

Rethinking Issue Conflicts in International Commercial Arbitration

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Introduction

There is a tangible focus on apparent bias¹ in international commercial arbitration. There are unyielding concerns and challenges on how arbitrators² and party-nominated arbitrators ought to be

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- 1 Put shortly, ‘apparent bias’ is generally understood in international commercial arbitration to mean that a ‘fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased’.
- 2 For example, *Halliburton Company v Chubb Bermuda Insurance Ltd & Ors* (‘Halliburton’) [2018] EWCA Civ 817, where the Court of Appeal of England and Wales considered whether and to what extent an arbitrator may accept appointments in multiple references concerning the same or overlapping subject matter with only one common party without giving rise to an appearance of bias and whether and to what extent they may do so without disclosure. At the time of writing, the Supreme Court of the United Kingdom has heard oral argument in *Halliburton* and is due to hand down its judgment imminently. See also *Almazeedi v Pennner & Anor (Cayman Islands)* [2018] UKPC 3 where the Privy Council had to decide apparent bias in the context of a High Court judge sitting in the Financial Services Division of the Grand Court of Cayman Islands.

appointed,³ the scope of an ‘open mind’⁴ in conflict of interest and on the scope of disclosure from an arbitrator of circumstances which may give rise to justifiable doubts as to their impartiality. The correlation between a tribunal’s ostensible independence and impartiality with users’ satisfaction of international commercial arbitration as a dispute resolution mechanism should not be disregarded. Issue conflicts are a nuanced species and require rigorous legal analysis.

Principles of impartiality and independence of arbitrators are at the core of international arbitration. The majority of rules and standards in international arbitration set out these fundamental principles and provide for disclosure by the arbitrator of any circumstances that could lead to justifiable doubts as to an arbitrator’s independence or impartiality.⁵ However, the malleability and generality of such standards inevitably lead to uncertainty, opaqueness and discretion with respect to what

- 3 In ‘Moral Hazard in International Dispute Resolution’ (2010), ICSID Review – 25 Foreign Investment L J 339, Professor Jan Paulsson advocated that institutional arbitral bodies should be responsible for the appointment of tribunals: ‘an institutional requirement that appointments be made from a pre-existing list of qualified arbitrators. When composed judiciously by a reputable and inclusive, international body, with in-built mechanisms of monitoring and renewal, such a restricted list may have undeniable advantages as a fairly intelligent compromise. Parties may freely select any one of a number of arbitrators but each potential nominee has been vetted by the institution and is less likely to be beholden to the appointing party’. Albert Jan van den Berg, ‘Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration’, in Mahnouch Arsanjani (ed), *Looking to the Future: Essays on International Law in Honor of W Michael Reisman* (2011), pp 821–843, believes that the way in which arbitrators are appointed may reduce the number of dissenting decisions and commented that: ‘In an insightful contribution on the subject, Jan Paulsson proposes replacing the method of party-appointed arbitrators with a list-procedure.’ An opposing view is put forward by Charles N Brower and Charles B Rosenberg, ‘The Death of the Two-Headed Nightingale: Why the Paulsson-Van Den Berg Presumption that Party – Appointed Arbitrators are Untrustworthy is Wrongheaded’, 29 Arb Int’l 7 (2013), who advocate that party-appointed arbitrators and dissenting judgments are a fundamental aspect of arbitration and should not be restricted or discouraged. See also Hamish Lal, ‘Mutual Confidence in Arbitrators: Independence and Impartiality’, paper presented to the ARBRIX Construction Group at Spring 2016 Meeting.
- 4 The concept of the ‘open mind’ is especially relevant in issue conflicts where views formed over many years (for example, about the application of good faith in commercial contracts governed by English law) are more likely to increase the risk of unconscious bias. In *AMEC Capital Projects Ltd v Whitefriars City Estates Ltd* [2005] 1 WLR 723 Dyson LJ made clear at para 21: ‘The mere fact that the tribunal has decided the issue before is therefore not enough for apparent bias. There needs to be something of substance to lead the fair-minded and informed observer to conclude that there is a real possibility that the tribunal will not bring an open mind and objective judgment to bear.’
- 5 See, among others, Arts 11 and 12 of the 2010 UN Commission on International Trade Law (UNCITRAL) Arbitration Rules, Art 7(1) of the ICC Arbitration Rules, Arts 14(1) and 57 of the International Centre for Settlement of Investment Disputes (ICSID) Convention, General Standard I and 3(a) of the International Bar Association Guidelines on Conflict of Interest in International Arbitration (the ‘IBA Guidelines’).

disclosures arbitrators need to provide and, subsequently, how institutions or other disqualifying bodies should judge when justifiable doubts exist. Issue conflicts are not adequately addressed in the rules and standards in international commercial arbitration and there are thus significant concerns about the potential for a closed mind and a lack of disclosure obligations placed on arbitrators.

When referring to an arbitrator's potential lack of independence or impartiality, one usually thinks in terms of the arbitrator's relationship with the parties, either personal or professional rather than their relationship to the subject matter of the dispute. However, an arbitrator's views and thoughts as codified in published papers, articles, blogs, interviews or advocacy on an issue that is at the heart of the dispute can also raise justifiable doubts about their ability to approach the dispute with an open mind and without unconscious bias. The line between an arbitrator's knowledge and familiarity with a particular issue (perceived to be desirable in sector-specific international commercial arbitration) and an arbitrator with, for practical purposes, a 'closed mind' on a particular point of law is fine. The line is also hard to detect given the opaqueness of the rules and lack of disclosure required to be provided by the arbitrator. One commentator illustrates the dilemma that arises:

'On the one hand, experience in international public or private law is a threshold qualification for international adjudicators (whether they are selected by an international institution or the parties), but on the other hand, the fundamental unfairness is obvious when a party is faced with an adjudicator who has closed her mind on important issues in dispute.'⁶

In this article, it is suggested that issue conflicts in international commercial arbitration ought to borrow 'jurisprudence' on issue conflicts from investor-state arbitration. There is no research or analysis to support the proposition that such jurisprudence in investor-state arbitration is not applicable to the assessment of the risk of a closed mind and impartiality and independence in international commercial arbitration. On the contrary, like issues arising out of bilateral investment treaties (BITs) (for example, interpretations of most favoured nation or umbrella clauses), there are fundamental legal issues in international commercial arbitration which arise time and time again (for example, the application of good faith in commercial contracts; whether and to what extent disputes in collateral or third party commercial agreements can form part of an arbitration commenced in the primary commercial agreement; or whether strict notice or time-bar provisions are effective).

6 Joseph R Brubaker, 'The Judge Who Knew Too Much: Issue Conflicts in International Adjudication', 26 Berkeley J Int'l L 111 (2008).

It is further suggested that issue conflicts in international commercial arbitration require increased and proactive disclosure from arbitrators and thus issue conflicts ought to come off the International Bar Association (IBA) Green List and move more fully on to the IBA Orange List. This move from Green to Orange should be accompanied by additional clarifications to the scope of applicability. The risk of unconscious bias is perhaps most relevant in the context of issue conflicts. In *Halliburton Company v Chubb Bermuda Insurance Ltd & Ors* ('Halliburton') the Court of Appeal made a passing comment on the risk of unconscious bias. The judge at first instance had decided that the risk does not affect the relevant legal test for apparent bias, but provides an example of how bias may act or appear to act on the mind. It is not, though, part of the test for whether there is bias. The Court of Appeal, however, considered that the risk of unconscious bias is a relevant risk for the fair-minded and informed observer to take into account when applying the test for apparent bias.⁷ The Court of Appeal also reinforced the point that the common law test for apparent bias (namely whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased) is objective and is not to be confused with the approach of the person who has brought the complaint: 'It involves taking a balanced and detached approach, having taken the trouble to be informed of all matters that are relevant – see, for example, *Helow v Secretary of State for the Home Department* [2008] 1 WLR 2416 at [2]–[3] per Lord Hope.' This article urges empirical research on this specific problem and advocates a robust strategic rethink of issue conflicts in international commercial arbitration.

'Issue conflicts' guidance and practice

The word 'issue' refers to ideas such as 'a vital or unsettled matter' or 'a matter that is in dispute between two or more parties'.⁸ A 'conflict of interest' is defined as a conflict between 'the private interests and the official responsibilities of a person in a position of trust'.⁹ It should be readily apparent that the didactic approach of defining the terms separately does not aid an understanding of the nuanced contours of the concept. The broadest definition that emerges from the existing commentaries tends to the conclusion that the concept of 'issue conflict' refers to an arbitrator's

⁷ See n 2 above, *Halliburton*, para 41.

⁸ As defined in Merriam Webster Online Dictionary, www.merriam-webster.com/dictionary/issue, accessed 11 March 2020.

⁹ *Ibid*, www.merriam-webster.com/dictionary/conflict%20of%20interest, accessed 11 March 2020.

relationship with the subject matter(s) of the dispute which results in actual or apparent bias:

‘An “issue conflict” in arbitration describes the existence of actual or apparent bias on the part of the arbitrator stemming from his or her previously expressed views on a question that goes to the very outcome of the case to be decided. It denotes the arbitrator’s relationship to the subject matter of the dispute, and his or her perceived capacity to adjudicate with an open mind.’¹⁰

‘Essentially, an issue conflict refers to actual bias, or an appearance of bias, arising from an adjudicator’s relationship with the subject matter of, as opposed to the parties to, the dispute.’¹¹

Other commentators, in an attempt to be more specific, consider that ‘issue conflict’ is akin to ‘pre-judgment’:

‘This is usually a pre-judgment of legal issues anchored on the previous opinions, writings and/or judgments of an arbitrator which is deemed a hindrance to offer fresh perspective on the matter at hand.’¹²

Alternatives to the term ‘issue conflict’ include ‘inappropriate predisposition’,¹³ which encapsulates ‘the varying situations where arbitrators’ impartiality might properly be subject to question on account of some prejudice regarding significant issues in a case’.¹⁴

The term ‘issue conflict’ is imperfect, not least because it does not fully address the broad array of instances where an ‘issue conflict’ could arise. Although guidance on independence and impartiality with respect to an arbitrator’s relationships with the parties or their counsel exists extensively, the same is not true with respect to arbitrators’ relationship with the subject matter of the dispute. As a result, the users of international arbitration, in particular lay clients, are left with unsatisfactory ambiguities or a ‘sense

10 Anthony Sinclair and Matthew Gearing, ‘Partiality and Issue Conflicts’, 5:4 *Transnat’l Disp Mgmt* (2008).

11 See n 6 above.

12 Kuda Tshiamo, ‘Issue conflicts in investment treaty arbitration: a move towards stricter application of impartiality standards?’, *Young ICCA Blog*, www.youngicca-blog.com/issue-conflicts-in-investment-treaty-arbitration-a-move-towards-stricter-application-of-impartiality-standards-part-1-of-a-3-part-series, accessed 11 March 2020.

13 ASIL-ICCA Joint Task Force, *Report on Issue Conflicts in Investor-State Arbitration* (17 March 2016), para 18.

14 *Ibid*, para 16.

of unease'¹⁵ with respect to an arbitrator's independence and impartiality. Many arbitral institutions do not adequately address such concerns: for example, the London Court of International Arbitration (LCIA), Stockholm Chamber of Commerce (SCC), International Centre for Settlement of Investment Disputes (ICSID) and Chartered Institute of Arbitrators (CI Arb) leave this issue unsettled and appear to defer to 'soft law', the

15 In 'Arbitrating insurance and reinsurance disputes: transparent and impartial?', a lecture to the British Insurance Law Association on Friday 21 July 2017, Jeffrey Gruder QC described certain scenarios that could result in a 'sense of unease' but which did not relate to justifiable doubts as to the arbitrators' impartiality. In the English High Court, in *Guidant LLC v Swiss Re International SE* [2016] EWHC 1201 Leggatt J was concerned with an application to appoint a third arbitrator in two arbitrations brought by Guidant against Swiss Re companies. Guidant sought the appointment of the same third arbitrator as in its arbitration against Markel, which raised closely overlapping issues. Guidant contended that having a common third arbitrator would reduce costs and delay and minimise the risk of inconsistent decisions. Leggatt J observed at [9]:

'In circumstances where the arbitrations will therefore be taking place separately, it seems to me that Swiss Re has a legitimate basis for objecting to the appointment as the third member of the tribunals in its arbitrations of the same person who is the third arbitrator and chair of the tribunal in the Markel arbitration. If the same person were to be appointed, there would be a legitimate concern that that person would be influenced in deciding the Swiss Re arbitrations by arguments and evidence in the Markel arbitration. Indeed, the likelihood that that would occur is implicit in the very argument which Guidant makes that appointment of the same person would minimise the risk of inconsistent decisions. Swiss Re is not a party to the Markel arbitration and will have no opportunity to be heard in that arbitration or to influence its outcome. Indeed, without a waiver of confidentiality, they will not be privy to the evidence adduced or the submissions made in the Markel arbitration. If the Markel arbitration were to be heard first, the members of the tribunal in that arbitration would form views, without any input or opportunity for input from Swiss Re, from which they may afterwards be slow to resile.'

In the light of these considerations, Leggatt J did not appoint Guidant's requested arbitrator as the third arbitrator in the *exercise of his discretionary powers* under s 18 of the Arbitration Act 1996. At the same time he recognised, however, that the appointment of a common arbitrator did not justify an inference of apparent bias. Thus, he noted that the fact that Guidant had appointed the same arbitrator in all three arbitrations was not a ground upon which disqualification could be sought. As he stated at [10]:

'I accept the submission made by Mr. Tse on behalf of Guidant that the appointment of a common arbitrator does not justify an inference of apparent bias. The fact that the same person has been appointed by Guidant as its arbitrator in the Markel arbitration is not, therefore, a ground on which an application could be made to seek to disqualify him from acting in the Swiss Re arbitrations. Guidant is entitled to choose the same individual as their arbitrator in all three arbitrations, as they have. But conversely Swiss Re, for their part, are in my view reasonably entitled to object to having forced upon them an arbitrator who has already been appointed in the Markel arbitration and about whose involvement in that arbitration they are entitled to feel the concern which I have indicated.'

Leggatt J therefore drew a distinction between the concern that Swiss Re 'were entitled to feel' and a concern that would justify an inference of apparent bias.

common-law or *lex arbitri*. Guidance is provided by the International Bar Association Guidelines on Conflicts of Interest in International Arbitration (the ‘IBA Guidelines’) and the International Chamber of Commerce (ICC) Guidance Note (published 1 January 2019).

The 2014 IBA Guidelines are widely referenced with respect to assessing conflicts of interest.¹⁶ The IBA Guidelines categorise in three coloured lists (the so-called traffic light system) situations that may or may not constitute conflicts of interest including whether or not those situations should be disclosed to the parties:

- the Red List: situations that give rise to justifiable doubts as to the arbitrator’s impartiality and independence;
- the Orange List: only situations that may be *potential* conflicts of interest; and
- the Green List: circumstances where no appearance and no actual conflict of interest exist.

While the IBA Guidelines seek to codify potential conflicts of interest, they favour simplicity and memorability over rigorous analysis thereby oversimplifying certain species of conflicts of interest. In practical terms, the IBA Guidelines allow practitioners, arbitrators and institutions to avoid proactive disclosure by analogising to a situation falling under one of the traffic light categories. This is especially so in the context of the Green List. It is important to note that the codification of ‘issue conflicts’ appears to have been a concern at the time of drafting the IBA Guidelines:

‘Within the members of the Subcommittee, there was no unanimity of views. While some wanted to have a strict approach and include issue conflicts in the Orange List, if not in the non-waivable Red List, others considered this as less critical, mainly comparing the situation to State judges where this has not given rise to similar concerns.’¹⁷

With respect to issue conflicts, the IBA Guidelines contemplate four ‘issue-conflict’ situations:

- Paragraph 6 of Part II: ‘Because the Orange List is a non-exhaustive list of examples, there may be situations not mentioned, which, depending on the circumstances, may need to be disclosed by an arbitrator. Such may be the case, for example... *when an arbitrator concurrently acts as counsel in an unrelated case in which similar issues of law are raised.*’ [emphasis added]

¹⁶ International Bar Association, Guidelines on Conflict of Interest in International Arbitration, www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx, accessed 11 March 2020.

¹⁷ Nathalie Voser and Angelina M Petti, ‘The Revised IBA Guidelines on Conflicts of Interest in International Arbitration’, 33 ASA Bull 31 (Kluwer 2015).

- Article 3.1.5 (Orange List): ‘The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties, or an affiliate of one of the parties.’
- Article 3.5.2 (Orange List): ‘The arbitrator has publicly advocated a position *on the case*, whether in a published paper, or speech, or otherwise.’ [emphasis added]
- Article 4.1.1 (Green List): ‘The arbitrator has previously expressed a legal opinion (such as in a law review article or public lecture) concerning an issue that also arises in the arbitration (but this opinion is not focused on the case).’

In short, one can begin to discern that the concept of an ‘issue conflict’ comprises several different scenarios, ranked differently among the traffic lights. However, as will be discussed, there remain a number of situations that are not covered by the IBA Guidelines – thus, the arbitral community must give more thought to how gaps ought to be filled.

The ICC Guidance is also of limited utility. The ICC Guidance Note focuses on potential conflicts of interests arising out of relationships with the parties, one of its affiliates or counsel. It gives instructions on circumstances and relationships arbitrators should pay particular attention to when assessing their impartiality and independence. Among others, the ICC recommends taking into consideration the fact that: ‘The arbitrator or prospective arbitrator or his or her law firm is or has been involved in the dispute, or has expressed a view *on the dispute* in a manner that might affect his or her impartiality.’ [emphasis added]¹⁸

Because neither the IBA Guidelines nor the ICC Guidance Note give substantive or meaningful guidance on situations where an arbitrator has previously expressed opinions on *issues arising in the dispute*¹⁹ or where an arbitrator has provided scholarly opinion discussing legal issues in *prior* cases in which the arbitrator has served,²⁰ other ‘ad hoc’ alternatives have emerged offering additional analysis on the seriousness and complexity of issue conflicts.

These authors provide additional guidance, through the application of thought-provoking tests to the various and specific situations. One commentator has argued that the impact of an adjudicator’s opinion depends on three factors: proximity, depth and timing.²¹ In line with this thesis, the co-authors to the *Report on Issue Conflicts in Investor-State Arbitration*

18 ICC Court of Arbitration, *Note to the Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration* (1 January 2019).

19 Ina C Popova and Jessica L Polebaum, ‘Emerging Expectations for Arbitrators: ‘Issue Conflict’ in Investor–State Arbitration and Beyond’, 41 *Fordham Int’l LJ* 937 (2018).

20 See n 13 above, para 59.

21 See n 6 above.

identified three major considerations in deciding challenges to arbitrators on the basis of issue conflict:²²

- **Degree of commitment:** the character or depth of the arbitrators' commitment to their prior views and their inner conviction need to be analysed to decide whether they could be immune to contrary argument and evidence.
- **Concurrency, propinquity:** contrary to prior professional advocacy, *concurrent* service as an arbitrator and counsel in matters involving the same party or that are otherwise related in some way creates unacceptable risks of bias. In general, *timing* is also a factor that needs to be taken into account. However, there may be cases where no amount of time will change the adjudicator's opinion, or on the contrary, the passage of time can restore the arbitrator's ability to be impartial.
- **Specificity/proximity to the current case:** the closer the arbitrator's comments or experience come to the specific case at hand, the greater the risk of bias.

The aforementioned ad hoc approaches have not been widely adopted despite the fact that they have the benefit of making case-by-case assessments of potential issue conflicts.

Concerns arising out of 'issue conflicts'

Investment arbitration v commercial arbitration: double standards?

Issue conflicts arise in all types of arbitration. Yet, the problem has only been extensively reviewed in investor-state arbitration. There may be reasons for this, but there is not – necessarily – a causal link between the fact that issue conflicts are more well-known in investor-state arbitration and the fact that issue conflicts are most likely to arise in investor-state arbitration. The 2015 Queen Mary School of International Arbitration Survey found that only 37 per cent of respondents considered that issue conflicts should receive specific regulation in commercial arbitration. By contrast, the opinion in investment treaty arbitration was that 49 per cent of respondents thought that issue conflicts required specific regulation.²³ While there is a gap in these survey responses, the gap in responses is far from suggesting that there are no concerns with issue conflicts in international commercial arbitration. Some of the reasons put forward by

²² See n 13 above, para 161 *et seq.*

²³ White and Case and Queen Mary School of International Arbitration, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf, accessed 11 March 2020.

commentators who consider that issue conflicts are more of a concern in investor-state arbitration are:²⁴

- investor-state arbitration cases involve the interpretation of BITs containing similar provisions and therefore a reduced number of legal issues;
- investment arbitration is subject to enhanced transparency, notably with the publication of its awards;
- the pool of international arbitrators with experience deciding investment disputes is limited;
- arbitrators perform more of a ‘law-making’ role and the awards have a tendency to serve as precedent; and
- matters of public interest are often at stake.

None of the reasons is compelling enough, or restricted to investor-state arbitration, such that it ought to be concluded that issue conflicts need only to be addressed in investor-state arbitration.

Investor-state arbitrations deal with a smaller number of legal issues

There is no good reason why the same commentators who say that investment arbitration deals with a small number of legal issues would not agree with the statement that many sector areas of international commercial arbitration also deal with a small number of legal issues. One example, which lends itself well to a comparison with investment arbitration, is international construction arbitration. Many engineering, procurement and construction (EPC) or other construction contracts are based upon (if not wholesale adoptions of) the FIDIC²⁵ suite of contracts and involve similar and discrete issues such as the enforcement of time-bar clauses; payment for variations when the contract procedure has not been followed; and the treatment of concurrent delay to completion of the works. Many of these legal issues will be present in each dispute under such FIDIC-based contracts. Similarly, liquefied natural gas price negotiation arbitrations, commodity arbitrations and sports arbitrations under international regulatory rules will all share a relatively small number of fundamental legal principles or issues.

To take the commercial arbitration example a little further, there are now many textbooks, treatises and other journals that seek to codify certain areas of commercial arbitration. The books not only review various issues

24 Judith Levine, ‘Dealing with Arbitrator “Issue Conflicts” in International Arbitration’, 61 *Disp Resol J*, 60, 65 (2006). See also Maria Angelica Burgos, ‘Double-Hatting in International Commercial Arbitration?’, in Carlos Gonzalez-Bueno (ed), *40 under 40 International Arbitration* (Kluwer 2018), pp 87–88.

25 International Federation of Consulting Engineers (commonly known as FIDIC, the acronym for its French name *Fédération Internationale Des Ingénieurs-Conseils*) is an international standards organisation for the consulting engineering and construction, best known for the FIDIC family of contract templates.

in the sector area, but also review cases decided in those areas, sometimes based on ‘inside information’ which is anonymised so as not to breach other confidentiality undertakings. These works will include subjective opinions of the authors on the legal principles or doctrines, the case law (including their own previous decisions) and suggested solutions where there is a divergence of views. As authors become known for expertise in certain areas, they supplement or reinforce previous views. Whether that academic and professional work concerns investment arbitration, construction arbitration or sports arbitration the potential impact on users of arbitration facing an arbitrator nominated by an opposing party precisely for their published views can be significant (especially if the issue conflict comes to light during the arbitration). In such situations (as has been done in investment arbitration), those grounds require proactive and full disclosure, which in turn may warrant replacement of the arbitrator with an open-minded and unbiased decision-maker.

Transparency

There are two problems with the ‘transparency’ argument. First, in light of criticism that the arbitration process is ‘opaque’, institutions in commercial arbitration, along with ICSID have enhanced transparency. In this respect, some institutions have agreed to publish their decisions on arbitrators’ challenges.²⁶ Greater transparency will assist practitioners with understanding the precise grounds cited when an ‘issue conflict’ is raised. Second, the fact that more information is available in the context of investment arbitrator challenges should only *heighten* the concern in commercial arbitration where less information is known about arbitrators, their published work and their prior decisions. Indeed, if the fact that counsel representation is known in ICSID cases where an arbitrator is representing an investor or claimant, but also sitting on an arbitral panel – and this situation gives rise to legitimate concerns about the independence and impartiality of the candidate – then a similar ‘double hat’ scenario could arise in commercial arbitration. For example, if an attorney is representing the employer under a FIDIC contract in one case as an advocate where the main issue in dispute is the enforceability of a time-bar clause and nominated by an employer in another case concerning a FIDIC contract regarding the same clause. The fact that these circumstances are not known – and under present regimes are unlikely to emerge – cannot be acceptable to the parties to the arbitration. It follows that if the movement calling

²⁶ See, eg, LCIA database on Challenges, www.lcia.org//challenge-decision-database.aspx, accessed 11 March 2020.

for greater transparency and the publication of awards in international commercial arbitration is to achieve utility, more data on arbitrators' legal views and preferences must be provided.

Small pool of arbitrators

There is criticism within international commercial arbitration that a small number of arbitrators are deciding a large number of disputes. There is no empirical research to contradict such criticisms. One commentator highlighted that 'the apparently large pool of practitioners [in international commercial arbitration] has not been a stranger to issues of repeat arbitrators and "clubiness"'.²⁷ First-time appointments are a minority, thus making a small number of arbitrators arbitrating a large number of cases.²⁸ In addition, as disputes become more sophisticated, there is an increasing demand for arbitrators who have specialised expertise. These qualification requirements can certainly restrict the size of the pool of potential arbitrators. The more arbitrators sit in a certain type of dispute (or research the subject matter of the dispute), the greater their ostensible expertise. However, along with the achievement of ostensible expertise the risk of a closed mind may also increase.

Another condition, which contributes to a small number of arbitrators relates to the desire of parties to nominate arbitrators with whom they are familiar. The IBA Guidelines and arbitrator disclosure focus on the arbitrator's relationship with a party or its counsel (including the number of prior appointments). However, such 'relational' disclosures are masking deeper questions of issue conflicts of interest. While it may be desirable for counsel to feel that it has developed a rapport with an arbitrator such that the arbitrator is inclined to look more favourably on a case or on the style of advocacy, it is also more likely that the client or advocate is more inclined to appoint a specific arbitrator for a specific dispute on the basis of that arbitrator's views on the subject matter of the dispute. This insight *could* be gained through previous appearances before the arbitrator (and therefore caught by the IBA Guidelines). The knowledge could also be gained through attending conferences where the arbitrator gives their particular view on an issue or even other informal discussions with an arbitrator before formally appointing them for a dispute (even years before a particular dispute crystallises).

²⁷ See n 24 above, Burgos, pp 94–95 in Carlos Gonzalez-Bueno (ed), *40 under 40 International Arbitration* (Kluwer 2018).

²⁸ According to the LCIA, 13 per cent of appointments made in 2018 were of candidates not previously appointed. See LCIA 2018 Annual Casework Report, www.lcia.org/LCIA/reports.aspx, accessed 11 March 2020.

The 'law-making' role of investment arbitrators

Investment arbitration awards (like international commercial arbitration awards) do not create binding precedent. This is clear on many levels, not least through Article 53 of the ICSID Convention, which specifically states that 'the award shall be binding on the parties... ', thus excluding, *a priori*, the applicability of precedent in subsequent ICSID or investment cases.²⁹ Moreover, it is understood that unlike courts in the common law system, investment tribunals have neither hierarchy nor ranking of seniority, meaning each is of equal importance and each award rendered shares the same features.

Investment tribunals (like commercial tribunals) are not compelled to refer to prior cases, though they may well do so by way of guidance or perusal of the position (rather like an English High Court judge may do with learned commentaries). However, there can be no criticism for failing to follow decisions of their predecessors, especially when investment treaty cases vary considerably from case to case. The same holds true for commercial arbitration.³⁰ It has been observed among commercial arbitration awards that: (1) a small percentage of awards cited previous arbitral decisions; (2) references to earlier cases were mostly done in connection with jurisdiction, procedure and determination of the law governing the merits; and (3) substantive issues rarely prompt reference to arbitral awards.³¹ Other commentators suggest that the doctrine of precedent is relevant in the context of investor-state arbitrations and that arbitrators are under a *moral*, if not *legal*, obligation to follow precedents.³² It can also be argued that such doctrine of precedent is desirable as the observance of past case law secures both consistency and predictability within a legal system.³³ It is not clear, however, which came first in terms of the 'law-making' role of

29 ICSID tribunals reached the same conclusion in different matters, for instance, in *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No ARB/02/6, Decision on Jurisdiction 24 January 2008, para 97, the tribunal asserted that there was no doctrine of precedent in international law and no hierarchy of international tribunals. More recently, in *AES Corp v Argentine Republic*, ICSID Case No ARB/02/17, Decision on Jurisdiction 26 April 2005, the ICSID tribunal stated that 'there is so far no rule of precedent in general international law; nor is there any within the specific ICSID system for the settlement of disputes between one State party to the Convention and the National of another State Party'.

30 Gabrielle Kauffmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse? – 2006 Freshfields Lecture', 23(3), *Arb Int'l* 357, 373 (2007).

31 *Ibid.*

32 Nicolas Béguin, 'The Rule of Precedent in International Arbitration', *Jusletter* (5 January 2009).

33 When making law, decision-makers have a moral obligation to strive for consistency and predictability, and thus to follow precedents. See Edward Tucker, 'The Morality of Law', 40 *Ind LJ* 270 (1965).

the investment arbitrator or the publication of investment treaty awards. Put differently, if international investment awards were not available publicly, would commentators still be asserting that investment awards and arbitrators serve a law-making role?

There is no inherent reason why, even if investment awards had a larger law-making role, that investment arbitration awards should be more ‘unimpeachable’ or otherwise subject arbitrators to a higher degree of impartiality or independence compared to commercial arbitration. In many circumstances, the standards for conflicts of interest are the same between the commercial and investment cases (either because the rules applied are the same or because the laws of the seat require the same level of independence and impartiality).³⁴ The law-making role should not have an impact on challenges based on issue conflicts. Further, ‘important’ issues (which involve states or state-owned entities) also exist in the context of a commercial arbitration, putting significant doubt into the rationale that the ‘law-making’ role of investment arbitration reinforces the need for challenges to arbitrators based on issue conflicts.

Matters of ‘public interest’ in investment arbitration

The last reason for equating issue conflicts with investment arbitration relates to a notion that investment arbitration often raises fundamental issues of public interest, which are considered absent from international commercial arbitration. While that may be true, there is merit in the proposition that arbitrators are not guardians of the public interest and instead should resolve the dispute *inter partes* without looking at the wider political and economic impact of the issues in debate.³⁵ Arbitrators are asked to decide only the dispute in respect of the two parties to the arbitration agreement and not based on what may be good for the investment arbitration regime as a whole.

It is a significant oversimplification to say that investment tribunals deal with matters that have a public interest while commercial arbitrations do not. There is an increasingly growing middle ground occupied by commercial

³⁴ See, eg, ICSID Convention Art 14 (‘Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, *who may be relied upon to exercise independent judgment.*’ [emphasis added]); 2010 UNCITRAL Rules, Art 12 (‘Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence’); 2017 ICC Rules, Art 11 (‘Every arbitrator must be and remain impartial and independent of the parties involved in the arbitration.’).

³⁵ Nigel Blackaby, ‘Public Interest and Investment Treaty Arbitration’, in Albert Jan van den Berg (ed), *International Commercial Arbitration: Important Contemporary Questions*, 11 ICCA Congress Series 355 (Kluwer 2003).

contracts between public bodies and private parties. Inevitably, disputes arising from such contracts have public interest implications. Examples of such contracts include public procurement contracts, major infrastructure contracts, natural resources concession contracts, production sharing contracts, contracts for the provision of an essential public service or contracts for the implementation of important governmental policies in sectors that are sensitive for the public.³⁶ Why would these disputes receive different treatment in terms of arbitrator impartiality or independence than similar (if not identical) disputes brought under bilateral or multilateral treaties?

The so-called collapse of the non-arbitrability doctrine has made for significant growth in the scope of arbitration. Commercial arbitration now occupies disputes, which give arbitrators authority to determine not only claims referring to the formation, interpretation and performance of commercial contracts, but also statutory claims that may have crucial social implications, such as competition law claims, tax claims or claims arising from securities transactions.³⁷ These disputes too have a public interest in their resolution and implications. Finally, it is suggested that enforcing private contractual relationships is in the ‘public interest’. It is for this reason that judges in courts deciding commercial cases are held to the same standards and, generally, apply similar rules of evidence or otherwise to such disputes. That is particularly true when the matter relates to a governmental body which is also engaging in or otherwise dealing with commercial (as opposed to criminal) issues.

Grappling with the fundamental question

The fundamental question³⁸ underlying concerns about issue conflicts remains: how does one distinguish between unobjectionable forms of predisposition and those triggering reasonable concerns about the lack of an open mind and bias? The Court of Appeal in *Halliburton* considered that the relevant experience of an arbitrator is material to the risk of unconscious bias:

‘Halliburton suggested that M’s oversight in relation to disclosure might be indicative of unconscious bias. In the *Almazeedi* case the Privy Council cited with approval at [19] a passage from Lord Bingham’s judgment in the case of *Prince Jefri Bolkiah v State of Brunei Darussalam* (No 3) [2007]

36 Stavros Brekoulakis, ‘The Protection of the Public Interest in Public Private Arbitrations’, *Kluwer Arbitration Blog* (8 May 2017).

37 Stavros Brekoulakis and Margaret Devaney, *Public-private arbitration and the public interest under English Law*, not published.

38 See n 13 above, para 159.

UKPC 62, [2008] 2 LRC 196 at [18] where he said [quoting from the Court of Appeal of Brunei]:

“As to a possible predisposition of the judge in His Majesty’s favour, we think the observer would take the view earlier expressed by this court that ‘judicial experience, by its nature, conditions the mind to independence of thought and impartiality of decision’. He would know that any judge appointed to the High Court would not be lacking in experience. We see no room for unconscious predisposition.”

Although the Privy Council stated that they did not “take this passage to mean that the fair-minded and informed observer would discount the risk of unconscious bias in all situations”, the *Prince Jefri* case does illustrate that relevant experience is material to the risk of such bias. In this case, as the judge observed, M is a “well known and highly respected international arbitrator” with very extensive experience as an arbitrator.³⁹

Some commentators argue that arbitrators, as professionals, are perfectly able to detach themselves from any perceived preconceptions and hear the parties’ arguments with an open mind. The same commentators then argue that allowing challenges on issue conflicts could prevent useful publications, professional development or shrink the number of arbitrators with the necessary knowledge and experience all to the detriment of international arbitration. However, a party in a specific case may or may not be concerned with an arbitrator’s ability to build a profile and perhaps even less concerned about the international arbitration system’s overall welfare.⁴⁰ Instead, the party to an international arbitration may be correctly, albeit selfishly, concerned with having its specific claim decided by an unbiased arbitrator.

When is academic writing problematic?

There are different views with respect to academic writing and the impact it may have on an arbitrator’s independence or impartiality. One commentator points out that: ‘it can also be said that it is different to write a legal article or research piece about what one believes the law should be, than to approach a case as an arbitrator that should apply existing law as it is, rather than as what it should be.’⁴¹ As the tribunal in *Urbaser* stated: ‘One of the main qualities of an academic is the ability to change his/her opinion as required in light of

³⁹ See n 2 above, *Halliburton*, paras 97 and 98.

⁴⁰ See n 13 above, para 159.

⁴¹ Hernando Diaz-Candia, “Issue Conflict” in Arbitration as apparently [un]seen in 2011 by a U.S. Court in *STMicroelectronics vs. Credit Suisse Securities*, 5 *Arbitraje: Revista de Arbitraje Comercial y de Inversiones* 287, 288 (CIAMEN 2012).

the current state of academic knowledge.⁴² These comments have a logical pragmatism – for example, just because an arbitrator thought one way about a particular legal doctrine in the past does not mean they cannot now approach the same doctrine with an open mind. The issue, however, becomes more complicated when one considers academic writing that ‘pushes’ a particular proposition or advocates a particular legal position. Some commentators have added:

‘[it is] unlikely albeit not impossible, that the mere writing of academic papers may serve as sole basis to disqualify an arbitrator for an issue conflict, unless a paper specifically related to the facts or the parties in dispute and not only to general legal issues, or if a position *has been argued vehemently as means to achieve academic recognition.*’ [emphasis added]⁴³

There are complex factual questions in parsing between an innocuous academic or legal paper and ‘achieving academic recognition’ on a particular subject through the articulation and publication of particular views. The difficulty in such circumstances is the lack of disclosure from the arbitrators (who having read the notice for arbitration and the response are in a privileged and best position to know how many relevant academic papers or awards have been written). In such circumstances, it is not right for the institutions and disqualifying bodies to place the higher burden on parties making a challenge and a low or no burdens on arbitrators.

Is previous exposure to legal or factual issues an asset or a burden?

In the words of one commentator, ‘some clarification would... be welcome’ when it comes the utility of previous exposure to factual or legal issues.⁴⁴ While prior opinions about similar abstract legal or factual issues may not generally be disqualifying, views about the same matters which are specific to the case at hand cause significantly more concern. Sometimes though, the line between the two is not that clear. There is the often-cited aspiration⁴⁵

42 *Urbaser SA v Argentine Republic*, ICSID Case No ARB/07/26, Decision on Proposal to Disqualify Arbitrator 12 August 2010, para 51.

43 See n 41 above.

44 See n 24 above, Levine.

45 In *H v L & Ors* [2017] EWHC 137 (Comm) at paras 21–24 the Judge observed that it is ‘a regular feature of international arbitration in London that the same underlying subject matter gives rise to more than one claim and more than one arbitration without identity of parties’. He considered that this was desirable because: (1) ‘parties should be free to appoint their chosen arbitrator in accordance with the procedure agreed in the arbitration clause in fulfilment of the contractual bargain’; (2) arbitrators are often chosen for their particular knowledge and expertise, but frequently comprise a limited pool of talent, and it is ‘undesirable that parties should be unnecessarily constrained in their ability to draw on this pool if there are multiple arbitrations arising out of a single event or overlapping circumstances’; and (3) the principle of finality is served ‘if the tribunal is already familiar with the background to and uncontroversial aspects of the subject matter of the dispute.’

that an arbitrator is open to considering opposing views of both parties in the particular case regardless of previous statements.⁴⁶ On other occasions, in particular cases and circumstances it would be difficult – objectively – to believe that an arbitrator would rule against a previously held long-term view on a given legal issue which is likely to present itself in many cases. In those circumstances, is the arbitrator’s position considered merely as academic writing or as an expression of an issue in the particular case (though the arbitrator knows nothing about the dispute concerning the two particular parties)?

The most dissatisfying answer to this type of question is one that is heard often in the arbitral community: issue conflicts based on prior academic writing are on the IBA Green List. The fundamental problem with that response is that it ignores all analysis in favour of a quick rebuttal under the cover of the IBA Guidelines. The IBA Green List does not cover all prior academic writing. Necessary revisions to the Green List entry on the IBA Guidelines are the minimum redress – if, as one apprehends, the arbitral community is going to continue its heavy reliance on the IBA Guidelines. Although it is far from the simple solution, the best solution appears to be serious analysis of the issues in question (as opposed to a superficial comparison to circumstances on the IBA Guidelines Green List).

What should practitioners do when called upon to be arbitrators and advocates concurrently?

It is unlikely and perhaps undesirable that the arbitral community will decide not to permit concurrent ‘double-hatting’ as a general position. Critics argue that allowing double-hatting creates an overall perception of illegitimacy in the system as a whole. One advantage of restricting double-hatting is that it would result in an expansion of the number of arbitrators and in more diverse appointments. For instance, this would create more opportunities for less experienced practitioners to be retained to represent parties in international arbitrations or to be appointed as arbitrators.⁴⁷ Eliminating double-hatting is not unprecedented. The Court of Arbitration for Sport (CAS) amended its regulations in 2009 to prohibit the double-hat arbitrator/counsel role. This may contradict the principle of party autonomy and prejudice international arbitration as the fact that parties are able to select the arbitrators without any limitation is one of the key features of international arbitration. One commentator believes that there is a tangible benefit in people having experience in all aspects of the process:

⁴⁶ See n 13 above, para 174.

⁴⁷ M Hwang and K Lim, ‘Issue Conflict in ICSID Arbitrations’, 8(5) *Transnat’l Disp Mgmt*, para 72 (2011).

‘When acting as counsel, an arbitrator might understand better the needs of the proceedings in terms of cost and efficiency. Similarly, when acting as an arbitrator, a lawyer that usually performs as counsel might obtain important insight on how to best present its cases and how arbitrators respond to the Party’s pleadings.’⁴⁸

The case law on the matter indicates that double-hatting becomes more problematic when arbitrators could take inconsistent positions because they are also concurrently acting as counsel in related matters. Some commentators suggest that one possible solution would be a separation ‘between the bench and the bar’ where practitioners would have to decide which hat to wear, leading to the isolation of the work of arbitrators from the work of counsel, which could give rise to sub-specialties in the context of dispute resolution.⁴⁹ Such a separation could alleviate the problem of issue conflicts and restore any lost confidence in international arbitration.⁵⁰

There are also questions about what disclosures would be necessary when it comes to double-hatting. Certainly, an arbitrator should not be called upon to disclose all matters in which they are acting as counsel. However, where for example, an arbitrator is acting as counsel for an employer in an international construction arbitration that concerns the enforceability of a time-bar clause and, at the same time, is being appointed by another employer in a dispute that concerns the same issue there must be a positive duty on the arbitrator to make full and proper disclosure. In such a case, the parties should be entitled to disclosure or recusal (as they might otherwise be in investment arbitration). However, without proper disclosure from the arbitrator who has the relevant information and knowledge about the conflict of interest, it is a significant and distressing burden for a party to consider any challenge. A fundamental rethink about the disclosure obligations placed on arbitrators is a pragmatic solution.

Rethinking issue conflicts: recommendations

The proliferation in the number and frequency of conferences, law firm ‘alerts’, so-called client briefings, webinars, blogs and published papers in journals tends to the irresistible conclusions that the number of serious concerns about issue conflicts will increase and that the occurrence of

48 Maria Angelica Burgos, ‘Double-Hatting in International Commercial Arbitration?’, in Carlos Gonzalez-Bueno (ed), *40 under 40 International Arbitration* (Kluwer 2018), p 96.

49 *Ibid*, p 98.

50 Yet this drastic solution would eventually create an ‘elite’ pool of decision-makers, deplete an already limited supply of competent arbitrators and lead to the professionalisation of arbitrators as a specific field, denaturing the overall arbitration system.

issue conflict is more probable. The species of issue conflicts cannot be overlooked. It is critically important that there is certainty as to whether or not these writings, speaking engagements, previous arbitral awards and expressions of normative legal propositions can be used to assess the risk of a closed mind and the ability of an arbitrator to act impartially. Arbitrators enjoy a sense of impunity for the views they are expressing in such works. Perhaps cynically, one can all too readily assert that after all, prior academic writing is on the IBA Green List and that concludes the matter. With all problems and proposed solutions there is inertia to overcome before certain solutions detailed here are embraced. To the extent that the proposed solutions in this article have provoked additional critical legal thought, they are successful. Shifting of the issue conflict landscape will happen.

Recommendation 1: institute mandatory case-by-case analyses

Each challenge based on issue conflict should be analysed on a case-by-case basis. This means that institutions, parties and arbitrators cannot simply rely on the fact that a particular fact situation is (or used to be) on the IBA Green List or only on the IBA Orange List (and thus requires no further analysis). While adopting more precise rules identifying the circumstances under which arbitrators would be disqualified on the grounds of issue conflicts could be an option, disqualification decisions are highly fact-specific. The ICCA Task Force has already recommended that bright-line rules are ‘unnecessary’ and ‘counterproductive’⁵¹ but the tendencies towards bright line rules remain. Fundamentally, the critical activity is that institutions and arbitrators facing issue conflict challenges must provide full and proper disclosure and then assess the risk of unconscious bias objectively. This naturally requires institutions and arbitrators to carry out a thorough and comprehensive analysis of the facts and circumstances of the case in order to determine whether there is a risk of a closed mind and there are justifiable doubts as to the arbitrator’s independence or impartiality.

Recommendation 2: rethink the importance of issue conflicts in the IBA Guidelines

It would be wrong to assert that the IBA Guidelines have no influence or significance within the arbitration community. Their global reach and acceptance is clear. Nonetheless, it is of the utmost importance that they be refined in order to give higher priority to issue conflicts. Issue conflicts related to prior academic writings should move out of the Green List. The hierarchy of potential ‘issue conflict’ situations of the IBA Guidelines is unsatisfactory. Depending on the circumstances of the case at hand, some

⁵¹ See n 13 above, para 183.

scenarios could be more problematic than their ‘tagged’ colour suggests meaning that, at the very least ‘issue conflicts’ should move up to the Orange List, which also needs to be refined. In addition, the wording of the IBA Guidelines’ articles dealing with issue conflict should be amended in the following way:

Orange List Revisions

- 3.1.5: ‘The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue irrespective of whether it involved one of the parties, or an affiliate of one of the parties.’
- 3.5.2: ‘The arbitrator has publicly advocated a position on issues in the case and/or the case, whether in a published book, paper, article, blog, or speech, or otherwise.’
- 3.5.5: ‘The arbitrator concurrently acts as counsel in an unrelated case in which similar issues of law or fact are raised or are likely’
- 3.5.6: ‘The arbitrator has on multiple occasions expressed legal views or opinions (such as in a law review articles or lectures or blogs) concerning an issue that also arises in the arbitration (although this opinion is not focused on the case).’

Recommendation 3: increase arbitrators’ burden of proof in disclosing issue conflicts

In circumstances where an issue conflict is raised, there must be full and proper disclosure⁵² or explanation from the arbitrator so challenged. It is illogical and unfair to the parties and a deep flaw in the process of dealing with issue conflict challenges that the arbitrator who is the subject of the challenge also controls the largest amount of information relevant to such a challenge (which they can deploy selectively or not at all in their own discretion). Arbitrators must embrace the need to give full and proper disclosure. In the English Court of Appeal Lord Woolf MR gave guidance (albeit in the context of judges) in *Taylor v Lawrence* [2003] about disclosure

52 The IBA Guidelines require disclosure of facts or circumstances ‘that may, *in the eyes of the parties*, give rise to doubts as to the arbitrator’s impartiality or independence’ [emphasis added] (General Principle (3)). The ICC Rules require disclosure of facts or circumstances which ‘might be of such a nature as to call into question the arbitrator’s independence *in the eyes of the parties* as well as any circumstances that could give rise to reasonable doubts as to the arbitrator’s impartiality’ [emphasis added] (Art 11). The LCIA Rules require disclosure of ‘circumstances currently known to the candidate which are likely to give rise *in the mind of any party* to any justifiable doubts as to his or her impartiality or independence’ [emphasis added] (Art 5.4).

‘if the position is borderline’.⁵³ In any event, there is a multitude of ways in which full and proper disclosure can be given without ‘over-burdening’ the arbitrator and still providing for increased transparency (at least) to the decision-maker. For example, once an issue conflict challenge has been made, the decision-making body could place a burden on the arbitrator to disclose to the decision maker (if not also to the parties) all other relevant circumstances related to that particular challenge. Those circumstances would include:

- counsel appointments which relate to relevant issues (listing overlapping issues);
- additional publications or speaking engagements where the issues related to the subject matter were raised;
- copies the arbitrator possesses of any such articles or engagements (whether given to the public at large or to ‘closed’ audiences); and
- confirmation that no other circumstances are known to the arbitrator which it is not disclosing.

These suggestions recognise the need to balance between discouraging ill-founded or hopeless challenges (which are often employed primarily to delay or disrupt proceedings) and a party’s legitimate interest in having an arbitrator with an open mind, unencumbered with unconscious bias and thus an independent and impartial decision-maker. Neither institutions nor arbitrators should be biased in favour of the arbitrators that they feel reluctant to place obligations on arbitrators. After all, the system is there to protect and resolve disputes between the parties, not to facilitate at all costs the arbitrator’s process of appointment. The measures would safeguard the procedural fairness of arbitral proceedings – one of the main rationales for challenges or replacement of arbitrators in the first place.⁵⁴ More robust disclosure rules would also ease the onerous burden imposed on the challenging party to know and prove the unknowable and unprovable.

53 *Taylor v Lawrence* [2003] QB 528 at paragraph 64 Lord Woolf MR stated:

‘A further general comment which we would make, is that judges should be circumspect about declaring the existence of a relationship where there is no real possibility of it being regarded by a fair-minded and informed observer as raising a possibility of bias. If such a relationship is disclosed, it unnecessarily raises an implication that it could affect the judgment and approach of the judge. If this is not the position no purpose is served by mentioning the relationship. On the other hand, if the situation is one where a fair-minded and informed person might regard the judge as biased, it is important that disclosure should be made. If *the position is borderline*, disclosure should be made because then the judge can consider, having heard the submissions of the parties, whether or not he should withdraw. In other situations disclosure can unnecessarily undermine the litigant’s confidence in the judge.’ [emphasis added]

54 See n 47 above, para 72.

Conclusion

The scope of an ‘open mind’, the potential impact of unconscious bias and the scope of disclosure from an arbitrator of circumstances which may give rise to justifiable doubts as to impartiality are of fundamental importance in the specific context of issue conflicts. The proliferation in the number and frequency of conferences and published materials tends to the irresistible conclusions that the number of serious concerns about issue conflicts will increase and that the occurrence of issue conflict is more probable. Little is written about issue conflicts and there is even less empirical research on issue conflicts or the impact of unconscious bias where, for example, an arbitrator has previously authored an article dealing with a particular legal doctrine that is also material to the subject matter of the current dispute. English case law suggests that relevant experience of the arbitrator is a key factor in assessing whether unconscious bias could fatally be engaged.

When referring to an arbitrator’s potential lack of independence or impartiality, one usually thinks in terms of the arbitrator’s relationship with the parties, either personal or professional, rather than a relationship to the subject matter of the dispute. That must now change. The character or depth of an arbitrator’s commitment to prior written legal views needs to be analysed to decide whether the arbitrator is immune to contrary argument and evidence – in other words, is an open mind still feasible? This article urges empirical research on this specific problem and advocates a robust strategic rethink of issue conflicts in international commercial arbitration. Issue conflicts in international commercial arbitration ought to borrow jurisprudence on issue conflicts in investor-state arbitration. Issue conflict in international commercial arbitration need increased and pro-active disclosure from arbitrators and thus issue conflicts ought to, at least, migrate on to a revised IBA Orange List. This is because the IBA Guidelines have favoured simplicity and memorability over rigorous analysis thereby over-simplifying certain species of conflicts of interest and because issue conflicts need to be better defined. In practical terms, the IBA Guidelines allow practitioners, arbitrators and institutions to avoid proactive disclosure by analogising to a situation falling under one of the traffic light categories. This is especially so in the context of the Green List.

Lord Sumption, giving a dissenting opinion in *Almazeedi v Penner & Anor (Cayman Islands)*,⁵⁵ stated: ‘Hypothetical possibilities may of course found a case of apparent bias, but since there are few limits to the possibilities that can be hypothetically envisaged, there must be some substance to them.’

55 *Almazeedi v Penner & Anor (Cayman Islands)* [2018] UKPC 3, para 43.

The authors agree with Lord Sumption. It is apprehended that a rigorous rethink of issue conflicts in the context of international commercial arbitration will lead to further clarification of the substance founding challenges for apparent bias, a more transparent process for the parties, a decrease in frivolous challenges and increased user satisfaction.