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

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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]"

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.

1. 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.

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[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 accepting his appointment, Mr Rokinson disclosed to Halliburton and the court about (i) his previous appointments in which Chubb was a party, including as party appointed arbitrator nominated by Chubb, and (ii) his current appointment as arbitrator in two pending references in which Chubb was involved. The High Court did not consider these appointments as an impediment. 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) it was common for arbitrators with the relevant expertise to sit in different arbitrations arising out of the same factual circumstances or subject matter; (b) arbitrator under English law was required to decide the case by reference to material available to the parties to the particular reference; (c) rejected the submission that the chairman of the

[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.

tribunal had an enhanced duty to maintain demonstrable impartiality as the ultimate guarantor of fairness and impartiality.

An appeal was filed before the Court of Appeal, where Halliburton assailed the High Court's application of the principles of disclosure to the facts of the case in assessing whether there was a real possibility that the tribunal was biased, regard should be had to the risk of unconscious bias.

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

However, the Court of Appeal agreed with the overall conclusion of the High Court that (a) the non-disclosed circumstances did not of itself justify an inference of apparent bias; (b) failure to disclose was accidental and not deliberate; (c) there was only a limited degree of overlap between the arbitration references; (d) mere oversight in such circumstances would not give rise to justifiable doubts as to impartiality.

2. PROCEEDINGS BEFORE UK SUPREME COURT:

Halliburton did not contend that Mr Rokinson was guilty of any deliberate wrongdoing or actual bias, and the challenge was confined to apparent unconscious bias. 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 sitting on an arbitral tribunal in Reference 1. Mr. Rokison gave Chubb the unfair advantage 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 whether and to what extent he would be influenced in Reference 1 by the arguments and evidence in Reference 2. Chubb would be able to communicate with him in Reference 2, for matters which might be relevant in Reference 1 and would know of his 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, the same high standards of fairness and impartiality are expected from a party-appointed arbitrator as 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 of international arbitration and the customs and practices of the relevant field of arbitration.

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

One way in which an arbitrator can avoid the appearance of bias is - by disclosing matters, which could arguably be said to give rise to a real possibility of bias. Such disclosure makes parties aware of matters which could give rise to justifiable doubts about his impartiality, and enables them 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. Failure to disclose may demonstrate 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]

Specifically referring to multiple arbitral appointments, the UK Supreme Court held that - acceptance of arbitral appointments in multiple references concerning the same or overlapping subject matter with only one common party may give rise to an appearance of bias, depending on the relevant customs and practices.[9]

The UK Supreme Court further held that inequality of knowledge between the common party and the other party or parties may confer an unfair advantage – depending on relevant circumstances and custom and practice in arbitrations in the relevant field.

(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.

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[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.

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.

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

- the identity of the common party who was seeking the appointment of the arbitrator in Reference 2;
- whether 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 of disclosure is a continuing duty and circumstances may change before the disclosure. 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 an arbitrator has failed in a duty to make disclosure must have regard to 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 use of the present tense ("exist") indicates that – the fair-minded and informed observer assesses whether there is a real possibility that an arbitrator is biased by

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

reference to the facts and circumstances known "*at the date of the hearing to remove the arbitrator*".

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) Lack of clarity/ certainty in English case laws as to whether there was a legal duty of disclosure and whether disclosure was needed;

(ii) References 2 and 3 followed Reference 1. Such time sequence of the three references may provide an explanation for Mr. Rokison's disclosure of Reference 1 to Transocean but not the need to inform Halliburton about Reference 2;

(iii) It was likely that there would not be any overlap in evidence or legal submissions between References 2 and 3 and Reference 1;

(iv) There was no question of Mr. Rokison having received any secret financial benefit in this case; if that objection were valid it would mean that every party-appointed arbitrator receives a disqualifying benefit;

(v) There was no basis for inferring unconscious bias in the form of subconscious ill-will, or any evidence that he bore any animus towards Halliburton.

3. 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

[11] ibid.

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 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.

4. 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]

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[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).

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 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 another 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