

The Cassandra of the Caymans – Testing the limits of an arbitrator’s duty of impartiality

By [Robert Blackett](#)

Introduction

The Arbitration Act 1996 imposes upon arbitrators a duty to act “*impartially*” (section 33) and empowers the court to remove an arbitrator if “*circumstances exist which give rise to justifiable doubts as to his impartiality*” (section 24(a)) and to set aside an award by a tribunal which failed to comply with the duty to act impartially (section 68(2)(a)).

It has repeatedly been held that the question of whether circumstances exist which give rise to justifiable doubts as to an arbitrator’s impartiality is equivalent to the test for ‘apparent bias’ which the common law applies to judges and other tribunals (*Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at 17, *A v B* 2011 2 Lloyd’s Rep 591 at 22, *Sierra Fishing Co v Farran* [2015] EWHC 140 at 51) and, latterly, *Halliburton Company v Chubb Bermuda Insurance Ltd* [2018] EWCA Civ 817 at 39). The common law test for apparent bias was laid down by the House of Lords in *Porter v Magill* [2001] UKHL 67 (at paragraph 103). It is whether a “*fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased*”.

In 2018 appellate courts were called upon to apply that test on two occasions. In each case the result has proved divisive, illustrating the difficulty courts face in deciding what a “*fair minded observer*” would think and, by extension, the difficulty practitioners and prospective arbitrators face in making predictions about what a court will decide regarding the same. The first of those cases is *Almazeedi v Penner and Another (Cayman Islands)* [2019] UKPC 3, a decision of the Privy Council from 26 February 2019. The second is *Halliburton Company v Chubb Bermuda Insurance Ltd* [2018] EWCA Civ 817, a decision of the Court of Appeal from 19 April 2018. Of the two decisions *Almazeedi*, being a decision of the Privy Council, is presently the more significant. More ink has been spilled, however, over the Court of Appeal’s decision in *Halliburton* because the Supreme Court is due to hear an appeal in that case in November 2019 (Brexit-related appeals permitting). Given that a decision in the *Halliburton* appeal may be imminent, any detailed analysis of that case is liable to be immediately superseded. This article therefore focuses instead on *Almazeedi*, which has attracted less commentary, and addresses *Halliburton* more briefly.

Independence

Before turning to *Almazeedi* and *Halliburton*, it is worth acknowledging (though very much as an aside) that the Arbitration Act 1996 might not be an exhaustive statement of the law with respect to arbitral bias.

The UNCITRAL Model Law on International Arbitration, first published in 1985, required not only that arbitrators be impartial, but also that they be ‘independent’. Those who advised Parliament regarding the wording of the Arbitration Act 1996 chose not to follow the Model Law in that regard, saying (Report of the Departmental Advisory Committee on Arbitration Law, February 1996, paragraphs 101-102):

“The Model Law (article 12) specifies justifiable doubts as to the independence (as well as impartiality) of an arbitrator as grounds for his removal. ... no-one has persuaded us that, in consensual arbitrations, this is either required or desirable. It seems to us that lack of

independence, unless it gives rise to justifiable doubts about the impartiality of the arbitrator, is of no significance. The latter is, of course, the first of our grounds for removal. If lack of independence were to be included, then this could only be justified if it covered cases where the lack of independence did not give rise to justifiable doubts about impartiality, for otherwise there would be no point including lack of independence as a separate ground.

We can see no good reason for including “non-partiality” lack of independence as a ground for removal and good reasons for not doing so. We do not follow what is meant to be covered by a lack of independence which does not lead to the appearance of partiality. Furthermore, the inclusion of independence would give rise to endless arguments, as it has, for example, in Sweden and the United States, where almost any connection (however remote) has been put forward to challenge the “independence” of an arbitrator. For example, it is often the case that one member of a barristers’ Chambers appears as counsel before an arbitrator who comes from the same Chambers. Is that to be regarded, without more, as a lack of independence justifying the removal of the arbitrator? We are quite certain that this would not be the case in English law. ...”

Another reason for omitting the reference to ‘independence’ was a practice, in commodity and reinsurance arbitrations, whereby each party would appoint an arbitrator, the two arbitrators would seek to reach a consensus and, absent consensus, they would become the parties’ representatives and argue the case before an umpire.

It has been suggested (e.g. Luttrell, *Bias Challenges in International Commercial Arbitration* (2009)) that, notwithstanding the omission of ‘independence’ from the Arbitration Act 1996, English law might, nonetheless, require that arbitrators be independent, and that the courts may remove arbitrators and set aside awards on the ground that the arbitrators lacked independence, in the sense that they had an interest in the cause, even if that interest was insufficient to give rise to a *Porter*-type ‘real possibility’ of bias. This is said to follow from two case law and statute.

First, in *Dimes v Grand Junction Canal Co. Proprietors* (1852) 3-HCLC-759, the House of Lords reversed a decision of a judge who had made a determination regarding the rights of a company in which he had a substantial shareholding. This judgment (it is said) elucidates a distinct, common law rule which requires automatic disqualification for interest in the cause, distinct from any enquiry as to whether a third party would think there was ‘real possibility’ of bias. The interest alone suffices. That common law rule was invoked by the House of Lords in a subsequent case as a ground for disqualifying an arbitrator (*Sellar v Highland Railway Company* (1919) SC (HL) 19). The rule in *Dimes* arguably survives the enactment of the Arbitration Act 1996 by virtue of section 81 “*Nothing in this Part shall be construed as excluding the operation of any rule of law consistent with the provisions of this part*”.

Second, Article 6 of the European Convention on Human Rights stipulates that the determination of civil rights and obligations must be by “*an independent and impartial tribunal*”. The Human Rights Act 1998 requires statutes (including the Arbitration Act 1996) to be read in a manner consistent with the Convention, and requires public authorities (including courts who are asked to consider challenges to arbitrators or awards) not to act in a manner inconsistent with the Convention.

The above arguments remain untested in litigation and did not feature in *Almazeedi* and *Halliburton* – in neither case was it being suggested that the tribunal had any interest in the cause. It should also be borne in mind that most arbitral rules require both independence and impartiality (e.g. ICC Rules Articles 7(1) and 11(1), LCIA Rules Article 5(2)) thus importing a requirement of independence which is absent from the Arbitration Act 1996.

The IBA Guidelines

Although the test in *Porter* undoubtedly represents the law of England, there are other schools of thought about how the law should approach the issue of bias. The best-known example is the International Bar Association's *Guidelines on Conflicts of Interest in International Arbitration* ("**IBA Guidelines**"), first published in 2004 (three years after *Porter*).

The IBA Guidelines define the circumstances which the authors consider should disqualify a person from acting as an arbitrator in similar terms to *Porter* (General Standard (2)):

"... if facts or circumstances exist, or have arisen since the appointment, which, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances, would give rise to justifiable doubts as to the arbitrator's impartiality or independence ..."

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

The IBA Guidelines go on to lay down, however, four lists.

First, the 'non-waivable red list' describes situations where the IBA considers someone should never be permitted to act as arbitrator even if the parties have full knowledge of the facts, and waive their right to object.

Second, the 'waivable red list' describes situations where the IBA considers someone should not be permitted to act as arbitrator unless the parties, with full knowledge of the facts, waive their right to object.

Third, the 'orange list', "*a non-exhaustive list of specific situations that, depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence" and which arbitrators should therefore disclose to the parties, albeit that "the fact that an arbitrator did not disclose such facts or circumstances should not result automatically in non-appointment, later disqualification or a successful challenge to any award. Nondisclosure cannot by itself make an arbitrator partial or lacking independence: only the facts or circumstances that he or she failed to disclose can do so"* (Part 2, paragraph 5).

Fourth, the green list, "*a non-exhaustive list of specific situations where no appearance and no actual conflict of interest exists from an objective point of view" and which arbitrators have no duty to disclose.*

Status of the IBA Guidelines in English law

The IBA Guidelines will not necessarily be relevant with respect to an English-seated arbitration in every case. They do not form part of the laws of England, and the English courts have evidently not found the idea of 'non-waivable' conflicts helpful, for instance in *Weissfisch v Julius*, [2006] EWCA Civ 218, the Court of Appeal upheld a waiver by the parties of a 'non-waivable red list' conflict. If parties were to agree that the IBA Guidelines should apply to their arbitration, then (arguably) if the court was called on to appoint an arbitrator, the court would not appoint a prospective arbitrator who was disqualified from acting according to the IBA Guidelines, even if they were not disqualified from acting under *Porter* (section 19 of the Arbitration 1996 provides that, when exercising its powers to appoint arbitrators, the court shall have due regard to any agreement of the parties as to the qualifications required of the arbitrators).

In the same scenario of the parties having adopted the IBA Guidelines by agreement, if an arbitrator infringed the IBA Guidelines the court would give effect to the parties' agreement, and remove the arbitrator or set aside their award; if an arbitrator did not infringe the IBA Guidelines, but did infringe the *Porter* test, the court ought to remove the arbitrator or set aside their award. That is because the Arbitration Act 1996 does not make any provision for the parties to exclude or reduce the removal and set-aside powers in sections 24 and 68.

What happened in *Almazeedi*

With that in mind, we turn to the decision of the Privy Council in *Almazeedi*. This concerned a challenge to the independence of a judge sitting in the Cayman Islands. The judge in question was Sir Peter Cresswell, a former judge of the Commercial Court in England who had retired in 2007. In 2009, he was appointed as an additional judge of the Financial Services Division of the Grand Court of the Cayman Islands, where he sat *ad hoc*. In late 2011 he was appointed as a Supplementary Judge of the Qatar International Court and Dispute Resolution Centre (the "QICDRC") though his swearing in did not take place until May 2012. In the event, he never sat there in that capacity, or received any remuneration from that appointment.

Sir Peter's appointments, the Privy Council would later observe "*arise from the modern development across the world of courts with an international element in their judiciary, designed to serve the business and financial community*".

With respect to the QICDRC, the relevant Qatari law provided that judges would be appointed, and their remuneration determined following a proposal by the Qatari Minister of Finance:

"4. The chairman and members shall be appointed for a five-years renewable term. A decision of The Council of Ministers, upon the proposal of the [Minister of Finance], shall determine the terms and conditions of their appointment and remuneration.

5. The chairman and members ... shall enjoy due independence and impartiality in performing their duties and neither the state, The Council of Ministers, The Chairman, The QFC Authority, The Regulatory Authority nor any other person may intervene in the course of their decisions.

6. The chairman and any member ... may be removed by a decision of The Council of Ministers if

...

(c) ... The Council of Ministers is satisfied that he has been guilty of a serious misconduct which, in either case, The Council of Ministers considers to be of a nature which warrants his removal from office."

On 11 November 2011, at around the same time Sir Peter was appointed as a judge of the Qatar court, a petition was made in the Grand Court of the Cayman Islands for the winding-up of a Cayman Islands company called "**BTU**". The conduct of the winding-up petition was assigned to Cresswell J.

The factual background to the matter is complicated. However, the test in *Porter* does require the fair-minded observer to 'consider all the facts', so they are discussed (as briefly as possible) below. With a 'spoiler warning' for those interested in the detail, Sir Peter ultimately made orders adverse to the interests of an individual who had power or influence with respect to renewing Sir Peter's appointment as a judge in Qatar at the end of the

initial five-year term. As we shall see, the cast of characters and the web of relationships is complex, so Sir Peter would have had to be almost prescient to have foreseen this.

BTU was a vehicle through which institutional investors from the Gulf States had invested in power projects in the Middle East and North Africa by purchasing preference shares issued by BTU. BTU had been managed by a management company (the “**Manager**”) owned by a Mr. Almazeedi. Originally BTU and the Manager each had two directors – Mr. Almazeedi and a Mr. Hayat.

BTU’s investors included the Qatar Investment Authority (“**QIA**”) and the Qatar National Bank (“**QNB**”). The QIA is owned by the State of Qatar and owns a 50% interest in the QNB. It is not apparent from the Privy Council judgment what proportion of BTU’s preference shares were owned by QIA and QNB (see paragraph 5) – it could be that QIA and QNB together owned less than 7% of the shares, or that QNB owned 7% and QIA owned a further, unspecified, amount.

The CEO of QIA was a Mr. Al-Emadi. Mr. Al-Emadi’s father-in-law, Mr. Kamal, was: (i) chairman of QNB; and also (ii) Qatar’s Minister of Finance. Thus, it would have been Mr. Kamal who had proposed Sir Peter’s appointment and the terms and conditions of his remuneration, and Mr. Kamal will have been one of the Ministers who voted in late 2011 to approve Sir Peter’s appointment on those terms.

In 2006 a dispute had arisen between Mr. Almazeedi and Mr. Hayat. From 2007, Mr. Hayat ceased to be a director of BTU and of the Manager, leaving Mr. Almazeedi as the sole director of BTU and of the Manager.

In September 2007, Mr. Almazeedi had BTU commence proceedings against Mr. Hayat in the Grand Court of the Cayman Islands. These included an allegation that, while a director of BTU, Mr. Hayat had an undisclosed interest in “**Evolve**”, a placement agent which had formerly been engaged by BTU to find investors and which had, it was alleged, unlawfully diverted placement fees to QIA and QNB executives. Mr. Hayat countered by suing Mr. Almazeedi in the United States, alleging self-dealing, mismanagement and misfeasance by Mr. Almazeedi.

Mr. Almazeedi’s (disputed) evidence was that this litigation drew the attention of QIA’s CEO Mr. Al-Emadi who was also allegedly a business partner of Evolve’s CEO. It was alleged that, for this reason, Mr. Al-Emadi threatened and harassed Mr. Almazeedi, insisting he withdraw the claims against Mr. Hayat. QIA and QNB then began seeking an exit from BTU.

In 2009, Mr. Almazeedi wrote to QNB’s directors (including Mr. Kamal) recounting his allegations and complaining about Mr. Al-Emadi’s conduct. In a letter of 5 November 2009 Mr. Kamal/QNB’s response was that the allegations Mr. Almazeedi made against QNB’s executives were defamatory and unsubstantiated.

On 11 November 2011 all the preference shareholders, including QIA and QNB, presented their petition for winding up of BTU on just and equitable grounds. In support of their winding-up petition, the petitioners filed an affidavit by Mr. Longmate, QIA’s senior legal adviser, alleging various misconduct by Mr. Almazeedi and relying on the outstanding litigation in the Cayman Islands and the US as giving rise to serious concerns about the probity of BTU’s management.

Mr. Almazeedi / BTU initially sought to resist liquidation and applied for the court to instead validate a proposed asset swap transaction. Sir Peter ordered that BTU obtain a report from Deloitte in respect of that proposed transaction. Deloitte produced an unfavourable report, and so Sir Peter made an order refusing the proposed validation order.

Mr. Almazeedi then filed evidence responding to the allegations against him, referring to QIA's intimidation tactics and alleging that on a flight to Miami immediately following a hearing in the winding-up proceedings, Mr. Longmate had made a threat "*to retaliate against [Almazeedi] and [BTU's] lawyers for daring to stand up against the state of Qatar*". The Privy Council later observed that:

"Before the winding-up petition was heard and determined, the judge was therefore made aware of various aspects in dispute between the appellant and QIA and its 50% subsidiary QNB, of which Mr Al-Emadi was chief executive officer, and that the dispute was seen by QIA's legal adviser as being with the state of Qatar."

Mr. Almazeedi conceded, however, that since all of those with an economic interest in BTU had requested winding-up, BTU would consent to this, although it was not in his view in BTU's best interests. Sir Peter therefore made a winding-up order on just and equitable grounds on 26 January 2012. In his judgment Sir Peter said that the reasons for the order "*should be limited to BTU's decision not to oppose the liquidation, because of the unanimous support for this by the preference shareholders, and the Company*" noting that it was accepted that "*the relationship between the preference shareholders and the Company, Mr Almazeedi and BTU Management Company has irretrievably broken down*". He said that "*these areas of common ground are a sufficient basis and a proper basis, on which to make a winding-up order*". He added that the allegations against the appellant were untested and denied, that there was no need to address them, and that the court had not done so.

Two Deloitte partners were appointed joint official liquidators and proceeded to investigate the claims made against Mr. Almazeedi in the winding-up petition. On 7 May 2013 Sir Peter made an *ex parte* order requiring Mr. Almazeedi to attend oral examination for that purpose.

On 26 June 2013, Mr. Kamal ceased to be Qatar's Minister of Finance and Chairman of QNB. His successor in both roles was his son-in-law Mr. Al-Emadi.

Mr. Almazeedi then lodged a proof of debt in the liquidation alleging he personally was owed \$672,000 by BTU pursuant to an indemnity clause in BTU's articles of association. That proof of debt was rejected by the liquidators. Mr. Almazeedi appealed. On 7 February 2014 Sir Peter rejected the appeal, preferring the liquidators' construction of that clause. Sir Peter ordered Mr. Almazeedi to pay indemnity costs of \$286,995 in respect of that failed application.

A company called 'BTU Industries Holdings (USA) Inc' also lodged a proof of debt in the liquidation which was rejected by the liquidators (the amount is not stated). This could have been a company associated with Mr. Almazeedi, though that is not stated expressly in the judgment. On 25 June 2014, Sir Peter ordered that company to provide security for costs in respect of its appeal against the liquidators' determination. On 10 September 2014, Sir Peter dismissed that company's appeal on the grounds that it had failed to provide security. Thereafter Sir Peter retired from his role as a judge in the Cayman Islands. According to his chambers' website, he remains a judge of the QICDRC.

In June 2014, Mr. Almazeedi learned that Sir Peter had concurrently been a judge of the Qatar civil and commercial court. Mr. Almazeedi applied to set aside the 10 September 2014 order, and appealed all the other orders Sir Peter had made on the grounds of apparent bias.

Cayman Islands Court of Appeal's judgment in *Almazeedi*

Appeals from the Grand Court of the Cayman Islands are to the Cayman Islands Court of Appeal. The appeal was heard by Newman, Rix and Mottley JJA, with Sir Bernard Rix giving the court's unanimous judgment (Sir Bernard Rix, incidentally, had been appointed a Lord Justice of the Court of Appeal of the Cayman Islands in 2013, following his retirement as a Lord Justice of the Court of Appeal of England and Wales, further exemplifying "the modern development ... of courts with an international element in their judiciary" referenced above).

In his judgment in *Almazeedi*, Sir Bernard drew a distinction between the periods before and after 26 June 2013, the date Mr. Al-Emadi became Minister of Finance. From that date, it was said, a fair-minded observer would have concluded that there was a real possibility that Sir Peter was biased. Sir Bernard said: "*It must be entirely exceptional, if not unique, for a senior government minister, with power over the appointment and removal of judges, to be involved personally in litigation being conducted overseas by a judge who is also a judge of a court, however distinguished, in the country where that minister exercises power*".

Neither party had in fact argued for this conclusion. Mr. Almazeedi's contention had been that all of Sir Peter's decisions, not just those after 26 June 2013, were tainted by apparent bias. The liquidators' contention had been that none of his decisions were so tainted. Mr. Almazeedi and the liquidators each appealed to the Privy Council, which is the final court of appeal for the Cayman Islands.

The Privy Council's decision in *Almazeedi*

The Privy Council (Lords Mance, Wilson, Hughes and Lloyd Jones, Lord Sumption dissenting) allowed Almazeedi's appeal, holding that all of Sir Peter's decisions, not just those after 26 June 2013, should be set aside. Their key findings are addressed below.

Quality of decision irrelevant

Before the Privy Council the liquidators argued that any flaw in Sir Peter's independence could be ignored or overlooked because, Mr. Almazeedi / BTU had consented to the order for winding-up and the decisions which Sir Peter had made thereafter in the case were uncontroversial.

The Privy Council rejected that argument, citing Lord Hope's judgment in *Millar v. Procurator Fiscal (Scotland)* [2001] UKPC D4 (24 July 2001): "[T]he question of impartiality, actual or perceived, has to be judged from the very moment when the judge or tribunal becomes first seized of the case. It is a question which, at least in a case of perceived impartiality, stands apart from any questions that may be raised about the character, quality or effect of any decisions which he takes or acts which he performs in the proceedings".

Characteristics of the fair-minded observer

The majority had the following to say regarding the characteristics of the fair-minded observer (quoting a judgment of Lord Hope in *Helow v Secretary of State for the Home Department* [2008] UKHL 62; [2008] 1 WLR 2416):

"She or he is a person who reserves judgment until both sides of any argument are apparent, who is not unduly sensitive or suspicious, and who is not to be confused with the person raising the complaint of apparent bias. ... She or he is not, on the other hand complacent, knows that justice must not only be, but must be seen to be, unbiased and knows that judges, like anybody else, have their weaknesses - an observation with perhaps particular relevance in relation to unconscious predisposition. She or he "will not shrink from the conclusion, if it can be justified objectively, that things that they have done or said or associations that they have formed may make it difficult for

them to judge the case before them impartially ... She or he will also take the trouble to inform themselves on all matters that are relevant, and see it in ... its overall social, political and geographical context.”

Issue applied with respect to the whole period

The Privy Council agreed with counsel for the liquidators that “[w]hile Mr Kamal was not so directly involved in the subject matter leading up to and involved in the present proceedings, the Board considers, in the light of this material, that there is considerable force in [Almazeera’s counsel’s] criticism of the bright line drawn by reference to Mr Al-Emadi’s appointment as Minister of Finance”:

“Mr Kamal and Mr Al-Emadi were very closely related and appear to have had a mutually supportive collaboration in almost every possible sense. Such positive evidence as there is of Mr Kamal’s direct involvement in the disputes leading up to the winding-up petition, in the form of his categorical dismissal of any complaints against Mr Al-Emadi in his letter dated 5 November 2009, is to the same effect.”

Tribunal’s knowledge?

The majority said:

“... Mr Kamal’s positions as Minister of Finance and chair of QNB were public knowledge, as was the closeness of his relationships with Mr Al-Emadi, and in that sense would be known to a fair-minded and informed observer, even though he would not know whether or not the judge’s familiarity with Qatar extended so far.”

This is one of the more difficult aspects of the majority’s decision.

Sir Peter had been appointed a judge in Qatar. He knew some (but by no means all) of the preference shareholders were Qatar-based companies. In one affidavit (never tested in cross-examination) Mr. Almazeera alleged that Mr. Al-Emadi, the CEO of one of the preference shareholders (QIA), which held a small minority of the shares, was pursuing a personal vendetta against Mr. Almazeera. He claimed that, in the conversation on the flight, QIA’s lawyer had equated QIA with the State of Qatar. But, in the same document, Mr. Almazeera had also consented to the winding-up, because that was what all the preference shareholders (not just QIA) were seeking. Hence Sir Peter made the winding-up order on that basis, saying it was unnecessary to consider the various factual allegations, and that the court had not done so.

For any of that to have stood a chance of biasing Sir Peter against Mr. Almazeera as alleged:

- Sir Peter, despite having seen that all the preference shareholders and BTU’s sole director had all consented to the winding-up, and having been presented with a consent order, rendering all the other evidence irrelevant, would nonetheless need to have read it all, (the allegation regarding the conversation on the plane appeared only in Mr. Almazeera’s sixth affidavit).
- Sir Peter would need to have spotted Mr. Almazeera’s evidence about the conversation on the plane (which appeared only in Mr. Almazeera’s sixth affidavit) and thought both that: (i) Mr. Almazeera’s account of the conversation was credible; and (ii) the lawyer’s claim that QIA’s actions were a manifestation of / equated to ‘the wrath of’ the State of Qatar sounded credible.

- Sir Peter would have to have known (assuming it is indeed the case), or else suspected, that in Qatar the Minister of Finance plays a role in the appointment of QICDRC judges, something which is hardly intuitive.
- Sir Peter would have to have known that the state of Qatar's Minister of Finance was Mr. Kamal.
- Sir Peter would have to have known that Mr. Kamal happened to be Mr. Al-Emadi's father in law.
- Sir Peter would have to have known (assuming it is indeed the case), or else suspected, that, by reason of his role as Minister of Finance, Mr. Kamal had a role in the appointment of QICDRC judges, such that, if Mr. Kamal was still in that position in five years' time, he would be in a position to influence the decision whether to renew Sir Peter's appointment.
- Further or alternatively, when Mr. Al-Emadi became Minister of Finance in July 2013, Sir Peter would have to have become aware of that fact. In that regard, the Privy Council referred to an unspecified 'online article' from July 2013, which the informed observer would allegedly have been familiar with. There is, of course, no evidence that Sir Peter ever read that article. Recall that Sir Peter's appointment to QCIDRC had already taken place by that time. It is hard to see any reason why (before or after his appointment) he would have been following Mr. Al-Emadi's career or combing the internet more generally for the latest news about changes to the composition of the Qatari cabinet. Recall that, Mr. Al-Emadi, and his supposed vendetta had been referred to once, six months previously, in connection with a consensual winding-up petition with respect to which they had no relevance. Mr. Al-Emadi, and his alleged vendetta, seem not to have been referred to again.
- Sir Peter would have to have speculated (unconsciously) from the above that if he were to decide the issues before him in a manner which was favourable to Mr. Almazeedi then there might be a risk of his QCIDRC appointment not being renewed in five years' time, if Mr. Al-Emadi was still in the post, and was aware of, and recalled, Sir Peter's decision.

The hypothetical risk of that appointment not being renewed in five years' time would need to be something which Sir Peter, an eminent judge, coming to the end of a long, successful career, cared sufficiently about as to supply him an (unconscious) motive to decide the issues before him in a manner unfavourable to Mr. Almazeedi, irrespective of the legal merits, in an entirely speculative attempt to curry Mr. Al-Emadi's favour, without any threat or promise, implicit or overt, having been made in that regard by Mr. Al-Emadi or anyone else.

The resulting (unconscious) bias would need to be present in Sir Peter's mind when he came to make his later decisions, which were contrary to Mr. Almazeedi's interests: deciding that Mr. Almazeedi (the sole director of a fund whose liquidators were investigating his alleged impropriety) should be ordered to attend for examination in that regard; and deciding that the liquidator's construction of an indemnity provision in Mr. Almazeedi's contract was to be preferred to that contended for by Mr. Almazeedi. As for Sir Peter's decision to order security for costs against BTU Industries Holdings (USA) Inc Sir Peter's (alleged subconscious) bias against Mr. Almazeedi could only have affected that decision if Sir Peter was aware of an association between Mr. Almazeedi and that company - assuming there was such an association, which is not clear from the Privy Council judgment.

Is all the above the reasoning of a fair-minded and informed observer, who was not unduly sensitive or suspicious, who knows "*judges have weaknesses*" and has "*take[n] the trouble to inform themselves on all matters that are relevant*"? Arguably it more closely resembles the reasoning of someone who believes judges have unlimited hearing preparation time, during which they not only rigorously read superseded witness statements but also conduct their own independent research into biographies of directors of companies which are minority

shareholders in companies which are the subject of applications before them and, thereafter, continue to follow the minutiae of those directors' careers.

Relevance of non-disclosure

The Privy Council, however, concluded (emphasis added):

“... the [court], with some reluctance, has come to the conclusion that the Court of Appeal was right to regard it as inappropriate for the judge to sit without disclosure of his position in Qatar as regards the period after 26 June 2013 and that this represented a flaw in his apparent independence, but has also come to the conclusion that the Court of Appeal was wrong to treat the prior period differently. The judge not only ought to have disclosed his involvement with Qatar before determining the winding-up petition. In the Board's view, and at least in the absence of any such disclosure, a fair-minded and informed observer would regard him as unsuitable to hear the proceedings from at least 25 January 2012 on. The fact of disclosure can itself serve as the sign of transparency which dispels concern, and may mean that no objection is even raised.”

Of course an alternative explanation for a non-disclosure might be that a tribunal either: (i) was not aware of the factual situation which is said to have supplied the motive for bias, and so was not in a position to disclose it; or else (ii) the tribunal was aware of the facts but never ‘connected the dots’ – i.e. it never occurred to the tribunal that those facts provided / could be thought to provide a motive for deciding the case in favour of one party or the other. This is the invidious potential problem with drawing an inference from a ‘failure’ to disclose – such ‘failure’ could be equally symptomatic of bias or its absence.

For that reason, the position in the IBA Guidelines – that “[n]ondisclosure cannot by itself make an arbitrator partial or lacking independence: only the facts or circumstances that he or she failed to disclose can do so” - seems preferable.

Lord Sumption's dissenting judgment in *Almazeedi*

Lord Sumption took a completely different view to that of the majority. Lord Sumption identified that:

“The case against [Sir Peter] rests entirely on the notion that he might be influenced, possibly unconsciously, by the hypothetical possibility of action being taken against him in Qatar as a result of any decision in the Cayman Islands which was contrary to the Qatari Government's interests ... the suggestion is that the notional fair-minded and informed observer would anticipate a real risk of bias because Sir Peter Cresswell might be influenced by the thought that if he made decisions adverse to the interests of the influential persons in Qatar, in particular Mr Al-Emadi, his appointment might not be renewed after his first five-year term or his terms of service might be adversely affected by a decision of the Council of Ministers on the proposal of Mr Al-Emadi. That really is all that it amounts to.”

This, he said was “at the outer extreme of implausibility”. His reasoning was, essentially that Qatar had established the QICDRC with a view to attracting international business and financial services to Qatar, promoting it as a world class court which was totally impartial and independent. The court comprised one judge from Qatar and eight judges of distinction from other jurisdictions including two former Lord Chief Justices of England and Wales. “The salient point in the mind of the notional fair-minded and informed observer would be that any overt government action against a judge of the QICDRC on account of a decision adverse to Qatari interests would be in the highest

degree unlikely. It would immediately and irretrievably destroy the international reputation of the court, in which Qatar has invested a great deal, both politically and financially. It is hardly conceivable that the other judges of the court ... would lend their reputations to an institution about which credible allegations of that kind had been made. The notional observer would expect Sir Peter Cresswell to be conscious of all of these matters."

Following Lord Sumption's logic and reasoning, it is not clear: (i) who is responsible for the appointment or renewal of QICDRC judges; and so (ii) whether Mr. Al-Emadi could in fact have engineered the non-renewal of Sir Peter's appointment, as alleged.

Even assuming the case was a personal vendetta which was being pursued against Mr. Almazeedi by Qatar: "*there is no reason to suppose that was known to Sir Peter at the time he was concerned with this litigation*", causing him (unconsciously) to fear non-renewal, five years hence, of his QICDRC appointment. "[T]he portrayal of this dispute as a personal vendetta between Mr Almazeedi and the Government of Qatar only once surfaced in the course of the proceedings before Sir Peter, and that was in Mr Almazeedi's sixth affidavit relating to the application for the winding-up order".

Addendum to Lord Sumption's dissenting judgment

Peculiarly, an addendum to Lord Sumption's judgment reads:

"The Court of Appeal and the [Privy Council] were, when deciding the appeals in this matter, invited to, and did, proceed on the agreed factual basis that there was no disclosure of the Qatari appointment.

Subsequently, however, notwithstanding that agreement, it has been brought to the attention of the [Privy Council] that it is possible that the judge did indeed make the disclosure of it which the [Privy Council] has held ought to have been made, although recollections are, at this distance in time, not consistent and no contemporary record is now extant.

None of the parties bound by the order of this court seeks any re-opening of the appeal but it is nevertheless appropriate to record the position as now understood."

It is hard to know what to make of this. One might have thought that the issue of whether Sir Peter made the requisite disclosure would have been at the forefront of the parties' and their lawyers' minds, – less because of the supposed relevance of non-disclosure as evidence of the absence of bias but more because, if Sir Peter in fact made such disclosure, Mr. Almazeedi's failure to raise a timely objection would (no doubt) have operated to deprive him of the right to object thereafter. It seems surprising that something so crucial could have been overlooked until after the case had reached the Supreme Court. Yet that appears to have been the case.

What happened in *Halliburton*

Leaving *Almazeedi* and moving on to *Halliburton*. Transocean and Halliburton each purchased liability insurance from Chubb. The material terms of Halliburton's policy and of Transocean's policy appear to have been the same.

Following an explosion and fire in 2010 on the Deepwater Horizon oil rig numerous claims were made against Halliburton, BP and Transocean.

The US Government claims were for civil penalties under various federal statutes. The private claims for damages were pursued through a Plaintiffs' Steering Committee ("PSC"). Many of the claims were consolidated into a single 'Multi District Litigation'.

Judgment was given on 4 September 2014 holding the apportionment of blame to be BP 67%; Transocean 30% and Halliburton 3%. Shortly before judgment, Halliburton concluded a settlement of the PSC claims against it in the sum of approximately US\$1.1 billion. Following the judgment, Transocean settled the PSC claims for some US\$212 million and paid civil penalties of about US\$1 billion to the US Government.

Halliburton sought to claim from Chubb under its policy. Chubb declined to pay and the dispute was referred to arbitration. The arbitration agreement provided for there to be three arbitrators, one appointed by each party and the third by the party arbitrators. In the event of disagreement between the party appointed arbitrators as to the choice of the third, the appointment was to be made by the court.

Chubb and Halliburton each appointed an arbitrator. Those arbitrators failed to agree as to the identity of the third. The court appointed the third arbitrator, Chubb's preferred candidate. He is referred to in the judgments as 'M', though his identity is, in fact, widely known or suspected.

Prior to his appointment M disclosed that he had previously acted as arbitrator in a number of arbitrations in which Chubb was a party and that he was currently appointed as arbitrator in two references in which Chubb was involved. Halliburton did not object.

Following his appointment, M also accepted appointments in relation to separate claims made against Chubb and another insurer by Transocean in connection with the Deepwater Horizon. M did not disclose those appointments to the parties. The parties accepted that the reason M did not disclose those appointments was because "*it did not occur to him at the time that he was under any obligation under the IBA Guidelines to do so*". The court refers to this as "*an innocent oversight*".

Halliburton learned of those appointments and applied to the court to remove M as arbitrator. The court dismissed that application. Halliburton appealed.

Meanwhile, the tribunal (M and the arbitrator nominated by Chubb) issued a partial final award in Chubb's favour. The arbitrator who had been nominated by Halliburton declined to join in the award. He issued "*Separate Observations*" in which he wrote that he was unable to join in the award as a result of his "*profound disquiet about the arbitration's fairness*", explaining that:

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

Court of Appeal judgment in *Halliburton*

The Court of Appeal upheld the decision below and dismissed Halliburton's appeal.

The following passages in the Court of Appeal's judgment have proved to be the most controversial:

“49 ... We accept that inside information and knowledge may be a legitimate concern for the parties to have in overlapping arbitrations involving a common arbitrator but only one common party. ... that, in itself, it does not justify an inference of apparent bias.

53 ... the mere fact that an arbitrator accepts appointments in multiple references concerning the same or overlapping subject matter with only one common party does not of itself give rise to an appearance of bias. ... “[s]omething more is required” and that must be “something of substance”.

This seems to mean that a concurrent appointment in a reference concerning the same or overlapping subject matter can never justify an inference of bias, so never constitutes grounds for removing an arbitrator or setting aside an award. Thus, for all that such an appointment raises a “*legitimate concern*” the ‘legitimately-concerned’ party has no remedy.

This is arguably at odds with the approach in the IBA Guidelines. Item 3.1.5 on the Orange list is “[t]he arbitrator currently serves ... as arbitrator in another arbitration on a related issue involving one of the parties, or an affiliate of one of the parties”. The IBA Guidelines thus seem to contemplate that such a situation could, without more, justify an inference of bias.

As regards the relevance of non-disclosure, the Court of Appeal’s reasoning includes the following:

“M ought as a matter of good practice and, in the circumstances of this case, as a matter of law to have made disclosure to Halliburton at the time of his appointments in references 2 and 3.

The question then becomes whether, at the time of the hearing to remove, the non-disclosure taken together with any other relevant factors would have led the fair-minded and informed observer, having considered the facts, to conclude that there was in fact a real possibility that M was biased.

In answering this question we would in particular take the following factors into account from the perspective of the fair-minded and informed observer: (1) the non-disclosed circumstance does not in itself justify an inference of apparent bias; (2) disclosure ought to have been made, but the omission was accidental rather than deliberate; (3) the very limited degree of overlap means that this is not a case where overlapping issues should give rise to any significant concerns; (4) the fair-minded and informed observer would not consider that mere oversight in such circumstances would give rise to justifiable doubts as to impartiality ...”

It can be seen that the Court of Appeal seems to have assigned less weight to non-disclosure than did the Privy Council in *Almazeedi*. Does the fact that in *Halliburton* “it did not occur” to M that he was under a duty to disclose, and the parties agreed M’s non-disclosure was “*accidental rather than deliberate*”, justify a different treatment? In *Almazeedi* it was said that “*there is no suggestion of actual bias*” (paragraph 1) and “*there was no suggestion there that [Sir Peter] would break his oath ... the only suggestion ... was of the risk of ... unconscious ... bias*” (paragraph 18). The strong implication is that Sir Peter’s and M’s non-disclosure were equally non-deliberate. Absent actual bias, what reason could there be for Sir Peter not having disclosed his concurrent appointment other than it not having occurred to him that he was under a duty to do so?.

Halliburton has of course appealed to the Supreme Court. The Chartered Institute of Arbitrators, LCIA and ICC have each made submissions in the case which are (to varying degrees) critical of the Court of Appeal’s approach. The Court of Appeal’s decision has also been criticised in some practitioner articles. We, like others, await the judgment of the Supreme Court with interest.

Comment

Meanwhile, the following points can be made by way of commentary. In *Almazeedi* six Privy Council judges (counting Sir Bernard Rix who has continued to sit as a member of the judicial committee of the Privy Council in addition to his role as a judge of the Cayman Islands Court of Appeal between them reached three completely different conclusions when they applied the same test (*Porter*) to the same facts.

Would a consensus as to the answer more easily have been achieved had Sir Peter been an arbitrator rather than a judge, and the case been governed by the IBA Guidelines? The situation in *Almazeedi* does not appear on any of the 'lists' in the IBA Guidelines. The closest scenarios are:

- Non-waivable red-list 1.1 "... *the arbitrator is a[n] employee of an entity that is a party in the arbitration*". Qatar was not a party to the case, and query too whether a QICDRC judge is an 'employee' – English law does not consider its judges to be employees, deeming them rather to be 'office holders' (*Gilham v Ministry of Justice* [2017] EWCA Civ 2220).
- Green list 4.4.3 "[t]he arbitrator and a ... director ... of one of the parties, have worked together ... in another professional capacity ...". It is something of a stretch to characterise Sir Peter's appointment to the QICDRC as having 'worked together' with Mr. Kamal / Mr. Al-Emadi (whom he had never met).

A court seeking to apply the IBA Guidelines would thus be required to decide the matter not by reference to the lists, but by applying the test in General Standard 2, which is materially identical to *Porter* save for the guidance that "[n]ondisclosure cannot by itself make an arbitrator partial or lacking independence: only the facts or circumstances that he or she failed to disclose can do so". Hence, if it was non-disclosure which swung the majority against Sir Peter in *Almazeedi*, the result might conceivably have been different under the IBA Guidelines.

Similarly, the court's task in *Halliburton* would not be made much easier if the matter had fallen to be determined under the IBA Guidelines. The situation in *Halliburton* is not on the Green list or Red list (which would have been determinative and provided a clear answer but appears on the Orange list at 3.1.5: "*The arbitrator currently serves ... as arbitrator in another arbitration on a related issue involving one of the parties, or an affiliate of one of the parties*"). The court would thus also have been required to conduct a *Porter*-type enquiry pursuant to General Standard 2 as to whether that would cause a reasonable third person to have justifiable doubts as to M's impartiality or independence. The differences would be: (i) that enquiry would not have started from the position that a concurrent appointment is *never* capable of giving rise to such doubts. But, equally, the fact of non-disclosure would fall to be disregarded.

(Incidentally, in a letter to the parties M took the position that his appointment in the *Transocean v Chubb* arbitration did not fall within the Orange List definition, so that the IBA Guidelines would not have obligated him to disclose it: "... *all three References arise from the Deepwater Horizon incident, but it is not the case, as you suggest, that they raise the same or even similar issues. The two claimants, Halliburton and Transocean, as I understand it, performed very different roles and the issues were totally different ...*". With respect, that would seem to construe "*related issue*" too narrowly. *Transocean* and *Halliburton* were each claiming under identical policies, seeking to recover settlements they had made, in respect of their liabilities, established in the same proceedings, for the same losses, arising out of the same explosion. The Court of Appeal took the same view.)

The submissions of the ICC, LCIA and CI Arb in support of *Halliburton*'s application for permission to appeal to the Supreme Court all stressed the importance of clear guidance on the issues raised by the case. It is, however, necessary to be realistic. Parliament, in section 24(a) of the 1996 Act, has decreed that an arbitrator may be

removed if “*circumstances exist that give rise to justifiable doubts as to his impartiality*”. Whatever their Lordships decide in *Halliburton* it is not going to change that underlying legislation and the need, in each case, for an enquiry as to whether there are “*justifiable doubts*”. As *Almazeedi* illustrates there will always be scope for a range of opinion, even amongst the most experienced and respected judges when called upon to examine the same set of facts, about whether they raise *any* (not just *justifiable*) doubts.

In light of decisions like that of the majority *Almazeedi*, prospective arbitrators could be forgiven for erring on the side of caution and disclose everything, relevant or irrelevant. Such a trend is not without eventual consequence. If it were to become the norm for arbitrators always to disclose everything, however innocuous, then that will become the norm and it will come to be seen as suspiciously divergent if they fail to do so. Thus the “*fair-minded and informed observer*” becomes gradually more suspicious and exacting, to the detriment of arbitration.