HFW

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AND THE AWARD SHOULD GO TO...

In such a strange year, and in light of the Oscars® stepping away from having a single host, we think it is only appropriate to recognise not one, but two contributions during these challenging times: the evolution of the common law in the hands of the UK Supreme Court and the land of Zoom – even if the Oscars® don't wish to utilise the latter.

...THE SUPREMES

The UK Supreme Court houses some of the most high profile legal professionals who hear and decide on cases of the greatest public importance. We highlight some of their landmark decisions over the past year.

Halliburton v Chubb

As you will likely be aware, it is not uncommon for the same arbitrators to be appointed in industries, or in related references. Arbitrators have a fundamental duty to act fairly and impartially and, as the Supreme Court reminded us in *Halliburton v Chubb*[1], a legal **duty to disclose** any matters that might cast doubt on their impartiality – which will include disclosure of appointments in related and overlapping references.

Enka v Chubb

In October 2020, the Supreme Court considered how to correctly determine the **governing law of an arbitration agreement**. This was the important case of *Enka v OOO Insurance Company Chubb*[2]. Under English law, an arbitration agreement is considered entirely separate to the underlying contract, and a choice of law in the substantive contract will not automatically apply to the arbitration agreement. In the absence of any express choice of law within the arbitration agreement itself, the arbitration agreement will be governed by the law that is *most closely connected to it*. If the parties have agreed on a seat of arbitration, the law most closely connected will generally be the law of that seat.

Okpabi v Royal Dutch Shell

The Supreme Court restated that a **parent company can be responsible for** the actions of **its foreign subsidiary**. In relation to a jurisdictional issue, the Court held that a group of Nigerian citizens had an arguable case that the *Shell* UK parent company owed them a duty of care in respect of damage caused by its subsidiary in Nigeria.[3] This decision built on the earlier 2019 Supreme Court decision of *Vedanta v Lungowe*[4]. Where a parent company lays down group wide policies, and takes active steps to manage the implementation of those policies or holds itself out as exercising a level of control of implementation, a parent company will risk being liable for any damage that flows from applying those policies.

Sevilleja v Marex

The Supreme Court revisited the rule against **reflective loss**. Recent case law had applied the rule to prevent shareholders and creditors from taking action against a third party wrongdoer. However, the Supreme Court held that this application was too wide.[5] The Court reinstated the original rule that where a shareholder's shares or distributions are diminished in value because the company has suffered a loss from a third party, *the shareholder* is unable to claim *for losses suffered in their capacity as a shareholder*, as such loss is merely a reflection of the loss suffered by the company. Creditors will welcome this decision as it restrains the reflective loss rule and re-opened an avenue of recourse that had previously been closed.

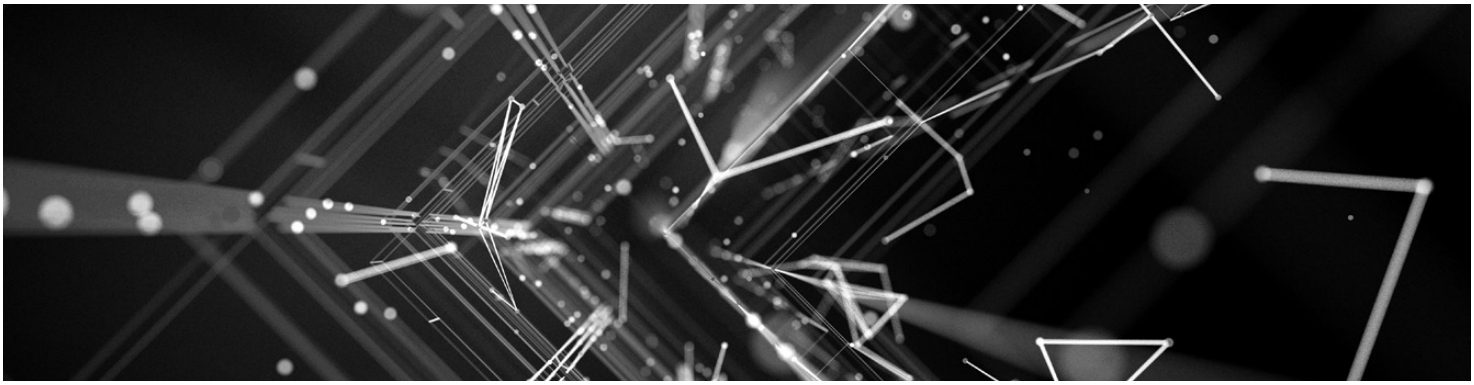
FCA test case

One of the most topical cases of the past year was when the courts considered the interpretation of **business interruption** insurance policies and whether they ought to apply to the Covid-19 pandemic and related disruptions. This was the well-publicised *FCA test case*.[6] The Supreme Court expedited the appeal process in recognition of the public interest, and after two short months, decided to substantially allow the FCA's appeal. The Court found that most of the sample policies before them would respond to the losses caused by the Covid-19 pandemic – a big win for many businesses in a time of need.

Uber v Aslam

Most recently, the Supreme Court further found in favour of the little people by giving *Uber* drivers **employment rights** when it held that they were actually "workers" and not independent self-employed contractors as Uber had described them.[7] This means that Uber now owes its drivers a minimum hourly wage, holiday pay and pensions – benefits it had, up until now, avoided. This decision will inevitably shock the booming gig economy and result in many employers revisiting how they engage and control their contractors.

1 *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48
2 *Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb* [2020] UKSC 38
3 *Okpabi & Ors v Royal Dutch Shell Plc & Another* [2021] UKSC 3
4 *Vedanta Resources Plc & Another v Lungowe & Ors* [2019] UKSC 20
5 *Sevilleja v Marex Financial Ltd* [2020] UKSC 31
6 *The Financial Conduct Authority v Arch Insurance (UK) Ltd & Ors* [2021] UKSC 1
7 *Uber BV & Ors v Aslam & Ors* [2021] UKSC 5



...LAND OF ZOOM

At HFW, like most companies around the world, we have had to adjust to a virtual way of working. This was an initial shock, however over time, bridges were built and familiarity increased allowing us, and the rest of the legal industry, to continue as if business was (almost) usual.

Pre-pandemic, conducting legal business wholly (or largely) virtually was almost unheard of. The likes of Zoom and Microsoft Teams had existed, but, at least from our experience, they were not commonly used. In 2016, the English Government had announced support to reform and modernise the English Courts, including virtual hearings, but in the years leading up to 2020, little progress had been made. The low uptake of the opportunity to carry out business virtually was clearly not because it had not been thought of, or was impossible, but perhaps because the legal industry favoured the energy of in person advocacy and negotiation, or perhaps because it was simply "stuck in its ways".

Fast forward to 2020, the industry was forced to accelerate into the modern world. We have all now proven that it is possible to conduct business (almost) entirely virtually, so we reflect and ask, *is the land of Zoom here to stay?*

There are many benefits to this new way of working. Parties to international disputes no longer have to travel hours to a different city or country to attend a hearing or mediation, and can simply "dial in" from their living rooms in the comfort of tracksuit pants. Along with this comes the shift toward electronic bundles and papers. This movement clearly benefits our environment through reducing carbon emissions and unnecessary volumes of paper, and naturally produces costs savings.

There is certainly an ease in virtual working, which is attractive to most, but we would be naive to say it was all smooth sailing.

At the beginning of the Covid-19 pandemic, many were unfamiliar with carrying out hearings and mediations via video conference. The English Courts issued guidance almost instantaneously, however in practice, it took some time for lawyers, judges, and everyone to build up their practical experience and confidence in these realms. One year on, and many of these teething problems have fallen away.

However, as the uptake in video conferencing products increased, so did concerns over whether such virtual "rooms" were truly private. Too frequently internet connections drop out or transmissions are delayed – clearly disrupting the natural rhythm and flow of dialogue. These issues can cause delays, which translates to *time and money*. We also suspect that such issues may provide scope for an increase in parties looking to appeal decisions.

A new product release or connecting to the modem by Ethernet cable may resolve some issues, but this will not solve the natural limitations of the virtual world. During a cross-examination, a witness's body language can be telling and a webcam can only capture so much. Mediations and settlement discussions are often fuelled by the energy and tension that is built up in the room – emotions that cannot easily translate through virtual means and are often lost.

The social scene has had its ups and downs. It was clear from the get go that interpersonal relationships within teams and between lawyers and clients would be key. This fuelled an initial rush of excitement to host virtual quiz nights and drinks – however, over time, this faded along with the appetite to stay behind the screen for longer than necessary. Day to day, we have enjoyed learning more about those behind the screen from the unique angle of a webcam at home. We learnt about the meaning of the artwork on the wall and new pets as they came into the camera shot. There was also room for more in-depth personal discussions about how one was feeling about the changes and mental health.

Looking forward, we are excited to see how the industry will develop. We suspect many will still prefer the "old" way of working, whilst others will opt to remove the commute. We see the benefits of both, and imagine a hybrid and more flexible future. Straightforward or lower cost disputes are likely to reap the benefits of virtual hearings and mediations, whereas many other disputes will naturally be better suited to a traditional "in person" approach. We are excited to see what the future holds, and most of all, we are excited to get back out to see our clients face to face.

Our previous editions

For further information please contact the authors of this briefing:

BRIAN PERROTT
Partner, London
T +44 (0)20 7264 8184
M +44 (0)7876 764032
E brian.perrott@hfw.com

SHELBY McGREACHAN
Associate, London
T +44 (0)20 7264 8327
M +44 (0)7970 627880
E shelby.mcgreachan@hfw.com

STEPHANIE MORTON
Associate, London
T +44 (0)20 7264 8133
M +44 (0)7980 764940
E stephanie.morton@hfw.com

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