

Michaelmas Term
[2020] UKSC 48
On appeal from: [2018] EWCA Civ 817

JUDGMENT

Halliburton Company (Appellant) *v* Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd) (First Respondent)

before

Lord Reed
Lord Hodge
Lady Black
Lord Lloyd-Jones
Lady Arden

JUDGMENT GIVEN ON

27 November 2020

Heard on 12 and 13 November 2019

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Appellant
Lord Grabiner QC
Neil Kitchener QC
Owain Draper

(Instructed by K & L Gates LLP (London))

1st Respondent
Michael Crane QC
Toby Landau QC
David Scorey QC
David Peters

(Instructed by Clyde & Co LLP)

1st Intervener
Constantine Partasides QC
Maanas Jain
Nicola Peart

(Instructed by Three Crowns LLP (London))

2nd Intervener
Charles Kimmins QC
Nigel Rawding QC
Luke Pearce
Olivia Valner

(Instructed by Freshfields Bruckhaus Deringer LLP (London))

3rd Intervener
Louis Flannery QC
Duncan Bagshaw

(Instructed by Mishcon de Reya LLP (London))

4th Intervener
Nicholas Vineall QC
Andrew Stevens

(Instructed by HFW LLP (London))

5th Intervener
Christopher Smith QC

(Instructed by Gateley Plc (London))

Interveners:-

(1) International Court of Arbitration of the International Chamber of Commerce
(2) London Court of International Arbitration
(3) Chartered Institute of Arbitrators (written submissions only)
(4) London Maritime Arbitrators Association (written submissions only)
(5) Grain and Feed Trade Association (written submissions only)

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LORD HODGE: (with whom Lord Reed, Lady Black and Lord Lloyd-Jones agree)

1. It is axiomatic that a judge or an arbitrator must be impartial; he or she must not be biased in favour of or against any party in a litigation or reference. A judge or arbitrator, who is not in fact subject to any bias, must also not give the appearance of bias: justice must be seen to be done. This appeal is not concerned with any deliberate wrongdoing or actual bias but with the circumstances in which an arbitrator in an international arbitration may appear to be biased. It raises important questions about the requirement that there be no apparent bias and the obligation of arbitrators in international arbitrations to make disclosure.

2. The appeal concerns an arbitration under a Bermuda Form liability policy which arose out of the damage caused by the explosion and fire on the Deepwater Horizon drilling rig in the Gulf of Mexico in 2010 when a well was being plugged in the context of a temporary abandonment. That disaster gave rise to several arbitrations between insured parties and insurers. The principal issues which are raised in this appeal are: (i) 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 thereby giving rise to an appearance of bias, and (ii) whether and to what extent the arbitrator may do so without disclosure.

3. I will therefore address first, the duty of impartiality in the context of arbitration, secondly, whether an arbitrator is under a legal duty to disclose particular matters, thirdly, how far the obligation to respect the privacy and confidentiality of an arbitration constrains his or her ability to make disclosure, and fourthly, whether a failure to disclose such matters demonstrates a lack of impartiality. I then address the times at which (a) the duty of disclosure and (b) the possibility of bias fall to be assessed.

4. The appellants ("Halliburton") entered into a Bermuda Form liability policy ("the Policy") with ACE Bermuda Insurance Ltd, which is now called Chubb Bermuda Insurance Ltd ("Chubb") in 1992 and the Policy was renewed annually. Chubb and the three arbitrators involved in the arbitration which I discuss below are the defendants in this action to remove one of the arbitrators. But Chubb alone defended the proceedings and appears as the respondent in this appeal. Because the appeal raises questions of law of general importance in the field of arbitration this court allowed and received written and oral representations from the International Court of Arbitration of the International Chamber of Commerce ("ICC") and the London Court of International Arbitration ("LCIA") and written submissions from the Chartered Institute of Arbitrators ("CIArb"), the London Maritime Arbitrators

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Association ("LMAA") and the Grain and Feed Trade Association ("GAFTA"). The court is very grateful to the interveners for their contribution to the clarification of the wider issues raised by this appeal.

5. At first instance, the names of the parties to, and the arbitrators in, the arbitrations referred to in these proceedings were anonymised. In the judgment handed down by the Court of Appeal, the names of the parties to the Halliburton/Chubb arbitration were revealed and only the names of the arbitrators were anonymised. During the hearing of this appeal, this court questioned the need for and appropriateness of such anonymity once the names of the parties to the arbitration had been disclosed and gave the parties to these proceedings, including the arbitrators, an opportunity to make submissions on the issue.

6. Arbitration in the United Kingdom is as a norm a private form of dispute resolution and both the arbitration and the arbitral award are not generally a matter of public record. In England and Wales, the rules of procedure (CPR rule 62.10) empower the court to order that a claim under the Arbitration Act 1996 ("the 1996 Act") or otherwise affecting arbitration proceedings or an arbitration agreement be heard in public or in private but create a norm that such claims are heard in private. The obligations of confidentiality which are usually imposed in arbitration agreements are designed to protect the privacy of the parties to the arbitration and the evidence led in arbitral hearings. But nobody has suggested any basis in the public interest for preserving the anonymity of the arbitrators themselves in a challenge of this nature. I am satisfied that the principle of open justice, which this court discussed in *Dring (on behalf of the Asbestos Victims Support Group) v Cape Intermediate Holdings Ltd* [2019] UKSC 38; [2020] AC 629, paras 41-43, points towards disclosure. This court has emphasised the importance of avoiding incremental exceptions to the principle of open justice: *Khuja v Times Newspapers Ltd* [2017] UKSC 49; [2019] AC 161, paras 12-14 per Lord Sumption; *In re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47; [2005] 1 AC 593, para 29 per Lord Steyn, endorsing the warning of Lord Woolf MR in *R v Legal Aid Board, Ex p Kaim Todner* [1999] QB 966, 977. The arbitrators in the Halliburton/Chubb arbitration were defendants in the action but understandably took no part in the proceedings. The arbitrator, whose decisions are challenged in these proceedings, Mr Kenneth Rokison QC has a long-established reputation for integrity and impartiality. But the protection of that reputation is not a sufficient ground for anonymity, particularly when the courts below have founded on that reputation in their reasoning. In any event, the challenge in this case involves no assertion of actual bias but relies entirely on an assertion of an objective appearance of bias. I am satisfied that there are no good grounds for maintaining the anonymity of the arbitrators in this appeal.

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Factual background

7. BP Exploration and Production Inc ("BP") was the lessee of the Deepwater Horizon drilling rig. Transocean Holdings LLC ("Transocean") owned the rig and had contracted with BP to provide crew and drilling teams. Halliburton provided cementing and well-monitoring services to BP in relation to the temporary abandonment and the plugging of the well.

8. The blow out of the well caused extensive damage and loss of life. It resulted in numerous legal claims by the US Government and corporate and individual claimants against BP, Halliburton and Transocean. The US Government claimed civil penalties under federal statutes and the private claims for damages were pursued through a Plaintiffs' Steering Committee ("PSC"). After a trial to determine liability, the Federal Court for the Eastern District of Louisiana in a judgment handed down on 4 September 2014 ("the Federal Judgment") apportioned blame between the defendants as follows: BP 67%, Transocean 30%, and Halliburton 3%.

9. Before the Federal Judgment was handed down, Halliburton settled the PSC claims against it by paying approximately US$1.1 billion. Following that judgment, Transocean settled the PSC claims for about US$212m and paid civil penalties to the US Government of about US$1 billion.

10. Halliburton claimed against Chubb under the Policy but Chubb refused to pay Halliburton's claim, contending among other things that Halliburton's settlement was not a reasonable settlement and that Chubb had acted reasonably in not consenting to the settlement. Transocean made similar claims against its liability insurers, including Chubb. Chubb contested Transocean's claim against it on substantially the same grounds.

11. Both Transocean and Halliburton had purchased liability insurance from Chubb on the Bermuda Form. 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. Bermuda Form arbitrations are ad hoc arbitrations which are not subject to the rules of an arbitral institution. Transocean and Halliburton had arranged liability insurance in layers and both had obtained cover for the top layer from Chubb. It appears that the material policy terms were the same. The Policy was governed by the law of New York. The Policy contained a standard arbitration clause which provided for arbitration in London by a tribunal of three arbitrators, one appointed by each party and the third by the two arbitrators so chosen. If the party-appointed arbitrators could not agree on the appointment of the third arbitrator, the High Court in London

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was to make the appointment. The arbitrators were to deliver the award within 90 days of the conclusion of the hearing. There was no right of appeal from the award.

12. Halliburton invoked the arbitration clause of the Policy and nominated Professor William W Park, Professor of Law at Boston University, USA, who is a very experienced arbitrator, as its party-appointed arbitrator on 27 January 2015. Chubb nominated Mr John D Cole, an accomplished US insurance executive, counsel and arbitrator as its party-appointed arbitrator. The nominated arbitrators were not able to agree on the appointment of the third arbitrator as chairman. As a result, after a contested hearing in the High Court in which each side put forward several candidates, on 12 June 2015 Flaux J appointed Mr Rokison, who was one of the arbitrators whom Chubb had proposed to the court, as the third arbitrator. Halliburton's main objection to Chubb's candidates, including Mr Rokison, was that they were English lawyers and the Policy was governed by the law of New York but it also objected to the appointment of Mr Rokison as chair of the tribunal because insurers had a practice of repeatedly appointing retired judges or QCs known to them, such as Mr Rokison, as party-appointed arbitrators. Nonetheless, Halliburton did not appeal against that order. I refer to this Halliburton/Chubb reference to arbitration as "reference 1".

13. Before he expressed his willingness to be appointed, Mr Rokison disclosed to Halliburton and the court that he had previously acted as an arbitrator in several arbitrations in which Chubb was a party, including as a party-appointed arbitrator nominated by Chubb, and that he was currently appointed as arbitrator in two pending references in which Chubb was involved. The High Court did not treat these appointments as an impediment to his appointment in reference 1.

14. Halliburton served its statement of claim in reference 1 on 18 September 2015. Chubb served its statement of defence on 11 December 2015.

15. In December 2015 Mr Rokison accepted appointment as an arbitrator by Chubb in relation to an excess liability claim by Transocean arising out of the same incident ("reference 2"). The appointment was made on behalf of Chubb by Clyde & Co, who were also Chubb's solicitors in reference 1. Within Chubb, the same manager, Mr Trimarchi, was responsible for monitoring the claims made by both Halliburton and Transocean and took the decision to refuse the claims in each case.

16. Before accepting appointment by Chubb in reference 2, Mr Rokison disclosed to Transocean his appointment in reference 1 and in the other Chubb arbitrations which he had disclosed to Halliburton. Transocean did not object. But in an omission which is central to the disclosure issue in this appeal, Mr Rokison did not disclose to Halliburton his proposed appointment by Chubb in reference 2.

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17. In August 2016 Mr Rokison accepted appointment in another arbitration arising out of the Deepwater Horizon incident as a substitute arbitrator on the joint nomination of the parties in a claim made by Transocean against a different insurer on the same layer of insurance as the claim in reference 2. I refer to this as "reference 3". Nobody disclosed this proposed appointment to Halliburton. This further omission also is a ground of the non-disclosure claim in this appeal but the submissions on this appeal have focused more on the non-disclosure of the appointment in reference 2.

18. In references 2 and 3 there was a preliminary issue which was potentially dispositive of the claims if the tribunal decided in favour of the insurers. The issue was whether the fines and penalties which Transocean had paid to the US Government should be taken into account in the exhaustion of both the underlying layers of insurance and Transocean's self-insured retention. This issue involved the construction of the relevant insurance policy on undisputed facts. The preliminary issue was heard separately in each of those references during November 2016.

19. On 10 November 2016 Halliburton discovered Mr Rokison's appointment in references 2 and 3. Mr Thomas Birsic, an attorney at K & L Gates, Halliburton's US lawyers, wrote to Mr Rokison on 29 November 2016 to raise its concerns. He referred to the International Bar Association Guidelines on Conflicts of Interest in International Arbitration ("the IBA Guidelines"), which, he stated, imposed on an arbitrator a continuing duty of disclosure of potential conflicts of interest in accordance with the Orange List in those guidelines, and asked for confirmation of the fact of the two later appointments and an explanation of the failure to make prior disclosure of those appointments.

20. Mr Rokison responded by email on 5 December 2016. He explained how he had come to be appointed in the later references. He explained, and both parties have accepted his explanation as truthful, that he had not disclosed those appointments to Halliburton, because it had not occurred to him at the dates of those appointments that he was under any obligation to do so under the IBA Guidelines. He stated that he appreciated, with the benefit of hindsight, that it would have been prudent for him to have informed Halliburton through its lawyers and apologised for not having done so. He explained that while the three references all arose out of the Deepwater Horizon incident, the roles which Halliburton and Transocean had played had been very different. His involvement in the two Transocean arbitrations had been confined to two two-day hearings on the construction of the policy in which the only evidence had been about the circumstances in which the parties entered into the relevant insurance contracts. He stated his commitment to remain independent and impartial and acknowledged the importance of both parties in an arbitration sharing confidence that their dispute would be determined fairly on the evidence and the law without bias. He concluded:

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> "I do not believe that any damage has been done but, if your clients remain concerned, I would be prepared to consider tendering my resignation from my appointment in the two Transocean cases if the results of the determination of the preliminary issues of construction, which are likely to be issued shortly, do not effectively bring them to an end."

21. Halliburton's lawyer responded by repeating his concerns about Mr Rokison's impartiality and calling for him to resign. But Chubb would not agree to his resignation which, in its assessment, would cause the proposed hearing of evidence in the arbitration to be postponed and thereby cause wasted costs and delay. Mr Rokison responded in an email of 15 December 2016 in which he stated that he sought to take into account his duty to both parties. He repeated his view that he had not breached the IBA Guidelines by a failure to disclose the later appointments but referred to his earlier statement that with hindsight he accepted that it would have been prudent to have made disclosure to avoid any sense of lack of transparency on his part. He repeated that in references 2 and 3 he had not learned anything about the facts of the incident which was not public knowledge. But, recognising that it was fundamentally important that both parties should have confidence in the impartiality of the arbitral tribunal and in particular its chairman, he stated that, if he could decide the matter in accordance with his own self-interest, he would resign. Nonetheless, he owed duties to both parties to complete the task and would be in breach of his duties if he resigned in the face of strong opposition from one party. He therefore proposed that the parties should concentrate on trying to agree upon a mutually acceptable replacement chairman who would be available before the hearing in the arbitration (which was scheduled to start towards the end of January 2017). If they could so agree, he would gladly resign. If they could not, he would have to continue and leave it to the court to decide whether he should be removed.

22. Halliburton responded by issuing a Claim Form in the High Court on 21 December 2016 seeking an order under section 24(1)(a) of the 1996 Act that Mr Rokison be removed as an arbitrator. Halliburton then raised further questions about the overlap between the references, to which Mr Rokison responded by email on 4 January 2017, stating that he was not aware that there were any common issues. Halliburton's lawyers in an email of 5 January 2017 asked Mr Rokison whether he had seen any document in which Chubb or any other respondent in references 2 or 3 had set out similar defences to those pleaded in reference 1. Mr Rokison did not reply to that enquiry. But on 10 January 2017 Chubb released to Halliburton the pleadings in reference 2 which revealed the substantial similarity in its defences which I mentioned in para 10 above, which were challenges to the reasonableness of the settlement which Transocean had negotiated. In its pleaded defence in reference 2, Chubb had also advanced, as an additional defence, the issue of construction of the policy which was the subject matter of the preliminary issue determination.

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23. Mr Justice Popplewell heard Halliburton's application in the High Court on 12 January 2017, in which Halliburton sought to have Mr Rokison replaced by Sir Stephen Tomlinson who had just retired from the Court of Appeal, and delivered a judgment, which I discuss below, on 3 February 2017, dismissing the application.

24. The hearing in reference 1, which included the adducing of evidence and the making of legal submissions, took place between 27 January and 6 February 2017.

25. On 1 March 2017 the tribunals in references 2 and 3 issued awards on the preliminary issues of policy construction, deciding them in favour of Chubb and the other insurer. The tribunals held that because the fines did not count towards the exhaustion of Transocean's self-insured retention, Transocean could not claim an indemnity under the relevant layer of insurance. The awards brought both references to an end, without either tribunal having to consider questions as to the reasonableness of Transocean's settlement.

26. On 5 December 2017 the tribunal in reference 1 issued its Final Partial Award on the merits, deciding in Chubb's favour. The award was signed by all three arbitrators, although Professor Park, the arbitrator whom Halliburton had appointed, qualified his signature of the award in "Separate Observations". Professor Park stated that he had signed the award to confirm his participation but that he was unable to join in the award as a result of his "profound disquiet about the arbitration's fairness". He explained that:

> "… arbitrators who decide cases cannot ignore the basic fairness of proceedings in which they participate. One side secured appointment of its chosen candidate to chair this case, over protest from the other side. Without any disclosure, the side that secured the appointment then named the same individual as its party-selected arbitrator in another dispute arising from the same events. The lack of disclosure, which causes special concern in the present fact pattern, cannot be squared with the parties' shared *ex ante* expectations about impartiality and even-handedness."

The other arbitrators, Mr Rokison and Mr Cole, responded to the separate observations, stating that they did not regard them as being part of the tribunal's award so as to render it a majority award. This was because those observations did not contain any opinion dissenting from any part of the award, which contained findings of fact, statements of applicable law, the process of reasoning and the final conclusions drawn from that reasoning.

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27. It appears from Chubb's written case and Mr Birsic's second witness statement that Halliburton appointed Professor Park as its party-appointed arbitrator in three references against different insurers in insurance claims arising out of the Deepwater Horizon disaster, without formal disclosure. But K & L Gates suggest, in Mr Birsic's second witness statement, that their proposal, which they made when they requested the arbitration and nominated Professor Park, that the arbitrations be consolidated revealed the multiple nominations. Mr Birsic also suggests that the fact that Professor Park was a party-appointed arbitrator rather than a chair or umpire is a significant distinction from Mr Rokison's position. I will return to the question whether that distinction is legally relevant in English law in my discussion below.

Halliburton's pleaded case

28. In its claim Halliburton sought the removal of Mr Rokison as arbitrator in reference 1 and the appointment of another arbitrator to chair the tribunal in his place. The grounds for the claim were that circumstances existed that gave rise to justifiable doubts as to his impartiality and in particular (i) his acceptance of the appointments by Clyde & Co in references 2 and 3 and his failure to notify Halliburton or give it the opportunity to object and (ii) his offer to resign from the tribunal in reference 1 but Chubb's refusal to permit him to do so.

The judgments at first instance and in the Court of Appeal

29. In his judgment of 3 February 2017 ([2017] EWHC 137 (Comm); [2017] 1 WLR 2280) Popplewell J addressed the three elements of Mr Rokison's conduct which were said to give rise to the appearance of bias. The first was his acceptance of the appointments in the Transocean arbitrations in references 2 and 3. The judge rejected the contention that the arbitrator would derive a secret benefit in the form of remuneration which he would receive from the arbitrations. 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 was enshrined in section 33 of the 1996 Act. He also rejected the contention that the overlap between the references was a concern because the arbitrator would learn information in the Transocean references which was relevant to the issues in reference 1 and that information would be available to Chubb but not to Halliburton. He observed that it was a regular feature of international arbitration that the same underlying subject matter gives rise to more than one claim and more than one arbitration without identity of parties. It was common for arbitrators with the relevant expertise to sit in different arbitrations arising out of the same factual circumstances or subject matter. It was desirable that arbitrators be able to do so for three reasons. First, arbitration was a consensual process allowing parties to appoint their chosen arbitrators in accordance with the procedures set out in their contract. Secondly, the parties to an arbitration often wished their tribunal to have particular knowledge and expertise in the law and

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practices of the businesses and market in which the parties operated. Thirdly, the 1996 Act sought speedy finality, which was served when the tribunal was already familiar with the background to and uncontroversial aspects of the subject matter of the dispute.

30. The judge considered that as a general rule the fact that an arbitrator may be involved in an arbitration between party A and party B, whose subject matter was identical to that in an arbitration between party B and party C did not preclude him or her from sitting on both tribunals. This was because an arbitrator in English law was required to decide the case by reference to the material available to the parties to the particular reference: section 33 of the 1996 Act. He concluded his consideration of element 1 in these terms (para 29):

> "The informed and fair-minded observer would not therefore regard [Mr 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 section 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."

31. Popplewell J also rejected a submission that the chairman of a tribunal had an enhanced duty to maintain demonstrable impartiality as the ultimate guarantor of fairness and impartiality. This submission, he opined, misunderstood the English law of arbitration which required all arbitrators, including party-appointed arbitrators, to maintain the same high standards of impartiality. The judge did not think that there was a risk of the tribunal in reference 1 having to address issues which arose in references 2 and 3 if the preliminary issues in the latter references were decided in the insurers' favour. If the tribunals' determinations of the preliminary issues in those references went against the insurers, there was very little risk of overlap because (i) the issue of the reasonableness of Halliburton's settlement was legally and factually distinct from that of Transocean's settlement as the two companies had played different roles on the rig, were alleged to have committed different breaches of duty and had reached different settlements and (ii) Mr Rokison had offered to resign from the Transocean references if the preliminary issue were resolved against the insurers.

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32. On element 2, which was the alleged failure to disclose the appointments to Halliburton, the judge held that, because of his conclusion on element 1 that the circumstances did not give rise to any justifiable concerns about the arbitrator's impartiality, there was nothing which had to be disclosed. Even if the disclosure ought to have been made, the failure did not give rise to a real possibility of apparent bias against Halliburton because Mr Rokison's explanation in correspondence, which was not challenged, was that it did not occur to him that he was under a duty to do so. Even if that honest belief were mistaken, it did not raise a real possibility of apparent bias. The judge also rejected element 3, which was Mr Rokison's response to Halliburton's challenge to his impartiality. Popplewell J discussed and rejected each of the complaints about that response, commenting that Mr Rokison had dealt with the challenge, which the judge said had included a "grossly offensive" suggestion, in a courteous, temperate and fair way which demonstrated his even-handedness.

33. Halliburton sought and obtained permission to appeal from Popplewell J and renewed its challenge on appeal to the Court of Appeal in a hearing on 7 February 2018. The Court of Appeal (Sir Geoffrey Vos C, Simon and Hamblen LJJ) dismissed the appeal in a judgment dated 19 April 2018 ([2018] EWCA Civ 817; [2018] 1 WLR 3361).

34. In the Court of Appeal Halliburton did not challenge Popplewell J's summary of the relevant legal principles in para 16 of his judgment but suggested, and the court accepted, that, in assessing whether there was a real possibility that the tribunal was biased, regard should be had to the risk of unconscious bias. The question for the Court of Appeal was the application of those principles to the facts of the case.

35. The first issue which the Court of Appeal addressed was the same issue as issue 1 in this appeal, namely 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 thereby giving rise to the appearance of bias. The court recognised that the existence of appointments in such related arbitrations could cause the party which was not involved in the related arbitrations to be concerned and could be a good reason for a judge to decline to appoint a person as an arbitrator in the exercise of powers under section 18 of the 1996 Act in the face of an objection by that party. But the court held that the appointment of a common arbitrator did not justify the inference of apparent bias; something more of substance was required.

36. Applying those conclusions to the facts of the case the Court of Appeal held that the degree of overlap between reference 1 and references 2 and 3 was in fact very limited. The latter references were decided on the preliminary issue. As a result, the question of the reasonableness of the settlement by Transocean and the reasonableness of the insurers' withholding of consent to that settlement did not arise. In any event,

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the circumstances were different: Halliburton settled before the Federal Judgment and Transocean after that judgment had allocated responsibility for the incident between the three parties. The fact that an arbitrator obtained a financial benefit from appointment to an arbitral tribunal was not disqualifying; otherwise objection could be taken to every party-appointed arbitrator.

37. The second issue which the Court of Appeal addressed was to identify the circumstances in which an arbitrator should make disclosure of matters which may give rise to justifiable doubts as to his or her impartiality. The court, citing extensive case law in support, stated (para 56):

> "Under the common law, judges should disclose facts or circumstances which would or might provide the basis for a reasonable apprehension of lack of impartiality."

When a judge was aware of a matter which could arguably be said to give rise to a real possibility of bias and disclosed that matter, such disclosure enabled parties to consider the disclosure and decide whether there was no legitimate problem or to make submissions to the judge or to address the potential problem by waiver. The judge in turn could decide in the light of those submissions whether to withdraw from the case. The court stated that the test for apparent bias applied equally to arbitral tribunals and the practical advantages of early disclosure were just as important. The court held that the question whether there should be disclosure was to be decided prospectively, as it depended on the prevailing circumstances at that time when the disclosure should have been made. When deciding whether circumstances existed that would or might lead to the conclusion that there was a real possibility of bias, with the result that those circumstances needed to be disclosed, a court should not have regard to matters known only at a later stage.

38. A failure to make disclosure when it should have been made was itself a factor which should be taken into account when considering whether there was a real possibility that the arbitrator was biased. But, the court held, non-disclosure of a matter which should have been disclosed but did not on examination give rise to justifiable doubts as to the arbitrator's impartiality could not in and of itself justify an inference of apparent bias; something more was required.

39. Applying those conclusions to the facts of the case, the Court of Appeal recognised that in the context of international commercial arbitration it was good practice to make disclosure where a party had such concerns. That practice combined with the other factors, such as the degree of overlap between the references and the nature of other connections, might have been argued to combine to give a basis for a reasonable apprehension of lack of impartiality. On that basis, the court disagreed with

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the judge and held that Mr Rokison ought as a matter of law to have made disclosure to Halliburton at the time of his appointments in references 2 and 3. Nonetheless, the court agreed with the judge's overall conclusion that the fair-minded and informed observer, having considered the facts, would not conclude that there was a real possibility that Mr Rokison was biased. In reaching that conclusion the court took account of the following factors: (i) the non-disclosed circumstance did not of itself justify an inference of apparent bias, (ii) the failure to disclose was accidental and not deliberate, (iii) there was only a limited degree of overlap between the references, (iv) mere oversight in such circumstances would not give rise to justifiable doubts as to impartiality, and (v) there was no substance in Halliburton's criticism of Mr Rokison's conduct after it challenged the non-disclosure. The Court of Appeal therefore dismissed the appeal.

Halliburton's case and the interventions

40. Halliburton renews its challenges before this court and founds on concerns expressed by LCIA, ICC and CIArb that the Court of Appeal's judgment is out of step with internationally accepted standards and practices.

41. Halliburton in its written case confirms that it does not suggest that Mr Rokison was guilty of any deliberate wrongdoing or actual bias. Its case is one of apparent unconscious bias and it founds on five points: (i) he accepted the benefit of a paid appointment on Chubb's nomination when he was sitting on an arbitral tribunal in reference 1; (ii) in so doing, he gave Chubb the unfair advantage of being a common party to two related arbitrations with a joint arbitrator while Halliburton was ignorant of the proceedings in reference 2 and thus unaware whether and to what extent he would be influenced in reference 1 by the arguments and evidence in reference 2; (iii) Chubb would be able to communicate with him in reference 2, for example by its submissions and the evidence it led, on matters which might be relevant to reference 1 and would know of his responses to those communications while Halliburton would not even know that they had occurred; (iv) he failed to disclose his appointment to Halliburton and thereby prevented it from forming its own view as to whether it might lead to unfairness and from either making submissions to the tribunal in reference 1 or otherwise proposing or taking practical steps to mitigate the unfairness; and (v) he did not pay proper regard to Halliburton's interest in the fairness of the procedure. Under point (v) Halliburton also suggests that Mr Rokison had regard only to what he and Chubb both wanted, which was his appointment to sit as arbitrator in reference 2. In my view, the evidence before Popplewell J, which I have summarised above, clearly negatives that gloss but that negation does not wholly remove the force of point (v). Halliburton submits that English law does not require a party to an arbitration to have its disputes resolved by someone who has acted in this manner and argues that the fair-minded and informed observer would see such conduct as giving rise to justifiable doubts as to the arbitrator's impartiality.

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42. LCIA expresses concern that the tests set by the Court of Appeal were not sufficiently strict compared with international norms. The common law test of bias applies, but in applying it the court must take account of the context of the arbitration and the differences between arbitration and litigation. Depending on the facts of a particular arbitration, the circumstances described in the first issue in para 2 above (ie appointments in multiple references concerning the same or overlapping subject matter with only one common party) can give rise to the appearance of bias. It will all depend on the facts. A failure to disclose can give rise to that appearance even if the fact or circumstance which should have been disclosed would not of itself give rise to apparent bias. The arbitrator in considering what needs to be disclosed is under a duty to make reasonable enquiries whether there are circumstances which may give rise to doubts as to his or her impartiality. ICC also questions the approach of the Court of Appeal and submits that the fact of multiple overlapping appointments with only one or some common parties concerning the same or overlapping subject matter can, depending on the circumstances, give rise to reasonable doubts as to the arbitrator's impartiality. On the second issue (disclosure) ICC opines that in English law a failure to disclose multiple appointments by a common party in overlapping references can of itself give rise to justifiable doubts as to the arbitrator's impartiality. CIArb also submits (a) that a failure by an arbitrator to disclose any facts and circumstances which might give rise to justifiable doubts as to that arbitrator's impartiality may in and of itself give rise to justifiable doubts as to his or her impartiality, and (b) that the acceptance by an arbitrator of multiple appointments in related references without full disclosure to all parties may, without more, give rise to justifiable doubts as to impartiality. CIArb also, unusually, expresses its views on the application of the tests to the facts of this case.

43. The other interveners are GAFTA, which is concerned with agricultural commodities arbitration and which trains and certifies arbitrators who must have extensive practical experience in the relevant trades, and LMAA, which is an association of arbitrators concerned with shipping and trade arbitration and which produces arbitration terms and procedures widely used for maritime arbitration in London. GAFTA explains that disputes often arise in chain or string supply contracts and that arbitrations in such contracts, which often involve common issues of law or fact, are regularly referred to the same arbitrator or arbitrators. GAFTA's Rules and Code of Conduct for Qualified Arbitrators & Qualified Mediators and General Code of Conduct Applicable to All Members do not require its arbitrators to disclose multiple appointments in relation to the same event or issue, which are an intrinsic and necessary part of GAFTA arbitrations. GAFTA also provides with its submission a report from the Management Committee of ARIAS (UK), the Insurance and Reinsurance Arbitration Society, describing practice in treaty reinsurance arbitrations, which are conducted by a limited pool of specialist arbitrators and often involve multiple disputes about the same subject matter. ARIAS (UK) opines that practitioners in its field are well aware of the possibility of overlapping appointments and have not expected such appointments to be disclosed.

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44. LMAA similarly explains that multiple appointments are relatively common under their procedures because they frequently arise out of the same incident. Speed and simplicity are necessary because of the tight limitation periods in maritime claims. There is a relatively small pool of specialist arbitrators whom parties use repeatedly. LMAA terms give arbitral tribunals the power to order concurrent hearings where two or more arbitrations raise common issues of fact or law without requiring the consent of the parties. Disclosure of multiple appointments should be required only when it is arguable that the matters to be disclosed give rise to the appearance of bias. LMAA points out that the IBA Guidelines recognise that in certain types of arbitration no disclosure of multiple appointments is required if parties are familiar with such custom and practice (see para 133 below).

45. GAFTA and LMAA submit that in their fields of activity the mere fact of appointment in arbitrations with overlapping subject matter but without identity of parties does not give rise to any appearance of bias and is a feature of arbitrations which parties in their fields of operation accept. They submit that the court should respect such party autonomy and that there is no need to impose an obligation of disclosure in their fields of operation.

46. Chubb defends the judgments of the courts below. But Chubb also argues that the Court of Appeal was wrong to conclude that Mr Rokison was under a legal duty to disclose his appointments in references 2 and 3 because it submits that an arbitrator is only obliged to disclose circumstances which the fair-minded and informed observer would regard as giving rise to a real possibility of bias. The disclosure of circumstances which might give rise to the possibility of bias was good practice but was not an obligation in law. A failure to disclose in accordance with good practice will be a factor to which the fair-minded and informed observer will have regard in determining whether there is justifiable doubt as to an arbitrator's impartiality.

Discussion

47. The 1996 Act is based on the principle of party autonomy and aims to limit the role of the courts to the protection of the public interest. Section 1 of the 1996 Act provides that the provisions of Part I (sections 1-84):

> "are founded on the following principles, and shall be construed accordingly - (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense; (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest; (c) in matters governed by this Part the court should not intervene except as provided by this Part."

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The 1996 Act is not a complete code of the law of arbitration but allows the judges to develop the common law in areas which the Act does not address.

48. Against that background, it is necessary to consider, first, the duty of impartiality in the context of arbitration before addressing, secondly, whether an arbitrator is under a legal duty to disclose particular matters, thirdly, how far the obligation to respect the privacy and confidentiality of an arbitration constrains his or her ability to make disclosure, and fourthly, whether a failure to disclose such matters demonstrates a lack of impartiality. I also address the times at which (a) the duty of disclosure and (b) the possibility of bias fall to be assessed.

(i) The duty of impartiality

49. Impartiality has always been a cardinal duty of a judge and an arbitrator. Thus, the first of the principles set out in section 1 of the 1996 Act is that disputes should be resolved fairly by an impartial tribunal. The duty is now enshrined within section 33 of the 1996 Act, which provides:

> "(1) The tribunal shall -
>
> (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
>
> (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.
>
> (2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it."

50. Principle (c) in section 1 of the 1996 Act (para 47 above) seeks to limit the intervention of the court in arbitral proceedings. One such power of intervention arises in section 24(1) of the 1996 Act which provides (so far as relevant):

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> "A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds:
>
> (a) that circumstances exist that give rise to justifiable doubts as to his impartiality; …
>
> (d) that he has refused or failed -
>
> (i) properly to conduct the proceedings, …
>
> and that substantial injustice has been or will be caused to the applicant."

I will return to consider section 24(1)(a) later in this judgment but note at this stage (i) that by the use of the present tense of the verb "exist" the court is directed to the circumstances as they exist at the time at which it hears the application for removal of the arbitrator and (ii) that, in contrast with section 24(1)(d), the applicant does not have to show that substantial injustice has been or will be caused to it.

51. A party to arbitral proceedings is also empowered by section 68 of the 1996 Act to challenge an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award and such serious irregularity includes a failure by the tribunal to comply with section 33 of the Act.

52. In this appeal the court is concerned with an allegation of apparent bias. We are not concerned with any disqualifying interest in the outcome of the arbitration nor are we required to "make windows into men's souls" in search of an animus against a party or any other actual bias, whether conscious or unconscious. No such allegation is made against Mr Rokison. We are concerned only with how things appear objectively. There is no disagreement as to the relevant test. As Lord Hope of Craighead stated in *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357, para 103:

> "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."

The courts have given further guidance on the nature of this judicial construct, the "fair-minded and informed observer" (to whom in this judgment I also refer as "the objective observer"). Thus, in *Helow v Secretary of State for the Home Department*

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[2008] UKHL 62; [2008] 1 WLR 2416, Lord Hope (paras 1-3) explained that the epithet "fair-minded" means that the observer does not reach a judgment on any point before acquiring a full understanding of both sides of the argument. The conclusions which the observer reaches must be justified objectively and the "real possibility" test ensures the exercise of a detached judgment. He continued:

> "Then there is the attribute that the observer is 'informed'. It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographic context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment." (Emphasis added)

I have added the emphasis in this citation because the context in which the test falls to be applied in this appeal is of particular importance.

53. Finally, in my consideration of the characteristics of the objective observer, I adopt Kirby J's neat phrase in *Johnson v Johnson* (2000) 201 CLR 488, para 53, which members of the House of Lords approved in *Helow* (above, Lord Hope para 2, Lord Mance para 39) that the fair-minded and informed observer is "neither complacent nor unduly sensitive or suspicious".

54. This objective test of the appearance of bias is similar to the test of "justifiable doubts" which is adopted in the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration 1985 (as amended in 2006) article 12(2) ("the UNCITRAL Model Law"), the IBA Guidelines (General Standard 2(c)) and article 10.1 of the LCIA Arbitration Rules (2014). It is not necessary to determine whether the tests as to the nature of the doubts in the UNCITRAL Model Law, the IBA Guidelines and the LCIA Rules are precisely the same as those of English law. The important point is that the test in English law, involving the fair-minded and informed observer, requires objectivity and detachment in relation to the appearance of bias.

55. The objective test of the fair-minded and informed observer applies equally to judges and all arbitrators. There is no difference between the test in section 24(1)(a) of the 1996 Act, which speaks of the existence of circumstances "that give rise to justifiable doubts as to [the arbitrator's] impartiality" and the common law test above. But in applying the test to arbitrators it is important to bear in mind the differences in

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nature and circumstances between judicial determination of disputes and arbitral determination of disputes.

56. First, judges resolve civil disputes in courts which are, as a general rule, open to the public; by contrast arbitration is a consensual form of dispute resolution which is generally conducted in private and of which there is very limited public oversight. A person who is not a party to an arbitration may know nothing about the arbitration and may have no ready means of discovering its existence, the evidence adduced and the legal arguments advanced at it, or the award made. Arbitrators and the parties to an arbitration are generally under a duty of privacy and confidentiality which militates against such discovery, in the absence of disclosure. That puts a premium on frank disclosure.

57. In English law arbitration is, as a general rule, a private process. In *Russell v Russell* (1880) 14 Ch D 471, 474, Sir George Jessel MR said of arbitration:

> "As a rule, persons enter into these contracts with the express view of keeping their quarrels from the public eyes, and of avoiding that discussion in public, which must be a painful one, and which might be an injury even to the successful party to the litigation, and most surely would be to the unsuccessful."

It is because arbitrations are private that arbitrators have no power to order concurrent hearings without the consent of the parties: *Oxford Shipping Co Ltd v Nippon Yusen Kaisha: "The Eastern Saga"* [1984] 2 Lloyd's Rep 373; [1984] 3 All ER 835. The 1996 Act says nothing about privacy or confidentiality. But that was a deliberate omission. In its report on the Arbitration Bill (February 1996), paras 10-17, the Departmental Advisory Committee on Arbitration Law ("the DAC") recorded that users of commercial arbitration in England "place much importance on privacy and confidentiality as essential features of English arbitrations" but, recognising that there was uncertainty as to the breadth and existence of certain exceptions to those principles, recommended that there be no statutory formulation of those principles but that the courts should be left to develop the law "on a pragmatic case-by-case basis." I will consider the principles of privacy and confidentiality further when I discuss the duty of disclosure in paras 70-116 below.

58. Secondly, unlike a judge who decides issues of fact and law at first instance and from whose decisions the parties usually have a right of appeal, an arbitrator is not subject to appeals on issues of fact and often not on issues of law. By contrast with a first instance judge, there are very limited powers of review of the decision of an arbitral tribunal.

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59. Thirdly, a judge is the holder of a public office, is funded by general taxation and has a high degree of security of tenure of office and therefore of remuneration. An arbitrator is nominated to act by one or both of the parties to the arbitration either directly or by submitting names to the appointing body, whether an institution or the court, for appointment. The arbitrator is remunerated by the parties to the arbitration in accordance with the terms set out in the reference, and often is ultimately funded by the losing party. He or she is appointed only for the particular reference and, if arbitral work is a significant part of the arbitrator's professional practice, he or she has a financial interest in obtaining further appointments as arbitrator. Nomination as an arbitrator gives the arbitrator a financial benefit. There are many practitioners whose livelihood depends to a significant degree on acting as arbitrators. This may give an arbitrator an interest in avoiding action which would alienate the parties to an arbitration, for example by assertive case management against the wishes of the legal teams who are presenting their clients' cases. It also may give those legal teams an incentive to be more assertive of their side's interests in the conduct of the arbitration than might be the case in a commercial court.

60. Fourthly, people who are appointed as arbitrators include lawyers and also other professionals and experts in a wide range of business activities, and trades. Some, like the arbitrators in this case, may have very extensive experience of arbitration practice while others may have very limited involvement in and experience of arbitration. Moreover, arbitrators in international arbitration come from many jurisdictions and legal traditions and may have divergent views on what constitutes ethically acceptable conduct.

61. Fifthly, it follows from the private nature of most arbitrations that where there are multiple references concerning the same or overlapping subject matter in which the same arbitrator is a member of the tribunal, the party which is not common to the various arbitrations has no means of informing itself of the evidence led before and legal submissions made to the tribunal (including the common arbitrator) or of that arbitrator's response to that evidence and those submissions in the arbitrations in which it is not a party. It is not unusual in commercial litigation for an interested party to instruct its lawyer to sit in on a court case involving other parties which may have a bearing on its interests in a separate action. Such an expedient is generally not available in arbitration.

62. Sixthly, in the field of international arbitration there are differing understandings of the role and obligations of the party-appointed arbitrator. There has been a lively debate as to the justification for party-appointed arbitrators and their role. See, for example, the concerns about partisanship expressed by Professor Jan Paulsson, "Moral Hazard in International Dispute Resolution" (2010) 25 ICSID Review, Foreign Investment Law Journal, p 339 and Professor Albert Jan van den Berg, "Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration" in *Looking to the Future: Essays on International Law in Honor of W*

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Michael Reisman, ed Mahnoush Arsanjani et al (Brill Academic 2010) and the defence of party-appointed arbitrators by Judge Charles N Brower and Charles B Rosenberg, "The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded", (2013) Arbitration International, Vol 29 No 1, pp 7-44. Other experienced commentators have suggested that, without compromising his or her independence and impartiality, the party-appointed arbitrator's role involves a sensitivity to the appointing party's legal, cultural and commercial background and its position in the arbitration (*Born*, *International Commercial Arbitration*, 2nd ed (2014), p 1808) and making sure that the arbitral tribunal properly understands the case of the appointing party (*Redfern and Hunter*, *Law and Practice of International Arbitration*, 6th ed (2015), para 4.30). In his written case, Lord Grabiner, who appears on behalf of Halliburton, goes further and refers to the selection of an arbitrator by a party as "forum shopping". He quotes from an article by Professor Martin Hunter, "Ethics of the International Arbitrator", ASA Bulletin, Kluwer Law International 1986, Vol 4 Issue 4, pp 173-196, at p 189, in which the author draws a distinction between impartiality and neutrality and states:

> "Indeed, when I am representing a client in an arbitration, what I am really looking for in a party-nominated arbitrator is someone with the maximum predisposition towards my client, but with the minimum appearance of bias."

In arbitrations where the parties have, or one party has, an expectation that the party-nominated arbitrator will be pre-disposed towards it, it is perceived that the person chairing the tribunal, whether appointed by the party-nominated arbitrators jointly or by an appointing institution or the court, has a particular role in making sure that the tribunal acts fairly and impartially.

63. Notwithstanding this perception of the reality in some quarters, a party-appointed arbitrator in English law is expected to come up to precisely the same high standards of fairness and impartiality as the person chairing the tribunal. Popplewell J correctly summarised the position in English law, and I would venture to say also in Scots law, when he stated in his judgment (para 19):

> "[T]he duty to act independently and impartially involves arbitrators owing no allegiance to the party appointing them. Once appointed they are entirely independent of their appointing party and bound to conduct and decide the case fairly and impartially. They are not in any sense … a representative of the appointing party or in some way responsible for protecting or promoting that party's interests."

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As Popplewell J went on to state, the duty on all arbitrators to act fairly and impartially is enshrined in section 33 of the 1996 Act. Lord Grabiner submits that London is the premier seat for international arbitration. He points to a survey of international arbitration which Queen Mary University of London carried out in 2018 which reveals that the main reasons why parties in international arbitration choose to arbitrate in England are the reputation of London and that the English legal system guarantees neutrality and impartiality. It is therefore important that English law upholds rules which support the integrity of international arbitration.

64. In applying the test of the fair-minded and informed observer it would be wrong to have regard to the characteristics of the parties to the arbitration, including the fact that one or more were foreign parties, as Popplewell J stated in para 16(6) of his judgment, referring to the judgment of Flaux J in *A v B* [2011] EWHC 2345 (Comm); [2011] 2 Lloyd's Rep 591, paras 23-24; see also *ASM Shipping Ltd of India v TTMI Ltd of England* [2005] EWHC 2238 (Comm); [2006] 1 Lloyd's Rep 375, para 39(2) per Morison J. The requirement in English law that all arbitrators, whether party-appointed or independently appointed, comply with the same high standards of impartiality, appears to be increasingly widely accepted as the legal norm internationally: see the article by the Chief Justice of Singapore, Sundaresh Menon, "Adjudicator, advocate or something in between? Coming to terms with the role of the party-appointed arbitrator", Arbitration 2017, 83(2), pp 185-202. But this does not negate the fact that in some quarters there are understandings of the arbitral process which appear not to accept that requirement. Further, some legal systems take a different view and accept the proposition that a party-appointed arbitrator has a special role in relation to his or her appointing party.

65. For example, in *Certain Underwriting Members of Lloyds of London v Florida* (2018) 892 F 3d 501; 2018 US App Lexis 15377 the United States Court of Appeals for the Second Circuit addressed a case in which a party sought to vacate an arbitral award on the ground of evident partiality because of a failure by a party-appointed arbitrator on a tri-partite panel to disclose close business relationships with directors and employees of the party appointing him. The court drew a distinction between party-appointed arbitrators on the one hand and "neutral" arbitrators on the other. It held that in the case of a party-appointed arbitrator, an undisclosed relationship with the appointing party constituted evident partiality only if the relationship violated the contractual requirement of disinterestedness or prejudicially affected the award. The court recognised that in insurance and reinsurance arbitrations the parties sought arbitral panels with expertise and that it was common to have "repeat players" who had connections with the industry. This understanding applied in relation to both party-appointed arbitrators and "neutral" arbitrators or umpires. Beyond that, recognising that party-appointed arbitrators were expected to espouse the view or perspective of the appointing party and serve as de facto advocates, it considered that party appointment involved various degrees of partiality in contrast with the neutral arbitrator. It is clear from the judgment (p 509) that several circuits draw this distinction between party-appointed and neutral arbitrators. Closer to home, in this

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case Mr Birsic sought in his second witness statement to the High Court to distinguish Mr Rokison's obligations as the neutral chair of the tribunal and those of Professor Park as a party-appointed arbitrator (para 27 above).

66. When such ideas are in play the parties in reality put a particularly heavy responsibility on the arbitrator who is not a party-appointee and who chairs the tribunal. The courts in applying the test of the fair-minded and informed observer 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. To do so is not to measure apparent bias by reference to the subjective understanding of the parties to a particular arbitration and thereby to abandon the objective assessment which the fair-minded and informed observer entails. Nor is it an acceptance that there is any difference in English law as to the obligation of impartiality owed by different types of arbitrator, for there is none. It is to recognise the context in which the objective observer's judgement as to apparent bias is being made. The objective observer takes account of how some parties and their appointees conduct themselves in such arbitrations and of the debate within the arbitration community as to the role of the party-appointed arbitrator when considering whether "mixing and matching" (as counsel put it) the roles as party appointee in one reference and chairman of an arbitral tribunal in a related reference would pose a risk to the arbitrator's impartiality in either case.

67. The fair-minded and informed observer would also be aware that in international arbitration the parties to an arbitration and their legal advisers may often have only limited knowledge of the reputation and experience of a professional who is appointed by an institution or by the court to chair their arbitration. While many parties and their advisers who are engaged in high value international arbitrations devote considerable resources to researching the background of people who might be suitable for selection as party-appointed arbitrators or as nominees for third party appointment, there is no basis for assuming that that practice is universal. The professional reputation and experience of an individual arbitrator is a relevant consideration for the objective observer when assessing whether there is apparent bias as an established reputation for integrity and wide experience in arbitration may make any doubts harder to justify. But the weight which the fair-minded and informed observer should give to that consideration will depend upon the circumstances of the arbitration and whether, objectively and as a generality, one could expect people who enter into references of that nature to be informed about the experience and past performance of arbitrators. In the context of many international arbitrations, it is likely to be a factor of only limited weight. The weight of that consideration may also be reduced if the circumstances give rise to a material risk of unconscious bias on the part of a person of the utmost integrity: *Almazeedi v Penner* [2018] UKPC 3, para 1 per Lord Mance.

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68. On other hand, the objective observer is alive to the possibility of opportunistic or tactical challenges. Parties engage in arbitration to win. Their legal advisers present their cases to the best of their ability, and this pursuit can include making tactical objections or challenges in the hope of having their dispute determined by a tribunal which might, without any question of bias, be more predisposed towards their view or simply to delay an arbitral determination. The courts are alive to similar tactical objections in litigation. In *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, the Court of Appeal (Lord Bingham of Cornhill CJ, Lord Woolf MR and Sir Richard Scott V-C) addressed the circumstances in which judicial office holders may be required to disqualify themselves from hearing a case. The court stated (para 25) that it would be dangerous and futile to attempt to define or list the factors which may or may not give rise to what we now describe as a real possibility of bias; "[e]verything will depend on the facts, which may include the nature of the issue to be decided". The court stated (para 21):

> "If objection is then made, it will be the duty of the judge to consider the objection and exercise his judgment upon it. He would be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance."

The court went on (para 22) to cite with approval dicta of Mason J in the High Court of Australia in *In re JRL, Ex p CJL* (1986) 161 CLR 342, 352:

> "Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."

An arbitrator when deciding to accept a reference is not under the same obligation as a judge to hear a case but, having taken up the reference, the arbitrator may reasonably feel under an obligation to carry out the remit unless there are substantial grounds for self-disqualification. Similarly, a court, when asked to remove an arbitrator, needs to be astute to see whether the ground of real possibility of bias is made out.

69. Summarising the position so far, the English courts in addressing an allegation of apparent bias in an English-seated arbitration will (i) apply the objective test of the fair-minded and informed observer and (ii) have regard to the particular characteristics of international arbitration which I have discussed in paras 56 to 68. Those characteristics highlight the importance of proper disclosure as a means of maintaining the integrity of international arbitration, a topic to which I now turn.

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(ii) Disclosure

a) The role of disclosure

70. An arbitrator, like a judge, must always be alive to the possibility of apparent bias and of actual but unconscious bias. The possibility of unconscious bias on the part of a decision-maker is known, but its occurrence in a particular case is not. The allegation, which is advanced in this case, of apparent unconscious bias is difficult to establish and to refute. One way in which an arbitrator can avoid the appearance of bias is by disclosing matters which could arguably be said to give rise to a real possibility of bias. Such disclosure allows the parties to consider the disclosed circumstances, obtain necessary advice, and decide whether there is a problem with the involvement of the arbitrator in the reference and, if so, whether to object or otherwise to act to mitigate or remove the problem: see *Almazeedi* (above) para 34; *Davidson v Scottish Ministers (No 2)* [2004] UKHL 34; 2005 1 SC (HL) 7. In the latter case, Lord Hope of Craighead stated (para 54):

> "[T]he best safeguard against a challenge after the event, when the decision is known to be adverse to the litigant, lies in the opportunity of making a disclosure before the hearing starts. That is the proper time for testing the tribunal's impartiality. Fairness requires that the quality of impartiality is there from the beginning, and a proper disclosure at the beginning is in itself a badge of impartiality."

That statement mutatis mutandis applies to the arbitrator as much as to the judge. In *Davidson* (above, para 19) Lord Bingham of Cornhill spoke with approval of the practice of judges to "disclose a previous activity or association which would or might provide a basis for a reasonable apprehension of lack of impartiality" (emphasis added). When, on being asked to accept an appointment, an arbitrator knows of a matter which ought to be disclosed to the parties to the reference, prompt disclosure to those parties of that matter provides the safeguard as the quality of impartiality is shown to have been there from the beginning. But the obligation of impartiality continues throughout the reference and the emergence during the currency of the reference of matters which ought to be disclosed means that an arbitrator's prompt disclosure of those matters can enable him or her to maintain what Lord Hope calls the "badge of impartiality".

71. The various arbitral codes to which we were referred address the need for proper disclosure in arbitrations. The IBA Guidelines 2014 set out good arbitral practice which is recognised internationally, and Popplewell J in setting out his uncontested principles in para 16 of his judgment in this case correctly stated that they

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can assist the court in identifying what is an unacceptable conflict of interest and what matters may require disclosure: para 16(7). But the IBA Guidelines do not of themselves give rise to legal obligations or override national law or the arbitral rules chosen by the parties: IBA Guidelines, Introduction para 6. By contrast, the submission to arbitration under arbitral rules can give rise to legal obligations. An agreement to submit to arbitration under the ICC Arbitration Rules 2017 is deemed to be a submission to those rules (article 6) and similar provision is made in the preamble to the LCIA Rules 2014 to give contractual effect to the relevant rules.

72. Under those codes the arbitrator is required to make disclosure of facts and circumstances that may in the eyes of the parties give rise to doubts about the arbitrator's independence and impartiality. Thus, in the IBA Guidelines, General Standard 3, the duty of disclosure is triggered by the existence of facts and circumstances "that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence" (emphasis added). It is clear from the explanation of General Standard 3 that under the IBA Guidelines the duty of disclosure arises out of the parties' interest in being fully informed and a disclosure does not imply the existence of a conflict of interest. Article 11 of the ICC Arbitration Rules and article 5.4 of the LCIA Rules, relating to disclosure, have a similar focus on the perceptions of the parties to an arbitration. This subjective approach to the duty of disclosure in the IBA Guidelines and the rules of the arbitral institutions addresses the perception of the parties to an arbitration who are people or entities involved in a stressful and often expensive dispute. English law, by contrast, adopts an objective test by looking to the judgement of the fair-minded and informed observer. The codes also use different expressions in describing the nature of the doubts. The IBA Guidelines (General Standard 3) speak simply of "doubts" while the ICC Rules (article 11) speak of "reasonable doubts" and the LCIA Rules (article 5.4) speak of "justifiable doubts". But I do not think that there is a material difference between those formulations, as I do not construe the IBA Guidelines or the institutions' rules as requiring disclosure when the only doubts to which the circumstances might give rise would be unreasonable or unjustified.

73. It is also clear that an arbitrator may fail to make disclosure for entirely honourable reasons, such as forgetfulness, oversight, or a failure properly to recognise how matters would appear to the objective observer. But as Lord Bingham of Cornhill stated in *Davidson* (above, para 19), "[h]owever understandable the reasons for it, the fact of non-disclosure in a case which calls for it must inevitably colour the thinking of the observer".

b) Whether there is a legal duty of disclosure?

74. A question, on which Popplewell J and the Court of Appeal reached contradictory conclusions and which is material to this appeal, is whether disclosure is

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a legal duty in English law or merely good arbitral practice unless the parties submit their dispute to arbitration under arbitral rules which impose a legal obligation. The Court of Appeal held (para 71):

> "the present position under English law to be that disclosure should be given of facts and circumstances known to the arbitrator which, in the language of section 24 of the Act, would or might give rise to justifiable doubts as to his impartiality."

The court continued:

> "Under English law this means facts or circumstances which would or might lead the fair-minded and informed observer, having considered the facts, to conclude that there was a real possibility that the arbitrator was biased." (Emphasis added)

75. The Court of Appeal held that this is a legal duty. In so holding, the Court of Appeal has developed the English law of arbitration. The question arises whether it was correct to do so.

76. In my view the Court of Appeal was correct so to hold. An arbitrator is under the statutory duties, in section 33 of the 1996 Act, to act fairly and impartially in conducting arbitral proceedings, in decisions on matters of procedure and evidence and in the exercise of all powers conferred on him or her (para 49 above). Those statutory duties give rise to an implied term in the contract between the arbitrator and the parties that the arbitrator will so act. The arbitrator would not comply with that term if the arbitrator at and from the date of his or her appointment had such knowledge of undisclosed circumstances as would, unless the parties waived the obligation, render him or her liable to be removed under section 24 of the 1996 Act.

77. Moving away from the circumstances of this appeal, if one supposes that an arbitrator has a close financial relationship with a party to the arbitration in which he or she is or is to be appointed, there can be little doubt that such a relationship could readily give rise to justifiable doubts as to the arbitrator's impartiality. Indeed, if the arbitrator had a financial interest in the dispute he or she would be disqualified and the award would be voidable: *Dimes v Proprietors of Grand Junction Canal* (1852) 3 HL Cas 759; 10 ER 301. But absent disclosure, the other party to the arbitration would be unaware of that disqualifying interest. In such circumstances it would in my view be incumbent on the arbitrator to disclose the relationship in order to comply with his statutory duty of fairness under section 33 of the 1996 Act. The duty of fairness is engaged because it is necessary that the other party to the arbitration be aware of the

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arbitrator's financial connection with the first party and so be able to form a judgment as to his or her suitability as an arbitrator.

78. Unless there is disclosure, the parties may often be unaware of matters which could give rise to justifiable doubts about an arbitrator's impartiality and entitle them to a remedy from the court under section 24 of the 1996 Act. Those remedies are necessary in the public interest. A legal obligation to disclose such matters is encompassed within the statutory obligation of fairness. It is also an essential corollary of the statutory obligation of impartiality: an arbitrator who knowingly fails to act in a way which fairness requires to the potential detriment of a party is guilty of partiality. Unless the parties have expressly or implicitly waived their right to disclosure, such disclosure is not just a question of best practice but is a matter of legal obligation.

79. While the statutory duty on the arbitrator to act fairly and impartially arises on his or her appointment, there is a necessity for pre-appointment disclosure if the arbitration system is to operate smoothly and the making of such disclosure is recognised as good practice. If an arbitrator waited until after appointment to make disclosure, the arbitrator might have to resign after appointment when a party objects to his or her appointment following disclosure. Unsurprisingly, there is an established practice of pre-appointment disclosure by prospective arbitrators.

80. It is striking that ICC, LCIA and CIArb, which have no financial interest in the outcome of this litigation but have an interest in the integrity and reputation of English-seated arbitration, argue in favour of the recognition of such a legal duty. The existence of a legal duty promotes transparency in arbitration and is consistent with best practice as seen in the IBA Guidelines and in the requirements of institutional arbitrations such as those of ICC and LCIA.

81. In summary, I would hold that there is a legal duty of disclosure in English law which is encompassed within the statutory duties of an arbitrator under section 33 of the 1996 Act and which underpins the integrity of English-seated arbitrations.

c) The relationship between disclosure and the duty of privacy and confidentiality

82. In this appeal, which concerns the allegation that an arbitrator should have disclosed the existence of a related arbitration involving a common party, it is necessary to consider the obligation in English law on an arbitrator to uphold the privacy and confidentiality of an arbitration which has an English seat and the boundaries of that obligation.

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83. English-seated arbitrations are both private and confidential, if the law governing the confidentiality of the arbitration is English law. The obligations on the parties to uphold the privacy and confidentiality of an arbitration have been characterised as implied obligations arising out of the nature of arbitration itself: *Dolling-Baker v Merrett* [1990] 1 WLR 1205 (CA), 1213 per Parker LJ; *Ali Shipping Corpn v Shipyard Trogir* [1999] 1 WLR 314, 326 per Potter LJ. In the latter case Potter LJ stated, "the parties have indicated their presumed intention simply by entering into a contract to which the court attributes particular characteristics". This analysis coincides with the view expressed by Sir Patrick Neill QC in his lecture, "Confidentiality in Arbitration" which he delivered in 1995, which is published in (1996) 12 Arb Int 287-318, and which the DAC cited with approval in their Report on the Arbitration Bill (para 12). In that lecture he described the privacy and confidentiality of arbitration proceedings as "a fundamental characteristic of the agreement to arbitrate" (p 316). In *Department of Economics, Policy and Development of the City of Moscow v Bankers Trust Co* [2004] EWCA Civ 314; [2005] QB 207, Mance LJ stated (para 2): "Among features long assumed to be implicit in parties' choice to arbitrate in England are privacy and confidentiality". Mance LJ went on to state (para 30) that the changes to the CPR in 1997 and 2002:

> "rest clearly on the philosophy of party autonomy in modern arbitration law, combined with the assumption that parties value English arbitration for its privacy and confidentiality. Party autonomy requires the court so far as possible to respect the parties' choice of arbitration. Their choice of private arbitration constitutes an election for an alternative system of dispute resolution to that provided by the public courts. The same philosophy limits court intervention to the minimum necessary in the public interest, which must include the public interest in ensuring not that arbitrators necessarily decide cases in a way which a court would regard as correct, but that they at least decide them in a fundamentally fair way: see section 1 of the 1996 Act."

In his illuminating judgment in *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184; [2008] Bus LR 1361 Lawrence Collins LJ (para 84) described the fundamental characteristics of privacy and confidentiality in an agreement to arbitrate under English law as being "really a rule of substantive law masquerading as an implied term". Arbitrators also must respect the private nature of the proceedings in which they are engaged: *The Eastern Saga* (para 57 above). They are bound to uphold the privacy and confidentiality of the arbitration, whether as a result of contract or in performance of an equitable duty because they have acquired the information in circumstances importing an obligation of confidence.

84. The common law does not limit the obligation of privacy and confidentiality to information, such as a trade secret, which is inherently confidential but extends it to

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notes of evidence and other documents disclosed or generated in arbitration because of the implied agreement that such documents can only be used for the purpose of the arbitration. Further, privacy may be violated by the publication or dissemination of documents deployed in the arbitration or information relating to the conduct of the arbitration. See *Emmott v Michael Wilson & Partners Ltd* (above) Lawrence Collins LJ (paras 79-83), Thomas LJ (para 129(i)-(iv)).

85. What are the boundaries of the arbitrator's obligation of privacy and confidentiality which would allow for or prevent disclosure? While there is broad agreement that the obligation is not absolute, its boundaries are unclear. The law in this area is developing. It is sufficient to quote Lawrence Collins LJ's summary in *Emmott* (above) para 107 of the principal cases in which disclosure is permissible:

> "In my judgment the content of the obligation may depend on the context in which it arises and on the nature of the information or documents at issue. The limits of that obligation are still in the process of development on a case-by-case basis. On the authorities as they now stand, the principal cases in which disclosure will be permissible are these: the first is where there is consent, express or implied; second where there is an order or leave of the court (but that does not mean that the court has a general discretion to lift the obligation of confidentiality); third, where it is reasonably necessary for the protection of the legitimate interests of an arbitrating party; fourth, where the interests of justice require disclosure, and also (perhaps) where the public interest requires disclosure."

As I have stated (para 57 above), the DAC did not support legislative definition but left the task of developing the rules relating to the privacy and confidentiality of arbitrations, including the boundaries of and exceptions to those obligations, to the judiciary. Parliament enacted the 1996 Act against that background. In this appeal the court is not concerned with identifying an exception to the duty of privacy and confidentiality but seeks to discover the extent to which the parties have implicitly consented to disclosure.

86. After the hearing of this appeal, it became clear that the court needed further assistance from the parties and interveners concerning arbitral practices in making disclosure. In particular, the court sought guidance on practice in relation to the disclosure of facts concerning a related arbitration or arbitrations without obtaining the express permission of the parties to the arbitration about which information was being disclosed, and what were the practical consequences of the recognition of a legal duty of disclosure in those circumstances. Both parties and each of the interveners prepared careful written submissions for which the court is very grateful.

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87. It is clear from the parties' and interveners' initial cases and from their further submissions that there is a variety of arbitral practices in relation to the disclosure of multiple appointments in different contexts. In this context I use the expression "multiple appointments" to cover the acceptance of appointments in multiple references concerning the same or overlapping subject matter with only one common party as described in issue 1 in para 2 above. What is appropriate for arbitration in which the parties have submitted to institutional rules, such as those of ICC and LCIA, differs from the practice in GAFTA and LMAA arbitrations. There are practices in maritime, sports and commodities arbitrations, as the IBA Guidelines recognise (para 133 below), in which engagement in multiple overlapping arbitrations does not need to be disclosed because it is not generally perceived as calling into question an arbitrator's impartiality or giving rise to unfairness.

88. Where the information which must be disclosed is subject to an arbitrator's duty of privacy and confidentiality, disclosure can be made only if the parties to whom the obligations are owed give their consent. In such a circumstance, if a person seeking appointment as an arbitrator in a later arbitration does not obtain the consent of the parties to a prior related arbitration to make a necessary disclosure about it, or the parties to the later arbitration do not consent to the arbitrator's disclosure of confidential matters relating to that prospective appointment to the parties to the earlier arbitration, the arbitrator will have to decline the second appointment. Such consent may be express or may be inferred from the arbitration agreement itself in the context of the custom and practice in the relevant field.

89. Regard must be had to the relevant custom and practice to ascertain whether consent can be inferred. For example, in an Admiralty case concerning a Lloyd's Open Forum ("LOF") arbitration, Peter Gross QC (sitting as a deputy High Court judge) agreed with the parties that "the implied term of confidentiality in LOF arbitration agreements is qualified by the custom and practice of awards being made available to LOF arbitrators and counsel in other LOF cases, with a view to promoting uniformity and consistency within the LOF system of arbitration": *The Hamtun (owners) v The St John (owners)* [1999] 1 All ER (Comm) 587, 611. By agreeing to arbitrate in accordance with the terms and practice of a particular arbitral institution the arbitrating parties implicitly consent to the qualification or limitation of the obligations of privacy and confidentiality.

90. In arbitrations which are governed by institutional rules which require disclosure to the institution or the parties of matters which may include information about other arbitrations (such as the ICC Arbitration Rules, article 11(2), the LCIA Rules, article 5.4, and the ICSID Arbitration Rules, rule 6(2)), the incorporation of such rules into an arbitration (arbitration 1) provides a basis for the inference that the parties to that arbitration consent to disclosure of such information about that arbitration to the parties to a prospective arbitration (arbitration 2) under such rules.

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Similarly, one can readily infer from the submission of the parties in arbitration 2 to such rules that they have consented to such disclosure to the parties to arbitration 1.

91. 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 a 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. As I have said, there is evidence of similar practice in re-insurance arbitrations: para 43 above.

92. Where parties submit to an ad hoc arbitration, practice as to privacy, confidentiality and disclosure may differ. Such arbitrations may include those in which the parties maintain the confidentiality of the existence of the arbitration itself by prohibiting any disclosure whatsoever. In such a case, the consent of both parties to the arbitration would be required to enable an arbitrator to disclose its existence to the parties to another arbitration. Whether an arbitrator can make disclosure of an existing or prospective arbitration without first obtaining the express consent of all parties to the arbitration about which disclosure requires to be made will depend on the relevant arbitration agreement and the custom and practice in the relevant field.

93. In this appeal the court is concerned with a Bermuda Form arbitration which is a specialist form of arbitration (para 11 above). It is not disputed that it is common practice for parties, and in particular insurance companies, to appoint arbitrators who have experience in interpreting the Bermuda Form policy on repeated occasions, including in arbitrations relating to the same occurrence. There are sound reasons for doing so because the Bermuda Form contains some unique provisions and there is an interest in obtaining consistency of interpretation of the policy in the absence of published reports of the awards which the arbitrators have made. As Popplewell J stated (in para 23 of his judgment) parties often wish their arbitral tribunal to have particular knowledge and expertise in the law and practices of the relevant business or market.

94. It is not uncommon for arbitrators in Bermuda Form arbitrations to disclose their involvement in prior or current arbitrations involving a common party without disclosing the identity of the other party or details concerning the arbitration, as the circumstances of this case demonstrate.

95. But in this appeal the parties disagree as to the practice of disclosure in Bermuda Form arbitrations. Halliburton asserts that there is both a practice and a legal requirement to disclose the minimum information necessary to achieve proper

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disclosure while Chubb says that there is no established practice of disclosure in Bermuda Form arbitrations. I will address that question in para 137 below after I have considered the content of the duty of disclosure. It is sufficient at this stage to state that I am satisfied that in English law such multiple appointments must be disclosed in the absence of contrary agreement.

96. The question which is relevant at this stage is: does the arbitrator need to obtain the express consent of the parties to the arbitration about which disclosure is to be made before making such disclosure?

97. The parties agree that the disclosures which, in accordance with common practice in England, Mr Rokison made to the court in reference 1 and to Transocean in reference 2 did not breach his obligation of confidentiality to the parties to the references which were disclosed. Other nominees for appointment by the court in reference 1 made similar disclosures without seeking consent.

98. Mr Rokison's disclosure, which Clyde & Co passed on to Transocean on 23 December 2015, stated:

> "… I have acted as party-appointed arbitrator and chairman in many 'Bermuda Form' arbitrations, a number of which, not surprisingly, have involved [Chubb], who have appointed me as their nominated arbitrator on various occasions. I have also previously acted as chairman in two other arbitrations, in which [Chubb] was a party.
>
> Currently I have only three pending cases involving [Chubb]. In one, I am their appointee; in the second, I have been appointed as sole arbitrator by agreement between the parties; and, in the third, I have been appointed as third arbitrator by order of the London Commercial Court. The last of these also happens to involve what I understand is a different aspect of the Deepwater Horizon incident.
>
> I do not consider that the above matters affect my independence or impartiality, which I have always been at pains to maintain, but I nonetheless consider that these are matters which ought to be disclosed at this stage, rather than risking possible disruption of the arbitral proceedings after they have got under way."

99. It is not disputed that the duty of privacy and confidentiality is not absolute, that the parties to an arbitration can determine as a matter of contract the extent to which they wish matters to be treated as confidential, or that there is a common

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practice for arbitrators in English-seated arbitrations to make such high-level disclosure of their involvement in other relevant arbitrations without obtaining the express consent of the parties to the arbitrations about which disclosure is being made. Halliburton's position is that the arbitrator's duty of confidentiality does not prevent the disclosure of the names of the parties to the disclosed arbitration. Chubb's position is that the arbitrator's duty of confidentiality covers the identity of the parties but that the information which Mr Rokison disclosed to Transocean, which did not include the identity of the parties other than Chubb itself, which was the common party who proposed his appointment, or the issues in the disclosed arbitrations, was confidential to Chubb alone and the disclosure was made on Chubb's behalf. The needed consent can therefore be inferred.

100. There also appears to be broad agreement between ICC, LCIA and CIArb that as a general rule, in the context of a proposed appointment by a common party, an arbitrator can disclose the existence of a current or past arbitration involving a common party and the identity of the common party (but not the identity of the other party or parties) without obtaining the express consent of the parties to that arbitration, unless the parties to that arbitration have agreed to prohibit such disclosure. The arbitrator may similarly disclose the proposal for his or her engagement in a proposed arbitration and the identity of the common party who is seeking to make the appointment or nomination. The widespread arbitral practice in English-seated arbitrations, which those institutions describe, supports the view that an arbitrator can do so on a confidential basis without breaching his or her obligation of privacy and confidentiality.

101. This current practice of arbitrators in English-seated arbitrations vouches two things. First, as a general rule the duty of privacy and confidentiality is not understood to prohibit all forms of disclosure of the existence of a related arbitration in the absence of express consent. Secondly, the duty of disclosure does not give an arbitrator carte blanche to disclose whatever is necessary to persuade a party that there is no justification for doubts about his or her impartiality. There will be many matters which cannot be disclosed without the express consent of the parties to that arbitration. As I discuss further in para 146 below, the information that can be disclosed in this context without having to obtain the express consent of the parties to the disclosed arbitration is limited. In many cases such a limited disclosure may satisfy the recipient, as Transocean's response to Mr Rokison's disclosures shows. If an arbitrator needs to disclose more detail about another arbitration in order to comply with the duty of disclosure, the arbitrator or proposed arbitrator must obtain the consent of the parties to the arbitration or proposed arbitration about which he or she is making a disclosure.

102. It is clear from the responses to the court's further questions that participants in arbitration understand that the information which is disclosed can be used by its recipients only for the purpose of judging the impartiality and suitability of the

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arbitrator making the disclosure. The legal basis for this expectation or practice is that there is an equitable duty on the recipient to confine the use of the information to the purpose for which it was disclosed because (a) the information about the related arbitration is of a confidential nature and (b) it is imparted in circumstances importing an obligation of confidence: *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41, 47 per Megarry J. The first of these criteria is met because of the general rule that English-seated arbitrations are private matters. The second is met because the recipients of the disclosure know that the information which is the subject of the disclosure has been given to the arbitrator in the context of a confidential relationship between the arbitrator and the parties to the arbitration or prospective arbitration whose existence is being disclosed.

103. In my view, the law can and should recognise the realities of accepted commercial and arbitral practice as a guide both in the formulation of legal rules and in the interpretation of the parties' contracts when the practice operates in the public interest. In this case it should do so. In the 18th century, Lord Mansfield as Chief Justice of the King's Bench used honest commercial practices and informal rulings on the lex mercatoria to shape the common law in relation to commercial matters. More recently, Lord Goff of Chieveley in an extra-judicial writing ("Commercial Contracts and the Commercial Court" [1984] LMCLQ 382, 391) described the role of a judge to assist honest businesspeople in these terms:

> "We are there to give effect to their transactions, not to frustrate them: we are there to oil the wheels of commerce, not to put a spanner in the works, or even grit in the oil."

There is a public interest in upholding the integrity of arbitration as a system of alternative dispute resolution by ensuring that there is proper disclosure of an arbitrator's involvement in related arbitrations in a field of arbitration in which repeated appointments occur but in which there is no common understanding that disclosure is not required. There is also a strong public interest in giving greater certainty as to the legal standing of established arbitral practice and the relationship between the duty of disclosure and an arbitrator's duty to respect the privacy and confidentiality of an arbitration.

104. In short, this court should hold that in Bermuda Form arbitrations an arbitrator may, in the absence of agreement to the contrary by the parties to the relevant arbitration, make disclosure of the existence of that arbitration and the identity of the common party in accordance with the practice which I have described without obtaining the express consent of the relevant parties. The consent of the common party can be inferred from its action in seeking to nominate or to appoint the arbitrator. The consent of the other party is not required for such limited disclosure. In legal analysis, the contract or contracts under which the arbitrator has been appointed in an existing

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or past arbitration is to be interpreted in the light of the custom and practice in the relevant field of arbitration and the party or parties to whom the relevant duty of confidence is owed are taken to have consented to such disclosure on a confidential basis. The common law obligation of confidence owed by a candidate for appointment to a prospective arbitration is to be understood in the same way.

105. It appears from the submissions of ICC, LCIA and CIArb that the practice in English-seated arbitrations of making a confidential disclosure of involvement in an arbitration involving a common party without obtaining the express consent of the parties to that arbitration is, unsurprisingly, not confined to Bermuda Form arbitrations. Nonetheless, how far this ruling on consent, which relates to Bermuda Form arbitrations, can be applied by analogy to other arbitrations will depend on their particular characteristics and circumstances and custom and practice in their field.

d) The risk of further challenges?

106. For completeness, I also address the suggestion by Chubb that the recognition of a legal duty of disclosure will tend to increase the number of challenges to appointment and to awards and possibly give rise to personal claims against arbitrators. Halliburton, ICC, LCIA and CIArb do not agree and none of the respondents to the court's questions are able to assist the court with empirical evidence on the matter. There is some empirical evidence that, in the years immediately after the IBA Guidelines were adopted in 2004, there was an increase in challenges to arbitrators as a result of disclosures. But three points may be made. First, this increase was not a consequence of making disclosure a legal duty but may have been the result of more extensive disclosure which followed the formulation of good practice. Secondly, that statement of good practice exists and is influential internationally whether or not a jurisdiction has a legal duty of disclosure. Thirdly, the challenges have rarely succeeded. Further, research carried out within the court in relation to jurisdictions which impose a legal duty of disclosure found very little evidence of personal claims against arbitrators. I respectfully question whether there is a basis in English law for a claim for damages relating to disclosure or non-disclosure, in the absence of bad faith, where the legal duty is a component of the statutory duties of fairness and impartiality which do not support such claims. In any event, section 29 of the 1996 Act will protect arbitrators against personal claims for non-disclosure in most circumstances so long as the arbitrator has not acted in bad faith. The LCIA Arbitration Rules (article 31) and the ICC Arbitration Rules (article 41) contain exclusion provisions and parties, arbitrators and institutions, who have not already done so, can adapt their contracts or rules to confer a wider immunity against personal claims in the light of this ruling.

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e) What is the content of the duty?

107. I also agree with the Court of Appeal's formulation of the duty of disclosure (para 74 above) subject to one qualification, which concerns the words "known to the arbitrator". An arbitrator can disclose only what he or she knows and is, as a generality, not required to search for facts or circumstances to disclose. But I do not rule out the possibility of circumstances occurring in which an arbitrator would be under a duty to make reasonable enquiries in order to comply with the duty of disclosure. For example, if a would-be arbitrator had a business relationship with a person (A), which, because of a financial interest, would have prevented him from being an arbitrator in a reference in which A was a party, he or she, if offered an appointment in an arbitration in which B was a party, might be under an obligation to make enquiry if he or she had grounds to think that B might a business partner of A. Mr Kimmins, on behalf of LCIA, referred the court to the IBA Guidelines, Part I, General Standard 7(d), and submitted that an arbitrator is under a duty to make reasonable enquiries as to whether there are facts or circumstances which might lead the fair-minded and informed observer to conclude that there was a real possibility of bias. It is not necessary in the context of this appeal to express a concluded view on whether this statement of good practice is also an accurate statement of English law, but I do not rule out that it might be.

108. What is meant by the Court of Appeal's formulation of the duty, and in particular the words "would or might"? Counsel hardly touched on this issue. It is not central to the dispute but it must be addressed. It appears to me that if some matter would give rise to justifiable doubts as to an arbitrator's impartiality, the disclosure of that matter would not as a general rule remove the difficulty. The correct course for the arbitrator would usually be not to take up or, if the matter arose later, to withdraw from the reference. On the other hand, to require disclosure of some matter which was trivial and could not materially support a conclusion that there was a real possibility of bias, would be to risk causing the parties unnecessary concerns about an arbitrator's impartiality and also to encourage vexatious challenges by a party to the arbitrator's position. As Lord Mance stated in *Helow* (above, para 58):

> "[T]o take two opposite extremes, disclosure could not avoid an objection to a judge who in the light of the matter disclosed clearly ought not to hear the case; and non-disclosure could not be relevant, if a fair-minded and informed observer would not have thought that there was anything even to consider disclosing."

An obligation to disclose a matter which "might" give rise to justifiable doubts arises only where the matter might reasonably give rise to such doubts.

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109. There will be matters between the two extremes of which Lord Mance spoke. There will be matters which, if left unexplained, would give rise to justifiable doubts as to an arbitrator's impartiality. They must be disclosed and neutralised by explanation. Similarly, there will be matters, which are more than trivial, which an arbitrator ought to recognise could by themselves or in combination with other circumstances (including a failure to disclose those matters) give rise to such justifiable doubts, if later discovered.

110. Commentators have sought to express the requirement in different ways. *Redfern and Hunter* (above, paras 4.79-4.80) suggest that the arbitrator should disclose "all of the facts that could reasonably be considered to be grounds for disqualification" and also that there should be immediate disclosure if new circumstances arise "that might give cause for any doubt" as to the arbitrator's impartiality. *Merkin and Flannery on the Arbitration Act 1996*, 6th ed (2019), pp 286-287, advise that an arbitrator should disclose "any fact or circumstance which in his or her mind would or might (once disclosed) give rise to justifiable doubts as to his or her impartiality". The authors draw on the case of *Almazeedi* (above) and suggest that the purpose of disclosure may often go beyond legitimate concerns about independence and impartiality which would (subject to waiver) require the arbitrator to recuse himself or herself because such disclosure enables the parties to address whether there is a problem and if so how to tackle it. They advise disclosure in cases where the arbitrator "might not be sure whether the truth, if disclosed, would give rise to justifiable doubts, but would (or ought to) know that the truth might do so". *D Sutton et al, Russell on Arbitration*, 24th ed (2015), para 4-131 state that an arbitrator should disclose a prior interest "that might raise doubts about his impartiality" but go on to suggest that the only legal obligation is to disclose matters which would amount to bias. Like the Court of Appeal, I am not persuaded that the legal obligation is limited as the authors of *Russell* suggest in their second statement.

111. It has been suggested that the breach of a legal obligation to disclose a matter which might, but on examination after the event did not, give rise to a real possibility of bias would be a legal wrong for which there was no legal sanction. I do not agree for two reasons. First, in a case in which the matter is close to the margin, in the sense that one would readily conclude that there is apparent bias in the absence of further explanation, the non-disclosure itself could justify the removal of the arbitrator on the basis of justifiable doubts as to his or her impartiality: paras 117-118 below. Secondly, in cases where the matter is serious but the non-disclosure of that matter, on later examination, does not support the conclusion that there is apparent bias, the arbitrator might, depending on the circumstances, face an order to meet some or all of the costs of the unsuccessful challenger or to bear the costs of his or her own defence. The existence of such a duty provides support to the fairness and impartiality of arbitral proceedings under English law by allowing non-disclosure to carry greater weight in the basket of factors to be assessed under section 24(1)(a) of the 1996 Act than a mere deviation from best practice.

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112. The development of the common law to impose such a duty is consistent with developments in other jurisdictions. In Scotland, there was no express authority but legal commentators on arbitration had long suggested that "an arbiter is subject to a duty to disclose to the parties any factor of which he is aware which might provide a basis for a challenge": *F Davidson*, *Arbitration*, 1st ed (2000), para 6.20 and the commentaries which he there cites. More recently, the Scottish Parliament has enacted a mandatory rule in the Arbitration (Scotland) Act 2010, which draws on the UNCITRAL Model Law. This rule (Schedule 1, rule 8) imposes a duty on an arbitrator or anyone asked to become an arbitrator to disclose any conflicts of interest. It provides that the individual must without delay make disclosure of:

> "any circumstances known to the individual (or which become known to the individual before the arbitration ends) which might reasonably be considered relevant when considering whether the individual is impartial and independent."

Professor Davidson in the second edition of his book (in 2012) (paras 7.29-7.30) observes that this is an objective test and suggests that the factors listed in the Red and Orange Lists of the IBA Guidelines will usually provide useful guidance.

113. Several jurisdictions have adopted the UNCITRAL Model Law which provides in article 12(1):

> "When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties …" (Emphasis added)

The word "likely" in the UNCITRAL 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 could reasonably give rise to justifiable doubts. 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 <u>give rise</u> to justifiable doubts" (emphasis added).

114. Provisions to substantially the same effect have been adopted in jurisdictions which have adopted the UNCITRAL Model Law, including Germany (section 1036 of Book 10 of the Zivilprozessordnung), Canada (article 12 of Schedule 1 to the Canadian Commercial Arbitration Act, RSC 1985), Belgium (article 1686(1) of the Belgian Judicial Code), Sweden (sections 8 and 9 of the Swedish Arbitration Act

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1999) and Austria (section 588 of the Austrian Arbitration Act 2006). In Switzerland, although the rule is not part of a statutory regime, the Swiss Chambers' Arbitration Institution has adopted the UNCITRAL Model Law's approach in article 9(2) of its "Swiss Rules of International Arbitration".

115. It is consistent with these international comparators for English common law in relation to the obligation of disclosure of an arbitrator to develop as the Court of Appeal has found.

f) Summary on disclosure

116. In summary, the arbitrator's legal obligation of disclosure imposes an objective test. This differs from the rules of many arbitral institutions which look to the perceptions of the parties to the particular arbitration and ask whether they might have justifiable doubts as to the arbitrator's impartiality. The legal obligation can arise when the matters to be disclosed fall short of matters which would cause the informed observer to conclude that there was a real possibility of a lack of impartiality. It is sufficient that the matters are such that they are relevant and material to such an assessment of the arbitrator's impartiality and could reasonably lead to such an adverse conclusion. Whether and to what extent an arbitrator may disclose the existence of a related arbitration without obtaining the express consent of the parties to that arbitration depends upon whether the information to be disclosed is within the arbitrator's obligation of privacy and confidentiality and, if it is, whether the consent of the relevant party or parties can be inferred from their contract having regard to the customs and practices of arbitration in their field.

(iii) Whether a failure to make disclosure can demonstrate a lack of impartiality

117. Is disclosure relevant to apparent bias? Mr Michael Crane QC on behalf of Chubb correctly makes the point that the inequality of knowledge, which Halliburton lists as one of the principal concerns arising from multiple references concerning overlapping subject matter with only one common party, raises a question of the fairness of the arbitral proceedings, which can be dealt with under section 24(1)(d)(i) of the 1996 Act if there is proof of substantial injustice. That is so; but a failure of that arbitrator to disclose the other references could give rise to justifiable doubts as to his or her impartiality. I agree with the dicta of Cockerill J in *PAO Tatneft v Ukraine* [2019] EWHC 3740 (Ch), para 57 that:

> "the obligation of disclosure extends … to matters which may not ultimately prove to be sufficient to establish justifiable doubts as to the arbitrator's impartiality. However, a failure of disclosure may then be a factor in the latter exercise."

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118. Where an arbitrator has accepted an appointment in such multiple references in circumstances which might reasonably give rise to justifiable doubts as to his or her impartiality, or is aware of other matters which might reasonably give rise to those doubts, a failure in his or her duty to disclose those matters to the party who is not the common party to the references deprives that party of the opportunity to address and perhaps resolve the matters which should have been disclosed. The failure to disclose may demonstrate a lack of regard to the interests of the non-common party and may in certain circumstances amount to apparent bias.

(iv) The time of the assessment of the need for disclosure

119. The Court of Appeal (para 70) held that, as disclosure was required of circumstances that might lead to a conclusion of apparent bias, the question of what is to be disclosed is to be considered prospectively. A court when later assessing whether there should have been disclosure must have regard to the circumstances prevailing at the time when the arbitrator acquired the requisite knowledge of those circumstances and disregard matters of which the arbitrator could not have known at that time. I agree with that conclusion. A determination as to whether an arbitrator has failed to perform a duty to disclose can only be made by reference to the circumstances at the time the duty arose and during the period in which the duty subsisted. The question whether there should have been disclosure should not be answered retrospectively by reference to matters known to the fair-minded and informed observer only at a later date.

120. The duty of disclosure is a continuing duty and circumstances may change before there is disclosure. Those circumstances may aggravate an existing failure to disclose a matter or, while not expunging such a failure, may render any continuing failure a less potent factor in an assessment of justifiable doubts as to impartiality. For example a scenario might be that (i) an arbitrator accepts an appointment in a reference between A and B; (ii) the arbitrator accepts an appointment in an overlapping reference to which A is not a party but B is, without disclosing the appointment to A in circumstances in which the arbitrator should have disclosed it; (iii) the arbitrator makes an interim determination in the first reference which causes A to question his or her impartiality; (iv) the second reference then does not proceed. The failures to disclose at stages (ii) and (iii) would not be negated by the termination of the second reference, but in assessing the significance of the continuing failures to disclose after stage (iv) to the question of justifiable doubts, the court would have regard to the fact that the second arbitration did not proceed.

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(v) The time of assessment of the possibility of bias

121. What is the time by reference to which the court must assess the question of the possibility of bias? This question is, in my view, of central importance to the outcome of this appeal. As we have seen, section 24(1)(a) empowers the court to remove an arbitrator on the ground that circumstances exist that give rise to justifiable doubts as to his impartiality. The use of the present tense ("exist") directs the court to assess the circumstances as they exist at the date of the hearing of the application to remove the arbitrator by asking whether the fair-minded and informed observer, having considered the facts then available to him or her, would conclude that there is a possibility that the arbitrator is biased.

122. There is support for this view in the case law concerning the application of the test in other circumstances. In *R v Gough* [1993] AC 646, Lord Goff of Chieveley stated (p 670E) that the court had to ascertain the relevant circumstances "from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time". In *AT & T Corpn v Saudi Cable Co* [2000] 2 Lloyd's Rep 127, the Court of Appeal (Lord Woolf MR, Potter and May LJJ) dealt with an application for the removal of an arbitrator as chairman of an ICC Tribunal on the ground of apparent bias. Lord Woolf in para 42 of his judgment described the court's task in this way:

> "The court considers on all the material which is placed before it whether there is any real danger of unconscious bias on the part of the decision maker. This is the case irrespective of whether it is a judge or an arbitrator who is the subject of the allegation of bias." (Emphasis added)

Lord Woolf's formulation of the test pre-dated the refinement of Lord Goff's formulation by Lord Hope in *Porter v Magill* but that refinement is not material to the point for which I cite this passage. In *R (Condron) v National Assembly for Wales* [2006] EWCA Civ 1573; [2007] LGR 87 the Court of Appeal (Ward, Wall and Richards LJJ) addressed a challenge to a decision to allow a planning application taken by the Planning Decision Committee of the Assembly on the basis of apparent bias arising from a remark made by a member of the committee to an objector on the day before the decision. After the decision, the objectors to the application complained to the Commissioner for Standards who produced a report several months later which stated that he found no evidence of bias in the members' consideration of the application. The judge disregarded evidence of the Commissioner's assessment of what had occurred at the meeting of the committee, because it would not have been available to the objectors or the hypothetical observer at the time of the decision. Richards LJ, with whom the other Lord Justices agreed, disagreed with the judge's approach and stated (para 50):

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> "The court must look at all the circumstances as they appear from the material before it, not just at the facts known to the objectors or available to the hypothetical observer at the time of the decision."

At para 63 of *AT & T Corpn* Potter LJ in his concurring judgment described the court's task as embodying the standards of the informed observer viewing the matter at the relevant time, "which is of course the time when the matter comes before the court".

123. In the present appeal the Court of Appeal was correct in para 95 of its judgment to apply the test for apparent bias by asking whether "at the time of the hearing to remove" the circumstances would have led the fair-minded and informed observer to conclude that there was in fact a real possibility of bias.

124. I turn then to the two principal issues in this appeal.

(vi) The issues

a) Issue 1

125. The first issue is 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 thereby giving rise to an appearance of bias.

126. Arbitration involves the conferral of jurisdiction by contract, through the consensus of the parties to the reference. As it is a contract-based jurisdiction, the degree of the independence of the arbitrators from the parties and the extent of their prior knowledge of the circumstances of an event giving rise to the arbitration or the market in which the arbitrating parties operate may, subject to the requirements of the 1996 Act, be determined by the agreement of the parties, express or implied. The 1996 Act contains no provision which directly addresses the arbitrator's independence and prior knowledge, but it imposes the centrally important obligations of fairness and impartiality. Therefore, an arbitrator would be in breach of the requirements of the 1996 Act if his or her lack of independence compromised the duties of fairness and impartiality.

127. In the absence of a statutory provision which directly addresses the question of overlapping appointments, the fair-minded and informed observer will have regard to the terms of the contract or contracts giving rise to the arbitration and the factual

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matrix in addressing the issue. In considering the factual matrix, the objective observer will take account both of the differing perceptions of the role of the party-appointed arbitrator and the fact that in certain subject matter fields of arbitration there are different expectations as to the degree of independence of an arbitrator and as to the benefits to be gained by having an arbitrator who is involved in multiple related arbitrations. The objective observer will appreciate that there are differences between, on the one hand, arbitrations, in which there is an established expectation that a person before accepting an offer of appointment in a reference will disclose earlier relevant appointments to the parties and is expected similarly to disclose subsequent appointments occurring in the course of a reference, and, on the other hand, arbitrations in which, as a result of relevant custom and practice in an industry, those expectations would not normally arise. The objective observer will consider whether in the circumstances of the arbitration in question it would be reasonable to expect the arbitrator not to have the knowledge or connection with the common party which the multiple references would give him or her.

128. It is clear that interrelated arbitrations meeting the description of issue 1 are rarer in some circumstances than in others. Mr Constantine Partasides QC, who appears on behalf of ICC, represents to the court that such interrelated arbitrations are not common in ICC arbitrations and therefore such circumstances may more readily give rise to an appearance of bias. GAFTA and LMAA explain that multiple appointments are common in their fields of operation: see paras 43 and 44 above. There is also evidence from ARIAS (UK) of such practice in reinsurance arbitrations: para 43 above. It appears that it is not uncommon for a number of arbitrations involving claims against different insurers arising out of the same incident to commence at around the same time and for the same arbitrator to be appointed in respect of several or all of those arbitrations: see for example, *Jacobs, Masters and Stanley, Liability Insurance in International Arbitration*. *The Bermuda Form*, 2nd ed (2011), para 14.32. It is of note that both Halliburton and Chubb made such appointments in relation to the Deepwater Horizon disaster. It does not appear that this practice is inherently problematic so long as the arbitrator can approach each individual arbitration objectively and with an open mind; it depends on the facts of the individual case: see, in analogous judicial proceedings, *Locabail (UK) Ltd* (above), para 25 (p 480G-H); *Stubbs v The Queen* [2018] UKPC 30; [2019] AC 868, para 16. Mr Crane also cited many arbitral appeals in which courts or arbitral bodies have rejected challenges to an arbitrator's impartiality based on his or her participation in prior or contemporaneous related arbitrations.

129. Different practices in differing fields are recognised in the IBA Guidelines. As the LMAA points out, the IBA Guidelines describe the Orange List as "a non-exhaustive list of specific situations that, depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence" (emphasis added). The IBA Guidelines impose a higher test for the duty to decline an appointment than for the duty of disclosure. The former requires the

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existence of justifiable doubts (General Standard 2; para 54 above) and the latter merely the possibility of such doubts (General Standard 3; para 72 above).

130. The Court of Appeal in para 53 of its judgment agreed with the judge 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". The court referred to the judgment of Dyson LJ in *AMEC Capital Projects Ltd v Whitefriars City Estates Ltd* [2004] EWCA Civ 1418; [2005] 1 All ER 723, paras 20 and 21, in support of the view that something more, which was something of substance, was required. I do not interpret the Court of Appeal as saying that the acceptance of multiple appointments can never be sufficient of itself to give rise to the appearance of bias. But if that is what the court meant, I would respectfully disagree, especially because the inequality of knowledge between the common party and the other party or parties has the potential to confer an unfair advantage of which an arbitrator ought to be aware. It must depend on the circumstances of the particular arbitration, including the custom and practice in arbitrations in the relevant field, which should be examined closely.

131. I therefore agree with the submission of LCIA that where an arbitrator accepts appointments in multiple references concerning the same or overlapping subject matter with only one common party, this may, depending on the relevant custom and practice, give rise to an appearance of bias.

b) Issue 2

132. The second issue is whether and to what extent an arbitrator may accept the multiple references described in the first issue without making disclosure to the party who is not the common party. In English law it is not necessary that the facts or circumstances which are to be disclosed would cause the fair-minded and informed observer to conclude that there was a real possibility that the arbitrator was biased. It is sufficient that they might reasonably cause the objective observer to reach that conclusion: see paras 108 and 118 above. It follows that the obligation to disclose can arise in circumstances in which the objective observer, informed of the facts at the date when the decision whether to disclose is or should have been made ("the disclosure date"), might reasonably conclude that there was a real possibility of bias, even if at a later date, with the benefit of information which was not available at the disclosure date, the objective observer would conclude that there was not such a real possibility.

133. The failure of the arbitrator to disclose such facts and circumstances is itself a factor to which the fair-minded and informed observer would have regard in reaching a conclusion as to whether there was a real possibility of bias. Whether there needs to

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be such a disclosure depends on the distinctive customs and practices of the arbitration in question. The Orange List in the IBA Guidelines includes the circumstance of an arbitrator having been appointed as arbitrator on two or more occasions within the past three years by one of the parties or its affiliate (para 3.1.3 of Part II ("Practical Application of the General Standards")). However, footnote 5 to para 3.1.3 states:

> "It may be the practice in certain types of arbitration, such as maritime, sports or commodities arbitration, to draw arbitrators from a smaller or specialised pool of individuals. If in such fields it is the custom and practice for parties to frequently appoint the same arbitrator in different cases, no disclosure of this fact is required, where all parties in the arbitration should be familiar with such custom and practice."

Para 3.1.5 of that Part also lists as a circumstance which might require disclosure:

> "The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties, or an affiliate of one of the parties."

134. There will be cases where the custom and practice of the type of arbitration have created expectations which would negative the need for disclosure. There may also be cases where the failure to disclose would carry little or no weight as in *Helow v Secretary of State for the Home Department* (above), para 58 per Lord Mance. But an arbitrator cannot be wholly equated with a judge: see paras 56-68 above. There will therefore be circumstances in which an arbitrator is under a duty to make disclosure when a judge would not.

135. There may be many circumstances in which the combination of multiple references as described in the first issue and a failure by the arbitrator to disclose such references to the party who is not a common party would give rise to the appearance of bias. That would require the arbitrator to extricate himself or herself from one or more of the relevant arbitrations or to face removal by the court. There may also be circumstances in which because of the custom and practice of specialist arbitrators in specific fields, such as maritime, sports and commodities and maybe others, such multiple appointments are a part of the process which is known to and accepted by the participants. In such circumstances no duty of disclosure would arise. But rather than having disputes about the existence or absence of such a duty by proof of a general custom and practice in a particular field of arbitration, there may be merit in putting the matter beyond doubt by express statement in the rules or guidance of the relevant institutions. And, in line with the principle of party autonomy, the parties to an arbitration can contract to limit the arbitrator's obligation of disclosure.

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136. The answer to the second issue therefore is 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 practice 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.

(vii) Must there be disclosure of multiple appointments in the context of Bermuda Form arbitrations?

137. In my view under English law multiple appointments (as described in the first issue (para 2)) must be disclosed in the context of Bermuda Form arbitrations in the absence of an agreement to the contrary between the parties to whom disclosure would otherwise be made. Unlike in GAFTA and LMAA arbitrations, it has not been shown that there is an established custom or practice in Bermuda Form arbitrations by which parties have accepted that an arbitrator may take on such multiple appointments without disclosure. This is unsurprising as the claimant in such an arbitration may often not be a repeat player while an insurance company is much more likely to be.

138. The need for disclosure can be illustrated by the circumstances of this case which I discuss more fully in the next section. In summary, on appointment as arbitrator in reference 1, Mr Rokison became subject to the statutory duties in section 33 of the 1996 Act, to act fairly and impartially in conducting arbitral proceedings, in decisions on matters of procedure and evidence and in the exercise of all powers conferred on him (para 49 above). Those duties were owed to both Halliburton and Chubb. One of Halliburton's complaints (para 41 above) is that relevant information and the opportunity for communication with the common arbitrator were available to Chubb in reference 2 which were not available to Halliburton. Being unaware of the appointment in reference 2, Halliburton was not able to assess whether and to what extent this involved unfairness and how to respond to that appointment. The appointment in reference 2 had the potential to give rise to unfairness, which Halliburton had no opportunity to address. The failure to give a party to an arbitration that opportunity, Halliburton argues, might amount to apparent bias. I agree.

(viii) Application to the facts

139. Before accepting his appointment by the High Court, Mr Rokison disclosed his prior involvement in arbitrations involving Chubb, including those in which he was appointed by Chubb. The High Court appointed him to reference 1 against the wishes

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of Halliburton but as one of the nominees of Chubb. The court's decision to appoint Mr Rokison, which was not challenged, means that Halliburton's wish to have another person to be the chair of the arbitral tribunal is of little if any relevance to the objective assessment of Halliburton's claim of appearance of bias.

140. When Mr Rokison was offered the appointments by Chubb as party-appointed arbitrator on references 2 and 3, he disclosed his appointment in reference 1 to the parties to those arbitrations. Transocean did not object. The appointment in reference 2 was made approximately six months after Flaux J appointed him as the third arbitrator in reference 1 and the appointment in reference 3 was over one year after that court appointment. Other things being equal, the objective observer at the time of each of the later appointments would expect that the substantive hearing in reference 1 would precede those in references 2 and 3.

141. Each of the references arose out of the Deepwater Horizon disaster and concerned the liability of an insurer to indemnify a party involved in the disaster which had settled claims. It is not clear that at the date of his acceptance of appointment in reference 2 in December 2015, Mr Rokison would have known of the degree of overlap which might arise between reference 1 and reference 2. Most of the background circumstances of the disaster would be uncontroversial but it is not clear whether the different circumstances of the two settlements, including the fact that one pre-dated and the other post-dated the Federal Judgment, would have been apparent. Even if such information was then available, there is no suggestion that, at the date of appointment in reference 2, the preliminary issue which undermined Transocean's claims for indemnity had been identified as a feature that distinguished reference 2 from reference 1.

142. The possibility that the common party to two overlapping references might obtain an advantage over its opponent in one or the other arbitration by having access to information about the common arbitrator's responses to the evidence led or the arguments advanced in the arbitration which was the first to be heard can readily be seen as a cause of concern to the other party in the arbitration in which the evidence and legal submissions are heard later. That is why, in an application under section 18 of the 1996 Act, Leggatt J declined to appoint as the third arbitrator in two related arbitrations a person who had been appointed the third arbitrator in a prior overlapping arbitration, holding that there would be a legitimate concern that he would be influenced by arguments and evidence in the earlier arbitration: *Guidant LLC v Swiss, In re International SE* [2016] EWHC 1201 (Comm); [2016] 1 CLC 767.

143. In the present case, the existence of possibly overlapping arbitrations with only one common party would not necessarily cause the fair-minded and informed arbitrator to conclude that there was a real possibility of bias, when assessed at the date when the appointment to reference 2 was made. But if Halliburton had been

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aware of the appointment in reference 2, it might have had concerns about the fairness of its arbitration because of the inequality of knowledge and opportunities to communicate with the arbitrator set out in para 41 above. Such circumstances might reasonably cause the objective observer considering the matter at that time to conclude that there was a real possibility of bias. The circumstances were both relevant and material to that assessment.

144. I recorded in para 27 above the fact that Halliburton had not formally disclosed their appointment of Professor Park in three arbitrations arising out of the Deepwater Horizon incident and the suggestion that the fact that Professor Park was a party-appointed arbitrator rather than a chair or umpire is a significant distinction from Mr Rokison's position. As I have said, that is not a distinction which English law would recognise as a basis for a party-appointee avoiding the obligation of disclosure. The disagreement among people involved in international arbitration as to the role of the party-appointed arbitrator is a circumstance which points to the disclosure of such multiple nominations; it does not provide a ground for non-disclosure.

145. I am persuaded that Mr Rokison was under a legal duty to disclose his appointment in reference 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 the real possibility of bias.

146. In my 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: see paras 78-98 above. A high-level statement as to whether similar issues were likely to arise, such as Mr Rokison gave to Transocean when he made a proper disclosure of his prior involvement in arbitrations involving Chubb including in an arbitration concerning the Deepwater Horizon incident (para 98 above), would also involve no breach of the arbitrator's duty of privacy and confidentiality. If further information had to be imparted to achieve proper disclosure or to satisfy Halliburton that the appointment in reference 2 was not a problem, Mr Rokison would have had to obtain the express consent of both parties to the second reference to that disclosure.

147. Mr Rokison's failure to disclose his appointment in reference 2, which was a potentially overlapping arbitration with only one common party, was a breach of his

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legal duty of disclosure. Without the further information which I discuss below, I am of the view that the fair-minded and informed observer, if he or she had considered the question at or around the date of his acceptance of appointment in reference 2, may well have concluded that there was a real possibility of bias. But it is not necessary to express a concluded view on this as that is not the correct time to ask the question.

148. By the date of the hearing for removal in January 2017 Mr Rokison had given an explanation of his failure to disclose the appointments in references 2 and 3. Halliburton's lawyers accepted that his explanation of oversight was genuine and they did not challenge his statement that he believed that there was not a material overlap between the references. Chubb also points out that reference 2 followed about six months behind reference 1 and suggests it is more likely that Transocean rather than Halliburton would have cause for concern about one arbitration being a dress rehearsal for the later arbitration.

149. Having regard to the circumstances known to the court at the date of the hearing at first instance, I am not persuaded that the fair-minded and informed observer would infer from the oversight that there was a real possibility of unconscious bias on Mr Rokison's part. First, there appears 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; that can be seen from the judgment at first instance of the able and experienced commercial judge. Secondly, the time sequence of the three references may explain why Mr Rokison saw the need to disclose reference 1 to Transocean but did not identify the need to tell Halliburton about reference 2. Thirdly, his measured response to Halliburton's robust challenge disclosed that it was likely that references 2 and 3 would be resolved by the preliminary issue and that there would not be any overlap in evidence or legal submissions between them and reference 1. As the arbitral tribunal had held hearings on the preliminary issues in November 2016, Mr Rokison would have been aware of its likely decision when he corresponded with K & L Gates in December 2016 and January 2017 (paras 19-22 above). Indeed, the awards handed down on 1 March 2017 revealed that his discreet prediction was correct. If that had not been the outcome of the preliminary issues, he had also offered to consider resigning from his appointments in references 2 and 3. As a result of Mr Rokison's response, there was no likelihood of Chubb gaining any advantage by reason of the overlapping references. Fourthly, there is no question of Mr Rokison having received any secret financial benefit in this case; if that objection were valid it would mean that every party-appointed arbitrator receives a disqualifying benefit. In this regard I agree with the Court of Appeal in para 82 of its judgment and with Popplewell J in para 20 of his judgment. Fifthly, I am satisfied that there is no basis for inferring unconscious bias in the form of subconscious ill-will in response to the robustness of the challenge which K & L Gates mounted on behalf of Halliburton. As Popplewell J stated (in para 56 of his judgment), he responded in a courteous, temperate and fair way and there is no evidence that he bore any animus towards Halliburton as a result.

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150. Therefore, for reasons which differ in part from the courts below, I am satisfied that Popplewell J and the Court of Appeal were correct to hold that the fair-minded and informed observer, looking at the facts and circumstances which would be known to him or her at the date of the hearing in January 2017, would not conclude that there was a real possibility of bias or, in the words of section 24(1)(a) of the 1996 Act, that circumstances existed that gave rise to justifiable doubts about Mr Rokison's impartiality. The appeal therefore fails.

Summary of the law

151. The obligation of impartiality is a core principle of arbitration law and in English law the duty of impartiality applies equally to party-appointed arbitrators and arbitrators appointed by the agreement of party-appointed arbitrators, by an arbitral institution, or by the court. (paras 49 and 63)

152. The assessment of the fair-minded and informed observer of whether there is a real possibility of bias is an objective assessment which has regard to the realities of international arbitration which I have discussed in paras 56-68 above and the customs and practices of the relevant field of arbitration. There may be circumstances in which the acceptance of appointments in multiple references concerning the same or overlapping subject matter with only one common party might reasonably cause the objective observer to conclude that there is a real possibility of bias. Whether the objective observer would reach that conclusion will depend on the facts of the particular case and especially upon the custom and practice in the relevant field of arbitration. (paras 127-131)

153. Where, as in the context of a Bermuda Form arbitration, such circumstances might reasonably give rise to a conclusion by the objective observer that there was a real possibility of bias, the arbitrator is under a legal duty to disclose such appointments, unless the parties to the arbitration have agreed otherwise. (paras 76-81, 132-136)

154. That legal duty of disclosure, which is a component of the arbitrator's statutory duty to act fairly and impartially, does not override the arbitrator's duty of privacy and confidentiality in English law; but, absent a contract restricting or prohibiting disclosure or binding rules which have different effect, the disclosure of information of the nature described at para 146 above may be made without obtaining the express consent of the parties to the relevant arbitration where the needed consent is inferred. Such consent may be inferred from the arbitration agreement itself in the context of the practice in the relevant field. (paras 76-81, 88-104, 146)

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155. A failure of an arbitrator to make disclosure in the circumstances described in para 153 above is a factor for the fair-minded and informed observer to take into account in assessing whether there is a real possibility of bias. (paras 117-118)

156. The fair-minded and informed observer in assessing whether an arbitrator has failed in a duty to make disclosure must have regard to the facts and circumstances as at and from the date when the duty arose. (paras 119-120)

157. The fair-minded and informed observer assesses whether there is a real possibility that an arbitrator is biased by reference to the facts and circumstances known at the date of the hearing to remove the arbitrator. (paras 121-123)

Conclusion

158. I would dismiss the appeal.

LADY ARDEN:

159. The parties and the interveners have provided such a considerable body of submissions and material, containing a wealth of learning, that it is hardly possible for a single judgment, or even more than one, to capture all the points that could be made. I agree with the judgment of Lord Hodge but there are a few further points I wish to make which seem to me to reinforce the overall conclusions which this court has reached, or in paras 164, 171, 185 and 188 below to qualify them.

Disclosure: secondary obligation arising from the primary impartiality duty

160. In my consideration of the issues I have found it useful to dissect the particular characteristics of the duty of disclosure. It is not an unconditional duty, or a duty in the usual sense of the word, but a part of a bigger picture. The duty is not the primary duty. The primary duty is to act fairly and impartially as arbitrator (section 33 of the Arbitration Act 1996 ("the 1996 Act"), set out in para 49 above). An arbitrator who acts with actual or apparent bias does not act impartially. As hereafter explained, to remove any doubt about apparent bias, an arbitrator may wish to disclose matters to the parties. It is from that consequence of the impartiality duty that a duty of disclosure can be said to arise, but it is not an independent, self-contained duty.

161. The Court of Appeal described the duty as a legal duty and Lord Hodge has made it clear that it is a legal duty because it is implied (if not express) into the

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contract between all the parties to an arbitration when an arbitrator is appointed. There is scope for debate as to whether it is a duty at all *in the strict sense*. The duty only arises if the arbitrator wants to take a further appointment in a different arbitration. The question whether there is then a duty in the strict sense or not is analogous to the debate in the law of fiduciaries as to whether a fiduciary is subject to a duty not to have a conflict of interest or merely under a disability so that the transaction into which he or she enters while he or she has a conflict of interest is liable to be set aside and he or she becomes accountable for any profit which he thereby makes. Lord Hodge and I, as fellow Law Commissioners, drew attention to this debate in the context of company directors (*Company Directors: Regulating Conflicts of Interest and Formulating a Statement of Duties* (1998) (Law Commission Consultation Paper No 153; Scottish Law Commission Paper No 105, para 11.13)). But Sir Robert Megarry V-C in *Tito v Waddell* [1977] Ch 106, 248 and others regarded this problem as essentially one of classification and indeed the Law Commissions went on to recommend that Parliament should enact a statement of duties. Parliament enacted a statement which includes a duty to avoid conflicts of interest and a duty to disclose interests of which a director is aware in proposed contracts in sections 175 and 177 of the Companies Act 2006. So, I too am content to refer to it as a duty to disclose (with the special characteristics already mentioned).

162. As regards the duty to disclose, it is of some interest that section 177(5) of the Companies Act 2006 provides that a director should be treated as being aware of matters "of which he ought reasonably to be aware". While I agree with Lord Hodge (para 107 above) that this court should leave open the question of what enquiries an arbitrator should make about conflict of interests, the formulation in this subsection seems to me to be unexceptionable in principle, and it may be helpful guidance to arbitrators. I would add that the conclusion that as a matter of the law of England and Wales an arbitrator is to be treated as aware of a conflict of interest of which he is not actually aware would on the face of it take English and Wales beyond Scots law, which appears to require actual awareness (see para 112 above). That may confirm the wisdom of Parliament when it enacted the 1996 Act in leaving issues such as these to judicial development of the law rather than codifying them in legislation. By leaving them to judicial development, the common law of England and Wales can keep pace with change. It can take account of developing standards and expectations in international commercial arbitration in particular.

163. The debate to which I have referred may account for any reticence in English arbitration law to referring to a duty to disclose but I have no doubt that the law of England and Wales is rigorous in its approach to arbitrator bias and conflicts of interest. Ensuring impartiality is a key principle of our arbitration law. Indeed, as there is force in the view expressed by Professor McKendrick and others that the courts must be especially mindful of the these issues in relation to arbitration where the proceedings take place in private and subject to strict obligations of confidentiality (Ewan McKendrick, chapter 4: *Arbitrations, Multiple References and Apparent Bias: A Case Study of Halliburton Co v Chubb Bermuda Insurance Ltd* (2018), in Axel

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Calissendorff and Patrik Schöldstrom (eds), *Stockholm Arbitration Yearbook 2019*, Stockholm Arbitration Yearbook Series, Volume 1 (Kluwer Law International; Kluwer Law International (2019), pp 55-68, see further Paul Stanley QC, *Haliburton v Chubb*, 9 May 2018 at pp 4-6 and see Julia Dias QC *Resignation in the Face of Confidentiality*? (2020) TDM 2).

164. I would urge caution in relation to the conclusion of the Court of Appeal (judgment para 77) that the mere acceptance of a multiple appointment in the sense described above did not give rise to an objective appearance of apparent bias. The Court of Appeal considered that, although there was a risk that an arbitrator might acquire inside information in the new arbitration, something more, which had to be something of substance, was required to establish apparent bias. In their judgment, an arbitrator could be trusted to decide a case solely on the evidence or other material before him in the reference in question (judgment, paras 51, 86). In my judgment, unless the arbitration is one in which there is an accepted practice of dispensing with any need to obtain parties' consent to further appointments, an arbitrator should proceed on the basis that a proposal to take on a further appointment involving a common party and overlapping subject-matter (in that it arises out of the same event) is likely to require disclosure of a potential conflict of interest. The fact that an arbitrator is to be trusted to decide the case on the evidence is not a complete answer to the objections based on inequality of arms and material asymmetry of information that have been raised by Halliburton (see paras 41 and 142 above). Moreover, as Paul Stanley QC points out at p 18 of the article already cited, this trust may not translate easily for the many parties to arbitrations who are familiar with different legal systems.

165. The fact that section 24 of the 1996 Act (set out in para 50 above) requires the question of removal to be assessed at the date of the hearing (by when the materiality of the non-disclosure may have changed) is to be attributed to the legislature's desire to hold the balance between the parties and to ensure that removal with all its consequences occurs only where the non-disclosure has been material. It is understandable that the legislator would not wish section 24 to give rise to satellite litigation to upset awards that had been duly made. The balance struck in section 24 may also help to mitigate the risk of any shortage of experienced arbitrators of the parties' choice due to difficulties in disclosing proposed appointments, but in fact there is no evidence that there is such a shortage. The balancing exercise is to be performed with commercial realities in mind, including the fact that parties who use arbitration must expect arbitrators to take further appointments to acquire the experience needed. On the other hand, those further appointments must be consistent with the arbitrator's obligations in current arbitrations.

166. Like Lord Hodge, I also attach considerable importance to the principles set out in section 1 of the 1996 Act (set out at para 47 above). It is unusual for Parliament to set out principles in this way. They are expressed to be foundational principles ("*The*

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provisions of this Part of the Act are founded on the following principles …"). (The provisions of the 1996 Act other than Part I contain a limited number of provisions, for example for the protection of consumers and enforcement, to which it would be inappropriate to apply the section 1 principles.) The section 1 principles must, therefore, guide the development of arbitration law. The second and third principles reinforce party autonomy in arbitration, which is an important, though naturally not unlimited, principle.

Disclosure: rooted in both the contract of appointment and section 33

167. I agree with Lord Hodge in basing the duty of disclosure in both the contract of appointment and section 33 of the 1996 Act. In my judgment, while section 33 must inform the terms of appointment of the arbitrator, this duty is also an implied term of his appointment (if indeed it is not express). An arbitrator on accepting appointment comes under a duty to all the parties to the arbitration to observe this duty throughout his or her appointment. In addition, in my judgment, in the possibly unlikely circumstance that he or she has not been asked for some express assurance prior to being appointed, it is to be implied into the appointment of an arbitrator that the arbitrator has no conflict of duty at the date of his appointment which either prevents him from acting at all, or renders him liable to be removed, in the latter case unless the parties have agreed to waive this conflict. Waiver requires properly informed consent, and thus disclosure of the conflict of interest. The contract of appointment gives rise to a contract with all the parties to the arbitration.

168. By rooting the duty in both section 33 and the contract of appointment, there is a clear legal basis for Lord Hodge's conclusion, with which I also agree, that the parties can agree to waive any objection to a conflict of interest. In theory at least they can also lay down the scope for the arbitrator to accept further arbitrations and the procedure which is to apply if he or she wishes to do so. The contract-based approach also overcomes the problem, which the parties drew to our attention, that section 33 in terms applies only to the tribunal and not a proposing arbitrator. The term will thus apply to a person who accepts appointment in respect of interests that he or she acquired before appointment as well as to those he or she acquires later. I need not address the case of a person who is offered an appointment but does not subsequently take it up for whatever reason because the issues in this appeal are not concerned with that situation.

169. There is a concern that the duty of disclosure carries no sanction if an application is made to the court about a non-disclosure by the arbitrator and fails (see para 111 above). I think this misses the point. It would still be a breach of the terms of appointment with such consequences, if any, as the law of contract prescribes. In addition, a person may commit a breach of contract but incur no liability as a result, and the situation postulated falls into that category.

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Disclosure: not available with incompatible conflicts of interest

170. I emphasise a point which Lord Hodge makes (see para 108 above) that disclosure is only an option if the conflict of interest is not one which would prevent the arbitrator from discharging his or her duty of impartiality in the current arbitration and therefore from acting altogether. Clearly, having accepted the first arbitration, he or she cannot then go on to accept a further arbitration in these circumstances. We are concerned with a situation in which he or she wishes to accept a further appointment but, as a matter of good practice and caution, wishes to place the possibility before the parties in case they considered that it created a conflict of interest which they were not prepared to waive (Lord Hodge makes a similar point at para 79 above). By parties, I mean the parties to the current arbitration and the parties to the proposed arbitration.

Disclosure where more than one form of arbitration involved

171. As a corollary, I would point out that the arbitrations that give rise to the potential conflict may be of different kinds. The current arbitration may be a Bermuda Form arbitration, but the second may be an ad hoc arbitration of a different kind. Differing from Lord Hodge, I find it difficult, therefore, to limit what is said in this case to Bermuda Form arbitrations (see, for example, para 104 above), as opposed to other ad hoc arbitrations or arbitrations held under institutional rules which make no relevant provision. Arbitrations under institutional rules, such as the rules of the LCIA, may involve their own rules as to disclosure of interests making it unnecessary to consider the position under the general law, and so for convenience and without underestimating their important role in international commercial arbitration I leave them on one side at this point.

Disclosure of multiple appointments

172. Like Lord Hodge I am considering only conflicts of interest which arise because an arbitrator is proposed to be appointed to a further arbitration in which one of the parties in the current arbitration is also a party and which arises out of the same event with the likelihood that the issues will be the same or similar (see, for example, para 61 above). Such an appointment is likely to give rise to a potential inequality of arms and material asymmetry of information. In principle the parties to both the current and proposed arbitration should be given a chance to object to the arbitrator accepting the new appointment. And if there is more than one current arbitration in which the conflict arises, there must if there is to be disclosure be disclosure to the parties in those arbitrations too.

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Confidentiality - an important implied term

173. There is an implied term as to confidentiality in an arbitration agreement which binds an arbitrator: see *Ali Shipping Corpn v Shipyard Trogir* [1999] 1 WLR 314 and cf *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184; [2008] Bus LR 1361, cited by Lord Hodge in para 83 above.

174. Confidentiality is of great importance to the parties since it enables them to resolve their dispute without the glare of potentially commercially damaging publicity, which makes arbitration an attractive process of dispute resolution to commercial parties (see paras 57 and 83 above). The parties may even bolster the obligations to keep information confidential in the terms of the orders which they ask the arbitrators to make and in the arbitration agreement itself. Institutional rules applying to the arbitration may also make further provision as to the responsibilities of the parties and arbitrators in arbitrations governed by such rules. The Departmental Advisory Committee's report (see para 57 above) emphasised the importance of confidentiality, and, to bring matters up to date, it is also emphasised in the submissions before us. Thus, for instance, the LMAA states:

> "The LMAA believes that users of *ad hoc* maritime arbitration particularly value confidentiality. Any new general rule of English law requiring disclosure of confidential information against parties' wishes runs a serious risk of undermining the attractiveness of London as the preeminent seat for maritime arbitration." (para 22)

175. The implied term as to confidentiality is independent of the implied term that the arbitrator should comply with his impartiality duty. It is truly a self-standing term - so much so that the parties' submissions at the hearing of this appeal did not include submissions as to the effect of disclosure on confidentiality obligations. Those submissions only came later when the parties and interveners helpfully provided further written submissions at the court's request.

176. Not all information about an arbitration is confidential. Some information may, for instance, already be in the public domain.

177. The principle of confidentiality was not codified in the 1996 Act (see para 85 above). This was because it was too difficult to reach a statutory formulation "in the light of 'the myriad exceptions' and the qualifications that would have to follow": see *Department of Economics, Policy and Development of the City of Moscow v Bankers Trust Co* [2004] EWCA Civ 314; [2005] QB 207, para 3. In those circumstances, the Departmental Advisory Committee concluded that the courts should continue to be left to work out the implications "on a pragmatic case-by-case basis".

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178. The Court of Appeal considered that the disclosure which the arbitrator had to make had to be:

> "regarded as being an exception to that duty, a duty which is recognised not to be absolute." (para 91)

179. It is not clear whether the Court of Appeal were referring here to an existing exception or were creating a new exception. The current exceptions to confidentiality are most conveniently set out in the judgment of Lawrence Collins LJ, as he then was, with whom Carnwath and Thomas LJJ (as they then were) agreed in the *Michael Wilson & Partners Ltd* case. Lord Hodge sets out the relevant passage at para 85 of his judgment and so I need not set it out again.

180. I am only concerned with the question of confidentiality of the high-level disclosure described by Lord Hodge at para 146 above. That disclosure does not in my judgment fall within any of the existing exceptions to confidentiality listed by Lawrence Collins LJ. The disclosure of information arises to a material extent from the voluntary decision of the arbitrator to pursue a further appointment (see para 160 above), and, as a result of that, I do not consider that such disclosure can fall within the protection of legitimate interests. The LCIA suggests in parenthesis that the exceptions available to an arbitrating party extend "by logical extension" to the arbitrator but that would appear to be on the basis of the legitimate interests exception. There is no consent, no court order, and there is no public interest mandating disclosure because disclosure is driven by the arbitrator's wish to take the further appointment.

181. Moreover, neither the Court of Appeal nor the judge found that there was any custom as to what might be disclosed by an arbitrator or proposing arbitrator without the parties' consent (as to what must be proved to show a custom, see generally *Baker v Black Sea & Baltic General Insurance Co Ltd* [1998] 1 WLR 974).

182. So far as a practice which falls short of a custom is concerned, this would necessarily have to be incorporated into the terms on which the arbitrator agrees to act expressly or by implication. I, therefore, leave aside GAFTA and LMAA arbitrations as in those arbitrations there is said to be an accepted practice under which arbitrators may accept multiple appointments without the consent of the parties to existing arbitrations.

183. Further, where the information is disclosed by a party on his behalf, then in the usual case that party may be taken to have consented to the disclosure of the information and to waive any confidentiality obligation owed to itself. That party cannot waive confidentiality obligations owed to the other parties.

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184. So, in my judgment, there is in general no need, as the Court of Appeal considered, to search for, or create, an exception to confidentiality for the information in the numbered list in para 146 above. The basic reason is that the other parties, who have not been asked to consent to the disclosure, have not been named. This conclusion is supported by commentaries cited by the parties (see, for example, *Derains & Schwartz, A Guide to the ICC Rules of Arbitration*, 2nd ed (2005), pp 135-136 n70 ("Derains/Schwartz") "*It is generally possible, however, for arbitrators to disclose relationships relating to other arbitration proceedings in such a manner as to avoid infringing any obligations of confidentiality that may be owed to the parties in respect of the same.*") Jeffrey Waincymer, "Part II: The Process of an Arbitration, chapter 5: Selection, Challenge and Change of Arbitrators" in *Procedure and Evidence in International Arbitration* at 313 ("*In most such cases a careful description of the nature of the previous event without identification of the parties ought to be enough to meet both obligations [disclosure and confidentiality] concurrently.*"). Mauro Rubino-Sammartano, "chapter 11 - The Arbitrator" in *International Arbitration Law and Practice* 3rd ed (2014), p 508 (citing in support *Prodim*, Court of Appeal, Reims, January 31, 2012, Lettre d'info, Versailles, July 2012).

185. In the first sentence of the preceding paragraph, I use the words "in general". My reason is that there may be exceptional cases where the other parties (that is the parties other than the proposing appointor) can be identified even without being named, and in those circumstances their consent will be required to the making even of the high-level disclosure. But it is not suggested that this qualification is relevant in this case.

186. As to the high-level disclosure, para 146 addresses the matters that might be included in disclosure to the parties to the first arbitration about a proposed appointment in a further arbitration without breaching confidentiality obligations owed to the parties in the second arbitration. It may be adapted for the converse situation.

187. Paragraph 146 does not state that disclosure of the matters itemised in that paragraph will necessarily of itself be enough to discharge the duty of disclosure, only that such matters may be included without breaching a confidentiality obligation, or as I would say, as I have explained, may *in general* be included without breaching such obligation.

188. On this basis, therefore, there is no question of the other parties' confidentiality being eroded by the decision on this appeal. As Lord Hodge explains, if more information is required (or, I would add, at least if it is reasonably required), it cannot be disclosed without the relevant parties' consent. If consent is not forthcoming, the

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arbitrator will have to decline the proposed appointment (see, for example, Derains/Schwartz at the passage cited).

189. As Lord Hodge holds, the extent of the required disclosure will depend on the facts (see para 129 above, citing the IBA Guidelines). The parties to whom the high-level disclosure is made may well ask for further information to enable them to assess whether they should agree to the arbitrator taking the further appointment. Julia Dias QC gives some assistance in her article cited above on the range of disclosure by explaining what she considers would be needed:

> "… whether there is *in fact* a real possibility of bias depends on matters such as the identity of the parties to the two arbitrations, the nature of the subject-matter, the degree of overlap between the issues and the type of evidence adduced. The problem is that none of this can be explored without disclosing in the first arbitration matters relating to the second arbitration which in principle should be confidential to that arbitration. Indeed, it is impossible to see how the confidentiality of the second arbitration would not be compromised by the need to investigate whether there is an overlap between the two references in relation to subject-matter, issues etc." (p 12)

Conclusion

190. In conclusion, with and subject to these further points I agree with the judgment of Lord Hodge.

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