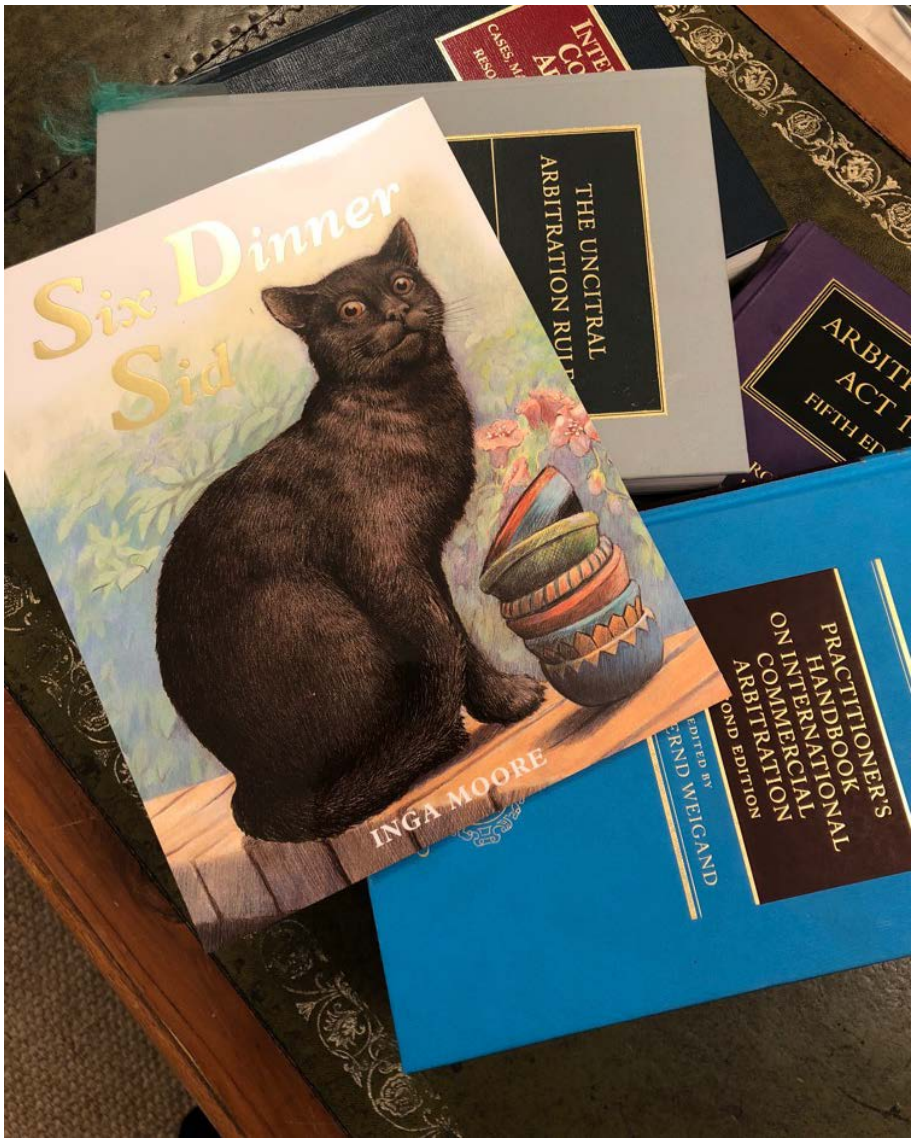
# Arbitrators and potential bias

## What should they declare? When can they be removed?

**Josephine Davies, 20 Essex Street Chambers**[1]

**COMBAR Vienna, 31 May 2018**




*Inga Moore's 'Six Dinner Sid': useful reading for aspiring lawyers and arbitrators?*

[1] All views and errors are my own.

## HALLIBURTON V CHUBB: THE FACTS

Halliburton Company v (1) Chubb Bermuda Insurance Ltd, (2) M, (3) N, (4) P

[2018] EWCA Civ 817 (not yet reported, decided on 19 April 2018)
Sir Geoffrey Vos, Chancellor, Simon LJ, Hamblen LJ

Appeal from: H v L and others [2017] EWHC 137 (Comm), Popplewell J

**Various contracts:**

**Transocean** lease Deepwater Horizon (rig) to **BP**
**Halliburton** contracts to provide cementing and well-monitoring services to **BP**
**Chubb** writes liability insurance on Bermuda Form to **Transocean** and **Halliburton**

**The arbitration in issue:**

Halliburton v Chubb

- Halliburton appoints N
- Chubb appoints O
- The court (Flaux J) appoints M

**M** is an English lawyer, put on the list by Chubb, declares previous appointee of Chubb.

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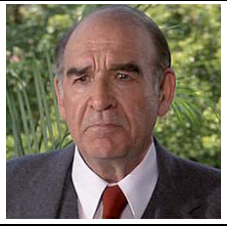
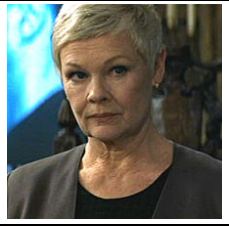
|  |  |  |  |
| Bernard Lee<br>1962 - 1979<br>'Dr No' to 'Moonraker' | Robert Brown<br>1983 - 1989<br>'Octopussy' to 'Licence to Kill' | Judi Dench<br>1995 - 2012<br>'Golden Eye' to 'Spectre' | Ralph Fiennes<br>2012 – present<br>'Skyfall' to ? |

**The problem:**

M appointed in:
Reference No. 2: Transocean v Chubb
Reference No.3: Transocean v anon.

**M's letter when challenged by Halliburton:**

Dear Parties,

"I do not think and did not think that the above circumstances put any obligation upon me to make any disclosure to you or your clients under the IBA Guidelines. However, I appreciate, with the benefit of hindsight, that it would have been prudent for me to have informed your clients through your firm, and I apologise for not having done so.

It is correct that 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 and, so far, beyond matters which are public knowledge, my only involvement in the Transocean cases, has concerned the issue of construction argued by Counsel in two 2-day Hearings, without any evidence save as to the circumstances of the making of the relevant insurance contract. I have received no information which would not be shared by my co-arbitrators in the Halliburton case.

Both you and your clients have my assurance that during the period of about 20 years during which I have practised as a full-time international commercial arbitrator, I have at all times remained independent and impartial and will continue to do so.

That said, I readily acknowledge that it is important that both parties in arbitration should share confidence that the dispute will be determined fairly on the evidence and the law without bias.

I do not believe that any damage has been done but, if your clients remain concerned, I would be prepared to consider tendering my resignation from my appointment in the two Transocean cases if the results of the determination of the preliminary issues of construction, which are likely to be issued shortly, does not effectively bring them to an end."

Yours,

## CoA analysis, Step 1 – The test for removal for bias

**English law:**

Arbitration Act 1996, s.24(1):

> "A party to arbitral proceedings 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**;"

Test for bias (Porter v Magill [2001] UKHL 67, [2002] 2 AC 357, [102] – [103] Lord Hope – adjusting the R v Gough test in line with ECHR):

> First "ascertain **all the circumstances** which have a bearing on the suggestion that the judge was biased",
>
> Then "ask whether those circumstances would lead a **fair-minded and informed observer** to conclude that there was a **real possibility that the tribunal was biased**."

Bias explained in R v Gough [1993] AC 646, 670 Lord Goff:

> "bias … in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him…"

**International 'rules':**

UNCITRAL Model Law (1985, 2006 amends), Art. 12(2):

> "An arbitrator may be challenged only if **circumstances exist that give rise to justifiable doubts as to his impartiality or independence** …"

IBA Guidelines (2014), (2) Conflicts of Interest:

> "(a) An arbitrator shall decline to accept an appointment or … refuse to continue to act … if **he or she has any doubt** as to his or her **ability to be impartial or independent**.
>
> (b) The same principle applies if **facts or circumstances exist** … 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** …
>
> (c) 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.**"

## CoA analysis, Step 2 – Per se problem with multiple appointments?

IBA Guidelines (2014), Part II (3)

> "The **Orange List** is 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**. The Orange List thus reflects situations that … the arbitrator has a duty to disclose …"

IBA Guidelines (2014), Orange List

> "3.1.3 The arbitrator has, **within the past three years**, been appointed as arbitrator on **two or more occasions by one of the parties**, or an affiliate of one of the parties.*
>
> *It may be the practice in certain types of arbitration, such as maritime, sports or commodities arbitration, to draw arbitrators from a smaller or specialised pool of individuals. If in such fields it is the custom and practice for parties to frequently appoint the same arbitrator in different cases, no disclosure of this fact is required where all parties in the arbitration should be familiar with such custom and practice.
>
> 3.1.5 The arbitrator currently serves, or has served **within the past three years**, as arbitrator in another arbitration on a **related issue involving one of the parties**, or an affiliate of one of the parties.
>
> 3.5.2 The arbitrator has publicly advocated a position on the case, whether in a published paper, or speech, or otherwise."

IBA Guidelines (2014), Part II (7)

> "The **Green List** is a non-exhaustive list of specific situations where **no appearance and no actual conflict of interest** exists from an objective point of view. Thus, the arbitrator has no duty to disclose situations falling within the Green List. …"

IBA Guidelines (2014), Green List

> "4.1.1 The arbitrator has previously **expressed a legal opinion** (such as in a law review article or public lecture) **concerning an issue that also arises** in the arbitration (but this opinion is not focused on the case)."

## CoA analysis, Step 3 – When should there be disclosure?

**English law:**

Davidson v Scottish Ministers (No 2) [2004] UKHL 34, [2005] 1 SC 7, [19] Lord Bingham:

> "…since it may obviate the risk of misunderstanding … it is also routine for judges … to disclose a previous activity or association **which would or might provide the basis for a reasonable apprehension of a lack of impartiality**. It is very important that proper disclosure should be made in such cases, first, because it gives the parties an opportunity to object and, secondly, because the judge shows … that he or she has nothing to hide and **is fully conscious of the factors** which might be apprehended to influence his or her judgment. …"

Taylor v Lawrence [2002] EWCA Civ 90, [2003] QB 528, [64] Lord Woolf CJ:

> "… where a fair-minded and informed person **might** regard the judge as biased, it is important that disclosure should be made. If the position is borderline, disclosure should be made …"

Halliburton v Chubb [2018] EWCA Civ 817, [65] Hamblen LJ:

> "… disclosure should be given of circumstances **which would or might lead** the fair-minded and informed observer, having considered the facts, to conclude that there was a real possibility that the tribunal was biased. …"

**International 'rules':**

IBA Guidelines (2014), (3) Disclosure by the Arbitrator:

> "(a) If facts or circumstance exist that **may, in the eyes of the parties,** give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties …"

## CoA analysis, Step 4 – Consequences of failing to Disclose

**English law:**

Davidson v Scottish Ministers (No 2) [2004] UKHL 34, [2005] 1 SC 7, [19] Lord Bingham:

> Non-disclosure "…must inevitably colour thee thinking of the observer…"

Halliburton v Chubb [2018] EWCA Civ 817, [75]-[76] Hamblen LJ:

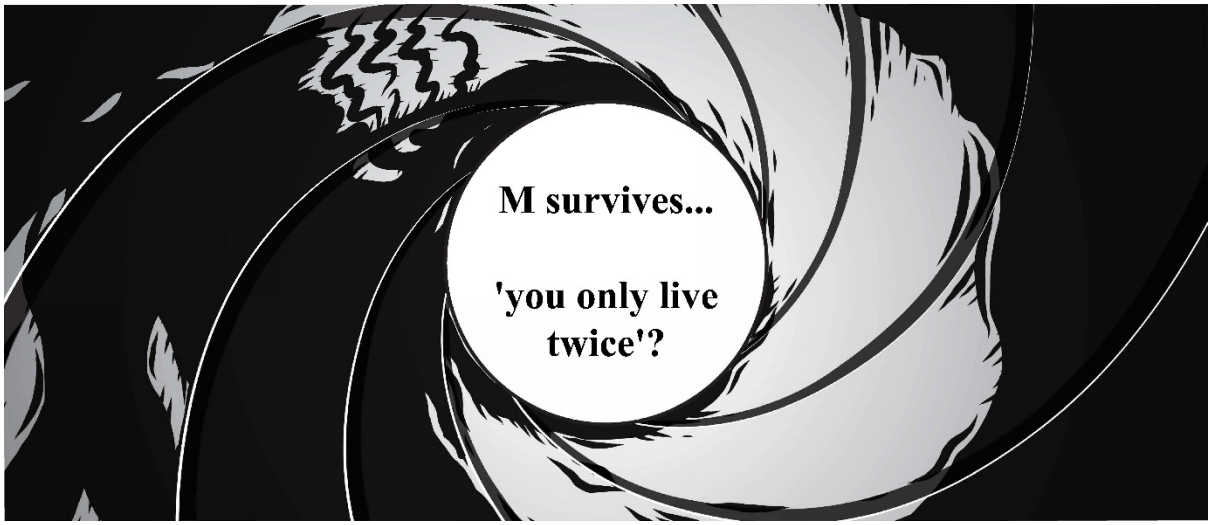
> "Non-disclosure is therefore a factor to be taken into account in considering the issue of apparent bias. An inappropriate response to the suggestion that there should be or should have been disclosure may further colour the thinking of the observer and may fortify or even lead to an overall conclusion of apparent bias …
>
> Non-disclosure … cannot, however, in and of itself justify an inference of apparent bias. Something more is required …"

**International 'rules':**

IBA Guidelines (2014), Part II (5)

> "A later challenge based on the fact that an arbitrator **did not disclose** such facts or circumstance **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 and circumstances that he or she failed to disclose can do so."

## CoA – The Result




But these notes are 'For Your Eyes Only'