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ARBITRATOR'S IMPLIED DUTY OF DISCLOSURE AND ITS INTERACTION WITH THE DUTY OF IMPARTIALITY AND THE DUTY OF CONFIDENTIALITY

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ABSTRACT

In 2020, The UK Supreme Court delivered Halliburton Company (Appellant) v. Chubb Bermuda Insurance Ltd*. In this case, the Supreme Court confirmed that an arbitrator has an implied duty of disclosure of conflict of interest involving the same or overlapping matters or a common party. Such an implied duty is a duty corollary of the statutory obligation of impartiality and is essential in imposing the duty of impartiality on the basis of the public interest and arbitrator's statutory duty under section 33 of the English Arbitration Act 1996. The analysis of the case demonstrated that the non-absolute duty of confidentiality allows for disclosure in an England-seated arbitration. Also, similar to the position taken by the IBA Guidelines on Conflicts of Interest in International Arbitration (2014), this implied duty is intended to address "inequality of arms" and the private nature of arbitration and enable a "fair-minded and informed observer" to judge whether there is a real possibility of bias on an arbitrator's part.*

KEYWORDS: *implied duty of disclosure, statutory duty of impartiality, fair-minded and informed observer test, inequality of arms, duty of confidentiality,*

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the English Arbitration Act 1996, IBA Guidelines of Conflicts of Interest in International Arbitration, removal of arbitrator

I. INTRODUCTION

The bar set by the Judiciary of England and Wales for the users of London-seated arbitration to challenge an arbitral award or an arbitrator remains high. Such a high threshold was highlighted in the minutes of the Commercial Court User Group Meeting that took place in November 2020 (the "2020 Minutes")[1] as well as confirmed in *Halliburton Company (Appellant) v. Chubb Bermuda Insurance Ltd*[2] (hereinafter "*Halliburton*"). In *Halliburton*, the UK Supreme Court confirmed that the duty of disclosure is an implied term bridging the application of a removal of an arbitrator under section 24(1) and arbitrator's duty of impartiality required in section 33(1) of the English Arbitration Act 1996. *Halliburton* is now the leading English case clarifying the existence of an implied duty of impartiality and the standard applied to this duty, and furthermore the interaction between the duty of disclosure and the duty of confidentiality and privacy in an England-seated arbitration. Its importance can be seen in the number of significant arbitration institutions acting as interveners[3] during the proceedings.

In this case, Halliburton (the appellants) raised concerns over the impartiality of the presiding arbitrator[4] who was involved in multiple arbitrations in relation to claims arising out of the Deepwater Horizon incident 2010 under the Bermuda Form policy. The multiple appointments accepted by the arbitrator include the references of (1) the presiding arbitrator appointed by the English High Court in 12 June 2015 between Halliburton and Chubb (the respondents), (2) a party (Chubb) appointed arbitrator in a dispute between Chubb and Transocean, the owner of the rig, December 2015 and (3) a substitute arbitrator on the joint nomination by Transocean and another insurer in August 2016. The omission of non-disclosure of the appointments in References 2 and 3 was a ground for the challenge raised by Halliburton on 21 December 2016.

In its decision, the UK Supreme Court addressed the duties of disclosure, impartiality and confidentiality to answer the questions of (1) whether and

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[1] This report contains updated information and statistics relating to challenges to arbitral awards under s68 Arbitration Act 1996 and appeals on a point of law under s69 of the Act for the legal year October 2019-September 2020. Compared to the 2018 and 2019 Minutes, the number of cases decreased from seventy-one to nineteen then to sixteen and eighty-seven to thirty-nine then to twenty-two in 2020 Minutes. *See* COMMERCIAL COURT USERS GROUP MEETING (Dec. 4, 2018), https://www.judiciary.uk/wp-content/uploads/2019/02/CCUG-Meeting-04-Dec-18-minutes-1.pdf; COMMERCIAL COURT USERS GROUP MEETING (Nov. 20, 2019), https://www.judiciary.uk/wp-content/uploads/2020/02/Minutes-of-Comm-Ct-Users-Group-20.11.19.pdf.

[2] Halliburton Company v. Chubb Bermuda Insurance Ltd [2020] UKSC 48.

[3] The interveners are the International Court of Arbitration of the International Chamber of Commerce, London Court of International Arbitration, Chartered Institute of Arbitrators (written submissions only), London Maritime Arbitrators Association (written submissions only) and Grain and Feed Trade Association (written submissions only).

[4] Mr. Rokison QC.

to what extent an arbitrator is entitled to accept multiple appointments in different arbitrations relating to the same or overlapping matters and where there is one common party, without this resulting in an appearance of bias; and (2) whether and to what extent the arbitrator could accept multiple appointments in this way without providing disclosure. On the duty of disclosure, Lord Hodge confirmed that there is an implied common law duty of disclosure in English law. Such an implied duty[5] links section 24(1)(a) with section 33 primarily, and sections 1 and 68 of the English Arbitration Act 1996 (hereinafter "The Act"). He also re-affirmed that the same standard of the duty of disclosure applies to both judges and arbitrators in England.[6] In terms of the scope of the duty, he pointed out that the duty of disclosure is a continuing duty[7] and an arbitrator should have the duty to disclose "only" what an arbitrator knows and/or information after reasonable enquiry at the time of the hearing.[8] He spoke of the application of a "fair-minded and informed observer test" in ascertaining whether there is a real possibility of bias on an arbitrator's part.[9] He also pointed out that a failure to disclose information itself is only a factor to be considered by the fair-minded and informed observer.[10]

Regarding the interaction between the common law implied duties of confidentiality and disclosure, Lord Hodge determined that the duty of disclosure is subject to an arbitrator's duty of privacy and confidentiality.[11] Nevertheless, the latter duty may prohibit a disclosure of the necessary information required for the purpose of judging an arbitrator's impartiality.[12] To reconcile the conflicting duties, the court re-affirmed the non-absoluteness of the duty of privacy and confidentiality. [13] Its non-absoluteness allows for a waiver by consent,[14] contract and practice.[15] The consent of the common party can be inferred from nomination or appointment of the repeated arbitrator[16] in a Bermuda Form Arbitration used in this case. Furthermore, equity demands that the parties can only use the information disclosed for their judgment of arbitrator's impartiality or independence.

Using *Halliburton*, the author will start with a brief description of the doubts in the eyes of the non-common party and the arbitrator which led to

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[5] *Halliburton v. Chubb* [2020] [76].
[6] *Id.* [70].
[7] *Id.* [120].
[8] *Id.* [107].
[9] *Id.* [72].
[10] *Id.* [67], [117], [133], [155]; Chubb also defended this point at [46].
[11] *Id.* [88].
[12] *Id.* [101].
[13] *Id.* [99].
[14] *Id.* [88].
[15] *Id.* [112].
[16] *Id.* [104].

the issues of disclosure, impartiality and confidentiality discussed in *Halliburton*. This will be followed by a scrutiny of views that the duty of fairness and impartiality is a cardinal duty for all arbitrators and how the implied duty of disclosure plays a key role in the application of sections 24 and 33 of the Act as well as the interpretation of impartiality. A further discussion with a critical analysis on the functions and the application of the implied duty of impartiality and how it is used as a tool to address the inequality of arms in information will be provided. Finally, the author will analyse the non-absoluteness of the duties of confidentiality and disclosure and their interactions to achieve an arbitrator's implied duty of disclosure. Throughout the discussion, the legal reasonings given in *Halliburton* and the General Standards provided in the IBA Guidelines on Conflicts of Interest in International Arbitration 2014 (hereinafter "the IBA Guidelines") will be cross-referenced to enable the author to conclude that both *Halliburton* and the IBA Guidelines use the arbitrator's duty of disclosure to achieve the cardinal duty of fairness and impartiality.

II. "DOUBTS" IN THE EYES OF HALLIBURTON AND THE ARBITRATOR

The importance of the link between impartiality and enforcement of awards was highlighted by commentators[17] who argue for "the fair solution of disputes by an impartial tribunal"[18] and the ground for challenging arbitral awards.[19] Others also recommend support for a fair arbitration system as "the key reason for imposing the duty of impartiality and independence upon party-appointed arbitrators is not a purported (and actually inexistent) absolute need for party-appointed arbitrators to have such duty, but the crucial need to show that international arbitration is a fair system of dispute resolution."[20] Furthermore, it was said: "impartiality is needed to ensure that justice is done, independence is needed to ensure that justice is seen to be done."[21]

However, before accepting the appointment made by the English High Court, the presiding arbitrator in *Halliburton* disclosed to the court that he had previously been an arbitrator in arbitrations involving Chubb, including some appointments on behalf of Chubb. He also disclosed that he was acting as arbitrator in relation to two current references involving Chubb. Before accepting the appointment for Reference 2 involving both Chubb and

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[17] CLARE AMBROSE & KAREN MAXWELL, LONDON MARITIME ARBITRATION 122 (2d ed. 2002); ROBERT MERKIN & LOUIS FLANNERY, ARBITRATION LAW ¶¶ 10:22, 10:25 (2015).
[18] MERKIN & FLANNERY, *supra* note 17, ¶ 10:23.
[19] *Id.* ¶ 10:25.
[20] ALFONSO GOMEZ-ACEBO, PARTY-APPOINTED ARBITRATORS IN INTERNATIONAL COMMERCIAL ARBITRATION ¶ 4-57 (2016).
[21] Pietro Ferrario, *Challenge to Arbitrators: Where a Counsel and an Arbitrator Share the Same Office—The Italian Perspective*, 27(4) J. INT'L ARB. 421, 421-22 (2010).

Transocean, the arbitrator disclosed the appointment in Reference 1 involving Halliburton and Chubb and the other arbitration involving Chubb to Transocean. His non-disclosure of appointment to Halliburton regarding References 2 and 3 attracted the challenge to his impartiality over multiple appointments involving a common party. The appointments made in References 2 and 3 did not come to light until Halliburton became aware of them in November 2016. Relying on the IBA Guidelines, Halliburton called for his resignation. Chubb disagreed.

In the eyes of Halliburton, the overlap between the references, the substantial similarity between the defences argued in reference 1 and those pleadings asserted and additional defence raised by Chubb in Reference 2 led to justifiable doubts on the presiding arbitrator's independence and impartiality. Halliburton consequently sought an order under section 24(1)(a) of the English Arbitration Act 1996 to have the presiding arbitrator removed as the presiding arbitrator. Nevertheless, re-asserting his independence and impartiality, the presiding arbitrator was of the view that he had breached neither the duty to be independent and impartial nor the IBA Guidelines because of the sequences of the appointments.[22]

Halliburton's challenge over the presiding arbitrator's impartiality was based on the required fairness throughout of the process stipulated in section 1,[23] and the imposition of a statutory duty on an arbitrator to act fairly and impartially to allow each party a reasonable opportunity of putting their case forward following the acceptance of the appointment under section 33.[24] In the breach of his or her duty to act fairly and impartially, an arbitrator can be removed by parties' consent or, upon a party's application, by a court order to remove the arbitrator on the grounds that give rise to justifiable doubts as to his/ her impartiality under section 24(1)(a) of the Act.[25] Failing to observe fairness and impartiality, the award made by the arbitrator can be viewed as one with serious irregularities and be subject to the setting aside procedure.

III. FAIRNESS AND IMPARTIALITY AS A CARDINAL DUTY FOR ALL ARBITRATORS

While all courts[26] confirmed no bias on the arbitrator's part, they stressed that the arbitrator's duty to act fairly and impartiality is the cardinal

[22] The arbitrator emphasised that the matters to be considered in the three arbitrations were different. He pointed out that the disputes argued in References 2 and 3 are likely to be dealt with during the preliminary proceedings. Furthermore, in relation to references 2 and 3, he had not learned anything about the facts of the incident which was not in public knowledge.
[23] H v. L [2017] EWHC (Comm) 137, [47], [51].
[24] English Arbitration Act 1996, § 33(1)(a).
[25] English Arbitration Act 1996, § 24(1)(a).
[26] *H v. L* [2017]; Halliburton Company v. Chubb Bermuda Insurance Ltd [2018] EWCA Civ 817; *Halliburton v. Chubb* [2020].

duty for all arbitrators; regardless of the methods of appointment. An arbitrator's obligation to act fairly and impartiality is also supported by scholars. Lozada stated that, subject to the outcome of a challenged award, impartiality and independence can be perceived as a precondition to render an enforceable award.[27] Also, Born,[28] Ambrose and Maxell have used the term "mandatory duty"[29] and the common law duty of impartiality has been emphasised by Davidson. Aside from the duty, Redfern and Hunter have highlighted the parties' right to have "a prospective arbitrator [who] should disclose all the facts that could reasonably be considered to be grounds for disqualification."[30]

This view[31] was expressed as "no allegiance to the party appointing them" by Popplewell J of the High Court, upheld by the higher courts.[32] In his view, once appointments are made, the appointed arbitrators "are entirely independent of the appointing party"[33] and they are obliged to act fairly and impartially by law.[34] He further stated that, due to the duty enshrined in section 33, a fair-minded and informed observer would expect the arbitrator "to treat as second nature the fact that his duty of impartiality was entirely unaffected by the identity of the party appointing him, and would expect such independence to inform his entire approach to the subject reference."[35] This view is further supported by the appellate courts which pointed out that

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[27] Fernando Pérez Lozada, *Duty to Render Enforceable Awards: The Specific Case of Impartiality*, 27 SPAIN ARB. REV. 71, 92 (2016).

[28] GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2035-44 (3d ed. 2021) (on Disclosure under National Laws).

[29] AMBROSE & MAXWELL, *supra* note 17, at 120; HONG-LIN YU, COMMERCIAL ARBITRATION 105-18 (2011); FRASER DAVIDSON, ARBITRATION ¶ 7.21 (2d ed. 2012) (on Common Law duty).

[30] ALAN REDFERN ET AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION ¶ 4.80 (5th ed. 2009).

[31] *H v. L* [2017] [16].

[32] *Id.* [19].

[33] *Id.*

[34] AMBROSE & MAXWELL, *supra* note 17, at 120-25; D. RHIDIAN THOMAS, THE LAW AND PRACTICE RELATING TO APPEALS AND ARBITRATION AWARDS ¶ 1.2.2.6 (1994); JULIAN D. M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION ¶¶ 11-11-11-15, at 258-60 (2003); BORN, *supra* note 28, at 2035-53 (2035-44 (Disclosure under National Laws); 2045-46 (Disclosure under institutional rules); 2051 (Continuing disclosure obligations); 2051-53 (Arbitrator's obligations to investigate)); MERKIN & FLANNERY, *supra* note 17, ¶¶ 10:22-:25 (10:22 (the significance of impartiality); 10:22 and 10:25 linking up ss1, 24, 33 and 68 (10:25 challenge awards); 10:23 (s 1 objective of fairness: "to obtain the fair resolution of disputes by an impartial tribunal; Merkin used legal safeguards (badge) to describe the importance of impartiality on arbitrator appointment and post appointment); 11:24 (continuing duty in post appointment legal safeguard); 10:28 on the DAC); Shivani Singhal, *Independence and Impartiality of Arbitrators*, 11 INT'L ARB. L. REV. 124 (2008); Mark Kantor, *Arbitrator Disclosure: An Active but Unsettled Year*, 11 INT'L ARB. L. REV. 20 (2008); DAVIDSON, *supra* note 29, ¶¶ 7.20-.34 (7.21 (Common Law duty); 7.22 (Financial/commercial interest); 7.24 (party-appointed arbitrators and the continuing duty)); M'Dougall v. Laird & Sons (1894) 22 R 71, 74 (Scot.); YU, *supra* note 29 (112-15 (difference between independence and impartiality)); REDFERN ET AL., *supra* note 30, ¶¶ 4.72-.90.

[35] *H v. L* [2017] [19].

the duty to act fairly and impartially is "a cardinal duty"[36] for both arbitrators and judges.[37]

Apart from speaking of "a cardinal duty for all arbitrators," both the Court of Appeal and the Supreme Court re-affirmed that the arbitrator's duty of impartiality is the same as those of the judges.[38] Lord Hodge stated that "[a]n arbitrator, like a judge, must always be alive to the possibility of apparent bias and of actual but unconscious bias."[39] Their view followed Lord Woolf MR's decisions in the earlier *Locabail (UK Ltd) v. Bayfield Properties Ltd*[40] and *AT&T*[41] cases. In the *Locabail* case, involving a challenging of the judge, Lord Woolf MR stated that the issue of bias will depend on the facts of the case. On the challenge, a judge must consider the objection and exercise his judgment upon it. A judge should not simply give in to an apparent bias as "[h]e would be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance."[42] On the appeal against the trail judge's decision in dismissing the challenge in *AT&T*, Lord Woolf MR again ruled that the same standard should be applied to both judges and arbitrators. He stated that:

> [I]t would be surprising if a lower threshold [for disqualification] applied to arbitration than applied to a court of law. The courts are responsible for the provision of public justice. If there are two standards, I would expect a lower threshold to apply to courts of law than applied to a private tribunal whose "judges" are selected by the parties. After all, there is an overriding public interest in the integrity of the administration of justice in the courts.[43]

The Supreme Court stressed that a party-appointed arbitrator in English law and Scots law[44] is expected to come up to precisely the same high standard of fairness and impartiality as that imposed upon both presiding arbitrator and parties-appointed arbitrators.[45] Horvath stated that "the

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[36] *Halliburton v. Chubb* [2020] [49].
[37] Paschalis Paschalidis, *Arbitral Tribunals and Preliminary References to the EU Court of Justice*, 33(4) ARB. INT'L 663, 670 (2017).
[38] *Halliburton v. Chubb* [2018] [56].
[39] *Halliburton v. Chubb* [2020] [70].
[40] Locabail (UK) Ltd v. Bayfield Properties Ltd [2000] QB 451.
[41] AT&T Corp. v. Saudi Cable Co. [2000] EWCA Civ 154, [2000] 2 All ER (Comm.) 625.
[42] Locabail (UK) Ltd v. Bayfield Properties Ltd [2000] QB 451 [21].
[43] AT&T Corp. v. Saudi Cable Co. [2000] 2 All ER (Comm.) 625 [40].
[44] Rule 24 of the Scottish Arbitration Rules (Arbitration (Scotland) Act 2010) covers both independence and impartiality. It reads: "(1) The tribunal must (a) be impartial and independent, (b) treat the parties fairly, and (c) conduct the arbitration (i) without unnecessary delay, and (ii) without incurring unnecessary expense."
[45] *Halliburton v. Chubb* [2020] [62]-[64], [66]; William W. Park, *The Four Musketeers of Arbitral Duty: Neither One-For-All nor All-For-One*, *in* IS ARBITRATION ONLY AS GOOD AS THE

angelic party-appointed arbitrator believes himself to be immune to the influences of a legal background or any personal affinity between himself and the party or counsel appointing him."[46] In other words, the requirement for impartiality sees no difference in the types of appointments.[47] In Scots law, Lord McLaren spoke of "ceas[ing] to be qualified to act impartially"[48] when an arbitrator takes upon himself the active conduct on behalf of one of the parties. Similarly, Davidson has written: "the common law position appears to be that, in the absence of agreement to the contrary, party-appointed arbitrators must be impartial . . . . Thus an arbitrator who seems to act in the interests of one of the parties cannot be regarded as impartial."[49]

The cardinal duty of impartiality for all arbitrators is stipulated in the IBA Guidelines. Accordingly, the same standard as applied to both arbitrators and chair is highlighted in General Standard 5(a) which reads: "These Guidelines apply equally to tribunal chairs, sole arbitrators and co-arbitrators, howsoever appointed." In other words, each member of a tribunal has the same obligation to be impartial and independent and no distinction should be made between sole arbitrators, tribunal chairs, party-appointed arbitrators or arbitrations appointed by an institution or a third party.

IV. AN IMPLIED DUTY OF DISCLOSURE APPLIED TO ALL ARBITRATORS

Dismissing the lower courts' view on "good practice to disclosure", the Supreme Court ruled that there is an implied legal duty of disclosure under the common law to link section 24 with section 33. This duty can only be waived by the parties' express or implicit consent.[50] In English law, this implied duty is a duty corollary of the statutory obligation of impartiality[51] and is essential in imposing the duty of impartiality on the basis of the public interest and arbitrator's statutory duty to act fairly. Without such an implied duty, a gap would exist between the application of section 24 and section 33 of the Act.[52] This implied duty would be able to maintain the arbitrators' obligation of fairness and impartiality by addressing the issues arising from inequality of arms and uphold the legal basis for remedies available to parties under section 24.

ARBITRATOR? STATUS, POWERS AND ROLE OF THE ARBITRATOR 25, 26 (Yves Derains & Laurent Lévy eds., 2011).

[46] Günther J. Horvath, *The Angelic Arbitrator Versus the Rogue Arbitrator: What Should an Arbitrator Strive to Be?*, *in* THE POWERS AND DUTIES OF AN ARBITRATOR: LIBER AMICORUM PIERRE A. KARRER 143, 144 (Patricia Shaughnessy & Sherlin Tung eds., 2017).

[47] *Halliburton v. Chubb* [2020] [66].

[48] M'Dougall v. Laird & Sons (1894) 22 R 71, 74 (Scot.).

[49] DAVIDSON, *supra* note 29, ¶ 7.24.

[50] *Halliburton v. Chubb* [2020] [76].

[51] *Id.* [78].

[52] *Id.* [78].

Taking the different nature and circumstances between judicial determination and arbitral determination of disputes[53] into consideration, Lord Hodge expressly named the reasons one must consider in relation to the implied duty of disclosure. They are: (1) inequality of arms, (2) the private nature of arbitration, (3) no right to appeal, (4) elimination of financial gain from appointment and the influence of the appointing party and the legal team, (5) the divergent background of the people involved and ethics, (6) a party's inability to inform itself of evidence and (7) avoidance of pre-disposed arbitrator towards the appointing party.[54]

The significance of inequality of arms in information available to a common party but not to the other party was highlighted in Lord Hodge's judgment. In his words, inequality of arms can arise when the arbitrating party who "is not common to the various arbitrations has no means of informing itself of the evidence led before and legal submissions made to the tribunal (including the common arbitrator) or of that arbitrator's response to that evidence and those submissions in the arbitrations in which it is not a party."[55] Highlighting the difference between private arbitration and the open court justice available to parties in commercial litigation, Lord Hodge pointed out that such an inequality of arms in information would put the non-common party in a disadvantageous position during the proceedings.

Apart from the non-common party, citing Sir George Jessel MR in *Russell v. Russell*,[56] Lord Hodge also pointed out that possible injury can also be suffered by both parties due to inequality of arms and non-disclosure. He pointed out that imbalanced knowledge in information used in multiple arbitrations involving a common arbitrator can cause injury to both parties with the unwitting revelation of their dispute in the context of arbitral determination of disputes. Furthermore, an injury of this nature should be and could be avoided by the performance of the duty of disclosure on the arbitrator's part. A premium on frank disclosure must be part of arbitration to mitigate the effects of the duties of privacy and confidentiality on discovery. This will further avoid the inequality of arms in the situation where "a person who is not a party to an arbitration may know nothing about the arbitration and may have no ready means of discovering its existence";[57] let alone how the evidence adduced and the legal arguments advanced at it, or the award made. "That puts a premium on frank disclosure."[58]

Lord Hodge also emphasised the link between the duty of disclosure, the finality of an award and the different backgrounds of the players involved in

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[53] *Id.* [55].
[54] Oxford Shipping Co. Ltd. v. Nippon Yusen Kaisha [1984] 2 Lloyd's Rep. 373; *Halliburton v. Chubb* [2020] [56]-[62].
[55] *Halliburton v. Chubb* [2020] [61].
[56] Russell v. Russel [1880] LR 14 Ch D 471 at 474-75.
[57] *Halliburton v. Chubb* [2020] [56].
[58] *Id.*

arbitration. Because an arbitral award made by an arbitrator is subject to no appeals or reviews on the issue of fact and often on issues of law,[59] the duty of disclosure imposed on the arbitrator ensures the integrity of an arbitration, reduces the possibility of challenging of an award[60] and re-asserts the arbitrator's independence and impartiality. Considering a financial gain in accepting an appointment, disclosure can further provide an arbitrator an interest in avoiding action which "would alienate the parties to an arbitration . . . also [it] may give those legal teams an incentive to be more assertive of their side's interest in the conduct of the arbitration than may be the case in a commercial court."[61] Performing the duty of disclosure can also be seen as an ethical step to ensure the integrity of international arbitration[62] and remove the concerns over the financial gain mentioned. It has also been decided that the information disclosed by arbitrators will assure the international parties, fellow arbitrators, legal counsels, and other professionals and experts based in different jurisdictions but practising in different legal and cultural traditions an understanding of what conduct would be viewed as ethically acceptable.[63]

V. THE SAME LEVEL OF CONTINUING DUTY OF DISCLOSURE FOR ALL ARBITRATORS

Lord Hodge spoke against a pre-disposed attitude towards the appointing party. He firmly pointed out that no such proposition exists in English law or Scots law despite his acknowledgment of the accepted proposition that a party-appointed arbitrator may have a special role in relation to his or her appointing party in other countries.[64] He ruled that the presiding arbitrator has the same standard in acting fairly and impartially.[65] Furthermore, the duty of disclosure arising from the duty to act fairly and impartially would eliminate the misunderstanding in relation to the party-nominated arbitrator and the role played by the presiding arbitrator. Lord Hodge concluded that in English law and Scots law, both the party-nominated arbitrator and the presiding arbitrator are expected "to come up to precisely the same high stands of fairness and impartiality."[66]

A similar comment is noted in Gomez-Acebo's analysis on a straightforward arbitration when compared to Arb-Med-Arb. He argued for

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[59] *Id.* [58].
[60] Pérez Lozada, *supra* note 27, at 72, 83.
[61] *Halliburton v. Chubb* [2020] [59].
[62] Stavroula Angoura, *Arbitrator's Impartiality Under Article V(1)(d) of the New York Convention*, 15(1) ASIAN INT'L ARB. J. 29, 30 (2019).
[63] *Halliburton v. Chubb* [2020] [60].
[64] The Singapore and US practice was discussed in *Halliburton v. Chubb* [2020] [64]-[65].
[65] *Id.* [62], [64].
[66] *Id.* [63].

a different treatment in Arb-Med-Arb where arbitrators are "required to act as mediators that support their respective appointing parties for the sole purpose of exploring zones of possible agreement during one or more mediation periods—mediation windows—within the arbitration process."[67] However, in a straightforward arbitration, he maintained that all arbitrators, including a party-appointed arbitrator, should remain impartial. Echoing Lozada,[68] he went as far as arguing that an award made by a biased arbitrator is not an arbitral award for the purpose of the New York Convention.[69]

Such an implied duty applied to all arbitrators is also said to be a continuing and non-retrospective duty.[70] The continuing duty of disclosure has been raised by various scholars who argue that "an arbitrator must remain neutral *at all times*."[71] Others include Born,[72] Remberg,[73] Merkin and Flannery[74] who believe that an arbitrator should not favour one party or be predisposed as to the question in dispute *throughout* the proceedings.

Lord Hodge stressed that such a continuing duty throughout the reference may have changing circumstances affecting the scope of disclosure[75] and requiring a fresh disclosure.[76] This is a further extension of Lord Hope of Craighead's statement on "a badge of impartiality" highlighting that the best safeguard against a challenge is to make a disclosure before the hearing starts on the ground of fairness. This ensures that the quality of impartiality exists from the beginning; furthermore, a proper disclosure at the beginning is itself a badge of impartiality.[77] The Supreme Court agreed with Lord Hope of Craighead that a continuous disclosure throughout the reference is the best safeguard to obtain a badge of impartiality.[78] Essentially, a badge of impartiality can be obtained only if an arbitrator makes a prompt disclosure before arbitration starts and also later in the light of the emergence during the currency of the reference of

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[67] Alfonso Gómez-Acebo, *A Special Role of Party-Appointed Arbitrators?*, *in* EVOLUTION AND ADAPTATION: THE FUTURE OF INTERNATIONAL ARBITRATION 381, 407, 416 (Jean Engelmayer Kalicki & Mohamed Abdel Raouf eds., 2019).
[68] Pérez Lozada, *supra* note 27, at 92.
[69] GOMEZ-ACEBO, *supra* note 20, at 56.
[70] *Halliburton v. Chubb* [2020] [119]-[120].
[71] DAVIDSON, *supra* note 29, ¶ 7.24.
[72] BORN, *supra* note 28, at 2035.
[73] Jan Ramberg, *Too Close for Comfort*, *in* STORIES FROM THE HEARING ROOM: EXPERIENCE FROM ARBITRAL PRACTICE 136 (Bernd Ehle & Domitille Baizeau eds., 2014).
[74] MERKIN & FLANNERY, *supra* note 17, ¶¶ 10.24, 10.28; Bankole Sodipo, *Dealing with Arbitrator Challenge, Non-Disclosure and Allegations of Bias: A Review of the Lagos Court Ruling Setting Aside the ICC Global Gas v. Shell Award*, 86(4) ARB.: INT'L J. ARB., MEDIATION & DISP. MGMT. 517, 531-32 (2020).
[75] *Halliburton v. Chubb* [2020] [120].
[76] *Id.* [120].
[77] Davidson v. Scottish Ministers [2004] UKHL 34, [54].
[78] *Halliburton v. Chubb* [2020] [70].

matter which ought to be disclosed.[79] This is similar to the term "legal safeguards" described by Merkin [80] concerning the importance of impartiality on arbitrator appointment and post appointment.

Both the UK Supreme Court and the Court of Appeal ruled that the information on the multiple appointments discussed in this case should be disclosed to *Halliburton*. Also, judges are required to look into the information available "at that time" when the disclosure should have been made by an arbitrator.[81] This corresponds with Lord Hope's statement on "a badge of impartiality" mentioned above. It was further explained that "at that time" means that a court should not have regard to matters known at a later stage[82] and the court can only deal with the grounds for challenge which exist at the time at which it hears the application.[83]

On this point, the Supreme Court agreed with Lord Justice Hamblen's formulation of the duty of disclosure; that is, an arbitrator should give disclosure of facts and circumstances known to him "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".[84] In his explanation of "would or might"[85] discussed in Lord Justice Hamblen's decision, Lord Hodge made a distinction between justifiable doubts and tactical challenge. In the former case, the correct course for an arbitrator whose acts or failure to act would give rise to justifiable doubts is to decline the appointment or withdraw from the reference.

Regarding the content to be disclosed, Lord Hodge stated that "reasonable enquiries" may be needed to have a proper disclosure of the facts "known to the arbitrator." He said: "An arbitrator can disclose only what he or she knows and is, as a generality, not required to search for facts or circumstances to disclose. But I do not rule out the possibility of circumstances occurring in which an arbitrator would be under a duty to make reasonable enquiries in order to comply with the duty of disclosure."[86] This view draws a parallel with Born's observation that some institutional rules and national laws impose duties on arbitrators to investigate the existence of potential conflicts.[87] Davidson pointed out that the IBA

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[79] *Id.* [70].
[80] MERKIN & FLANNERY, *supra* note 17, ¶ 10.23.
[81] *Halliburton v. Chubb* [2018] [56]; *Halliburton v. Chubb* [2020] [37].
[82] *Id.*
[83] *Halliburton v. Chubb* [2020] [50].
[84] *Halliburton v. Chubb* [2018] [65].
[85] *Halliburton v. Chubb* [2020] [108].
[86] *Id.* [107].
[87] BORN, *supra* note **Error! Bookmark not defined.**, at 2035-44; EVA LITINA, THEORY, LAW AND PRACTICE OF MARITIME ARBITRATION: THE CASE OF INTERNATIONAL CONTRACTS FOR THE CARRIAGE OF GOODS BY SEA 152 (2020); Teresa Giovannini, *Ex Officio Powers to Investigate: When Do Arbitrators Cross the Line?*, *in* STORIES FROM THE HEARING ROOM: EXPERIENCE FROM ARBITRAL PRACTICE 59, 75 (Bernd Ehle & Domitille Baizeau eds., 2014).

Guidelines only speak of "circumstances known to him", and do not qualify this with a phrase such as "or which ought to be known", or "or which could be discovered with reasonable due diligence."[88] He further stated that duty of impartiality does not impose a duty of enquiry on the potential or actual arbitrator. Nevertheless, this is not what the IBA Guidelines have stipulated in General Standard 7(d) where:

> An arbitrator is under a duty to make reasonable enquiries to identify any conflict of interest, as well as any facts or circumstances that may reasonably give rise to doubts as to his or her impartiality or independence. Failure to disclose a conflict is not excused by lack of knowledge, if the arbitrator does not perform such reasonable enquiries.

The same duty also applies to the parties under General Standard 7(c).

VI. DUTY OF DISCLOSURE AS A BALANCE TOOL FOR AN OBJECTIVE DUTY OF IMPARTIALITY

The Supreme Court dismissed the arguments for a subjective test which looks into the issue of impartiality from parties' viewpoints.[89] Instead, one should see the duty of disclosure act as a tool to balance vexatious challenges caused by trivial matters which could not materially support a conclusion of a real possibility of bias and those matters which "might"[90] reasonably give rise to justifiable doubts. Hence a financial gain in accepting multiple appointments with a common party itself may not be a sufficient ground for removing an arbitrator on its own. It may be sufficient in the probability of bias but may not constitute Lord Goff's "real danger" of a possibility "which leads [the arbitrator] to unfairly regard or have unfairly regarded with favour, or disfavour."[91]

The "real possibility of bias" [92] was discussed in both appeals in *Halliburton*. It was related to the presiding arbitrator's failure in disclosing the information at that time when the disclosure should have been made. A mere failure of disclosure of "a fact or circumstance which should have been disclosed, but does not in fact, on examination, give rise to justifiable doubts as to the arbitrator's impartiality, cannot, however, in and of itself justify an

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[88] Davidson, *supra* note **Error! Bookmark not defined.**, at 7.31.
[89] *Halliburton v. Chubb* [2020] [66], [72].
[90] *Id.* [108].
[91] Regina Respondent v. Gough [1993] AC 646, 670.
[92] AMBROSE & MAXWELL, *supra* note **Error! Bookmark not defined.**, at 124. The view is similar to, see generally, AT&T Corp. v. Saudi Cable Co. [2000] 2 All ER (Comm.) 625, where the Court of Appeal took the view that the court must consider whether there was a real danger of unconscious bias and the test of real possibility raised in Porter v. Magill [2001] UKHL 67, [2002] 2 WLR 37.

inference of apparent bias", according to Lord Justice Hamblen.[93] Even if this single factor "ought to" be disclosed, its failure of disclosure may not have the real danger of bias. Whether a reasonable apprehension of lack of impartiality can be upheld depends on a combination of factors;[94] for instance, the combination of the actual degree of an overlap about what the arbitrator knew at the time and the nature of other connections.

The same point on an omission being "a factor to be considered"[95] was also supported by the Supreme Court.[96] In other words, more evidence is required before the courts can consider the real possibility of bias. The Supreme Court acknowledged that the arbitrator's failure to disclose may demonstrate "a lack of regard to the interests of the non-common party and may in some circumstances amount to apparent bias."[97] However, the court ruled that an arbitrator's failure to disclose information is only one factor which must be taken into consideration together with other factors assessed by an objective observer. Taking the interventions by the International Chamber of Commerce (hereinafter "ICC"), the London Court of International Arbitration (hereinafter "LCIA") and Chartered Institute of Arbitrators (hereinafter "CIArb") into account, the court pointed out that the existence of bias can only be upheld by a fair-minded and informed observer when the non-disclosure would colour their thinking.[98] Before reaching the conclusion of a bias, an informed observer must show awareness of different practice and custom in arbitration and consider the reputation and experience of the arbitrator and the relevant circumstances of the arbitration. No assumption of universal practice should be made by the informed observer[99] who should also watch out closely for "opportunistic or tactical challenges" raised by a party.[100]

Lord Hodge's intention to prevent "unwarranted or frivolous challenges" resembles the statement contained in the Introduction of the General Standards provided in the IBA Guidelines. It reads: "Parties have more opportunities to use challenges of arbitrators to delay arbitrations, or to deny the opposing party the arbitrator of its choice. Disclosure of any relationship, no matter how minor or serious, may lead to unwarranted or frivolous challenges."[101] To avoid ill-founded, tactical, unwarranted or frivolous challenges spoke in *Halliburton* so as to protect awards against

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[93] *Halliburton v. Chubb* [2018] [76].
[94] *Id.* at [91].
[95] *Halliburton v. Chubb* [2020] [67].
[96] *Id.* [67], [111], [117].
[97] *Id.* [118].
[98] *Id.* [73].
[99] *Id.* [67].
[100] *Id.* [68].
[101] INT'L BAR ASS'N, IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION Introduction, ¶ 1 (2014) [hereinafter IBA GUIDELINES].

challenges based on alleged failure to disclose, a balance must be struck between the parties' ability to select arbitrators of their own choice and parties' right to a fair hearing and right to disclosure of circumstances that may call into question an arbitrator's impartiality or independence. [102] Therefore, it is essential to have "more information be made available to the parties … and to promote a level playing field among parties and among counsel engaged in international arbitration."[103] This allows the parties to evaluate the arbitrator's impartiality[104] as well as to protect the legitimacy of the process and provide certainty of arbitration.

Nonetheless, the Supreme Court urged one to exercise caution against the Court of Appeal's decision that multiple references concerning the same or overlapping subject matter with only one common party does not of itself give rise to an appearance of bias. Though the Supreme Court agreed that receiving financial benefit from appointments on its own is not a disqualifying factor alone,[105] a qualification to that part of the decision was added by both Lord Hodge and Lord Arden regarding the relationship between multiple references and an appearance of bias. Lord Hodge spoke of his disapproval of the argument that "multiple appointments *can never* be sufficient of itself to give rise to the appearance of bias"[106] (italics added). He expressed his concerns in stating that "the inequality of knowledge between the common party and the other party or parties has the potential to confer an unfair advantage of which an arbitrator ought to be aware."[107] In his emphasis on the circumstances which can compromise impartiality, he stated that the circumstances of the arbitration include the custom and practice in arbitrations in the relevant field.[108] Lady Arden similarly pointed out in her concurring judgment that providing an arbitrator with "a blank cheque of arbitrator's trustworthiness" in their multiple references concerning a common party does not provide "a complete answer to the objections based on inequality of arms and material asymmetry of information."[109] Practice of the relevant fields must be considered. After all, "this trust may not translate easily for the many parties to arbitrations who are familiar with different legal systems."[110] She further stated:

> In my judgment, unless the arbitration is one in which there is an accepted practice of dispensing with any need to obtain parties'

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[102] *Id.* Introduction, ¶ 2.
[103] *Id.* Introduction, ¶ 1.
[104] *Id.* Explanation to General Standard 3(c).
[105] *Halliburton v. Chubb* [2020] [149].
[106] *Id.* [130].
[107] *Id.*
[108] *Id.* [130]-[131].
[109] *Id.* [164].
[110] *Id.*

> consent to further appointments, an arbitrator should proceed on the basis that a proposal to take on a further appointment involving a common party and overlapping subject-matter (in that it arises out of the same event) is likely to require disclosure of a potential conflict of interest.[111]

VII. OBJECTIVE IMPARTIALITY

The Courts dismissed the application of parties' subjective understanding of the information which may raise "their justifiable doubts" [112] in their determination of duty of impartiality and duty of disclosure. Lord Hodge denied the link between the requirement of impartiality and the subjective understanding of the parties. He spoke of the relationship between the arbitrator and his or her appointing party being the compatibility of that role and the requirement of impartiality. He ruled that the issue of impartiality must be objectively reviewed using the following methods:

> To do so is not to measure apparent bias by reference to the subjective understanding of the parties to a particular arbitration and thereby to abandon the objective assessment which the fair-minded and informed observer entails. Nor is it an acceptance that there is any difference in English law as to the obligation of impartiality owed by different types of arbitrator, for there is none. It is to recognise the context in which the objective observer's judgement as to apparent bias is being made. The objective observer takes account of how some parties and their appointees conduct themselves in such arbitrations and of the debate within the arbitration community as to the role of the party-appointed arbitrator when considering whether "mixing and matching" (as counsel put it) the roles as party appointee in one reference and chairman of an arbitral tribunal in a related reference would pose a risk to the arbitrator's impartiality in either case.[113]

Objective impartiality was also spoken of by both the High Court and the Court of Appeal. Popplewell J saw "multiple appointments" as the usual practice since arbitration is based on consensus and expertise. It was said that the finality of arbitration sought by the disputants engaged in arbitration

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[111] *Id.*
[112] *Id.* [60].
[113] *Id.* [66].

can be achieved by multiple appointments.[114] Popplewell J's view on the overlap between appointments with a common party[115] was also upheld by the Court of Appeal. Lord Justice Hamblen confirmed that the overlap is minimal and it does not justify an inference of apparent bias.[116] Both judges and arbitrators are to be trusted, including arbitrators whose multiple references involve a common party. Lord Justice Hamblen stated:

> Arbitrators are assumed to be trustworthy and to understand that they should approach every case with an open mind. The mere fact of appointment and decision making in overlapping references does not give rise to justifiable doubts as to the arbitrator's impartiality. *Objectively* this is not affected by the fact that there is a common party. An arbitrator may be trusted to decide a case solely on the evidence or other material before him in the reference in question and that is equally so where there is a common party.[117] (Italic added)

The word "objectively" used by Lord Justice Hamblen corresponds with the objective "fair-minded and informed observer" test[118] in case law. Citing Lord Hope in *Helow v. Secretary of State for the Home Department*,[119] Lord Justice Hamblen's emphasis is on the difference between the objective and subjective tests as: "an objective test . . . is not to be confused with the approach of the person who has brought the complaint. It involves taking a balanced and detached approach, having taken the trouble to be informed of all matters that are relevant."[120] Consequently, the fair-minded and informed observer should work on an assumption of an objective basis.[121] This basis requires that a fair-minded person be not unduly sensitive or suspicious[122] and always reserves judgment on every point until she has seen and fully understood both sides of the argument.[123]

The word "objectively" was also spoken of in other cases. The European Court of Human Rights answered positively to the question of whether the fear of impartiality must be objectively justified in *Hauschildt v. Denmark*.[124] The Court stated: "This implies that in deciding whether in a

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[114] *H v. L* [2017] [29].
[115] *Id.* [19]; *Halliburton v. Chubb* [2020] [31], [63], [70].
[116] *Halliburton v. Chubb* [2018] [49].
[117] *Id.* [51].
[118] *H v. L* [2017] [37], [63].
[119] Helow v. Secretary of State for the Home Department [2008] UKHL 62, [2008] 1 WLR 2416 [2-3].
[120] *Halliburton v. Chubb* [2018] [40].
[121] *Helow v. Secretary of State for the Home Department* [2008] [29].
[122] *Id.* [2]; Johnson v. Johnson (2000) 201 CLR 488 (Austl.) [53].
[123] *Helow v. Secretary of State for the Home Department* [2008] [2].
[124] Hauschildt v. Denmark 154 Eur. Ct. H.R. (Ser.A) ¶ 48 (1989).

given case there is a legitimate reason to fear that these requirements are not met, *the standpoint of a party is important but not decisive*. What is decisive is whether this fear can be held to be *objectively justified*"[125] (italic added). Similarly, the concept of independence and objective impartiality was supported in *Findlay v. United Kingdom*,[126] where the court said that when judging a tribunal as being "independent", regard must be paid to "the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence."[127] As to "impartiality", two requirements are required; "First, the tribunal must be subjectively free from personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect."[128]

In England, the word "objective" is consistent with Lord Goff's discussion on "the eyes of a reasonable man", a test applied to both jurors and judges. Such a personified reasonable man is required for the courts to "ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time."[129] This was also discussed in *Porter v. Magill*[130] where an auditor appointed was required to "maintain an independent and objective attitude of mind and ensure that his independence was not impaired in any way."[131] Lord Bingham also stated that the fundamental question the court needs to address is "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."[132]

In Scotland, a fair-minded and informed observer's view on a real possibility of bias would determine this issue.[133] Lord Bingham pointed out that "[t]he judge must be free of any influence which could prevent the bringing of an objective judgment to bear or which could distort the judge's judgment, and must appear to be so"[134] when answering whether the decisions of an Extra Division of the Court of Session were vitiated by apparent bias and want of objective impartiality in *Davidson v. Scottish Ministers.*[135]

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[125] *Id.*
[126] Findlay v. United Kingdom 24 Eur. Ct. H.R. 221 (1997).
[127] *Id.* ¶ 73.
[128] *Id.*
[129] *Regina v. Gough* [1993] 670.
[130] *Porter v. Magill* [2001].
[131] *Id.* [66].
[132] *Id.* [103].
[133] *Davidson v. Scottish Ministers* [2004] [9].
[134] *Id.* [7].
[135] *Davidson v. Scottish Ministers* [2004] UKHL 34.

Returning to *Halliburton*, in his application of the objective test, Lord Hodge pointed out that a fair-minded and informed observer can only look into the relevant factors and circumstance in an "astute"[136] manner to determine whether there is a real danger of bias after the objective test is fulfilled.[137] He further pointed out that a fair-minded and informed observer must have awareness of non-existence of universal practice and the issue of inequality of arms in the limited knowledge of the reputation and experience of an arbitrator. Without universal practice in place, the relevant factors a fair-minded and informed observer should consider are: the characteristics of international commercial arbitration, [138] the privacy nature of arbitration,[139] the limited right to appeal,[140] international backgrounds of the partakers,[141] non-allegiance towards the appointing party,[142] the level of professional reputation and experience of an arbitrator, the circumstances of the arbitrator,[143] and the possibility of opportunistic or tactical challenges[144] as discussed above.

Acknowledging the accepted practice of further appointment, Lady Arden cautioned us about how the objective appearance of apparent bias in multiple appointments would present to the users. She was of the opinion that an arbitrator should make a disclosure of a potential conflict of interest to eliminate doubts over impartiality.[145] In her concurring judgment, unless there is an accepted practice of dispensing with any need to obtain parties' consent to further appointments, an arbitrator should proceed on the basis that a disclosure of a potential conflict of interest is required if a further appointment proposal involves a common party and overlapping subject-matter.[146] Disclosure would avoid the risk of satellite litigations to upset awards and maintain a balance between the parties and material non-disclosure under section 24 of the Act. [147] Consequently, further appointments must observe the arbitrator's obligations in the current arbitration[148] and "an arbitrator should proceed on the basis that a proposal to take on a further appointment involving a common party and overlapping

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[136] *Halliburton v. Chubb* [2020] [69].
[137] *Id.* [55].
[138] *Id.* [69].
[139] *Id.* [57].
[140] *Id.*
[141] *Id.* [60].
[142] *Id.* [62].
[143] *Id.* [68].
[144] *Id.*
[145] *Id.* [161].
[146] *Id.* [164].
[147] *Id.* [165].
[148] *Id.*

subject-matter (in that it arises out of the same event) is likely to require disclosure of a potential conflict of interest."[149]

Similarly, avoidance of a potential conflict of interest is highlighted in the IBA Guidelines which point out that a disclosure does not imply the existence of conflict of interest.[150] Any challenge over a potential conflict should only be successful if an objective test set out in General Standard 2 is met.[151] It highlights that the purpose of disclosure is to "allow the parties to judge whether they agree with the evaluation of the arbitrator and, if they so wish to explore the situation further."[152] In other words, the parties can only judge, evaluate or explore with more information and be in a position of being fully informed of any facts or circumstances that may be relevant in "their" view.[153]

The objective test also receives support from Ambrose and Maxwell who wrote that "the court must be satisfied that the alleged circumstances exist and they justify any doubts as the arbitrator's impartiality." [154] However, it is worth noting that not every scholar agrees with the application of an objective test. For instance, while acknowledging that "[a] purely objective test for disclosure exists in the majority of the jurisdictions analysed and in the UNCITRAL Model Law," Redfern and Hunter hold a view which is more inclined to the subjective test taking parties' interest into account. They said: "Nevertheless, the working Group recognizes that the parties have an interest in being fully informed about any circumstances that may be relevant in their view."[155]

In the IBA Guidelines, General Standards 2 and 3 outline the duty of impartiality or independence and duty of disclosure respectively. The reference to an objective test can be seen in the IBA Guidelines where Standard 2(b) talks about "from the point of view of a reasonable third person." [156] The explanation to Standard 2(b) reads: "the test for disqualification is an objective one" as well as "a reasonable third person test" [157] by citing Article 12 of the UNCITRAL Model Law in the explanation.

Nevertheless, the subjective test of "in the eyes of the parties" is specified in General Standard 3(a) in relation to arbitrator's duty of disclosure. It reads: "If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or

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[149] *Id.* [164].
[150] IBA GUIDELINES, *supra* note 101, Explanation to General Standard 3(c).
[151] *Id.* General Standard 3(c); *id.* Explanation to General Standard 3(c).
[152] *Id.* Explanation to General Standard 3(c).
[153] *Id.* Explanation to General Standard 3(a).
[154] AMBROSE & MAXWELL, *supra* note **Error! Bookmark not defined.**, at 122.
[155] REDFERN ET AL., *supra* note **Error! Bookmark not defined.**, ¶ 4.83.
[156] IBA GUIDELINES, *supra* note 101, General Standard 2(b).
[157] *Id.* Explanation to General Standard 2(b).

independence, the arbitrator shall disclose such facts or circumstances to the parties, the arbitration institution or other appointing authority (if any, and if so required by the applicable institutional rules) and the co-arbitrators, if any, prior to accepting his or her appointment or, if thereafter, as soon as he or she learns of them."

It is clear from the language used in both General Standards that an objective test is applied to the issue of impartiality or independence whereas a subjective test is used in the arbitrator's duty of disclosure. For the former, there should be a limit to disclosure, based on reasonableness. In the duty of impartiality, "an objective test should prevail over the purely subjective test of "the eyes" of the parties,"[158] whereas the subjective test should be applied to the latter duty under the IBA Guidelines.

The key difference between *Halliburton* and the IBA Guidelines is that English law applies the "fair-minded and informed observer" and a case-by-case approach to both the duty of disclosure and the breach of the duty, in the eyes of a fair minded and informed observer who has the chance to review all the relevant facts and claims of the breach. The only objective observer to carry out the task is the court. This is different from the approaches taken by the IBA Guidelines which apply "reasonable third person", an objective test, to determine the claims over arbitrator's breach of impartiality or independence[159] but requires the application of a subjective test for the duty of disclosure.

VIII. CONFLICTING DUTIES OF DISCLOSURE AND CONFIDENTIALITY AND PRIVACY AND THEIR NON-ABSOLUTENESS

There is no universal duty of confidentiality. Most literature post 2010 suggests that the law governing such a duty varies from jurisdiction to jurisdiction.[160] Most scholars have spoken of confidentiality as one of the fundamental characteristics of arbitration,[161] whereas others have spoken of

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[158] *Id.* Part II Practical Application of the General Standards, ¶ 7.

[159] Independence is not a ground for a challenge in England. *See* English Arbitration Act 1996 § 33.

[160] *See generally* Hong-Lin Yu, *Duty of confidentiality: Myth or reality?* 31(2) CIV. JUST. Q. 68 (2012); Liam M. O'Connor, *Should the Implied Duty of Confidentiality Be Rejected for ICAs?* 86(1) ARB.: INT'L J. ARB., MEDIATION & DISP. MGMT. 83, 93-95 (2020); Isaac J. Buckland, *A Comparative Approach to Consistent Ethical Standards in International Commercial Arbitration*, 85(3) ARB.: INT'L J. ARB., MEDIATION & DISP. MGMT. 230, 237 (2019).

[161] Patrick Neill, *Confidentiality in Arbitration*, 12(3) ARB. INT'L 287, 303, 316 (1996); AMBROSE & MAXWELL, *supra* note **Error! Bookmark not defined.** at 176; THOMAS, *supra* note **Error! Bookmark not defined.**, ¶ 1.2.2.6; LEW ET AL., *supra* note **Error! Bookmark not defined.**, ¶ 1-26 (2003); BORN, *supra* note **Error! Bookmark not defined.**, at 3003, 3022-23; MERKIN & FLANNERY, *supra* note **Error! Bookmark not defined.**, at 17.26 (2015); DAVIDSON, *supra* note **Error! Bookmark not defined.**, at 2.42, 12.06, 12.21-12.22); REDFERN ET AL., *supra* note **Error! Bookmark not defined.**, ¶¶ 1.96, 2.147-48, 2.149-51; QUENTIN LOH SZE ON SC & EDWIN LEE PENG KHOON, CONFIDENTIALITY IN ARBITRATION: HOW FAR DOES IT EXTEND? 2, 19-27, 95-98 (2007); M. PALMER & S. ROBERTS, DISPUTE PROCESSES 213 (3d ed., 2020).

non-universal duty of confidentiality[162] or "every jurisdiction has its own rules governing duty of confidentiality"[163] in their examination of ethical standards in arbitration. Despite this, it is acknowledged that there is an implied duty of confidentiality in English law.[164] It is confirmed that English-seated arbitrations are both private and confidential, if the law governing the confidentiality of the arbitration is English law.[165] Lord Justice Mance cited section 1 of the Act and spoke of respecting parties' choice of England as the seat of arbitration where both privacy and confidentiality are being assumed "to be implicit in the parties' choice to arbitrate in England."[166] In *Emmott v. Michael Wilson & Partners Ltd*,[167] Lawrence Collins LJ described the fundamental characteristics of privacy and confidentiality in an agreement to arbitrate under English law as being "really a rule of substantive law masquerading as an implied term".[168] Arbitrators must respect the private nature of the proceedings in which they are engaged[169] as they are bound to uphold the privacy and confidentiality of the arbitration whether as a result of contract or in performance of an equitable duty of disclosure because they have acquired the information in circumstances importing an obligation of confidence. Lady Arden pointed out that there is no possibility of the parties' confidentiality being eroded by the duty of disclosure.[170] She pointed out that the implied duty of confidentiality confirmed in the English case law[171] is a duty independent from the impartiality duty. Accordingly, the duty of confidentiality is "truly a self-standing term."[172]

Arbitrators and the parties to an arbitration are generally under a duty of privacy and confidentiality which militates against such discovery, in the absence of disclosure being made by the arbitrator. Addressing the conflicting duties of disclosure and confidentiality, Lord Hodge firstly

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[162] YU, *supra* note **Error! Bookmark not defined.**, at 19, 47; ON & KHOON, *supra* note 161; Philip Clifford & Eleanor Scogings, *Which Law Determines the Confidentiality of Commercial Arbitration?*, 35(4) ARB. INT'L 391, 395 (2019); Timothy Foden & Odysseas G. Repousis, *Giving Away Home Field Advantage: The Misguided Attack on Confidentiality in International Commercial Arbitration*, 35(4) ARB. INT'L 401, 406-08 (2019); Buckland, *supra* note 159.

[163] Khushboo Hashu Shahdadpuri, *Third-Party Funding in International Arbitration: Regulating the Treacherous Trajectory*, 12(2) ASIAN INT'L ARB. J. 77, 99 (2016).

[164] Dolling-Baker v. Merrett [1990] 1 WLR 1205 (CA), 1213 per Parker LJ; Ali Shipping Corp. v. Shipyard Trogir [1999] 1 WLR 314, 326 per Potter LJ.

[165] *Halliburton v. Chubb* [2020] [83]; Hassneh Insurance Co of Israel v. Mew [1993] 2 Lloyd's Rep. 243 (QB), 246; Ali Shipping Corp. v. Shipyard Trogir [1999] 1 WLR 314, 326; Emmott v. Michael Wilson & Partners Ltd [2008] EWCA Civ 184 [66].

[166] Department of Economics, Policy and Development of the City of Moscow v. Bankers Trust Co [2004] EWCA Civ 314, [2005] QB 207, [2].

[167] Emmott v. Michael Wilson & Partners Ltd [2008] EWCA Civ 184.

[168] *Id.* [84].

[169] Oxford Shipping v. Nippon Yusen Kaisha (The "Eastern Saga") [1984] 2 Lloyd's Rep. 373, 379.

[170] *Halliburton v. Chubb* [2020] [188].

[171] Emmott v. Michael Wilson & Partners Ltd [2008] EWCA Civ 184 [27].

[172] *Halliburton v. Chubb* [2020] [175].

pointed out that the duty of confidentiality is not an absolute duty. Secondly, the duty of confidentiality can be waived by the parties' express or implied consent. Thirdly, whether and to what extent an arbitrator may disclose the existence of a related arbitration depends upon whether the information to be disclosed is within the arbitrator's obligation of privacy and confidentiality if no express waiver is given by the parties. Finally, without such an express waiver, the consent can be inferred from the contract having regard to the customs and practices of arbitration in their field. His judgment was directed to the non-absoluteness of the duty of confidentiality.

The non-absoluteness of the duty of confidentiality is well documented in the commentaries.[173] Partasides and Maynard argued that "the potential for confidentiality is a virtue of the arbitral process, but believe that confidentiality should be an option, not a presumption."[174] In *Halliburton*, the non-absoluteness of the duties of confidentiality and disclosure and the limited use of disclosed information were applied to reconcile both duties. In its response to the Halliburton's argument concerning the duty of disclosure as being restricted by the arbitrator's duty of confidentiality in other arbitrations involving a common party, the Supreme Court re-affirmed that the duty of confidentiality in England is not an absolute duty.[175] This duty can be subject to parties' agreement, common law exceptions and practice as the list of exception delivered in *Ali Shipping*[176] and rule 26 of the Scottish Arbitration Rules; namely (1) consent, (2) order of the court, (3) leave of the court, (4) disclosure is reasonably necessary for the protection of the legitimate interests of an arbitrating or a third party, and (5) public interest.[177] Accordingly, the scope of the duty of confidentiality varies from case to case, [178] such as restrictions imposed by parties' agreement, arbitration institutional rules, the choice of procedural law or rules in an arbitration.

Although Lord Hodge expressly stated that the law on the boundaries of arbitrator's obligation of privacy and confidentiality which would allow for or prevent disclosure remain unclear and still developing.[179] Focusing on the extent to which the parties have implicitly consented to disclosure, Lord Hodge pointed out that the legal duty of disclosure does not override the duty of privacy and confidentiality in English law. Arbitrator's disclosure of

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[173] Srishti Kumar & Raghvendra Pratap Singh, *Transparency and Confidentiality in International Commercial Arbitration*, 86(4) ARB.: INT'L J. ARB., MEDITATION & DISP. MGMT. 463, 477 (2020).
[174] Constantine Partasides & Simon Maynard, *Raising the Curtain on English Arbitration*, 33(2) ARB. INT'L 197,197, 201 (2017).
[175] *Halliburton v. Chubb* [2020] [99].
[176] *Id.* [83].
[177] Ali Shipping Corp. v. Shipyard Trogir [1999] 1 WLR 314, 325.
[178] *Halliburton v. Chubb* [2020] [85].
[179] *Id*.

information subject to privacy and confidentiality can only be made by parties' consent, expressed or implied.[180]

Parties' express consent can waive the arbitrator's duty of confidentiality. The needed consent reflects its non-absolute nature as highlighted by the UK Supreme Court. The UK Supreme Court stated that:

> [T]he parties to an arbitration can determine as a matter of contract the extent to which they wish matters to be treated as confidential, or that there is a common practice for arbitrators in English-seated arbitrations to make such high-level disclosure of their involvement in other relevant arbitrations without obtaining the express consent of the parties to the arbitrations about which disclosure is being made.[181]

To enable the arbitrator to fulfil the duty of disclosure, parties' consent can be inferred in order to satisfy the common law obligation of confidence owed by a candidate for appointment to a prospective arbitration.[182] The Supreme Court confirmed that such a consent can be expressed in or inferred from the arbitration agreement itself or in the context of the custom and practice in the relevant field.[183] This inferred consent can arise from parties' submission to an arbitration institution which prescribes the duty of disclosure as the interveners pointed out.[184] By agreeing to subject the dispute to an institutional arbitration, the parties are said to give implicit consent to any qualification of the duty of privacy and confidentiality.[185] In contrast, the consent of the parties to an *ad hoc* arbitration would be required to enable an arbitrator to disclose its existence to the parties to another arbitration.[186] Therefore, in English law, consent has to be given to allow disclosure to whom the obligations are owed.[187] Lady Arden's judgment supported Lord Hodge's decision on the existence of an implied duty of disclosure.[188] She also pointed out that such a duty is not the primary duty.

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[180] *Id.* [88].
[181] *Id.* [99].
[182] *Id.* [104].
[183] *Id.* [87], [89].
[184] *Id.* [90], such as the International Chamber of Commerce (ICC) Arbitration Rules, article 11(2), the London Court of International Arbitration (LCIA) Arbitration Rules, article 5.4, and the International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules, rule 6(2).
[185] Simon Fletcher, *Salvage, Danger and Remuneration Abstract*, 3 INT'L J. SHIPPING L., 236-39 (1999); *Halliburton v. Chubb* [2020] [89].
[186] *Halliburton v. Chubb* [2020] [92].
[187] *Id.* [88].
[188] *Id.* [175].

The primary duty is to act fairly and impartially as arbitrator, as required by section 33 of the Act[189] and the appointment contract.[190]

In the case where the common appointment in multiple arbitrations is a common practice, parties' referral of their dispute to arbitration would be seen as acceding to the common practice and accepting that no concerns over impartiality or fairness would arise from such involvement by their arbitrators.[191] Consent can be inferred from the practice of "nomination or appointment of the repeated arbitrator"[192] in the Bermuda Form arbitration. In *Halliburton*, such an inferred consent given by Chubb can be found in the disclosure made by the presiding arbitrator on Chubb's behalf to Transocean stating Chubb as the common party who proposed his appointment and the issues in the disclosed arbitrations. The parties' consent was inferred from the common practice for parties to appoint arbitrators with the required expertise or experience in interpreting the Bermuda Form policy. This has been made "on repeated occasions, including in arbitrations relating to the same occurrence."[193] Most importantly, it is also common for arbitrators involved in Bermuda Form arbitrations to "disclose their involvement in prior or current arbitrations involving a common party without disclosing the identity of the other party or details concerning the arbitration, as the circumstances of this case demonstrate."[194] The interveners, the ICC, the LCIA and the CIArb also pointed that as a general rule, an arbitrator appointed by a common party can disclose:

> [T]he existence of a current or past arbitration involving a common party and the identity of the common party (but not the identity of the other party or parties) without obtaining the express consent of the parties to that arbitration, unless the parties to that arbitration have agreed to prohibit such disclosure.[195]

This led the Supreme Court to conclude that the widespread arbitral practice in English-seated arbitrations supports the view that an arbitrator can make such a disclosure on a confidential basis without breaching his or her obligation of privacy and confidentiality.[196]

As arbitration differs from court where open justice operates,[197] the non-absoluteness of disclosure also affects the amount of information an

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[189] *Id.* [160].
[190] *Id.* [167]-[68].
[191] *Id.* [91].
[192] *Id.* [88], [99], [104].
[193] *Id.* [93].
[194] *Id.* [94].
[195] *Id.* [100].
[196] *Id.*
[197] Cape Intermediate Holdings Ltd v. Dring [2019] UKSC 38 [34]-[40].

arbitrator should disclose. In England, arbitrators are not given "carte blanche to disclose whatever is necessary to persuade a party that there is no justification for doubts about his or her impartiality."[198] Lady Arden agreed that "[n]ot all information about an arbitration is confidential."[199] In the absence of contrary agreement, the Supreme Court was of the view that disclosure should be made in such multiple appointments.[200] With the non-absolute duty of confidentiality and privacy,[201] the disclosure of information allowing parties to judge an arbitrator's impartiality should not be viewed as a breach of the duty of confidentiality.[202]

However, Lady Arden stated that confidentiality of the high-level disclosure arising from the voluntary decision of the arbitrator to pursue a further appointment discussed by Lord Hodge[203] does not fall within any existing exceptions to confidentiality listed in *Emmott v. Michael Wilson & Partners*; particularly the protection of legitimate interests argued in this case. She also pointed out that the confidentiality of multiple arbitrations would be compromised in order to receive information on the identity of the parties to the two arbitrations, the nature of subject-matter, the degree of overlap between the issues and the type of evidence adduced.[204] Consequently, "[i]f consent is not forthcoming, the arbitrator will have to decline the proposed appointment."[205] It is also worth noting that the disclosure made by one party on arbitrator's behalf does not waive this party's duty of confidentiality to the other party.[206]

There is no universal duty of confidentiality according to the 2012 and 2020 Surveys.[207] Hence, it is not surprising that confidentiality is not directly addressed in the Guidelines. Saying that, General Standard 3(d) highlights that disclosure should be opted for if an arbitrator has any doubt as to whether he or she should disclose certain facts or circumstances to allow the parties to judge the impartiality or independence. The explanation to General Standard 3(d) specifically refers to "professional secrecy rules of other rules of practice or professional conduct which may prevent such disclosure."[208] If prevented from making such a disclosure by the duty of confidentiality and privacy, the IBA Guidelines take the position that an arbitrator should

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[198] *Halliburton v. Chubb* [2020] [101].
[199] *Id.* [176].
[200] *Id.* [95].
[201] *Id.* [101].
[202] *Id.* [102].
[203] *Id.* [146], [160].
[204] *Id.* [189].
[205] *Id.* [188].
[206] *Id.* [183].
[207] *See generally* Yu, *supra* note 160; Hong-Lin Yu, *The Duty of Confidentiality Within the Global Landscape*, CAA (Jan., 2021), http://caa-epaper.arbitration.org.tw/paper_detail.aspx?ID=d73c25a2-c3bc-41eb-9a50-55be3cfe6af0.
[208] IBA GUIDELINES, Explanation of General Standard 3(d).

not accept the appointment or should resign.[209] This resembles Halliburton's call for the presiding arbitrator's resignation and Lady Arden's decision on arbitrator's resignation or not to take up the reference in *Halliburton*.

Lord Hodge pointed out that, in English law, the duty of disclosure is not an absolute duty, meaning that arbitrators are not required to disclose everything. Instead, they are only required to disclose the information to be used only for the purpose of judging their impartiality by an objective observer. As Lord Hodge stated:

> This current practice of arbitrators in English-seated arbitrations vouches two things. First, as a general rule the duty of privacy and confidentiality is not understood to prohibit all forms of disclosure of the existence of a related arbitration in the absence of express consent. Secondly, the duty of disclosure does not give an arbitrator carte blanche to disclose whatever is necessary to persuade a party that there is no justification for doubts about his or her impartiality.[210]

Its non-absolute nature lies in an equitable duty imposed on the recipient to confine the use of the information in the determination of impartiality, based on private nature of arbitration and the confidential nature of information given to the arbitrator by the parties to the arbitration or prospective arbitration. It confines the use of the information disclosed by an arbitrator[211] in order to ensure the confidentiality and integrity of arbitration.[212] The Court expressed its expectation that the participants in arbitration should be aware of a limited use of the disclosed information by arbitrators. Accordingly, the parties should understand that an equitable duty is imposed on the recipient of the information to confine the use only for the purpose of judging the impartiality and suitability of the arbitrator who made the disclosure due to the confidential nature of the information and the departure from the duty of confidentiality.[213] Therefore, the duty of confidentiality would not be compromised due to a limited use of the disclosed information. Citing Megarry J. in *Coco v. A N Clark (Engineers) Ltd*,[214] Lord Hodge emphasised the limited use of disclosed information and

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[209] *Id*.
[210] *Halliburton v. Chubb* [2020] [101].
[211] *Id.* [102].
[212] *Id.* [103].
[213] *Id.* [102].
[214] Coco v. A N Clark (Engineers) Ltd. [1969] RPC 41, [47] (where Megarry J. stated: "he must show a strong *prima facie* case for the existence of his right and at least that he is likely to succeed on this issue, as regards the infringement of that right, he needs to show only a *prima facie* case which is reasonably capable of succeeding."); DAVIDSON, *supra* note 29, ¶ 12.21; HENRY BROWN ET AL., BROWN & MARRIOT'S ADR PRINCIPLES AND PRACTICE ch. 15 (4th ed. 2018).

its link with the private nature of English-seated arbitrations which are private matters under section 1 of the Act. Due to this nature, the recipients of the disclosure should know that the use of the information is limited and is subject to disclosure in the context of a confidential relationship between the arbitrator and the parties to the arbitration or prospective arbitration.

The main emphasis made in *Halliburton* lies in the arbitrator's legal duty to disclose and the importance of arbitrator's impartiality in London-seated arbitrations involving multiple appointments with overlapping subjects. Nevertheless, given that the source, nature, content and scope of the duties of disclosure and confidentiality differ between jurisdictions and institutions, the significance of *Halliburton* may have to be re-assessed according to the different customs and practices of the arbitrations in question. Arbitrators sitting in England must bear in mind that the "one size doesn't fit all" approach taken by the Supreme Court. For institutional arbitrations seated in England, following Lord Hodge's emphasis on party autonomy and advice on "putting the matter beyond doubt"[215], one may witness the inclusion of express statement or clarification on the duty of disclosure and a waiver of confidentiality in their rules or guidance of the relevant institutions.[216] Without doing so, an arbitration seated in England with an overlapping subject or a common party can always face the tension discussed. In *ad hoc* arbitrations seated in England, while the tension should be determined by the procedural law or rules chosen by the parties but reviewed according to *Halliburton*, it is advisable for arbitrators to insert a waiver of confidentiality in their terms of appointment. This will allow arbitrators to disclosure their appointment in subsequent arbitrations involving the overlapping subject or party in order to comply with the legal duty of impartiality. For an arbitration seated in a common law country which imposes both duties, *Halliburton* may be considered persuasive in their decision on the conflicting duties. For an arbitration seated outside England involving multiple appointments with overlapping subject matter with one common party, the questions whether an arbitrator requires the parties' express consent to make disclosure or whether such consent can be inferred must be answered according to the law of the country where the arbitration is seated. Such a concern is well-reflected in the different opinion delivered by Lady Arden who spoke of her difficulty in seeing why Lord Hodge only limited the ruling within Bermuda Form arbitrations as opposed to other ad hoc arbitrations or other institutional arbitrations. She pointed out that in the case where an arbitration institution has its own rules of disclosure of conflicts of interest, there is no need to call on the general law in this matter.

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[215] *Halliburton v. Chubb* [2020] [135].
[216] *Id.*

IX. CONCLUSION

Giving effect to commercial and arbitration practice was held as a guide for the different scope of disclosure of information required for parties to judge an arbitrator's impartiality. This duty of disclosure can maintain the integrity of arbitration and the certainty of an arbitral award. In the case of conflicting duties between the duty of disclosure and the duty of privacy and confidentiality,[217] exceptions to the duty of confidentiality, such as express or inferred consent, allow an arbitrator to disclose information which may be subject to the duty of confidentiality; but only on the basis of equity. Without being opted in by the parties' agreement, the UK Supreme Court rightly dismissed the application of the IBA Guidelines[218] in *Halliburton*. However, it is evident both the UK Supreme Court and the IBA are similar on the needs for the duty of disclosure, the objective standard of the duty of impartiality, and furthermore, non-absoluteness of the duty of confidentiality.[219]

In England, both the Court of Appeal[220] and the Supreme Court[221] agreed that the implied duty of disclosure is subject to "what is known to the arbitrator". An arbitrator may have to make reasonable enquiries before disclosing only what he or she knows and is not required to search for facts or circumstance to disclose. In other words, similar to General Standard 7(c), a reference can only be made at the time the duty arose and during the period in which the duty subsisted.[222] In the case of any doubts, the Supreme Court stated that (1) the proper course of action for an arbitrator with some matter which would give rise to justifiable doubts as to his or her impartiality and the disclosure would not remove the difficulty would be not to take up the appointment or withdraw from the reference if the matter arose after the acceptance of appointment.[223] (2) in the case where a disclosure of some

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[217] *Halliburton v. Chubb* [2020] [103].
[218] IBA GUIDELINES, Introduction, ¶ 6.
[219] The IBA Guidelines place the duty of disclosure of any circumstances which may affect the arbitrator's independence on both the arbitrators and the parties. The parties have the duty of disclosure of any relationship with the arbitrator. This duty is also extended to relationships with persons or entities having a direct economic interest in the award to be rendered in the arbitration; such as an entity providing funding for the arbitration or having a duty to indemnify a party for the award. The party must do so on its own initiative "at the earliest opportunity" informing an arbitrator, the arbitral tribunal, the other parties and the arbitration institution or other appointing authority of such a direct or indirect relationship between the party, or between the arbitrator and any person or entity with a direct interest, or a duty to indemnify a party for, the award to be rendered in the arbitration (Explanation to General Standard 7(a)) after performing reasonable enquiries and provide any relevant information available to it (General Standard 7(c)).
[220] *Halliburton v. Chubb* [2018] [74].
[221] *Halliburton v. Chubb* [2020] [107].
[222] *Id.* [119].
[223] *Id.* [108].

trivial matter a fair-minded and informed observer[224] would not support a real possibility of bias or worth of disclosing. Hence, "[a]n obligation to disclose a matter which 'might' give rise to justifiable doubts arises only where the matter might reasonably give rise to such doubts."[225] A balance between an arbitrator's impartiality and vexatious challenges by a party to the arbitrator's position can be made.[226] (3) Anything in between "a real possibility of bias" and "unnecessary concerns" must be disclosed and neutralised by further explanation to remove justifiable doubts as to an arbitrator's impartiality.[227]

These three points are also highlighted in the express duty of disclosure contained in General Standards 2(b), 3(c), and the introduction to the IBA Guidelines. In terms of "doubts", the IBA Guidelines use the same term "justifiable doubts" as Article 12 of the Model Law, section 24(1)(a) of the English Arbitration Act 1996, rules 12(c), 68(2)(i) and 77(c) of the Scottish Arbitration Rules throughout the document. In the case of any doubts, an arbitrator shall decline to accept an appointment or refuse to continue to act as an arbitrator regardless of the stage of the proceedings.[228] The context provided by General Standard 2(b) is similar to a fair-minded and informed observer judging an arbitrator's impartiality as discussed in *Halliburton*. General Standard 2(b) reads:

> Doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.

Similar to *Halliburton*,[229] the same precise and high standard of fairness and impartiality is applied equally to the presiding arbitrator, parties-appointed arbitrators and co-arbitrators, regardless of the method of appointments according to General Standard 5(a).

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[224] DAVIDSON, *supra* note 29, ¶¶ 7.29-.30.

[225] *Halliburton v. Chubb* [2020] [108]; REDFERN ET AL., *supra* note 30, ¶¶ 14.79-.80 (it suggests that the arbitrator should disclose "all of the facts that could reasonably be considered to be grounds for disqualification" and also that there should be immediate disclosure if new circumstances arise "that might give cause for any doubt" as to the arbitrator's impartiality.). ROBERT MERKIN & LOUIS FLANNERY, MERKIN AND FLANNERY ON THE ARBITRATION ACT 1996, at 286-87 (6th ed. 2019) (they advise that an arbitrator should disclose "any fact or circumstance which in his or her mind would or might (once disclosed) give rise to justifiable doubts as to his or her impartiality".).

[226] *Halliburton v. Chubb* [2020] [108]. The same view was also expressed by Lord Mance in *Helow v. Secretary of State for the Home Department* [2008] UKHL 62 [58] (appeal taken from Scot.).

[227] *Halliburton v. Chubb* [2020] [109].

[228] IBA GUIDELINES, General Standard 2(a).

[229] *Halliburton v. Chubb* [2020] [62]-[64], [66]; Park, *supra* note 45.

The Supreme Court confirmed that no disclosure should be answered retrospectively.[230] In judging apparent bias, a court must have regard to the circumstances and disregard matters of which the arbitrator could not have known at that time. In other words, a reference can only be made at the time the duty arose and during the period in which the duty subsisted.[231] Consequently, "[t]he duty of disclosure is a continuing duty".[232] This continuous duty is subject to the changing circumstances affecting the scope of disclosure.[233] In terms of a judge's assessment of the possibility of real bias this starts from "the time of the hearing to remove" the arbitrator whose actions led the fair-minded and informed observer to conclude the existence of a real possibility of bias.[234] This view found support in *AT & T Corpn v. Saudi Cable Co*[235] where the court stated that a judge is to consider all the material which "is placed before the court"[236] or "comes before the court",[237] not that information "known to the objectors or available to the hypothetical observer at the time of the decision."[238] This conclusion was reached through the analysis of the word "exist" used in section 24(1)(a) in relation to "the circumstances as they exist at the date of the hearing of the application to remove the arbitrator."[239]

The timing of the assessment of the need for disclosure expressed by the Supreme Court matches the duty of disclosure[240] provided in Standard 1 of the Guidelines which also highlighted the continuing duty of the arbitrator "at the time of accepting an appointment to serve" and which "shall remain so until the final award has been rendered or the proceedings has otherwise finally terminated."[241] Such a continuing duty would only extend to the period during the challenging stage when the final award may be referred back to the original Arbitral Tribunal under the relevant applicable law of institutional rules.[242] Similar reference to the arbitrator's continuing duty of disclosure is also seen in the required disclosure by the arbitrator "prior to accepting his or her appointment or, if thereafter, as soon as he or she learns of them."[243] Such an ongoing duty of disclosure is also not affected by an

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[230] *Halliburton v. Chubb* [2020] [119].
[231] *Id*.
[232] *Id*. [120].
[233] *Id*.
[234] *Id*. [123].
[235] *Id*. [122], citing *AT&T Corp. v. Saudi Cable Co*. [2000] 2 Lloyd's Rep 127.
[236] *Id*., citing *AT&T Corp. v. Saudi Cable Co*. [2000] 2 Lloyd's Rep 127 [42], Lord Woolf.
[237] *Id*., citing *AT&T Corp. v. Saudi Cable Co*. [2000] 2 Lloyd's Rep 127 [63], Lord Justice Potter.
[238] *Id*., citing R (Condron) v. National Assembly for Wales [2006] EWCA Civ 1573; [2007] LGR 87, [50].
[239] *Id*. [121].
[240] IBA GUIDELINES, Introduction, ¶ 6.
[241] *Id*. Explanation to General Standard 1.
[242] *Id*.
[243] *Id*. Standard 3(a).

advanced declaration or waiver in relations to possible conflicts of interest under General Standard 3(a).[244]

On the timing of assessing the possibility of bias, Lord Hodge stated that the timing is "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."[245] This is a narrower approach taken by the IBA Guidelines which requires an observation of the duty of impartiality and independence from the time of accepting an appointment as to the end of arbitration, with a further extension if an award is referred back to the arbitrators.

In principle, where multiple appointments involve a common party, in English law such multiple appointments must be disclosed in the absence of contrary agreement.[246] During the disclosure, the information an arbitrator wishes to disclose can be subject to the duty of confidentiality. The varying scope of the exceptions to the duty of confidentiality dictates what information can be disclosed. The boundary between the duty of disclosure and the duty of privacy and confidentiality is not fixed and can be re-defined by parties' express or inferred consent, [247] exceptions to the duty of confidentiality and arbitration practice and custom.[248] This draws a parallel with General Standard 3(d) where disclosure is favoured in any doubts as to what facts or circumstances should be disclosed.

To conclude, the *AT&T* case taught us that the same level of impartiality applies to both judges and arbitrators whose connection must be judged based on a real danger of bias. At the very least, *Halliburton* taught us that an arbitrator should keep in mind that the implied duty of disclosure allows

> [T]he person who needs to be reassured about his impartiality are not the lawyer-colleagues who frequently appear before him and see him at conferences, but the parties themselves who have never seen him before and will never see him again and ultimately have to justify a potentially unfavourable award . . . that an *impartial* panel issued it[249] (emphasis added).

This person must be a fair-minded and informed observer, similar to a reasonable third person applying an objective test stated in the IBA Guidelines, who is required to be in possession of all the facts, not unduly

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[244] *Id*. Standard 3(b).
[245] *Halliburton v. Chubb* [2020] [121]
[246] *Id*. [95].
[247] *Id*. [96].
[248] *Id*. [87].
[249] Hong-Lin Yu & Laurence Shore, *Independence, Impartiality and Immunity of Arbitrators: US and English Perspectives*, 52 INT'L COMP. L. Q. 935, 942 (2003).

sensitive or suspicious, have awareness of the context[250] and non-absolute duty of confidentiality, as well as understand the way in which the legal profession operates in practice.[251]

[250] *Helow v. Secretary of State for the Home Department* [2008] UKHL 62 [14].
[251] Taylor & Anor v. Lawrence & Anor [2002] EWCA Civ 90, [61].

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