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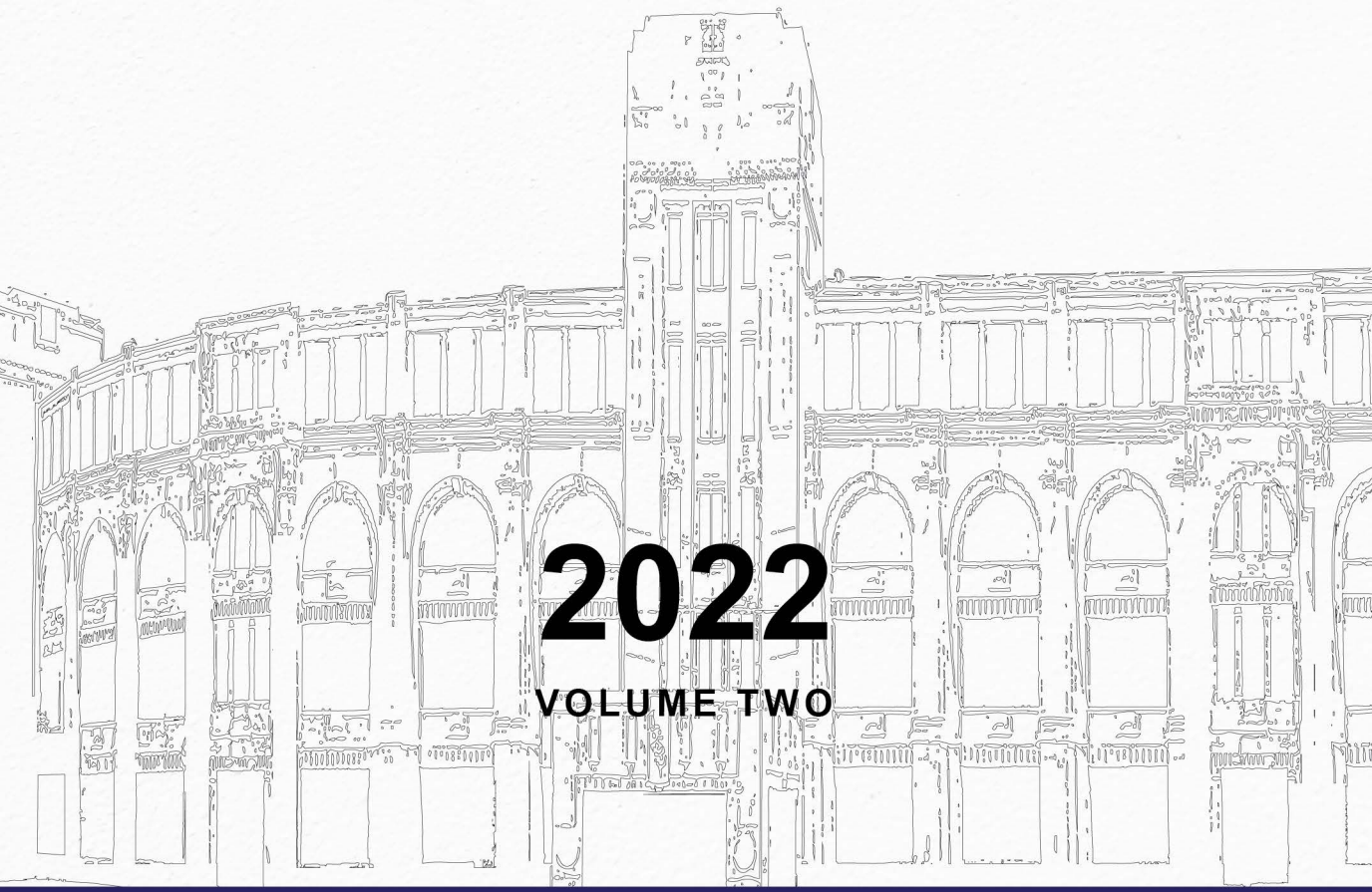

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Preface

Welcome to the second edition of the AIAC Alternative Dispute Resolution Journal 2022. This second edition features four articles, reflecting the second half of the year's interest in ADR.

The AIAC acknowledges the growing interest in article writing and knowledge-sharing which are inculcated in this journal. We are delighted to publish materials attributed to different perspectives of ADR practitioners, academicians, jurists, as well as young practitioners from around the globe.

As Malaysia recently opened its borders and COVID-19 restrictions were lifted, the AIAC took the opportunity to organize evening talks and workshops where a meeting of minds in the ADR industry was made possible. As a result, we witnessed an interesting panorama of discussions ranging from res judicata in arbitration, the journey embracing the historical milestones in the "Sulu Arbitration", to the perspective of arbitrators facing challenge applications, and investment arbitration in the winning article from the AIAC Young Practitioners' Group Essay Competition 2022.

Without a doubt, the quality of content paired with case law analysis in both domestic and international arbitration practice is inspired within these pages. The AIAC extends its utmost gratitude to the peer reviewers who undertook the arduous task of reviewing and assessing the second set of articles published in this second volume.

I sincerely hope the AIAC ADR Journal 2022 Volume 2 aid readers in expanding their compendium in ADR enchiridia.

TAN SRI DATUK SURIYADI BIN HALIM OMAR
Director of the AIAC

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Challenges to Arbitrators: Recent Developments in English Law

by Joseph Dyke • McNair International

1 Introduction

Mechanisms for seeking the removal or disqualification of arbitrators for lack of independence or impartiality are "*fundamental control mechanisms*"[1] that are vital for encouraging procedurally fair arbitrations and promoting the legitimacy of arbitration for dispute resolution. Accordingly, such mechanisms exist in the rules of all the major arbitral institutions,[2] in the UNCITRAL Arbitration Rules,[3] and in national laws governing arbitration.[4] However, although removing an arbitrator "*is a most serious step … [which] should only be ordered where there are real reasons for loss of confidence in that arbitrator*",[5] data shows that challenges to

1 Giorgetti C, *Between Legitimacy and Control: Challenges and Recusals of Arbitrators and Judges in International Courts and Tribunals*, 49 Geo. Wash. Int'l L. Rev. 205 (2016)

2 E.g., Article 14, ICC Arbitration Rules 2021; Article 10, LCIA Arbitration Rules 2020; Rule 14, SIAC Arbitration Rules 2016; Article 19, SCC Arbitration Rules 2017; Rule 5, AIAC Arbitration Rules 2018; Article 11, HKIAC Administered Arbitration Rules 2018; R-18, AAA Commercial Arbitration Rules and Mediation Procedures 2013; Chapter V, ICSID Convention and Chapter III, ICSID Arbitration Rules

3 Article 12, UNCITRAL Arbitration Rules

4 E.g., Section 24 of England & Wales' Arbitration Act 1996, Section 1033 of the Netherlands Arbitration Act 1986, Article 180 of the Swiss Private International Law Act, Article 1456 of France's Code of Civil Procedure, Article 12 of the First Schedule to Singapore's International Arbitration Act, Article 14 of Malaysia's Arbitration Act 2005

5 *Groundshire v VHE Construction* [2001] EWHC 8 (TCC) per HHJ Bowsher QC at [23]. See also *Brake v Patley Wood Farm LLP* [2014] EWHC 1439 (Ch) per Tim Kerr QC (as deputy high court judge) at [166]: "*Removal of an arbitrator is an extreme step and is only likely to occur in the rarest of cases*".

arbitrators generally have a very low success rate.[6] For many years, practitioners have expressed concerns at an increasingly prevalent use of challenges as a tactical device. As the editors of *Redfern & Hunter* put it:

> *"Challenges of arbitrators were, at one time, a rare event. … However, modern commercial and investment arbitrations often involve vast sums of money and the parties have become more inclined to engage specialist lawyers, who are expert in manoeuvres designed to obtain a tactical advantage, or at least to minimise a potential disadvantage. Statistics on arbitrator challenges are available from most of the main institutions, and some commentators have concluded that the practice has increased to the extent that it is at risk of affecting the efficiency and legitimacy of the process".*[7]

This article examines the progression of the arbitrator challenge mechanism in the English jurisdiction, and its highly significant developments in recent years.

2 Development of Arbitrator Challenges Under English Law

A. *Section 24 of the Arbitration Act 1996*

Section 24(1) provides that:

> *"A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds–*
>
> *(a) that circumstances exist that give rise to justifiable doubts as to his impartiality;*
>
> *(b) that he does not possess the qualifications required by the arbitration agreement;*
>
> *(c) that he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so;*
>
> *(d) that he has refused or failed–*
>
> *(i) properly to conduct the proceedings, or*

6 See, e.g., Thompson J, '*Challenging Arbitrators in International Arbitration: How are Challenges Made and What is the Likely Outcome?*' (July 2019) (http://www.keatingchambers.com/wp-content/uploads/2020/04/Challenging-Arbitrators-in-International-Arbitration-James-Thompson-July-2019.pdf)

7 Redfern A, Hunter M, Blackaby N and Partasides C (eds), *Redfern & Hunter: Law and Practice of International Arbitration* (6th ed, 2015) (at 4.89)

(ii) to use all reasonable despatch in conducting the proceedings or making an award,

and that substantial injustice has been or will be caused to the applicant".

In *Cofeley Ltd v Bingham* [2016] EWHC 240 (Comm), Mr. Justice Hamblen (as he then was) held (at [116]) that "*where there is actual or apparent bias there is also substantial injustice and there is no need for this to be additionally proved*".

In its report on the Arbitration Bill (that became the Arbitration Act 1996),[8] the Department Advisory Committee (chaired by Lord Saville) explained (at [106]) the pro-arbitration intention behind the power to remove arbitrators:

> *"We have every confidence that the courts will carry through the intent of this part of the Bill, which is that it should only be available where the conduct of the arbitrator is such as to go so beyond anything that could reasonably be defended that substantial injustice has resulted or will result. The provision is not intended to allow the court to substitute its own view as to how the arbitral proceedings should be conducted.*[9] *Thus the choice by an arbitrator of a particular procedure, unless it breaches the duty laid on arbitrators by Clause 33, should on no view justify the removal of an arbitrator, even if the court would not itself have adopted that procedure. In short, this ground only exists to cover what we hope will be the very rare case where an arbitrator so conducts the proceedings that it can fairly be said that instead of carrying through the object of arbitration … he is in effect frustrating that object. Only if the court confines itself in this way can this power of removal be justified as a measure supporting rather than subverting the arbitral process".*

B. *Laker Airways – Common Law Bias Test Established*

The first reported Section 24 case concerned an application to remove an arbitrator for "*justifiable doubts as to his impartiality*" because he was from the same barristers' chambers as the counterparty's counsel. In *Laker Airways Inc v FLS Aerospace Ltd* [2000] 1 WLR 113 at 117F, Mr. Justice Rix (as he then was), dismissing the challenge, set out several of the key applicable principles,

8 Department Advisory Committee, Report on the Arbitration Bill (February 1996)

9 See also *Enterprise Insurance Company Plc v U-Drive Solutions (Gibraltar) Ltd* [2016] EWHC 1301 (QB) wherein HHJ Moulder (as she then was) held (at [94]) that: "*It is not for this court to substitute its view for the decisions made by the arbitrator in the course of the proceedings. The mere fact that Enterprise failed in its various applications … cannot … possibly lead to any inference that there was a real possibility that the tribunal was biased*".

including: (1) the test, having regard to *R v Gough* [1993] AC 646,[10] was objective: *"the court must find that circumstances exist, and are not merely believed to exist … [and] those circumstances must justify doubts as to impartiality*", and (2) it is unnecessary to prove actual bias.

The applicability of the *Gough* test was reconfirmed by Mr. Justice Moore-Bick (as he then was) in *Rustal Trading Ltd v Gill & Duffus SA* [2000] CLC 231, and then again by Mr. Justice Longmore (as he then was) in *AT&T Corp v Saudi Cable Co* [2000] 1 All ER (Comm) 201. In *AT&T* the challenge was based on the arbitrator's (non-disclosed) position as a non-executive director and shareholder of an unsuccessful bidder for a telecommunications project. The contention was that he could not therefore be impartial over a dispute between the successful bidder and a third party with whom bidders were required to contract. The challenge was unsuccessful. On appeal, the Court of Appeal confirmed the *Gough* test again and also held that, whilst recognising the applicant's concerns about disclosing confidential information to a rival company's director *qua* arbitrator, this particular arbitrator's level of experience was such that the risk of his leaking that confidential information "*was sufficiently remote to be ignored*" (*AT&T Corp v Saudi Cable Co* [2000] 2 All ER (Comm) 625 per Lord Woolf MR at [54]).

C. *Failure to conduct arbitration properly – requires "serious risk"*

The *Kalmneft* case,[11] well known for establishing the so-called *Kalmneft* factors applicable to extensions of the time limit for bringing challenges to awards under Sections 67[12] and 68,[13] also featured an application under Section 24(1)(d). Mr. Justice Colman held (at [94]–[98]) that a failure "*properly to conduct the proceedings*" required "*at least some form of serious irregularity*" under Section 68 as well as a "*serious risk that [the arbitrator's] future conduct of the proceedings would not be in accordance with his [duty to act fairly and impartially]*". The evidence adduced by the applicant went "*nowhere near*" demonstrating that risk.

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10 Although the facts of *Gough* concerned juror bias, in reaching his conclusion that the appropriate test was "*whether, having regard to [the relevant] circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question*", Lord Goff held (at 669–670) that: "*I wish to add that in cases concerned with allegations of bias on the part of an arbitrator, the test adopted … has been whether the circumstances were such that a reasonable man would think that there was a real likelihood that the arbitrator would not fairly determine the issue on the basis of the evidence and arguments adduced before him … Such a test is, subject to the introduction of the reasonable man, consistent with the conclusion which I have reached, provided that the expression "real likelihood" is understood in the sense I have described, i.e. as meaning that there is a real possibility or, as I would prefer to put it, a real danger of bias. … In conclusion, I wish to express my understanding of the law as follows. I think it possible, and desirable, that the same test should be applicable in all cases of apparent bias, whether concerned with justices or members of other inferior tribunals, or with jurors, or with arbitrators.*"

11 *AOOT Kalmneft v Glencore International AG and another* [2002] 1 All ER 76

12 Under Section 67, parties challenge an award for "*lack of substantive jurisdiction*"

13 Under Section 68, parties challenge an award for "*serious irregularity*"

D. *Previous opinions expressed or formed in non-arbitrator capacity – bias?*

If an arbitrator has previously expressed opinions on issues in a different capacity (i.e. not *qua* arbitrator), might that affect his impartiality when he is an arbitrator for a dispute where those issues are relevant?

In *Argonaut Insurance Co v Republic Insurance Co* [2003] EWHC 547 (Comm), the removal of the non-lawyer arbitrator (an underwriter) was sought on the basis of statements he made in a previous arbitration (where he was a fact witness) concerning the meaning of a particular clause. Mr. Justice David Steel held that there was only a tentative link between that and the issues in the second arbitration, and that the opinion expressed *qua* fact witness did not implicate his impartiality as an arbitrator in the second arbitration.

By contrast, in *Sphere Drake Insurance v American Reliable Insurance Co* [2004] EWHC 796 (Comm), an arbitrator was removed on the basis that his prior involvement as a consultant advising parties who had been adverse to the applicants in related commercial litigation gave rise to apparent bias. As Mr. Justice Cooke held (at [41]), "*what he knows and what he thinks is unknown and must indeed remain so because it is privileged, but it is not possible for this court or a fair-minded and informed observer to conclude that it might not have a bearing on the issues he has to decide in the arbitration and that as a result he would regard the case of one or other party with favour or disfavour, however objectively he seeks to determine the matter*" (emphasis added).

E. *Unilateral communications between arbitrator and one party – "generally to be deprecated"*

Will unilateral communications between the arbitrator and one of the parties give rise to apparent bias?

In *Norbrook Laboratories Ltd v Tank* [2006] EWHC 1055 (Comm), where the arbitrator made telephone calls to one party to discuss administrative matters, Mr. Justice Colman held (at [132]) that such a practice "*is generally to be deprecated for it inevitably gives rise to the risk that evidence or submissions will be put before the Arbitrator in circumstances where no record is kept of what has been said and without the opposing party's awareness and therefore of an opportunity of challenging it*". The arbitrator was removed.

F. *Running the risk of losing the right to object*

ASM Shipping Ltd v TTMI Ltd [2005] EWHC 2238 (Comm) was a shipowner-charterer dispute, which concerned a serious irregularity challenge premised on

the argument that one of the three-person tribunal (a Queen's Counsel ("QC")) ought to have recused himself because he had been instructed as advocate by the charterers' solicitors in a previous arbitration in which allegations of impropriety in giving disclosure were mounted against the shipowners' principal witness (which was also an issue in this arbitration). Mr. Justice Morison held, applying the apparent bias test (which had since received further consideration from the House of Lords in *Porter v Magill* [2002] 2 AC 357[14]), that the QC ought to have recused himself when the objection was raised. However, the shipowners, having not made a Section 24 application, had now lost any right to object to his continued involvement. The shipowners' argument that that judgment was "*so clearly and obviously wrong that it … was an unlawful contravention of Article 6 of the European Convention of Human Rights which guaranteed a fair hearing before an impartial tribunal*" was rejected by the Court of Appeal in *ASM Shipping Ltd v TTMI Ltd* [2006] EWCA Civ 1341.

In the event, the QC resigned as chairman. The two wing arbitrators were also asked to stand down, but they refused, and the shipowners sought their removal on the grounds that they would have or had been infected by the QC's apparent bias and were no longer capable of acting fairly and impartially. The shipowners' attempt to debar the charterers from resisting the challenge was rejected by Mr. Justice Christopher Clarke (as he then was) in *ASM Shipping Ltd v TTMI Ltd* [2007] EWHC 927 (Comm). The challenge itself was dismissed by Mr. Justice Andrew Smith in *ASM Shipping Ltd v Harris* [2007] EWHC 1513 (Comm), finding that "*there was no invariable rule, nor was it necessarily the case, that where one member of a tribunal was tainted by apparent bias the whole tribunal was affected second-hand by apparent bias*".

G. *Arbitrator acting as counsel instructed by a party's solicitors in a different case – unconscious bias?*

Arbitrators are often appointed because they are known and because trust is placed in them (and their competence) by parties or, very often, by parties' legal representatives. However, where arbitrators are repeatedly instructed by the same lawyers, concerns begin to rise about their relationship, including whether it evidences apparent bias.

14 Which had since received further consideration from the House of Lords in *Porter v Magill* [2002] 2 AC 357, where Lord Hope approved the "*modest adjustment of the test in R v Gough*" to bring English law "*in harmony with the objective test which the Strasbourg court applies when it is considering whether the circumstances give rise to a reasonable apprehension of bias*" that had been suggested by Lord Phillips MR in *Re Medicaments and Related Classes of Goods (No.2)* [2001] 1 WLR 700 at 726–727. Accordingly, test was confirmed as "*whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased*".

In *A v B* [2011] EWHC 2345 (Comm), the arbitrator gave late disclosure (shortly before issuing his award) that he was instructed as counsel by the law firm (although not the same partner) acting for the respondent in an ongoing matter that had no connection to the arbitration. The applicant contended this justified removal because it gave rise to the prospect of "*unconscious bias*" due to a potential "*unconscious predisposition*" in favour of that law firm. Mr. Justice Flaux (as he then was) rejected that contention, holding (at [60]) that:

> *"I do not consider that the fair-minded and informed observer, who is presumed to know how the legal profession in this country works, would consider that, merely because the arbitrator acted as counsel for one of the firms of solicitors acting in the arbitration, whether in the past or simultaneously with the arbitration, there was a real possibility of apparent bias. Since the alleged predisposition to favour that firm is necessarily unconscious, any possibility that the arbitrator's judgment was, … "skewed", would be entirely theoretical".*

H. *The ever-increasing importance placed on an arbitrator's reaction to challenge*

What is an arbitrator to do when they are challenged? How should they react? A challenged arbitrator is entitled to appear and be heard by the court before any removal order is made[15], but how much of a detailed response is it advisable for them to give? What attitude should they adopt towards the challenging party?

In *Sierra Fishing Co v Farran* [2015] EWHC 140 (Comm), an arbitrator in a dispute arising out of a loan agreement was challenged on the bases of his legal and business connections to the defendants, his assistance with drafting and negotiating the parties' agreements, and his conducting himself in a manner justifying doubts as to his impartiality. In response, the arbitrator made representations to the court concerning his impartiality, the nature of the attack on his appointment and opining that the claimants had lost their right to challenge. Mr. Justice Popplewell (as he then was) held that, in addition to his legal/business connections to the defendants and his assistance drafting/negotiating the parties' agreements (which all gave rise to apparent bias), the tone and content of the arbitrator's correspondence with the parties and the court demonstrated he had "*become too personally involved in the issue of impartiality, and the issue of jurisdiction, to guarantee the necessary objectivity which is required to determine the merits of the dispute*" ([65]).

Similar concerns of an arbitrator "*descending into the arena*" featured in *Cofely v Bingham* (supra). In that case, the applicants had sought information from the arbitrator as to how many times in the previous 3 years he had acted as arbitrator in

15 Section 24(5)

disputes where the second defendant was the referring party, and what proportion of his professional income was derived from such referrals. The arbitrator was repeatedly dismissive and challenging of the relevance of those requests. It turned out that 25 of his 137 appointments in the previous three years had been by the second defendant. The arbitrator issued an unrequested ruling finding that there was no conflict of interest. Finding that the bias test was met, the court held (at [114]) that the arbitrator appeared "*to have considered Cofeley's inquiries to amount to an unwarranted attack on him and in turn to have seen attack as the best form of defence – this involved descending into the arena*".

A better approach by an arbitrator was that seen in *T v V and W* [2017] EWHC 565 (Comm) by Mr. Justice Popplewell who approved the "*measured way*" the arbitrator "*dealt with sometimes intemperate and critical correspondence*" (at [125]).

I. *Document disclosure in support of Section 24 applications*

Can the challenging party seek document disclosure to support its challenge?

In *P v Q* [2017] EWHC 148 (Comm), the applicant sought the arbitrators' removal on the basis of improperly delegation of their role to the tribunal secretary. This was based on the chairman's inadvertently sending the claimant's solicitors an email intended for the secretary asking their views on a letter from the claimant. The applicant sought disclosure by the arbitrators of several categories of documents including "*instructions, requests, queries or comments from the co-arbitrators…; and all responses from the Secretary…*", as well as "*all communications sent or received by the co-arbitrators which relate either: [i] to the role of the Secretary; and/or [ii] to the tasks delegated to the Secretary*". Refusing disclosure, Mr. Justice Popplewell held (at [71]) that "*What is sought would amount to disclosure of the confidential deliberations of the tribunal which is impermissible both under the Locabail principle*[16] *and under the parties' agreement contained within article 30.2 of the LCIA rules*".

J. *Extensive tribunal secretary involvement – grounds for removal?*

But is it possible for a tribunal secretary's involvement in arbitral decision-making to give rise to a challenge against the arbitrators?

In *P v Q* [2017] EWHC 194 (Comm), Mr. Justice Popplewell (having dismissed the aforementioned disclosure application) held (at [70(1)]) that:

16 In *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at 477, the Court of Appeal (Lord Bingham LCJ; Lord Woolf MR; Sir Richard Scott VC) held that "*There can, however, be no question of cross-examining or seeking disclosure from the judge*"

> *"The use of a tribunal secretary to analyse submissions and draft procedural orders is not an improper delegation of decision making functions, absent contrary agreement by the parties. Nor would it necessarily be such an improper delegation were the Chairman to solicit or take account of the views of this arbitral secretary on the merits of these procedural decisions".*

However, he also recognised (at [68]) the "*considerable and understandable anxiety in the international arbitration community*" about tribunal secretaries being used so extensively that they became "*fourth arbitrators*".

K. *Repeat/concurrent appointments*

Even today certain pools of arbitrators are small, particularly for disputes in niche economic sectors. This leads to some arbitrators being appointed repeatedly and/or concurrently by the same parties, creating fertile ground for conflicts of interest to arise. Can arbitral institutions lawfully impose limits on the number of repeat and concurrent appointments an arbitrator can accept?

In *Aldcroft v International Cotton Association Ltd* [2017] EWHC 642 (Comm), the International Cotton Association, on whose terms (including their arbitration clause) most of the world's cotton trades were done, attempted to do so by amending its arbitrators' code of conduct. The claimant (a full-time arbitrator on ICA disputes) claimed that constituted an unlawful restraint of trade. David Foxton QC (as he then was) rejected that claim, finding that, by virtue of the fundamental principle of party autonomy, the restraint of trade doctrine was inapplicable to rules defining arbitrators' rights to accept appointments on the institution's terms.

L. *Removal of arbitrator without a Section 24 application?*

When the court upholds a challenge to an arbitral award and remits matters for fresh determination, can it remove the tribunal without a separate Section 24 application?

In *RJ v HB* [2018] EWHC 2833 (Comm), Mr. Justice Andrew Baker recognised (at [15]) that "*whether there is power to remove under section 68, or only under section 24, is an important question of principle*", and declined to follow an earlier case (*Home Secretary v Raytheon Systems Ltd (No.2)* [2015] EWHC 311 (TCC)) in which it appeared to have been assumed the court could remove an arbitrator if it was remitting parts of an award for fresh determination. Since he did not need, on that case, to decide the issue, he held (at [21]) that:

> *"there would have been an interesting question to consider whether removal under section 24 was available in this claim (subject to re-re-amending and joining the Arbitrator), or would be a matter for a fresh*

> *claim, arising only upon the setting aside (in part) of the Award, with RJ and L Ltd then being required, by section 24(2), first to seek removal under articles 14–15 [of the ICC Rules of Arbitration] before making any such further claim".*

That result was consistent with the judgment in *Hussmann (Europe) Ltd v Pharaon* [2002] EWHC 689 (Comm), where a deputy judge held (at [30]) that:

> *"where a setting-aside order has been made in circumstances where it is undesirable to entrust the existing arbitrators with the further conduct of the reference, it may well be the intention of the court that the reference should not be resumed. But in such cases, the power to remove an arbitrator, now contained in s. 24 of the Act, will be available"*[17].

M. *Costs*

What might be the costs consequences of a failed arbitrator challenge? In *Koshigi Ltd v Donna Union Foundation* [2019] EWHC 122 (Comm), Sir William Blair found (at [59]) that the challenging party had advanced "*a very weak case of bias and non-disclosure. Advancing such a case under s 68 Arbitration Act 1996 may well in itself justify the court awarding indemnity costs*". The weakness of the challenge (and further factors such as the late discontinuance of Section 68 challenges) justified indemnity costs in that case.

Could a costs order be made against the arbitrator? In *C Ltd v D* [2020] EWHC 1283 (Comm), the arbitrator had been appointed by the LCIA on the basis of his significant experience in commercial disputes. However, the applicant sought his removal on the basis that his level of experience was deliberately misrepresented on his CV and this was, in fact, his first appointment. Although the arbitrator denied the allegation, he agreed to stand down on condition that no costs order was made in the Section 24 proceedings. The applicant rejected that, and referred the matter to the Solicitors Regulation Authority. The arbitrator then offered to resign on condition that he could retain his fees and the parties reach an agreement on costs. Mr. Justice Henshaw held that, although costs orders against an arbitrator were not precluded, they were rare and the starting point was that there should not be such an order unless it was tolerably clear that the Section 24 application would have been successful (which, on the facts, it was not).

17 Approved by the Court of Appeal in *Hussmann (Europe) Ltd v Pharaon* [2003] EWCA Civ 266, [2003] 1 CLC 1066 at 1088 per Lord Justice Rix

3 The UK Supreme Court's Decision in *Halliburton v Chubb*

Undoubtedly the most significant recent development in this area has been the decision of the UK Supreme Court in *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] UKSC 48 (handed down on 27 November 2020).

The case arose out of the 2010 explosion and fire on the Deepwater Horizon drilling rig in the Gulf of Mexico, of which BP Exploration and Production Inc ("BP") was the lessee, Transocean Holdings LLC ("Transocean") was the owner and contractor for providing crew and drilling teams, and the appellants ("Halliburton") provided cementing and well-monitoring services.

The appellants and respondent ("Chubb") had entered into a Bermuda Form liability policy in 1992. Substantial legal claims were brought against BP, Transocean and Halliburton in respect of the disaster. Halliburton and Transocean settled claims and then claimed against Chubb under their Bermuda Form policies. Chubb refused to pay out to Halliburton on the basis, *inter alia*, that its settlement had been unreasonable.

The resulting dispute was referred to arbitration. The policy's arbitration clause required each party to appoint an arbitrator and, if the two party-appointed arbitrators could not agree a chairman, the chairman was to be appointed by the English High Court. On 12 June 2015, the court appointed Kenneth Rokison QC (one of the candidates proposed by Chubb).

In December 2015, Mr. Rokison accepted an arbitral appointment (nominated by Chubb) on an excess liability claim by Transocean arising out of Deepwater Horizon. Although Mr. Rokison disclosed to Transocean his appointment in *Halliburton v Chubb*, he omitted to disclose to Halliburton his proposed appointment in *Transocean v Chubb*. In August 2016, Mr. Rokison accepted appointment in another Deepwater Horizon arbitration in a claim by Transocean against a different insurer.

Halliburton discovered Mr. Rokison's appointments in the other two arbitrations in November 2016 and raised its concerns. Mr. Rokison agreed with the benefit of hindsight he ought to have disclosed the other two appointments but declined to recuse himself.

Halliburton filed a Section 24 application asserting justifiable doubts as to Mr. Rokison's impartiality in particular his acceptance (and non-disclosure) of the appointments in the other two arbitrations.

On 3 February 2017, Mr. Justice Popplewell dismissed Halliburton's application, holding, *inter alia*, that: (i) the arbitrator would not derive a secret benefit in the form of remuneration which he would receive from the arbitrations; (ii) there was no concern that the arbitrator would learn information in the Transocean references which was relevant to the issues in *Halliburton v Chubb* (which would be available to Chubb but not Halliburton); (iii) generally an arbitrator's involvement in multiple arbitrations with a single common party did not preclude them from sitting on both tribunals; (iv) there was no rule that a tribunal chairman had a greater duty than the wing arbitrator to maintain demonstrable impartiality; (v) in light of his explanations to the parties (even if he was under an honest mistaken belief as to his disclosure duty), Mr. Rokison's non-disclosure did not give rise to a real possibility of apparent bias. Importantly, however, Mr. Justice Popplewell granted permission to appeal[18].

The Court of Appeal disagreed with Mr. Justice Popplewell and found that Mr. Rokison ought, as a matter of law, to have disclosed to Halliburton his appointments in the other two arbitrations. However, the Court of Appeal upheld the overall conclusion that the bias test was not met in Mr. Rokison's case.

In the Supreme Court, the issues put to the court in the parties' agreed statement of facts and issues were whether and to what extent (i) an arbitrator might accept appointments in multiple references concerning the same or overlapping subject matter with only one common party without thereby giving rise to an appearance of bias, and (ii) he might do so without disclosure. Several arbitral institutions intervened and were given permission to make written and/or oral submissions.

The Supreme Court (Lord Hodge giving the main judgment) held as follows:

> The duty of impartiality applied equally to all arbitrators, regardless of how they were appointed. The test in Section 24(1)(a) was the same as the common law apparent bias test (whether the fair-minded and informed observer would conclude that there was a real possibility of bias). The fair-minded and informed observer needed to consider the realities, customs and practices of the relevant field of arbitration. There might be circumstances where acceptance of appointments in multiple arbitrations with the same or overlapping subject matter and only one common party would justify a conclusion of apparent bias;
>
> The duty to act impartially contained in Section 33 (which would be an implied term in a contract between the arbitrator and the parties) would not be complied with if the arbitrator, at and from the date of appointment, knew of undisclosed

18 Had he not done so, the case would have stopped there. The leave of the Commercial Court hearing the challenge at first instance is required for an appeal against a Section 24 decision. See Section 24(6) and *Athletic Union of Constantinople v National Basketball Association (No.2)* [2002] 1 WLR 2863 at 2867–2868 per Lord Phillips MR.

circumstances which would leave them liable to be removed under Section 24 (unless the parties agreed to waive the obligation[19]). In English law, arbitrators were under a legal duty to disclose facts and circumstances known to them which might meet the apparent bias test. In Bermuda Form arbitrations, the duty required the disclosure of appointments in multiple arbitrations concerning the same or overlapping subject matter but with only one common party (absent contrary agreement by the parties);

Where the information to be disclosed was covered by the arbitrator's obligations of privacy and confidentiality, those to whom the obligations were owed needed to give (express or inferred) consent before the arbitrator could give disclosure, otherwise the arbitrator would have to decline the second appointment. The common party's consent to multiple appointments of the same arbitrator could be inferred from its nomination of them;

Failure to make a required disclosure was a relevant factor for the apparent bias test.[20] Assessment of whether there was a failure of an arbitrator's disclosure duty required consideration of the facts and circumstances as at and from the date when the duty arose. The Supreme Court held that the relevant reference point was the date of the hearing, rather than the date of the application;[21]

On the particular facts of *Halliburton v Chubb*, Mr. Rokison had been under a legal duty to disclose his second appointment because, at that time, the existence of potentially overlapping arbitrations with only one common party might reasonably give rise to a real possibility of bias. However, the Supreme Court nevertheless concluded that the apparent bias test was not met. In circumstances where Mr. Rokison had explained his non-disclosure was an oversight (which explanation Halliburton accepted as truthful) and where the material overlap between the arbitrations had diminished (through extrinsic factors), the fair-minded and informed observer assessing the situation at the date of the hearing would not infer a real possibility of bias in respect of Mr. Rokison.

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19 By framing the disclosure obligation as a (waivable) component of the duty to act fairly and impartially under Section 33 (a non-waivable mandatory provision of English arbitration law: see Section 4 of and Schedule 1 to the Arbitration Act 1996), there is the potential for confusion.

20 Applying *dicta* of Mrs. Justice Cockerill in *PAO Tatneft v Ukraine* [2019] EWHC 3740 (Ch) at [57]. In that case, Ukraine unsuccessful applied to set aside permission to enforce a New York Convention award under Section 103(2)(e) for reasons which included that the presiding arbitrator's failure to disclose his subsequent appointment by Tatneft's solicitors in an unrelated ICSID arbitration gave rise to justifiable doubts as to impartiality and independence under Article 9 of the UNCITRAL Arbitration Rules

21 Identified as an issue that "*critics of the decision will undoubtedly focus on*" (see Rainey S and Sharma G, *Halliburton v Chubb: is timing everything?* https://www.quadrantchambers.com/sites/default/files/media/document/halliburton_v_chubb_is_timing_everything_-_simon_rainey_qc_and_gaurav_sharma.pdf), this proved to be a significant part of the *Halliburton v Chubb* result, as it enabled significant weight to be given to events which occurred post-challenge but pre-hearing: including the arbitrator's measured reaction to the challenge, and the significant reduction in the overlap between the two arbitrations following the early resolution of *Transocean v Chubb*.

4 Continued Development of the Law Related to Arbitrator Challenges

The English courts have given several other significant judgments in recent years relating to several different issues that can arise on arbitrator challenges, including the Commercial Court's first consideration of challenges post-*Halliburton v Chubb*.

N. *Unilateral communications between arbitrator and one party – have standards changed?*

Some of the most significant challenges were seen in two cases where football clubs had to play against the Premier League in 2021.

The first was *Newcastle United Football Company Ltd v The Football Association Premier League Ltd* [2021] EWHC 349 (Comm). In the context of the (then putative) acquisition of the claimant by a Saudi Arabian sovereign wealth fund (SWF), the defendant issued a decision finding that, because of the level of control exercisable by Saudi Arabia over the SWF, Saudi Arabia would be a "*Director*" (as that term was defined in Section A of the defendant's Rules). Section F of the defendant's Rules required the defendant to disqualify entities from acting as a "*Director*" of a club in certain circumstances – but the defendant had not made that decision yet. However, the claimant disputed the Section A decision and the matter was referred to arbitration pursuant to the defendant's Rules. An experienced QC was appointed as tribunal chair and he gave a statement of impartiality. The defendant's solicitors disclosed that (a) they had, in the previous 3 years, been involved in 12 arbitrations where the QC had been an arbitrator (in three he was their appointee; two were done after his appointment in this case), and (b) the QC had advised the defendant on four occasions (though all more than three years prior to this appointment) and on one occasion he had given legal advice on a potential amendment to Section F. The QC declined the claimant's invitation to recuse himself. Thereafter, the QC engaged in direct correspondence with the defendant's solicitors (without copying the claimant's solicitors) seeking consent to disclose his previous legal advice and clarification as to whether the defendant considered he should recuse himself.

HHJ Pelling QC dismissed a bias challenge, finding that none of (1) his having advised the defendant more than three years previously on a different issue than that which arose on this reference, (2) the (inadvertent) non-disclosure of the same, (3) the other arbitral appointments (given the limited number of experienced sports arbitrators), or (4) the unilateral communications with the defendant's solicitors (which were "*written in some haste and under some pressure of time*"), would give rise to apparent bias on the QC's part.

O. *The bias test applies to all arbitrators equally, but are experienced arbitrators more equal than the others?*

The second was *Manchester City Football Club Ltd v The Football Association Premier League Ltd* [2021] EWHC 628 (Comm). The defendant began a disciplinary investigation into the claimant and requested (under Rule W of the defendant's Rules) the claimant to provide information and documents. When that was not done, the defendant commenced arbitration. The parties both appointed arbitrators from a list of individuals from the defendant's panel of arbitrators. The claimant challenged the tribunal for lack of jurisdiction and lack of impartiality. (Meanwhile, the defendant's Rules on dispute resolution were amended). After the tribunal issued awards against them, the claimant sought to challenge those awards and to remove the arbitrators.

Mrs. Justice Moulder dismissed all the claimant's challenges. The manner in which arbitrators were appointed (and reappointed) to the defendant's panel (i.e. managed by the defendant without any open competition or written selection policy) did not suggest the arbitrators were "*beholden*" to the defendant. *Halliburton v Chubb* emphasised the need to view the broader context, and the judge considered several further factors: (i) the arbitrators' "*not insignificant*" remuneration did not lead to the conclusion that they derived their livelihood from acting as arbitrators (such as to render them susceptible to partiality through the need to secure appointments); (ii) sports arbitration was still a specialist field with a small pool of potential candidates; (iii) the undoubted professional reputation and experience of these arbitrators needed to be factored in; (iv) the fact that the defendant amended its Rules part-way through the dispute did not establish that the tribunal lacked independence prior to the changes. The judge also noted (at [140]) that *Halliburton v Chubb* did not directly deal with the issue of whether a lack of impartiality before the court was seised could be cured by a change of circumstances between that date and the hearing (but held in the circumstances of the instant case she need not make any further comment.[22]

22 Converse from the idea that a tribunal might cure a lack of impartiality between the date of challenge and date of hearing, there have been (unsuccessful) attempts to argue that the mere fact of challenges has deepened a lack of impartiality during that period. *Ovsyankin v Angophora Holdings Ltd* [2021] EWHC 3376 (Comm) included a post-award Section 24 challenge that contained, *inter alia*, an allegation that, because the applicant was claiming relief against each arbitrator by way of repayment of fees, and because the arbitrators had made representations to the authority designated to hear the challenge under the LCIA Rules, the reasonable observer would take note of that so-called "*confrontational dispute*" between the applicant and the tribunal in assessing apparent bias. Sir Andrew Smith held (at [109]) that: "*It would be strange if, because [the applicant] has launched an unsuccessful challenge under the LCIA Rules and he … had made otherwise unmeritorious applications in these proceedings, it should thereby come about that the applications under section 24 were granted. … Arbitrators are aware that the contentious nature of references means that their conduct and decisions might be challenged, and challenged vigorously, in the Courts and elsewhere. They do not generally allow it to influence their dispassionate assessment of disputes that come before them*".

P. *Arbitral Confidentiality vs Open Justice Court Proceedings*

As arbitrations are typically private and confidential, should a judgment given by the court on an arbitrator challenge be publicised or kept confidential? If publicised, should it be anonymised and/or redacted? Should any publication await the final award in the arbitration?

In *Newcastle United Football Company Ltd v The Football Association Premier League Ltd* [2021] EWHC 450 (Comm), one of the issues for HHJ Pelling QC was whether his Section 24 judgment (discussed above) should be publicised. Relying on principles set out by Lord Justice Mance (as he then was) in *Moscow v Bankers Trust Co* [2004] EWCA Civ 314, the judge held (i) the desirability of preserving arbitral confidentiality must in each case be balanced against the factors militating in favour of publication, (ii) there is a public interest in publicising Section 24 judgments because there is a public interest in maintaining standards of fairness in arbitrations, which is capable of outweighing the significance of arbitral privacy, (iii) the instant Section 24 judgment contained no significant confidential information other than the existence of and parties to the arbitration. The defendant had not established it would suffer a positive detriment in the event of unredacted and unanonymised publication. The defendant's expectation that the arbitration would be private and confidential had been diluted by the information already in the public domain (including the names of relevant participants).

In *Manchester City Football Club Ltd v The Football Association Premier League Ltd* [2021] EWHC 711 (Comm), both parties objected to publication of her judgment on the claims under Sections 24, 67 and 68 (discussed above), but Mrs. Justice Moulder held that the public interest in maintaining confidence in the courts outweighed the factors militating in favour of non-publication. The judgment did not contain significant confidential information – the only confidential information that would be disclosed was existence of the dispute and the arbitration, in circumstances where the defendant had already publicly stated it was investigating alleged breaches of its Rules. Even where both parties argued against publication, that was not determinative of (though it was relevant to) the court's assessment. That was upheld by the Court of Appeal, which held, *inter alia*, that "*the fact that [both parties] are opposed to publication is of some weight, but should lead to the court being careful not simply to accept the parties' wishes without scrutiny*"[23].

The tensions between arbitration confidentiality and open court proceedings were seen in a different context in *Chartered Institute of Arbitrators v B* [2019] EWHC 460 (Comm). Following a successful challenge under Section 24(1)(a), CIArb wished to bring disciplinary charges against the arbitrator and refer them to a

23 *Manchester City Football Club Ltd v The Football Association Premier League Ltd* [2021] EWCA Civ 1110 at [56] per Sir Julian Flaux C

disciplinary tribunal. The decision to bring charges was based upon the transcript of the arbitral hearing and on certain correspondence. But CIArb wished to obtain further material, including copies of the witness statements and exhibits filed in relation to the Section 24 application. CIArb applied to the court, *inter alia*, for an order to obtain copies of those materials.[24] Mrs. Justice Moulder, finding that the principle of open justice was engaged and that CIArb had a legitimate purpose in seeking the documents for disciplinary purposes (which was also in the public interest), granted CIArb access to the transcript of the arbitral hearing, the form and correspondence relating to the arbitrator's appointment and witness statements, but not to the skeleton arguments.

Q. *Refusal to admit substantial evidence pre-award (but post-closing of proceedings)*

A challenge seeking the removal of a three-person LCIA tribunal for apparent bias based on their refusal to allow evidence to be admitted was seen in *BSG Resources Ltd v Vale SA* [2019] EWHC 3347 (Comm). A dispute arising out of a JV to exploit Guinean iron ore deposits gave rise to both an LCIA arbitration (between the JV partners) and an ICSID arbitration (by one of the JV partners against Guinea). The LCIA tribunal ordered that the ongoing documentary record of the ICSID arbitration be disclosed in the LCIA arbitration. After the claimant failed to attend the final LCIA hearing, the proceedings were closed pending a final award. Several months later, but before an LCIA award had been given, the final ICSID hearing was held. The claimant applied for its 2000-page transcript to be admitted in the LCIA arbitration on the grounds that Guinean officials had given evidence contrary to what was in the LCIA arbitration. After the LCIA tribunal refused to admit the transcript (and gave an award in favour of the defendant), the claimant filed a bias challenge. Sir Michael Burton dismissed the challenge, finding that the arbitrators had been entitled not to admit substantial amounts of evidence (that would in any event not assist them in reaching their decision) in circumstances where the record-sharing agreement had ended. In those circumstances, there could be no suggestion of apparent bias.

R. *Unilateral communications between arbitrator and one party – have standards changed (again)? A question of fact and degree?*

As set out above in *Norbrook*, unilateral communications between arbitrator and one party on administrative matters for the arbitration were "*generally to be deprecated*". Yet, in *Dadoun v Biton* [2019] EWHC 3441 (Ch), the court reconfirmed (at [37]) that "*the fair-minded and informed observer is not unduly sensitive or*

24 Civil Procedure Rule 5.4(C) allows non-parties to obtain (with the court's permission) certain documents filed at court

suspicious but neither are they complacent". Accordingly, an allegation that a short discussion between the arbitrator and one of the parties' brothers regarding when a Beth Din award would be issued (in circumstances where 5 years had elapsed since the final hearing) gave rise to apparent bias was unsuccessful. As a result, non-disclosure of documents recording that short discussion also did not give rise to apparent bias: "*It is difficult to see how the non-disclosure of something that was not evidence of apparent bias could itself be evidence of apparent bias*" ([42]). *Norbrook* appeared only as a footnote in *Dadoun*.

S. *Potential Difficulties of Agreeing (in an Arbitration Clause) an Identified Individual as Arbitrator, then Seeking their Removal for Apparent Bias*

B v J [2020] EWHC 1373 (Ch) provided an illustration of difficulties that might arise where an arbitration agreement requires the appointment of a specific person with close professional involvement to the likely parties to a putative dispute. In that case, the contract (intended to regulate the affairs of several companies of which various members of the same family were shareholders) had an arbitration clause requiring disputes to be referred to a particular arbitrator who had previously worked as the family's accountant with involvement in their business for 20+ years. The applicants sought his removal on grounds that (i) the arbitrator had previously been employed by one of the defendant companies on opaque terms (he had resigned just shortly before the arbitration commenced), (ii) the arbitrator had allegedly refused to provide the claimants with financial information when requested, (iii) the arbitrator would be a fact witness if an account of profits was ordered, (iv) the arbitrator would be a witness in connection with alleged breaches by the first defendant of the relevant contract. The court held that the allegations of a sham resignation (based on the content of the resignation letter), the vague prospect of the arbitrator bringing a late claim for constructive dismissal in respect of his employment, and the purported refusal to provide financial information (where the arbitrator had been transparent as to the reason why) would not meet the bias test. Further, the fact that the arbitrator might be a possible witness did not give rise to apparent bias, in circumstances where it was his position in relation to the family that had led to his being designated as the arbitrator in the first place.

6 Concluding Observations

The law on arbitrator challenges continues to develop following *Halliburton v Chubb*. The courts recognise that removing an arbitrator is a serious step, and successful challenges are rare. As the *Halliburton*, *Newcastle United* and *Manchester City* decisions illustrate, the courts continue to exhibit deference to the reputations and experience of (senior) arbitrators.