THE DUTY TO DISCLOSE, OF IMPARTIALITY AND THE ASSESSMENT OF BIAS IN INTERNATIONAL ARBITRATION: COMMENTS ON *HALLIBURTON COMPANY V CHUBB BERMUDA INSURANCE LIMITED**[1]

Abstract
This study is a case comment on the issues of the duty to disclose, the duty of impartiality and the duty to assess bias in international arbitration as determined by the Supreme Court of the United Kingdom. The study sees in the judgement of the Court a model of approach to be adopted globally. The paper recommends that courts in Africa and European countries should adopt the approach and the standard set by the UK Supreme Court in this case to handle similar International Arbitration issues in their countries for the development of their Bar Associations for innovation, judicial activism and sustainable development.

Keywords: Duty to Disclose, Duty of Impartiality, Assessment of Bias**,** *Halliburton Company v Chubb Bermuda Insurance Limited,* International Arbitration

1. Introduction

Disclosure *simpliciter* is the act of or process of making known something that was previously unknown, a revelation of facts (Garner, 2014). An arbitrator like a judge, must always be alive to the possibility of apparent bias, and of actual unconscious bias. Impartiality which is the opposite of partiality is a noun word which is taken from the adjective word 'impartial' which connotes not favoring one side more than another, unbiased and disinterested; unswayed by personal interest (Garner, 2014). The duty of impartiality has always been a cardinal duty of a judge and an arbitrator. Bias on the other is the mental inclination or tendency, prejudice, predilection (Garner, 2014). Bias rule is a principle of procedural fairness requiring a decision-maker not to be personally biased and not to appear to a reasonable, informed, detached observer to be prejudiced in anyway in legal proceedings or dealing with some matter in the course of making a decision. It is my intention therefore to review this case at hand with respect to two principal issues, to wit (a) 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 (b) whether and to what extent the arbitrator may do so without disclosure. The precis of this UK Supreme Court decision upon which this case will be x-rayed therefore is a reflection of the sacred duty of a judge's or arbitrator's duty to disclose, of impartiality and lack of bias in a matter brought before him; with a view of lending credence to the UK Supreme Court's unprecedented and innovative decision on international arbitration. On Friday; the 27th day of November, 2020 the UK Supreme Court delivered or gave its judgement in this case heard on 12th and 13th November, 2020 UK SC 48.

2. The Brief Facts of this Case (2020) UK SC 48

The appellants ('Halliburton') entered into a Bermuda Form liability policy ('the Policy') with ACE Bermuda Insurance Ltd, which is now called Chubb Bermuda Insurance Ltd ('Chubb') in 1992 and the Policy was renewed annually, Chubb and the three arbitrators involved in the arbitration which I discuss below are the defendants in this action to remove one of the arbitrators (Per Lord Hodge (with whom Lord Reed, Lady Black and Lord Lloyd Jones agree)). But Chubb alone defended the proceedings and appears as the respondent in this appeal. Because the appeal raises questions of law of general importance in the field of arbitration this court allowed and received written and oral representations from the International Court of Arbitration of the International Chamber of Commerce ('ICC') and the London Court of International Arbitration ('LCIA') and written submissions from the Chartered Institute of Arbitrators ('CIArb'), the London Maritime Arbitrators Association ('LMAA') and the Grain and Feed Trade Association ('GAFTA'). The court is very grateful to the interveners for their contribution to the clarification of the wider issues raised by this appeal. At first instance, the names of the parties to, and the arbitrators in, the arbitrations referred to in these proceedings were anonymised. In the judgment handed down by the Court of Appeal, the names of the parties to the Halliburton/Chubb arbitration were revealed and only the names of the arbitrators were anonymised. During the hearing of this appeal, this court questioned the need for and

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appropriateness of such anonymity once the names of the parties to the arbitration had been disclosed and gave the parties to these proceedings, including the arbitrators, an opportunity to make submissions on the issue.

Arbitration in the United Kingdom is as a norm a private form of dispute resolution and both the arbitration and the arbitral award are not generally a matter of public record. In England and Wales, the rules of procedure (CPR Rule 62.10) empower the court to order that a claim under the Arbitration Act 1996 or otherwise affecting arbitration proceedings or an arbitration agreement be heard in public or in private but create a norm that such claims are heard in private. The obligations of confidentiality which are usually imposed in arbitration agreements are designed to protect the privacy of the parties to the arbitration and the evidence led in arbitral hearings. But nobody has suggested any basis in the public interest for preserving the anonymity of the arbitrators themselves in a challenge of this nature. The arbitrators in the Halliburton/Chubb arbitration were defendants in the action but understandably took no part in the proceedings. The arbitrator, whose decisions are challenged in these proceedings, Mr Kenneth Rokison QC has a long-established reputation for integrity and impartiality. But the protection of that reputation is not a sufficient ground for anonymity, particularly when the courts below have founded on that reputation in their reasoning. In any event, the challenge in this case involves no assertion of actual bias but relies entirely on an assertion of an objective appearance of bias. I am satisfied that there are no good grounds for maintaining the anonymity of the arbitrators in this appeal.

BP Expiration and Production Inc ('BP') was the lessee of the Deepwater Horizon drilling rig. Transocean Holdings LLC ('Transocean') owned the rig and had contracted with BP to provide crew and drilling teams. Halliburton provided cementing and well-monitoring services to BP in relation to the temporary abandonment and the plugging of the well. The blow out of the well caused extensive damage and loss of life. It resulted in 'numerous legal claims by the US Government and corporate and individual claimants against BP, Halliburton and Transocean. The US Government claimed civil penalties under federal statutes and the private claims for damages were pursued through a Plaintiffs' Steering Committee ('PSC'). After a trial to determine liability, the Federal Court for the Eastern District of Louisiana in a judgment handed down on 4 September 2014 ('the Federal Judgment') apportioned blame between the defendants as follows: BP 67%, Transocean 30%, and Halliburton 3%. Before the Federal Judgment was handed down, Halliburton settled the PSC claims against it by paying approximately US$ 1.1 billion. Following that judgment, Transocean settled the PSC claims for about US$212m and paid civil penalties to the US Government of about US$1 billion. Halliburton claimed against Chubb under the Policy but Chubb refused to pay Halliburton's claim, contending among other things that Halliburton's settlement was not a reasonable settlement and that Chubb had acted reasonably in not consenting to the settlement. Transocean made similar claims against its liability insurers, including Chubb; Chubb contested Transocean's claim against it on substantially the same grounds.

Both Transocean and Halliburton had purchased liability insurance from Chubb on the Bermuda Form. The Bermuda Form policy was created in the 1980s to provide high excess commercial general liability insurance to companies operating in the United States after the market for such insurance collapsed in that country. Bermuda Form policies usually contain a clause providing for disputes to be resolved by arbitration. Bermuda Form arbitrations are ad hoc arbitrations which are not subject to the rules of an arbitral institution. Transocean and Halliburton had arranged liability insurance in layers and both had obtained cover for the top layer from Chubb. It appears that the material policy terms were the same. The Policy was governed by the law of New York. The Policy contained a standard arbitration clause which provided for arbitration in London by a tribunal of three arbitrators, one appointed by each party and the third by the two arbitrators so chosen. If the party-appointed arbitrators could not agree on the appointment of the third arbitrator, the High Court in London was to make the appointment. The arbitrators were to deliver the award within 90 days of the conclusion of the hearing. There was no right of appeal from the award. Halliburton invoked the arbitration clause of the Policy and nominated Professor William W Park, Professor of Law at Boston University, USA, who is a very experienced arbitrator, as its party-appointed arbitrator on 27 January 2015. Chubb nominated Mr John D Cole, an accomplished US insurance, executive, counsel and arbitrator as its party-appointed-arbitrator. The nominated arbitrators were not able to agree on the appointment of the third arbitrator as chairman. As a result, after a contested hearing in the High Court in which each side put forward several candidates, on 12 June 2015 Flaux J appointed Mr Rokison, who was one of the arbitrators whom Chubb had proposed to the court, as the third arbitrator. Halliburton's main objection to Chubb's candidates, including Mr Rokison, was that they were English lawyers and the Policy was governed by the law of New York but it also objected to the appointment of Mr. Rokison as chair of the tribunal because insurers had a

practice of repeatedly appointing retired judges or QCs known to them, such as Mr Rokison, as party-appointed arbitrators. Nonetheless, Halliburton did not appeal against that order. I refer to this Halliburton/Chubb reference to arbitration as 'reference 1'. Before he expressed his willingness to be appointed, Mr Rokison disclosed to Halliburton and the court that he had previously acted as an arbitrator in several arbitrations in which Chubb was a party, including as a party-appointed arbitrator nominated by Chubb, and that he was currently appointed as arbitrator in two pending references in which Chubb was involved. The High Court did not treat these appointments as an impediment to his appointment in reference 1. Halliburton served its statement of claim in reference 1 on 18 September 2015. Chubb served its statement of defence on 11 December 2015. In December 2015 Mr Rokison accepted appointment as an arbitrator by Chubb in relation to an excess liability claim by Transocean arising out of the same incident ('reference 2'). The appointment was made on behalf of Chubb by Clyde & Co, who were also Chubb's solicitors in reference 1. Within Chubb, the same manager, Mr Trimarchi, was responsible for monitoring the claims made by both Halliburton and Transocean and took the decision to refuse the claims in each case.

Before accepting appointment by Chubb in reference 2, Mr Rokison disclosed to Transocean his appointment in reference 1 and in the other Chubb, arbitrations which he had disclosed to Halliburton. Transocean did not object. But in an omission which is central to the disclosure issue in this appeal, Mr Rokison did not disclose to Halliburton his proposed appointment by Chubb in reference 2. In August 2016 Mr Rokison accepted appointment in another arbitration arising out of the Deepwater Horizon incident as a substitute arbitrator on the joint nomination of the parties in a claim made by Transocean against a different insurer on the same layer of insurance as the claim in reference 2.1 refer to this as 'reference 3'. Nobody disclosed this proposed appointment to Halliburton. This further omission also is a ground of the non-disclosure claim in this appeal but the submissions on this appeal have focused more on the non-disclosure of the appointment in reference 2. In references 2 and 3 there was a preliminary issue which was potentially dispositive of the claims if the tribunal decided in favour of the insurers. The issue was whether the fines and penalties which Transocean had paid to the US Government, should be taken into account in the exhaustion of both the underlying layers of insurance and Transocean's self-insured retention. This issue involved the construction of the relevant insurance policy on undisputed facts. The preliminary issue was heard separately in each of those references during November 2016. On 10 November, 2016 Halliburton discovered Mr Rokison's appointment in references 2 and 3. Mr Thomas Birsic, an attorney at K & L Gates, Halliburton's US lawyers, wrote to Mr Rokison on 29 November 2016 to raise its concerns. He referred to the International Bar Association Guidelines on Conflicts of Interest in International Arbitration ('the IBA Guidelines'), which, he stated, imposed on an arbitrator a continuing duty of disclosure of potential conflicts of interest in accordance with the Orange List in those guidelines, and asked for confirmation of the fact of the two later appointments and an explanation of the failure to make prior disclosure of those appointments.

Mr Rokison responded by email on 5 December 2016. He explained how he had come to be appointed in the later references. He explained, and both parties have accepted his explanation as truthful, that he had not disclosed those appointments to Halliburton, because it had not occurred to him at the dates of those appointments that he was under any obligation to do so under the IBA Guidelines. He stated that he appreciated, with the benefit of hindsight that it would have been prudent for him to have informed Halliburton through its lawyers and apologised for not having done so. He explained that while the three references all arose out of the Deepwater Horizon incident, the roles which Halliburton and Transocean had played had been very different. His involvement in the two Transocean arbitrations had been confined to two two-day hearings on the construction of the policy in which the only evidence had been about the circumstances in which the parties entered into the relevant insurance contracts. He stated his commitment to remain independent and impartial and acknowledged the importance of both parties in an arbitration sharing confidence that their dispute would be determined fairly on the evidence and the law without bias. He concluded:

> I do not believe that any damage has been done but, if your clients remain concerned, I would be prepared to consider tendering my resignation from my appointment in the two Transocean cases if the results of the determination of the preliminary issues of construction, which are likely to be issued shortly, do not effectively bring them to an end.

Halliburton's lawyer responded by repeating his concerns about Mr Rokison's impartiality and calling for him to resign. But Chubb would not agree to his resignation which, in its assessment, would cause the proposed hearing of evidence in the arbitration to be postponed and thereby cause wasted costs and delay. Mr Rokison responded in an email of 15 December 2016 in which he stated that he sought to take into

account his duty to both parties. He repeated his view that he had not breached the IBA Guidelines by a failure to disclose the later appointments but referred to his earlier statement that with hindsight he accepted that it would have been prudent to have made disclosure to avoid any sense of lack of transparency on his part. He repeated that in references 2 and 3 he had not learned anything about the facts of the incident which was not public knowledge. But, recognising that it was fundamentally important that both parties should have confidence in the impartiality of the arbitral tribunal and in particular its chairman, he stated that, if he could decide the matter in accordance with his own self-interest, he would resign. Nonetheless, he owed duties to both parties to complete the task and would be in breach of his duties if he resigned in the face of strong opposition from one party. He therefore proposed that the parties should concentrate on trying to agree upon a mutually acceptable replacement chairman who would be available before the hearing in the arbitration (which was scheduled to start towards the end of January 2017). If they could so agree, he would gladly resign. If they could not, he would have to continue and leave it to the court to decide whether he should be removed. Halliburton responded by issuing a Claim Form in the High Court on 21 December 2016 seeking an order under section 24(1)(a) of the 1996 Act that Mr Rokison be removed as an arbitrator. Halliburton then raised further questions about the overlap between the references, to which Mr Rokison responded by email on 4 January 2017, stating that he was not aware that there were any common issues. Halliburton's lawyers in an email of 5 January 2017 asked Mr Rokison whether he had seen any document in which Chubb or any other respondent in references 2 or 3 had set out similar defences to those pleaded in reference 1. Mr Rokison did not reply to that enquiry. But on 10 January 2017 Chubb released to Halliburton the pleadings in reference 2 which revealed the substantial similarity in its defences which I mentioned in para 10 above, which were challenges to the reasonableness of the settlement which Transocean had negotiated. In its pleaded defence in reference 2, Chubb had also advanced, as an additional defence, the issue of construction of the policy which was the subject matter of the preliminary issue determination. Mr Justice Popplewell heard Halliburton's application in the High Court on 12 January 2017, in which Halliburton sought to have Mr Rokison replaced by Sir Stephen Tomlinson who had just retired from the Court of Appeal, and delivered a judgment, which I discuss below, on 3 February 2017, dismissing the application.

The hearing in reference 1, which included the adducing of evidence and the making of legal submissions, took place between 27 January and 6 February 2017. On 1 March 2017 the tribunals in references 2 and 3 issued awards on the preliminary issues of policy construction, deciding them in favour of Chubb and the other insurer. The tribunals held that because the fines did not count towards the exhaustion of Transocean's self-insured retention, Transocean could not claim an indemnity under the relevant layer of insurance. The awards brought both references to an end, without either tribunal having to consider questions as to the reasonableness of Transocean's settlement. On 5 December 2017 the tribunal in reference 1 issued its Final Partial Award on the merits, deciding in Chubb's favour. The award was signed by all three arbitrators, although Professor Park, the arbitrator whom Halliburton had appointed, qualified his signature of the award in 'Separate Observations'. Professor Park stated that he had signed the award to confirm his participation but that he was unable to join in the award as a result of his 'profound disquiet about the arbitration's fairness'. He explained that:

> ... arbitrators who decide cases cannot ignore the basic fairness of proceedings in which they participate. One side secured appointment of its chosen candidate to chair this case, over protest from the other side. Without any disclosure, the side that secured the appointment then named the same individual as its party-selected arbitrator in another dispute arising from the same events. The lack of disclosure, which causes special concern in the present fact pattern, cannot be squared with the parties' shared *ex ante* expectations about impartiality and even-handedness.

The other arbitrators, Mr Rokison and Mr Cole, responded to the separate observations, stating that they did not regard them as being part of the tribunal's award so as to render it a majority award. This was because those observations did not contain any opinion dissenting from any part of the award, which contained findings of fact, statements of applicable law. The process of reasoning and the final conclusions drawn from that reasoning. It appears from Chubb's written case and Mr Birsic's second witness statement that Halliburton appointed Professor Park as its party -appointed arbitrator in three references against different insurers in insurance claims arising out of the Deepwater Horizon disaster, without formal disclosure. But K & L Gates suggest, in Mr Birsic's second witness statement, that their proposal, which they made when they requested the arbitration and nominated Professor Park, that the arbitrations be consolidated revealed the multiple nominations. Mr Birsic also suggests that the fact that Professor Park was a party-appointed

arbitrator rather than a chair or umpire is a significant distinction from Mr Rokison's position. I will return to the question whether that distinction is legally relevant in English law in my discussion below.

In its claim Halliburton sought the removal of Mr Rokison as arbitrator ir reference 1 and the appointment of another arbitrator to chair the tribunal in his place. The grounds for the claim were that circumstances existed that gave rise to justifiable doubts as to his impartiality and in particular (i) his acceptance of the appointments by Clyde & Co in references 2 and 3 and his failure to notify Halliburton or give it the opportunity to object and (ii) his offer to resign from the / tribunal in reference 1 but Chubb's refusal to permit him to do so.

3. Comments / Review

The Duty of Impartiality

Impartiality has always been a cardinal duty of a judge and an arbitrator, Thus, the first of the principles set out in section 1 of the 1996 Act is that disputes should be resolved fairly by an impartial tribunal. The duty is now enshrined within section 33 of the 1996 Act, which provides:

'(1) The tribunal shall -

(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and

(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

(2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all ether powers conferred on it.'(paragraph 49 of the Judgement)

In the writer's view the Court of Appeal was correct so to hold. An arbitrator is under the statutory duties, in section 33 of the 1996 Act, to act fairly and impartially in conducting arbitral proceedings, in decisions on matters of procedure and evidence and in the exercise of all powers conferred on him or her. Those statutory duties give rise to an implied term in the contract between the arbitrator and the parties that the arbitrator will so act. The arbitrator would not comply with that term if the arbitrator at and from the date of his or her appointment had such knowledge of undisclosed circumstances as would, unless the parties waived the obligation, render him or her liable to be removed under section 24 of the 1996 Act. Moving away from the circumstances of this appeal, if one supposes that an arbitrator has a close financial relationship with a party to the arbitration in which he or she is or is to be appointed, there can be little doubt that such a relationship could readily give rise to justifiable doubts as to the arbitrator's impartiality. Indeed, if the arbitrator had a financial interest in the dispute he or she would be disqualified and the award would be voidable (*Dimes v Proprietors of Grand Junction Canal* (1852) 3 HL Cas 759; 10 ER 301). But absent disclosure, the other party to the arbitration would be unaware of that disqualifying interest. In such circumstances it would in my view be incumbent on the arbitrator to disclose the relationship in order to comply with his statutory duty of fairness under section 33 of the 1996 Act. The duty of fairness is engaged because it is necessary that the other party to the arbitration be aware of the arbitrator's financial connection with the first party and so be able to form a judgment as to his or her suitability as an arbitrator. Unless there is disclosure, the parties may often be unaware of matters which could give rise to justifiable doubts about an arbitrator's impartiality and entitle them to a remedy from the court under section 24 of the 1996 Act. Those remedies are necessary in the public interest. A legal obligation to disclose such matters is encompassed within the statutory obligation of fairness. It is also an essential corollary of the statutory obligation of impartiality: an arbitrator who knowingly fails to act in a way which fairness requires to the potential detriment of a party is guilty of partiality. Unless the parties have expressly or implicitly waived their right to disclosure, such disclosure is not just a question of best practice but is a matter of legal obligation.

While the statutory duty of the arbitrator to act fairly and impartially arises on his or her appointment, there is a necessity for pre-appointment disclosure if the arbitration system is to operate smoothly and the making of such disclosure is recognised as good practice. If an arbitrator waited until after appointment to make disclosure, the arbitrator might have to resign after appointment when a party objects to his or her appointment following disclosure. Unsurprisingly, there is an established practice of pre-appointment disclosure by prospective arbitrators. It is striking that ICC, LCIA and CIArb, which have no financial interest in the outcome of this litigation but have an interest in the integrity and reputation of English-seated arbitration, argue in favour of the recognition of such a legal duty. The existence of a legal duty promotes

transparency in arbitration and is consistent with best practice as seen in the IBA Guidelines (Part 1 of the IBA Guidelines on Conflict of Interest in International Arbitration) and in the requirements of institutional arbitrations such as those of ICC and LCIA. In summary, there is a legal duty of disclosure in English law which is encompassed within the statutory duties of an arbitrator under section 33 of the 1996 Act and which underpins the integrity of English-seated arbitrations. It will be relevant for emphasis to paraphrase the contents of Part I of the IBA Guidelines. Thus,

> Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so during the entire arbitration proceeding until the final award has been rendered or the proceeding has otherwise finally terminated.' (Section 1 of the Guidelines).
>
> (a) An arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator if he or she has any doubts as to his or her ability to be impartial or independent.
>
> (b) The same principle applies if facts or circumstances exist, or have arisen since the appointment, that, from a reasonable third person's point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator's impartiality or independence, unless the parties have accepted the arbitrator in accordance with the requirements set out in General Standard.' (Section 2 of the Guidelines)

The relationship between disclosure and the duty of privacy and confidentiality

In this appeal, which concerns the allegation that an arbitrator should have disclosed the existence of a related arbitration involving a common party, it is necessary to consider the obligation in English law on an arbitrator to uphold the privacy and confidentiality of an arbitration which has an English seat and the boundaries of that obligation. English-seated arbitrations are both private and confidential, if the law governing the confidentiality of the arbitration is English law. The obligations on the parties to uphold the privacy and confidentiality of an arbitration have been characterised as implied obligations arising out of the nature of arbitration itself (*Dolling-Baker v Merrett [1990]* 1 WLR1205 (CA)). In the latter case Potter LJ stated, 'the parties have indicated their presumed intention simply by entering into a contract to which the court attributes particular characteristics'. This analysis coincides with the view expressed by (Sir Patrick Neill QC in his lecture, 'Confidentiality in Arbitration' which he delivered in 1995). In that lecture he described the privacy and confidentiality of arbitration proceedings as 'a fundamental characteristic of the agreement to arbitrate'. In *Department of Economics, Policy and Development of the City of Moscow v Bankers Trust Co* [2004] EWCA Civ 314; [2005] QB 207, Mance LJ stated (para 2)' Among features long assumed to be implicit in parties' choice to arbitrate in England are privacy and confidentiality'.

Whether a failure to make disclosure can demonstrate a lack of impartiality

Is disclosure relevant to apparent bias? Mr Michael Crane QC on behalf of Chubb correctly makes the point that the inequality of knowledge, which Halliburton lists as one of the principal concerns arising from multiple references concerning overlapping subject matter with only one common party, raises a question of the fairness of the arbitral proceedings, which can be dealt with under section 24(l)(d)(i) of the 1996 Act if there is proof of substantial injustice. That is so; but a failure of that arbitrator to disclose the other references could give rise to justifiable doubts as to his or her impartiality. I agree with the dicta of Cockerill J in *PAO Tatneft v Ukraine* [2019] EWHC 3740 (Ch), para 57 that: 'the obligation of disclosure extends ... to matters which may not ultimately prove to be sufficient to establish justifiable doubts as to the arbitrator's impartiality. However, a failure of disclosure may then be a factor in the latter exercise.' Where an arbitrator has accepted an appointment in such multiple references in circumstances which might reasonably give rise to justifiable doubts as to his or her impartiality, or is aware of other matters which might reasonably give rise to those doubts, a failure in his or her duty to disclose those matters to the party who is not the common party to the references deprives that party of the opportunity to address and perhaps resolve the matters which should have been disclosed. The failure to disclose may demonstrate a lack of regard to the interests of the non-common party and may in certain circumstances amount to apparent bias. The Court of Appeal (Para 70) held that, as disclosure was required of circumstances that might lead to a conclusion of apparent bias, the question of what is to be disclosed is to be considered prospectively. A court when later assessing whether there should have been disclosure must have regard to the circumstances prevailing at the time when the arbitrator acquired the requisite knowledge of those circumstances and disregard matters of which the arbitrator could not have known at that time. I agree with that conclusion. A determination as to whether an arbitrator has failed to perform a duty to disclose can only be made by reference to the circumstances at the time the duty arose and during the period in which the duty subsisted. The question whether there should

have been disclosure should not be answered retrospectively by reference to matters known to the fair-minded and informed observer only at a later date.

The duty of disclosure is a continuing duty and circumstances may change before there is disclosure. Those circumstances may aggravate an existing failure to disclose a matter or, while not expunging such a failure, may render any continuing failure a less potent factor in an assessment of justifiable doubts as to impartiality. For example a scenario might be that (i) an arbitrator accepts an appointment in a reference between A and B; (ii) the arbitrator accepts an appointment in an overlapping reference to which A is not a party but B is, without disclosing the appointment to A in circumstances in which the arbitrator should have disclosed it; (iii) the arbitrator makes an interim determination in the first reference which causes A to question his or her impartiality; (iv) the second reference then does not proceed. The failures to disclose at stages (ii) and (iii) would not be negated by the termination of the second reference, but in assessing the significance of the continuing failures to disclose after stage (iv) to the question of justifiable doubts, the court would have regard to the fact that the second arbitration did not proceed.

The Time of Assessment of the Possibility of Bias

What is the time by reference to which the court must assess the question of the possibility of bias? This question is, in my view, of central importance to the outcome of this appeal. As we have seen, section 24(1)(a) empowers the court to remove an arbitrator on the ground that circumstances exist that give rise to justifiable doubts as to his impartiality. The use of the present tense ('exist') directs the court to assess the circumstances as they exist at the date of the hearing of the application to remove the arbitrator by asking whether the fair-minded and informed observer, having considered the facts then available to him or her, would conclude that there is a possibility that the arbitrator is biased. In the present appeal the Court of Appeal was correct in para 95 of its judgment to apply the test for apparent bias by asking whether 'at the time of the hearing to remove' the circumstances would have led the fair-minded and informed observer to conclude that there was in fact a real possibility of bias (Per Lord Hodge).

We turn then to the two principal issues in this appeal.

The issues

a) Issue 1

The first issue is 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 (Orange List under IBA Guidelines). Arbitration involves the conferral of jurisdiction by contract, through the consensus of the parties to the reference. As it is a contract-based jurisdiction, the degree of the independence of the arbitrators from the parties and the extent of their prior knowledge of the circumstances of an event giving rise to the arbitration or the market in which the arbitrating parties operate may, subject to the requirements of the 1996 Act, be determined by the agreement of the parties, express or implied. The 1996 Act contains no provision which directly addresses the arbitrator's independence and prior knowledge, but it imposes the centrally important obligations of fairness and impartiality. Therefore, an arbitrator would be in breach of the requirements of the 1996 Act if his or her lack of independence compromised the duties of fairness and impartiality. In the absence of a statutory provision which directly addresses the question of overlapping appointments, the fair-minded and informed observer will have regard to the terms of the contract or contracts giving rise to the arbitration and the factual matrix in addressing the issue. In considering the factual matrix, the objective observer will take account both of the differing perceptions of the role of the party-appointed arbitrator and the fact that in certain subject matter fields of arbitration there are different expectations as to the degree of independence of an arbitrator and as to the benefits to be gained by having an arbitrator who is involved in multiple related arbitrations. The objective observer will appreciate that there are differences between, on the one hand, arbitrations, in which there is an established expectation that a person before accepting an offer of appointment in a reference will disclose earlier relevant appointments to the parties and is expected similarly to disclose subsequent appointments occurring in the course of a reference, and, on the other hand, arbitrations in which, as a result of relevant custom and practice in an industry, those expectations would not normally arise. The objective observer will consider whether in the circumstances of the arbitration in question it would be reasonable to expect the arbitrator not to have the knowledge or connection with the common party which the multiple references would give him or her.

b) Issue 2

The second issue is whether and to what extent an arbitrator may accept the multiple references described in the first issue without making disclosure to the party who is not the common party. In English law it is not necessary that the facts or circumstances which are to be disclosed would cause the fair-minded and informed observer to conclude that there was a real possibility that the arbitrator was biased. It is sufficient that they might reasonably cause the objective observer to reach that conclusion. It follows that the obligation to disclose can arise in circumstances in which the objective observer, informed of the facts at the date when the decision whether to disclose is or should have been made ('the disclosure date'), might reasonably conclude that there was a real possibility of bias, even if at a later date, with the benefit of information which was not available at the disclosure date, the objective observer would conclude that there was not such a real possibility (Paras 108 and 118 of the judgement). The failure of the arbitrator to disclose such facts and circumstances is itself a factor to which the fair-minded and informed observer would have regard in reaching a conclusion as to whether there was a real possibility of bias. Whether there needs to be such a disclosure depends on the distinctive customs and practices of the arbitration in question. The Orange List in the IBA Guidelines includes the circumstance of an arbitrator having been appointed as arbitrator on two or more occasions within the past three years by one of the parties or its affiliate. However:

> It may be the practice in certain types of arbitration, such as maritime, sports or commodities arbitration, to draw arbitrators from a smaller or specialised pool of individuals. If in such fields it is the custom and practice for parties to frequently appoint the same arbitrator in different cases, no disclosure of this fact is required, where all parties in the arbitration should be familiar such custom and practice.'(Para 3.1.3 of the judgement)

4. Comparing Bermuda Form Policy Clause, Nigerian Arbitration and Conciliation Act and United Nations Commission on International Trade Law (UNCITRAL) Act for the Sustainability of the Decision

Bermuda Form Policy Clause

The policy contained a standard arbitration clause which provided for arbitration in London by a tribunal of three arbitrators, one appointed by each party and the third by the two arbitrators so chosen. If the party appointed arbitrators could not agree on the appointment of the third arbitrator, the High Court in London was to make the appointment. The arbitrators were to deliver the award within 90 days of the conclusion of the hearing. There was no right of appeal from the award (Para II of the UK SC Judgement).

Appointment of Arbitrators under the Arbitration and Conciliation Act

(1) Subject to Subsection (3) and (4) of this section, the Parties may specify in the arbitration agreement the procedure to be followed in appointing an arbitrator.
(2) Where no procedure is specified under subsection (1) of this section –
   (a) (i) in the case of an arbitration with three arbitrators, each party shall appoint one arbitrator and the two thus appointed shall appoint the third, so however that – as if a party fails to appoint the arbitrator within 30 days of receipt of a request to do so by the order party, or
   (ii) if two arbitrators fail to agree on the third arbitrator within 30 days of their appointments, the appointment shall be made by the court on the application of any party to the arbitration agreement;
   (b) In the case of an arbitration with one arbitrator, where the parties fail to agree on the arbitrator, the appointment shall be made by the court on the application of any party to the arbitration agreement made within 30 days of such disagreement (Section 7(1) and (2) of the Arbitration and Conciliation Act, Law of Federation of Nigeria, 2004)

Appointment of Arbitration under the UNCITRAL Act

1. If a sole arbitrator is to be appointed, either party may propose to the other:
   (a) The names of one or more persons, one of whom would serve as the sole arbitrator and
   (b) If no appointing authority has been agreed upon by the parties, the name or names of one or more institutions or persons, one of whom, would serve as appointing authority.
2. If within thirty days after receipt by a party of a proposal made in accordance with paragraph 1, the parties have not reached agreement on the choice of a sole arbitrator, the sole arbitrator shall be appointed by the appointing authority agreed upon by the parties. If no appointing authority has been agreed upon by the parties, or if the appointing authority agreed upon refuses to act or fails to appoint the arbitrator within sixty days of the receipt of a party's request therefore, either party may request

the Secretary-General of the Permanent Court of Arbitration at the Hague to designate an appointing authority.

3. The appointing authority shall at the request of one of the parties, appoint the sole arbitrator as promptly as possible… (Article 6 of the UNCITRAL Arbitration Rules).

In summary, the said Bermuda Form Policy Clause, the Arbitration and Conciliation Act of Nigeria and UNCITRAL Arbitration Rules seems to have the same procedure on the appointment of the third arbitrator or sole arbitrator. Is the judgement of UK Supreme Court sustainable? Sustainable simply put means that can continue or be continued for a long time (Hornby, 2015).

Challenge of Arbitrators (Articles 9 and 12 of the UNCITRAL Arbitration Rules)

Article 9

Prospective arbitrator shall disclose to those who approach him in connexion with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have ready been informed by him of these circumstances.

Article 12

1. If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge will be made:

(a) When the initial appointment was made by an appointing authority, by that authority;

(b) When the initial appointment was not made by an appointing authority/ but an appointing authority has been previously designated, by that authority;

(c) In all other cases, by the appointing authority to be designated in accordance with the procedure for designating an appointing authority as provided for in article 6.

2. If the appointing authority sustains the challenge, a substitute arbitrator shall be appointed or chosen pursuant to the procedure applicable to the appointment or choice of an arbitrator as provided in articles 6 to 91 except that, when this procedure would call for the designation of an appointing authority, the appointment of the arbitrator shall be made by the appointing authority which decided on the challenge.

5. Conclusion and Recommendations

The Supreme Court's judgment significantly clarifies the governing standards under English law for arbitrator disclosures and challenges. It also underscores the fact-specific nature of the enquiry and may make the practical application of the Court's articulated principles a matter for future development and discussion, as well as ground for future disputes. In the specific context of Bermuda Form arbitrations, the judgment is disappointing from a policyholder perspective, as it suggests that the courts may not police issues of apparent bias as robustly as policyholders would reasonably expect in circumstances where, as the Court acknowledged, ‘the policyholder claimant... may often not be a repeat player while an insurance company (and the arbitrators it nominates) ‘is much more likely to be.’ That said, the Court found the arbitrator in question to have breached his legal duty of disclosure, and insurers and lower courts are now on notice, both of that result and of the Court's appreciation of the need for heightened scrutiny in respect to these concerns in Bermuda Form cases. In fact, this judgment has emphasised the importance of arbitrator impartiality and has both clarified and refined the law on apparent bias in the context of arbitration. The case is of real significance for the wider ‘international arbitration community, and should allay potential concerns as to London's status as a leading seat of arbitration. The decision is the latest case to demonstrate the robust approach of the English courts to arbitrator challenges, in line with the courts' non-interventionist and pro-arbitration stance. In this case, the Supreme Court noted that challenges of this kind have ‘rarely succeeded’ and also noted that the objective observer at the heart of the apparent bias test will be ‘alive to the possibility of opportunistic or tactical challenges. We, therefore, recommend that courts in Africa and European countries should adopt the approach and the standard set by the UK Supreme Court in this case to handle similar International Arbitration issues in their countries for the development of their Bar Associations for innovation, judicial activism and sustainable development.