

HALLIBURTON ABC ...

Nick Vineall QC

ALPHABET

A is for Arbitrators and Appointments

B is for Bias

C is for Conflicts and Confidentiality

D is for Disclosure

E is for Enforcement

F is for Fairness

And IFMO is the Informed Fair-Minded Observer



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



The facts

- Bermuda form insurance ad hoc arb - *Deepwater Horizon* disaster.
- Arbitration 1: Court appoints KR (insurer Chubb's choice) as **third** arbitrator.
 - KR disclosed involvement in prior arbitrations involving Chubb
 - Neither side took issue with multiple appointments

and then

- KR *subsequently* appointed arbitrator in
 - (Arb 2) by Chubb (as party appointee)
 - (Arb 3) re Deepwater Horizon (same facts, different policy)
- KR **fails** to disclose to H in Arb 1. H finds out – asks KR to resign.
- KR offers to resign. C insists he remain.
- Arbs 2 and 3 decided on preliminary issues of (different) wording. Facts not in issue.

The comment by Halliburton's appointee

“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.”



BIAS

- Actual Bias and Apparent Bias
- Apparent Bias:

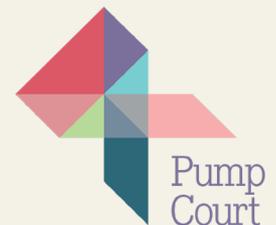
Would the informed fair-minded observer (IFMO) having considered the facts, conclude that there was a real possibility that the judge was biased? *Locabail v Bayfield*, [2000] QB 451.

What about arbitrators? Should the test be the same?



So what is the problem?

- We know what the test is – so just apply it?
- Judge (Popplewell J) said –
 - No legal duty to disclose
 - No grounds to find apparent bias 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



And the Supreme Court said

- There is a duty to disclose
- It was breached in this case
- ***But*** the Court was right not to remove the arbitrator because by the time the question arose at first instance IFMO would ***not*** conclude that there was a real possibility of unconscious bias

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

The Supreme Court decision

- 5 Judges
- 2 judgments
- Lord Hodge (+3) and Lady Arden

- Lord Hodge has 158 paragraphs. Just one – para 149 – explains why a real possibility of bias was not made out.

What is the law decided by Halliburton?

- Impartiality is a core principle and applies equally to party appointees and chairs

IFMO and the test for bias

- The test is whether IFMO would conclude that there was a real possibility of bias
- That assessment is objective but must have regard to the “realities of international arbitration”
- And must have regard to the customs and practices of the relevant field of arbitration

Legal Duty?

- There is a duty to disclose circumstances which “might reasonably give rise to a conclusion by IFMO that there is a real possibility of bias”
- ... unless the parties have agreed otherwise.

Relevance of breach of duty to disclose ?

- Note that a failure to disclose in breach of duty can itself be a matter relevant to the question of whether IFMO would conclude there was a reasonable possibility of bias [#133]

Duty to disclose vs duty of confidentiality

- Disclosure duty does not override duty of privacy and confidentiality
- But sometimes consent to disclose some information may be inferred from “the arbitration agreement in the context of the practice in the relevant field”
- If not and the duties are in conflict you must resign or decline to take the appointment.

As of when are these questions answered?

- When IFMO asks whether an arbitrator has failed in a duty to disclose, that question must be answered as of the date that that duty arose
- But when the question is whether IFMO would conclude there is a real possibility of bias, that is done as of the time when the question is asked (ie first instance decision on removal)

Maritime Arbitration

The LMAA's submissions as interveners

- Concern about the possibility of a requirement to disclose multiple appointments

Average arbs commenced and awards issued pa (14-18)

LMAA	1728	532
GAFTA	799	180
LCIA	305	56
ICC	842 (73)	512



Maritime arb/contd

- Appointment process – giving rise to difficulties
- Chain arbitrations
- Multiple appointments

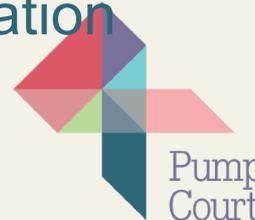
Maritime arbtn/contd

IBA Guidelines Para 3.13

Orange list: Arbitrator has within the past 3 years been appointed as arbitrator on two or more occasion by one of the parties/affiliates

Footnote:

It may be the practice in certain type of arbitration, such as maritime sports or commodities arbitration, to draw arbitrators form a smaller 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



Supreme Court response

- “As GAFTA and the 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 does not call into question their fairness or impartiality.”
- ... so no duty to disclose multiple appointments per se



Loose Ends

- What duty on arbitrator to make enquiries?
- If there is a slightly different approach for maritime arbitration, what is the scope of maritime arbitration?

Back to the facts of Halliburton

- Why exactly did AC decide that, despite breach, there was no appearance of bias?
- Would the result be the same?

Enforcement

- Halliburton is about the view the curial court happens to take about disclosure
- Don't forget the importance of the view taken in jurisdictions where enforcement may need to take place
- New York Convention – Art V
- Too narrow a view of (or approach to) disclosure, or apparent bias, may put at risk effective enforcement

Fairness as a drive of disclosure – a missed opportunity?

- 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

Impact of Halliburton?

- Arbitrators thinking much more carefully about disclosure
- Slightly more disclosure being given

Practical Suggestions - arbitrators

- For arbitrators
 - Think about IFMO
 - Always safer to disclose – if you can
 - Maybe think about appointment terms which will allow appropriate subsequent disclosure
 - Insurance?

Practical Suggestions - Institutions

- Review rules
 - Be explicit about what disclosure is required
 - Perhaps say something about implied confidentiality and disclosure

Practical suggestions - appointers

- Perhaps be cautious about multiple appointments esp. if not likely to be disclosed
- Be very cautious about sailing close to the wind if enforcement might be needed in a country which might interpret the public policy exception broadly

Good luck ...

Nick Vineall QC
4 Pump Court,
Temple, London

