RAYMOND YANG: Okay. Good afternoon, everyone, and good morning to the speakers in London. Thanks for joining us. My name is Raymond Yang, counsel member of HKIArb, the host of today's webinar. First of all, a number of housekeeping matters. This webinar will be recorded, and during the webinar, please do not unmute yourselves or start the video function. We will have a separate Q&A session at the end of the talk, so if you have any questions, please type the question in the Q&A box. And for those of you who are in need of CPD points, the good news is CPD points have been applied. And we will send an email once we receive the confirmation letter from the Hong Kong Law Society. And after watching this webinar, please make sure to submit your evaluation form.

And today, it is our great honour to have three esteemed speakers. They are Sir Bernard Eder, Christopher Smith QC, and Jern-Fei Ng, QC.

Now I shall give a brief introduction to the three speakers. Thankfully, they are so famous in the arbitration community, so this makes my task of introduction much easier.

Sir Bernard Eder is an independent international arbitrator. From 2011 to 2015, he sat as a judge of the High Court of England and Wales, mainly in the Commercial Court. Since 2015, he was appointed an international judge at the

Singapore International Commercial Court.

The second speaker is Christopher Smith QC from Essex Court Chambers. Chris has over 30 years commercial -- experience as a commercial barrister, acting in litigation and in arbitration in various jurisdictions, including Hong Kong. And the most important and relevant to today's talk, he represented GAFTA as one of the interveners in the Supreme Court for the United Kingdom in the Halliburton v Chubb case. I just quote a remark from the legal directories:

"Chris is a good cross-examiner with a fantastic eye for detail. He's extremely knowledgeable and hard-working."

Last but not the least, we have Jern-Fei Ng QC, also from Essex Court Chambers. He's experienced counsel, specialising in commercial litigation and arbitration. Most important, he has experience sitting as arbitrator in over 30 cases of just over the past three years, and almost half of them are HKIAC arbitration, and he's also a member of HKIAC's Proceedings Committee. So we expect we will have some inputs from Jern-Fei Ng QC on the arbitrator's duty of disclosure from the Hong Kong practice and Hong Kong perspective.

So without further ado, I shall hand over the floor -- or, actually the screen to Sir Bernard Eder. So please start

your talk. Thanks.

SIR EDER: Thank you, Raymond, and warm regards to everyone in Hong Kong. I say "warm regards". In case I'm wrong. It is cold regards. It's minus 10 degrees in London today. I have just come back from walking my dog on Hampstead Heath where there are three or four inches of snow. It is very, very cold indeed.

Anyway, thank you to the institute for allowing us to talk about this case Halliburton v Chubb. It has become something of a notorious case, and it is obviously very, very important for arbitrators.

I will talk generally. I will set out the general background and highlight a number of themes, and then Chris Smith will talk about some general points arising as a result of the case, and then Jern-Fei will focus in particular on arbitration in Hong Kong. And as Raymond said earlier, there will be a Q&A session after that, and we certainly would invite people to submit questions in the Q&A box, and I will do my best to select the most difficult ones to challenge my co-panelists.

Right. Raymond, can you go to the next slide, please.

So the background of the case concerns the explosion of a rig in 2010, and this is a diagram -- a diagram showing the various parties or the main parties involved. You will

see in the middle -- at the bottom you will see Transocean. They were the owner of the rig. It was leased to BP, and then Halliburton was a third party who provided various services, cementing and wall-mounting services to BP. There was, as I say, a huge explosion. There was much damage and oil pollution. The claims went into the billions of dollars. And there were third-party claimants who suffered loss, who then -- I'm summarising it, but -- made claims in the main that we are concerned with anyway, against Halliburton, the provider of the services, and against Transocean. There were also claims against BP, but those are not of primary concern today.

Both Halliburton and Transocean settled those claims, or most of them. You will see the claims Halliburton settled to third parties of $1.1 billion. And Transocean settled, as well, to third-party claimants. At the bottom, you will see $212 million. And Halliburton had their main insurance against -- it was previously called ACE, then it became Chubb. It was a Bermuda Form Liability Policy, New York law, London arbitration with the Commercial Court to choose the chair in the absence of agreement of the parties.

Transocean also had a Bermuda Form Liability Policy with Chubb, and also other insurers at the bottom. You will see that.

And so Halliburton started proceedings, arbitration proceedings against Chubb, and Transocean also instituted arbitration proceedings, and that is what we are concerned with today.

Next slide, please.

So in June 2015, as I said, this is the -- you will see on this slide there are -- there's four main columns. The date. What I've called arbitration 1 between Halliburton and Chubb, and then arbitration 2 between Transocean and Chubb. And then arbitration 3, Transocean and the other insurer.

So in arbitration 1, it kicks off in June 2017, where the court appoints as chair a person who we now know is Mr Ken Rokison QC. He may be well known to many of you. He is a well-known QC in London, a very well-known arbitrator. And he was appointed as the chair by the court. He had, in fact, been proposed by Chubb as one of the arbitrators, and that is potentially important.

Then six months later in December 2015, Chubb then appoints Mr Rokison as its appointed arbitrator. Mr Rokison discloses to Transocean his appointment as chair in arbitration 1, as you see in June 2015. But, and this is very important, he does not disclose to Halliburton in arbitration 1 his proposed appointment in arbitration 2.

Transocean does not object, and then Mr Rokison is accepted. He accepts the appointment in arbitration 2.

Then we go forward to August 2016. Arbitration 3 then kicks off. And Mr Rokison, in August, accepts the joint nomination as, in fact, he was a substitute arbitrator in arbitration 3. But again he does not disclose this appointment to the existing -- to Halliburton in existing arbitration 1.

In November 2016, Halliburton then discovers the appointment of Mr Rokison as arbitrator in arbitration No. 2 -- that's between Transocean and Chubb -- and 3 as well. And Halliburton expresses concern and asks for an explanation.

Next slide, please.

And that was -- no, I think you've jumped one. No. There should be one more. No. We've lost one. Just hold on a minute. We seem to have lost a slide. Well, I'm afraid we've lost a slide. It doesn't matter tremendously. Can we go back just to the previous slide. Thank you.

So Halliburton discovers the appointment of Mr Rokison in arbitrations 2 and 3, expresses concern. There is then a correspondence between the parties. And eventually -- and this is all really that matters -- Mr Rokison does not resign, and he remains appointed in arbitration 1. And, therefore,

Halliburton starts proceedings in the Commercial Court in London, in effect to obtain an order from the court requiring Mr Rokison to resign on the basis -- or, dismiss him on the basis that he should have disclosed those matters. And in the end -- again this doesn't really matter for present purposes -- but an award is made by the tribunal in arbitration 1, and Halliburton lose their claim, and Chubb are successful.

And that is how it then comes before the court. When it gets to the court, the Court of First Instance upholds the award in effect and makes various orders. The matter then goes to the Court of Appeal.

If we can again have the next slide. Thank you.

So Halliburton have lost at First Instance. Mr Rokison was, in effect, declared to be no problem, in effect. And the Court of Appeal dismisses Halliburton's appeal. And in summary, what the Court of Appeal held was that Mr Rokison ought to have disclosed his appointment in arbitration 2 and arbitration 3 to Halliburton in arbitration 1, but -- and this is the really important point -- mere nondisclosure was not without more sufficient to give rise to an inference of apparent bias. And, therefore, the appeal was dismissed on that basis.

Next slide, please.

It then gets to the Supreme Court, and again Halliburton lose in the Supreme Court. And I would just like to highlight six points arising out of the judgments in the Supreme Court. It is a long judgment, and there are a number of judgments, and it is long. I can't highlight everything, but I want to highlight these six main points. The first is the duty to disclose.

Now, sections in the judgment, at paragraphs 49 to 69, consider the arbitrator's duty of impartiality, and concludes that in addressing an allegation of apparent bias in an English-seated arbitration, the English courts will (1) apply an objective test of the fair-minded and informed observer; and (2) have regard to the particular characteristics of international arbitration.

Next slide, please.

Highlight 2, and this is a long part of the main judgment, at paragraphs 70 to 116, considers what constitutes or what is required by disclosure and concludes that there is a legal duty of disclosure which imposes an objective test. And I think it is right that this is the first case anywhere in the world that has actually concluded that there is a legal duty of disclosure on arbitrators which imposes an objective test.

Next slide, please.

Highlight No. 3, one of the problems is multiple references. And I'm sure that Chris, Chris Smith, will deal with this briefly in a moment. But in broad terms, what was held in paragraph 131 was where an arbitrator accepts appointments in multiple references concerning the same or overlapping subject matter with only one common party, this may -- and I've highlighted the important words -- depending on the relevant custom and practice give rise to an appearance of bias.

So the -- the obligation to disclose, particularly in overlapping cases, depends on the relevant custom and practice in relation to the arbitration.

Next slide, please.

Now, highlight No. 4 focuses on GAFTA and LMAA arbitrations. GAFTA is the Grain and Feed Trade Association, and the London Maritime Arbitrators Association. Both of those organisations made written submissions to the Supreme Court, and as you heard, Chris Smith acted for GAFTA in preparing those submissions. And here we focus -- or, the Supreme Court focused on the custom and practice so far as it affects GAFTA and LMAA-type cases. And what was held was that as GAFTA and LMAA have shown, it is an accepted feature of their arbitrations that arbitrators will act in multiple arbitrations, often arising out of the same events. Parties

which refer their disputes to their arbitrations are taken to accede to this practice and to accept that such involvement by their arbitrators does not call into question their fairness or impartiality. In the absence of requirement of disclosure of such multiple arbitrations, the question of the relationship between such disclosure and the duty of privacy and confidentiality does not arise. And as I have said, there is evidence of similar practice in reinsurance arbitrations.

So in effect, what the Supreme Court decided was that there was a special custom and practice in GAFTA, LMAA and indeed in reinsurance arbitrations that meant that the -- what one might call the general duty of disclosure was to a certain extent circumscribed in relation to those types of cases. Next slide, please.

Highlight No. 5 concentrates on the nature of the legal duty, and that is summarised at paragraph 136. And it says that unless the parties to the arbitration otherwise agree, arbitrators have a legal duty to make disclosure of facts and circumstances which would or might reasonably give rise to the appearance of bias. The fact that an arbitrator has accepted appointments in multiple references concerning the same or overlapping subject matter with only one common party is a matter which may have to be disclosed depending upon

the customs and practices in the relevant field.

And, again, you will see a reference to customs and practices in the relevant field.

In cases in which disclosure is called for, the acceptance of those appointments and the failure by the arbitrator to disclose the appointments taken in combination might well give rise to the appearance of bias. And, again, the important words there, I would suggest, are the words "might well".

Next slide, please.

My final highlight, so to speak, is the decision itself in Halliburton. So what was held was that Mr Rokison was under a legal duty to disclose an appointment in arbitration 2 to Halliburton, because at the time of that appointment the existence of potentially overlapping arbitrations with only one common party was a circumstance which might reasonably give rise to a real possibility of bias. And Mr Rokison's failure to make that disclosure was a breach of his legal duty of disclosure that would satisfy the real possibility of bias test.

Now, having come to that conclusion, you all might think that the Supreme Court would have decided to uphold Halliburton's appeal. But, in fact, the Supreme Court did not. And I just want to focus very briefly on the reasons

for that. And you will see at the bottom of the slide, what they said was that by the time of the application to the court -- that's a section 24 arbitration hearing in court -- Mr Rokison had explained his oversight in not telling Halliburton about his appointments in arbitration 2 and 3. And Halliburton accepted that that oversight was genuine.

Furthermore, the reference in arbitration 2 came six months after the reference in arbitration 1, and it was more likely that Transocean would have cause for concern rather than Halliburton.

And last slide, please.

So on the facts, the Supreme Court was not persuaded that the fair-minded and informed observer would infer a real possibility of unconscious bias on the part of Mr Rokison for five main reasons. And these are the five main reasons for rejecting Halliburton's appeal:

One, the lack of clarity in English case law as to whether there was a legal duty of disclosure, and whether disclosure was needed. When I say the "lack of clarity" there, it's the lack of clarity at the time when, as the Supreme Court held, Mr Rokison ought to have made the disclosure but did not.

Two, the time sequence of the three references.

Three, Mr Rokison's measured response to the challenge.

Four, no question of Mr Rokison having received any secret financial benefit.

And, five, no suggestion of unconscious bias in the form of subconscious ill-will in response to the robustness of the challenge.

Now, very briefly before Chris Smith comes in, I can say that although there is much acceptance in the international arbitration community of the general matters dealt with by the Supreme Court, the actual decision in the case is a matter of some controversy. There are views both ways, and it may be that we can deal with that later. But the important point I would like to say, finally, is that going back to point one here, talking about the lack of clarity in English case law, that lack of clarity certainly existed or may have existed at the time, as I have said, when Mr Rokison, as the Supreme Court held, was in breach of his legal duty. But given that the Supreme Court has now, I'm going to say, made the legal position clear, or at least given it more clarity, one might think that if Halliburton v Chubb, the relevant events, took place today against the backdrop of the decision in Halliburton v Chubb, then it would seem that that point, point No. 1, would not apply. And, therefore, one of the matters in discussion is that if a Halliburton

v Chubb-type case occurred today, the actual decision would be different.

Anyway, with that brief introduction, that tells you some of the highlights of the case, and I turn over now to Chris Smith, please. Thank you.

MR SMITH: Thank you, Sir Bernard. And good afternoon, good evening, everybody in the audience. I'd like to add my warm welcome, not from London, but from Essex outside of London. Bernard may have four or five inches of snow, but looking outside my window now, I'm looking at three or four feet. So I've not even been out to walk the dog this morning.

As Sir Bernard said, I acted for GAFTA in the Supreme Court in the Halliburton v Chubb matter. But I should say at the outset that the views I'm going to express in this brief talk are my own views. I'm not representing GAFTA for these purposes. I'm going to be touching on maritime arbitration, but I should also stress neither am I representing the London Maritime Arbitrators Association that was one of the other interveners. So by way of overview, what I'm going to do is look at why the Court of Appeal decision caused concern in some parts of the market, particularly in shipping and commodities arbitrations.

Secondly, has the decision of the Supreme Court resolved those concerns?

Thirdly, what impact the Supreme Court decision would have on an arbitration not run under LMAA and GAFTA rules. And in particular, I'm going to try and focus the end of my talk on what effect it might, if any, have on arbitrations under HKIAC rules which Jern-Fei will then deal with in a little bit more detail in his talk.

Next.

So the issue referred to the Court of Appeal was 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 relatedly, whether and to what extent he may do so without giving disclosure. That question is set out in paragraph 2 of the Court of Appeal judgment.

I'm going to refer to those kind of issues as multiple appointment issues. But in deciding the multiple appointment issues, the Court of Appeal also touched on the duty of disclosure generally, not surprisingly. And it specifically considered the possibility of repeat appointments and the fact that repeat appointments by the same party may give rise objectively to justifiable doubts. Now, that's a somewhat different question to the question of multiple appointments, but it gives rise to similar issues,

and I'm going to refer to those as the "repeat appointment" issues.

They're important, and they were important, when parties were considering the Court of Appeal decision, because counsel for Chubb expressly accepted in argument that 10 repeat appointments for one party might give rise to justifiable doubts as to the arbitrator's impartiality. And you can see that from paragraph 90 of the Court of Appeal judgment. And the Court of Appeal appeared to accept this, although rather unhelpfully. It didn't give any guidance as to the period that applied. So is that 10 appointments in a year, or 10 appointments in 10 years? Nevertheless, in considering repeat appointments and multiple appointments, the Court of Appeal referred to the IBA guidelines, which I'm sure you're all familiar with, to the ICC rules, and to the LCI rules. And at paragraph 67 of their judgment they concluded that:

"In the context of international commercial arbitration, as a matter of good practice, disclosure of multiple appointments ought to have been given."

And that's paragraph 89 of the Court of Appeal judgment. The Court of Appeal also went at paragraph 91 which referred to what it referred to as best practice in international commercial arbitration. Although without any, or certainly

any apparent or obvious regard to the possibility that different considerations might apply in different types of arbitrations or in arbitrations run under different institutional rules, and particularly without regard to the practice in maritime and commodities arbitrations.

So the Court of Appeal concluded, as Sir Bernard has said, that M -- as he was then known, or Mr Rokison as we now know -- ought as a matter of law to have disclosed the multiple appointments but without giving any indication as to how that legal duty might apply to other forms of arbitration.

So next slide, please.

This, as I say, gave rise to particular concern in maritime and commodity arbitrations. In shipping arbitrations, chains of contracts and subcontracts are commonplace. They may be on back-to-back terms or they may not be on back-to-back terms. A time charter and a sub-time charter or possibly a bareboat charter followed by a time charter followed by a voyage charter. You may also have sales and subsales of secondhand tonnage. Or sales or resales of new builds. And also in commodities arbitrations, strings of contracts relating to the same cargo or parcels of cargo are commonplace. Both in shipping and in commodities arbitrations, it's common to have a single event which may

give rise to a large number of disputes in London or otherwise. Sometimes between entirely different parties, but sometimes with one or more common parties. Some of the examples one could think of is, for example, a strike at a load port, which affects numerous sale contracts, or delays in the construction of a series of new build vessels, or a casualty affecting numerous cargoes on board the same vessel.

And in both maritime and commodity arbitrations, and certainly in London, it's commonplace for the same arbitrators to be appointed up and down the line, all to be appointed in relation to more than one reference arising out of related facts. This might well, for example, leave the same arbitrator receiving 10 or more appointments relating to exactly the same event. Certainly, I've done cases -- I've got one case where -- same arbitrator appointed in relation to 12 different arbitrations arising out of the same factual circumstances in London, cutting right through the number suggested by Chubb in submissions in the Court of Appeal and certainly through the numbers suggested in the IBA orange list, which I will be coming back to later.

And all of this is without, in London arbitrations, the need to give disclosure.

And as Sir Bernard mentioned, and it is clear from paragraph 43 of the Supreme Court judgment, there's also

evidence in due cost that in treaty reinsurance arbitrations, specifically under ARIAS rules, it's common for arbitrators to accept appointments in multiple references without being expected to give disclosure, and there may well be other examples.

Now, in these specialist areas, given the relatively small pool of arbitrators available and the large number of disputes arising, it's also common for the same arbitrator to be appointed on repeat occasions as well as in relation to multiple references. Sometimes by the same party, but also by parties with the same manager or perhaps by parties with the same insurer, either for their hull insurance, property insurance or for their liability insurance, their P&I insurance. So do arbitrators who accept repeat appointments have to give disclosure? Indeed, there may be many who accept appointments as arbitrators whilst still practicing at the bar. I do, and I know Jern-Fei does. Do we need to give disclosure if appointed by a law firm we also receive instructions from? And all of these practical issues are compounded by the fact that parties to maritime arbitration tend, by and large, to instruct specialist lawyers who have got the specialist knowledge and expertise required. And that's true both for maritime arbitration under the LMAA rules, and for cases involving shipping

disputes all around the world.

So next slide, please.

Significant concern, therefore, was felt because the approach taken in the Court of Appeal could, on one interpretation, give rise to the suspicion that there was something inherently wrong with multiple appointments in references concerning same or overlapping subject matter, or that there was something inherently wrong with repeat appointments by or on behalf of the same party. At the very least, by basing its judgments on what it called "best practice in international commercial arbitration", and proceeding on the basis that by accepting multiple appointments, the arbitrator may give rise to an appearance of bias and may give rise to a legal duty of disclosure, the Court of Appeal effectively proceeded, certainly on one view, on the basis that there was something inherently wrong with these practices, which, as I've said, are common in maritime, commodities and other forms of arbitration.

The Court of Appeal also appeared, or certainly gave no specific consideration, to the interrelationship between duty of disclosure and a confidential nature in arbitration, and that the duty of disclosure is all very well, but what can you disclose without breaching your obligations of confidentiality to the parties? It took no account of

practical difficulties that can arise, particularly in maritime arbitrations for appointments often made towards the end of a very short limitation period where many appointments are made to protect time and never proceed, when they might, for example, still count towards the arbitrator's tally for the purposes of repeat appointments.

And the Court of Appeal appeared to take no apparent consideration to the difficulties, particularly in maritime arbitration, of identifying precisely who the relevant parties are when you are considering repeat appointments. So do you look at simply the SPVs involved, the ship-owning companies -- the one single-purpose ship-owning companies? Or do you have to identify the beneficial owners behind the ship-owning companies if you know them? Or the managers or the H&M insurers or the P&I clubs? So how do you identify whether an appointment really is a repeat appointment?

And in the light of all those concerns, GAFTA and the LMAA applied for permission to intervene the Supreme Court so as to ensure that the Supreme Court was aware of the practice in shipping and commodities arbitrations, to support the argument that the test for apparent bias was objective and not subjective. One of the other interveners did at one stage seem to argue that a subjective test should be applied, not an objective one. And also to ensure that any test formulated

by the Supreme Court took all of these factors into account.

Now, neither GAFTA nor the LMAA sought to argue that there was no duty of disclosure or that the duty of disclosure did not arise in appropriate circumstances as a matter of law. Their point was that, in any case, the question of whether disclosure is required is highly fact-specific. The mere fact that an appointment is made in overlapping subject matter arbitrations or indeed repeat appointments does not of itself give rise to an appearance of bias.

Next slide, please.

So as Sir Bernard has said, the Supreme Court judgment goes a long way towards meeting these concerns. At paragraph 43 in relation to GAFTA specifically points out and recalls that disputes in relation to string contracts are regularly referred to the same arbitrator. But paragraph 44 in relation to the LMAA specifically recalls that multiple appointments are relatively common.

Next slide, please.

The Supreme Court is -- and again, I will take this quickly because Sir Bernard has already looked at it -- is that there's a legal obligation to give disclosure which can be engaged even if the matter to be disclosed falls short of what would lead an objective observer to consider there was a real possibility of a lack of impartiality. It's

sufficient that the facts might reasonably give rise to justifiable doubts, and this is all assessed from the perspective of a reasonably informed observer. But, as I've said, the Supreme Court specifically recognised that in shipping and commodities and possibly other arbitrations, such as sporting arbitrations, multiple appointments are commonplace. They do not call into question the arbitrator's impartiality so as to require disclosure. And that's set out at paragraph 136, which is on the slide.

So next slide, please.

And again, just to recap, as Sir Bernard said in relation to the Supreme Court decision at paragraph 87, there was practices in maritime, sports, and commodities arbitration in which the engagement of multiple, overlapping appointments does not need to be disclosed. And then in paragraph 135.

Next slide said.

"There may also be circumstances in which, because the custom and practice of specialist arbitrators in specific fields such as maritime, sports and commodities and maybe others, such multiple appointments are part of the process which is known and accepted by the parties."

Just pause there. And you will make a note of "known and accepted". I will be coming back to that in a moment.

And then the next slide, please.

At paragraph 19, as GAFTA and LMAA have shown, it is an accepted feature of their arbitrations. So the Supreme Court accepting that it was in GAFTA and LMAA arbitrations, an accepted feature, that arbitrators will act in multiple appointments, and that parties which refer their disputes to their arbitrators are taken to accede to this practice and accept that such involvement by their arbitrators does not call into question their fairness or impartiality.

Now, this goes -- it's similar to but goes quite a lot further than the carve-out at paragraph 3.1.3 of the IBA orange list.

Next slide, please.

So paragraph 3.1.3 deals with this issue. The arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties. That's repeat appointments.

And paragraph 3.1.5. The arbitrator currently serves or has served within the past three years -- apologize for the typo, it says "tree years" -- three years as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties. That's multiple appointments. And then footnote 5 reads as follows:

"It may be the practice" -- and I stress the word

"may" -- "in certain types of arbitration such as maritime, sports or commodities arbitrations, to draw arbitrators from a small or specialist pool of individuals if" -- and I stress the word "if" -- "in such fields it is custom or practice for parties to frequently appoint the same arbitrator in different cases, no disclosure of this fact is required where all partes to the arbitration should" -- and I stress the word "should" -- "be familiar with such custom."

But footnote 5 only goes with paragraph 3.1.3. It's dealing with related -- sorry, repeat appointments. So the Supreme Court has gone quite a lot further in applying essentially the same carve-out to the issue of multiple appointments, and also accepting, certainly on the evidence before the Supreme Court, that the practice contended for by the LMAA and by GAFTA did exist. So although the Supreme Court decision is welcome for reflecting the IBA guidelines, does it really work in practice? The Supreme Court's approach is that there's an established practice, as we have said, in maritime and commodities and possibly other arbitrations. Meaning that engagement in multiple, overlapping arbitrations does not need to be disclosed because it's not generally perceived as calling into question the arbitrator's impartiality. The argument is that it's an accepted feature of arbitrations under GAFTA and LMAA rules that the

arbitrator will accept multiple appointments. It's, therefore, said the parties that refer their dispute to LMAA and GAFTA arbitrations accept that involvement. And they accept that it doesn't call into question the fairness of the arbitrator in the process. And all of that would, of course, be known to reasonably well-informed and objective observer. But how does it work in practice?

Next slide, please.

I think the following issues arise -- next, please. There we are. Good. Thank you -- in practice. Firstly, are all users of maritime and commodities arbitrations aware of the practice? I would suggest not necessarily. Whilst there are some even with London arbitration who are repeat users, many come to London and other jurisdictions for the first time. Are they aware of the practice? Do all users of maritime and commodities arbitrations accede to this practice? Again, I would suggest not necessarily. Many simply accept London arbitration, or indeed other arbitrations, because the arbitration clause forms part of the standard form contract that they use day in and day out, and they're not even aware of the fact that they've "chosen" London arbitration. Particularly, in the shipping field, in my field, you can have an endorsee of the bill of lading that incorporates the terms of an unseen charterparty. Even

regular users of London arbitration may never in fact -- clauses may never in fact get involved in a London arbitration.

Thirdly, would it be open to parties in maritime arbitrations to sort of opt out of the opt-out, and say that in his case, disclosure must be given because he wasn't aware of the practice? Can a party argue that notwithstanding the observations of the Supreme Court, there's no settled custom and practice? What about an arbitration -- and this is what I want to come on to develop, just to finish, under the HKIAC rules with a maritime or commodities element or a sporting element? How is that position going to be resolved?

Next slide, please.

Now, the Supreme Court did suggest that rather than having disputes about the existence of a custom or practice and requiring that to be proved to decide whether there was a duty of disclosure, institutions could make amendments to their rules. That's at paragraph 135. And I know that institutions will be considering that paragraph and thinking about whether they need to. HKIAC rules -- and I'm sure you are all aware -- next slide -- already have a specific and ongoing obligation at rule 11.4:

"Before confirmation of appointment, a prospective arbitration shall disclose any circumstances likely to give

rise to justifiable doubts about his impartiality."

So that's a slightly different formulation to the Supreme Court. And Jern-Fei is going to go on to consider it in a little bit more detail. But it doesn't really offer any guidance to the issue I'm concerned about, which is whether multiple or repeat appointments must, without war, be disclosed. Do they give rise to justifiable doubts about the arbitrator's impartiality? All HKIAC arbitrators are obliged to remain independent and impartial. In my experience, all parties in arbitration want their disputes to be resolved by a fair and impartial tribunal. Shipowners, charters, commodity traders, they don't have lower standards than anybody else. They don't have a lower concept of justice and impartiality. Nor, in my experience, does sportsmen and women or sporting clubs or associations.

So against that background, I want to end by posing a few quick questions. And all of these examples assume an HKIAC arbitration clause in a contract governed by the English law. So English law is governing the arbitration, as well as the substantive contract. So in that sense, the Supreme Court judgment is binding on the parties and on the arbitrator, since it is considering whether there is a matter that needs to be disclosed. What if a charterparty dispute is referred to HKIAC arbitration? In circumstances where

a number of other related disputes are also referred to arbitration and there is a common arbitrator, is the custom and practice referred to by the Supreme Court relevant?

In my view, probably not. Because all the Supreme Court has done is recognise a practice in London maritime or commodities arbitration. Indeed, it could well be argued that the parties have opted to HKIAC arbitration precisely because they did not agree with the London practice. They didn't accede to it. So multiple appointments, I would suggest, probably do need to be disclosed in accordance with paragraph 3.1.5 of the IBA rules. But what if the other multiple appointments are all London multiple appointments, where they are completely unobjectionable, based on the Supreme Court ruling? Do they need to be disclosed? Logically, how can a matter that if it was being considered in London in references 1, 2 and 3, and would lead to the conclusion that it does not need to be disclosed, have to be disclosed in reference 4? The Hong Kong reference?

The same objective and reasonably informed observer is assessing the same risk, the same arbitrator being partial or bias. But he's going to reach a separate conclusion in relation to the London references to the Hong Kong one. But, again, I suggest none of this is concluded. It's my own personal views that probably in the Hong Kong reference,

the arbitrator would have to, subject to his duties of confidentiality, give disclosure. Because we're in Hong Kong, not in London. And there's no recognised or settled practice.

But what if the appointments were simply repeat appointments, not multiple appointments? If the same arbitrator has been appointed five or six times by the charterer, that always opts for HKIAC arbitration, not LMAA arbitrations, does that need to be disclosed? Possibly not. Because under the IBA guidelines, that's paragraph 3.1.3 we've looked at, the repeat appointments may well not to, because of footnote 5. But remember, I stress this. The words "may" and the words "if" in paragraph 3.1.3 and the footnote, would it be necessary to prove the custom and practice? How would one do so? Who's obliged to prove the custom and practice? The arbitrator considering disclosure or the party who subsequently wants that arbitrator's appointment not to be overturned? How does an arbitrator know in practice whether there's an established custom and practice? Is his view as to whether there's an established custom and practice binding? How can he be sure when he's deciding whether to give disclosure?

And unfortunately, the rules don't give any guidance on that. And I'm not aware of any rules that do. And as

I say, the IBA simply says "may" and "if".

And what if the HKIAC arbitration wasn't a shipping arbitration at all? So take a Chinese ship-building contract -- company. That always includes LMAA arbitration in its ship-building contracts. It's appointed arbitrator X as its arbitrator in five LMAA arbitrations in the last three years. X hasn't disclosed any of those references in London. He doesn't need to. But the company now has an issue with its steel supplier. And the supply contract is subject to HKIAC arbitration. If the company appoint X, does he have to give disclosure of that fact? Arguably, he does have to give disclosure. But why should that be? Similar to the previous example I gave, on each of X's second, third, fourth and fifth appointments in London, when an informed, objective observer has been perfectly happy that there's nothing in the repeat appointments that will or even might give rise to reasonable doubts, is X's ability to deal with the Hong Kong reference suddenly changed just because it takes place in Hong Kong? Is his ability to be impartial suddenly changed because his appointment is under different rules? Would it be different if you were considering a supply contract if, for example, the dispute under the supply contract related to the shipment of the cargo, so it would be Hong Kong arbitration with a shipping rather than a supply dispute?

Would it make any difference if the steel supplied and subject to the Hong Kong arbitration had given rise to warranty issues under the shipping contracts? And therefore this wasn't just a related reference -- sorry, a repeat reference. It was a multiple reference. By reference to ship-building disputes.

Now, logically it seems to me that the answer must be "no". As a matter of fact, the arbitrator is still independent, and he's still impartial. But I suspect the reality -- the safe course is that he really probably should give disclosure. And just to conclude, to pose the question why. And I suspect the answer lies at paragraph 1 of the Supreme Court judgment. Justice must not only be done. It must be seen to be done. And if one party is not aware of the custom, or if there is any doubt as to whether one party is aware of the custom, then the reasonably informed, objective observer knows this and would conclude that the repeat appointment might give rise to an appearance of bias, and an experienced international arbitrator really should be aware of that and reach the same conclusion. Now, whether he does or does not may well give rise to challenges to his appointment, and that's an issue that I know Jern-Fei is now going to deal with specifically by reference to the HKIAC rules.

Thank you.

MR NG: Thank you very much, Chris. And a very good afternoon, good evening to you all, ladies and gentlemen. And thank you so much for having Sir Bernard Eder, Chris Smith and myself address you this evening in respect of the decision in Halliburton v Chubb and the ramifications arising out of Halliburton v Chubb.

As Chris had previously previewed, what I'd like to focus on in particular is the challenges or the possibility of challenges to arbitrator appointments arising out of the decision in Halliburton v Chubb. And there are three takeaway propositions in respect of the application of Halliburton, especially in the context of Hong Kong-seated arbitrations, and in particular those which are subject to the 2018 administered arbitration rules of the HKIAC I'd like to focus on.

Now, the first proposition which I think can be distilled from the decision in Halliburton is that the process of determining whether grounds of challenge are made out is a fact-sensitive exercise that is based on reasons unknown to a challenging party at the time a person was designated as the arbitrator.

And if I could just trouble the slide operator to turn to the next slide.

And the starting point of any analysis is article 11.6

of the HKIAC rules, and these are the 2018 administered arbitration rules, which you hopefully will be able to see on your screen before you. And it says this:

"Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence or if the arbitrator becomes de jure or de facto unable to perform his or her functions, or for other reasons fails to act without undue delay."

And the next bit is important:

"A party may challenge the arbitrator designated by it or whose appointment it has participated only for reasons for which it becomes aware after the designation has been made."

Now, if I could just trouble the operator just to turn to the next slide, please.

And section 25 of Hong Kong's Arbitration Ordinance gives effect to article 12 (2) of the UNCITRAL Model Law, which is worded in similar terms to article 11.6 of the HKIAC rules. So there are two points arising from an analysis of the language in both article 11.6 of the HKIAC rules and article 12 (2) of the Model Law. The first point is that it may not be immediately obvious, but the opening words of article 11 (6) of the HKIAC rules and article 12 (2) of the Model Law, in other words where the emphasis has been

placed on "if circumstances exist" encapsulates the notion that the exercise for determining whether the grounds for challenging an arbitrator are made out is ultimately fact sensitive. Now, this is underscored by the Supreme Court judgment of Halliburton v Chubb which referred to no fewer than 29 instances on the -- and they are sort of various terms or phrases which are employed by the Supreme Court in that regard, variously the facts of the case or the facts and circumstances of the case. Either when setting out its own analysis or when the Supreme Court is discussing the analysis of the courts below, both the Court of Appeal as well as the First Instance judgment of Lord Justice Popplewell as he then was.

So the takeaway from that is that, as Sir Bernard has already emphasised in the course of his presentation, there is no one-size-fits-all approach. It all depends on the facts and circumstances of the particular case.

Secondly, can I just ask you to note the reference at the tail end of article 11 (6) of the HKIAC rules and the tail end of article 12 (2) of the Model Law, which you will see on the screen before you. And they are, using similar phraseology, to the right of challenge being confined to -- and I quote -- "reasons for which the challenging party becomes aware after the designation has been made".

Now, in the context of HKIAC arbitrations, it is commonplace for disclosures to be made via the declaration of acceptance and statement of availability, impartiality and independence which is typically sent to all prospective arbitrators. Completed, signed, dated and returned to the HKIAC secretariat and then circulated to the parties to the arbitration for their comments, if any.

So that's the first proposition to be distilled from the decision of Halliburton v Chubb, so far as challenges to arbitrators are concerned.

If I can then turn to the second proposition. Let me set out the proposition at the outset and then explain by a reference to analysis of the relevant provisions of the HKIAC rules, the Arbitration Ordinance and the case law as to how I've reached this conclusion or how I've distilled the second proposition from the decision of the Supreme Court in Halliburton.

So proposition two is that a challenge is only made out where, depending on the facts of the given case and having regard to the customs and practices of the relevant field of arbitration, an observer would conclude as opposed to might conclude that there was a real possibility that the arbitrator was biased.

So when considering Halliburton, it is important to

bear in mind that this is a case which principally deals with the duty of disclosure, the grounds of which are conceptually separate or were related to the grounds for challenging an arbitrator. So the failure to disclose where there is a legal duty to provide disclosure would, if sufficiently serious, be a relevant ground for a successful challenge. See in this regard the observations made by Lord Hodge at paragraph 117 of Halliburton, approving the dicta of Mrs Justice Cockerill in PAO Taftnet v Ukraine.

If I can just ask the arbitrator to kindly please turn to the next slide where you will see, amongst others, the citation from a PAO Taftnet v Ukraine at paragraph 57, where Mrs Justice Cockerill said this:

"The obligation of disclosure extends to matters which may not ultimately prove to be sufficient to establish justifiable doubts."

Just pausing there for a moment. "Justifiable doubts" is obviously the language in which article 11.6 of the HKIAC rules and article 12 (2) of the Model Law is couched.

As to the arbitrator's impartiality, the judge then went on to say that: however, a failure of disclosure may then be a factor in the latter exercise. Therefore, in circumstances where there is a duty of disclosure that has not been complied with, it doesn't ipso facto mean that there

are therefore grounds for challenging an arbitrator successfully. Nevertheless, a failure of disclosure, if it is sufficiently serious, would then be a factor in the exercise of determining whether or not there have been established justifiable doubts as to the arbitrator's impartiality so as to justify a successful challenge to the arbitrator's appointment.

Now, as a matter of fact, there is a difference in the test which applies to the duty of disclosure, on the one hand, and whether a challenge to an arbitrator's impartiality or independence is made out in the other.

If I can ask the operator, please, to turn back one slide, to the slide just before the one we are currently on. Operator, if you mind just going back one slide, please, to the Model Law. Back -- there we go. Pause there.

And this is born out by the difference in the wording between article 12 (1) of the Model Law.

And, operator, you have gone back too far one slide. Forward one slide, please. There we go. We got there in the end.

So this is borne out by the difference in the wording in article 12 (1) of the Model Law which deals with disclosure. And if you just cast your eye on the paragraph just below that, article 12 (2) which deals with challenge.

So if you look at article 12 (1) that deals with disclosure, what article 12 (1) of the Model Law provides is that there must be disclosure where there are circumstances likely to give rise to justifiable doubts, whereas a challenge is only made out if circumstances exist that would give rise to justifiable doubts.

This was explained in paragraph 113 of Halliburton in terms of where the Supreme Court made the observation that several jurisdictions have adopted the UNCITRAL Model Law which provides in article 12 (1) that an arbitrator shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. And the Supreme Court went on to make the observation that the word "likely" in article 12 (1) of the Model Law must be interpreted in the context of the Model Law itself which appears to suggest that the obligation to disclose arises if the circumstances would reasonably give rise to justifiable doubts.

Now, this is because the wording of article 12 (1) is in contrast with article 12 (2), which provides that an arbitrator may be challenged if circumstances exist that does give rise to justifiable doubts.

So what this does is it stacks up with the Porter v Magill test in English law, in which Lord Hope of Craighead summed it up as thus. That is whether an observer when

obviously considering a challenge to an arbitrator, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. Thus, summing it all up, a challenge is only made out where, depending on the facts of the given case and having regard to the customs and practices of the relevant field of arbitration, an observer would conclude as opposed to might conclude there was a real possibility that the arbitrator was biased.

Now, turning then to the third and final proposition to be distilled from the decision in Halliburton considering challenges, is that the test that is to be applied when considering a challenge to an arbitrator must be assessed from the perspective of the fair-minded and informed observer.

And can I just ask the operator to turn back to the previous slide, please.

And so returning to article 11.6 of the HKIAC rules and the language in which this key provision is couched, article 11.6 frames the basis of a challenge by reference to justifiable doubts.

And, operator, you can then go back -- sorry, go forward to the next slide, forward. No. Forward. That's all right. I think I have confused the operator.

But ladies and gentlemen, no doubt you will remember

the language of article 12 (1) of the Model Law, which deals with the duty of disclosure, and 12 (2) of the Model Law, which deals with the grounds for challenge to which section 25 of the Arbitration Ordinance gives effect, are both so couched with the reference to the same language where they talk about justifiable doubts. So what are the attributes of the hypothetical observer by reference to whom the justifiable doubt is to be assessed? As Sir Bernard had already observed in the course of his presentation, the two key attributes merged from the judgment is that this hypothetical observer must be (a) fair-minded and (b) informed.

I will spend the next few minutes, just drilling down as to what this means. If I can take it in the reverse order and look first at the concept of the informed observer, this is predicated on the premise that the notional or hypothetical observer (1) would take the trouble to inform him or herself of all matters that are relevant; and (2) will take the trouble to -- (2) is the sort of person who takes the trouble to read the text of an article as well as the headlines; and (3) is able to put whatever he or she has read or seen in its overall social, political or geographic context. And this all stacks up with the observation made by Lord Hodge, again in his judgment in Halliburton at paragraph 52, citing from the speech of Lord Reed in the House of Lords decision

in Helow v Home Secretary with approval.

So that's the second of the two characteristics or attributes of the notional observer.

Now, the first attribute is that the observer is fair-minded. And there are two points to emphasise in this regard. The first is that the fair-minded observer is neither complacent nor unduly sensitive or suspicious. This is quite an important point to emphasise. The phrase "neither complacent nor unduly sensitive or suspicious" is a neat phrase that was coined by Justice Kirby in Johnson v Johnson, the decision of the High Court of Australia, in which neat phrase was approved by the House of Lords in Helow and by the UK Supreme Court in Halliburton at paragraph 53.

The second point to emphasise is that a fair-minded observer will appreciate that context forms an important part of the material which he or she must consider before passing judgment. See, in that regard, observations which are made to that effect in Helow and endorsed in Halliburton at paragraph 52. And as you will have heard before already, the test to be applied is objective as opposed to subjective in nature. That was what was the finding or the conclusion that was reached by the Supreme Court in Halliburton. And to my mind, this applies with equal strength to HKIAC and/or Hong Kong-seated arbitrations, given that article 11.6 of

the HKIAC rules and article 12 of the Model Law, which applies generally to Hong Kong-seated arbitration, refers to both the duty of disclosure and determination of any challenges to arbitrators in objective terms. Compare in that regard the disclosure obligation in the ICC rules which, at article 11, focuses on reference being made to an evaluation from in the eyes of the parties, and the disclosure obligation in the LCIA rules at article 5.4 which also focuses on the perceptions of the parties to an arbitration. And these were points of distinction that were drawn by the Supreme Court in Halliburton at paragraph 72 of it judgment.

So, ladies and gentlemen, these are the sort of three propositions which I have been able to distill from the Supreme Court's judgment in Halliburton which deal specifically with challenges to arbitrator, and more particularly explained the interrelationship between challenges and the duty of disclosure which precedes it.

I just want to add one piece of practical advice to supplement, sort of, three propositions which I have touched on in the course of my presentation. And that practical advice is one that is particularly useful to those who are considering challenges to an arbitrator. I say to you, think carefully before launching a challenge, because, to quote the words of Ralph Waldo Emerson, in his reports to a young Oliver

Wendell Holmes who subsequently became a US Supreme Court justice: "When you shoot at the king, you best not miss".

And with that, I thank you for your time, and I hand it back to Sir Bernard who will now lead us into our Q&A session.

SIR EDER: Right. Thank you, Chris and Jern-Fei. And there are a number of questions that I'd like to put to the -- my two co-panelists, and I might even try to answer them myself.

The first one comes from Bill Amos (phonetic), if I may name him. It's really to Chris, Chris Smith. He asks:

"Did you suggest, Chris, that repeat appointments need not be disclosed pursuant to the IBA carve-out but multiple appointments might need to be? And if so, are you, for Hong Kong purposes, elevating the guidelines above Chubb?"

Chris.

MR SMITH: Well, a very interesting question. And the answer is: yes, I did suggest that in a Hong Kong context, repeat appointments might not need to be disclosed pursuant to the carve-out. And I did suggest that multiple appointments might well need to be. But that's not, I think, because I'm elevating the guidelines above Chubb. Chubb set out a test for disclosure that does not depend, as a matter of law, on whether you are in an LMAA arbitration or a GAFTA arbitration or any other kind of arbitration. It's an

objective test based on what a fair-minded, informed observer would conclude, particularly whether that fair-minded and informed observer would conclude that there were circumstances that might give rise to justifiable doubts. And that test applies whatever kind of arbitration you're in.

The Supreme Court then went on to observe -- and it's paragraph 91 in particular of the judgment -- that as GAFTA and the LMAA have shown, it is an accepted feature of their arbitrations that arbitrators will act in multiple arbitrations, often arising out of the same events. Parties which refer their disputes to their arbitrators -- that's to say LMAA and GAFTA arbitrators -- are taken to accede to that practice. So that is essentially a finding of fact by the Supreme Court, even though there wasn't really any factual evidence in front of the Supreme Court, that the practice exists and that the parties that refer disputes to LMAA and GAFTA arbitrations have acceded to that practice.

Now, that means that the informed, objective observer is aware of the practice and aware of the fact that the parties have acceded to it. But if you are not within LMAA or GAFTA arbitration, the position is neutral, and one has to fall back on the IBA guidelines which have no footnotes for paragraph 3.1.5. And in footnote 5, paragraph 3.1.3 only

refers, as I said, to the fact that it may be the practice in certain kinds of arbitrations to draw the arbitrators from a small pool and have repeat appointments. And that if in such fields it is custom and practice, that may not need to be disclosed.

So you come back, regrettably, to a fact-sensitive exercise, as Jern-Fei said. And the difficulty one has is that without a finding of fact that there is a practice and without a finding of fact that parties are taken to accede to it, the Supreme Court test really does require disclosure in those circumstances. So it's not elevating the guidelines above Chubb. It's noticing the fact that when one is outside the factual scheme of the Chubb decision, or at least of the LMAA and GAFTA interventions, one has to fall back on the guidelines.

SIR EDER: But may I be a little provocative for both of you, both Chris and Jern-Fei. Lawyers like clear lines, and there might be a strong argument that what Halliburton v Chubb really does is muddy the waters. It provides no clarity at all. And indeed my experience in arbitration is that what has happened even since the Court of Appeal judgment and most recently since the Supreme Court judgment, is that arbitrators have become incredibly cautious. They make declarations of disclosure which are truly astonishing in

terms of detail, going back a number of years.

And it causes real practical difficulty for arbitrators when an email comes in. What do you have to do? What enquiries do you have to make of the solicitor who is sending you an email at the edge of a limitation period, in terms of who are, as Chris said, the beneficial owners or the related parties or the manager of the company? What do you do?

So there is much discussion, and this is really important in Hong Kong, and which, as Chris says, is outside the strict territorial limits of England. What do you do in Hong Kong? How do you establish custom and practice in Hong Kong? Should the Hong Kong arbitration rules be amended to deal specifically with that kind of problem and deal with it expressly?

One of the questions is: should, for example -- and I know this is being considered in different organisations -- is: should, for example, the HKIAC carry out a survey of arbitrators practicing in Hong Kong, and proclaim by way of formal declaration what the custom and practice in Hong Kong -- what those are in Hong Kong?

And I know, again in the Supreme Court as Chris has said, both GAFTA and the LMAA and, I think, the ICC and the LCIA and possibly others made submissions as to what the practice was in their types of arbitration. And, therefore,

the question for the Hong Kong IAC is: well, should they make some kind of -- I'm not sure -- declaration statement of what arbitrations practicing in Hong Kong should do?

So Jern-Fei, what do you think of that? Is that something that should be considered, or is it a waste of time?

MR NG: Well, Bernard, I think perhaps in an attempt to be provocative as well, I think the short answer to that invitation, tempting as it may be, is "no". That's my own personal view. The reason why I say it's "no" is because in the experience which I have gained sitting as a member of the HKIAC Proceedings Committee, the reality is that there is a -- perhaps "infinite" may be putting it too high -- but there is quite a wide array of different types of arbitrations out there which are handled by the HKIAC such that it may be too difficult to be unduly prescriptive by publishing a statement or a declaration as to what the custom and practice of Hong Kong-seated or HKIAC arbitrations are. Because I think that would be predicated on the assumption that there is a single set -- a uniform set of practices or customs that apply across the board to all types of HKIAC-governed and/or Hong Kong-seated arbitrations, whether they are commodity arbitrations or shipping arbitrations or the like.

Let me just posit a slightly different example to

illustrate how difficult that may be. One of the features of HKIAC arbitration which perhaps may not necessarily be prevalent in other seats across the world is the fact that a number of HKIAC arbitrations are conducted in languages other than English, Chinese obviously being a predominant language used in arbitration. Some arbitrations are bilingual. I think it wouldn't surprise many of the viewers who are participating and attending this webinar to know that there is only a small pool of experienced arbitrators who are conversant in and fluent in Chinese, for example, to be able to conduct arbitrations in Chinese, or bilingually. And it may well be that there are certain customs and practices with respect to those types of arbitrations that might not necessarily be present in other types of arbitrations irrespective of the subject, whether they are commodity or shipping or what have you.

The other thing which I would also point out, and I think if I can just maybe take a leaf out of what Karen Mills (phonetic) has said in the Q&A app, in the Zoom, where she says:

"Don't you think we can avoid all of this confusion going forward if we simply adopt the policy, as many of us have, with regard to the IBA guidelines? When in doubt, disclose?"

So having said that, I don't think that it would be a good idea. That's just my personal view, for the HKIAC as a body, to publish a statement or a declaration as to what constitutes custom and practice of HKIAC and Hong Kong-seated arbitrations.

However, as a practical way going forward, I entirely agree with Karen's suggestion. And can I just point out that in the HKIAC's declaration of availability and statement of impartiality and independence, which all prospective arbitrators have to fill in, there is, in fact, a line in that which I think is mirrored in the similar forms that are sent out by other arbitral institutions which effectively says "if in doubt, disclose".

Now, what I'm afraid that really leads to on occasion is the vice which, Bernard, you quite rightly identified, whereby you have this disclosure practice now proliferating these sort of declarations whereby arbitrators disclose everything down to what they've had for breakfast.

I jest, but you know, it's quite extraordinary, some of this disclosure. It's defensive disclosure. But I am afraid, it may well be that that is within reason. Over-disclosure may be the best remedy to avoid challenges to their appointment in the future, whether or not they are justified or spurious. Even spurious challenges obviously

are time-consuming and have got cost consequences.

SIR EDER: Right. Chris, do you agree with Jern-Fei?

MR SMITH: I think so. Although I think it's slightly shades of grey, in this sense. I am not particularly in favour of the "when in doubt, disclose". Because I think as a potential appointee, what one ought to be doing is deciding whether you think that there are grounds which might give rise to reasonable doubt. And if there are, you need to disclose them. And the discretional element -- but the element of doubt there comes in the word "might". But if in doubt, then essentially you've already triggered the word "might", so you ought to be disclosing it.

But I'm concerned about adopting an "if in doubt, disclose" policy because I think it does lead to a vast amount of unnecessary disclosure, often the purpose of which is not to help the parties resolve their dispute; it is to ensure the arbitrator gets the job. And I think we need to remember here that although the parties want to appoint us when we're being appointed as an arbitrator, our purpose in giving disclosure should not be to ensure that we get the job. And certainly I have had experience recently, and I think, as you have said, Sir Bernard, I've become more cautious in disclosure I give. I hope that I still wouldn't be giving disclosure if in doubt. I would want to make up my mind what

the issue is.

But I do think overly defensive disclosure is going to be difficult. And to be go back to your original question as to whether there should be some kind of survey, the problem with surveying the arbitrators is that you don't really, by surveying the arbitrators to find out what the practice is, establish whether there really is a practice, and you don't really establish whether those who submit their disputes to HKIAC or other institutional arbitrations accede to that practice. So you don't necessarily answer the question that needs to be answered for the purpose of doing a disclosure.

And it may well be, as Jern-Fei says, that it wouldn't be appropriate for the HKIAC anyway, because of the huge variety of different arbitrations that it handles.

But if, for example, one were to stay with the Hong Kong perspective, but move away from the more institutional type of arbitration and look at the Hong Kong maritime and arbitration group, one might find that that is closer to the LMAA perspective. And then one comes back to, with disclosure, the difficulty you raised. What if you get appointed right at the end of a limitation period by somebody where there doesn't appear to be any kind of issue about disclosure, and you have no way of finding out whether there

is any more detailed disclosure, but you have to accept the appointment or not almost by return, so that the party appointing you has protected the limitation period.

Now, that's a real practical difficulty that arises in London maritime arbitration, that the LMAA was at pains to stress to the Supreme Court. And, again, those kind of repeat appointments for protecting times -- and they count, as I said in my talk, as part of your tally. And I think there are a lot of issues that need to be worked through. Now, I'm not sure with respect to what the Supreme Court said about amending rules, that any arbitral institution can do this, by amending its rule. Because the only way you could introduce a rule to deal with this is to say in your rules if you are disclosed X times, you do not need to disclose it. And I think that gives a very wrong flavour about arbitration, if you have a rule that specifically says you do not need to disclose these facts. One way to do it is to have a very tightly defined list of circumstances in which you may not accept an appointment and essentially say in your guidance or your rules that if those circumstances are not engaged, then you may accept.

And that's the GAFTA approach. GAFTA has a list of circumstances in which an arbitrator may not, under any circumstances -- it's effectively a non-waivable red list,

that they may not accept appointments in those circumstances. And if those circumstances are not engaged, they may accept appointment. And that's the way it works.

SIR EDER: One last question, then, for both of you maybe. On repeat appointments, in relation not to parties but to where the same solicitor is involved.

So in Hong Kong and in London, there is a small group of shipping solicitors, and any arbitrator in the -- doing shipping arbitrations does tend to be appointed on repeat occasions -- 5, 10, 20, 30 times a year. 100 times a year.

Now, Chris mentioned that in the Supreme Court, it was suggested that if there was an appointment, I think he said, of 10 times by one party, if I understood him correctly, that might give rise to a matter that needs to be disclosed.

Do either of you have views as to, in terms of numbers, what is the limit before you have to give disclosure?

Chris?

MR SMITH: Well, the example I gave was actually in the Court of Appeal and also the Supreme Court. And it was counsel for Chubb that conceded that 10 appointments would be a matter that did give rise for the same party to justifiable doubts. And -- but as I said, without saying over what period. So is that 10 appointments in a year or 10 appointments over 10 years?

The difficulty is that there are so many other factors, without wishing to dodge the question. There are so many other factors that come into play. I think one would need to take into account by reference to one's practice as an arbitrator, what percentage of one's appointments came from the same law firm as opposed to empirically the number. So if one is receiving 100 appointments a year, and 99 of them are from X & Company Limited, I think that probably ought to be disclosed because they really are the only people that are appointing you. If, on the other hand, one is receiving 100 appointments a year, 20 each from five major law firms, or 500 appointments a year, 100 each from five major law firms, I would not regard that as a matter that needed to be disclosed. I would regard that as part and parcel of how the shipping arbitration community works.

SIR EDER: Good. Jern-Fei, a number or not?

MR NG: I wouldn't go for a number either. And the reason why is, I think the focus perhaps in the argument before the Court of Appeal was quantitative in nature. But I think one mustn't lose sight of the fact that the assessment has at the same time, if not more importantly, to be qualitive in nature. Therefore, if you just focus on the quantitative aspect of the evaluation, as Chris pointed out, if you have appointments which are purely for the purpose of protecting

a limitation period running out on you, et cetera, and you have got a few of those, I wouldn't have thought that those would necessarily be indicative of you being biased in favour of the party who is appointing you as opposed to, say, two or maybe three major appointments by the same party in major arbitrations which are obviously bitter fought and last for a long period of time, et cetera.

So I think it's important not to be overly concerned or perhaps even obsessed with the quantitative feature or aspect of the appointments, but looking more holistically at the qualitative aspect as a whole.

SIR EDER: Right. Well, thank you, both. I think we are drawing to a close. There are no more open questions.

I hope we've generated some heat for you in Hong Kong, though I notice, looking out at the window now, that where I am, anyway, in London it is still snowing rather heavily. We haven't quite got to the two, three feet that I think Chris said that he's got, but I've certainly got six inches, perhaps, outside my window. So I'm going to go tobogganing.

The other good news, though, from London -- for me, anyway -- is that I've had my first jab of the Pfizer vaccine. That's because I'm a very old man, I should tell you. So -- but things in England have been very difficult, as you all know, and I wish you all safe times in Hong Kong

with this virus. And I hope 2021, we will all be coming out of it.

Anyway, thank you all for attending this webinar. we send you warm greetings from London, and we wish you well. Thank you very, very much.

MR SMITH: Thank you all very much.

MR NG: Bye, everyone. Thank you.

[End of audio]