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Raising Awareness on Alternative Methods of Dispute Resolution

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CONCILIATION

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NATIONAL LAW UNIVERSITY DELHI

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The Centre for ADR would like to thank the contributors to this edition for submitting their articles, to our CADR team for working through a difficult year towards our common goal, and specially to Abhishek Jain for setting up our website and to Hardik Baid for designing our cover.

Thanks are due to our Editorial team and our volunteers – Prof. (Dr.) Ruhi Paul, our Editor-in-Chief, to our Managing Editors, Abhinav Hansaraman and Hardik Baid, and our Editors – Akanksha Mathur, Abhishek Jain, and Sanchita Bhat.

EDITORIAL NOTE

We are delighted to introduce Centre for ADR's new Journal of Dispute Resolution (CJDR). CJDR is the first online Journal of the CADR and it aims to publish truly interdisciplinary research on issues related to dispute resolution and settlement. In 2017, ADR Society of NLU, Delhi has been reorganized as the Centre for ADR. CADR has been working towards promoting ADR methods through training students and undertaking other activities.

Disputes are inevitable part of human relations and methods of its efficient resolution is continuously evolving. Across the world people are involved in research as to how disputes can be resolved effectively and thereby relationships can be improved. CJDR is a humble attempt on part of CADR to contribute towards this larger global agenda. CJDR will provide a platform for sharing up-to-date, high-quality and original research papers alongside contemporary and insightful reviews. This is a biannual online Journal. In the coming editions all types of papers will be subject to the Journal's double-blind review process. However, the pieces in this edition are only by invitation.

In this Issue of the Journal, we present to you articles on various issues of contemporary relevance like issues regarding pre-arbitral steps, online Mediation in India, appointment of arbitrators, conflict of interest of arbitrators, attributability of wrongful conduct in Investment Arbitration and fundamental concepts in arbitration and issues of non-signatories. We hope this Issue of the Journal will be able to excite your mind to explore the realm of ADR further.

We invite you to be a part of our journey to take the research in this area a notch higher by submitting your papers, case comments, book reviews, either individually or collaboratively. We thank you in advance for your contribution to the Centre for ADR Journal of Dispute Resolution.

- ***Editor-in-Chief***

FOREWORD

WHY ADR, AND WHY NOW?

- ***John G. Shulman****

Let's say you have a dispute, and you believe you need a lawyer to help you "win" the dispute. Perhaps your dispute is over land. Or maybe it involves an important environmental or human rights issue. Or it could be a business dispute, or a family dispute. Fair enough, sounds like you need a lawyer.

But before we dive into the legal issues that may help determine the outcome of your dispute in the legal system, there are some questions you may want to consider…

For example, do you have a lot of extra money to spare? The legal system is costly, and you will most likely be asked to do your part to pay for your exposure to the legal system.

Also, are you ready to ride waves of emotions, like frustration, outrage and anger? If you think you are angry now, just wait to see what the legal system can do to turn your dispute (and your already bad relationship with the other party) even worse.

You will have plenty of time to absorb these negative emotions since you will most likely have to wait a decade or more to get a "final" decision from the legal system that purports to resolve your dispute – the judicial decision may help you remember what the original dispute was about so many years ago.

Perhaps you will be satisfied by the decision and call it — as the legal system does — "justice."

But as likely, after paying all that money, and waiting all that time, you may lose your case. And the legal system will also call your loss, "justice."

So you gambled a lot of money and got a lot older while your case was pending. But regardless of what the legal system decides with regard to your dispute, will you really be any wiser?

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These questions may seem provocative, and even cynical or impertinent, especially coming from a lawyer. But I have been around long enough and seen enough in a career as a human rights lawyer to believe that we as a profession had better start considering these questions and yes, start answering them. If we do not, we will render ourselves obsolete when people decide how best to resolve their disputes.

Before we go further, I will be the first to say we do need lawyers and a functioning legal system. In fact, for the most vulnerable among us, for those courageous enough to challenge the abuses by those with power, the legal system may be our only and best chance for meaningful justice.

Yet the courts should not, indeed cannot, be our only avenue for seeking justice and resolving disputes. We as lawyers must become advisers who help our clients solve problems in innovative, timely, effective ways. For example, rather than take a business dispute to court, why not try to negotiate a resolution first? Or if a family has conflict over land, why not bring in community elders or a mediator to help family members talk and listen to each other? While some forward-thinking lawyers are indeed already doing these things, more of us should begin to think this way.

Simply put, a lawyer's skills should extend beyond writing briefs, arguing in court and reassuring our clients that justice will be done if only they are patient and believe…We as a profession should develop and promote the skills required for resolving conflict, and promoting social justice and human rights.

And before you object that a lawyer's pecuniary and professional interests will be harmed by helping clients solve difficult problems in innovative, timely and effective ways, I can show you scores of lawyers who are making a good living, and more important "living good," employing these skills.

If we are truly to address the conflicts, disputes and injustices – big and small – that plague and bedevil us individually and as societies, then we must find new (and rediscover some old) ways to listen and understand each other, explore creative solutions, and understand the risks (and opportunities) associated with conflict.

While courts will undoubtedly play a role, it will still take legions of empowered advocates using wide ranging processes of negotiation and informal conflict resolution to address global climate change, social and economic inequality and injustice, racism, sexism and the manifold other conflicts and pressing issues of our time.

In sum, we as lawyers must develop and share the skills required of us *and our clients* to become proficient negotiators and problem solvers. We must partner with and empower our clients to become full participants in the resolution of their conflicts and disputes. Only in the legal profession, do we describe such skills as "alternative" dispute resolution.

The rest of the world calls it "*life*."

HALLIBURTON V. CHUBB: AN ENGLISH LAW TREATISE ON ARBITRAL BIAS AND THE INDIAN PERSPECTIVE

- ***Payel Chatterjee, Alipak Banerjee & Shweta Sahu****

ABSTRACT

The cardinal principle of an arbitral proceeding is the impartiality and fairness of the arbitrator while adjudicating the arbitral dispute before it. Issues have arisen in the past pertaining to arbitrator conflicts and apparent bias in several instances, necessitating a critical guidance for arbitrators, practitioners and arbitral institutions.

The UK Supreme Court in the judgement, *Halliburton Company v. Chubb Bermuda Insurance Ltd.*, has clarified and set precedent for issues relating to the apparent basis and extent of an arbitrator's duty to disclose material circumstances which may raise questions of bias in arbitrations. London is considered as one of the principal global hubs for arbitration and frequently selected as a seat of arbitration in commercial contracts. Thus, the Supreme Court's decision setting out the importance of fair disclosures, independence and impartiality in English-seated arbitration will act as a ready reference going forward for examining these issues across the globe.

The case brief examines the critical issues and delves on the detailed observations of the Supreme Court's decision on issues relating to multiple arbitral appointments on overlapping subject matters, involving a common party giving rise to justifiable doubts and arbitrator's duty to disclose the same. It further analyzes the impact of the decision on international commercial arbitration and discusses the Indian perspective on the subject matter in light of provision of Indian Arbitration and Conciliation Act, 1996.

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"*While it is trite that a judge or arbitrator must be just and impartial, he must also not give the appearance of bias: justice must be seen to be done.*[1]"

I. INTRODUCTION

Recently, in *Halliburton Company* ("**Halliburton/Appellant**") *v. Chubb Bermuda Insurance Ltd* ("**Chubb/Respondent**")[2], the Supreme Court of the United Kingdom ("**UK Supreme Court**") rendered a landmark ruling on arbitrator conflicts and apparent bias. The judgment considers (i) repeat arbitral appointments and (ii) disclosures required in a dispute concerning the same or overlapping subject-matter and involving a common party. While the UK Supreme Court ultimately dismissed the challenge to the arbitral appointment, the judgment sets out the importance of fair disclosures, independence and impartiality in international arbitration and will act as a ready reference going forward.

II. FACTUAL BACKGROUND

Appeals were filed before the UK Supreme Court in connection with the arbitration proceeding arising under a liability insurance policy. Pursuant to an explosion and fire on the Deep-Water Horizon Rig, there was extensive damage and loss of life. Transocean LLC owned the Rig and provided crew and drilling team to BP Exploration and Production Inc **("BP")** (lessee of the rig). The Appellant provided cementing and well-monitoring services to BP and had obtained a Bermuda Form liability policy from the Respondent. Transocean was also insured with Chubb by a similar policy. The rig disaster resulted in numerous claims.

Following a US court ruling ("**Apportionment Judgment**") apportioning blame - Halliburton and Transocean settled the claims against them by paying USD 1.1 billion and USD 212 million respectively. Subsequently, they initiated claim against Chubb under their liability policies. Chubb disputed such claims, contending that the settlements were not reasonable.

[1] *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48

[2] ibid.

Halliburton commenced arbitration under the insurance policy **("Policy")**.[3] Halliburton and Chubb nominated their arbitrators but were unable to agree on the appointment of the presiding arbitrator. After a contested hearing in the High Court, Mr. Rokison, proposed by Chubb, was appointed as the presiding arbitrator to adjudicate the dispute ("**Reference 1**"). Although Halliburton had objected to Mr Rokison's candidature on the premise that: (a) the Policy was governed by law of New York while Mr Rokinson was a English lawyer; and (b) insurers had a practice of repeatedly appointing retired judges or QCs known to them, such as Mr Rokinson, as party-appointed arbitrators, nonetheless, did not appeal against the appointment order.

Prior to acceptance of appointment - there was a disclosure of Mr Rokinson's previous appointments by Chubb and his current appointment as arbitrator in two pending references involving Chubb. The High Court did not cast any restraint on these appointments. Subsequently and without Halliburton's knowledge, during the pendency of Reference 1, Mr. Rokison accepted appointment as an arbitrator in two separate references, also related to the rig disaster. The first appointment was made by Chubb and related to Transocean's claim against Chubb ("**Reference 2**"). The second appointment was a joint nomination by the parties involved in a claim initiated by Transocean against another insurer ("**Reference 3**"). Mr. Rokison made necessary disclosures prior to his appointments in Reference 1 and 2 but failed to disclose to Halliburton his proposed appointment by Chubb in References 2 and 3.

On discovering Mr. Rokison's appointment in the subsequent references, Halliburton applied[4] for his removal as an arbitrator on grounds that circumstances existed that gave rise to justifiable doubts as to his impartiality before the High Court. The High Court dismissed Halliburton's application on the basis that: (a) arbitrators with the necessary expertise commonly get appointed in arbitrations pertaining to the same facts and subject matter; (b) English law requires the arbitrators to determine a case by reference to the material filed in that particular arbitration reference; (c) the presiding arbitrator does not have an enhanced duty to maintain impartiality.

[3] The Policy was governed by the law of New York. The Policy contained a standard arbitration clause which provided for arbitration in London by a tribunal of three arbitrators, one appointed by each party and the third by the two arbitrators so chosen. If the party-appointed arbitrators could not agree on the appointment of the third arbitrator, the High Court in London was to make the appointment.

[4] See Arbitration Act 1996 (England), s 24

An appeal was filed before the Court of Appeal, where Halliburton challenged the High Court's application of the principles of disclosure to the facts of the case in determining the possibility of bias of the Tribunal. Another issue for consideration was whether the risk of unconscious bias should have been considered by the High Court

The Court of Appeal observed that in the context of international commercial arbitration where a party had concerns, it is always a good practice to make disclosure. The degree of overlap between the arbitration references and the nature of other connections could be argued to allege a reasonable apprehension of lack of impartiality.

However, the Court of Appeal agreed with the overall conclusion of the High Court that (a) apparent bias cannot be inferred only on the basis of non-disclosed circumstances; (b) the non-disclosure was not deliberate but accidental; (c) only a limited degree of overlap existed between the arbitration references; (d) mere oversight, and a failure to disclose in such circumstances would not give rise to justifiable doubts as to impartiality.

III. PROCEEDINGS BEFORE UK SUPREME COURT

Halliburton restricted the challenge to apparent unconscious bias and did not contend that Mr Rokinson was party to any deliberate wrongdoing or actual bias. In particular, the challenge was broadly premised on the fact that Mr. Rokison accepted the benefit of a paid appointment on Chubb's nomination in Reference 2, while continuing to act as an arbitral tribunal in Reference 1. Halliburton alleged that Mr. Rokison gave an unfair advantage to Chubb of being a common party to two related arbitrations with a joint arbitrator, while Halliburton was ignorant of the proceedings in Reference 2, and thus, unaware of the extent to which he would be influenced in Reference 1 by the arguments and evidence in Reference 2. It was further contended that Chubb would be able to communicate with the arbitrator in Reference 2, for matters which might be relevant in Reference 1 and would know of the responses to such communications, while Halliburton would not even know that they had occurred. Lastly, the failure to disclose his appointment to Halliburton prevented it from forming its own view as to whether it might lead to unfairness.

The UK Supreme Court held as follows:

(i) The duty of impartiality of arbitrators

The UK Supreme Court referred to impartiality as a cardinal duty of an arbitrator.[5] Under English law, there is no difference between the standards of fairness and impartiality expected from a party-appointed arbitrator and the person chairing the tribunal. In this regard, whether any appointment constitutes an appearance of bias would be relevant to be determined if a "*fair-minded and informed observer*",[6] would conclude that there was a real possibility that the Tribunal was biased.[7] The fair-minded and informed observer would keep in mind the realities, customs and practices of international arbitration.

(ii) Whether an arbitrator is under a legal duty to disclose particular matters

If there is a real possibility of bias, the best way to avoid the appearance of bias is to disclose the matters. Such disclosure makes parties aware of matters which could give rise to justifiable doubts about his impartiality and provides them the opportunity to consider the disclosed circumstances, obtain necessary advice, and decide on – whether to seek removal of the arbitrator.

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[5] Arbitration Act 1996 (England), s 1:

The provisions of this Part are founded on the following principles, and shall be construed accordingly—

(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense…

Arbitration Act 1996 (England), s 33:

(1) The tribunal shall -

(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent…

[6] *Helow v Secretary of State for the Home Department* [2008] UKHL 62; [2008] 1 WLR 2416:

The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in Johnson v Johnson (2000) 201 CLR 488, 509, para 53.

Then there is the attribute that the observer is "informed". It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.

[7] See, *Porter v Magill* [2001] UKHL 67

Disclosure is a 'legal duty' under English law unless waived by the parties. A failure to disclose may establish a lack of regard to the interests of the non-common party, which may amount to apparent bias in certain circumstances. Arbitral institutions such as International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA) and CIArb (interveners) had also argued in favour of the recognition of such a legal duty – which promotes transparency in arbitration and is consistent with best practices.

Referring to situations where an arbitrator may fail to disclose for reasons, such as forgetfulness, oversight, or a failure to assess the consequences – the UK Supreme Court referred to Prof Davidson's observation that *"[h]owever understandable the reasons for it, the fact of non-disclosure in a case which calls for it must inevitably colour the thinking of the observer"*.[8]

The UK Supreme Court further held that if there was an inequality of knowledge between the common party and the other party or parties due to multiple arbitral appointments, it may confer an unfair advantage in the arbitration and give rise to an appearance of bias– depending on the circumstances, custom and practice in arbitrations in the relevant field.[9]

(iii) Duty of privacy and confidentiality of an arbitrator v. duty of an arbitrator to disclose

As per the practice in the UK-seated arbitrations - the duty of privacy and confidentiality would not prohibit all forms of disclosure of the existence of a related arbitration in the absence of express consent. Meanwhile, the duty of disclosure does not provide a free rein to an arbitrator to disclose everything necessary to persuade a party about his or her impartiality.

In the absence of a contract to the contrary or rules restricting/prohibiting disclosure, certain disclosures may be made without obtaining the express consent of the parties to the arbitration. Consent may be inferred from the relevant circumstances. For instance, the consent of the common party can be inferred from its action to seek appointment of the arbitrator, and the consent of the other party is not required for limited disclosures.

[8] F Davidson, Arbitration, 1st ed (2000)

[9] See IBA Guidelines on Conflicts of Interest in International Arbitration 2014 ("IBA Guidelines"), Orange List, para 3.1

Referring to the present case, the UK Supreme Court held that the disclosure ought to have included:

- the reference of the common party seeking the appointment of the arbitrator in Reference 2;

- if the proposed appointment in Reference 2 by the common party was to be a party-appointment or a nomination for appointment by a court or a third party, and a statement that Reference 2 arose out of the same incident.

Other disclosures, if required, may be made after obtaining express consent of parties to arbitration about which a disclosure is being made. The UK Supreme Court further observed that a high-level statement as to whether similar issues were likely to arise would also involve no breach of the arbitrator's duty of privacy and confidentiality.

(iv) The time of assessment for such duty of disclosure

The duty to disclose is a continuing one. The circumstances may change prior to such disclosures being made. Those circumstances may aggravate an existing failure to disclose a matter or render it less potent. Therefore, the fair-minded and informed observer in assessing whether the arbitrator failed to make adequate disclosure must consider the facts and circumstances "*at and from the date when the duty arose and during the period in which the duty subsisted*".

(v) The time of the assessment of the possibility of bias

The UK Supreme Court observed that the English Arbitration Act 1996 Act provides that an arbitrator may be removed if circumstances "exist" that give rise to justifiable doubts as to his impartiality.[10] The usage of the present tense, i.e., "*exist*" indicates that – the fair-minded and informed observer assesses whether there is a real possibility that an arbitrator is biased by reference to the facts and circumstances known "*at the date of the hearing to remove the arbitrator*".

[10] Arbitration Act 1996 (England), s. 24(1)(a)

Applying the above principles to the present case, the UK Supreme Court was of the view that the fair-minded and informed observer, looking at the facts and circumstances, which would be known to him or her in January 2017 (date of the hearing for removal of Mr. Rokison which was relevant for assessment of possibility of bias), would not conclude that there was a real possibility of bias or, that circumstances existed which gave rise to justifiable doubts about Mr. Rokison's impartiality.[11] The UK Supreme Court's reasoning was premised on the following:

i. There is no clarity or certainty under English law in respect of the legal duty to undertake a disclosure, and if such disclosures are required to be made.

ii. References 2 and 3 followed Reference 1. Therefore, the sequence of the invocation of arbitration may provide an explanation for Mr. Rokison's disclosure of Reference 1 to Transocean but not the obligation to inform Halliburton about Reference 2;

iii. Any overlap in evidence or legal submissions between References 2 and 3 and Reference 1, was unlikely;

iv. Mr. Rokison had not received any secret financial benefit in the arbitral reference;

v. Unconscious bias cannot be inferred in the form of subconscious ill-will, or there is no basis to suggest that he bore any hostility towards Halliburton.

IV. ANALYSIS

The list of interveners in this case such as the International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA) and many other arbitral institutions allude to the growing importance of arbitrator conflict and the requirement for fair and transparent disclosures during arbitral appointments. This judgment provides a balance between the duty to disclose and circumstances which may lead to inferring unconscious bias. The judgment has been rendered keeping in mind the practical realities of international commercial arbitration and multiple arbitral references arising out of the same set of facts and circumstances. Applying the facts to the principle laid down in this case, the decision of the High Court was undisturbed primarily due to lack of certainty in English law on whether a disclosure was required to be

[11] ibid

made. However, going forward, a failure to disclose in similar circumstances may nullify an arbitral appointment because one can no longer plead lack of certainty in English law.

V. THE INDIAN PERSPECTIVE

The IBA Guidelines on Conflicts of Interest in International Arbitration ("**IBA Guidelines**") provide general standards regarding impartiality, independence and disclosure in arbitral appointments. These guidelines are commonly used by arbitrators when making decisions about prospective appointments and disclosures; by parties and their counsel in assessing the impartiality and independence of arbitrators; and by arbitral institutions and courts in considering challenges to arbitrators.[12] While parties, courts and arbitral tribunals across the globe have placed reliance on the IBA Guidelines,[13] India is one of the few countries to have incorporated them in its domestic law, i.e., the Arbitration and Conciliation Act 1996 ("**Indian Arbitration Act**") as amended in 2015.

While the Fifth Schedule of the Indian Arbitration Act lists various instances giving rise to "*justifiable doubts as to the independence and impartiality*" of an arbitrator, the Seventh Schedule refers to instances which directly result in the "*ineligibility*" of a person from being appointed as an arbitrator.

Section 12 of the Indian Arbitration Act sets out that when a person is approached for an arbitral appointment, he shall disclose in writing circumstances, such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality.[14]

Specifically, Entry 22 of the Fifth Schedule which has been contested provides that a justifiable doubt as to impartiality and independence may be inferred if "*The arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties*." The Supreme Court clarified that application of

[12] See, IBA Guidelines

[13] See, Judith Gill, 'The IBA Conflicts Guidelines – Who's Using Them and How?' (2007) 1 Dispute Resolution International 58

[14] Arbitration and Conciliation 1996 (India), s 12(1)

Entry 22 triggers only upon a person having already been appointed as an arbitrator on two past occasions by a party, being then approached for a third appointment by the same party, all within a span of three years.[15] Further, Entry 24 of the Fifth Schedule refers to a situation where "*The arbitrator currently serves, or has served within the past three years, as arbitrator in arbitration on a related issue involving one of the parties or an affiliate of one of the parties.*" Therefore, in such cases, disclosure is mandated in the form specified in the Sixth Schedule to the Indian Arbitration Act to ensure applications for removal of arbitrators are avoided at a later stage. Indian courts haven't witnessed too many rulings yet disputing such issues of mandatory disclosures as most arbitrators tend to be over-cautious while accepting appointments.

Needless to say, the safeguards in the IBA Guidelines that have been plugged in the Indian Arbitration Act coupled with the overall guidance provided by the UK Supreme Court – further strengthens the need for appropriate disclosures in arbitral appointments.

[15] *HRD Corporation (Marcus Oil and Chemical Division) v. Gail (India) Limited* 2018 (12) SCC 471; *Kunwer Sachdev v. Hero Fincorp Limited* 2019 SCC OnLine Del 6694

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