



HALLIBURTON ABC ...

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ALPHABET

A is for Arbitrators and Appointments

B is for Bias

C is for Conflicts

D is for Disclosure

E is for Enforcement

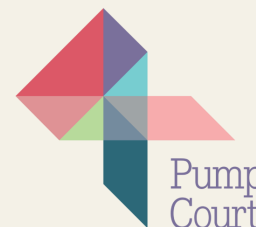
F is for Fairness

And IFMO is the Informed Fair-Minded Observer



Enforcement

- Parties (at least successful parties) want *internationally enforceable* awards
- a broad policy point here: if English arbitration procedure is out of line with [and lower than] typical international expectations, there is a risk that an award unchallengeable in E&W is unenforceable elsewhere
- The problem of equiparation of judges and arbitrators



The Facts

Deepwater Horizon Rig – temporary abandonment after a blow-out

BP the lessee

Transocean the Owner, engaged to provide drilling teams and crew

Halliburton provided cementing services on abandonment of well

Transocean and Halliburton both insured by Chubb



The sequence of references

- Reference 1: **Halliburton v Chubb**
 - M is Court-appointed chair 6/15
 - M was Chubb's preferred candidate and had been appointed by Chubb before
- Reference 2: **Transocean v Chubb**
 - M is appointed by Chubb 12/15.
 - Ref 1 appointment disclosed to Transocean, but Ref 2 appointment not disclosed to Halliburton
- Reference 3: **Transocean v L (another insurer of Transocean)**
 - M is substituted as arbitrator 8/16
 - Not disclosed to Halliburton



And next ...

- Nov 2016 - Trial of preliminary issues in References 2 and 3 (the Transocean cases)
- Nov 2016 – Halliburton learn of M’s subsequent and undisclosed appointments in Refs 2 and 3
- Halliburton write to complain
- M replies to say
 - Does not and did not think IBA rules put any obligation on him to disclose
 - But accepts it would have been prudent to do so

And finally

- December 2017 Reference 1 Final partial Award – Chubb wins.
- One arbitrator (N) produces “Separate observations”

The Challenge by Halliburton

- Application by Halliburton to remove M for apparent bias on grounds of his:
 - Acceptance of appointment in Refs 2/3 giving rise to an inequality of arms;
 - Failure to disclose his appointment in Refs 2/3;
 - Response when challenged.

Arbitrators and Appointments

- Why does Halliburton matter?
- A very rare chance for Supreme Court to state position of English law on a critical aspect of arbitration procedure



BIAS

- Actual Bias and Apparent Bias
- Apparent Bias:

Would the informed fair-minded observer (IFMO) having considered the facts, conclude that there was a real possibility that the judge was biased? *Locabail v Bayfield*, [2000] QB 451.

What about arbitrators? Should the test be the same as it is for judges?



What is the Disclosure requirement?

- The duty is to disclose anything which MIGHT lead IFMO to conclude that there was apparent bias
- So: the duty is to disclose anything which MIGHT lead IFMO to conclude that there was a real possibility that the arbitrator was biased

So what is the problem?

- We know what the test is – so just apply it?
- Judge (Popplewell J) said –
 - The arbitrator did **not** need to disclose
 - So the Halliburton challenge fails
- The Court of Appeal said
 - The arbitrator **did** have to disclose
 - But the fact that he did not do so does **not** give rise to apparent bias
 - So the Halliburton challenge still fails

Some distinctive features of Halliburton

- Not a maritime arbitration case – perhaps maritime arbitration is different?
- An ad hoc arbitration
 - So no prior agreement about disclosure
 - Tests the *minimum* standard, perhaps
- It is a case about subject matter overlap (with one common party) – *not* really about conflicts

What might happen in Supreme Court?

- No argument about the correct test – surprisingly
- Question is its application to facts
- For Maritime Arbitration the real issue will be how prescriptive or generalised the SC ruling is.
- LMAA intervention was keen to stress distinctive features of maritime arbitration and all other parties accepted there were differences.

LMAA arbitration

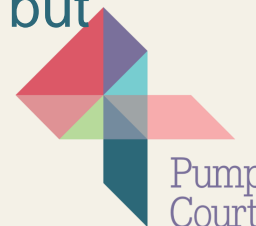
	Commenced	Awards issued
LMAA	1728	532
GAFTA	799	180
LCIA	305	56
ICC (globally)	842	512

(figs for 2014-2018)



A suggestion for a correct analysis

- Duty of arbitrator is to act fairly and impartially: see Arbitration Act s.33 (not independently)
- The Halliburton position has always suggested the reason for disclosure of the overlapping appointment was to avoid BIAS
- But what if the true reason was to meet the duty to act FAIRLY
- The equality of arms argument
- Sometimes something needs to be disclosed not because it gives rise to an arguable case of bias, but because the proceedings will be unfair if it is not disclosed

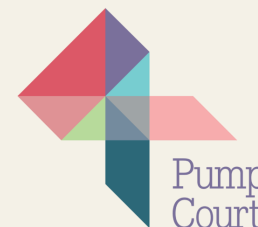


Problems with confidentiality?

- Perhaps the answer lies in public policy
- Perhaps confidentiality has to give way to the fairness of arbitral proceedings
- And note that often the confidentiality that parties are really worried about would not be compromised by disclosure of the mere fact of appointment.

Summary

- Be patient, Supreme Court judgment soon (?!).
- As an arbitrator
 - IFMO is your best friend (deals with Bias)
 - but remember Fairness too: that might give rise to disclosure obligations.
- Extent of guidance and breadth of reasoning perhaps more important than the result
- Not likely to be the last word and might stimulate major changes in arbitrator disclosure



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