It is presumed that all arbitrators, including party-appointed arbitrators, will be strictly impartial in compliance with their statutory duties. The presumption is said to be the objective conclusion which any fair-minded and informed observer would reach having read section 33. *H v L & Ors* [2017] EWHC 317 (Comm), [16]. Moreover, the presumption of impartiality is not easily rebutted. At the risk of stating the obvious, it appears that the more eminent the reputation of the arbitrator being challenged the less likely it is that a challenge founded on “apparent bias” will succeed.
2. At common law an arbitrator is under a duty to disclose circumstances known to him which “would or might” lead a fair-minded and informed observer to conclude there is a real possibility that the arbitrator is biased. *Halliburton v Chubb* [2018] EWCA Civ 817 [70] The category of circumstances which should be disclosed at common law is therefore broader than those which entitle a party to disqualify an arbitrator pursuant to section 24 of the 1996 Act.
3. An arbitrator may be removed under section 24 of the 1996 Act if, and only if, there are “justifiable doubts as to his impartiality”. *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] Q.B. 451 at [17], *A v B* [2011] 2 Lloyd’s Rep. 591 at [22], *Sierra Fishing Co v Farran* [2015] EWHC 140 at [51]. There does not appear to be separate legal basis upon which an arbitrator can be removed for lack of “independence” if it does not amount to “justifiable doubts as to his impartiality”.
4. The test to be applied is the same as the common law test of apparent bias: would a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias. *Porter v Magill* [2002] AC 357 per Lord Hope at [51]; *R v Gough* [1993] AC 646 per Lord Goff at 670.
5. The fair-minded observer is gender neutral, is not unduly sensitive or suspicious, reserves judgment on every point until he or she has fully understood both sides of the argument, is not complacent and is aware that judges and other tribunals have their weaknesses. The “informed” observer is informed on all matters which are relevant to put the matter into its overall social, political or geographical context. These include the local legal framework, including the law and practice governing the arbitral process and the practices of those involved as parties, lawyers and arbitrators. See *Helow v Secretary of State for the Home Department* [2008] 1 W.L.R. 2416 at [1]-[3]; *A v B* at [28]-[29]. *H v L & Ors* [2017] EWHC 317 (Comm), [16]. See also: *Almazeedi v Penner* [2018] UKPC 3 per Lord Sumption (dissenting) at [36].
6. The test is an objective one. The fair-minded observer is not to be confused with the person who has brought the complaint, and the test ensures that there is a measure of detachment. The litigant lacks the objectivity which is the hallmark of the fair-minded observer. He is far from dispassionate. Litigation is a stressful and expensive business and most litigants are likely to oppose anything which they perceive might imperil their prospects of success, even if, when viewed objectively, their perception is not well-founded: see *Helow v Home Secretary* per Lord Hope at [2]; *Harb v HRH Prince Abdul Aziz Bin Fahd Bin Abdul Aziz* [2016] EWCA Civ 556 per Lord Dyson MR at [69]. *H v L & Ors* [2017] EWHC 317 (Comm), [16].
7. One aspect of the objective test is that it is not dependent on the characteristics of the parties, for example their nationality: see *A v B* per Flaux J at [23]-[24]. The test is the same whether or not foreign nationals are involved, and the test is not informed by the actual or stereotypical attitudes towards the arbitral process which may be held by a party who is, or is managed by, foreign nationals. *H v L & Ors* [2017] EWHC 317 (Comm), [16].
8. 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: *Guidant LLC v Swiss Re International* [2016] EWHC 1201 (Comm); *Halliburton v Chubb* [2018] EWCA Civ 817. An arbitrator may be trusted to decide a case solely on the evidence or other material before him in the reference in question. Objectively this is not affected by the fact that there is a common party. *Halliburton v Chubb* [2018] EWCA Civ 817 [51]. However, a significant number of appointments of one arbitrator by the same party may allow an inference of apparent bias to be drawn. *Halliburton v Chubb* [2018] EWCA Civ 817 [90]. What constitutes a “significant number” has yet to be judicially determined; it was conceded by counsel in *Halliburton v Chubb* that 10 appointments on behalf of the same party was sufficient for there to be a reasonable inference of apparent bias.
9. Inadvertent non-disclosure by an arbitrator of a circumstance which should have been disclosed, but does not as a matter of English law give rise to justifiable doubts as to the arbitrator’s impartiality, cannot, in and of itself justify an inference of apparent bias. Something more is required – see, for example Lord Mance in *Helow v* *Secretary of State for the Home Department* [2008] 1 W.L.R. 2416 at [58]. *Halliburton v Chubb* [2018] EWCA Civ 817 [76]
10. All factors which are said to give rise to the possibility of apparent bias not merely individually but cumulatively. See: *Cofley Limited v Anthony Bingham* [2016] EWHC 240 (Comm) at [115]. *H v L & Ors* [2017] EWHC 317 (Comm), [16].
11. Non-disclosure is therefore a factor to be taken into account in considering the issue of apparent bias. Non-disclosure of a circumstance which “might” give rise to justifiable doubts 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 – see, for example, *Paice v Harding* [2015] EWHC 661, and *Cofley Ltd v Anthony Bingham* [2016] EWHC 240 (Comm). *Halliburton v Chubb* [2018] EWCA Civ 817 [75].
12. The International Bar Association Guidelines on Conflicts of Interest in International Arbitration 2014 edition (“The IBA Guidelines”), which reflect best practice in international arbitration, may provide some assistance to the Court with respect to what may constitute an unacceptable conflict of interests and what matters may require disclosure. However, they are not legal principles, and if there is no apparent bias applying the English law test, whether there has been compliance with the IBA Guidelines is irrelevant. *Cofley Ltd v Anthony Bingham* [2016] EWHC 240 (Comm) at [109]; *A v B* at [73]; *Sierra v Farran* at [58]. *H v L & Ors* [2017] EWHC 317 (Comm),
1. *Halliburton Company v Chubb Insurance Ltd* [2018] EWCA Civ 817, [55]. [↑](#footnote-ref-1)
2. *Halliburton Company v Chubb Insurance Ltd* [2018] EWCA Civ 817. [↑](#footnote-ref-2)
3. [2018] EWCA Civ 817, [56]. [↑](#footnote-ref-3)
4. Sir Geoffrey Voss V-C, Simon and Hamblen LJJ. [↑](#footnote-ref-4)
5. [2018] EWCA Civ 817, [71]. [↑](#footnote-ref-5)
6. See: [2018] EWCA Civ 817, [67]. [↑](#footnote-ref-6)
7. Article 5.4 (emphasis added), quoted *ibid*. [↑](#footnote-ref-7)
8. [2018] EWCA Civ 817, [75]. [↑](#footnote-ref-8)
9. [2018] EWCA Civ 817, [76]. [↑](#footnote-ref-9)
10. Popplewell J, [2017] EWHC 317 (Comm). [↑](#footnote-ref-10)
11. *Halliburton Company v Chubb Insurance Ltd* [2018] EWCA Civ 817; reported at first instance as *H v L & Ors* [2017] EWHC 317 Comm. [↑](#footnote-ref-11)
12. [2017] EWHC 317 Comm, [9], per Popplewell J. [↑](#footnote-ref-12)
13. M’s letter to the parties (quoted by the Court of Appeal: [2018] EWCA Civ 817, [19]) stated, in part, as follows: “Mr Payton wishes me to remain as chairman and for the hearing to go ahead. But if I were to decline Mr Brisic’s invitation to resign, I have little doubt that an application would be made to the court to remove me which may well take some time to resolve … were the decision left to me in accordance with my own self-interests, I would resign. I have no wish to continue to serve as chairman in a tribunal in a case in which one of the parties, through its legal team, has expressed serious doubts as to my impartiality. Furthermore, as you may know, I plan to retire later this year and would not wish that my long career as an international commercial arbitrator which has spanned over three decades should end with my being the subject of a debate in the Commercial Court as to whether I have behaved improperly. However, as I have already indicated, I have duties to both parties: by accepting the Court’s appointment as chairman, I undertook to continue to serve in that capacity until I had completed the task, unless prevented by circumstances beyond my control and I would, I think, be in breach of those duties were I simply to resign in the face of strong opposition from one party.” [↑](#footnote-ref-13)
14. [2016] EWCA Civ 817, [95]. [↑](#footnote-ref-14)
15. [2016] EWCA Civ 817, [96]. [↑](#footnote-ref-15)
16. Richard Jacobs, Lorelie Masters and Paul Stanley, *Liability Insurance in International Arbitration* (2nd ed., 2011 at 14.32), cited [2018] EWCA Civ 817, [52]. [↑](#footnote-ref-16)
17. [2016] EWHC 1201. [↑](#footnote-ref-17)
18. [2016] EWHC 1201, [10], per Leggatt J; cited by the Court of Appeal [2018] EWCA Civ 817, [45]. There was no application to disqualify Guidant’s party-appointed arbitrator. *Guidant v Swiss Re* was concerned with the appointment of a third arbitrator. [↑](#footnote-ref-18)
19. [2016] EWHC 1201, [19], per Leggatt J; cited by the Court of Appeal [2018] EWCA Civ 817, [44]. [↑](#footnote-ref-19)
20. [2016] EWCA Civ 817, [46]. [↑](#footnote-ref-20)
21. Model Law art. 12(1)[2]. [↑](#footnote-ref-21)
22. That is to say the court of first instance in Bermuda. [↑](#footnote-ref-22)
23. For an unsuccessful challenge to an arbitrator appointed the 1986 Act, in which the Supreme Court of Bermuda applied the English authorities on apparent bias, see: *Raydon Underwriting Management Co Ltd v Stockholm Re (Bermuda) Ltd (In Liquidation)* [1998] Bda L.R. 73 (discussed in O’Neill & Woloniecki, The Law of Reinsurance, 4th ed. at para 14-059). [↑](#footnote-ref-23)
24. [2018] UKPC 3. [↑](#footnote-ref-24)
25. [2018] UKPC 3, [32]. [↑](#footnote-ref-25)
26. Lords Mance, Hughes, Wilson and Lloyd-Jones, Lord Sumption dissenting. [↑](#footnote-ref-26)
27. [2018] UKPC 3. [↑](#footnote-ref-27)
28. The decision of the Privy Council in *Almazeedi v Penner* was handed down after the Court of Appeal had heard oral argument in *Halliburton v Chubb*, and the parties were given the opportunity to make further written submissions. The Court of Appeal noted that “the decision in *Almazeedi* supports the importance of disclosure” [2018] EWCA Civ 817 [65], but did not comment on the majority’s application of the “fair minded observer” test on the facts of that case. [↑](#footnote-ref-28)
29. [2018] UKPC 3, [36], [43]. It should be noted that dissenting opinions are very unusual in the Privy Council. A video of oral arguments is available at: https.//www.jcpc.uk/cases/jscpc-2016-0054.html (accessed 24 September 2018). [↑](#footnote-ref-29)
30. Case Note: “Halliburton Company v Chubb Bermuda Insurance Ltd” p. 2 (<http://essexcourt.com/publication/halliburton-v-chubb-2018-ewca-civ-817/> accessed 2 July 2018). [↑](#footnote-ref-30)
31. Mr Stanley QC quotes Jan Paulsson (*The Idea of Arbitration*, p. 155), “citing a case note by [a] distinguished French jurist … who wrote of ‘degrees of impartiality’, contrasting the ‘sufficient’ neutrality of the party-appointee with need for presiding arbitrators to be ‘particularly neutral’!” Although Mr Stanley may find the notion of degrees of impartiality troubling, hence his exclamation mark, in our view the remarks which Jan Paulsson quotes reflect commercial reality in many cases, and is the legal position in the United States. Mr Stanley goes on to quote a further observation by Jan Paulsson (*The Idea of Arbitration*, p. 160): “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.” Perhaps there is something to be said for the American system, where party-appointed arbitrators are expected to be advocates for their side, and only the chairman, who is referred to as “the neutral”, is supposed to be impartial. [↑](#footnote-ref-31)
32. See: *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet (No 2)* [2001] AC 119. [↑](#footnote-ref-32)
33. See: *Almazeedi v Penner* [2018] UKPC 3, discussed above. [↑](#footnote-ref-33)
34. Case Note: “Halliburton Company v Chubb Bermuda Insurance Ltd” p. 18 (<http://essexcourt.com/publication/halliburton-v-chubb-2018-ewca-civ-817/> accessed 2 July 2018) Mr Stanley QC is one to the co-authors of *Liability Insurance in International Arbitration* (which as we have noted above was cited by the Court of Appeal). Mr Stanley’s critique of the present state of the law on disclosure and disqualification of arbitrators is written from the perspective of an advocate who represents policyholders in Bermuda form disputes. Nonetheless, in the view of the authors (one of whom has experience as both counsel and as a party-appointed arbitrator on behalf of policyholders and insurers in Bermuda form arbitrations) some of the points he makes regarding lack of transparency in the arbitral process, and the perception “outsiders” have of London arbitrations are fair and reasonable. [↑](#footnote-ref-34)
35. [2018] EWCA Civ 871, [90]. [↑](#footnote-ref-35)
36. In the case of policyholders in Bermuda form arbitrations, party-appointed arbitrators are typically selected from among US lawyers whose practise involves acting exclusively for policyholders, or from a small number of English QCs, who do not regard insurance policies as ingenious linguistic puzzles which an insured must solve in order to obtain coverage. [↑](#footnote-ref-36)
37. [2017] EWHC 317 (Comm), [22]. [↑](#footnote-ref-37)
38. See: [www.arbitrationpledge.com](http://www.arbitrationpledge.com). [↑](#footnote-ref-38)
39. This summary, which is taken from the 5th edition of O’Neill & Woloniecki, The Law of Reinsurance (due to be published in early 2019) is derived, in part, from the first instance judgment of Popplewell J in *Halliburton v Chubb*, *H v L & Ors* [2017] EWHC 317 (Comm), [16]. [↑](#footnote-ref-39)