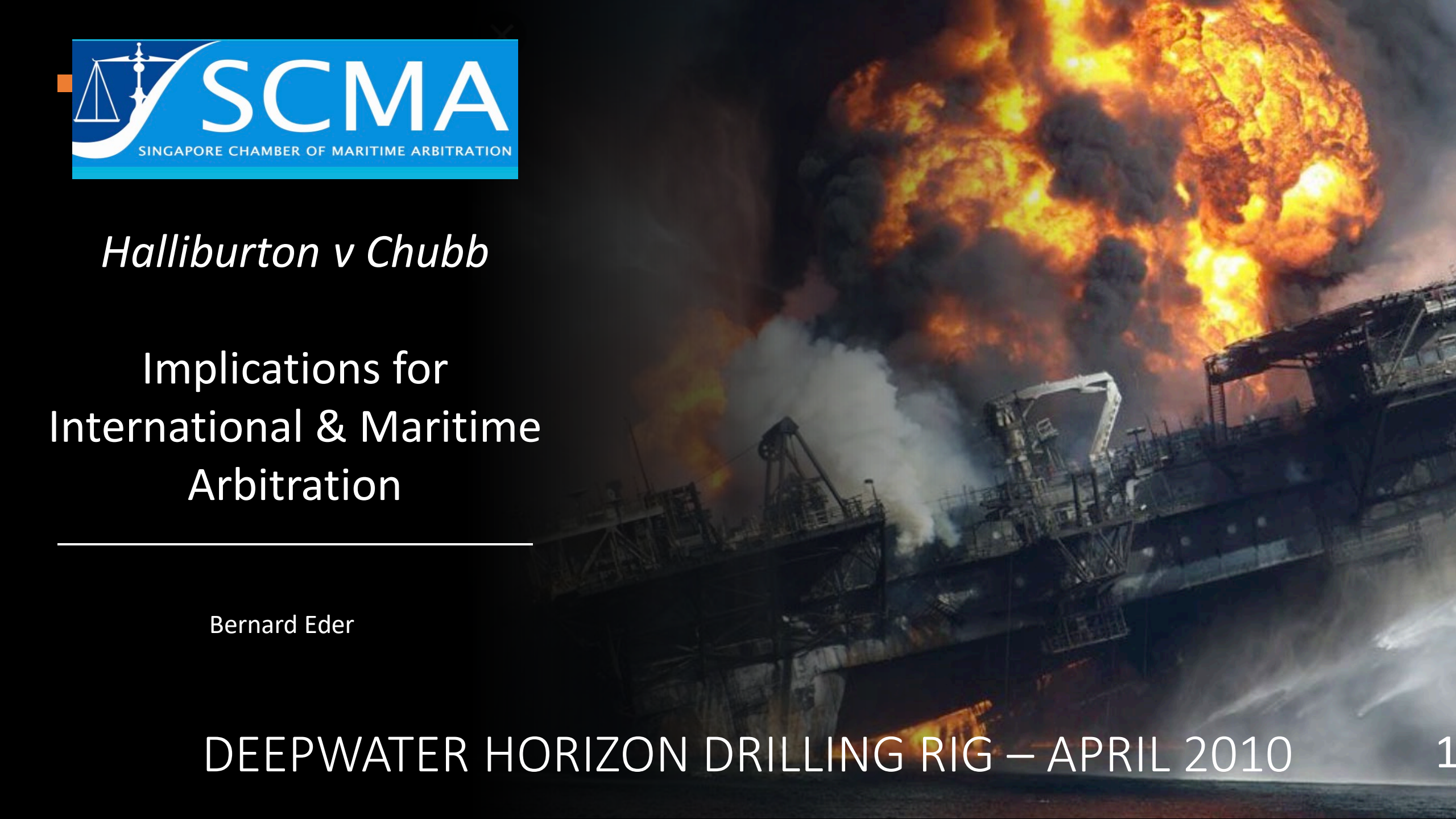
SCMA
SINGAPORE CHAMBER OF MARITIME ARBITRATION

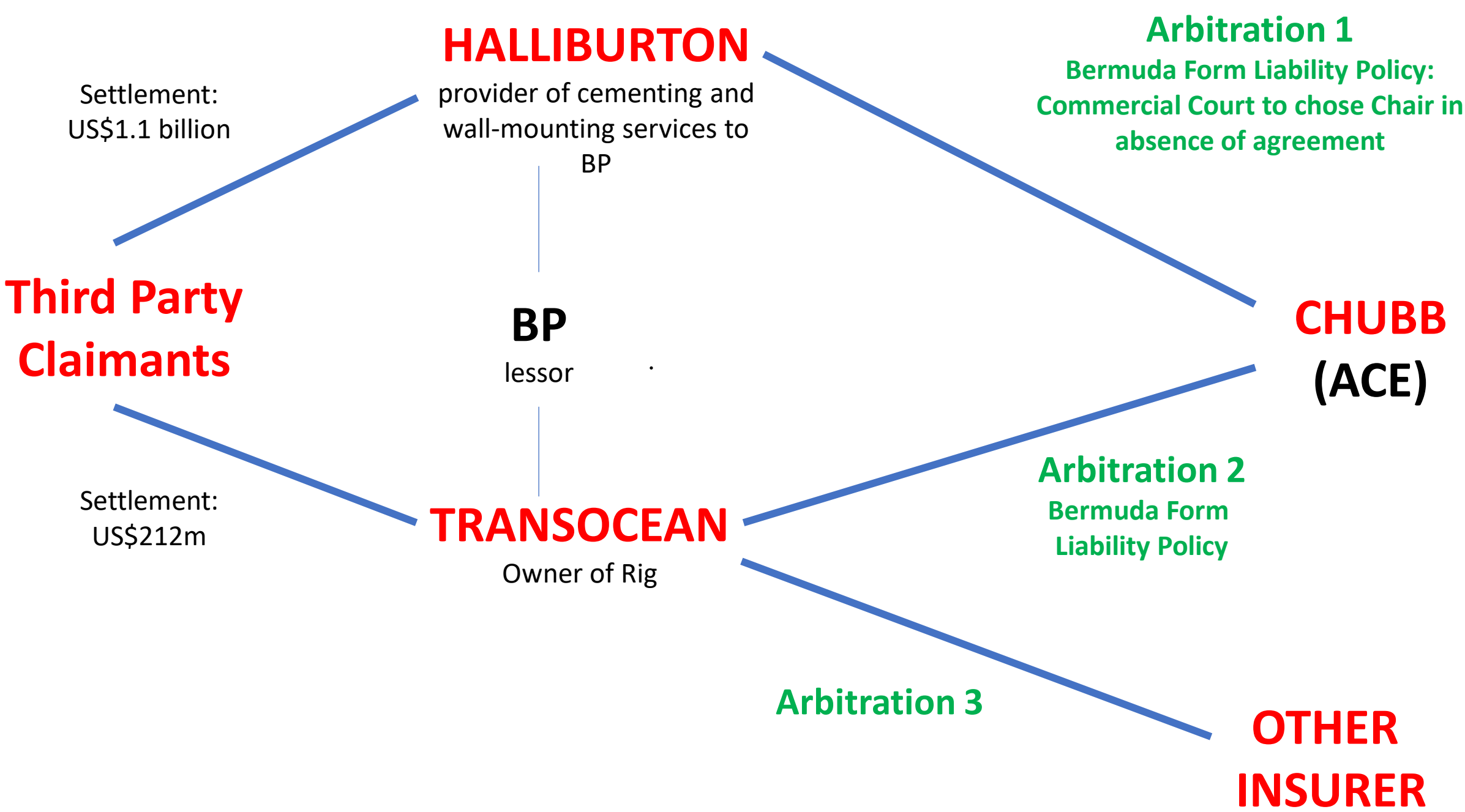
Halliburton v Chubb

Implications for International & Maritime Arbitration

Bernard Eder



DEEPWATER HORIZON DRILLING RIG – APRIL 2010


HALLIBURTON
provider of cementing and wall-mounting services to BP
Settlement: US$1.1 billion
Arbitration 1
Bermuda Form Liability Policy: Commercial Court to chose Chair in absence of agreement
Third Party Claimants
BP
lessor
CHUBB (ACE)
Settlement: US$212m
TRANSOCEAN
Owner of Rig
Arbitration 2
Bermuda Form Liability Policy
Arbitration 3
OTHER INSURER

Date	Arbitration 1 Halliburton v Chubb	Arbitration 2 Transocean v Chubb	Arbitration 3 Transocean v Other Insurer
June 2015	Court appoints as Chair KRQC – who had been one of the arbitrators proposed by Chubb		
Dec 2015		Chubb nominates KRQC as its appointed arbitrator. KRQC discloses to Transocean his appointment as Chair in Arbitration 1. BUT does not disclose to Halliburton in Arbitration 1 his proposed appointment in Arbitration 2. Transocean does not object. KRQC accepts appointment in Arbitration 2	
August 2016			KRQC accepts joint nomination as substitute arbitrator but does not disclose this appointment to Halliburton
Nov 2016	Halliburton discovers appointment of KRQC in Arbs 2 and 3 and expresses concern – asking for explanation etc.	Hearing of preliminary issue of policy construction	Hearing of preliminary issue of policy construction

Date	Arbitration 1 Halliburton v Chubb	Arbitration 2 Transocean v Chubb	Arbitration 3 Transocean v Other Insurer
Dec 2016	KRQC states 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; maintains that he is independent but offers to resign. Chubb refuses to agree his resignation.		
Dec 2016	Halliburton issues Court application to remove KRQC under s24 of Arbitration Act 1996		
12 Jan 2017	Court Hearing of application to remove KRQC		
Jan/Feb 2017	Arbitration Hearing of preliminary issues of construction		
3 Feb 2017	Judgment: Popplewell J dismisses s24 application		
1 March 2017		Award on preliminary issues in favour of Chubb	Award on preliminary issues in favour of Chubb
Dec 2017	Arbitral Tribunal (including KRQC) issues its Award in favour of Chubb		
April 2018	Court of Appeal dismisses appeal		
Nov 2020	Supreme Court dismisses appeal		

Halliburton v Chubb

Court of Appeal [2018] EWCA Civ 817

Court of Appeal dismissed Halliburton's appeal:

In summary, held:

KRQC ought to have disclosed his appointment in Arbitration 2 and Arbitration 3 to Halliburton in Arbitration 1 but mere non-disclosure was not (without more) sufficient to give rise to an inference of apparent bias.

Halliburton v Chubb

Supreme Court [2020] UKSC 817

Supreme Court dismissed Halliburton's appeal – 6 Highlights

HIGHLIGHT 1. - The duty to disclose

At paras 49-69, SC considers the arbitrator's duty of impartiality and concludes that in addressing an allegation of apparent bias in an English-seated arbitration, the English Courts will (i) apply the objective test of the fair-minded and informed observer; and (ii) have regard to the particular characteristics of international arbitration [69].

HIGHLIGHT 2:

At paras 70-116, considers “disclosure” and concludes that there is legal duty of disclosure [81] which imposes an “objective test” [116].

HIGHLIGHT 3 – Multiple References

Para 131 – 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.

HIGHLIGHT 4: GAFTA and the LMAA

But, as to "custom and practice" see eg. @ [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…"

HIGHLIGHT 5: Nature of Legal Duty

Para 136 - 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.

HIGHLIGHT 6: The Decision

KRQC was "under a legal duty to disclose" his appointment in Arbitration 2 to Halliburton because "at the time of that appointment the existence of potentially overlapping arbitrations with only one common party was a circumstance which might reasonably give rise to the real possibility of bias" [145] and KRQC's failure to make that disclosure was a breach of his legal duty of disclosure that may well have satisfied the "real possibility of bias" test [147].

HOWEVER, by the time of the S.24 hearing, KRQC had explained his oversight (accepted by Halliburton as genuine). Furthermore, the reference in Arbitration 2 came 6 months after the reference in Arbitration 1. It was more likely that Transocean would have cause for concern, rather than Halliburton [148]…..

……On the facts, the SC was not persuaded that the fair-minded and informed observer would infer a real possibility of unconscious bias on the part of KRQC for 5 main reasons:

(1) The lack of clarity in English case law as to whether there was a legal duty of disclosure and whether disclosure was needed;

(2) The time sequence of the three references;

(3) KRQC's measured response to the challenge;

(4) No question of KRQC having received any secret financial benefit;

(5) No suggestion of an "unconscious bias in the form of subconscious ill-will in response to the robustness of the challenge".

ESSEX COURT CHAMBERS

BARRISTERS

THE MARITIME AND COMMODITIES PERSPECTIVE

CHRIS SMITH QC

- Whether and to what extent an arbitrator may accept appointments in multiple references concerning the same or overlapping subject matter with only one common party without giving rise to an appearance of bias
- Whether and to what extent he may do so without disclosure [2]

- Chains of contracts and sub contracts
- Long term time charterparty with sub time charterparties
- Bareboat charterparty with time charterparty and voyage charterparty
- Sale and sub sale of second hand tonnage
- Sales and re-sales of new builds
- Strings of contracts
- Common practice for the same arbitrator to be appointed up and down the chain or string
- One event giving rise to multiple disputes

- Is there anything inherently ‘wrong’ with multiple appointments:
  - In references concerning the same or overlapping subject matter
  - By or on behalf of the same party

- Supreme Court judgment recognises these concerns
- GAFTA at paragraph 43 – disputes in relation to string contracts regularly referred to the same arbitrator(s)
- LMAA at paragraph 44 – multiple appointments are relatively common

- The test for disclosure is objective
- There is a legal obligation to give disclosure
- Which can arise even when the matter to be disclosed falls short of what would cause an objective observer to conclude that there was a real possibility of a lack of impartiality
- Which requires disclosure of matters which are relevant and material to the assessment of impartiality and could reasonably lead to an adverse conclusion [116]
- "*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 on the customs and practice in the relevant field*" [136]

- "*there are practices in maritime, sports and commodities arbitrations … in which engagement in multiple overlapping appointments does not need to be disclosed because it is not generally perceived as calling into question the arbitrator's impartiality of giving rise to unfairness"* [87]

- "*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 part of the process which is known to and accepted by the participants. In such circumstances no duty of disclosure would arise*" [135]

- "*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 arbitrators are taken to accede to this practice and to accept that such involvement by their arbitrators does not call into question their farness or impartiality*" [91]

- Two concerns
- Do maritime and commodities arbitrations meet the ‘gold standard’?
- How does the ‘carve out’ work in practice?

- Are all users of maritime and commodities arbitrations aware of the practice?
- Do all users of maritime and commodities arbitrations agree with/consent to the practice?
- Could users opt out of the opt out?
- Can users still require the ‘gold standard’?
- Could a party argue that notwithstanding what the Supreme Court has held there is in fact no settled custom and practice?

- "*rather than having disputes about the existence of 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*" [135]

- Does that work?
- Is it necessary?
- Is it desirable?
- See the SCMA rules:
- "*a prospective Arbitrator shall disclose to any party who approaches him in connection with his possible appointment, any circumstances likely to give rise to justifiable doubts as to his impartiality or independence*" (rule 15.2)
- "*an arbitrator, once nominated or appointed, shall disclose any such circumstances referred to in Rule 15.2 above to all parties*" (rule 15.3)
- But also "*The … Tribunal shall at all times treat all matters relating to the arbitration including the existence of the arbitration … as confidential*" (rule 44)

Halliburton from the perspective of the wider arbitral community

The C/A decision

Why did it cause ripples in the wider arbitral community?

- Different needs and expectations
- Different procedures
- Perception that overly collegiate
- Often no right of appeal

Halliburton from the perspective of the wider arbitral community

Multiple interventions

- LCIA, ICC, CiArb, LMAA and GAFTA
- Different perspectives, but submissions similar: it all depends on context
- Some differences (e.g. is there legal duty to disclose?)

Halliburton from the perspective of the wider arbitral community

What did the wider arbitral community submit to the SC?

- All depends on context, but …
  - Reputation of little relevance
- Chairman and party appointees- the same
  - There is a legal duty of disclosure
- Non-disclosure innocent- limited relevance
  - Non-disclosure can tip the balance

Halliburton from the perspective of the wider arbitral community

Happy with the SC judgment?

- Welcome clarification of law, and
- Unlikely to result in rafts of unmeritorious challenges, but …
- Some principles not easy to apply, and
- Some unanswered questions