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The decision of the United Kingdom Supreme Court in Halliburton v. Chubb

Perspectives for Swiss International Arbitration Law

This article reviews the English law of arbitrators duties of disclosure in relation to potential sources of bias, compares the position under English law with that under Swiss law, and endeavours to identify areas where Swiss law may take direction.

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1. Introduction

[1] On 27 November 2020 the United Kingdom Supreme Court handed down its decision in *Halliburton* v. *Chubb*[1] («**Halliburton-Chubb**»). The decision addressed numerous issues in relation to arbitrator bias, and in particular arbitrators' duty under English law to disclose potential sources of bias.

[1] *Halliburton Company (Appellant)* v. *Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd) (First Respondent)* [2020] UKSC 48. References to paragraph numbers without more in this article are references to this decision of the UK Supreme Court, Halliburton-Chubb.

[2] There is a far-reaching uniformity of treatment of most of the central issues relating to arbitrator bias across major legal systems around the world. Switzerland's modern and purpose-oriented international arbitration law certainly expresses this general consensus. There nonetheless remain a number of issues in this area where one might contend the future direction of Swiss international arbitration law is not yet sealed. Even after the reforms to international arbitration law that entered into force on 1 January 2021 in Switzerland, Switzerland remains alert to refine this law wherever warranted.

[3] If London is not the world's foremost place of arbitration it is within a clutch of leading ones.[2] English arbitration law as shaped by the courts since the introduction of the *Arbitration Act* 1996, has been astute to continue to adapt in response to the legitimate needs of the users of arbitration. This decision vividly discloses such a concern.

[4] Because of England's leading status in the arbitration world, and because of the virtues of its arbitration law, it is right that the continuous quality improvement of Swiss international arbitration takes notice of developments there.

[5] The object of this article is to identify and assess what guidance Swiss arbitration law may usefully glean from this decision.

2. The Facts of Halliburton v. Chubb

2.1. The commercial facts

[6] This case arose out of the Deepwater Horizon oil drilling rig disaster in the Gulf of Mexico in 2010. The Deepwater Horizon rig was owned by a company called Transocean Holdings LLC («**Transocean**»). Transocean contracted with BP Exploration and Production Inc («**BP**») to provide crew and drilling teams. BP in turn contracted with Halliburton Company («**Halliburton**») to provide certain cementing and well-monitoring services.

[7] Transocean and Halliburton both entered into contracts of insurance for their risks in relation to their respective activities with the rig. The form of insurance contract was the Bermuda form, used frequently by corporations to insure against liability in excess of a stipulated floor amount in relation to catastrophic events. As is standard, this Bermuda form was subject to New York law and *ad hoc* arbitration in London. The insurance was for tranches of liability, that is, to cover claims against the insured as of a certain monetary amount of its overall liability for any incident, up to a certain monetary amount.

[8] The US Government instituted claims before the Federal Court for the Eastern District of Louisiana seeking civil penalties against BP, Transocean, and Halliburton under US federal statute in relation to losses occasioned by the disaster. Private claims for damages were joined to these proceedings. In a judgment of 4 September 2014 the court apportioned blame between them as follows: BP – 67%, Transocean – 30%, and Halliburton – 3%.

2 From 2015 to 2020, the annual White & Case and Queen Mary University of London *International Arbitration Survey* identified London as *the* most frequent place of arbitration. In the 2021 survey, London was joint leader with Singapore, both with 54% of participants' top five responses. See http://www.arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf (sourced on day of writing).

[9] Prior to this judgment, Halliburton had settled the private claims against it. After this judgment, Transocean settled the private claims against it (paragraphs 9 and 36). Both Transocean and Halliburton sought payment from Chubb of that portion of the respective settlement amounts that were insured with Chubb. Chubb refused to pay out on either policy, contending that the settlements were unreasonable.

2.2. The Halliburton-Chubb arbitration

[10] Halliburton initiated arbitration under its Bermuda Form insurance policy with Chubb, and nominated Professor William J. Park of Boston University as a co-arbitrator. Chubb nominated an American insurance executive called John D. Cole. The co-arbitrators could not agree on a president of the arbitral tribunal so this determination came before the English courts. The English High Court therefore appointed Kenneth J. Rokison QC, an experienced insurance arbitrator, as president of the arbitral tribunal. Mr Rokison was one of the persons whom Chubb had suggested to the Court for president. Halliburton had objected since the policy was subject to New York law and Mr Rokison was an English lawyer, and also because Halliburton took the view that insurance companies had a practice of repeatedly appointing retired judges or QCs known to them and perhaps therefore even sympathetic to them or at least to their position as insurers.

[11] Mr Rokison had disclosed to Halliburton and the court that he had previously acted as an arbitrator in several arbitrations in which Chubb was a party, including as a party-appointed arbitrator nominated by Chubb, and that he was currently appointed as an arbitrator in two pending arbitrations in which Chubb was involved.

[12] When the Halliburton-Chubb arbitration was already underway, Chubb nominated him as a co-arbitrator in the arbitration in which Transocean's Deepwater Horizon claims against Chubb were to be decided, and he was so appointed. In the Transocean-Chubb arbitration the same firm of solicitors acted for Chubb, and so did the same claims manager, as in the Halliburton-Chubb arbitration.

[13] Before accepting his appointment in the Transocean-Chubb arbitration, Mr Rokison disclosed all of his pending arbitrations involving Chubb to Transocean, including the Halliburton-Chubb arbitration. Transocean did not object. However, Mr Rokison made no disclosure to Halliburton that he had been nominated by Chubb as co-arbitrator and was taking on the position of co-arbitrator in the Transocean-Chubb arbitration.

[14] A few months later, Mr Rokison was jointly appointed by Transocean and another insurer as a substitute arbitrator in an arbitration concerning the Deepwater Horizon disaster and the same layer of insurance. No disclosure of this appointment was made to Halliburton.

[15] A few months later, Halliburton found out about the Transocean-Chubb arbitration and this other Transocean arbitration and immediately wrote to Mr Rokison to raise its concerns about bias in reference in particular to the IBA Guidelines on Conflicts of Interest in International Arbitration (the «**IBA Guidelines**»), which imposed continuing obligations of bias disclosure.

[16] Mr Rokison replied that he had not disclosed the other two arbitrations because he took the view that he was not under a duty to do so under the IBA Guidelines, but that it would have been prudent to do so. He distinguished the issues between the Halliburton-Chubb arbitration and the other two, and he said that he expected these other two to come to an end shortly upon the determination of a preliminary issue involving evidence narrowly circumscribed by that issue.

This issue was whether the amount of civil penalties and the insured's own excess should be taken into account in the exhaustion of the underlying layers of insurance. If this were not the case, then the liability level would not rise to the level where the insurance in dispute began to operate. This issue had not yet arisen in the Halliburton-Chubb arbitration but it would subsequently (para. 22). He also expressed his willingness to consider resigning as an arbitrator in these two other cases if they were not disposed of on the preliminary issue.

[17] Halliburton thereupon requested him to resign but Chubb requested him to continue. Mr Rokison then decided to continue as an arbitrator, now emphasising that in his view his position in the other two arbitrations did not give Chubb any informational advantage over Halliburton.

[18] The preliminary issues in the Transocean-Chubb arbitration and the other Transocean arbitration where then decided in favour of the insurer. The civil fines and the self-insured excess did not count in reduction of the amounts prior to those insurers' liability being engaged. In the result, both arbitrations came to an end without either tribunal having to consider the matter of the reasonableness of the insured's settlement.

[19] The arbitral tribunal in the Halliburton-Chubb arbitration issued its final partial award finding in favour of Chubb, with Professor Park adding individual comments protesting the «unfairness» of the arbitration in that the president, Mr Rokison, had not disclosed his involvement in another arbitration involving Chubb itself. In these comments Professor Park expressed the view that what determined whether there was a conflict was the parties' expectations prior to gaining knowledge of the facts of the alleged bias.[3]

[20] Professor Park himself had been nominated by insured parties (other than Halliburton) in three other arbitrations arising out of the Deepwater Horizon disaster, and appointed as co-arbitrator in all three. He had made no formal disclosure of this in the Halliburton-Chubb arbitration, but this other involvement appeared in a request by Chubb in the Halliburton-Chubb arbitration to consolidate all four.

2.3. The proceedings before the courts below seeking to remove Mr Rokison as president for bias

[21] This case was an application under section 24(1)(a) of the *Arbitration Act* 1996, that is, for the removal of an arbitrator on the basis that «circumstances exist that give rise to justifiable doubts as to his impartiality». By section 105(1) of the *Arbitration Act* 1996, the application lay to the High Court. By section 24(6) an appeal lay to the Court of Appeal with leave of the High Court.

[22] The High Court is usually composed of a single judge, in this case a highly experienced one, Popplewell J., now a member of the Court of Appeal.

[23] At first instance, Popplewell J. found that the settled test for bias was not satisfied. This test is that «the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility» of bias. On the basis that there was no qualifying risk of bias, he held too that there was no requirement to disclose Mr Rokison's role in the other two arbitrations.

3 See para. 26, in which Lord Hodge quotes from Professor Park's comments.

[24] So for Popplewell J., the test for disclosure is the same as the test for bias. Also, his Lordship's conclusion that there was no conflict of interest resulted in his not addressing the matter of the source and nature of any duty on arbitrators under English law to disclose (potential) conflicts.

[25] Popplewell J. gave permission to appeal (para. 33) in regard to the two following specific issues (judgment of the Court of Appeal, para. 2):

> (1) Whether and to what extent an arbitrator may accept appointments in multiple references concerning the same or overlapping subject matter with only one common party without thereby giving rise to an appearance of bias.
>
> (2) Whether and to what extent he may do so without disclosure.

[26] The Court of Appeal sits as a panel of three judges. In this case, that composition was Sir Geoffrey Vos C (the Chancellor of the High Court (*ex officio* a member of the Court of Appeal) and now as «the Master of the Rolls» the President of the Court of Appeal's Civil Division), Simon and Hamblen LJJ.

[27] In the Court of Appeal Halliburton accepted the legal principles enunciated by the court below, but argued that in their application the judge should have taken into account the risk of «unconscious bias». In a unanimous judgment written by Hamblen LJ,[4] the Court of Appeal agreed with Popplewell J. that the test for bias was not made out in this case. But, unlike Popplewell J., the Court of Appeal delved extensively into the source and nature of arbitrators' duty to disclose (potential) conflicts to the parties. The Court of Appeal «citing extensive caselaw» (para. 36) found that there is a duty on judges under the common law to disclose conflicts and that arbitrators are under the same duty. At para. 56 of their unanimous judgment the Court of Appeal declared:

> «Under the common law, judges should disclose facts or circumstances which would or might provide the basis for a reasonable apprehension of lack of impartiality.»

[28] Thus, this test for disclosure entails wider disclosure than in situations where the test for bias is or would be satisfied since it requires disclosure where there *might be* and not just where the court finds or would find that there is.

[29] On the facts the Court of Appeal found that Mr Rokison should have disclosed his appointments in the two other arbitrations, but that there was in fact no conflict of interest.

2.4. The proceedings before the Supreme Court

[30] Halliburton appealed this decision to the Supreme Court. The Supreme Court sits in panels of at least five, as in this case, but can sit in larger configurations, up to 11 of its full complement of 12 members. In this case the Supreme Court was composed of the Court's President Lord Reed, its Vice-President Lord Hodge, Lady Black, Lord Lloyd-Jones, and Lady Arden.

[31] Five important arbitration institutions intervened as third parties, the London Court of International Arbitration (LCIA), the International Chamber of Commerce (ICC), the Chartered

4 [2018] EWCA Civ 817.

Institute of Arbitrators (CIArb), the London Maritime Arbitration Association (LMAA) and the Grain and Feed Trade Organisation (GAFTA). The concern of the first three was that the Court of Appeal's judgment was «out of step with internationally accepted standards and practices» (para. 40). As will be seen, Lord Hodge's judgment is certainly alive to the concern that English law should be responsive to arbitration practice, and equally that it should contribute to the attractiveness of London as a leading place of arbitration.

[32] The Supreme Court heard the appeal on 12 and 13 November 2019 and reserved judgment, handing down judgment only a year later, on 27 November 2020. It unanimously rejected the appeal, with Lord Hodge providing reasons agreed to by Lord Reed, Lady Black and Lord Lloyd-Jones, and Lady Arden agreeing but providing additional, separate reasons.

2.5. Lord Hodge's reasons for the majority

2.5.1. Issues

[33] Lord Hodge's decision addressed the following issues:

a. whether, and if so how, the context of arbitration may affect the adjudicator's duty of impartiality;
b. whether, and if so on what basis, an arbitrator is under a legal duty to disclose particular matters;
c. how far the obligation to respect the privacy and confidentiality of an arbitration constrains the arbitrator's ability to make disclosure;
d. whether a failure to disclose is relevant to the assessment of partiality; and
e. the times at which (a) the duty of disclosure and (b) bias fall to be assessed.

[34] Lord Hodge's treatment of issue a. is presented in section 2.5.2 below, his treatment of issue b. is found in section 2.5.4 below, issue c. is addressed in section 2.5.3, issue d. is discussed in 2.5 below, and sections 2.5.6 and 2.5.7 treat the issues in e. above.

2.5.2. The duty of impartiality in the context of arbitration

[35] Lord Hodge initiated his analysis by explaining that the test for bias set forth in section 24(1)(a) of the *Arbitration Act* 1996, which speaks of the existence of circumstances «that give rise to justifiable doubts as to [the arbitrator's] impartiality», is identical to the common law test for bias, which is that the «fair-minded» and «informed» observer would conclude that there was «a real possibility of bias». Both were objective tests, and applied to judges and arbitrators alike. Lord Hodge referred to and accepted the definition of the «fair-minded and objective observer» in the case law (para. 52).[5] He also accepted that this standard was the same as the «justifiable doubts» standard in the United Nations Commission on International Trade Law («UNCITRAL») Model Law on International Commercial Arbitration 1985 (as amended in 2006), article 12(2)

5 *Helow* v *Secretary of State for the Home Department* [2008] UKHL 62; [2008] 1 WLR 2416, per Lord Hope, paras. 1 to 3; *Johnson* v *Johnson* (2000) 201 CLR 488, para. 53, per Kirby J., adopted in *Helow* by Lord Hope, para. 2, and Lord Mance, para. 39.

(«the UNCITRAL Model Law»), the IBA Guidelines (General Standard 2(c)) and article 10.1 of the LCIA Arbitration Rules (2014) inasmuch as they all require «objectivity and detachment in relation to the appearance of bias» (para. 54).

[36] However, his Lordship explained that «in applying the test to arbitrators it is important to bear in mind the differences in nature and circumstances between judicial determination of disputes and arbitral determination of disputes.» It appears from Lord Hodge's ascertainment of these factors that he conceived of them as exclusive (para. 55: «*the* differences»; para. 69: «have regard to *the* particular characteristics of international arbitration which I have discussed in paras. 56 to 68» (emphasis supplied)), although future cases may nonetheless expand the list.

[37] First, the confidentiality and privacy of arbitration (under English law, see paras. 83 to 84) act as impediments to the discovery of conflicts, thereby putting «a premium on frank disclosure». (para. 58). So too (secondly) does the very limited review of arbitrators' decisions (para. 56). Thirdly, Lord Hodge also identified as a relevant factor the fact that, unlike judges, arbitrators must continually bid for new assignments, thus making them to a degree beholden to parties and their counsel. Although not explicit in Lord Hodge's reasons, it would seem the concern here is that such a dependence may be a source of conflict, and may also cause an arbitrator to be reluctant to make disclosure. Fourthly, Lord Hodge pointed out that there are differences in experience and culture amongst arbitrators, which result in divergent views on what may constitute a conflict. Additionally, the confidentiality of arbitration will generally prevent a party from learning about other relevant arbitrations, and, where its counterparty is also a party in any other such arbitration, a disequilibrium in relevant information may arise, such as regards the evidence and legal submissions in any such other arbitrations. A further relevant factor identified by Lord Hodge is that in some quarters, although certainly not in English law, it is accepted that co-arbitrators may have a role in expressing the point of view of the party that nominated them, whereas presidents alone are required to be strictly neutral (paras. 62 to 66). Last, his Lordship referred to the «professional reputation and experience of an individual arbitrator» as a consideration relevant to arbitrators' conflicts but not as much regarding judges, presumably because arbitrators' experience varies more greatly than that of judges and there are lesser institutional safeguards in the selection of arbitrators (para. 67).

[38] Lord Hodge then identified a factor common to the assessment of judges' and arbitrators' bias, namely the danger of opportunistic or tactical challenges.

[39] Lord Hodge also declared, uncontroversially under English law, that co-arbitrators are subject to the same standard of impartiality as presidents of the arbitral tribunal are (para 63).

[40] His Lordship then turned to the matter of disclosure. He stated that the Court of Appeal's finding that arbitrators are under a duty to disclose facts 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 to have «developed the English law of arbitration» (para. 75), and that it was correct to have done so.

[41] Lord Hodge explained the basis for this duty under English law as follows: Section 33 of the *Arbitration Act* 1996 places arbitrators under a duty to act fairly and impartially in conducting arbitral proceedings, in decisions on matters of procedure and evidence and in the exercise of all powers conferred on them. Such statutory duties engender an implied contractual term that the arbitrator will comply with them. An arbitrator would be in default of this implied contractual term if «at and from the date of his or her appointment» he failed to disclose any circumstances

which would render him or her liable to be removed under section 24 of the *Arbitration Act* 1996 (para 76).

[42] This duty arises upon the arbitrator's appointment, but for the system «to operate smoothly», pre-appointment disclosure is necessary (para. 77). Therefore, a practice of pre-appointment disclosure has developed.

[43] It is not easy to piece together Lord Hodge's connection between this statutory duty and an obligation of disclosure. According to Lord Hodge, fairness requires that parties are made aware of circumstances of bias so that they can «form a judgment as to [a person's] suitability as an arbitrator» (para. 77).

2.5.3. The relationship between disclosure and the duty of privacy and confidentiality

[44] There is a duty of confidentiality and privacy on arbitrators under English law. Therefore, any arbitrator's disclosure about other arbitrations (as in the Halliburton-Chubb case) must be consistent with this duty. The *Arbitration Act* 1996 left the development of exceptions to this duty to judicial decision. One judicially-recognised exception is where there is consent from the parties. Lord Hodge declared that it is by reference to custom and practice that implied consent to ventilate confidential matters may be ascertained (para. 89). Importantly, Lord Hodge accepted that the parties' choice of arbitration rules such as the ICC and ICSID rules, with their disclosure requirements, entails a waiver of confidentiality (para. 90).

[45] Basing himself upon evidence from interveners of the ICC, LCIA and CIArb, Lord Hodge found that in English arbitration more generally there was a wide-scale practice accepting disclosure of other arbitrations in which a proposed arbitrator is sitting, and the identity of a party common to the new arbitration (para. 100[6]), and that therefore the duty of confidentiality exempts such disclosure (paras. 101 and 105).

2.5.4. The scope of the duty to disclose

[46] The arbitrator is required to disclose all he or she knows and there may be a duty on the arbitrator to make «reasonable enquiry» (para. 107).

[47] Lord Hodge agreed with the Court of Appeal that English law should be developed to extend the duty of disclosure not just to situations which amount to impartiality, but also to those which might do so. In so finding, he relied on various international instruments in arbitration (para. 115) such as the UNCITRAL Model Law, German law (section 1036 of Book 10 of the *Zivilprozessordnung*), Canadian law (article 12 of Schedule 1 to the Canadian *Commercial Arbitration Act*, RSC 1985), Belgian law (article 1686(1) of the Belgian *Judicial Code*), Swedish law (sections 8 and 9 of the Swedish *Arbitration Act* 1999) and Austrian law (section 588 of the Austrian *Arbitration Act* 2006). He noted that this is not the position under Swiss law, but that the Swiss Rules had adopted it in their article 9(2) (para. 114).

6 But not the identity of the other party.

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

[48] Lord Hodge determined that an arbitrator's failure to make relevant disclosure may be an indication of bias. He reasoned that, «[t]he failure to disclose may demonstrate a lack of regard to the interests of the non-common party and may in certain circumstances amount to apparent bias.» (para. 118).

2.5.6. The time of the assessment of the need for disclosure

[49] Lord Hodge agreed with the Court of Appeal that the time for the reviewing court to apply in determining whether disclosure should be made was the time when the arbitrator or prospective arbitrator has to make this determination. So the fact that other arbitrations, which should have been disclosed since there was a common party, ended prematurely should not be taken into account in making the disclosure assessment (para. 120).

2.5.7. The time of assessment of the possibility of bias

[50] Lord Hodge also agreed with the Court of Appeal that the time upon which to base the facts for assessing bias was the time when the court was called upon to do so, i.e. the time of the court hearing. So if subsequent facts came to light prior to the court hearing, they might affect the court's determination of bias, as indeed occurred in the present case. He based this determination on the present-tense language of the provision in the *Arbitration Act* 1996, under which bias challenges are made to the court, section 24(1)(a), although his Lordship also saw support for this in the case law (paras. 121 to 122).

2.5.8. Whether and to what extent an arbitrator may accept appointments in multiple arbitrations concerning the same or overlapping subject matter with only one common party without thereby giving rise to an appearance of bias

[51] Lord Hodge then turned to the assessment of conflicts in the context of related arbitrations. In reliance upon the intervention of various important arbitration institutions, and the LCIA in particular (para. 131), as well as on the IBA Guidelines (para. 129), he concluded that as a general principle overlapping arbitral appointments do not give rise to an appearance of bias, but they might do so in particular circumstances.

[52] A circumstance he noted as particularly concerning in relation to overlapping appointments is where «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».

[53] He emphasised that there are situations where there is a «custom and practice» of overlapping appointments which, one understands, constitute party acceptance of them. He explained that:

> [...] «there are differences between, on the one hand, arbitrations, in which there is an established expectation that a person before accepting an offer of appointment in a reference will disclose earlier relevant appointments to the parties and is expected similarly to disclose subsequent appointments occurring in the course of a reference,

and, on the other hand, arbitrations in which, as a result of relevant custom and practice in an industry, those expectations would not normally arise.» (para. 127).

2.5.9. Whether and to what extent an arbitrator may accept the multiple references without making disclosure to the party who is not the common party

[54] Since the disclosure obligation is simply a wider («might» not just «would») assessment of the same criteria as the bias assessment, Lord Hodges adverted again to customs and practices as a limiting criterion (para. 136).

2.5.10. Application on the facts

[55] Lord Hodge found that no custom or practice of not disclosing multiple appointments had been proven in Bermuda Form arbitrations. Therefore, in Lord Hodge's view, Mr Rokison should have disclosed his other appointments (paras. 143 to 147).

[56] On the other hand, Lord Hodge found that there is no appearance of bias since this assessment is made at the time of the hearing before the court, and by that time the two other arbitrations undisclosed by Mr Rokison had come to an end at a preliminary stage, before the fundamental issues in the instant arbitration were discussed. He also found that the non-disclosure itself did not in this case suggest bias, since, among other reasons, there was uncertainty in English law at the time relating to disclosure and Mr Rokison courteously dealt with the issue when it arose (paras. 149).

2.5.11. Lady Arden's supplementary reasons

[57] It would appear that Lady Arden's purpose in providing her separate and additional reasons was to record and comment on material in the case file not addressed by Lord Hodge with a view to «reinforcing» his conclusions (para. 159).

[58] Lady Arden was first concerned to delineate how arbitrators' disclosure falls to be categorised more generally in the English law taxonomy of duties. She first emphasised that it was a «secondary» duty dependent on the primary duty of avoiding conflicts stipulated in the *Arbitration Act* 1996, and that it is latent until some issue of conflicts emerges. These remarks serve not only the object of integrating arbitrators' disclosure into the wider English law, but may bear upon how, in future cases, judges will find that the duty behaves (para. 161).

[59] Perhaps of more direct significance, Lady Arden signalled more distinctly than did Lord Hodge that arbitrators should be under a duty to make reasonable investigation into potential sources of conflict, although she too left the question open. Again she based herself on considerations of consistency of treatment under English law with other similar situations (para. 162).

[60] Concerned with «inequality of arms and material asymmetry of information», Lady Arden was also a degree more firm about apparent bias in face of overlapping appointments than Lord Hodge, yet less categorical than the Court of Appeal. She expressed the view that, except in specific contexts where there is an established practice of non-disclosure of multiple appointments, disclosure should be made. Such a rule has the notable virtue of predictability in application (para. 164).

2.6. Commentary

2.6.1. The challenge process

[61] There are potentially three instances of courts in the challenge procedure under section 24 of the *Arbitration Act* 1996, although permission to appeal must always be sought and granted, as seen in this case. As also seen in this case, the arbitration may proceed pending the challenge (section 24(3) of the *Arbitration Act* 1996). This can make for a long wait. In Halliburton-Chubb, the application was made on 21 December 2016 (para. 22) at the beginning of the arbitration and the Supreme Court delivered its judgment on 20 November 2020, almost three years after the arbitration award was rendered (5 December 2017; para. 26).

[62] By contrast, the challenge procedure before the Swiss court of the seat of the arbitration under Art. 180a of the SPILA is limited to one instance (Art. 180a(2) SPILA) under the summary procedure (Art. 251a(b) of the Swiss Code of Civil Procedure) and thus will ordinarily be completed within a few months.

2.6.2. The usefulness of this decision

[63] Whilst in Swiss law statutes generally aim to serve as complete codes of areas of law, such as chapter 12 of the Swiss *Private International Law Statute* («**SPILA**») in relation to international arbitration, English statutes tend to operate as patchworks upon the whole cloth of the case law. Unusually for an English statute, the *Arbitration Act* 1996 purports to regulate most (but not all[7]) issues. It does leave certain areas to be developed by the courts (para. 47), in accordance with principles it enunciates in section 1 of the *Arbitration Act* 1996. This too is unusual in English law, as Lady Arden observed (para. 166).

[64] This case is helpful above all in that it is a fairly complete survey of the judicial ascertainment of certain areas Parliament left for development in relation to arbitrators' conflicts. It is therefore at present a handy reference for finding the law alongside the text of the *Arbitration Act*, 1996 itself.

[65] It is next useful in that it does develop the law on various of these issues, notably that there does exist a duty for arbitrators to disclose and this encompasses not just the situations which would constitute conflicts, but also those that might.

2.6.3. Objective tests for conflicts and disclosure

[66] The Swiss arbitration practitioner will immediately notice that the English test for arbitrators' conflicts is an objective one, as under Swiss law. The parties' own views of whether there is a conflict are not relevant.[8]

[67] It also obtains that the material scope of arbitrators' disclosure identified by the Supreme Court in this case resembles that in Swiss law. Disclosure must be made where the objective test

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7 For example, as observed by Lord Hodge at para. 57, the *Arbitration Act* 1996 is silent on the issue of confidentiality.

8 English law: Lord Hodge at para. 52 of the Halliburton-Chubb judgment referring to *Porter* v *Magill* [2001] UKHL 67; [2002] 2 AC 357, para. 103, per Lord Hope; Swiss law: ATF 128 V 82 consid. 2(a).

might be satisfied and not only where it will be.[9] One may therefore disagree formalistically with Lord Hodge's view (see para. 47 above) that the Swiss test for disclosure is confined to situations which constitute bias, and not those which might. But the effect of the Swiss rule, that the fact alone of failing to disclose is of no relevance to the bias assessment (see para. 107 below), results in practice in an obligation only to disclose what will constitute bias.

[68] As with Swiss law[10], in English law in principle the same requirements apply to arbitrators as apply to judges in relation to bias. This necessarily ensues because of the fundamental functional similarity of the *res judicata* result of judges' and arbitrators' activity alike.

2.6.4. Accounting for the particularities of arbitration

[69] With Lord Hodge's reasoning, English law now adjusts the assessment in view of specific identified differences between judges and arbitrators. Swiss law too accepts the principle that the context of arbitration should be accounted for in assessing arbitrators' conflicts, and in particular differences vis-à-vis the judicial *Ausgangspunkt*.[11] This principle was established in Swiss law as tolerance for the commercial promiscuity of arbitrators.[12] There is a question in Swiss law though as to what other aspects of the arbitral context may affect arbitrators' conflicts duty vis-à-vis judges'.

[70] By contrast, the English law on the question appears in Lord Hodge's reasons to have been born fully formed. Should Swiss law admit for example that the confidentiality and expansive unreviewability of arbitration, and diversity amongst arbitration users and arbitrators themselves, temper the bias assessment for arbitrators vis-à-vis that of judges? Should English law admit that other circumstances encountered by arbitrators impact upon the determination? One's instinct is that it may be best to develop the law on such matters, closely dependent upon particular facts and fact patterns, *par touches successives*.

[71] On the model of the expectations of judges, no regard is given to the fact that an arbitrator will often have been chosen by a party, neither in English nor in Swiss law. It is this which dictates the acceptance in both legal systems that the same test for bias applies for all arbitrators. This may, however, be a whistling past the graveyard in that in practice arbitrators often disclose a sensitivity to the interests of the party that nominated or appointed them, with the result that what determines the result is the view of the president. In response therefore, it might be that the law should demand a higher standard of neutrality of the president, somewhere between that of a judge and Caesar's wife. One might think that had Mr Rokison QC not been the president of the arbitral tribunal, as was the case in the Transocean-Chubb arbitration, Halliburton would not have objected. Indeed, Professor Park was appointed by Halliburton, and Chubb made no objection to his other Deepwater Horizon appointments.

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9 Article 179(6) of the SPILA: «Toute personne à laquelle est proposé un mandat d'arbitre doit révéler sans retard l'existence des faits *qui pourraient* éveiller des doutes légitimes sur son indépendance ou son impartialité. [...]» (emphasis supplied). This codified the position in the case law. ATF 111 1a 72 consid. 2(c) («Dès lors, l'arbitre a le devoir précontractuel, puis contractuel, d'informer les parties au procès des faits *pouvant être* tenus pour un motif de récusation») (emphasis supplied); ATF 136 III 605, consid. 3.4.4.

10 ATF 125 I 389, consid. 4(a) ; ATF 119 II 271, consid. 3(b).

11 ATF 129 III 445, consid. 3.3.3

12 ATF 129 III 445 at 454, ATF 125 I 389 at [390, ATF 124 I 121 at 123, ATF 118 II 359 at 361, 4A_233/2010, consid. 3.2.2, 4A_458/2009 consid. 3.1, 4A_586/2008 consid. 3.1.1, 4A_539/2008 consid. 3.2, 4A_210/2008 consid., 4.2, 4A_506/2007 consid. 3.1.1, and 4P.4/2007 consid. 3.1.

2.6.5. The legal basis for the disclosure obligation

[72] The Swiss arbitration practitioner will doubtless be intrigued by the limitation in the basis upon which the court recognised this duty of disclosure, namely statute; the *Arbitration Act* 1996 imputes a contractual term. In Swiss law[13], pre-contractual disclosure is a regular good faith duty, and at all events statute now provides for such a duty on arbitrators.[14]

[73] In English law, by contrast, pre-contractual disclosure is limited to specific contracts such as contracts *uberrimae fidei*, partnership contracts, and consumer contracts, all now upon a statutory footing. So, for example, an insured party is required to make disclosure which is material to the insured risks which are unknown to the insurer. But a seller in a contract of sale is not required to disclose defects.

[74] Since in English law the arbitrator's duty of disclosure arises by statute, and because of the wording of that statute, the duty does not arise until the arbitrator has been appointed, and thus has entered into his or her contract with the parties. Pre-contractual disclosure is simply a practical observance, apparently since the disclosure will at all events need to be made after, and it is efficient to address matters of conflicts prior to the appointment.

[75] Still, a prospective arbitrator may take the view that he or she is less likely to be recused if disclosure is made post-appointment. If this occurs, under English law one would strain to find a remedy.

[76] Institutional rules will, however, often require pre-contractual disclosure, in which case once an appointment is made, this becomes retroactively a contractual obligation upon the arbitrator, and a remedy would issue under English law.

[77] It may also be mentioned that in recognising a practice of pre-appointment disclosure, Lord Hodge, and with him the Supreme Court, may have prepared the ground for a future acceptance of such a legal duty in conformity with his acceptance of the role of custom and practice in legal development (see the following section, 2.6.11, below). Lord Hodge did refer to the contribution

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13 Cf. ATF 111 1a 72 consid. 2(c): «Comme avant la conclusion de tout autre contrat, les futures parties contractantes ont le devoir de se renseigner réciproquement sur des faits susceptibles d'influer de manière importante sur la détermination de l'autre partie à conclure lorsqu'il y a des raisons de penser que celle-ci les ignore (ATF 108 II 313, ATF 105 II 79, ATF 102 II 84 et les arrêts cités). L'arbitre n'échappe pas à cette règle.». The contract between the parties and the arbitrator, in Swiss law, the *sui generis receptum arbitri*, will usually be governed by the law of the place of arbitration but not always. See Daniel Girsberger/Nathalie Voser, *International Arbitration*, (Zurich: Schulthess, 2016), Chapter 3, «The Arbitral Tribunal» at para. 831 (p. 199): «If the parties have not chosen a law governing the arbitral contract, the applicable law has to be determined by conflict of laws rules. These rules generally provide that the applicable law is the law of the country with which the contract has its closest connection (e.g. Art. 117(1) SPILA). In most cases, this leads to the application of the law of the seat of the arbitration. It is not only the place where the characteristic performance (i.e. conducting the arbitration) is normally carried out, but it is also the law of the seat of arbitration (i.e. the *lex arbitrii*) which defines the scope of the arbitrator's mission and his or her powers.» According to Christopher Boog and Sonja Stark-Traber, once the contract is adopted the arbitrator's duty of disclosure flows from the fact that the *receptum arbitri* resembles the contract of mandate and therefore, by analogy to Art. 398(2) CO, the arbitrator must disclose in accordance with the mandatary's duty to carry out the mandate in a loyal and diligent manner (Christopher Boog/Sonja Stark-Traber, in: *Berner Kommentar, ZPO, Band III: Art. 353–399 ZPO und Art. 407 ZPO, Schweizerische Zivilprozessordnung, Band I-III*, Berne 2014, Art. 363 n 6): «Geht man mit der herrschenden Lehre davon aus, dass der Schiedsrichtervertrag als Vertrag sui generis mit stark auftragsrechtlichen Elementen zu qualifizieren ist (s. Näheres dazu in Art. 364 N 18 ff.), so folgt die Pflicht zur Offenlegung potenzieller Interessenkonflikte bereits aus Art. 398 Abs. 2 OR (Pflicht zur getreuen und sorgfältigen Geschäftsführung) (Bericht zum VE ZPO, 170; BSK-Weber-Stecher, Art. 363 ZPO N 7; Kellerhals, 393; Wehrli, 119). Auch das Bundesgericht, das den Schiedsrichtervertrag als Vertrag des Prozessrechts qualifiziert, geht von einer entsprechenden vorvertraglichen bzw. – nach Ernennung des Schiedsrichters – vertraglichen Offenlegungspflicht aus (BGE 111 Ia E. 2c, s. N 1 hiervor [...]».

14 Art. 363 CPC and now Art. 179(6) of the SPILA provide for pre-contractual disclosure of arbitrators' conflicts.

of Lord Mansfield to English law's acceptance of reference to commercial practices in the coalescing of legal principles (see para. 126 below). It was Lord Mansfield in *Carter* v. *Boehm*[15] who founded the duty of disclosure in contracts *uberrimae fidei* upon commercial practice.

2.6.6. Duties to investigate existence of conflicts

[78] In this case, the UK Supreme Court declined to determine whether there was a duty of investigation upon arbitrators:

> «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.»[16]

[79] Lady Arden suggested that a duty on arbitrators to investigate conflicts may be recognised in future case law:

> «While I agree with Lord Hodge (para 107 above) that this court should leave open the question of what enquiries an arbitrator should make about conflict of interests, the formulation in this subsection seems to me to be unexceptionable in principle, and it may be helpful guidance to arbitrators. I would add that the conclusion that as a matter of the law of England and Wales an arbitrator is to be treated as aware of a conflict of interest of which he is not actually aware would on the face of it take English and Wales beyond Scots law, which appears to require actual awareness (see para 112 above). That may confirm the wisdom of Parliament when it enacted the 1996 Act in leaving issues such as these to judicial development of the law rather than codifying them in legislation. By leaving them to judicial development, the common law of England and Wales can keep pace with change. It can take account of developing standards and expectations in international commercial arbitration in particular.»[17]

[80] Swiss arbitration law has not focussed on whether arbitrators are under a duty to make active enquiry about whether there may be a conflict. Art. 179(6) SPILA only recently entered into force, on 1 January 2021. The question does not seem to have been considered under Art. 363 CPC. As, however, in Swiss contract law the arbitrator is under pre-contractual disclosure duties, a failure to make reasonable enquiries about conflicts may amount to negligence sufficient to violate the duty.[18]

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15 (1766) 3 Burr 1905, (1766) 97 ER 1162.

16 Lord Hodge, para. 107.

17 Lady Arden, para. 162.

18 That negligence is sufficient to found a violation of pre-contactual duties, see ATF 140 III 200, consid. 5.2: «La responsabilità sulla fiducia include quella derivante dalla culpa in contrahendo (DTF 130 III 345 consid. 2.1 con rinvii) [...] *La parte che non rispetta i suoi obblighi non risponde unicamente quando essa ha agito con astuzia nel corso della negoziazione, ma già quando ha assunto un atteggiamento colpevole, sia che si tratti di dolo o di negligenza, perlomeno nei limiti della responsabilità in cui incorre sotto l'imperio del contratto previsto dalle parti* (DTF 101 Ib 422 consid. 4b con rinvii).» (emphasis supplied).

[81] Moreover, the IBA Guidelines contain an arbitrator's duty to make reasonable enquiries as to conflicts[19], and the Swiss Supreme Court does derive inspiration from them in dealing with matters relating to conflicts (see para. 129 below).

[82] The *grand absent* in this conflicts case for Swiss arbitration practitioners, especially as it concerns overlapping arbitral appointments, is the discussion of what in Swiss arbitration law has come to be known as the parties' «duty of curiosity», that is, the parties' obligation to make their own enquiries into any conflicts the arbitrator may be subject to, upon pain of preclusion from invoking them later to challenge the arbitrator or the award.

[83] It is true that more than in Swiss legal practice, in English legal practice legal argumentation tends to focus more exclusively on the issues decisive or potentially decisive to the outcome. In this case, however, it would seem unavoidable to address what the parties knew or ought to have known upon proper investigation into the arbitrator's other appointments as arbitrator. As the undisclosed appointments all came after the appointment in this case, the issue of any ongoing duty of curiosity is especially relevant.[20]

[84] In any event, it would seem that a logical inference from this case is that English law now recognises a party's duty of curiosity.

[85] Section 73(1) of the *Arbitration Act* 1996 imposes on parties a duty to conduct «reasonable diligence» to ascertain whether there has been «any other irregularity affecting the tribunal or the proceedings», in default of which the party will not be able to rely on that irregularity.[21] An arbitrator's failure to disclose a potential conflict would after this case constitute such an irregularity.

[86] The consequence of this is that parties must be required to conduct reasonable enquiries into any potential conflicts of arbitrators independently of the arbitrators' duty to disclose, that is, there would with this case appear now to be in English law a duty of curiosity on the parties.

[87] Future case law will need to clarify and ramify the extent of the duty, as has already occurred in Swiss law. It will also need to grapple with the relation of this duty on the parties and the arbitrator's duty of disclosure. As pointed out by Jean Marguerat[22], it is difficult to reconcile such a party duty with the arbitrator's duty of disclosure since it tends to negate the latter.

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19 IBA Guidelines, para. (d) of the Explanation to General Rule 7: «In order to satisfy their duty of disclosure under the Guidelines, arbitrators are required to investigate any relevant information that is reasonably available to them.»

20 Concerning the position in Swiss law relating to an ongoing duty of curiosity see footnote 28 below.

21 Section 73 of the *Arbitration Act*, 1996:«(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of the Part, any objection –[…]that the proceedings have been improperly conducted. […](d) that there has been any other irregularity affecting the tribunal or the proceedings, he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection.»

22 Jean Marguerat, Indépendance et impartialité de l'arbitre : le devoir de révéler de l'arbitre éclipsé, in: Jusletter 15 April 2013, at pages 5 and 6: «[…] le Tribunal fédéral rejette le principe que c'est avant tout à l'arbitre qu'il incombe de révéler les faits qui sont de nature à faire naître un doute sur son indépendance ou son impartialité. L'auteur soussigné ainsi que d'autres auteurs ont déjà critiqué cette tendance du Tribunal fédéral à reporter le fardeau de la révélation de l'arbitre sur le conseil. A notre avis, cette tâche revient à l'arbitre en premier lieu, et le critère subjectif de l'arbitre sur d'hypothétiques connaissances de certains faits par la partie ou son conseil ne saurait être érigé en tant que règle.»

[88] If there is a now a «duty of curiosity» on parties under English law, it would seem clear that the consequence of a failure to promptly satisfy it, is to preclude the party from relying on it in future.[23]

[89] In Swiss law, in accordance with this duty, a party is obligated to investigate according to «the care dictated by the circumstances»[24] any basis of conflict an arbitrator may be subject to.

[90] Any information which the party upon such enquiries would have known cannot later be relied upon to challenge the arbitrator or the award for bias.[25] The effect of this requirement on parties is a stark reduction in successful bias challenges to arbitrators and awards.

[91] This duty under Swiss law is indeed a fairly strenuous one.[26] It is, however, not an unlimited one. The Swiss Supreme Court has provided detailed guidance on the extent of the duty in relation to information over the internet, which today is very much the principal source. In outline, a general search using the name of the arbitrator is required, but further enquiry need not cover all available information on the internet. Deeper enquiry is limited to matters upon which there exists some suspicion of a conflicts issue upon that initial general trawl[27] during the period of challenge prior to the appointment of the arbitrator.[28]

2.6.7. Treatment of overlapping arbitrations

[92] The only conflicts concern in this case of multiple arbitral appointments which troubled Lord Hodge was that there would be an imbalance of information in favour of the one party involved in the arbitrator's overlapping arbitrations (para. 142). He did not mention any other concern;

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23 See *ASM Shipping Ltd of India* v. *TTMI Ltd of England* [2005] EWHC 2238 (Comm), 19 October 2005, per Morison J., relying at para. 29 on *Margulead* v. *Exide* [2005] 1 Lloyd's Rep. 324 (Colman J).

24 4A_234/2008, consid. 2.2.1; 4A_528/2007, consid. 2.5.1.

25 ATF 136 III 605 consid. 3.4.2; ATF 129 III 445 consid. 4.2.2.1 ; 4A_110/2012, consid. 2.2.2; 4A_763/2011; consid. 3.3.2; 4A_234/2008, consid. 2.2.2; 4A_528/2007, consid. 2.5.3; and 4A_506/2007, consid. 3.2.

26 See for example 4A_110/2012 where the Swiss Supreme Court found that the duty had not been discharged in relation to multiple arbitral appointments where the arbitrator in question refused to answer a question directly put to him by counsel about this during the hearing, on the basis that counsel was so eminent in the area of arbitration (sports arbitration) that he should have been able to ascertain the existence of these appointments and his knowledge was attributed to his client. For a comment on this case see Jean Marguerat, *op. cit.* at note 22 above.

27 ATF 147 III 65, consid. 6.5 : «Une partie peut ainsi, suivant les circonstances, avoir besoin d'indices l'alarmant sur l'existence d'un éventuel conflit d'intérêts lui imposant alors d'effectuer des recherches plus poussées, notamment lorsque le motif fondant le risque de partialité est a priori insoupçonnable (EL CHAZLI, op. cit., p. 329). Aussi le seul fait qu'une information soit accessible librement sur internet ne signifie-t-il pas ipso facto que la partie, qui n'en aurait pas eu connaissance nonobstant ses recherches, aurait nécessairement failli à son devoir de curiosité.»

28 The Swiss Supreme Court appears now to accept a distinctly lesser duty of the parties to make enquiry after the initial period for challenging the arbitrator is past. See ATF 147 III 65, consid. 6.5 : «En effet, on ne saurait exiger d'une partie qu'elle poursuive ses recherches sur internet tout au long de la procédure arbitrale, ni, a fortiori, qu'elle scrute les messages publiés sur les réseaux sociaux par les arbitres au cours de l'instance arbitrale.» In fashioning limits to the parties' duty to enquire about arbitrator conflicts the Swiss Supreme Court appears to be concerned to limit the time burden on the parties: ATF 147 III 65, consid. 6.5 : «il conviendrait, *le cas échéant*, de ne pas se montrer trop exigeant à l'égard des parties, sous peine de transformer le devoir de curiosité en une obligation d'effectuer des investigations très étendues, sinon quasi illimitées, *nécessitant un temps considérable*.» (emphasis supplied). It would therefore appear that the Swiss Supreme Court is not excluding an ongoing duty on the parties to enquire into arbitrators' conflicts in particular where those ongoing enquiries would not cost the parties undue time. See also, ATF 127 III 249 where at consid. 3.3.3 the Swiss Supreme Court stated that where there are indications of a conflict too indistinct to raise an early challenge the duty to do so increases as the arbitration proceeds: «Während die Parteien zu Prozessbeginn nicht schon jedes entsprechende Indiz zum Gegenstand eines unsubstanziierten Ablehnungsantrages machen müssen, trifft sie mit zunehmendem Prozessverlauf und Näherrücken des Urteilszeitpunkts die Pflicht, einen echten oder vermeintlichen Mangel auch bei bloss unvollständiger Kenntnis geltend zu machen [...]»

nor did Lady Arden. His Lordship did, however, mention that this concern was not the only one pleaded by Halliburton (see para. 138).

[93] The Court of Appeal found that this concern was not such as generally to found sufficient concern since, in accordance with their legal duty, arbitrators would generally decide on the evidence in the arbitration before them and not on information drawn from other arbitrations in which they also act as an arbitrator. However, Lord Hodge found that «inequality of arms and material asymmetry of information» (para. 164) «can readily be seen as a cause of concern» (para. 142). Lady Arden agreed (para. 172).

[94] In the case at first instance, before Popplewell J.[29], one sees that two bases of concern were pleaded by Halliburton, the other being that the appointment of the arbitrator in another arbitration would give the arbitrator a «secret remuneration».[30]

[95] Popplewell J. briskly dismissed this concern on the basis that, once appointed, an arbitrator is entirely independent of the party who nominated him or her, and remuneration in a second case is no different than remuneration in a first.[31]

[96] The Court of Appeal agreed (see para. 36).

[97] It is surprising that in both instances below, this concern was so rapidly dispatched, and that it was hardly even considered by the Supreme Court.

[98] Article 3.1.3 of the IBA Guidelines treats as a conflicts concern the fact that a party has repeatedly nominated the same arbitrator within a limited period of time:

> The arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties.

[99] The concern in Article 3.1.3 of the IBA Guidelines is not just an additional remuneration for the arbitrator[32] thanks to a party, but also that a second appointment in little time suggests that

29 *H* v. *L and Ors*, [2017] EWHC 137 (Comm).

30 *H* v. *L and Ors*, [2017] EWHC 137 (Comm), para. 17.

31 *H* v. *L and Ors*, [2017] EWHC 137 (Comm), paras. 19 and 20: «19. As to the first, the duty to act independently and impartially involves arbitrators owing no allegiance to the party appointing them. Once appointed they are entirely independent of their appointing party and bound to conduct and decide the case fairly and impartially. They are not in any sense, as may sometimes be misunderstood by those in other jurisdictions, a representative of the appointing party or in some way responsible for protecting or promoting that party's interests. This independence is enshrined in s.33 of the Act, which requires the arbitrator to act fairly and impartially irrespective of who appointed him or her. This is fundamental and well known to all involved in London international arbitration. The fair-minded and informed observer would expect M, with his extensive experience and high reputation, 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.20. The appointment of M by L in the R reference confers no immediate benefit on him in terms of his fees. L does not undertake to bear those fees; the tribunal as a whole, exercising its obligations under s. 33, will decide who ultimately is to bear them, in the light of the course of the arbitration and the result. It is true that an arbitrator gains a benefit from any appointment in the sense that the appointment contributes to the opportunity for him to earn his living. It would be absurd, however, to conclude that once appointed, the fact of appointment would dispose him to decide the case in favour of the appointing party. Were it so, no arbitrator could ever accept an appointment without being capable of removal for apparent bias. Such an approach is self-evidently wrong and inconsistent with the very nature of the arbitrator's role in London arbitration, reflected in s.33 of the Act.» See also Lord Hodge's summary of the ground at para. 29.

32 Article 3.1.5 of the IBA Guidelines is about disequilibrium of information.

the party is in a position to make further such appointments and is willing to do so.[33] This may constitute a financial incentive on an arbitrator to treat that party favourably.[34]

[100] Gary Born is critical of the rule in Article 3.1.3 of the IBA Guidelines.[35] He states that, «[t]he better approach would be to consider repeat appointments by a single party or lawyer only where they constituted a material part of the arbitrator's professional activities and income for a material period of time.»[36]

[101] On the facts of *Halliburton* v. *Chubb*, the second appointment by Chubb, even undisclosed (see section 2.6.8 below) would not satisfy Gary Born's test.

[102] Still, it is surprising that Popplewell J.'s and the Court of Appeal's dismissal of the concern is so absolute. Gary Born must surely be right that at some point work coming to an arbitrator from a party begins to create a perception of dependence.

[103] That was indeed the opinion of Hamblen J. (as he then was) in *Cofely Limited* v. *Anthony Bingham and Knowles Limited*[37], where, in holding that there was apparent bias,«of most significance is that it shows that over the last three years 18% of [the impugned arbitrator's] appointments and 25% of his income as arbitrator/adjudicator derives from cases involving [a firm of consultants]».[38]

[104] Whilst Swiss law does advert to the IBA Guidelines as indicative of international practice – as do a great many arbitration systems around the world – on this particular point the Swiss Supreme Court departs from the IBA Guidelines and requires that concrete economic dependence be shown.[39]

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33 See for example *Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, Arbitrator* in: ICSID Case No ARB/10/5, *Tidewater Inc.* v. *Venezuela* of 23 December 2010 by Professor Campbell McLachlan QC, President and Dr Andrés Rigo Sureda, Arbitrator at para. 62 relying on Craig, Park & Paulsson *International Chamber of Commerce Arbitration* (3rd edn, 2001), para. 13.5 (page 231): «[…] there *would be a rationale for the potential conflict of interest which may arise from multiple arbitral appointments by the same party if either (a) the prospect of continued and regular appointment, with* the attendant financial benefits, might create a relationship of dependence or otherwise influence the arbitrator's judgment; or (b) there is a material risk that the arbitrator may be influenced by factors outside the record in the case as a result of his or her knowledge derived from other cases.»

34 A further concern about an arbitrator being nominated by a party in one of the arbitrator's existing arbitrations is that the arbitrator will continue to have this relation of close confidence with the one party and not the other when one or other of the arbitrations finishes (before the other). This may influence the arbitrator to want to avoid disappointing the common party in the award terminating the first arbitration. The alleviation of this concern would entail that an arbitrator would never be able to accept an arbitration involving a party in a case he or she was already arbitrating.

35 Gary Born, «Chapter 12: Selection, Challenge and Replacement of Arbitrators in International Arbitration», in: Gary B. Born, *International Commercial Arbitration*, 3rd edition (Kluwer Law International, 2021) at page 2018: « The 2014 IBA Guidelines adopt a relatively extreme view of this issue, providing that multiple appointments of an arbitrator by the same party or the same legal counsel in the past three years are an Orange List circumstance, requiring disclosure and providing possible grounds for challenge.»

36 Gary Born, *op. cit.* at note 35 at page 2020.

37 [2016] EWHC 240 (Comm).

38 *Cofely Limited* v. *Anthony Bingham and Knowles Limited*, [2016] EWHC 240 (Comm) a para. 105.

39 4A_258/2009, consid. 3.1.2: «[…] Er zeigt jedoch nicht konkret auf, worin im zu beurteilenden Fall eine derartige bedeutende wirtschaftliche Beziehung bestehen soll.» See also Mariella Orelli, Chapter 2, Part II: Commentary on Chapter 12 PILS, Article 180 [Arbitral tribunal: challenge to an arbitrator]', in: Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide* (Second Edition), 2nd edition (Kluwer Law International, 2018) at para. 13 (p. 118): «In general, an arbitrator must not be (amicably or otherwise) closely connected to any of the parties, irrespective of the legal nature of any such connection. Hence, circumstances giving rise to justifiable doubts as to an arbitrator's independence, which doubts must be serious, may lie either in the arbitrator's personal conduct or relate to the functional or organizational state of affairs.» In coming to this conclusion Orelli refers (at her footnote 49) to a decision of the Swiss Supreme Court (ATF 129 III 445 para. 4.2.2.2) dismissing a challenge based on an arbitrator previously having acted in an arbitration with one of the parties.

2.6.8. Treatment of whether failure to disclose can be an indication of conflict

[105] Lord Hodge held at paras. 133 and 138 that an arbitrator's failure to disclose an element of potential conflict that should have been disclosed may itself constitute an indication of conflict. But at para. 149, he held that in this case there was no such concern as English law had been uncertain on the duty of disclosure and the impugned arbitrator put forward a credible excuse for his non-disclosure.

[106] Lord Hodge's approach, and therefore the approach now under English law, corresponds to that of the ICC Court. According to Professors Gabrielle Kaufmann-Kohler and Antonio Rigozzi, the ICC Court «is prepared to consider a breach of the duty to disclose as relevant, although not decisive in itself.»[40]

[107] There are more lenient standards. The IBA Guidelines deny any probative force of the failure to disclose itself.[41] Swiss law is substantially identical to the approach under the IBA Guidelines.[42]

[108] The position under English law seems the most appropriate in principle: arbitrators generally wish to take up appointments and continue in them. Treating their failure to disclose as a factor which as a rule suggests bias negatives this incentive on arbitrators to be parsimonious with disclosure. But it is submitted that one should not place much weight on the impugned arbitrator's post-challenge explanation in making this assessment since the arbitrator can always find a self-serving excuse.

2.6.9. Relevant time for the bias assessment

[109] Lord Hodge's finding that the time relevant for assessing whether there was bias was dispositive of this case. As seen in section 2.5.7 above, because of the wording of statute, that time is the time of the hearing before the court.

[110] It would seem that Lord Hodge should not be understood as deciding that any bias that existed but has since disappeared should not be taken into account in the bias assessment, or given less weight if subsequently that basis lessened.

[111] Rather he should be understood as saying that it is the state of information at the time of hearing that is the measure, and not the state of information at any earlier time, when for example there is uncertainty as to how events relevant to the bias risk will play out. In this case, for example, there was uncertainty as to the outcome of the preliminary issue in the other arbitrations and depending on how it was answered, there would be more or less substantive overlap with the arbitration in this case.

[112] To understand Lord Hodge to be declaring that no previous conflicts-state is relevant would amount to blindness as to how the proceedings may have been affected by that previous state of conflict, and how it may ultimately affect the result. It would also be inconsistent with the

40 Gabrielle Kaufmann-Kohler/Antonio Rigozzi, *International Arbitration: Law and Practice in Switzerland* (Oxford: OUP, 2015) at para. 4165 (page 226). See also 4P.188/2001, consid. 2f, a case referred to by Gabrielle Kaufmann-Kohler and Antonio Rigozzi.

41 IBA Guidelines, Comment 5 of the Practical Application of the General Standards.

42 Gabrielle Kaufmann-Kohler/Antonio Rigozzi, *op. cit.* in note 40 above, at paras. 4.164 – 4.165 (page 226).

proposition accepted in English law and virtually everywhere else, that arbitrators are under continuing obligations to remain free of conflict.

2.6.10. The relationship between the arbitrator's duty of confidentiality and the arbitrator's duty of disclosure

[113] The arbitrator's duty of disclosure will only rarely raise concerns about violating the arbitrator's duty to maintain the confidentiality of an arbitration. For such an issue to arise, the potential conflict must ensue from the arbitrator's being involved in another, or other arbitrations, with some overlap, in subject matter or participants, with the potentially conflicted arbitration.

[114] A number of such circumstances have come before the Swiss Supreme Court, but there does not appear to have been any discussion of the issue. It is therefore remarkable that the issue was so prominent in the Halliburton-Chubb case.

[115] It is all the more remarkable in that, at least as regards arbitrators, the nature of confidentiality in English arbitration law is similar to that in Swiss arbitration law.

[116] As Lord Hodge explained at para. 83, privacy and confidentiality are, «implied obligations arising out of the nature of arbitration itself [...]».[43] He was referring to confidentiality on parties, but the same applies as regards arbitrators' duty of confidentiality.

[117] In Swiss law, there is no statutory duty of arbitrators' confidentiality, neither under the PILA nor the CPC, and indeed nor in Art. 321 of the Swiss Criminal Code. There is, however, a duty on arbitrators to maintain confidentiality arising from their contract with the parties, the *receptum arbitri*. It is a secondary duty on arbitrators' flowing from their primary duty of diligence, on the model of Art. 398(2) CO in relation to the contract of mandate.[44]

[118] Under this duty of confidentiality, arbitrators must not disclose the existence of the arbitration and the parties to it.[45] Of course arbitrators may divulge information relating to the arbitration when it is necessary to their conduct of their function in the arbitration, like when they must instruct an expert. But this exception cannot apply in relation to disclosure of conflicts, since such disclosure is not necessary to the conduct of the arbitration in which the duty of confidentiality is relevant, but to another arbitration in which the common arbitrator is seeking appointment.

[119] Since arbitrators' duty of arbitration is contractual, and it is as a rule owed only to the parties, information may be divulged with the consent of the parties.[46] As with English law in Halliburton-Chubb, parties' consent would appear the best candidate in Swiss law to justify an

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43 But see *Emmott* v *Michael Wilson & Partners Ltd* [2008] EWCA Civ 184; [2008] Bus LR 1361 where Lawrence Collins LJ at para. 84 (as quoted by Lord Hodge at 83) characterised the duty of confidentiality as «a rule of substantive law masquerading as an implied term».

44 Roland Bühler in: Jolanta Kren Kostkiewicz/Stephan Wolf/Marc Amstutz/Roland Fankhauser (eds.), *OR Kommentar, Schweizerisches Obligationenrecht*, 3rd ed. Zürich: Orell Füssli, 2016), 398 N 3 (page 1100); «Ferner trifft den Beauftragten aufgrund seiner Treuepflicht eine Pflicht zu Verschwiegenheit über das, was er bei der Ausführung des Auftrages über die Verhältnisse des Auftraggebers erfahren hat. Diese Pflicht geht über die blosse Pflicht zur Geheimniswahrung hinaus, indem der Beauftragte sich über mit der Auftragsausführung zusammenhängende Tatsachen nur zu verbreiten hat, wenn dies den Interessen des Auftraggebers dient bzw. dessen tatsächliche oder eine sich nach Vertrauensprinzip ergebende Erlaubnis hierfür vorliegt.»

45 Philipp Ritz, *Die Geheimhaltung im Schiedsverfahren nach schweizerischem Recht* (Tübingen: Mohr Siebeck, 2007), at 193.

46 Philipp Ritz, *op. cit.* at note 45 at 196 et seq.

arbitrator's disclosure of the existence of another arbitration and the parties to it with a view to assessing conflicts.

[120] It may be that the Swiss Supreme Court is less inclined to found legal rules upon commercial customs and practices than the UK Supreme Court (see the next section, 2.6.11). However, Swiss law is open to interpreting contracts in accordance with these.[47]

[121] Lord Hodge recognised, under English law, party consent for an arbitrator to disclose an involvement in another arbitration and the identity of the common party, founded on English arbitration practice (see section 2.5.3 above and paras. 87 to 89 and 100 to 102 (of Halliburton-Chubb)).

[122] Swiss law may too base itself upon leading arbitration rules prescribing disclosure, the lack of any issue of confidentiality having been raised before it in relation to conflicts disclosure, and the Halliburton-Chubb decision, and any support in the legal literature, to conclude, even without the support of interveners, that there is indeed a practice and custom in Swiss international arbitration of arbitrators disclosing the existence of other arbitrations in which they sit as an arbitrator, and the identity of a party there common to the arbitration in which disclosure is being made.

2.6.11. Concern to develop the law consistently with the demands of commerce and arbitration

[123] At para. 103, Lord Hodge makes a statement, which one cannot conceive a Swiss judge as making[48]:

> «In my view, the law can and should recognise the realities of accepted commercial and arbitral practice as a guide both in the formulation of legal rules and in the interpretation of the parties' contracts when the practice operates in the public interest.»

[124] There is today an undisguised acceptance of the English court's role in legal development, in Lord Hodge's terms, «the formulation of legal rules and in the interpretation of the parties' contracts». This obtains even where a compendious statute applies, as with arbitration (see para. 63 above).

[125] In this case, commercial practice played a significant role in the formation of the legal rules in relation to disclosure.[49] Lord Hodge found at paras. 127, 133 and 152 that where the practice is not to disclose overlapping arbitral appointments this is a particularly weighty factor favouring there being no legal requirement to do so. His Lordship also found that practice of

47 ATF 94 II 157, consid. 4(b): «Die Verkehrssitte gilt aber auch nicht ohne weiteres als Vertragsinhalt; sie verpflichtet die Parteien bloss dann, wenn diese sich ihr durch übereinstimmende gegenseitige Willensäusserung – sei es ausdrücklich, sei es stillschweigend, durch schlüssiges Verhalten – unterwerfen. Die Übung kann sodann auch als Hilfsmittel für die Auslegung der Parteierklärungen nach der Vertrauenstheorie in Betracht kommen, jedoch nur unter der Voraussetzung, dass die durch die Verkehrssitte belastete Partei diese kannte oder doch wenigstens mit ihrem Bestehen rechnen musste (BGE 91 II 358 Erw. 2, BGE 90 II 101 Erw. 4 und dort erwähnte Rechtsprechung).»

48 But see paras. 130 and 131 below.

49 The requirements to establish a practice under English law are enunciated in *Baker* v *Black Sea & Baltic General Insurance Co Ltd* [1998] 1 WLR 974, as referred to by Lord Hodge at para. 181 of the Halliburton-Chubb judgment.

disclosing multiple arbitration appointments, constitutes parties' legally-valid consent to waive confidentiality (see paras. 87 to 89, 91 to 92 and 100 to 102).

[126] As seen in Lord Hodge's reference at para. 103 to Lord Mansfield's shaping of the «commercial law» in the 18th century in accordance with «honest commercial practices and informal rulings on the *lex mercatoria*», such treatment has traditionally not extended to arbitration law.

[127] It is thus a recognition of arbitration's importance to commerce, and indeed that it is a vehicle expressing the needs of commerce, that arbitration practice is now accepted as a source for its development, all the more in that pursuing arbitration and commercial practice are not found within the principles in section 1 of the *Arbitration Act* 1996 for the Act's construction.

[128] Lord Hodge referred to the IBA Guidelines and instruments and opinions of leading international arbitration institutions in England for evidence of practice.[50]

[129] The Swiss Supreme Court is a shade more guarded in the degree to which it accepts that the IBA Guidelines enunciate international practice. For the Swiss Supreme Court, the IBA Guidelines are a working instrument apt to contribute to the harmonisation and unification of international standards, which can be expected to influence the practice of arbitration institutions and courts in dealing with conflicts.[51]

[130] It may be ventured more generally, that English judges are less reserved than Swiss judges in shaping the law by reference to commercial practice, although it is true that Art. 1(2) CC directs the Swiss judge to decide in accordance with custom where the letter and spirit of statute give out.

[131] In Swiss law, on the whole, it is rare for the letter and spirit of statute to begrudge an answer. It has happened though that in international arbitration the Swiss Supreme Court has engaged in more innovation than in other areas of Swiss law. A good number of the important developments in Swiss international arbitration law over the last thirty years do proceed from decisions of the Swiss Supreme Court. The legislative reform of Swiss international arbitration law that entered into force on 1 January 2021 integrated into statute decisions of the Swiss Supreme Court *inter alia* i) allowing for correction, interpretation and supplementing of arbitration awards, ii) allowing for revision of arbitration awards, and iii) imposing preclusion of objections if not promptly made.

[132] It may also be noted that in shaping the law of arbitration, the English court may be going even further than crystalising practice into law. On two occasions in the Halliburton-Chubb judgment, Lord Hodge adverts to the importance of making English arbitration attractive to users.

[133] The first instance is his reference at para. 63 to the finding of a survey of international arbitration which Queen Mary University of London carried out in 2018, that «the main reasons why parties in international arbitration choose to arbitrate in England are the reputation of London and that the English legal system guarantees neutrality and impartiality.» He concludes from this

50 E.g. at para. 71, «The IBA Guidelines 2014 set out good arbitral practice which is recognised internationally [...]», at para. 80, «[...] best practice as seen in the IBA Guidelines and in the requirements of institutional arbitrations such as those of ICC and LCIA».

51 ATF 142 III 521, consid. 3.1.2, «Ces lignes directrices, que l'on pourrait comparer aux règles déontologiques servant à interpréter et à préciser les règles professionnelles (ATF 140 III 6 consid. 3.1 p. 9; ATF 136 III 296 consid. 2.1 p. 300), n'ont bien sûr pas valeur de loi; elles n'en constituent pas moins un instrument de travail utile, susceptible de contribuer à l'harmonisation et à l'unification des standards appliqués dans le domaine de l'arbitrage international pour le règlement des conflits d'intérêts, lequel instrument ne devrait pas manquer d'avoir une influence sur la pratique des institutions d'arbitrage et des tribunaux.»

at para. 33 that «[i]t is therefore important that English law upholds rules which support the integrity of international arbitration.»

[134] So far the discourse is only to «upholding rules».

[135] Later, however, in para. 174, Lord Hodge cites and relies on the evidence of the London Maritime Arbitration Association (LMAA) in his development of the extent to which confidentiality should limit disclosure, as follows:

> «The LMAA believes that users of ad hoc maritime arbitration particularly value confidentiality. Any new general rule of English law requiring disclosure of confidential information against parties' wishes runs a serious risk of undermining the attractiveness of London as the preeminent seat for maritime arbitration.»

[136] So, here, more than merely maintaining the law, the mercantile *interests* of English arbitration are being accounted for in the development of the law.

[137] It is even more difficult to conceive of Swiss courts being swayed by this brand of concerns in interpreting the law and in any development of it.

2.6.12. Procedural features

[138] It is notable that the Supreme Court took a full year from the time of the hearing in this case to render its judgment. The usual period is about 12 weeks plus any period of judicial vacation during the period.[52] This unusually long time for rendering judgment is perhaps an indication of the importance of the issues in this case, and perhaps also of the complexity of some. It was certainly in some part due to the voluminousness of the case file. At para. 159, Lady Arden remarked that «[t]he parties and the interveners have provided such a considerable body of submissions and material, containing a wealth of learning, that it is hardly possible for a single judgment, or even more than one, to capture all the points that could be made.»

[139] A stark procedural feature in this case is the identity and role of public interest interveners, known more popularly (outside of the UK) as *amici curiae* (friends of the court), since that is what they are called in the United States.[53]

[140] *Prima facie*, the category of persons who may gain admittance as public interest interveners in a matter before the United Kingdom Supreme Court is wide. Rule 26 of the *Supreme Court Rules 2009* provides that «any person [...] seeking to make submissions in the public interest, [...], may apply to the Court for permission to intervene in the appeal.»

[141] But the grant of permission to intervene will require the applicant to convince the Supreme Court that i) it has expertise, ii) its submissions will not be duplicative in particular of those of the parties, and iii) the public interest will be served notably by the intervener's being likely

52 UK Supreme Court FAQs, drawn at time of writing from https://www.supremecourt.uk/faqs.html.

53 According to Paul Collins, *Friends of the Supreme Court: Interest Groups and Judicial Decision Making* (Oxford: OUP, 2008) at 46, there are *amicus curiae* briefs in about 90% of the cases before the United States Supreme Court.

to supply the court with information, evidence or submissions on the state of the law that they would not otherwise obtain.[54]

[142] On fairly rare occasion, the Supreme Court will *invite* a person to intervene.[55] The Supreme Court may, more frequently, address particular questions to interveners. This occurred in this case in regard to arbitral practices in making disclosure (see para. 86).

[143] In this case, the International Court of Arbitration of the ICC and the LCIA intervened with both written and oral submissions. The CIArb, the LMAA, and the GAFTA intervened with written submissions. These five entities are leading arbitration institutions each with a close association with and knowledge of English arbitration.

[144] Lord Hodge thanked the intervenors for their contribution to the clarification of the «wider issues raised by this appeal» (para. 4).

[145] The issues on which the intervenors volunteered their views were i) whether the Court of Appeal's tests for disclosure and bias were sufficiently severe so as to reflect international norms[56]; ii) whether a failure to disclose can give rise to an appearance of bias even if the fact or circumstance which should have been disclosed would not of itself give rise to apparent bias[57]; and iii) whether the arbitrator in considering what needs to be disclosed is under a duty to make reasonable enquiries whether there are circumstances which may give rise to doubts as to his or her impartiality.[58]

[146] The court also sought further submissions from the interveners «on practice in relation to the disclosure of facts concerning a related arbitration or arbitrations without obtaining the express permission of the parties to the arbitration about which information was being disclosed, and what were the practical consequences of the recognition of a legal duty of disclosure in those circumstances» (para. 86).

[147] Quite apart from Lord Hodge's recognition of the helpful role of the interveners in this case (see para. 144 above), the degree to which the reasons and conclusions of both Lord Hodge and Lady Arden reflect the reasoning and positions of the interveners discloses their significant contribution in this case. Notably, the Supreme Court broadly accepted the interveners' views as regards practice in international arbitration, increased the level of disclosure and tightened the requirements of impartiality vis-à-vis those of the Court of Appeal, in accordance with the views of the LCIA, the ICC and the CIArb.

[148] The Supreme Court's acceptance in this case of the law-forming role of practice and custom in international arbitration certainly corroborates the function of public policy interveners, since they can have reliable evidence of these customs and practices.

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54 See the 2016 Freshfields guide for Liberty («an all-party law reform and human rights organisation working to strengthen the justice system»), *To Assist the Court: Third Party Interventions In The Public Interest*, available at time of writing on https://files.justice.org.uk/wp-content/uploads/2016/06/06170721/To-Assist-the-Court-Web.pdf at pages 16 – 21.

55 See for example *Rogers* v *Merthyr Tydfil County Borough Council*, [2006] EWCA Civ 1134 at para. 10 where certain insurers were invited to intervene.

56 The LCIA, ICC and CIArb expressed the view that the Court of Appeal's test for bias was not as demanding as that under international norms, and the LCIA expressed the same as regards the Court of Appeal's test for disclosure (para. 42). The LMAA and GAFT submitted that in circumstances usual in arbitrations under their auspices there may often be no apparent bias because of multiple arbitral appointments, and disclosure of them is at all events not indicated (paras. 43 to 45).

57 The LCIA, ICC and CIArb contended that the answer is in the affirmative (para. 42).

58 This was the view expressed by the LCIA (para. 42).

[149] As the name suggests, public interest intervenors have no private interest in the result of the case, but rather make submissions before the court with a view to assisting it with the ascertainment of the law in matters of public interest. It should be noted that the combined effect of the greater role of the English court in the development of the law, with the more exogenic treatment in English law of sources of considerations relevant to its development (see paras. 130 and 131) vis-a-vis the position under Swiss law, entails that public interest interveners often validly direct their submissions to the effect of any particular choice in the development of the law.

[150] There is therefore less of a functional use for public policy interveners in Swiss judicial proceedings. It may well be satisfactory, therefore, that there is in fact no opportunity for public interest intervention in either the CPC or in proceedings before the Swiss Supreme Court. Indeed, where the submissions of public interest interveners are repetitive of those of the parties', the result is increase in the cost and time of judicial proceedings without added value.[59]

[151] The heart of what third party interveners supply in English proceedings is nonetheless available to the Swiss Supreme Court in the form of publications by arbitration actors, such as the ICC,[60] which counsel often with rich first-hand experience of arbitration practice cite before it, and of course which the Court may cite of its own motion, subject to observance of the parties' rights to be heard. In its decisions on international arbitration, notably those in relation to setting aside challenges under Art. 190 of the SPILA, the Swiss Supreme Court cites extensively from the literature on international arbitration. The UK Supreme Court also cites international arbitration literature, as it did at para. 62 in relation to impartiality standards of co-arbitrators, but clearly not as extensively as the Swiss Supreme Court does, and it generally cites only publications in English.

[152] The UK Supreme Court will take no notice of the application of the law to the facts of a case by public policy interveners. Lord Hodge remarked courteously at para. 42 that it was «unusual» that CIArb had done so. Such «assistance» is therefore of no advantage vis-à-vis proceedings before the Swiss Supreme Court. At all events, by Art. 106(1) of the Swiss Supreme Court Act, the application of the law to the facts (*Subsumtion*) is a duty of the court itself.[61]

[153] It might be thought that the absence of public policy interveners before the Swiss Supreme Court deprives it of first-hand observance of debate on issues of public interest. However, as a rule proceedings before the Swiss Supreme Court are exclusively written. If such assistance is

59 *Re E (a child) (AP) (Appellant) (Northern Ireland)* [2008] UKHL 66, per Lord Hoffman at para. 3: «[a]n intervention is however of no assistance if it merely repeats points which the appellant or respondent has already made. An intervener will have had sight of their printed cases and, if it has nothing to add, should not add anything. It is not the role of an intervener to be an additional counsel for one of the parties. This is particularly important in the case of an oral intervention. I am bound to say that in this appeal the oral submissions on behalf of [one of the interveners in that case] only repeated in rather more emphatic terms the points which had already been quite adequately argued by counsel for the appellant. In future, I hope that interveners will avoid unnecessarily taking up the time of the House in this way.»

60 The ICC makes its reports, opinions, studies and other publications available in its digital library, accessible (for a fee) at https://library.iccwbo.org.

61 Thomas Sutter-Somm/Benedikt Seiler, «Art. 57 Rechtsanwendung von Amtes wegen» in: *Kommentar zur Schweizerischen Zivilprozessordnung (ZPO)*, Thomas Sutter-Somm, Franz Hasenböhler and Christoph Leuenberger (eds.), 3rd ed. (Zurich: Schulthess, 2016) at para. 4 (page 498): «Die Rechtsanwendung besteht in der Feststellung des anzuwendenden Rechts *und in der Anwendung dieses objektiven Rechts auf den konkreten Sachverhalt (Subsumtion)*.» (emphasis supplied).

unavailable, more than the admission of public interest interveners would be required to secure such an advantage.

[154] Perhaps the only discernible advantage in public policy intervention is that the court can actively request the intervener's views on matters of particular interest to the court in any particular case, as the UK Supreme Court did in this case (see para. 146 above).

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