HALLIBURTON ABC …

Nick Vineall QC

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

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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

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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

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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

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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

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And finally

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

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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.

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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

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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?

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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

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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

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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

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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.

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LMAA arbitration

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

(figs for 2014-2018

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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

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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.

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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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