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# A NEW (DEEPWATER) HORIZON FOR ARBITRATOR BIAS

By  
Michael Konen\*

## I. INTRODUCTION

Arbitration is based on an agreement between disputing parties that, presumably, provides for “a neutral, private, and efficient forum to resolve their disputes.”<sup>1</sup> It follows, that arbitration involves the use of an impartial decision-maker, whose decision is final and binding.<sup>2</sup> Even though arbitration is its own separate process, courts still have a role to play in it as they hear many challenges to arbitral decisions on the ground of arbitrator impartiality. Because of the weight of arbitral decisions, the selection of an arbitrator or an arbitral panel is arguably the most important choice a party must make.<sup>3</sup> To understand the importance of an impartial arbitrator, imagine a court-based civil trial where every juror is either financially or personally related to the plaintiff. The assumption would be that the verdict would likely be in favor of the plaintiff; however, in a civil trial there is an appeal option. In arbitration, conversely, the decision is final and highly unlikely to be overturned, so whoever is making that decision – the arbitrator – is a very important actor.

In November 2020, the Supreme Court of the United Kingdom decided an issue of arbitrator impartiality, and ruled on England’s approach to determining whether apparent bias is present in an arbitral proceeding.<sup>4</sup> Thirteen years earlier, the United States Court of Appeals for the Second Circuit (hereinafter “the Second Circuit”), decided on its own the issue of arbitrator impartiality and created its own approach to the issue.<sup>5</sup>

First, this paper will explore the International Bar Association’s (“the IBA”) response to arbitrator impartiality through the Guidelines on Conflicts of Interest in International Commercial Arbitration (“the Guidelines”) to provide a baseline on arbitrator bias from a non-binding yet persuasive perspective. Next, the two cases are

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1. Ronán Feehily, *Neutrality, Independence and Impartiality in International Commercial Arbitration, A Fine Balance in the Quest for Arbitral Justice*, 7 PENN. ST. J.L. & INT’L AFF. 88, 89 (2019).

2. Lindsay Melworm, Note, *Biased? Prove It: Addressing Arbitrator Bias and the Merits of Implementing Broad Disclosure Standards*, 22 CARDOZO INT’L COMP. POL’Y & ETHICS L. 431, 433 (2014).

3. *Id.* at 435.

4. Joe Rich, *U.K. Supreme Court Rules on Arbitrator Bias in Halliburton v. Chubb*, KLUWER ARBITRATION BLOG, Dec.1, 2020, <http://arbitrationblog.kluwerarbitration.com/2020/12/01/u-k-supreme-court-rules-on-arbitrator-bias-in-halliburton-v-chubb/>; *Halliburton Company v. Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd)* [2020] UKSC 48 (Eng.).

5. *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*

presented.: *Applied Indus. Materials Corp v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, decided by the Second Circuit, and *Halliburton Company v. Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd)*, decided by the Supreme Court of the United Kingdom. These discussions will present the background facts and rationales in addition to the different standards to be discussed. With this discussion in mind the paper will provide an analysis of why the Second Circuit’s approach to determining arbitrator impartiality is more effective.

## II. THE IBA GUIDELINES

Because two opinions from two different jurisdictions are being discussed, it is helpful to establish a neutral set of standards for comparison. The IBA has produced a set of guidelines which attempt to provide guidance to parties in an arbitration proceeding.<sup>6</sup>

The IBA stated that the guidelines reflect the understanding of the Arbitration Committee as to “the best current international practice.”<sup>7</sup> In the IBA’s view, the Guidelines attempt to balance the different interests of those involved in arbitral proceedings.<sup>8</sup> However, the Guidelines are not binding law nor do they supersede any applicable national law or arbitral rules selected by the parties; instead, the IBA stated that it hopes the Guidelines will “find broad acceptance within the international arbitration community, and that they will assist parties, practitioners, arbitrators, institutions and courts in dealing with...important questions of impartiality and independence.”<sup>9</sup>

The Guidelines are made up of two parts; the first part “declares [the] general standards” for arbitration impartiality, and the second part offers “specific application of the...standards to various situations.”<sup>10</sup> The Guidelines begin with the fundamental principle that every arbitrator should be impartial, and remain impartial until the end of a proceeding.<sup>11</sup> Further, the Guidelines direct the arbitrator to disclose any facts or circumstances to the parties if those facts or circumstances may, in the eyes of the parties, cause doubts about the arbitrator’s impartiality or independence.<sup>12</sup> Interestingly, the Guidelines state that “[a]n arbitrator is under a duty to make reasonable enquiries to

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6. Feehily, *supra* note 1, at 111.

7. IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION (2014), Introduction, ¶ 1

8. *Id.*

9. *Id.* at Introduction, ¶ 6.

10. Mark R. Joelson, *A Critique of the 2014 International Bar Association Guidelines on Conflicts of Interest in International Arbitration*, 26 AM. REV. INT’L ARB. 483, 484-85 (2015).

11. IBA, *supra* note 7, at General Standard 1.

12. *Id.* at General Standard 3(a).

identify” any information that may call their impartiality into question.<sup>13</sup> Failure to disclose is not excused by a lack of knowledge if an arbitrator does not perform this enquiry.<sup>14</sup>

The second part of the Guidelines attempts to provide specific guidance when a situation will be considered a conflict of interest and when disclosure is necessary.<sup>15</sup> The Guidelines do this by creating three distinct lists with varying disclosure requirements; however, the examples stated in the lists are not exhaustive. The first list is the Red List, which consists of two parts: a “Non-Waivable Red List” and a “Waivable Red List.”<sup>16</sup> The Non-Waivable Red List includes situations that are derived from the overriding principle that no person can be his or her own judge, and the Waivable Red List covers situations that are serious but not as severe.<sup>17</sup>

The second list is the Orange List, which consists of specific situations that, depending on the facts, may, in the eyes of the parties, give rise to doubts about the arbitrator’s impartiality or independence.<sup>18</sup> Under this list, the arbitrator has a duty to disclose, but the parties are deemed to have accepted the arbitrator if, after disclosure, no timely objection is made.<sup>19</sup> The Guidelines make clear, however, that disclosure does not imply the existence of a conflict of interest; nor does nondisclosure alone make an arbitrator partial or lacking independence as only the facts or circumstances that were not disclosed can.<sup>20</sup> Finally, the the third list is the Green List, which consists of situations where no appearance and no actual conflict of interest exists from an objective point of view.<sup>21</sup> The arbitrator has no duty to disclose these situations.<sup>22</sup>

While these lists are not binding law and were not explicitly applied in either decision at issue in this paper, they provide a necessary neutral standard. Having this neutral standard provides an international perspective on the issue of arbitrator impartiality as opposed to only a perspective based on American or English law.

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13. *Id.*

14. IBA, *supra* note 7, at General Standard 3(d).

15. Joelson, *supra* note 10, at 487.

16. IBA, *supra* note 7, at Part II, ¶ 2.

17. *Id.*

18. *Id.* at Part II, ¶ 3.

19. *Id.*

20. *Id.* at Part II, ¶ 5.

21. IBA, *supra* note 7, at Part II, ¶ 7.

22. *Id.*

### III. THE SECOND CIRCUIT - *APPLIED INDUSTRIAL MATERIALS CORP.*

#### A. *Background*

In 2007 the Second Circuit set its approach in its landmark decision *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*<sup>23</sup> *Applied Industrial* dealt with a joint venture, entered into in 1992, in which AIMCOR purchased and transported petroleum coke – a chemical created during oil refinery – to Ovalar, which then distributed the coke in Turkey.<sup>24</sup> The parties agreed that any disputes between them would be settled by arbitration in New York.<sup>25</sup> The arbitration agreement allowed for each party to select an arbitrator, and then the two party-appointed arbitrators would select a third, presiding arbitrator.<sup>26</sup> Specifically, Section 3 of the agreement provided:

“Prior to the first hearing or initial submissions, all the arbitrators are required to disclose any circumstance which could impair their ability to render an unbiased award based solely upon an objective and impartial consideration of the evidence presented to the Panel...”<sup>27</sup>

“No arbitrator shall accept an appointment or sit on a Panel, where the arbitrator...has a direct or indirect interest in the outcome of the arbitration....”<sup>28</sup>

Additionally, Section 4 provided that “[n]o person shall serve as an arbitrator who has...financial or personal interest in the outcome of the arbitration....”<sup>29</sup>

After Ovalar and AIMCOR selected one arbitrator, the parties selected Charles Fabrikant - the Chairman, President, and CEO of Seacor Holdings – as the third arbitrator and chairman of the tribunal.<sup>30</sup> Each arbitrator submitted their disclosure statement; specifically, Fabrikant’s statement stated that he had no personal or business relationship with any of the parties nor their affiliates,” and reserved the right to amend or add to the

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23. *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 138 (2d Cir. 2007).

24. *Id.* at 134.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Applied Indus.*, 492 F.3d at 134.

29. *Id.* at 135.

30. *Id.*

disclosure if necessary.<sup>31</sup> Later Fabrikant sent an email to the parties amending his disclosures and acknowledging that a division within his company, SCF, had been engaged with Ox-Bow (the parent of AIMCOR) for a contract between the two companies.<sup>32</sup> However, Fabrikant stated that he did not participate in the conversations, nor did he intend to, and that he felt his ability to decide the issues was not impaired.<sup>33</sup>

In a 2-1 decision, in which Fabrikant cast the deciding vote, the tribunal found Ovalar liable to AIMCOR for breach of contract.<sup>34</sup> However, Ovalar conducted an investigation and discovered a previously existing, inadequately disclosed commercial relationship between SCF and Ox-bow.<sup>35</sup> Ovalar claimed that prior to the 2-1 decision, SCF had been transporting petroleum coke for Ox-bow, generating approximately \$275,000 in revenue.<sup>36</sup> Ovalar asked Fabrikant to withdraw, but Fabrikant refused.<sup>37</sup> In his response, Fabrikant stated that he told SCF's president that he "wished to know nothing about SCF's conversations, or be a party to information about [their] activities with Oxbow or be consulted concerning any business with them."<sup>38</sup> In his mind, because he erected a "Chinese wall" to prevent from learning about any agreement between SCF and Oxbow, Fabrikant was unaware of the relationship until Ovalar pointed it out.<sup>39</sup>

## B. Discussion

The Second Circuit cited to the Federal Arbitration Act, specifically § 10(a), which provides: "[A] court...may make an order vacating the award upon the application of any party to the arbitration – ... (2) where there was evident partiality or corruption in the arbitrators . . . ."<sup>40</sup>

The Second Circuit previously attempted to make sense of the fractured *Commonwealth Coatings Corp. v. Continental Casualty Co* Supreme Court decision in *Morelitte Constr. Corp. v. New York City Dist. Council Carpenters Ben. Funds*, and held

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31. *Id.*

32. *Applied Indus.*, 492 F.3d at 135.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Applied Indus.*, 492 F.3d at 135.

38. *Id.* at 135-36.

39. *Id.* at 136.

40. *Id.*

that evident partiality will be found “where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.”<sup>41</sup> The Second Circuit further reasoned that an arbitrator who knows of a material relationship and fails to disclose it meets this standard since a reasonable person would have to conclude that an arbitrator in this situation was partial to one side.<sup>42</sup>

The Second Circuit did not address the scope of an arbitrator’s duty to investigate potential conflicts of interest in *Morelitte*.<sup>43</sup> But, the court concluded that arbitrators must take steps to ensure that the parties do not mistakenly believe that no trivial conflict exists.<sup>44</sup> Thus, the Second Circuit expanded the standard for evident partiality and announced their approach which requires that “where an arbitrator has reason to believe that a nontrivial conflict of interest might exist, he must (1) investigate the conflict (which may reveal information that must be disclosed under *Commonwealth Coatings*) or (2) disclose his reasons for believing there might be a conflict and his intention not to investigate.”<sup>45</sup> Even though the court set this standard, the Second Circuit emphasized that it was not creating a free-standing duty to investigate; in the court’s view, the failure to investigate is not, by itself, sufficient to vacate an arbitral award.<sup>46</sup> Yet, when an arbitrator knows about a potential conflict, a failure to either investigate or disclose their intention not to investigate is “indicative of evident partiality.”<sup>47</sup>

The Second Circuit found that had Fabrikant investigated the potential conflict, he would have found a relationship between SCF and Oxbow generating \$275,000 in revenue.<sup>48</sup> However, because Fabrikant failed to investigate or disclose that he would make no further inquiries, the court believed that a reasonable person would conclude that evident partiality existed.<sup>49</sup> The court’s reasoning here makes it arguable that it did create a duty, however; “if an arbitrator possesses a continuing duty to disclose conflicts, subsequent events can trigger [this] duty to either conduct an...investigation or disclose

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41. *Applied Indus.*, 492 F.3d at 136 (citing *Morelitte Constr. Corp. v. New York City Dist. Council Carpenters Ben. Funds*, 748 F.2d 79, 83 (2d Cir. 1984)).

42. *Id.* at 137.

43. *Id.* at 137.

44. *Id.* at 138.

45. *Id.*

46. *Applied Indus.*, 492 F.3d at 138.

47. *Id.*

48. *Id.* at 139.

49. *Id.*

his or her intent not to investigate.”<sup>50</sup> As one commentator has pointed out, an examination of *Applied Industrial Materials Corp.* appears to show “the court did create an affirmative duty to act.”<sup>51</sup> They argue that an arbitrator cannot turn a “blind eye to the existence of a nontrivial conflict.”<sup>52</sup> Further, the arbitrator cannot “actively mislead the parties into believing there is no trivial conflict of interest when there actually is.”<sup>53</sup> This seems to suggest that, while the Second Circuit was reluctant to establish a duty, an arbitrator does, in fact, have to either investigate a potential conflict or disclose the conflict and his or her decision not to investigate.

#### IV. SUPREME COURT OF THE UNITED KINGDOM – *HALLIBURTON V. CHUBB*

The Supreme Court of the United Kingdom’s decision in *Halliburton Company v. Chubb Bermuda Insurance Ltd* (formerly known as *Ace Bermuda Insurance Ltd*) set out England’s approach to arbitrator apparent bias.<sup>54</sup> The case presented two primary issues: (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,” and (2) “whether and to what extent the arbitrator may do so without disclosure.”<sup>55</sup> The court, in answering these questions, stated the principles of impartiality, specifically that an arbitrator must be impartial and an arbitrator, who has no actual bias, must not give the appearance of bias.<sup>56</sup> As the court stated, “justice must be seen to be done.”<sup>57</sup>

##### A. Background

The Deepwater Horizon<sup>58</sup> crisis provided the background to this arbitration; the blow-out of the well resulted in numerous legal claims by the U.S. government and

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50. Kathryn A. Windsor, Comment, *Defining Arbitrator Evident Partiality: The Catch-22 of Commercial Litigation Disputes*, 6 SETON HALL CIR. REV. 191, 201-02 (2009).

51. *Id.* at 207.

52. *Id.*

53. *Id.*

54. *Halliburton Company v. Chubb Bermuda Insurance Ltd* (formerly known as *Ace Bermuda Insurance Ltd*) [2020] UKSC 48 (Eng.).

55. *Id.* ¶ 2.

56. *Id.* ¶ 1.

57. *Id.*

58. The Deepwater Horizon crisis was the largest oil spill in United States history, spilling approximately 134 gallons of oil into the Gulf of Mexico. The disaster was caused by an explosion occurring on the



corporate and individual claimants against BP, Halliburton, and Transocean.<sup>59</sup> Halliburton had a liability insurance policy and claimed against Chubb under it, but Chubb refused to pay the claim because, it argued, Halliburton’s settlement was not reasonable.<sup>60</sup> The insurance policy contained a clause providing for ad hoc arbitration to settle disputes.<sup>61</sup> This policy was governed by New York law and contained an arbitration clause providing for arbitration in London by a three arbitrator panel.<sup>62</sup>

The party-appointed arbitrators failed to agree on a chairman, and, as result, the court appointed Rokison.<sup>63</sup> This contest between Halliburton and Chubb is referred to as “reference 1.”<sup>64</sup> Six-months after his appointment in reference 1, Rokison accepted an appointment by Chubb in a claim arising out of the same Deepwater Horizon incident (“reference 2”).<sup>65</sup> Before accepting his appointment in reference 2, Rokison disclosed to the parties his appointment in reference 1, but he did not disclose to Halliburton his proposed appointment by Chubb in reference 2.<sup>66</sup>

Halliburton discovered Rokison’s additional appointments; counsel for Halliburton raised concerns and “referred to the [IBA Guidelines], which he stated, imposed on an arbitrator a continuing duty of disclosure of potential conflicts of interest in accordance with the Orange List.”<sup>67</sup> Rokison responded that he did not disclose the additional appointment to Halliburton because it did not occur “to him...that he was under any obligation to do so under the IBA Guidelines.”<sup>68</sup> The tribunal in reference 2 issued a preliminary award in favor of Chubb without deciding any issue relating to reasonableness of other settlements.<sup>69</sup>

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*Deepwater Horizon* drilling platform on April 20, 2010. *Deepwater Horizon*, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION (Apr. 17, 2020), <https://darrp.noaa.gov/oil-spills/deepwater-horizon>.

59. *Halliburton Company*, [2020] UKSC 48, [¶ 8].

60. *Id.* ¶ 10.

61. *Id.* ¶ 11.

62. *Id.*

63. *Id.* ¶ 12.

64. *Halliburton Company*, [2020] UKSC 48, [¶ 12].

65. *Id.* ¶ 15. There was an additional third reference that Rokison accepted, but it is not relevant to this discussion.

66. *Halliburton Company*, [2020] UKSC 48, [¶ 16].

67. *Id.* ¶ 19.

68. *Id.* ¶ 20.

69. *Id.* ¶ 25.

Halliburton did not suggest that Rokison was guilty of a deliberate wrongdoing or actual bias; instead, it claimed apparent unconscious bias.<sup>70</sup>

## *B. Discussion*

### *1. The Duty of Impartiality*

The duty of impartiality is found within section 33 of the 1996 Arbitration Act (“the 1996 Act”), which provides:

(1) The tribunal shall –

- (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
  - (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.
- (2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.<sup>71</sup>

Generally, courts try to avoid intervention in arbitration proceedings, however one power of intervention for English courts arises in section 24(1) of the 1996 Act which states: “A party...may...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;...And that substantial injustices has been or will be caused to the applicant.”<sup>72</sup>

The court stated that there is no disagreement about the relevant test for apparent bias; the question is “whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”<sup>73</sup> While the fair-minded and informed observer test applies equally to judges and arbitrators, it is important to keep in mind the differences between judicial decisions and arbitral decisions.<sup>74</sup> Essentially, the English courts when addressing an allegation of

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70. *Id.* ¶ 41.

71. *Halliburton Company*, [2020] UKSC 48, [¶ 49].

72. *Id.* ¶ 50.

73. *Id.* ¶ 52 (quoting *Porter v. Magill* [2002] 2 AC 357, [2001] UKHL 67, [¶103] (Eng.)).

74. *Id.* ¶ 55.

apparent bias now will (i) apply the objective test of the fair-minded and informed observer and (ii) consider the particular characteristics of international arbitration.<sup>75</sup>

## 2. *Disclosure*

A primary question in this case was “whether disclosure is a legal duty in English law” rather than “good arbitral practice” if specific arbitral rules do not specify.<sup>76</sup> The court referred back to section 33 of the 1996 Act and restated that an arbitrator is under the statutory duties to act fairly and impartially in conducting arbitral proceedings.<sup>77</sup> Parties may be unaware of matters which could give rise to justifiable doubts about an arbitrator’s impartiality under section 24 unless there is disclosure; thus, a legal obligation to disclose is encompassed within the statutory obligation of fairness.<sup>78</sup>

The court held that there is a legal duty of disclosure in English law.<sup>79</sup> However, the duty of disclosure is subject to one qualification: an arbitrator can only disclose what he knows and is, generally, not required to search for material to disclose.<sup>80</sup> But, the court did not rule out the possibility of an arbitrator having a duty to make reasonable inquiries to comply with the duty of disclosure.<sup>81</sup> Instead, the court stated that it was not necessary in this case to express a concluded view of whether a duty to inquire is a statement of English law.<sup>82</sup>

The court summarized its findings on a duty to disclose in English law as: if an arbitrator has accepted multiple appointments that may cast doubt on their impartiality, or if they are aware of other facts that would do the same, and fails to make a disclosure, the arbitrator has effectively denied a party the opportunity to address the issues.<sup>83</sup> An additional qualification the court included in this duty of disclosure is that only the circumstances at the time the duty arose and continued may be considered to determine whether an arbitrator has failed to satisfy the duty.<sup>84</sup>

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75. *Id.* ¶ 69.

76. *Halliburton Company*, [2020] UKSC 48, [¶ 74].

77. *Id.* ¶ 76.

78. *Id.* ¶ 78.

79. *Id.* ¶ 81.

80. *Id.* ¶ 107.

81. *Halliburton Company*, [2020] UKSC 48, [¶ 107].

82. *Id.*

83. *Id.* ¶ 118.

84. *Id.* ¶ 199.

### 3. *The Issues*

The first issue the court faced was whether an arbitrator may serve on multiple panels deciding similar issues where one party, but not the others, is a party in each appointment.<sup>85</sup> The 1996 Act does not directly address the arbitrator's independence and prior knowledge, but it imposes obligations of fairness and impartiality, which means an arbitrator would be in breach of the 1996 Act if his lack of independence affected his ability to be fair and impartial.<sup>86</sup> Therefore, the court concluded on the first issue that if an arbitrator accepts multiple appointments concerning similar issues with only one common party, it may create an appearance of bias."<sup>87</sup>

The second issue was whether an arbitrator may accept multiple appointments without disclosing it to the non-common party.<sup>88</sup> The failure to disclose multiple appointments is a factor that the fair-minded and informed observer would consider; thus, the court found the answer to the second issue was that arbitrators have a legal duty to disclose facts and circumstances which reasonably could or do give rise to the appearance of bias, unless the parties have agreed otherwise.<sup>89</sup> Specifically, the fact that an arbitrator has accepted multiple appointments concerning the same subject matter is information that may have to be disclosed, and, in cases where disclosure is required, the acceptance of the appointments combined with a failure to disclose may give rise to the appearance of bias.<sup>90</sup>

In this case, however, the court was not persuaded that the fair-minded and informed observer would conclude that there was a real possibility of bias.<sup>91</sup> Rokison was under a legal duty to disclose his appointment in reference 2 to Halliburton, and he breached that duty.<sup>92</sup> The court referred to the circumstances known to the court at the date of the hearing, and cited five reasons for not finding bias: (1) a lack of clarity in English case law about a legal duty of disclosure and whether disclosure was required; (2) the timing of the appointments; (3) Rokison's response to Halliburton that it was likely that reference 2 would be resolved without any overlap in evidence or legal submissions between it and reference 1, which turned out to be correct; (4) Rokison did not receive any secret financial benefit; and (5) there was no reason to infer unconscious

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85. *Id.* ¶ 125.

86. *Halliburton Company*, [2020] UKSC 48, [¶ 126].

87. *Id.* ¶ 131.

88. *Id.* ¶ 132.

89. *Id.* ¶¶ 133, 136.

90. *Id.* ¶ 136.

91. *Halliburton Company*, [2020] UKSC 48, [¶ 143].

92. *Id.* ¶ 147.

bias in the form of subconscious ill-will by Rokison.<sup>93</sup> Based on these findings, the court concluded that a fair-minded and informed observer would not conclude, in the words of section 24(1)(a) of the 1996 Act, that “circumstances existed that gave rise to justifiable doubts about Rokison’s impartiality.”<sup>94</sup>

#### 4. Summary of Law

The court in *Halliburton* decided seven points of law, all relating to arbitrator bias and impartiality. First, the court found that the obligation of impartiality equally applies to party-appointed arbitrators and arbitrators appointed by the party-appointed arbitrators, an arbitral institution, or by a court.<sup>95</sup> Second, the fair-minded and informed observer test is an objective test, and whether the observer would conclude an arbitrator accepting multiple appointments creates the appearance of bias depends on the facts of the particular case and the customs in arbitration.<sup>96</sup> Third, where a reasonable conclusion of a real possibility of bias could be found, the arbitrator has a legal duty to disclose their multiple appointments, unless party agreement dictates otherwise.<sup>97</sup> Fourth, the disclosure of multiple appointments may be made, absent a contractual restriction, without obtaining the express consent of the parties to the relevant arbitration where consent is inferred; consent may be inferred “from the arbitration agreement itself in the context of the practice in the relevant field.”<sup>98</sup> Fifth, the failure of an arbitrator to make a disclosure is a factor for the fair-minded and informed observer to consider.<sup>99</sup> Sixth, when determining whether an arbitrator has violated his or her duty, the fair-minded and informed observer must consider the facts and circumstances at and from the date when the duty was created.<sup>100</sup> Finally, the fair-minded and informed observer should assess “whether there is a real possibility that an arbitrator is biased by reference to the facts and circumstances known at the date of the hearing to remove the arbitrator.”<sup>101</sup>

#### V. THE SECOND CIRCUIT’S APPROACH IS MORE EFFECTIVE

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93. *Id.* ¶ 149.

94. *Id.* ¶ 150.

95. *Id.* ¶¶ 49, 63, 151.

96. *Halliburton Company*, [2020] UKSC 48, [ ¶¶ 127-31, 152].

97. *Id.* ¶¶ 76-81, 132-36, 153.

98. *Id.* ¶¶ 76-81, 88-104, 146, 154.

99. *Id.* ¶¶ 117-18, 155.

100. *Id.* ¶¶ 119-20, 156.

101. *Halliburton Company*, [2020] UKSC 48, [ ¶¶ 121-23, 157].

As noted above, the Second Circuit concluded that arbitrators must take steps to “ensure that the parties are not misled into believing that no trivial conflict exists.”<sup>102</sup> The court expanded the standard for evident partiality and announced their approach which requires that “where an arbitrator has reason to believe that a nontrivial conflict of interest might exist, he must (1) investigate the conflict...or (2) disclose his reasons for believing there might be a conflict and his intention not to investigate.”<sup>103</sup> While the court was reluctant to state an affirmative duty to investigate, the decision appears to actually create the duty regardless.<sup>104</sup>

Conversely, the Supreme Court of United Kingdom stated that the relevant test for apparent bias is “whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”<sup>105</sup> However, the court found that it was not necessary to express a concluded view of whether a duty to inquire is a statement of English law.<sup>106</sup> This reluctance to state a duty to inquire, when compared to the standard set by the Second Circuit, is what separates the two opinions and makes the Second Circuit’s approach more effective.

A central tenet of international arbitration is a “diligent, qualified, and independent” tribunal.<sup>107</sup> Therefore, the tribunal should be subject to the greatest requirements for disclosure and impartiality. Merely deciding *ex post* if there was a real possibility of bias, while effective, is not nearly as effective as requiring an arbitrator to inquire into whether he or she has some potential bias or something to give that appearance. The International Chamber of Commerce – while not subject to these rulings because they have their own disclosure requirements – has recognized that parties “have a legitimate interest in being fully informed of all facts or circumstances that may be relevant in their view in order to be satisfied that an arbitrator or prospective arbitrator is and remains independent and impartial.”<sup>108</sup>

A discussion regarding whether an arbitrator should be required to inquire into their own background and interests to determine if a conflict exists can be considered from two primary perspectives: (1) the perspective of the parties involved and (2) the perspective of the arbitrator. If the discussion is considered from the perspective of the

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102. *Applied Indus.*, 492 F.3d at 138.

103. *Id.*

104. *See Windsor*, *supra* note 50, at 207.

105. *Halliburton Company*, [2020] UKSC 48, [¶ 52]. (quoting *Porter v. Magill* [2002] 2 AC 357, [2001] UKHL 67, [¶103] (Eng.)).

106. *Id.* ¶ 107.

107. Jason Fry & Simon Greenberg, *Review of the International Court of Arbitration of the International Chamber of Commerce*, INTERNATIONAL COMMERCIAL ARBITRATION PROACTIVE: 21<sup>ST</sup> CENTURY PERSPECTIVES, § 44.02[1] (Matthew Bender Elite Products 2020).

108. *Id.* at [2][f] (quoting ICC, *Notice to the Parties and Arbitral Tribunals on the Conduct of Arbitration under the ICC Rules of Arbitration* of 1 January 2019, para. 20).

parties involved in the arbitration, the duty to inquire seems obvious. As the ICC has noted, a party has an interest in being fully informed, and a party cannot be fully informed unless an arbitrator makes a reasonable inquiry and full disclosure.<sup>109</sup> Conversely, if the discussion is considered from the arbitrator's perspective there are several points that may also provide support for a duty to inquire. Primarily, failure to disclose a conflict of interest has serious consequences including vacatur of the arbitral award.<sup>110</sup>

An arbitrator will want to ensure that they are fully informed to avoid a charge of bias, whether actual or apparent, at the end of an arbitral proceeding. A potential counterpoint in this hypothetical discussion would be whether requiring an inquiry is a reasonable requirement for an arbitrator to exert their own time and resources into. While this may be a valid point and arbitrators may be reluctant to spend time and other resources looking into their own background and interests, the benefits of fully informed and adequate disclosure protecting the arbitrator during and after the proceedings appears to greatly outweigh the resource expenditure in the beginning.

Further, the implications for the parties also outweigh the potential de minimus hardship to a potential arbitrator. When the finality and weight of an arbitral decision are considered, fairness dictates that the arbitrators who issue the award should be unbiased.<sup>111</sup> Equity would seem to dictate, therefore, that an arbitrator has a responsibility to ensure that he or she is unbiased. Again, the most effective way to ensure that one is not biased and free from the appearance of bias is to investigate and fully disclose.

It has been stated that the "best way to address issues of arbitration bias is to ensure that from the onset, arbitrators are required to openly and broadly disclose prior relationships and dealings that may overlap or intertwine with the pending arbitration."<sup>112</sup> An arbitrator can best accomplish an open and broad disclosure by performing a reasonable inquiry into their prior relationships and dealings. It is clear that a reasonable inquiry is an ideal and best practice in arbitration, however it is not necessarily a legal duty. As shown above, and discussed by previous articles, "there is a split of authority regarding the implications of a failure to investigate."<sup>113</sup>

This split is illustrated by *Applied Indus. Materials Corp.* and *Halliburton*. The Second Circuit has, at least indirectly, created a duty to investigate while still stating that it was not creating an affirmative duty.<sup>114</sup> Conversely, the Supreme Court of the United

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109. *Id.*

110. David Allen Larson, *Conflicts of Interest and Disclosures: Are We Making a Mountain Out of a Molehill?*, 49 S. TEX. L. REV. 879, 919 (2008).

111. Melworm, *supra* note 2, at 435.

112. *Id.* at 470.

113. Larson, *supra* note 110, at 891.

114. *See Windsor, supra* note 50, at 207.

Kingdom refused to create a legal duty.<sup>115</sup> Because of the value of full disclosure and the importance of a reasonable inquiry to a full disclosure, the standard established by the Second Circuit is more effective for protecting against arbitrator bias. This is not to state that the U.K. Supreme Court decision was incorrect or flawed. Rather, the point is that the Second Circuit standard is further along in the process of creating the most ideal standard for arbitrator bias. This is not surprising given the fact that the U.K. Supreme Court's decision, from November of 2020, was the first time the court set a standard for the test for arbitrator bias. In the next several years it is likely that the court will fully consider the duty to investigate and either mirror the Second Circuit or surpass it and move closer to the IBA Guidelines.

## VI. CONCLUSION

Arbitrator bias, specifically apparent arbitrator bias, continues to be a major issue in international arbitration. This article has introduced two important cases from major jurisdictions: The United States and England. While both decisions are laudable for their steps toward establishing a more effective system for protecting parties from potentially biased arbitral tribunals, one decision appears to have created a more effective standard – the Second Circuit's decision.

It has been established that full disclosure is a principal step in establishing an unbiased tribunal. The best way to ensure full disclosure is to also require a duty of inquiry into previous dealings and relationships. The Second Circuit's standard creates this duty, whether directly or indirectly, while the Supreme Court of the United Kingdom's decision and standard does not.

Overall, both decisions are effective and both create valid standards. It is possible the U.K. standard catches up to the Second Circuit's based on the infancy of the discussion in the U.K. court. However, at this time, the Second Circuit's standard is more effective. The Second Circuit's willingness to express a duty to investigate, when compared to the U.K. Supreme Court's refusal to discuss the issue, at this time, places the Second Circuit's decision ahead. Full disclosure is the most effective way to ensure that parties are given a fair arbitration and receiving the benefits of the process. By not issuing any guidance on a duty to investigate, the U.K. Supreme Court remains a step behind the Second Circuit in creating the most effective arbitral standards.

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115. *Halliburton Company*, [2020] UKSC 48, [¶ 107].