Conflicts of Interest in International Commercial Arbitration

The Issue of Repeat Appointments of Arbitrators

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Abstract

Independence, impartiality and disclosure are primordial principles governing the process of international commercial arbitration. Taking the tie from the recent judgments of the UK Supreme Court Halliburton v. Chubb, this article aims to specifically discuss the issue of the repetition of appointments of arbitrators. Although repetition of arbitrators could raise justifiable doubts of bias (and has done so in case law), the circumstances under which those doubts could affect the arbitrator's impartiality and independence have not been clarified yet. Throughout this article, I will consider the different approaches taken concerning the issue of repeat appointments, and I will argue that although the qualitative approach is more realistic and efficient than the quantitative one, it still leaves much room for interpretation according to the specificities of the case ad hoc. I will therefore propose three criteria that could prove more practical when evaluating repeat appointments. I will then conclude by pointing out that although those solutions could prove to be useful, the critical question remains: does familiarity created with repetition actually breed partiality?

Keywords: International Commercial Arbitration, repeat appointments, IBA guidelines, UK Supreme Court.

1 Introduction

The principles of independence and impartiality of the arbitrator are the keys to an efficient arbitration procedure. At the same time, the imbalance between the number of disputes resorting to arbitration and the limited number of arbitrators has led to the creation of conflicts of interest in international arbitration. Hence, the development of professional relationships between lawyers, parties and arbitrators is becoming more and more frequent. Under this scope, doctrine and case law have attempted to regulate the repetition of appointments and reassure the integrity of the arbitral process.

In the first section of this article, I will analyse the concepts of 'independence' and 'impartiality' in international commercial arbitration and, mainly, their association with the duty of disclosure, both in the case of non-disclosure, as well as the consequences of disclosing previous appointments. While UK statute and case law constitute the focus of this work, reference will be made to other jurisdictions as well. Accordingly, although throughout this work I will refer to ICSID case law, the scope of this article is extended to the context of international commercial arbitration. In the second section, I will specifically examine the issue of repeat appointments of arbitrators, especially after the *Halliburton* v. *Chubb* decision of the UK Supreme Court. Through this analysis, I will break down the judgment and conclude that under the current standards, failure to disclose previous appointments cannot directly lead to the disqualification of the arbitrator, without the existence of 'other circumstances'. However, the Supreme Court does not clarify which 'other circumstances' are to be taken into consideration. Therefore, I will look further at the different approaches that have been developed: the qualitative approach that the IBA Guidelines on Conflicts of Interest in International Arbitration 2014 (thereinafter IBA Guidelines) provide for and the qualitative approach that looks at the specific case holistically and assesses the repetition of appointments in conjunction with other circumstances.

Taking the tie from the first section, I will then discuss that, although those considerations could prove useful in practice, it is also important to take a step back and look at the core of the problem: does familiarity breed favouritism? The development of a study, specifically targeting arbitration, will contribute to the discussion on whether repetition is a 'worrying' factor for the integrity of the arbitral process. A customised approach to the effect of familiarity on the psychology of the arbitrator will help adjust the different theories into the existing situation and decide whether repetition should constitute a real threat for a fair arbitral process.

After having analysed the latter, I will argue that, although the qualitative approach is more realistic, pro-arbitration oriented, and less dogmatic, the issue of the 'other circumstances' remains open and depends on the discretion of the court. Consequently, I will continue by proposing three more concrete standards that could

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be taken into account depending on which approach is followed: a. when following the quantitative approach, to replace numbers with percentages, b. when following the qualitative approach, to take into consideration the nature of the dispute in relation to the arbitrator's expertise and c. that lack of disclosure should constitute only an additional factor to be taken into consideration and should work independently since it serves different purposes.

2. Impartiality and Independence of Arbitrators

2.1 The Concept of Impartiality and Independence of Arbitrators in International Commercial Arbitration: An Overview

In the field of international commercial arbitration, the efficiency of the arbitral process requires the impartiality and independence of arbitrators. Impartiality and independence are placed among the fundamental principles of arbitration and should be preserved to ensure the effective administration of justice in the arbitral process.[1] Arbitration constitutes a form of 'private justice', aiming towards the provision of a more efficient form of adjudication. Maintaining the impartiality and independence of arbitrators is pivotal to preserving the reputation of arbitration as an alternative dispute resolution (ADR) mechanism. As has been held by the Paris Court of Appeal in a judgment delivered on 30 October 2012, 'the performance of the duties of an arbitrator implies a relation of trust with the parties that must be preserved throughout the entire duration of the arbitration'.[2] However, besides the considerable importance of these two principles, challenging an arbitrator on the grounds of his impartiality and independence may be used to delay the arbitral process or evade the recognition and enforcement of an arbitral award. Challenging an arbitrator at the beginning of the arbitral process or during the phase of annulment or recognition and enforcement of the arbitral award is an issue of substance, based on practice and the specific characteristics of the case at hand. While arbitral institutions have developed a series of uniform criteria as guidance concerning impartiality and independence,[3] the final verdict will depend on the peculiarities of the scenario at stake. This is the main reason why, although case law is relatively developed on the matter, it has not been an easy task extracting common criteria regarding the standard and threshold of impartiality and independence.

An impartial arbitrator is one 'who is not biased in favor of, or prejudiced against, a particular party or its case, while an independent arbitrator has no close relationship – financial, professional, or personal – with a party or its counsel'.[4] Thus, although impartiality refers to the mindset of the arbitrator and his attitude towards a party or a counsel, independence is connected to the external circumstances that may reveal a closer connection with one of the parties involved in the process. Independence is a situation of fact or law, and, therefore, it is easier to prove, whereas impartiality reflects a state of mind and, consequently, direct proof is harder to find.[5] Impartiality and independence of arbitrators are different terms, although they are often used interchangeably. The rigorous distinction of the two terms has often been criticised as 'the differences between impartiality, independence, and neutrality, because of their indeterminate and ambiguous nature, has given rise to long and sterile dogmatic debates'.[6] For example, the English Arbitration Act 1996 (thereinafter EAA) provides that an arbitrator may be removed if circumstances exist that give rise to justifiable doubts as to his impartiality.[7] The ICC Rules 2021 provide that an arbitrator may be challenged for an alleged lack of impartiality or independence.[8] Accordingly, the UNCITRAL Model Law 2006 (hereinafter the ML) refers both to independence and to impartiality as grounds for challenging an arbitrator.[9] In practice, the distinction in phrasing and the interchange between 'impartiality' or 'independence' do not imply a significant difference, since, eventually, what is crucial is the overall circumstances revealing an 'independence of mind' that encompasses impartiality as well as the independence of the arbitrator in question.[10] Just because, though, lack of independence and impartiality cannot be assessed objectively, as it relies on relevant factors, the test that is usually applied is the 'party's reasonable doubts as to the arbitrator's independence or impartiality'.[11] Under the English Arbitration Act (EAA), English courts have taken divergent approaches concerning the

1 See D.C. Nga and P.O. Adeleye, 'The English Supreme Court's Decision in *Halliburton* v. *Chubb*: An Examination of the Issues Arising from Arbitrator's Acceptance of Multiple Appointments in Related Arbitrations and Arbitrator's Duty to Disclose', 88(1) *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 201-18 (2022).

2 Mentioned in Astrid Westphalen and Vincent Carriou, 'The arbitrators' duty to disclose and the parties' duty to investigate: what are the safeguard mechanisms to ensure the independence and impartiality of arbitrators?' (2018) 6 I.B.L.J 543.

3 See indicatively: IBA Guidelines on Conflicts of Interest in International Arbitration, Art. 11.4, 13.4 of the 2018 HKIAC Rules, Art. 5(5) of the 2020 LCIA Rules.

4 A. Redfern and M. Hunter, *The Law and Practice of International Commercial Arbitration* (1999), at 220-21.

5 P. Fouchard, E. Gaillard & B. Goldman, *International Commercial Arbitration* (1999), at 564.

6 J.C. Fernández Rozas, 'Clearer Ethics Guidelines and Comparative Standards for Arbitrators' in M.A. Fernández-Ballesteros and D. Arias (eds), *Liber Amicorum Bernardo Cremades* (2010) 414.

7 EAA, Sect. 24(1)(a).

8 Art. 14(1).

9 Art. 12(2).

10 *Ury* v. *Galeries Lafayette* (1975) Rev Arb 235, cited in L.J.E. Timmer, 'The Quality, Independence and Impartiality of the Arbitrator in International Commercial Arbitration', 78(4) *Arbitration* 348, at 355 (2012); in this decision the French Court of Appeals also held that 'an independent mind is indispensable in the exercise of judicial power, whatever the source of that power may be [and it is] one of the essential qualities of an arbitrator', highlighting that the independence requirement of an arbitrator lies at the core of his judicial role.

11 Fouchard et al., above n. 5, at 571. See also ML Art. 12(1).

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applied test of 'lack of independence and impartiality', referring to 'real danger' or 'real possibility' of bias or 'a reasonable suspicion of bias'.[12] Today, it seems that the prevailing applied standard is the existence of a 'real likelihood of bias' that a fair-minded and informed observer would be able to detect.[13]

However, the standard of impartiality or independence does not substantially change according to the stage of proceedings. Nevertheless, according to Born,[14] what may be approached differently is that the analysis of the concept of 'justifiable doubts' will take into account the potential loss of time and effort that the disqualification procedure would result in. Therefore, although the criteria remain the same, the circumstances differ: at the beginning of the arbitral process a possible challenge is usually based on what has been disclosed or the investigation the parties have conducted themselves, whereas after the conclusion of the arbitration the parties have a clearer view of the arbitrator's mental state. However, it is far more likely to take advantage of a challenge procedure ex post, to delay or impede the recognition and enforcement of the arbitral award, while the 'clarification' of the matter at the beginning of the process would avoid further procedural disruptions in the future.[15]

2.2 The Duty to Disclose

The duty of the arbitrator to disclose refers to the duty to inform the parties, the counsels or the arbitral institution (if applicable in the case of institutional arbitration) regarding all the potential circumstances that may, from the parties' point of view, give rise to justifiable doubts concerning the arbitrator's independence or impartiality.[16] Consequently, apart from the duty of the arbitrator to be independent and impartial, there is an equal duty to disclose all the relevant facts, relationships and circumstances that exist before the arbitration procedure or that may arise during the process of it and that 'could reasonably be considered to be grounds for disqualification'.[17] The complexity of today's legal and commercial world as well as the globalisation of law firms have resulted in the emergence of different conflicts of interests between counsels, arbitrators and clients.[18] Simultaneously, arbitration remains an area for experts, and, therefore, professional relationships or other relevant circumstances may emerge daily. Although the duty to disclose is 'universally recognized'[19], there are no uniform standards of disclosure. For example, the IBA Rules on Conflicts of Interest 2014 provide that the arbitrator should disclose facts or circumstances that 'may [in the eyes of the parties] give rise to doubts',[20] whereas the ML[21] and the LCIA Rules 2014[22] (hereinafter LCIA Rules) require a likelihood of 'justifiable doubts'. The difficult issue that has to be crystallised, therefore, refers to what has to be disclosed on the part of the arbitrator, since it may sometimes be unreasonable or impossible for an arbitrator to disclose absolutely everything that may be considered a yellow light concerning his independence or impartiality.[23] An old US Supreme Court decision, *Commonwealth Coatings Corp* v. *Continental Casualty Co*, has recognised that 'arbitrators cannot sever all their ties with the business world'.[24] Failure to disclose an important fact does not automatically lead to the disqualification of the arbitrator; however, it may be considered as a strong proof of bias and lack of impartiality.[25]

Furthermore, apart from the different legal provisions, the issue of independence and impartiality has become even more complex owing to the disproportionality between the high demand for arbitration and the relatively limited pool of experienced arbitrators on an international scale. This imbalance between supply and demand has resulted, inter alia, in scenarios where certain arbitrators find themselves appointed multiple times by the same parties or counsels for similar or different cases. As Müller points out, different kinds of encounters are usual in the restricted circle of arbitration, and, therefore, it is not rare for the same person to find himself serving as arbitrator or representative for the same parties or as an arbitrator for the same party more than once.[26] Such potential conflicts of interest may jeopardise the arbitral process, since nominating an arbitrator who has been previously nominated by the same party or counsel may give rise to justifiable doubts concerning his independence or impartiality. Furthermore, failure to disclose may give rise to challenges that impede the arbitration and delay the completion of the procedure.[27] The lack of universal standards on what has to be disclosed, in general, and in this case, in particular, has resulted in confusion and uncertainty that may undermine the efficiency of the arbitral process.[28]

In the following part of the article, I will specifically discuss the issue of repeat appointments of arbitrators, focusing on the English law approach after the recent *Halliburton Company* v. *Chubb Bermuda* case (hereinafter

12 G.B. Born, *International Commercial Arbitration* (2nd ed. 2014, Vol. II), at 1822-1823.
13 See also in the *Halliburton* v. *Chubb* case below.
14 Born above n. 12, at 1771, with citation of further English court case law.
15 However, as Born points out, given that at the outset of the proceedings the parties do not have a clear picture of the arbitrator's cognitive state, a disqualification is far more likely to compromise the parties' freedom to appoint the arbitral tribunal. See Born above n. 12, at 1823.
16 Fouchard et al., above n. 5, at 578.
17 J. Waincymer, *Procedure and Evidence in International Arbitration* (2012), at 310. See also IBA Guidelines on Conflicts of Interest 2014, 9.
18 Timmer, above n. 10, at 349.
19 Fouchard et al., above n. 5, at 578.
20 Art. 3(a).
21 Art. 12.
22 Art. 5(4).
23 Waincymer, above n. 17, at 79.
24 393 U.S. 145 (1968).
25 See, *inter alia*, three relevant recent cases by the Cour d'Appel de Paris, no. 19/07575, 25 February 2020, Dommo Energia; no. 19/10666, 26 January 2021, Vidatel LTD; and no. 18/16695, 16 February 2021, Grenwich Enterprises Ltd).
26 C. Müller, *International Arbitration, A Guide to the Complete Swiss Case Law (Unreported and Reported)* (2004), at 75-6.
27 C.T. Salomon, J.M. Alcalá & C. Cardozo, 'Arbitrator's Disclosure Standards: The Uncertainty Continues', 63(3) *Dispute Resolution Journal* 78 (2008).
28 *Ibid*., 78.

the Halliburton case).[29] Taking the tie from the UK case law, I will conduct a more general analysis concerning the different approaches adopted in cases of repeat appointments of arbitrators, forming an argument on the most appropriate test for the sake of the efficiency of the arbitral process.

3 The Repeat Appointments of Arbitrators

3.1 Why Is It a 'Concerning' Scenario?

According to Slaoui, the terms 'repeat appointment of arbitrators' or 'repeat arbitrators' refer to the scenario in which 'the same party (A) or companies belonging to the same group of companies as the party appoint the same arbitrator (X) in several arbitrations. A similar situation is found when the same counsel regularly appoints the same arbitrator for different, but often similar, cases'.[30] If an arbitrator is repeatedly appointed by the same party or counsel, this may cause justifiable doubts regarding his independence or impartiality.[31] Multiple appointments do not affect the arbitrator's independence per se, since what is concerning is the possible partiality of the arbitrator towards the parties or counsels. If an arbitrator has been appointed repeatedly by the same party or counsel, then his independence may be affected (since there is a prior relationship with the parties) as well as his impartiality (since he may be more familiar with one side of the dispute and may act more favourably towards it).

The first question that may arise is why there is a need for a distinctive impartiality test between arbitrators and judges.[32] In fact, under English common law, the objective test of the fair-minded observer also applies to judges apart from arbitrators.[33] In the Halliburton case, Lord Hodge devotes a significant part of his reasoning to explaining the differences between an arbitrator and a judge that call for different approaches in terms of the impartiality test. The private nature of the arbitral process;[34] the confidentiality of the procedure;[35] the lack of a right to appeal;[36] and the pluralism of morals, experiences and understandings of the process in international arbitration[37] constitute some of the reasons why the test of impartiality and independence in the case of arbitrators is stricter. The consensual nature of arbitration, according to Lord Hodge, as an ADR, creates higher expectations of fairness, efficiency and impartiality.[38] Indeed, these considerations lead to a different perception of impartiality and repeat appointments when it comes to arbitrators. A judge that happens to be appointed repeatedly in cases involving the same party cannot be challenged for his impartiality and independence under the same standards as an arbitrator, who is usually appointed by the parties themselves. Furthermore, the public nature of judicial decision-making does not leave wide room for favouritism, unlike a closed-door arbitration procedure. Therefore, the parallelism between judges and arbitrators cannot answer the question of whether repetition affects impartiality, since this test would be based on different standards.

Therefore, there is indeed a possibility of bias in the case of repeat arbitrators that, although not automatically leading to disqualification, may result in a lack of independence and impartiality. As Koh points out, the general wisdom that you 'don't bite the hand that feeds you' has led to suspicions of 'systemic favouritism' towards the appointing party.[39] As in other similar scenarios of previous relationships with the parties, the question that initially arises is whether the arbitrator should disclose previous appointment(s) and if so, under what circumstances should a previous appointment be worth disclosing (e.g. how many previous appointments, how long ago, what kind of cases). The scenario of repeat appointments also reveals the interconnection between independence and impartiality, since although the pre-existing relationship with one of the parties could objectively lead to lack of independence, the question is whether this previous relationship can result in bias in favour of the party.[40]

Therefore, a first answer is usually provided by the duty to disclose. Given that disclosure is mainly discretionary, a possible omission would result in the disqualification of the arbitrator and the disruption of the arbitral proceedings, given that not disclosing these facts would be an aggravating factor in favour of the challenging party.[41] However, as will be demonstrated in the following chapters, neither disclosure nor repeat appointment circumstances is a simple box-ticking exercise. Paulsson highlights the lack of 'black and white' solutions by stating that any fact that is to be disclosed is subject to different implications.[42]

There can be a violation of a duty to disclose but not a disqualification due to repeat appointments. As will be analysed further on, disclosure can work as an indica-

29 *Halliburton Company* v. *Chubb Bermuda Insurance Ltd* [2020] UKSC 48.
30 F.-Z. Slaoui, 'The Rising Issue of "Repeat Arbitrators": A Call for Clarification', 25(1) *Arbitration International* 103, at 109 (2009).
31 Born above n. 12, at 1880-1881.
32 For a general analysis on the interrelation between personal values, discretion and independence of judicial decision-making under English law, see R.J. Cahill-O'Callaghan, 'The Influence of Personal Values on Legal Judgements', 40(4) *Journal of Law and Society* 596 (2013).
33 Halliburton case, para. 55.
34 *Ibid*., para. 56.
35 *Ibid*.
36 *Ibid*., para. 58.
37 *Ibid*., paras. 59-62.
38 *Ibid*., para. 62.
39 W.S. Wilson Koh, 'Think Quality Not Quantity: Repeat Appointments and Arbitrator Challenges', 34(4) *Journal of International Arbitration* 711, at 711-12 (2017).
40 Different conflicts of interest raise doubts concerning the arbitrator's impartiality and the integrity of the arbitral process. See A.K. Hoffmann, 'Chapter 18, Part XIII: Selection and Appointment of Arbitrators', in M. Arroyo (ed.), *Arbitration in Switzerland: The Practitioner's Guide*, 2nd ed. (2018), 2754-2755.
41 Slaoui, above n. 30, at 110.
42 J. Paulsson, 'Appointment of Arbitrators', in T. Schultz and F. Ortino (eds.), *The Oxford Handbook of International Arbitration* (2020) 113.

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tion but ultimately serves a different goal. Consequently, the issue comes down to how much repetition could affect impartiality and what the evaluating mechanism is.

3.2 The Halliburton v. Chubb Case

The EAA sec. 24(1)(a) provides for the disqualification of the arbitrator in case of justifiable doubts concerning his impartiality. It is worth mentioning that the Act does not include either the term 'independence' or any additional provision relating to the duty to disclose. And although the omission of the word 'independence' may not make a significant difference in practice,[43] the lack of specific provisions concerning the disclosure criteria could result in significant theoretical and practical implications. However, this does not mean that English law does not recognise the duty of disclosure. It has been recognised by the English case law that disclosure is not only a matter of good and fair arbitral practice but also a legal obligation.[44] In addition, for the efficiency of the procedure, disclosure should be taking place before the commencement of the hearing, to avoid disruptions in the future and safeguard the impartiality of the arbitrators.[45]

In the Halliburton case [2020], the Supreme Court specifically tackled the issue of multiple appointments of arbitrators concerning their duty to disclose. In a nutshell, the case concerned a liability insurance policy that was caused out of the damage created by an explosion on the Deepwater Horizon drilling rig in the Gulf of Mexico. Multiple damage claims were raised against Halliburton Company (service provider), which had entered into a Bermuda Form liability policy with Chubb Bermuda Ltd. When Halliburton settled in the main trial regarding the damages, it sought to claim against Chubb based on the insurance liability policy. However, the latter refused to pay, claiming the invalidity of the settlement in the main trial. The insurance policies provided for arbitration seated in London under New York law. Both parties selected one arbitrator, and, because they could not agree on the presiding arbitrator, the High Court appointed Mr Rokison, who was also originally proposed by Chubb and who accepted his appointment. However, Mr Rokison failed to disclose to Halliburton that he subsequently accepted an appointment in two cases arising out of the same disaster. When Halliburton found out, it filed a claim for Mr. Rokison's dismissal due to failure of disclosing multiple appointments by the same party.[46]

The Supreme Court ruled in favour of Chubb and rejected the application to dismiss Mr Rokison, stating that there is an ongoing duty of disclosure that indeed takes the form of a legal obligation that, if omitted, may give rise to justifiable doubts concerning the arbitrator's impartiality. However, the Court should apply the test of the 'fair-minded and informed observer' to conclude whether there is a real possibility of bias.[47] Furthermore, according to the Court, this test is objective and should be unanimously applied to all arbitrators, despite the appointment mechanism (party-appointed or court-appointed).[48] Nevertheless, the Court further pointed out that the objective observer should take into consideration the ongoing debate concerning the different levels of impartiality between party-appointed arbitrators and the presiding arbitrator.[49] Although the application of a common criterion for all arbitrators involved, achieves uniformity and avoids confusion, it does not take into consideration that party-appointed arbitrators are more likely to be proved impartial rather than the presiding arbitrator is.

Therefore, although there is a core test that will be applied when assessing the impact of repeat appointments on the impartiality of the arbitrator, the standards remain relevant, since the practical application of this test is highly fact-specific. What is clarified in the case is that the mere fact of the previous appointment(s) cannot lead to apparent bias of the arbitrator, since something more of substance is required. Thus, the issue circulates what 'something more' should be, what are the specific circumstances of the present case that may reveal lack of impartiality, and the lack of disclosure as such could be an aggravating factor in the arbitrator's impartiality.[50]

In this particular case, the Supreme Court, by considering all the relevant factors, concluded that, although the duty to disclose was breached by Mr Rokison, there were no doubts about his impartiality that would justify his removal. According to the Court, 'an obligation to disclose a matter which "might" give rise to justifiable doubts arises only where the matter might reasonably give rise to such doubts'.[51] Therefore, lack of disclosure is considered when there is an underlying substantial

43 The Departmental Advisory Committee on Arbitration Law (DAC) ruled against the addition of the word 'independence' because arbitration is consensual and 'lack of independence unless it gives rise to justifiable doubts about the impartiality of the arbitrator, is of no significance'. However, according to Chung, the issue is more complicated since the lack of independence creates justifiable doubts about a conflict of interests and hence impartiality. See R.K.L. Chung, 'Conceptual Framework of Arbitrators' Impartiality and Independence', 80(1) *Arbitration* 2, at 3 (2014).

44 Halliburton case, para 78.

45 *Davidson* v. *Scottish Ministers (No 2)* [2004] UKHL 34; 2005 1 SC (HL) 7

46 For case comments see K. El Chanzi, 'The UK Supreme Court on Arbitrator's Apparent Bias and Disclosure: Some Clarifications and Missed Opportunities: *Halliburton Company* v. *Chubb Bermuda Insurance Ltd* [2020] UKSC 48', 40(2) *Civil Justice Quarterly* 75 (2021); A. Samuel, 'Multiple Appointments, Multiple Biases: The U.K. Supreme Court Does Arbitrator Disclosure', 39(2) *Alternatives* 22 (2021); C. Connellan, T. Crosby & L. Amarasekara, 'Approaches to Arbitrator Bias Among National Courts: A Response to *Halliburton* v. *Chubb*' 24(2) *International Arbitration Law Review* 93 (2021); D.C. Nga & P.O. Adeleye, 'The English Supreme Court's Decision in *Halliburton* v. *Chubb*: An Examination of the Issues Arising from Arbitrator's Acceptance of Multiple Appointments in Related Arbitrations and Arbitrator's Duty to Disclose', 88(1) *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 201-18 (2022); P. Hodges QC, 'The View from the English Courts on Conflicts of Interest: Halliburton and Beyond', in F. Dasser (ed.), *Clear Path or Jungle in Commercial Arbitrators' Conflict of Interest?* (2021) 91-108.

47 Halliburton case, para. 150.

48 *Ibid*., para. 66.

49 *Ibid.*

50 See also *Laker Airways Inc.* v. *FLS Aerospace Ltd* [1999] EWHC B3 (Comm).

51 Halliburton case, para. 108.

matter that may give rise to justifiable doubts concerning the arbitrator's impartiality. Hence, two main points can be extracted from the Supreme Court's approach: a. lack of disclosure 'alone' does not prove apparent bias of the arbitrator, and b. the particular circumstances of the case should create justifiable doubts concerning his impartiality. In the case that the duty of disclosure has been followed and the arbitrator has informed the parties on the previous appointments, it is up to the parties to consider whether this could affect his impartiality. Disclosure or no disclosure, however, what is ultimately important is whether the mere fact that an arbitrator has been appointed multiple times by the same party can affect his impartiality. The Supreme Court has set the threshold for a successful challenge very high, since proving something that is connected to the cognitive and mental state of the arbitrator is not easy in practice. However, the Court leaves room for further considerations, since it does not delve into the question of impartiality violation due to repetition as such, specifically dealing with the issue of disclosure.

Consequently, the question comes down to how many repetitions could affect impartiality and what should the evaluating mechanism be. Since the first question fully depends on the particularities of the case at hand, it seems more efficient to try to define a mechanism that would facilitate the bias-identification process. As showcased in the Halliburton case, the lack of disclosure cannot work as such a mechanism alone. Therefore, in the following section I will analyse the different approaches taken by the IBA Guidelines and national case law and argue which, in my opinion, provides more stable and just results for the efficiency of the arbitral process.

3.3 Quantitative v. Qualitative Approaches

Although in the Halliburton case the Supreme Court clarified that the lack of disclosure as such does not lead to apparent bias, it leaves room for further interpretation concerning the circumstances under which repetition could be seen as affecting the arbitrator's independence and impartiality. In this section, I will discuss the different approaches followed.

3.3.1 The IBA Guidelines 2014 as an Example of the Quantitative Approach

The IBA Guidelines adopt the so-called 'quantitative' approach towards repeat appointments. According to sec. 3.1 (Orange List), the arbitrator has the duty to disclose the fact that he has been appointed as arbitrator two or more times by the same party over the last three years,[52] that he currently serves or has served within the past three years as arbitrator in another arbitration on a related issue involving one of the parties[53] or that he has within the past three years received more than three appointments by the same counsel or the same law firm.[54] First and foremost, it should be pointed out that the fact that the Guidelines explicitly provide for the issue of repeat appointments reveals their practical importance in the field of international commercial arbitration.[55] As has been addressed by the IBA Conflicts of Interest Subcommittee in the report *The IBA Guidelines on Conflicts of Interest in International Arbitration: The First Five Years 2004-2009* (the *Report of the Subcommittee*), repeat appointments is one of the most common grounds for challenging the appointment of an arbitrator.[56] These soft-law provisions are placed in the Orange List, meaning the list of assertedly close relationships that should be disclosed by the arbitrator, although the existence of the obligation to disclose will depend on the 'facts of the given case'.[57] As Born points out, although the Orange List contains 'relationships' of considerable practical importance, the Guidelines do not explain the fact of the particular case that may justify non-disclosure or the consequences of non-disclosure, as such.[58]

In any case, this approach that the IBA Guidelines opted for could be characterised as 'solid' and 'stable', since it provides for predetermined criteria, widely known and accepted,[59] that offer an 'easy' solution to the potential conflicts of interest created. Indeed, it has been proposed that implementing more rigid and stringent standards in national legal systems and institutional rules would make it easier to the parties to clarify the existing standards and regulate the disqualification of the arbitrators.[60] A series of case law has acknowledged the importance of the IBA Guidelines numeric approach.[61] Indicatively, in the *Demandantes* v. *Demanda-*

52 Sect. 3.1.3.

53 Sect. 3.1.5.

54 Sect. 3.3.8.

55 In Sect. 3.1.3(5), the Guidelines provide that '[i]t may be the practice in certain types of arbitration, such as maritime, sports or commodities arbitration, to draw arbitrators from a smaller or specialized 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'. However, in the field of international commercial arbitration, where the pool of arbitrators is rather wider than in those sectors, the issue remains of high practical importance.

56 N. Giraldo-Carrillo, 'The "Repeat Arbitrators" Issue: A Subjective Concept', 19 *International Law, Revista Colombiana de Derecho Internacional* 75, at 84 (2011).

57 See Part II (3) of the IBA Guidelines: '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'.

58 Born above n. 12, at 1848-1849. See also C. Lau, 'Do Rules and Guidelines Level the Playing Field and Properly Regulate Conduct? – An Arbitrator's Perspective', in A. Menaker (ed.), *International Arbitration and the Rule of Law: Contribution and Conformity, ICCA Congress Series*, vol. 19 (2017), at 572 on the results on a survey concerning the deficits of the soft-law guidelines in international arbitration.

59 The IBA Guidelines are said to be 'the most comprehensive work to date defining the framework by which the impartiality of arbitration in the international arena can be most effectively assured', cited in Wilson Koh, above n. 36, at 714.

60 See also R. de Vietri and K. Dharmananda, 'Impartiality and the Issue of Repeat Arbitrators, A Reply to Slaoui' 28(3) *Journal of International Arbitration* 194 (2011).

61 *Neaman* v. *Kaiser Foundation Hospital*, 11 Cal. Rptr. 2d 879 (California Court of Appeal) (2d Dist. 1992); *A (The Bank)* v. *M (Arbitrator), H (Arbitrator), B.C.*, Tribunal de première instance Bruxelles [Brussels Tribunal of First Instance], R.G. 99/11732/A, 14 Dec. 2006; *Société Somoclest* v. *Société D.V. Construction*, Cass. Civ. (1), French Court of Cassation, Case No. 09–68997, 20 October 2010, 29(1) ASA Bull. 195 (2011); *Kalinka-Stockmann* v. *ZAO AKB Mosstroy econom bank Federal Arbitrazh Court of Moscow Region*, 13 Oc-

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da case [2015],[62] the Portuguese Court of Appeal was required to adjudicate on a case of failure to disclose repeat appointments of the arbitrator by one of the parties. The Court of Appeal looked at the IBA Guidelines and held that 'the criteria established in the Orange List must be considered as objective indicators of the lack of independence or impartiality, even if the challenging party cannot demonstrate further evidence of them on the facts'. Similarly, in the *Highbury* v. *Venezuela* case [2015],[63] Professor Brigitte Stern was challenged for having previously received six appointments by Venezuela, and the court held that compliance with the IBA Guidelines was a necessary but not sufficient condition for the arbitrator to avoid disqualification.[64]

However, the IBA Guidelines have been taken into consideration by case law in international arbitration, mainly concerning the disclosure or non-disclosure dilemma and its consequences. The numeric criterion that the IBA Guidelines provide for has been characterised as extreme,[65] since it takes into account only numbers and focuses more on disclosure rather than the actual mental state of the arbitrator after he has been repeatedly appointed by the same party. In my opinion, this approach provides for an 'automatic' solution that does not take into consideration the human factor. More concretely, the categorisation of different conflicts of interest scenarios in the red, orange or green list is related to the arbitrator's duty of disclosure and does not touch upon the question of impartiality as a mental state.[66] This approach reflects the overall purpose of the IBA Guidelines to set common and general standards of arbitrator's disclosure of conflicts and avoid confusion on what should be disclosed or not.[67] Therefore, they do not concern the lack of independence or impartiality as such but the duty to disclose. Applying a numeric criterion may be justified under this purpose but does not answer the question of the impact of repetition in the arbitrator's impartiality. As was also demonstrated in the Halliburton case, lack of disclosure as such should not lead to the disqualification of the arbitrator since it should be accompanied by other factors that indicate a lack of independence and impartiality. The IBA Guidelines not only do not refer to those 'other factors' but also introduce a numeric factor to limit the obligation of disclosure in certain cases: an arbitrator, for instance, that has been appointed three times within the last three years may be disqualified if he does not disclose his previous appointments, whereas an arbitrator who has been appointed five times but not in the last three years would not be considered partial if he did not disclose those appointments. For example, in the *Korsnäs Aktiebolag* v. *AB Fortum Värme* case [2010],[68] the claimant sought to set aside the arbitral award, arguing that the arbitrator had been previously appointed three times by the respondent's law firm in three years. The Swedish Supreme Court held that the arbitrator had not been appointed enough times to be considered lacking independence and impartiality and that the lack of disclosure by no means leads to the automatic disqualification of the arbitrator. The Court of Appeal, making explicit reference to the IBA Guidelines, held that this case does not exceed the numeric criterion of Section 3.3.8 of the Guidelines ('… on more than three occasions…') and that the challenge was therefore overruled. This case is an example of a scenario where the quantitative criterion was not met and, consequently, where the court did not look deeper into the particularities of the specific case. Giraldo characterises this approach as 'overly orthodox' as it does not look at the issue of impartiality at its core.[69]

This system (numeric criterion linked to the duty of disclosure) lacks the necessary considerations concerning the actual and pragmatic impartiality that may occur in some cases that do not meet the numeric criteria, while at the same time may lead to the disqualification of an arbitrator that is not partial solely based on numbers. Although I agree with the implementation of stable standards as a time-saving solution that prevents further disruptions in the arbitral process, the IBA quantitative criterion is insufficient in tackling the core issue at hand. As Koh notes, 'the Orange List primarily concerns disclosure rather than disqualification', and, therefore, 'it provides for situations that ought to be disclosed' and not 'situations in which, depending upon the facts of a given case, an objective conflict of interest exists'.[70] Hence, in principle, the IBA Guidelines serve a different purpose, and for that purpose the quantitative criterion may be useful to achieve unification in case law and pre-existing criteria. However, when looking at the issue very closely, the Guidelines do not add much to the main question on how much repetition affects impartiality, because there is no legal explanation that proves that two repetitions do not lead to partiality whereas three do. Therefore, to find the answer to this core question, we need to look deeper.

3.3.2 The Qualitative Approach

An alternative approach would be to distance ourselves from the quantitative approach and look more closely at the specific characteristics of the situation in hand. In this case, the repetition of appointments is one of the

tober 2008, No. KG-A40/9254–08, all cited in Wilson Koh, above n. 36, at 714.

62 *Demandantes* v. *Demandada Court of Appeal of Lisbon*, Processo 1361/14.0YRLSB. L1-1, 24 March 2015, cited in M. Ahmed, 'Judicial Approaches to the IBA Guidelines of Conflicts of Interest in International Arbitration', *European Business Law Review* 649, at 655 (2017).

63 *Highbury Int'l AVV, Compañía Minera de Bajo Caroní AVV & Ramstein Trading Inc.* v. *Bolivarian Republic of Venezuela*, ICSID Case No. ARB/14/10, Decision on the Challenge of Professor Brigitte Stern (9 June 2015), cited in Wilson Koh, above n. 36, at 716.

64 Wilson Koh, above n. 36, at 716.

65 *Ibid.*

66 N. Allen and D. Mallett, 'Arbitrator Disclosure – No Room for Colour Blind', 7(2) *Asian International Arbitration Journal* 118, at 124 (2011).

67 *Ibid.*

68 Judgment of the Swedish Supreme Court, 9 June 2010, T 156-09, *Korsnäs Aktiebolag* v. *AB Fortum Värme samägt med Stockholms stad*, cited in Giraldo-Carrillo, above n. 56, at 89.

69 Giraldo-Carrillo, above n. 56, at 89.

70 Wilson Koh, above n. 36, at 721.

many factors that could be taken into account in a potential challenge of an appointed arbitrator. In the *Tidewater* v. *Venezuela* case [2010][71] the court concluded concerning the challenge of an arbitrator who had been previously appointed by Venezuela four times that 'whether multiple appointments to arbitral tribunals may impugn the independence or impartiality of an arbitrator is a matter of substance, not of mere mathematical calculation'.[72] Therefore, from this perspective, the case should be seen holistically and the mere fact that the arbitrator had been previously appointed by the same party should not be a determinative factor of a potential balance. Indeed, as was analysed in the previous part, partiality cannot be identified by numbers. Following an approach similar to the IBA, one would lead to disruptions in the arbitral process since it would multiply the possible challenges. Furthermore, it is closely linked to disclosure duty and not the lack of impartiality test.

A qualitative perspective, from the other side, marginalises disclosure and pays attention to the facts: do they reveal a biased approach to the case? Of course, in such a scenario, there is the disadvantage that there are no preset criteria that could guide the judge in determining whether there could be an indication of bias in this case. Although the IBA Guidelines are not legally binding, they serve as a guide for the interpretation of national laws. Therefore, completely leaving the repeat appointment scenario to the discretion of the judge does not contribute to consistency and efficiency in international arbitration and may create more problems than the ones it intends to solve.

In any case, following a more qualitative perspective seems more realistic and less dogmatic, while also appearing more pro-arbitration oriented since it minimises the challenges that emerge out of the plain numeric approach. It zooms into the particularities of the case and replaces typical considerations with pragmatic ones. For instance, it has been proposed to look at the proportion of the arbitrator's income as a determinative factor,[73] meaning that if the income from the repeat appointments constitutes a significant proportion of the arbitrator's total income, it could be an indication of partiality.[74]

A series of case law has followed the qualitative approach, evaluating repeat appointments beyond numbers and measuring the facts of the case as a whole, often incorporating the economic aspect as well. Indicatively, two Swedish cases dealt with the issue of previous appointments that had been disclosed by the arbitrators.[75] The first was a case of Stockholm Chamber of Commerce (SCC) arbitration, and the arbitrator disclosed that he had previously been appointed eight times by the same party within a period of two years. In the second case, an ad hoc arbitration, the arbitrator disclosed that he had been appointed ten times within the last ten years. What is interesting is that in the ad hoc arbitration case the court accepted that ten appointments within a period of ten years are not enough, stating that the repetition was due to the arbitrator's expertise in the area.[76] The challenge in the case of the institutional arbitration, however, was sustained, and the arbitrator was eventually removed. Yet there are situations where arbitration institutions have acted more leniently in matters concerning repeat appointments. For instance, in the LCIA No. 81160 case,[77] the challenge was based on the arbitrator's repeat selection by the respondent as both arbitrator and counsel. Most importantly, it was shown that the arbitrator had received 11% of his appointments over the last five years from the same party. The LCIA Division concluded that repeat appointments cannot be a ground for disqualification per se. The challenge was eventually accepted, however, not on the grounds of repeat appointments, but owing to the ongoing economic relationship with the party and the economic importance of the appointments.[78] One could argue that disqualifying an arbitrator on the basis of the economic significance of the appointment rather than the number of appointments as such could be seen as two sides of the same coin: if an arbitrator is constantly appointed by the same party, a significant part of his income will probably derive from these appointments. The critical point lies in the interpretation of the idea of 'a significant part of the income' and its proportion to the rest of the arbitrator's appointments. However, even in this case, there could be more clear cases (e.g. if the arbitrator is 'working' solely for that party, developing a looking-like business relationship) or grey zones (e.g. the arbitrator has earned a large amount of money from that party, but he is also being appointed to multiple other arbitrations). However, it is evident that such other factors are also extremely relevant and cannot provide a solid solution to the issue. As Slaoui points out, they could be useful when assessing the reasons behind failure to disclose previous appointments and not concerning the actual mental state of partiality and de-

71 *Tidewater Inc. and others* v. *Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, Arbitrator (23 December 2010).

72 *Tidewater* v. *Venezuela*, para. 59.

73 Slaoui, above n. 30, at 114.

74 In *Tidewater Inc. and others* v. *Bolivarian Republic of Venezuela* (above n. 68), as well as in the *OPIC Karimum Corporation* v. *The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/14, Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator (May 5, 2011) the court assessed the economic significance of the repeat appointments and concluded that both Professor Stern and Professor Sands accordingly report such extensive incomes from ICSID appointments that they cannot be considered as economically dependent by one of the parties. For both of the cases see W.W. Park, *Arbitration International Special Edition on Arbitrator Challenges* (2011) 300-1.

75 Both mentioned in Slaoui, above n. 30, at 111.

76 See also *Korsnas Aktiebolag* v. *Fortum Varme*, Supreme Court of Sweden, Case No. T 156-09, 9 June 2010.

77 Case LCIA No. 81160, 28 August 2009, cited in M. Estévez Sanz and R. Muñoz Rojo, 'La independencia e imparcialidad del árbitro: una visión práctica comparada' *CIAR Global* 13 (2017), https://ciarglobal.com/wp-content/uploads/2017/05/Independencia-e-imparcialidad-pdf.pdf (last visited 14 July 2022).

78 Park, above n. 74, at 298-9.

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pendence.[79] According to Giraldo, this line of reasoning that looks at the possible economic incentives may end up being misleading since a. especially when it comes to well-known arbitrators, they can increase their income from other endeavours as well, and b. independence and impartiality do not depend on money, as such.[80] As it comes to other scenarios, it falls to the discretion of the court to identify the significance of the economic relation and its impact on the arbitrator's impartiality. Nevertheless, apart from the existing economic dependence, other cases have also been considered beyond the mere numeric fact. For example, the Vienna Commercial Court rejected the application to disqualify an arbitrator that had been previously appointed four times by the same party on similar disputes because the previous experience of the arbitrator is what will contribute to his efficiency and ability to reach a 'better' result while no other indication of partiality was presented.[81] Similarly, French courts seem to be approaching repeat appointments as a factor that could be taken into account if combined with other connections.[82]

3.4 Can Repetition Affect Impartiality, After All?

Nevertheless, no matter what approach is followed (quantitative, qualitative, etc.), they all move a step forward without answering the underlying question, namely whether in the specific context of arbitration, repetition and familiarity can lead to favouritism.

Indeed, studies have demonstrated that repetition might provoke a sentiment of indebtedness since a 'repeated exposure to a stimulus will engender an increase in positive affect towards that stimulus'.[83] However, there are additional issues to consider. First, it has further been supported that those studies do not apply in the case of social relations and that it has been detected that, instead of goodwill, familiarity can cause contempt.[84] Furthermore, these studies do not explicitly refer to the case of arbitrators, and, therefore, although important, they end up being speculative in the context of international arbitration. Concerning the latter, for example, Giraldo has pointed out that the reputation of the arbitrator can work as an incentive to maintain impartiality and independence, since safeguarding the professional status is of paramount importance for ensuring fairness in the arbitral process.[85] At the same time, it has been noted that arbitrators care about the esteem of their colleagues and are strongly willing to protect their integrity and reputation.[86] Therefore, inferring that repeat appointments could lead to partiality could end up being an overly simplistic approach if not considered in conjunction with the arbitrator's profile and morals. Moreover, Koh points out that familiarity without friendship is not suspicious, since only sensitive personal relationships could give rise to bias.[87]

Correspondingly, what is missing from the puzzle of repeat appointments is not only finding the most efficient mechanism to assess them but also the development of a tailor-made theory for the specific needs of arbitration that would examine the impact of repetition in connection with the impartiality of an arbitrator. Doctrine and case law have already developed different mechanisms to evaluate the issue as analysed in this work. This theory, however, will contribute to the discussion with a more pragmatic and deep consideration of the core element, which is the perception of the repetition through the eyes of the arbitrator. Statistics, testimonies, interviews and psychological analysis will contribute to this study, aiming not to amend the existing status quo directly but to prove whether repetition is a condition affecting the arbitrator's independence and impartiality. The different theories could then be adjusted accordingly and a strict approach adopted.

3.5 A Proposal

The relativity of the different potential scenarios makes it harder to extract common criteria and shape unified standards on the determining factors that should be taken into consideration. However, from the analysis conducted in the previous sections, the following inferences can be drawn:

a. Independence and impartiality are connected to the specific facts of the case in hand and are related to the particular arbitrator in question. When it comes to lack of impartiality, it is not easy to prove since it depends on the mental state of the arbitrator and, therefore, the practice has led to a regulatory push including the development of soft-law standards to facilitate this process.
b. The IBA Guidelines constitute the universally accepted soft-law standards on arbitrators' conflict of interests that provide guidance when it comes to, inter alia, arbitrator challenges due to previous appointments.
c. However, although the IBA Guidelines could contribute to the analysis, it seems that they take a relatively impractical approach. First of all, the Guidelines set the standards in terms of disclosure and do not lack impartiality, as such. As previously demonstrated in this work, lack of disclosure does not mean lack of impartiality, and, therefore, the Guidelines serve different purposes. Moreover, the quantitative criterion that the Guidelines provide for is ill-founded, since, while it does provide for a solid

79 *Ibid.*
80 Giraldo-Carrillo, above n. 56, at 88.
81 Vienna Commercial Court, case No. 16 2/07, 24 July 2007, cited in Estévez Sanz and Muñoz Rojo, above n. 77.
82 For further references to French case law, see Slaoui, above n. 30, at 113.
83 R. Zajonc, 'Attitudinal Effects of Mere Exposure', 9(2) *Journal of Personality and Social Psychology* 1 (1968), cited in Wilson Koh, above n. 36, at 734.
84 See M.I. Norton, J.H. Frost & D. Ariely, 'Less Is More: The Lure of Ambiguity, or Why Familiarity Breeds Contempt', 92(1) *Journal of Personality and Social Psychology* 97 (2007), cited in Wilson Koh, above n. 36, at 735.
85 Giraldo-Carrillo, above n. 56, at 91.
86 W. Park, 'Arbitrator Integrity', in M. Waibel et al. (eds.), *The Backlash Against Investment Arbitration* (2010) 209.
87 Wilson Koh, above n. 36, at 735.

test, lack of impartiality cannot be inferred by a mere numeric approach.

d. Under this scope, a more qualitative approach has been developed that zooms into the characteristics of each case. Thus, previous appointments could be one element that, when combined and assessed with others, may lead to a successful challenge of an arbitrator.

It is evident that the existing rules and guidelines do not keep pace with the reality of international arbitration and do not reflect the fast-changing legal world. If the arbitration sector continues being accessible to only a limited number of arbitrators, more conflicts will continue to arise. A long-term solution would be to gradually expand the pool of available arbitrators, especially in international commercial arbitration, where the majority of cases lie.[88] Achieving proportionality between supply and demand in international commercial arbitration would mitigate the risks of conflicts of interest. However, it should be borne in mind that increasing the number of available arbitrators should be accompanied by the necessary training and expertise, since, as mentioned previously, most cases of repeat appointments arise out of the expertise of the particular arbitrator in a specific type of disputes. Therefore, there should be motives and opportunities for training, inclusion and further specialisation of younger arbitrators for them to be actively integrated into the international arbitration world.

Nevertheless, while targeting more short-term and practical solutions, resulting in the effective administration of justice, it is important to adopt a pro-arbitration approach to conflicts of interest, which will result in limiting arbitrator challenges that disrupt and delay the arbitral process or the recognition and enforcement of the arbitral awards, while also preserving the integrity of the arbitration.[89] Given the lack of relevant concrete legislative or case law guidance and the strong dependence of the issue on the mental and emotional state of the arbitrator, the following proposals (depending on which approach is followed), which work in collaboration with the existing approaches, could mitigate emerging conflicts that may lead to the disqualification of an arbitrator and clarify the interpretative and regulatory confusion regarding the issue of repeat appointments.

3.5.1 Using Percentages Instead of Numbers

Koh has suggested that a better approach to the quantitative theory would be to replace numbers with percentages.[90] Indeed, applying a percentage criterion instead of a purely numeric one would attenuate the disadvantages of the quantitative approach while also maintaining a more stable solution. Given that the purely numeric approach does not reflect the purposes of the provision, using percentages instead of numbers would broaden the area of discretion in regard to repeat appointments. However, a quantitative approach based on percentages (e.g. 30% of the arbitrator's appointments within the last three years), although less strict, still has two major disadvantages: a. its interrelation with economic dependence, which, as analysed before, is sometimes hard to prove, and b. the use of numbers, even in the form of percentages, entails the risk of having to justify the choice of this specific percentage (e.g. 30%) instead of another one (e.g. 20%). Nevertheless, given that there is no perfect criterion, in the case of the qualitative approach, the use of percentages would be a more effective and reasonable alternative for the reasons previously analysed.

3.5.2 Looking at the Nature of the Dispute in Relation to the Arbitrator's Expertise

In regard to the adoption of a qualitative approach that zooms into the specific characteristics of the dispute in question, multiple factors could be considered. On the issue of repeat appointments, however, when combined with other elements as well, it is important to pay attention to the nature of the dispute concerning the arbitrator's expertise. The IBA Guidelines provide that in certain types of arbitration, such as maritime, sports or commodities arbitration, given that arbitrators are usually selected from a smaller or specialised pool of individuals, the numeric criteria in relation to disclosure will not apply since all parties in the arbitration should be familiar with such custom and practice in those fields.[91] Even within the spectrum of international commercial arbitration, there may be specific disputes in which an arbitrator may be specialised. It has been demonstrated that there is a pool of 'elite' arbitrators that are mainly a combination of those in private practice and scholars of high esteem.[92] The expertise of the arbitrator on the subject matter of the dispute is one of the most crucial factors leading to his appointment,[93] and, therefore, it could work as a determinative factor when assessing the repeat appointments. As Slaoui notes, there are instances where the specific characteristics of the dispute, such as the high specialisation of the arbitrator or even his fluency in a particular language, justify the repetition.[94]

Hence, when assessing the impact of repetition of appointments, it is useful to take into account the profile of the arbitrator, his professional qualifications and practice, according to the priorities each party sets.[95] Specialised arbitrators should be further questioned on their impartiality if it can be proved that the repetition is so systematic that it results in an underlying business

88 See also Estévez Sanz and Muñoz Rojo, above n. 77.

89 See also Raphaël de Vietri and Kanaga Dharmananda, 187, who adopt a pro-arbitration approach and argue in favour of maintaining the existing legal framework, not strengthening the disclosure requirements, and respecting the freedom of the parties to appoint the arbitrators.

90 Wilson Koh, above n. 36, at 731.

91 Sect. 3.1.3, citation 5.

92 Giraldo-Carrillo, above n. 56, at 99.

93 B. Nigel, C. Partasides & A. Redfern, et al., *Redfern and Hunter on International Arbitration*, 6th ed. (2015) 249.

94 Slaoui, above n. 30, at 117.

95 Hoffmann, above n. 40, at 2751-2752.

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relationship.[96] At this later stage, the issue of economic dependence can play an important role, however, after it has been proved that there is something more than mere expertise behind repeat appointments. In any case, by considering the nature of the dispute, a more customised approach is feasible. Unifying the rules of disclosure for all types of disputes creates a level playing field by limiting the advantage of repeat arbitrators who are more likely to be repeatedly appointed in view of the nature and characteristics of the dispute,[97] something that the UK Supreme Court also accepted, stating that 'the law can and should recognize the realities of accepted commercial and arbitral practice'.[98]

3.5.3 The Role of Disclosure

In the course of this work, I showcased the relationship between disclosure and lack of independence and impartiality. Disclosure guarantees that the parties are fully informed when deciding on the appointment or disqualification of the arbitrator.[99] Indeed, developing trust is a key feature of international arbitration that is cultivated by full transparency. Therefore, lack of disclosure could work as a 'negative interference' that some courts have declared as a determinative factor.[100] However, as was analysed previously, it is not clear what has to be disclosed, and this gives rise to confusion. Gaillard has clearly distinguished between the subjective criteria of evaluation of the failure to disclose repeat appointments and the objective criteria of evaluation of the lack of impartiality and independence.[101] The Halliburton case clarified[102] that the violation of the duty to disclose does not automatically infer a lack of independence and impartiality, since it is just another factor in the impartiality exercise.[103] Under this scope, there is nothing that differentiates failure to disclose from other factors that may be taken into consideration: economic dependence, the proportion of appointments, expertise, personal relationship, nature of the case, etc. Thus, it is incumbent on the arbitrator to explain or prove why he failed to disclose the circumstances of conflict and provide a valid reason for his decision not to disclose those facts.[104] Consequently, disclosure should be integrated into the general test of independence and impartiality and be taken into consideration within the context of the specific characteristics of the case at stake.

4 Conclusion

After analysing the principles of independence, impartiality and disclosure in international commercial arbitration, this article aimed to discuss, specifically, the issue of the repetition of appointments of arbitrators. Although repetition could raise justifiable doubts of bias, the circumstances under which those doubts could affect the arbitrator's impartiality have not yet been clarified. In this work I have considered the different approaches developed concerning repeat appointments and argued that, although the qualitative approach is more realistic and efficient than the quantitative one, it still leaves much room for interpretation according to the specificities of the case in hand. Therefore, I proposed three more stable standards that could prove more practical when evaluating repeat appointments. In any case, I pointed out that although those solutions can prove useful, it is important to answer the core question, which is whether familiarity could breed partiality. This study, based on data collected specifically from the area of international arbitration, can contribute to resolving the main problem of whether repetition should be a 'threat' to the arbitral process in the first place or end up causing a challenge and disclosure 'paranoia'.

96 Slaoui, above n. 30, at 117.
97 El Chanzi, above n. 46, at 84.
98 Halliburton case, para. 103.
99 *Fremarc* v. *ITM Entreprises*, CA Paris, 2 April 2, cited in Slaoui, above n. 30, at 116.
100 *Ibid.*
101 *Fremarc* v. *ITM Entreprises*, CA Paris, 2 April 2003, Commentary in French: E. Gaillard in [2003] 4 Rev. Arb. 1240, cited in Slaoui, above n. 30, at 116.
102 At least regarding English law.
103 Halliburton case, para. 117.
104 Nathalie Allen and Daisy Mallett, 129.