## A cautionary note for international arbitrators

***Halliburton Company v Chubb Bermuda Insurance Ltd***[1] [2020] UKSC 48[2]

### Introduction

1. The subject matter of its lengthy judgment in this appeal by the United Kingdom's Supreme Court (**UKSC**) compels immediate association with the almost century-old maxim: [3]

> 'Justice should not only be done but should manifestly and undoubtedly be seen to be done.'

2. In essence, its sixty-page judgment deals with important matters that illustrate what factors may give rise to the appearance of bias on the part of an arbitrator in an international arbitration. Vital questions are raised in the judgment,[4] and comprehensively addressed therein, about an arbitrator's duty of independence and impartiality, as well as of his or her obligation to make disclosure of matters which may give rise to justifiable doubts as to his or her impartiality. Although the issues can be stated fairly simply, the judgment is fact-intensive and is laden with searching discussions in connection with the relevant legal principles. It evades a synoptic and condensed analysis. Extensive references to the judgment are included herein, so that readers can easily access it in order to follow and appreciate the underlying details that informed this analysis.

### Factual background

3. Many legal actions and arbitrations were spawned when the '*Deepwater Horizon*', an oil drilling rig, exploded (**the incident**). The drilling rig was owned by Transocean Holdings LLC (**Transocean**), which had let it to BP Exploration and Production Inc (**BP**) and also contracted with it to provide the required crew and drilling teams for the operation of the rig. At the time the incident occurred, the drilling rig was positioned in the Gulf of Mexico, approximately forty-one (41) miles off the coast of Louisiana. The explosion was caused

---

1 Formerly known as '*Ace Bermuda Insurance Ltd*'.

2 Halliburton Company (Appellant) v Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd) (First Respondent) (supremecourt.uk) (Accessed 16 January 2021).

3 *Per* Lord Hewart in ***The King v Sussex Justices*** [1924] 1 KB 256 at p. 259.

4 The importance of the questions in the field of arbitration also explains why there were so may high-profile interveners participating in the appeal, viz., the International Court of Arbitration of the International Chamber of Commerce (**ICC**), the London Court of International Arbitration (**LCIA**), the Chartered Institute of Arbitrators (**CIArb**), the London Maritime Arbitrators Association (**LMAA**) and the Grain and Feed Trade Association (**GAFTA**). The interveners' contributions comprised both written and oral representations by the ICC and the LCIA, and only written submissions in the case of the CIArb, the LMAA, and the GAFTA (*Cf*. **Judgment:** § 4).

when high-pressure methane gas escaping from the drilled well filtered into the drilling rig itself.[5]

4. BP had contracted the appellant (**Halliburton**) to provide it with cementing and well-monitoring services in relation to the temporary abandonment and the plugging of the drilled well.

5. Both Halliburton and Transocean had entered into liability insurance policies with the respondent, i.e. Chubb Bermuda Insurance Ltd (**Chubb**). The insurance policies they had entered into with Chubb, were so-called '*Bermuda Form*' liability policies,[6] that required any disputes arising under them to be resolved by arbitration.

6. Many claims were instituted against BP, Transocean, and Halliburton. The plaintiffs in these cases included the US Government, as well as various corporate and individual persons. Following a trial in the Federal Court for the Eastern District of Louisiana (**the US court**), which gave judgment in favour of the plaintiffs and apportioned the blame for the damages they had suffered between BP, Transocean and Halliburton. Halliburton settled the claims against it, and then, in turn, it instituted a claim against Chubb under the liability policy between them. Chubb repudiated liability and contended that Halliburton's settlement was not a reasonable one. Transocean's claim against Chubb was also repudiated and contested by the latter on virtually similar grounds.

7. Pursuant to the arbitration clause in the liability insurance policy it had concluded with Chubb, Halliburton commenced arbitration proceedings against Chubb (**the first arbitral reference**). Halliburton and Chubb each selected one arbitrator (**party-appointed arbitrator**), but the two of them were unable to agree on the appointment of the third arbitrator, who was intended to serve as the chairperson of the arbitral tribunal they would jointly constitute. This resulted in a contested hearing in the High Court, which subsequently ordered and appointed one of Chubb's proposed nominees, namely Mr Rokison (**Rokison**), an English QC and a well-known and highly respected international arbitrator, as the third arbitrator in the first arbitral reference.[7]

---

5 https://industrial3d.com/case-study-deepwater-horizon/ (Accessed 16 January 2021).

6 **Judgment:** § 11, where the origin of this form of policy is explained in these terms: '*The Bermuda Form policy was created in the 1980s to provide high excess commercial general liability insurance to companies operating in the United States after the market for such insurance collapsed in that country. Bermuda Form policies usually contain a clause providing for disputes to be resolved by arbitration*.'

7 **Judgment**: § 16, where it is emphasised that, prior to Rokison accepting appointment by Chubb in the second arbitral reference mentioned in paragraph 8 below, he disclosed to Transocean that he held an appointment in the first arbitral reference, as well as in the other Chubb arbitrations that he had previously disclosed to Halliburton. Transocean did not object to any of those appointments. However, Rokison failed to disclose to Halliburton his proposed appointment by Chubb in the second arbitral reference. The omission to make this disclosure to Halliburton constituted the central issue in the appeal before the UKSC.

8. Subsequently, and without Halliburton's knowledge, Rokison also accepted appointment as an arbitrator in two separate references also arising from the incident. The first of these appointments, also as a party-appointed arbitrator, was made by Chubb and related to Transocean's claim against it (**the second arbitral reference**). The other appointment was a joint nomination by the parties involved in a claim by Transocean against another insurer (**the third arbitral reference**).

**The judgment at first instance**

9. Halliburton, on learning of Rokison's appointment in these latter two references, applied to the High Court (**the court of first instance**)[8] to have Rokison removed as an arbitrator in the first arbitral reference. The application was brought under section 24(1)(a) of the Arbitration Act 1996 (**the Act**).[9] The court of first instance (*per* Justice Popplewell) dismissed the application on 3 February 2017. The UKSC summarised the grounds upon which the court of first instance rejected the arguments advanced by Halliburton for Rokison's removal.[10] In essence:

   9.1. As far as Halliburton's first – *essentially two-pronged* – contention is concerned, (i.e. that by accepting appointments in the first and second arbitral references, Rokison gave the appearance of bias against Halliburton, because (i) *first*, his party-appointment by Chubb in the second arbitral reference would involve Rokison being given a secret benefit by Chubb in the form of the remuneration he would earn from the arbitration;[11] and (ii) *second*, Rokison also would learn information during the course of the second and/or third arbitral references, which was relevant to the issues in the first arbitral reference involving Halliburton, and which then would be available to Chubb, but not to Halliburton),[12] the court of first instance rejected the first leg of the contention that Rokison would derive a secret benefit in the form of remuneration which he would receive from the arbitrations. In this regard, it held that, in English law, arbitrators were under a duty to act independently and impartially and owed no allegiance to the party which appointed them. This principle, it emphasised, was enshrined in section 33 of

---

8 ***H v L and Others***, [2017] EWHC 137 (Comm); [2017] 1 WLR 2280.

9 The germane portion of this section provides as follows:

'*24. Power of court to remove arbitrator*

*(1) A party to arbitral proceedings may … apply to the court to remove an arbitrator on any of the following grounds –*

*(a) that* ***circumstances exist that give rise to justifiable doubts as to his impartiality***; …' (Emphasis added).

10 **Judgment**: §s 29 to 32.

11 **Judgment at first instance**: § 17.

12 *Ibid*.

the Act.[13] The second leg of this contention was also rejected by the court of first instance, in, among others, the following terms, namely:

9.1.1. First, that it is:[14]

> '… equally unsound whatever the degree of overlap in the subject matter of the arbitrations. 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. This is common in insurance and reinsurance claims where there has been a large casualty and is a consequence of the spread of risk which insurance and reinsurance provides. It is common too in maritime disputes where an incident may give rise to a claim under a bill of lading and one or more of a string of charterparties; and in commodity disputes with string contracts. In such cases it is common for those with relevant expertise as arbitrators to sit in different arbitrations arising out of the same factual circumstances or subject matter'; and

9.1.2. second, that:[15]

> 'The informed and fair-minded observer would not therefore regard *[**Rokison**] as unable to act impartially in the reference between *[**Halliburton**] and *[**Chubb**] merely by virtue of the fact that he might be an arbitrator in other references arising out of the incident and might hear different evidence or argument advanced in another such reference. The objective and fair-minded assessment would be that his experience and reputation for integrity would fully enable him to act in accordance with the usual practice of London arbitrators in fulfilling his duties under s 33 by approaching the evidence and argument in the *[**Halliburton**] reference with an open mind; and in deciding the case, in conjunction with the other members of the tribunal, in accordance with such material, with which *[**Halliburton**] will have a full and fair opportunity to engage.' (*Insertions added)[16]

9.2. As far as Halliburton's second contention is concerned (i.e. that Rokison's failure to disclose his other appointments in the second and third arbitral disputes to it, gave rise to an appearance of bias),[17] the court of first instance rejected it on two grounds: (i) *First*, since Rokison's acceptance of appointments in those other two references did not of itself give rise to any justifiable concerns over his independence, then *ex hypothesi* he could not have been under any obligation to disclose the same: Put differently, that there is no obligation to disclose circumstances which the informed observer would not regard as raising a real

---

13 **Judgment**: § 29, read with the **judgment at first instance**: §s 21 to 29.

14 *Ibid***.**, read with the **judgment at first instance**: § 21.

15 **Judgment**: § 30, read with the **judgment at first instance**: § 29.

16 As appears from the citation of the case at first instance – see footnote 8 above – the parties' names were anonymised, a feature that was maintained in the above-quoted dictum by Popplewell, J. In its judgment, the UKSA eschewed this and held that: '… *there are no good grounds for maintaining the anonymity of the arbitrators in this appeal*' (*Cf*. **Judgment**: §s 5 and 6).

17 **Judgment at first instance**: §s 15(2) and 37.

possibility of impartiality;[18] and (ii) *second*, even if Rokison ought to have disclosed his appointments in the second and third arbitral references, his failure to do so would not give rise to a real possibility of apparent bias against Halliburton. In this regard, the court of first instance stated that, as Rokison had explained in correspondence that he did not make the disclosure because it had not occurred to him that there was any obligation to do so – the accuracy and honesty of which explanatory statement by Rokison was never challenged – the fair-minded observer would not have thought that it would raise a real possibility of apparent bias, even if Rokison's honest belief were mistaken, which Popplewell, J, found not to be the case.[19]

**The judgment on appeal**

10. Halliburton then sought and obtained permission to appeal from the court of first instance to the England and Wales Court of Appeal (**the Court of Appeal** or, simply, **the CoA**), which, among other things, held as follows:

    10.1. *First*, it agreed with the court of first instance that the mere fact that an arbitrator accepts appointments in multiple references concerning the same or overlapping subject matter with only one common party, does not of itself give rise to an appearance of bias; that *something more of substance* is required before any such an inference could be justified;[20] and that the concerns raided by Halliburton were irrelevant and did not even arise;[21]

    10.2. *Second*, Rokison had been duty-bound to disclose his envisaged appointments in the second and third arbitral references to Halliburton;[22] and

    10.3. *Third*, despite Rokison's aforesaid obligation of disclosure and his self-acknowledged failure to inform Halliburton accordingly, it agreed with the court of first instance's overall conclusion that the fair-minded and informed observer, having considered all the relevant facts and pertinent considerations, would not have concluded that there was a real possibility that Rokison was biased.[23]

---

18 **Judgment**: § 32, read with the **judgment at first instance**: § 37.

19 *Ibid*., read with the **judgment at first instance**: § 41.

20 **Judgment**: § 35, read with the **CoA's judgment**: §s 42 to 53, especially this last para (i.e. § 53).

21 *Ibid*. at § 36.

22 **Judgment**: §s 37 to 39, read with the **CoA's judgment**: §s 55 to 71 – especially at §s 70 and 71 – as well as §s 91 and 94.

23 **Judgment**: § 39, read with the **CoA's judgment**: §s 77 to 100.

11. The Court of Appeal consequently dismissed Halliburton's appeal,[24] which prompted it to renew its challenge before the UKSC.

**The UKSC's lead judgment on the further appeal to it**

12. The UKSC unanimously dismissed the appeal. The main or lead judgement was given by Lord Hodge (with whom Lord Reed, Lady Black and Lord Lloyd-Jones concurred),[25] while Lady Arden gave a separate, but concurring, judgment.[26]

13. The UKSC's reasons for the judgment can be summarised as follows:

(a) The applicable legal principles:

14. The *duty of impartiality* is a core principle of arbitration law.[27]

15. This duty applies equally to party-appointed arbitrators and independently appointed arbitrators in English law.[28]

16. The proper test to be applied, in considering an allegation of apparent bias against an arbitrator, is whether the *fair-minded and informed observer* would conclude there is a *real possibility of bias*.[29]

17. This objective, fair-minded and informed observer is '*neither complacent nor unduly sensitive or suspicious*'.[30]

18. This objective test must be applied by the courts having due regard to the particular characteristics of international arbitration, *including* the private and confidential nature of most arbitrations,[31] as well as, among others, the five further considerations referred to by Lord Hodge in the lead judgment.

19. The five further considerations referred to by Lord Hodge include:

---

24 **Judgment**: § 39, read with the **CoA's judgment**: § 101.

25 **Judgment**: §s 1 to 158.

26 *Ibid*., §s 159 to 190.

27 **Judgment**: § 49.

28 *Ibid*., § 63.

29 *Ibid*., § 52, read with § 55. See too: ***Porter v Magill*** [2001] UKHL 67; [2002] 2 AC 357 at para 103, where Lord Hope of Craighead expressed the test as follows: '*The question is whether **the fair-minded and informed observer**, having considered the facts, would conclude that there was a **real possibility that the tribunal was biased***.' (Emphasis added).

30 *Ibid*., § 52, read with § 53.

31 *Ibid*., § 69.

19.1. *First*, the fact that an arbitrator is not subject to appeals on issues of fact and often not on issues of law;[32]

19.2. *Second*, the fact that arbitrators – unlike judges, who are holders of a public office funded by general taxation and therefore enjoy security of tenure – are dependent on appointments in arbitral references for their remuneration, which, on the one hand, might also serve to dissuade an arbitrator from taking steps that would alienate the parties to an arbitration, e.g. by conducting assertive case management against the wishes of the parties' legal representatives; and, on the other hand, which could further encourage the parties' legal representatives to be more assertive in pursuance of their respective clients' interests in the conduct of the arbitration than might otherwise have been the case if the matter were being conducted in a civil commercial court;[33]

19.3. *Third*, the fact that arbitrators are usually appointed from a wide array of professionals and from different jurisdictions; that some of them may have very extensive experience of arbitration practice, while others may have very limited involvement in and experience of arbitration; and that the legal traditions of the countries or jurisdictions from which they come could also hold divergent views on what constitutes ethically acceptable conduct or not;[34]

19.4. *Fourth*, the fact that a party, who – or, as the case may be, which – is not common to the multiple arbitral references concerning the same or overlapping subject matter, has no means of informing himself/herself/itself of the evidence led before and legal submissions made to the tribunal (comprised of a common arbitrator), or what such common arbitrator's response is or was to evidence and submissions in the multiple arbitral references to which it is not a party;[35] and

19.5. *Fifth*, the fact that in the field of international arbitration there are *differing understandings of the role and obligations of the party-appointed arbitrator*,[36] and, in applying the test of the fair-minded and informed observer, the courts:[37]

> '… would credit that objective observer with the knowledge both that some, maybe many, parties and some, maybe many, arbitrators in international arbitrations have that understanding and that there is a debate within the arbitration community as to the precise role of the party-appointed arbitrator and the compatibility of that role with the requirement of impartiality.'

---

32 *Ibid*., § 69, read with § 58.

33 *Ibid*., § 69, read with § 59.

34 *Ibid*., § 69, read with § 60.

35 *Ibid*., § 69, read with § 61.

36 *Ibid*., § 69, read with § 62.

37 *Ibid*., § 69, read with §s 62 to 66, especially this last para (i.e. § 66) where the quoted passage is taken from.

20. The duty of disclosure is not simply good arbitral practice, but constitutes a legal duty in English law, informed by the arbitrator's statutory obligations of fairness and impartiality.[38]

21. However, the duty of disclosure does not override the arbitrator's duty to observe and maintain privacy and confidentiality of arbitral proceedings in English law. This means that where information that has to be disclosed is confidential, it remains subject to the arbitrator's duty of confidentiality. Consequently, such a disclosure can only be made if all the parties to whom confidentiality obligations are owed were to give their consent to such disclosure. Such consent may be expressed, but it could also be inferred from the provisions of the arbitration agreement itself and in the context of the custom and practice in the relevant field of arbitration.[39]

22. An arbitrator's duty of disclosure is to disclose all matters which might reasonably give rise to justifiable doubts as to his or her impartiality.[40]

23. An arbitrator's failure to disclose all relevant matters is a factor which the fair-minded and informed observer will have to consider in assessing whether there is a real possibility of bias.[41]

24. In assessing whether an arbitrator has failed in his/her duty to make disclosure, the fair-minded and informed observer will consider the facts and circumstances prospectively as at and from *the time the duty arose* and *during the period in which it subsisted*.[42]

25. On the other hand, when confronted with obligation or duty of having to decide whether there is a real possibility that an arbitrator is biased, the fair-minded and informed observer will consider the facts and circumstances *known at the time of the hearing to remove the arbitrator*. This is enjoined by the provisions of section 124(1)(a) of the Act, which empower the court to remove an arbitrator on the ground that circumstances '*exist*' – denoting, by the use of the present tense (i.e. exist), that such circumstances must be assessed at the time of the hearing – that give rise to justifiable doubts as to his or her impartiality.[43]

---

38 *Ibid*., § 78.

39 *Ibid*., §s 88 to 104.

40 *Ibid*., §s 107 to 116.

41 *Ibid*., §s 117 and 118.

42 *Ibid*., §s 119 and 120.

43 *Ibid*., §s 121 and 122.

(b) Application of the legal principles to the facts and the issues in the appeal:

26. The acceptance of multiple arbitral appointments involving a common party, and the same or overlapping subject matter, could give rise to an appearance of bias in certain circumstances. Whether it does so, obviously depends on the facts of every case and, in particular, the customs and practice in the relevant field of arbitration.[44]

27. Arbitrations emanating from arbitration agreements in *Bermuda Form* liability policies might reasonably give rise to a conclusion that there is a real possibility of bias. Consequently, 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.[45]

28. Applying these considerations and conclusions to the facts, Rokison was under a legal duty to disclose his appointment in the second arbitral reference – involving Chubb and Transocean – to Halliburton. At the time of his appointment, the existence of potentially overlapping arbitrations with only one common party, Chubb, was a circumstance which might reasonably give rise to the real possibility of bias.[46]

29. Consequently, Rokison breached such duty of disclosure when he failed to disclose his appointment in the second arbitral reference to Halliburton.[47] In the lead judgement, Lord Hodge stated that, in his view:

> '… the disclosure in such circumstances ought to have included (i) the identity of the common party who was seeking the appointment of the arbitrator in the second reference (ii) whether the proposed appointment in the second reference by the common party was to be a party-appointment or a nomination for appointment by a court or a third party, and (iii) a statement of the fact that the second reference arose out of the same incident. The disclosure of this information would impinge upon the privacy of the second reference to the extent that the identity of the common party and the prospect of its involvement in a related arbitration were disclosed, but **an arbitrator's duty of privacy and confidentiality would not prevent such disclosure because one can infer consent for such limited disclosure.**' (Emphasis added).

30. Notwithstanding Rokison's aforesaid breach of his duty of disclosure, it could not be said that the fair-minded and informed observer, having proper regard to the circumstances known at the date of the hearing at first instance (i.e. on 12 January 2017), would infer from Rokison's oversight to make disclosure that there was a real possibility of

---

44 *Ibid*., §s 127 to 131.

45 *Ibid*., §s 132 to 136.

46 *Ibid*., § 145.

47 *Ibid*., § 147.

unconscious bias on his part.[48] The following reasons were referred to in support of this conclusion, namely:[49]

30.1. *First*, that there appeared to have been a lack of clarity in English case law as to whether there was a legal duty of disclosure and whether disclosure was needed, as is evident from the judgment of the court of first instance by an able and commercially astute judge;

30.2. *Second*, that the time sequence of the three arbitral references could explain why Rokison saw the need to disclose the first arbitral reference to Transocean, but did not enable him to recognise the need to tell Halliburton about the second arbitral reference;

30.3. *Third*, that Rokison's measured response to Halliburton's challenge explained that it was likely that the subsequent references would be resolved by a preliminary issue (as they in fact were) and that, if they were not, he would consider resigning from the Transocean arbitrations – demonstrating that there was no likelihood of Chubb gaining any advantage by reason of the overlapping references;

30.4. *Fourth*, that there was no question of Rokison having received any secret financial benefit; and

30.5. *Fifth*, that there was no basis for inferring any unconscious *animus* or ill will on Rokison's part.

31. As a result, Halliburton's appeal failed.[50]

**Lady Arden's separate and concurring judgment**

32. Lady Arden agreed with the lead judgment,[51] but she elected to make a few further points, either to reinforce, and, in some instances, to qualify the conclusions reached therein.

33. The first matter Lady Arden addressed, concerned an arbitrator's duty of disclosure, which she emphasised is a *secondary obligation* arising from his or her *primary duty*, which is to act fairly and impartially.[52]

---

48 *Ibid*., § 149.

49 *Ibid*., §s 149 and 150.

50 *Ibid*.

51 *Ibid*., § 190.

52 *Ibid*., § 160, read with § 49.

34. Lady Arden was also at pains to point out that the Court of Appeal's approach – alluded to in paragraph 10.1 above[53] – should be approached with caution. According to Lady Arden, unless the arbitration is one where there is an accepted practice of dispensing with the need to obtain parties' consent to further appointments, an arbitrator should proceed on the basis that a proposed further appointment, involving a common party and overlapping subject matter, probably will ('*is likely to*') require disclosure of a possible conflict of interest.[54]

35. Although the duty of disclosure is an integral part of an arbitrator's statutory duty of impartiality in terms of section 33 of the Act, it simultaneously also constitutes a material implied – if not an express – term of the arbitrator's contract of appointment.[55]

36. Unless the parties to an arbitral reference agreed to waive any objection to a conflict of interest, disclosure is the *only* option open to an arbitrator where such conflict is one giving rise to incompatible conflicting interests that may prevent the arbitrator from acting impartially.[56]

37. Confidentiality, even if not pertinently expressed therein, nonetheless constitutes an important and free-standing implied term of an arbitration agreement and, as such, it is independent of an arbitrator's duty to act impartially and fairly.[57]

38. In referring to high-level disclosures about proposed appointments in any further arbitral references, where such disclosures can '*in general*' be made without any breach of confidentiality by *only* naming the common party (who may be taken to have consented to disclosure), this could still prevent an arbitrator from making any other disclosure about the other parties to such references, i.e. unless they were to consent to such disclosure; and, in the absence of their consent, the arbitrator will have to decline the envisaged appointment.[58]

**Eric Dunn, SC**

18 January 2021

---

53 That is, the mere fact that an arbitrator accepts appointments in multiple references concerning the same or overlapping subject matter with only one common party, does not of itself give rise to an appearance of bias and that *something more of substance* is required to justify an inference of bias.

54 *Ibid*., § 164, read with the **CoA's judgment**: § 77, as well as §s 51 and 86.

55 *Ibid*., §s 167.

56 *Ibid*., §s 168 and 170.

57 *Ibid*., §s 173 to 179.

58 *Ibid*., §s 183 to 188, read with § 146.