We need to talk about Ken (and about Michael)[1,2]

Peter Ashford FCIArb[3]

In *Halliburton Company v Chubb Bermuda Insurance Ltd*[4], the Supreme Court unanimously dismissed Halliburton's appeal from the Court of Appeal decision that had upheld the refusal to remove the arbitrator. In the first arbitration case to apply *Halliburton*, the Commercial Court has rejected an attempt to disqualify an arbitrator in *Newcastle United Football Company Limited v The Football Association Premier League Limited*[5].

If these cases represent the application of the law of England and Wales on conflicts in arbitration, it is in a sorry state. In several respects the results are deeply unsatisfactory. Distinguished arbitrators have been found not to have complied with disclosure duties but the courts have declined to interfere. There are four specific areas where the state of the law is unsatisfactory. Firstly, the duty (if any) on an arbitrator of enquiry before disclosure is unclear ("**enquiry**"); secondly, the lack of presumption of apparent bias from a breach of disclosure obligations is troubling ("**presumption**"); thirdly, we are dangerously close to admitting and relying upon the reputation of the challenged arbitrator or what the challenged arbitrator says about his or her state of mind without affording any opportunity to challenge that ("**reputation**"); and finally when is the analysis to be performed ("**date**").

[1] With apologies to Lionel Shriver and Lynne Ramsay and all others involved in ***We Need to Talk About Kevin*** a psychological thriller book and 2011 film where a mother struggles to love her strange child, Kevin, despite the increasingly dangerous things he says and does as he grows up: I am struggling to love arbitration if it is dealing with conflicts in this way.

[2] *Halliburton* concerned Ken Rokison QC as arbitrator and *Newcastle United* concerned Michael Beloff QC as arbitrator (the latter sitting with Lords Neuberger and Dyson). Both Mr Rokison and Mr Beloff are highly distinguished, able and respected lawyers and arbitrators. Nothing in this article should be taken as any criticism of them (beyond the errors of judgment recorded in the judgments) or of their integrity or impartiality, still less that they displayed any actual bias.

[3] Partner and Co-Head of International Arbitration at Fox Williams LLP

[4] [2020] UKSC 48

[5] [2021] EWHC 349 (Comm)

Enquiry

The Supreme Court in *Halliburton* agreed with the Court of Appeal's formulation of the duty of disclosure[6] subject to one qualification concerning the knowledge of the arbitrator and held that: *"[a]n arbitrator can disclose only what he or she knows and is, as a generality, not required to search for facts or circumstances to disclose. But I do not rule out the possibility of circumstances occurring in which an arbitrator would be under a duty to make reasonable enquiries in order to comply with the duty of disclosure*."[7]

Lord Hodge continued: "*IBA Guidelines, Part I, General Standard 7(d), [provides] …that an arbitrator is under a duty to make reasonable enquiries as to whether there are facts or circumstances which might lead the fair-minded and informed observer to conclude that there was a real possibility of bias. It is not necessary in the context of this appeal to express a concluded view on whether this statement of good practice is also an accurate statement of English law, but I do not rule out that it might be*."[8]

In *Locabail v Bayfield*[9], the Court of Appeal acknowledged, indeed recommended, that solicitors "*conduct a careful conflict search*". Barristers are, apparently, "*expected to know of any past or continuing professional or personal association*" – so whilst the 'conflict search' might simply be asking themselves a question, it is a 'search' nevertheless. *Locabail* was a special sitting of the Court of Appeal comprising Lord Bingham CJ, Sir Richard Scott V-C and Lord Woolf MR[10] hearing five applications for permission to appeal, listed and heard together since they raised common questions concerning disqualification of judges on grounds of bias. The judgment was unanimous and plainly sought to clarify and bring certainty to the law. It deserves appropriate respect.

The Supreme Court having made a clear finding that there is a duty of disclosure, abdicated, I suggest, responsibility by leaving any duty of enquiry in vague terms. It is unfortunate that the Supreme Court did not take the further step of elevating a 'statement of good practice' to a legal duty. I accept that strictly it was not necessary for the result (as there was no issue about enquiry) but the Court could have said more on an *obiter* basis.

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[6] The Court of Appeal held, at [71], that "*the present position under English law to be that disclosure should be given of facts and circumstances known to the arbitrator which, in the language of section 24 of the Act, would or might give rise to justifiable doubts as to his impartiality*." (emphasis added).

[7] [107]

[8] [107]

[9] [2000] QB 451 at [20]: "*When members of the Bar are appointed to sit judicially, whether full-time or part-time, they may ordinarily be expected to know of any past or continuing professional or personal association which might impair or be thought to impair their judicial impartiality. They will know of their own affairs, and the independent, self-employed status of barristers practising in chambers will relieve them of any responsibility for, and (usually) any detailed knowledge of, the affairs of other members of the same chambers. The position of solicitors is somewhat different, for a solicitor who is a partner in a firm of solicitors is legally responsible for the professional acts of his partners and does as a partner owe a duty to clients of the firm for whom he or she personally may never have acted and of whose affairs he or she personally may know nothing. While it is vital to safeguard the integrity of court proceedings, it is also important to ensure that the rules are not applied in such a way as to inhibit the increasingly valuable contribution which solicitors are making to the discharge of judicial functions. Problems are, we apprehend, very much more likely to arise when a solicitor is sitting in a part-time capacity, and in civil rather than criminal proceedings. But we think that problems can usually be overcome if, before embarking on the trial of any assigned civil case, the solicitor (whether sitting as deputy district judge, assistant recorder, recorder or section 9 judge) conducts a careful conflict search within the firm of which he is a partner. Such a search, however carefully conducted and however sophisticated the firm's internal systems, is unlikely to be omission-proof. While parties for and against whom the firm has acted, and parties closely associated, would (we hope) be identified, the possibility must exist that individuals involved in such parties, and parties more remotely associated, may not be identified. When in the course of a trial properly embarked upon some such association comes to light (as could equally happen with a barrister-judge), the association should be disclosed and addressed, bearing in mind the test laid down in Reg. v. Gough. The proper resolution of any such problem will, again, depend on the facts of the case*."

[10] The famous Tom (Bingham), Dick (Scott) and Harry (Woolf) sitting.

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The weight of precedent is plainly in favour of enquiry as a precursor to disclosure. Not only, is there *Locabail*, but ICSID cases such as *Vivendi v Argentina*[11] plainly recognise the duty of enquiry.

Likewise, the IBA Guidelines on Conflicts of Interest in International Arbitration, in General Standard 7(d),[12] plainly require "*reasonable enquiries*" by an arbitrator to identify any conflict (notably preceded by the parties' performing "*reasonable enquiries*" (General Standard 7(c)) to comply with a duty to inform the arbitrator of any relationship between the arbitrator and the party or any person with a direct economic interest in the award (General Standard 7(a)).

Leading commentators similarly endorse the duty to enquire e.g. Lew, Mistelis and Kroll in *Comparative International Commercial Arbitration*.[13]

In *Halliburton* itself it appears that there was no question of enquiry[14]: it was accepted that the arbitrator knew that he had been appointed in the other arbitrations. He applied his mind to it at the time of those appointments and it did not occur to him that he was under any obligation to disclose.[15]

In *Newcastle* it seems clear that the arbitrator knew some things, in the sense that he recalled some, but not all, details. *Premier League* had disclosed the fact that the arbitrator had advised it on a possible change to a section of its Rules in 2017 (that section was apparently not relevant to the pending dispute and the advice was more than 3 years prior to appointment). *Newcastle* had requested the arbitrator recuse himself. The arbitrator declined. *Newcastle* persisted and the arbitrator entered into *ex parte* communications with *Premier League's* solicitors stating that he had no recollection of the advice, could they provide a copy and consent to it being disclosed to *Newcastle.* This was described by the Judge as an *"error of judgment".*

This highlights that had the arbitrator properly enquired before disclosure, the problem ought not to have arisen. To sanction or endorse the lack of enquiry might not be going so far as to endorse Nelsonian blindness but nevertheless it leaves a very bad taste in the mouth. To deliberately not enquire would be dishonest, but mere negligent failure to search is neither dishonest nor sufficient to attribute knowledge and presumably most failures to search would fall into this category.[16]

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[11] Annulment Decision 20 August 2007 available at https://www.italaw.com/sites/default/files/case-documents/ita0221.pdf. The case concerned an arbitrator who was a director of a bank. *"[222] ... any arbitrator **[must]**… specifically investigate whether the bank has any connection with or interest in any of the parties in its pending arbitrations but, if such an arbitrator decides in principle to continue, also to notify the parties in each arbitration of such a connection or interest. This imposes a continuous duty of investigation…. [226] having properly and adequately investigated and established any relationship between the bank and any of the parties to the arbitrations, it is for the arbitrator personally first to consider such a connection in terms of a voluntary resignation as arbitrator. Such connection must otherwise be properly disclosed to the parties* …"

[12] "*An arbitrator is under a duty to make reasonable enquiries to identify any conflict of interest, as well as any facts or circumstances that may reasonably give rise to doubts as to his or her impartiality or independence. Failure to disclose a conflict is not excused by lack of knowledge, if the arbitrator does not perform such reasonable enquiries*."

[13] "***11-39** The duty to disclose also requires an arbitrator to make enquiries as to whether any relationships exist which have to be disclosed. He cannot just rely on his existing knowledge. The principle of reasonableness limits the extent of enquiries to be made by the arbitrator to find out potential conflicts and the resulting obligation to disclose those facts. Arbitrators cannot, for example, be expected to extend their conflict check to their former law firms and to provide the parties with a complete and unexpurgated business biography*." (footnotes omitted)

[14] No doubt this was the reason that the Supreme Court did not decide the issue.

[15] Mr Rokison wrote: "*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*." (emphasis added) - see Court of Appeal Judgment at [2018] EWCA Civ 817 at [18].

[16] See Lord Millett in *Twinsectra v Yardley* [2002] UKHL12 at [112]: "*It is dishonest for a man deliberately to shut his eyes to facts which he would prefer not to know. If he does so, he is taken to have actual knowledge of the facts to which he shut his eyes. Such knowledge has been described as "Nelsonian knowledge", meaning knowledge which is attributed to a person as a consequence of his "wilful blindness" or (as American lawyers describe it) "contrived ignorance". But a person's failure through negligence to make inquiry is insufficient to enable knowledge to be attributed to him: see Agip (Africa) Ltd v Jackson [1990] Ch 265, 293.*"

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However, as the arbitrator in *Halliburton* positively asserted that he *"did not think that the above circumstances put any obligation upon [him] to make any disclosure"*[17] he presumably applied his mind and had the case been one where enquiry was relevant, the argument might have been made that Nelsonian blindness was present.

Presumption

As to presumption Lord Hodge in *Halliburton* said:

> "*… the weight which the fair-minded and informed observer should give to that consideration will depend upon the circumstances of the arbitration and whether, objectively and as a generality, one could expect people who enter into references of that nature to be informed about the experience and past performance of arbitrators. In the context of many international arbitrations, it is likely to be a factor of only limited weight. The weight of that consideration may also be reduced if the circumstances give rise to a material risk of unconscious bias on the part of a person of the utmost integrity: Almazeedi v Penner [2018] UKPC 3, para 1 per Lord Mance*"[18]

The reference to *Almazeedi* was to the following *passage: "… if a judge of the utmost integrity lacks independence, then there is a danger of the unconscious effect of that situation, which it is impossible to calibrate or evidence.*" (emphasis added and internal quotation omitted).

Equally significantly in *Almazeedi* the majority held*:*

> *"In the result, the Board, with some reluctance, has come to the conclusion that …it [w]as inappropriate for the judge to sit without disclosure of his position … and that this represented a flaw in his apparent independence, …. 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 …. The fact of disclosure can itself serve as the sign of transparency which dispels concern, and may mean that no objection is even raised."*[19] (emphasis added)

It is thus clear that the Privy Council in *Almazeedi* (heard less than two years before *Halliburton* and with one common judge) held that failure to disclose itself represented apparent bias. The question is one of law, to be answered in the light of the relevant facts.[20] This is illustrated by the *Medicaments*[21] case which concerned one of the members of the court, who had applied, unsuccessfully, for a position in a company in which one party's principal expert witness was a director. It was held that there was an appearance of bias and the member of the court should have recused herself. Lord Phillips of Worth Matravers MR said:

> "*The material circumstances will include any explanation given by the judge under review as to his knowledge or appreciation of those circumstances. Where that explanation is accepted by the applicant for review it can be treated as accurate. Where it is not accepted, it becomes one further matter to be considered from the viewpoint of the fair-minded observer. The court does not have to rule whether the explanation should be accepted or rejected. Rather it has to decide whether or not the fair-minded observer would consider that there was a real danger of bias notwithstanding the explanation advanced*."

[17] See fn 15

[18] [67]

[19] [34]

[20] *Helow v S/S for Home Department* [2008] UKHL 62 at [39]

[21] *Director General of Fair Trading v Proprietary Association of Great Britain*, also known as: *Medicaments and Related Classes of Goods (No.2), Re* [2001] 1 WLR 700

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The judicial mindset of making findings and decisions has lost sight of the simple fact that in this instance a decision on believing, or otherwise, the arbitrator is not necessary. The explanation is simply to be added to the scales.

This addresses the ethical codes that solicitors and barristers are subject to. These codes prevent us from making an allegation of dishonesty or actual bias without clear evidence in support. As the arbitrator will never be cross-examined, the chances of discovering real wrongdoing or whether something did or did not happen is highly unlikely.

Reputation

As to the reputation of the arbitrator Lord Hodge in *Halliburton* said:

> "*The professional reputation and experience of an individual arbitrator is a relevant consideration for the objective observer when assessing whether there is apparent bias as an established reputation for integrity and wide experience in arbitration may make any doubts harder to justify*."

In *Halliburton* the finding of fact at first instance[22] was:

> "*The objective and fair-minded assessment would be that his experience and reputation for integrity would fully enable him to act in accordance with …his duties … by approaching the evidence and argument … with an open mind; and in deciding the case, in conjunction with the other members of the tribunal, in accordance with such material, with which [Halliburton] will have a full and fair opportunity to engage …*"

In *Newcastle* the arbitrator's reputation, willingness to give transparency after the event, confirmation that the views of the former client solicited *ex parte* were not decisive, and that the communications were written in haste and under some pressure of time:

> "*…would on balance lead such an observer to conclude that these events were errors of judgment made in pressured circumstances rather than evidence of a real risk of bias."*[23]

The judge in *Newcastle* further inflated the reputation issue when, after reciting the evidence of an illustrious legal career said:

> "*It would be fanciful to suppose … that … the [arbitrator] would have lied ... Unless therefore there is some credible basis for concluding that … the [arbitrator] …ha[s] lied then an observer with the attributes attributed to him or her by the case law … would be bound to accept what … the [arbitrator] ha[s] said*."[24]

This is precisely the problem. It is impossible to advance any credible basis to suggesting that a challenged arbitrator's explanation is incorrect.

[22] Recited at [30]

[23] [60]

[24] [45]

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In *Newcastle* the arbitrator submitted that a non-disclosure was "*inadvertent*"[25] as to which the Court held:

> "*… the disclosure was inadvertent. The [arbitrator] has so stated and there is no fact or matter that would suggest this was wrong. I am not concerned with careless inadvertence, because someone cannot be expected to disclose that which has been forgotten, unless it would support an inference by a fair-minded and informed observer that there was a real possibility of bias*."[26]

Furthermore, the Court held that fair-minded and informed observer "*… would have been influenced by … the backdrop of the second defendant's very substantial experience and unquestioned reputation …"*

It is important to recall that bias is not used in a pejorative sense, rather it means the absence of demonstrated independence and impartiality: *Yiacoub v The Queen*[27]*.* This appears to be lost sight of in *Halliburton* and *Newcastle* (but not *Almazeedi* – see above). Bias is the absence of demonstrable independence and, it follows, I suggest, that the absence of demonstrable independence is bias. There is no middle ground here.

In *Halliburton* there was a finding of a breach of the duty of disclosure[28], but after the arbitrator had given his explanation (and perhaps importantly after Halliburton's lawyers had accepted that the oversight to disclose was genuine and had not challenged that the arbitrator believed that there was no material overlap in the multiple arbitrations) it was held that the fair-minded and informed observer would not infer a real possibility of bias.

In determining the facts that the notional fair-minded and informed observer is deemed to be aware of, the Court can receive a statement from the arbitrator as to what he knew at the time, although the Court is not bound to accept any such statement at face value. It can be seen from *Newcastle* that the court appears to have found as a fact what the arbitrator submitted: the inadvertence.

Furthermore, there is no question of cross-examining the arbitrator. However, no attention is paid to any statement by the arbitrator as to the impact of any knowledge on his mind: *Locabail.*[29] All of this points away from subjectivity.

The apparently subjective nature of the knowledge of the arbitrator sits unhappily with the objective nature of the test for apparent bias set out by the House of Lords in *Helow v S/S for Home Department*[30]:

> "*The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. … She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially*":

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[25] [33 (iv)]
[26] [50]

[27] [2014] UKPC 22, [12] "*That and similar formulations use the word 'biased', which in other contexts has far more pejorative connotations, to mean an absence of demonstrated independence or impartiality. Lord Hope had made this clear in the contemporary case of Millar v Dickson [2002] 1 WLR 1615 at paragraph 63:* "*….the appearance of independence and impartiality is just as important as the question whether these qualities exist in fact. Justice must not only be done, it must be seen to be done. The function of the Convention right is not only to secure that the tribunal is free from any actual personal bias or prejudice. It requires this matter to be viewed objectively. The aim is to exclude any legitimate doubt as to the tribunal's independence and impartiality*."

[28] [147]

[29] At [19] approved in *Helow* at [39]

[30] [2008] UKHL 62 at [2]

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The *Helow* approach is consistent with the statement of principle of the Privy Council in *Miller*[31]:

> *"So one has the situation of the appellants having been tried, convicted and sentenced by a tribunal which was not independent. …. The appearance that justice is being done is as important as the actual doing of justice. The independence of the judiciary is not an empty principle which can be forgotten simply because one thinks that a correct conclusion has been reached. Rightly or wrongly there is always room for an uneasy fear that there might have been some improper influence affecting the mind of the judge where he lacks independence. The principle is far too important to allow it to be passed over …."*[32]

Once the objective facts are established it does not matter, indeed the court should not enquire into, whether it would, or would not, have made a difference. But that is precisely what the courts in *Halliburton* and *Newcastle* have done: they have found failures to disclose but forgiven them because the failures were by men of the highest repute.

Date

It has to be recalled that in *Halliburton* the same law firm that had proposed the arbitrator as presiding arbitrator in the first arbitration also appointed him in the two later arbitrations, and in all three references for the insurer. It follows that they and he alone were privy to the multiple appointments (and the potential overlap of issues), but neither said anything to Halliburton or its lawyers. Halliburton did not run these arguments, it only submitted that there was an asymmetry of information, i.e. the arbitrator might learn something in one arbitration that would infect his thinking in another. But the Court ruled that with the benefit of hindsight that concern was misplaced.

Hindsight should never, I suggest, be relevant. At the point of the later appointments, the arbitrator could not possibly have guaranteed to Halliburton that he would never be infected by knowledge gained in one of the other two arbitrations. Rather, once the breach of the duty to disclose was established, there should be a presumption of apparent bias, which should mean the onus passing to the arbitrator to demonstrate otherwise: in practice very few arbitrators would even attempt to do so as, in doing so, they would descend into the ring and such actions may well themselves evidence apparent bias.

This is another crucial part of *Halliburton* reasoning: that the time for assessing the materials was at the time of the hearing to remove the arbitrator.[33] The primary basis for so holding was that the relevant provision in the Act uses the term 'exist'[34] i.e. the present tense.

[31] *Miller v Dickson* [2001] UKPC D 4

[32] [83]

[33] See [121] – [123].

[34] S24(1)(a) Arbitration Act 1996 provides: "*A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds— (a)that circumstances exist that give rise to justifiable doubts as to his impartiality; …*" (emphasis added)

This might be thought a rather thin basis to decide such important matters. Lord Hodge sought to bolster his opinion with authority but that too is, at best, equivocal.[35]

More importantly this might be thought to be at odds with *Miller*[36] at [63]:

> "*As Lord Clarke said in Rimmer v HM Advocate, 23 May 2001 (unreported)*[37]*, the 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*." (emphasis added)

Conclusions

There is no doubt that the arbitrators in *Halliburton* and *Newcastle* did things that ought not to have been done. All courts found as much. Yet both arbitrators were able to continue, their behaviour criticised and yet forgiven by the courts. A large part of that forgiveness was centred on their repute – there was confidence that they would render a fair decision in the end. That is simply not good enough if justice must be seen to be done as we cannot look inside the minds of an arbitrator to see what might have, subconsciously, affected the decision and/or the decision-making process. Rather the approach in *Almazeedi* is to be preferred: non-disclosure is a flaw in an arbitrator's independence which makes him unsuitable – it is that simple.

It must be recalled that bias is the absence of demonstrable independence – by failing to make the disclosures that they were obliged to make, the arbitrators failed to demonstrate the very independence that was required of them. At the very least, there was an asymmetry of information such that the party with less information may always feel aggrieved. Allied to that is the date of the analysis. To move the goal-posts to a time when an arbitrator of repute has made self-serving explanations and given assurances – and then to accept those assurances - is likewise wholly unsatisfactory.

Similarly, the apparent dismissal of any duty of enquiry is regretted. A reasonable enquiry is vital to give substance to the disclosures. As above, there should also be a presumption of apparent bias when there is a failure to disclose.

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[35] Firstly, Lord Hodge relied on *In R (Condron) v National Assembly for Wales* [2006] EWCA Civ 1573 but that was a case of admitting the evidence of the impartiality that was central to the case; and secondly and similarly *AT & T Corpn v Saudi Cable Co* [2000] 2 Lloyd's Rep 127 Lord Hodge relied on a brief extract at the end of [122] underlined below but the full quote is "*It is not in dispute that reasonable apprehension of bias is a test in which reasonableness is judged by the standards of the reasonable objective observer. That is, in reality, the court itself, embodying the standards of the informed observer viewing the matter at the relevant time, which is of course the time when the matter comes before the court. That last qualification is important because, in judging whether there is bias or apparent bias, the court approaches the matter on the basis of an observer informed as to the facts upon which, and the context in which, the allegation of bias is made. As Lord Goff observed in Gough : "The law has first to ascertain the real circumstances from the available evidence, knowledge of which would not necessarily be available to an observer at court".* What both these cases are referring to, I suggest, is that the facts which constitute that alleged lack of independence or impartiality can be imputed to the observer at the court where the apparent bias is or may be occurring – it is not concerned with the court of the challenge.

[36] *Miller v Dickson* [2001] UKPC D 4

[37] Now reported at [2002] SCCR 1. Lord Clarke said the following: "*Whether or not a breach of the right to an independent and impartial tribunal in terms of article 6(1) has occurred is not, in my judgment, to be determined by considerations of whether or not any actual or perceived unfairness has arisen in the particular case. The question of impartiality, actual or perceived, has to be judged from the very moment when the judge or tribunal becomes first seised of the case, as judge or tribunal in that case and before the judge or tribunal takes any decision or performs any act in the proceedings. It is a question which stands, at least in relation to perceived impartiality, independently of the character, quality and effect of any such decisions or acts*."

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Of the four criticisms I level against *Halliburton*, and its application in *Newcastle*, there was prior authority in each of the four areas from the Court of Appeal, House of Lords or Privy Council that is to a different effect from these judgments. None are cited on the points I rely upon and many are not cited at all in the judgments (I do not know whether they were cited in argument). It may not be too late to rescue the position but as things stand arbitration is in real danger of being regarded as not fit for purpose.

We need to act quickly to save the reputation of London arbitration, and fall back in love with it.

Author

Peter Ashford
Partner
pashford@foxwilliams.com
+44 (0)20 7614 2596