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BIAS OF ARBITRATORS: A CRITICAL ANALYSIS ON THE LAW POST-HALLIBURTON v. CHUBB AND A COMPARATIVE APPROACH[*]

HAKEMLERİN YANLILIĞI: HALLIBURTON v. CHUBB SONRASI HUKUK KRİTİK BİR ANALİZ VE KARŞILAŞTIRMALI BİR YAKLAŞIM

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Abstract

The principle of independence and impartiality has been formed, over the course of time, into a well-established and simultaneously into a fundamental duty of the arbitrator. However, the question, which arises, pertains to what kind of duty it is, namely either a legal duty or one resembling professional ethics. As the case is with judges, arbitrators also shall not be biased or even give the impression of being biased. Unlike judges, however, arbitrators are nominated by the parties to the arbitration and therefore, concerns with regards to possible bias or lack of impartiality are likely to be raised to a greater extent. The principal triptych, which overrides this multifaceted subject, concerns mainly questions of disclosure, repeat appointments and apparent bias. The arbitrator's duty to remain unbiased and impartial is stipulated as a soft law rule in the IBA Guidelines of 2014, which serves as the point of reference and according to which there has to be an equilibrium between the principle of party autonomy and the tribunal's independence. In the present paper, a critical analysis is conducted as to the formation of the landscape regarding arbitrator's bias, before and after the landmark decision of the Supreme Court in Halliburton Co v Chubb Bermuda Insurance Ltd (2020) UKSC 48. The lessons to be learned from this judgment are comparatively assessed alongside the position of arbitration laws of England, India, and China, and by illustrating how the duty has been incorporated and appeared in arbitration practice through the lenses of the arbitration laws in each of the examined legal regimes. Resultantly, the Arbitration Act 1996, the Arbitration and Conciliation (Amendment) Act, 1996, the Chinese Arbitration Law as well as the China International Economic and Trade Arbitration Commission (CIETAC) Rules, which apply to foreign-related arbitrations, will be analyzed in conjunction with case-law in the above-mentioned jurisdictions.

General Key Words

Arbitration, Halliburton case, IBA Guidelines, case-law, Arbitration Act 1996, the Arbitration and Conciliation (Amendment) Act 1996, Chinese Arbitration Law

The JEL Classification Keywords

K00 : Law and Economics General
K15 : Civil Law • Common Law
K19 : Law and Economics Other
K4 : Legal Procedure, the Legal System, and Illegal Behavior
K41 : Litigation Process
J52 : Dispute Resolution: Strikes, Arbitration and Mediation, Collective Bargaining

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List of Abbreviations

BAC	: Beijing Arbitration Commission
CAL	: China Arbitration Law
CIArb	: Chartered Institute of Arbitrators
CIETAC	: China International Economic and Trade Arbitration Commission
DAC	: Departmental Advisory Committee
IBA	: International Bar Association
ICC	: International Chamber of Commerce
LCIA	: London Court of International Arbitration
NTPC	: National Thermal Power Corporation
NUFC	: Newcastle United Football Company
PLL	: Football Association Premier League Ltd
S.C.	: Supreme Court
SPC	: Supreme People's Court of China
UNCITRAL	: United Nations Commission on International Trade Law

I. Independence and Impartiality in Arbitration: An overview of the English Legal System

Under the notion of party autonomy, parties to an arbitration enjoy the right of appointing the arbitrators of their choice based on, their qualifications, expertise, specialist knowledge, language skills, etc. However, it is essential for the smooth running of arbitral proceedings that arbitrators can demonstrate their impartiality and independence from the parties to the arbitration and the subject matter of the dispute so that there can be no doubt as to the appropriateness and quality of their decision-making. Without demonstrable independence and impartiality of the tribunal, the trust placed upon it and the legitimacy of the decisions reached would be jeopardised. This could result in more challenges of the tribunal or the arbitral awards, because if a party considers a decision

to be ill-informed, then it is more likely to disobey with it or seek its appeal. The concepts of arbitral impartiality and independence are well recognised in international arbitration.[1] Arbitrators are always expected to act fairly and neutrally and remain unbiased as to the subject matter of the dispute as well as between the parties. Otherwise, the integrity of the process will be compromised.

Independence is an objective concept, which amounts to the absence of material or intellectual link between the arbitrators and the parties or any other authority; whereas impartiality is subjective in nature and indicates the absence of any bias held by the arbitrator towards the parties or the dispute.[2] Impartiality indicates whether an arbitrator enters arbitral proceedings with an open mind or whether the arbitrator has a predisposition towards the parties or the subject matter itself.[3]

Under English law, if a party is aware of circumstances, which create doubts as to an arbitrator's impartiality, a party may apply to the court for an arbitrator to be removed under section 24(1)(a) of the Arbitration Act 1996, if that party believes that there are circumstances giving rise to justifiable doubts as to the arbitrator's impartiality. Section 24 of the Arbitration Act 1996 provides a direct route to challenge the impartiality of the arbitrator prior to the issuing of an award. However, the removal of an arbitrator is perceived as "an extreme step" only likely to occur in the rarest of cases.[4] A party wishing to rely on this provision must bring a challenge at the earliest opportunity - a right which under section 73(1) of the Arbitration Act 1996 may be lost if a party continues to take part in arbitral proceedings without making any objection.

Apart from requesting the removal of an arbitrator under section 24 of the Arbitration Act 1996, a party may raise the issue of impartiality after an award has been issued and challenge that award on the ground of serious irregularity affecting the tribunal under section 68 of the Arbitration Act 1996. A breach of the general arbitral duty found under section

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1 E.g., *United Nations Commission on International Trade Law. (2006). UNCITRAL Model Law on International Commercial Arbitration*, Articles 11(5) and 12 of the Model Law.

2 Westphalen & Vincent, (2018), 543, 544.

3 Noussia, (2018), 344-366.

4 *Brake v. Patley Wood Farm LLP* (2014), EWHC 1439 (Ch); *C Ltd v D and Another* (2020) EWHC 1283.

33 of the Arbitration Act 1996, which also incorporates the duty to act impartially, also constitutes an irregularity within the meaning of section 68 of the Arbitration Act 1996 and could therefore result in the setting aside of the award, the remittance of the award or the award being declared to be of no effect. Finally, a party could challenge the award for lack of substantive jurisdiction under section 67 of the Arbitration Act 1996, if the impartiality of the tribunal was specifically required by the arbitration agreement.

The requirement of impartiality is a principle of natural justice and reflects the principle that everyone is entitled to a fair hearing by an impartial tribunal –as also embodied in Article 6(1) of the European Convention on Human Rights.[5] An identical right figure is also in the Universal Declaration of Human Rights[6] as well as the International Covenant on Civil and Political Rights.[7] The right to a fair trial is also entrenched in section 1 of the Arbitration Act 1996, which sets out an expectation of "the fair resolution of disputes" as well as in section 33(1)(a) of the Arbitration Act 1996, which requires an arbitral tribunal to "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." However, the Arbitration Act 1996 makes no reference to independence, which distinguishes it from most of the international rules on arbitration which require a tribunal to be both impartial and independent.

Under English law, lack of impartiality is discovered if there is actual or apparent bias. Actual bias is difficult to prove as it expects hard evidence of the arbitrator's partiality or prejudice,[8] as opposed to establishing that there were justifiable doubts therein. The common law test for apparent bias was originally formulated in *Dimes v Grand Junction Canal*.[9] Then later in *R v Gough*,[10] the test was further exemplified and amounted to whether there was a real danger of bias. The test was trans-

5 Tweeddale & Tweeddale, (2007), 639.

6 *The Universal Declaration of Human Rights 1948*, Article 10.

7 *The International Covenant on Civil and Political Rights 1976*, Article 14.1.

8 *Locabail (UK) Ltd v. Bayfield Properties Ltd* (2000), QB 451, 2-3 (CA).

9 *Dimes v. Proprietors of the Grand Junction Canal* (1852) 3 H.L. Cas. 759.

10 *R v. Gough* (1993) AC 646 (HL).

formed by *Porter v Magill*[11] to its current shape, deleting the reference to "a real danger", namely "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased." The fair-minded observer is gender-neutral, not unduly sensitive or suspicious, reserves judgement until he/she has fully understood both sides, is not complacent, is aware that judges or other tribunals have weaknesses, and is informed of all relevant matters.[12] Furthermore, the test is an objective one and ensures a level of detachment as the fair-minded observer is not to be confused with the opinion of the litigant.[13] A real danger of bias might arise from a particular closeness of the relationship between an arbitrator and a party, or arbitrator and counsel, or between an arbitrator and a witness to the proceedings, or following an arbitrator's public expression of strong views in relation to a particular case where he is sitting as arbitrator.[14] Arbitrators, however, are not expected to have had any contact or professional connection with each other or the parties' representatives.[15] This will not be a realistic requirement. Nevertheless, they are required to approach each case with an open mind. The test was most recently revised by the Supreme Court in *Halliburton v Chubb,*[16] which will be further discussed and analysed below.

A. The 2014 IBA Guidelines in the English Legal Landscape

The 2014 IBA Guidelines on Conflicts of Interest in International Arbitration demonstrate the arbitrators' duty to remain impartial and independent and illustrate a balancing exercise between allowing sufficient party autonomy in appointing the arbitrators of their choice against the need to ensure arbitral disclosure of facts and circumstances which may give rise to justifiable doubts as to the tribunal's impartiality and independence. Specifically, the Guidelines require arbitrators to be impartial and independent prior to their appointment and to refuse an appo-

11 *Porter v. Magill* (2001), UKHL 67; (2002) 2 AC 357, 103.

12 *Helow v. Secretary of State for the Home Department* (2008), 1 WLR 2416, 1-3; *C Ltd v D andAnother* (2020), EWHC 1283 (Comm), 76.

13 *Janan George Harb v. HRH Prince Abdul Aziz Bin Fahd Bin Abdul Aziz* (2016), EWCA Civ 556, 69.

14 Joseph, (2015), 16.30.

15 *Id.*

16 *Halliburton Co v Chubb Bermuda Insurance Ltd* (2020) UKSC 48.

intment, if a reasonable third person having the knowledge of the facts and circumstances, would conclude that there were justifiable doubts as to the arbitrator's impartiality or independence.[17]

The current version of the IBA Guidelines was adopted by the resolution of the Council of the International Bar Association in October 2014. They are a form of soft law and consist of General Standards, Explanations to the Standards and Application Lists. They have been compiled to assist arbitrators and arbitral institutions, national courts and party' representatives in assessing the question of arbitral neutrality. They are intended to apply equally to commercial as well as investment arbitrations. The Guidelines also provide for the test of establishing conflicts of interest, according to which an arbitrator should decline an appointment or refuse to continue as an arbitrator if doubts as to his or her impartiality or independence have arisen. The test is established from the point of view of a reasonable third person who, having knowledge of the relevant facts and circumstances, would conclude that there are justifiable doubts as to the arbitrator's impartiality or independence. The Guidelines specify that doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case.[18] The test for arbitrator's disqualification is objective and it is derived from Article 12 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law.

The IBA Guidelines are perhaps best known for their categorisation of situations according to which the lack of impartiality or independence and conflicts of interests are to be assessed. Those practical situations are divided into three lists: Red, Orange, and Green. These lists reflect the severity of a situation and the concerns it raises as to the impartiality or independence of a tribunal. The Red List consists of situations, which necessarily give rise to justifiable doubts as to an arbitrator's impartiality and independence. The Red List is divided into two

[17] *The IBA Guidelines 2014*, Part I, 2.b, https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918 (accessed 7.10.2021).

[18] *Id.*, Part I, 2.c,, https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918 (accessed 7.10.2021).

sub-categories: Waivable and Non-Waivable situations. The lists are non-exhaustive. For example, situations, which cannot be waived by the parties, even if they consent to, include evidence that the arbitrator has a significant financial or personal interest in one of the parties, or the outcome of the case.[19] The non-waivable list has been created based on the principle that no person can be his/her own judge. The waivable list proposes situations, which are serious but not as severe and allow the parties to continue with their appointed arbitrators, so long as they are aware of the conflict of interest. The Orange List comprises situations, which might create reasonable doubts as to the arbitrator's impartiality or independence. The arbitrator is under a duty to disclose relevant facts and circumstances, while the parties have a right to waive that duty. Finally, the Green List is composed of situations, which create no scope for concerns of impartiality and independence and no duty to disclose those. Therefore, another valuable feature of the Guidelines is the express duty to disclose relevant facts and circumstances which may create justifiable doubts as to an arbitrator's impartiality.

The Guidelines are not binding on English courts, but their relevance is still discernible from the number of times English judges have invoked them as guidance, or to provide further justification to a decision. They have generally been welcomed by English courts for setting out "good arbitral practice which is recognised internationally."[20] However, they are believed not to give rise to legal obligations or override national law or arbitral rules and have therefore been considered as providing merely a "practical benchmark".[21] However, in the case of *W Ltd v M Sdn Bhd*[22], Knowles J found that there was no ground for apparent bias on an allegation of serious irregularity and adopted a very reserved approach to the utility of the Guidelines. The challenge was brought on a claim of conflict of interest on the basis that the firm of the arbitrator had regularly advised a company, which had the same corpora-

[19] *Id.,* Part II, 1.3, https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918 (accessed 7.10.2021).

[20] *Halliburton Co v. Chubb Bermuda Insurance Ltd* (2020), UKSC 48, 71.

[21] *Newcastle United Football Company Limited v. The Football Association Premier League Limited* (2021), EWHC 349 (Comm) 48.

[22] *W Ltd v M Sdn Bhd* (2016), EWHC 422 (Comm); (2017) 1 All E.R. (Comm) 981.

te parent as the respondent and had earned substantial remuneration.[23] He refused to follow the IBA Guidelines and held that it was wrong that para 1.4 was positioned in the Non-Waivable Red List, according to which an arbitrator's law firm advises an affiliate of one of the parties. While it is unlikely that the Guidelines will become the predominant influence in English law, they have been of particular significance to the development of arbitration with regards to the question of disclosure. There continues to be a desire for disclosure and increased transparency and the Guidelines' emphasis in this regard has not only been a welcome aspect of the rules, but also one that is in line with the current status quo of arbitration. The approach of encouraging disclosure is effective and positive because once a party receives full disclosure, then this waives any potential issue arising; and if there is an issue stemming from that disclosure, then it is better that this is resolved at the outset, rather than at the end of the arbitration process. Finally, a challenge based on impartiality and independence following a timely and full disclosure of all relevant facts and circumstances would have allowed the parties to be acquainted with any possible conflicts of interests early on and would be relevant in the dismissal of the challenge.[24]

A re-occurring type of conflict of interest stems from repeat appointments of arbitrators whereby the same arbitrator is reappointed by the same party or counsel in several arbitrations. According to the IBA Guidelines, repeat appointments falling within the three-year period provided for in the Orange List should be disclosed. The timely and accurate disclosure of such appointments may avoid later challenges of the arbitrator's impartiality and independence or challenges on the award itself. While the non-disclosure of repeat appointments will not automatically lead to the arbitrator's disqualification from the process, it might be a determinative factor in the assessment of his/her impartiality and independence. A situation of having a repeat arbitrator would not lead to an appearance of bias per se, but where an arbitrator has derived substantial remuneration from the same party and there was evidence that the arbitrator was influenced to rule in the party's favour and did not disclose his

[23] *Id.*

[24] Joseph, (2015), 16.38.

previous involvements with that party, then this would create sufficient basis for the removal of an arbitrator on grounds of apparent bias.[25]

B. The Law Pre-*Halliburton* v *Chubb (SC)*

While there are only very few challenges to the impartiality of arbitrators which have been in fact successful, there is a vast amount of case law discussing the need to disclose relevant information, the test of apparent bias and the concept of repeat appointments. For example, the LCIA's own database suggests that from the 32 challenges brought in since 2010, only 6 have been upheld, with one being partially upheld. [26]

One of the prominent cases where the sole arbitrator was removed based on apparent bias is *Sierra Fishing Co v Farran.*[27] The second claimant, Mr Said Mohamed, entered into a finance agreement with the first and second respondents, Dr Farran and Mr Assad, for the purchase of two fishing vessels to be operated by the first claimant, Sierra Fishing, a company owned by Mr Mohamed's brother and late father. The loan agreement contained an arbitration clause. After the claimants failed to make repayments, the first and second respondents appointed the third respondent as arbitrator, Mr Ali Zbeeb. The parties later reached a series of agreements to repay the loan and suspend the arbitration. The arbitrator assisted in drafting one of the agreements wherein some of the first claimant's company shares were to be transferred to the respondents in satisfaction of the debt. The agreements were not performed, and the arbitration was resumed. However, the claimants objected to the arbitrator, alleging that he was not impartial because: (i) he was employed by a bank of which Dr Farran was chief executive; (ii) his father still worked for the bank; (iii) his father had acted for Dr Farran on personal matters; and (iv) he had financial interests in his father's law firm. Popplewell J found that Mr Ali Zbeeb would be removed under section 24(1)(a) of the Arbitration Act 1996 on the ground that circumstances gave rise to justifiable doubts of impartiality. Specifically, it was found that the connections between the arbitrator's firm and Dr Farran were such as to create a real possibility that the arbitrator would be predisposed to favour Dr Far-

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[25] *Cofely v Bingham* (2016) EWHC 240 (Comm); (2016) 2 All E.R. (Comm) 129.

[26] LCIA Challenge Decision Database, (2021). LCIA. https://www.lcia.org/challenge-decision-database.aspx (accessed 7.10.2021).

[27] *Sierra Fishing v. Farran* (2015) EWHC 140 (Comm); (2015) 1 AII E.R. (Comm) 560.

ran in order to maintain the business relationship with himself, his firm, his father, to the financial benefit of all three, even if the financial benefit would accrue to his father rather than the firm.[28] Mr Zbeeb's conduct of the reference also gave rise to justifiable doubts as to his impartiality because he refused to postpone the publishing of his award pending the outcome of the present application and despite being asked to do so by both parties. Furthermore, Mr Zbeeb's communication with the parties was argumentative in style and advanced points against the claimants, which had not been put forward by Dr Farran or Mr Assad, and to which the parties had not been given an opportunity to respond.[29]

Significantly, Popplewell J reasserted the position of the IBA Guidelines in English law. He maintained, that "assistance is derived" from the IBA Guidelines. He stated that both the Non-Waivable Red List and the Waivable Red List reflected "the wider category of circumstances" as per section 24 of the Arbitration Act.[30] The judge asserted that the doubts were reinforced by Mr Zbeeb's statement that it was not for him to do due diligence on behalf of the claimants in relation to any connections he had with Dr Farran. On the contrary, Popplewell J found that it was Mr Zbeeb's duty to make voluntary disclosures of connections that were known to him which might justify doubts as to his impartiality, as per General Principle 3 of the IBA Guidelines.[31] Therefore, apart from reinstating the relevance of the IBA Guidelines in facilitating arbitrators' decision-making, he also found a duty of disclosure of relevant factors which might affect the arbitrator's impartiality.[32]

In *Beumer Group UP Ltd v Vinci Construction UK Ltd, UK Ltd*,[33] it was found that adjudicators should disclose whether they were acting as such in other matters involving the same party, even where those mat-

[28] *Sierra Fishing v. Farran* (2015) EWHC 140 (Comm); (2015) 1 AII E.R. (Comm) 560, 57.

[29] *Sierra Fishing v. Farran* (2015) EWHC 140 (Comm); (2015) 1 AII E.R. (Comm) 560, 64.

[30] *Sierra Fishing v. Farran* (2015) EWHC 140 (Comm); (2015) 1 AII E.R. (Comm) 560, 59.

[31] *Sierra Fishing v. Farran* (2015) EWHC 140 (Comm); (2015) 1 AII E.R. (Comm) 560, 60.

[32] Dundas, (2015), 332, 333-336.

[33] *Beumer Group UP Ltd v Vinci Construction UK Ltd* (2016), EWHC 2283, 31.

ters were unrelated. In the case, the adjudicator's failure to disclose that he was involved in related proceedings was a serious breach of natural justice and resulted in the court's refusal to enforce the adjudicator's award. The principle that adjudicators must not only act fairly but must be seen to act fairly was reinstated. Even unrelated telephone conversations between the adjudicator and one party run the risk that the fair-minded and informed observer would conclude that there was a real possibility of bias, if not properly disclosed.[34] Such an approach was later contrasted with the Court of Appeal's judgement in Halliburton; for, the case seemed to have considered the duty of disclosure and the appearance of bias as related and interdependent –something, which Hamblen LJ later seems to have approached differently.

In *Guidant LLC v Swiss Re International SE,*[35] the court found that while the appointment of a common arbitrator might reduce costs, delay and the risk of inconsistent decision, there was a concern that the arguments and evidence in the first arbitration might prejudice the arbitrator's decision-making in the subsequent ones. Therefore, the court refused to appoint, under section 18(3)(d), a specified third arbitrator to three arbitrations linked by a common party. The decision thus demonstrates the caution with which English judges will exercise their powers under the Arbitration Act 1996 and a practical approach in applying "a measure of reality".[36]

In *Dera Commercial Estate v Derya Inc (The "Sur"),* [37] a dispute arose under a bill of lading after a cargo of Indian maize carried on board the vessel Sur was not permitted to enter Jordan and had to be returned to its country of origin. The tribunal found that Dera was responsible for a delay, which caused serious prejudice to the owners and created a substantial risk that it was not possible to have a fair resolution of the cargo claim. Dera challenged the award on, amongst others, grounds of serious irregularity under section 68 of the Arbitration Act 1996 alleging apparent bias of the tribunal based on certain remarks made by the tribunal during closing submission and an alleged one-sided approach to interlocutory orders. The court was not persuaded that the tribunal's re-

[34] *Beumer Group UP Ltd v Vinci Construction UK Ltd* (2016), EWHC 2283, 31.

[35] *Guidant LLC v Swiss Re International SE* (2016) EWHC 1201 (Comm).

[36] *Guidant LLC v Swiss Re International SE*, (2016) EWHC 1201 (Comm), 7.

[37] *Dera Commercial Estate v Derya Inc (The "Sur")* (2018) EWHC 1673 (Comm).

marks or conduct, individually or cumulatively, was such as to establish a finding of bias.[38] The court noted that remarks cannot be taken in isolation and that they should be such as to evince the tribunal's closed mind, a perception of unfairness, be extremely hostile or express views in favour or against a party. Therefore, with regards to the allegation of bias, the case demonstrates that the threshold to satisfy a challenge under section 68 is a high one and such as to prevent claims without merit.

Endorsing the Court of Appeal's ruling in *Halliburton v Chubb,* the court in *Koshigi Ltd v Donna Union Foundation* examined the transcript of the arbitration and found that the Chair's response to an allegation of bias was not "aggressive" or "inappropriate." The case itself is largely concerned with liability costs because the issue of bias was discontinued by the challenger. However, the allegation arose after it transpired via an internet search that the Chair of the tribunal was the Chairman of the arbitration centre and DUF's QC was an advisor to the board. Moreover, it was stated that the Chair and the QC for DUF had served together as co-arbitrators and that the Chair had previously been employed by the claimants' solicitors about a decade ago. In the court's view, disclosure was not given, nor required, because it was very unlikely to give rise to circumstances, which could lead the fair-minded observer to conclude that there was a real possibility of bias. It was found that the fact that the Chair and the advocate had served as co-arbitrators in unconnected arbitrations was very unlikely to give rise to bias, while the Chair's previous employment fell outside the three-year period specified in the Orange List of the IBA Guidelines, thus making disclosure unnecessary. Finally, a reference to a professional relationship described as "warm and friendly" was far from fitting within the "close personal relationship" described in the Orange List.

On the question of repeat appointments, Teare J found in *Interprods Ltd v De La Rue International Ltd*[39] that there was no apparent bias in the case of an arbitrator who had been appointed in the present case by the LCIA and who had been appointed in two other cases where one of the parties was represented by De La Rue's solicitors. Teare J was

[38] *Dera Commercial Estate v Derya Inc (The "Sur")* (2018) EWHC 1673 (Comm), 158-165.

[39] *Interprods Ltd v De La Rue International Ltd* (2014) EWHC 68 (Comm).

mindful of the realities of arbitration and maintained that if the solicitors were satisfied with the arbitrator's work, then they might appoint him in future arbitrations. This is considered a well-known practice in London arbitration.[40] Only the most suspicious of observers might have concluded that there was a possibility of bias, and the fair-minded observer is not unduly suspicious.[41] Therefore, the court provided reassurance that the institutional appointment of an arbitrator in several matters involving the same firm does not lead to an appearance of bias.

C. The Significance of *Halliburton* v *Chubb*

Doubts as to the tribunal's impartiality and independence can, amongst others, arise in situations of conflict of interest, such as multiple or repeat appointments whereby the same arbitrator is appointed in several arbitrations by the same party. The Latin maxim *nemo iudex in causa sua* has been increasingly relevant in recent arbitrations. One of them is the English Supreme Court case *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020].[42] Therein, the leading questions posed before the judiciary were whether and if so, to what extent an arbitrator might accept appointments in multiple references concerning the same or overlapping subject matter with only one common party without giving rise to an appearance of bias; and whether and to what extent they might do so without being required to disclose this. The Supreme Court's decision was followed by several other decisions on the question of disclosure, repeat appointments and apparent bias.

Halliburton Co v Chubb Bermuda Insurance Ltd [2020][43] has made an incredible contribution to the field of international arbitration and as such, it has driven a significant amount of academic discussion on the question of impartiality and apparent bias. It provided the long-awaited guidance from English judges on the question of arbitrator's duty to disclose, which previous judges have avoided discussing, plausibly, due to the lack of such a duty in the English Arbitration Act 1996.

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40 *Interprods Ltd v De La Rue International Ltd*, (2014) EWHC 68 (Comm), 29.

41 *Id.*

42 *Halliburton Co v Chubb Bermuda Insurance Ltd* (2020) UKSC 48.

43 *Halliburton Co v Chubb Bermuda Insurance Ltd* (2020) UKSC 48.

The dispute between the parties originates from the Deepwater Horizon oil spill in the Gulf of Mexico in 2010.[44] The Deepwater Horizon drilling rig was owned by Transocean Holdings LLC, BP Exploration was a lessee, while Halliburton was a sub-contractor engaged by BP. The explosion gave rise to several claims against Transocean, Halliburton and BP. Halliburton and Transocean settled the claims against them and both claimed against Chubb Bermuda Insurance Ltd under a Bermuda Form liability policy. Chubb rejected both claims. Halliburton commenced arbitration proceedings against Chubb in 2015 and each party appointed one arbitrator. The two party-appointed arbitrators could not agree on the third arbitrator and the English High Court ultimately appointed Mr Kenneth Rokison QC. Prior to his appointment, Mr Rokison disclosed that he was acting as arbitrator in two pending references involving Chubb and had previously acted as an arbitrator in several arbitrations in which Chubb was a party. Later, Mr Rokison accepted two other arbitral appointments by Chubb in an arbitration commenced by Transocean after Chubb's rejection of Transocean's claim and in an arbitration commenced by a different insurer on a claim relating to the Deepwater Horizon oil spill. Mr Rokison did not disclose these appointments to Halliburton.

The issue in *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020][45] arose after the appellant Halliburton discovered that the third appointed arbitrator, Mr Rokison, had been asked by Chubb to act as an arbitrator in two other arbitration proceedings on an overlapping subject matter. Halliburton, therefore, applied for the removal of the arbitrator and claimed that Mr Rokison's acceptance of those appointments and his failure to disclose them had given rise to an appearance of bias. Chubb disagreed maintaining that this would add costs and delay to the arbitration. Halliburton applied to the High Court for an order under s. 24(1)(a) of the Arbitration Act 1996 that Mr Rokison is removed as an arbitrator from the arbitral tribunal.

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44 Fonh, *et al*., (2020), The Supreme Court decision in Halliburton v Chubb, Reed Smith https://www.reedsmith.com/en/perspectives/2020/11/the-supreme-court-decision-in-halliburton-v-chubb (accessed 7.10.2021).

45 *Halliburton Co v Chubb Bermuda Insurance Ltd* (2020) UKSC 48.

In the High Court, Popplewell J refused the application for removal of the arbitrator. It was held that Mr Rokison's acceptance of those further arbitrations did not involve him receiving any "secret benefit", that it was "a regular feature of international arbitration in London that the same underlying subject matter gives rise to more than one claim"; that the arbitrator's failure to disclose did not give rise to any justifiable concerns of impartiality because there was nothing to disclose; and finally, that Mr Rokison's response to the challenge to his impartiality was "courteous, temperate and fair" and demonstrated "commendable even-handedness."[46]

Unsatisfied with the High Court's decision, Halliburton appealed in the Court of Appeal. However, the appeal was dismissed. The Court of Appeal noted that a lack of independence may give rise to justifiable doubts of impartiality, but the Arbitration Act does not make a separate reference to independence as a ground for removal and the Court considered it to be within the scope of impartiality. The Court noted that sometimes parties may wish that arbitrators have familiarity with a specific field, which would not make them fully independent.[47] This is in line with the DAC report, produced to aid the interpretation of the Arbitration Act 1996.[48] The Court also reinforced the test for apparent bias, stating that section 24 of the Arbitration Act 1996 reflects the common law test, namely that "the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."[49] The Court of Appeal found that an arbitrator could accept appointments in multiple references concerning the same or overlapping subject matter with only one common party without giving rise to an appearance of bias. Even though "[i]nside information and knowledge might be a legitimate concern," this was not sufficient to make a conclusion of bias in itself as arbitrators are presumed to be

[46] *Halliburton Co v Chubb Bermuda Insraunce Ltd and Others* (2018) EWCA 817 (Civ), 26-27, 30, 32.

[47] *Halliburton Co v Chubb Bermuda Insurance Ltd and Others* (2018) EWCA 817 (Civ), 38.

[48] DA Report, (1996), para 102.

[49] *Halliburton Co v Chubb Bermuda Insurance Ltd and Others* (2018) EWCA 817 (Civ), 39.

trustworthy and to approach each case with an open mind.[50] The Court maintained that disclosure of facts and circumstances known to the arbitrator, which may give rise to justifiable doubts as to his impartiality, should be given, although it did not provide further guidance other than relying on the common law test for bias and referring to "borderline cases."[51] While the court set out the expectation of disclosure, it specified that the lack of such in itself does not justify an appearance of bias – "something more was required", which must be "something of substance."[52] It was found that the omission to disclose was accidental, rather than deliberate.

Halliburton then appealed the decision to the Supreme Court for a final ruling. Interestingly, the Supreme Court noted that section 33 of the Arbitration Act 1996 creates an implied term in the contract between an arbitrator and the parties that the arbitrator will act impartially.[53] Therefore, the duty to disclose is a legal duty, not merely good practice, and is derived from the statutory duty to act fairly and impartially. Section 33 of the Arbitration Act 1996 is a mandatory provision, which means that it is non-waivable. Yet again, the Court also noted that the parties could, if they so wish, waive this implied duty found therein by agreement.[54] Perhaps, the possibility for waiver is justified with the Court's remark that the statutory duty to act fairly and impartially "gave rise to an implied term in the contract between the arbitrator and the parties that the arbitrator will so act."[55] Moreover, the Court stated that "an arbitrator who knowingly fails to act in a way which fairness requires to the potential detriment of a party is guilty of partiality."[56] Therefore, what remains unclear is the reasoning behind this duty to be found in statute and then contract as well and, especially, the suggestion that the parties can waive

[50] *Halliburton Co v Chubb Bermuda Insurance Ltd and Others* (2018) EWCA 817 (Civ), 49-54.

[51] *Halliburton Co v Chubb Bermuda Insurance Ltd and Others* (2018) EWCA 817 (Civ), 65.

[52] *Halliburton Co v Chubb Bermuda Insurance Ltd and Others* (2018) EWCA 817 (Civ), 77.

[53] *Halliburton Co v Chubb Bermuda Insurance Ltd* (2020) UKSC 48, 49, 63, 151.

[54] *Halliburton Co v Chubb Bermuda Insurance Ltd* (2020) UKSC 48, 76-78.

[55] *Halliburton Co v Chubb Bermuda Insurance Ltd* (2020) UKSC 48, 76.

[56] *Halliburton Co v Chubb Bermuda Insurance Ltd* (2020) UKSC 48, 78.

a mandatory duty.[57] The duty of disclosure does not exist for the benefit of the parties, but it is instead an element of public policy and a requirement of the rule of law.[58] Therefore, the parties should not normally enjoy the right of waiving it. This approach upholds party autonomy, which is indeed a pillar of commercial arbitration, but it might be hindering the public interest.[59]

Another interesting thing from the Supreme Court's ruling is the development of the fair-minded and informed observer test. The Court maintained that regard must be given to the realities of international arbitration and the customs and practices of the relevant field of arbitration.[60] The Court applied the objective test of whether a fair-minded and informed observer, having regard to the characteristics of international arbitration, would conclude that there was a real possibility of bias. Considerations to be considered included the private nature of arbitration, the arbitrator's remuneration, the limited appeals system. Therefore, the Court seems to have expressed a potential division in the expected standard of impartiality depending on the type of arbitration. This approach could be criticised because there are no rules offered by the Supreme Court as to which types of arbitration should invoke protection from the general rules of disclosure, neither could it be easy to see how there can be general arbitration and specialised arbitration as every form of arbitration fits within an industry and can thus be perceived as a specialist.[61] The Bermuda Form arbitration was considered to be a specialist type of arbitration, yet again the Supreme Court found an existing duty to disclose with regards to multiple appointments because there was no custom or practice to the contrary.

It is indeed useful and pragmatic to take account of the realities of international arbitration. Unlike national judges, arbitrators are party-appointed decision-makers, who necessarily gain a monetary benefit

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57 Singh, (2021), Halliburton v. Chubb: Waiving a Mandatory Duty, Kluwer Arbitration Blog
http://arbitrationblog.kluwerarbitration.com/2021/04/28/halliburton-v-chubb-waiving-a-mandatory-duty/ (accessed 7.10.2021).

58 *Id.*

59 *Arbitration Act 1996*, I, s.1(b).

60 *Halliburton Co v Chubb Bermuda Insurance Ltd* (2020) UKSC 48, 152.

61 El Chazli, (2021), 75, 83-84.

from the appointment. Simultaneously, for a party faced up against multiple disputes of the same or similar character, it might understandably be important that it appoints someone in whose knowledge and experience they trust. Ultimately, this may lead to repeat appointments and the fact that the arbitrator serves in multiple arbitrations with the same party should not in itself justify an appearance of bias. However, upon becoming aware that there are existing circumstances, which may create an appearance of bias, arbitrators should disclose either before accepting an appointment or as soon as the obligation to disclose arises. Parties concerned with the tribunal's impartiality should also initiate the challenge promptly.[62] The Court thereby stated that repeat appointments on the same or overlapping subject matter *may* give rise to an appearance of bias, but this should be determined in the context of the custom and practice in the specific field of arbitration. Similarly, the duty to disclose multiple appointments would depend on the custom and practice of the relevant arbitration. The fair-minded and informed observer is expected to recognise that there might be differences between arbitrations.[63] In the context of the Bermuda Form arbitrations, the Supreme Court found that there was no custom or practice to suggest that an arbitrator in multiple appointments can proceed without making a disclosure.

Furthermore, as the Court moved on to discuss the duty of disclosure, it stated that this was part of the arbitrator's statutory duty to act fairly and impartially and was also reflected in the arbitrator's contract of appointment, although it did not override his duty of privacy and confidentiality.[64] This means that an arbitrator would not be obliged to disclose matters, which are subject to a duty of privacy and confidentiality under the contract and would need to obtain the parties' consent in order to do so. The interaction between disclosure, on the one hand, and privacy and confidentiality, on the other, has been acknowledged in the IBA Guidelines on Conflicts of Interests. The explanation to the stan-

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62 Connellan, *et al*., (2021), Bias in arbitration: duty to disclose appointments, White & Case LLP. (Jan).*Practical Law UK*. https://uk.practicallaw.thomsonreuters.com/ w-029 3480?transitionType=Default&contextData=(sc.Default)&firstPage=true (accessed 20.10.2021).

63 *Halliburton Co v Chubb Bermuda Insurance Ltd* (2020) UKSC 48, 66.

64 *Halliburton Co v Chubb Bermuda Insurance Ltd* (2020) UKSC 48, 88-89.

dard of the disclosure provides that "professional secrecy rules or other rules of practice or professional conduct prevent such disclosure."[65]

The Court discussed the circumstances in which the obligation to disclose would arise. It was said that it could arise when the matters to be disclosed "fell short of matters which would cause the informed observer to conclude that there was a real possibility of a lack of impartiality." An arbitrator would be expected to disclose only facts and circumstances of which he was aware, although reasonable enquires were not ruled out. Crucially, the fair-minded and informed observer would assess whether there was a real possibility that an arbitrator was biased by reference to the facts and circumstances known at the date of the hearing to remove an arbitrator. However, this raises the question – what if there are necessarily more facts and circumstances known at that undoubtedly later date? Would this create an opportunity for the arbitrator to protect himself against claims of impartiality? Why did the Court not focus on the facts and circumstances known to the claimant at the time the complaint was raised? This approach focused on whether the risk of bias would in fact be likely to affect the outcome of the arbitration.[66] While the allegation of apparent bias in the Transocean arbitration was considered as likely to be resolved by the determination of a preliminary issue, Mr Rokison was not required to deliberate the same issue in Halliburton. In this way, the adequate concern of Halliburton that an arbitrator may have a conflict of interest or separate communications with a related party on a similar issue is undermined. Halliburton might rightfully feel that its complaint has been left without proper deliberation. Moreover, by assessing apparent bias on facts and circumstances occurring after the complaint has been made, the Supreme Court has allowed steps to be taken after the complaint was made so as to affect whether the complaint was legitimate or not.[67] Assessing apparent bias at the point of the court hearing means that the hearing judge has access to more data than they would have had if the matter was assessed on the basis of the information available at the earlier point of non-disclosure.[68]

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[65] *The 2014 IBA Guidelines on Conflicts of Interest in International Arbitration*, Explanation to General Standard 3.d.

[66] Fairclough, (2021), 4.

[67] *Id.*

[68] Campbell, (2021), 219, 222.

Simultaneously, one might argue that the Court attempted to strike a fair balance between an overly lenient threshold of disclosure against a rigid and high standard so as to prevent challenges used merely as a disruption to the arbitral proceedings but also to allow the genuine challenges to impartiality to be heard. Furthermore, the Supreme Court held that multiple appointments concerning the same or overlapping subject matter with only one common party should be disclosed, but also found that, in the current case, the lack of disclosure did not give rise to justifiable doubts as to the arbitrator's impartiality. The Supreme Court justified its decision with the fact that at the time there was no clarity in English law as to disclosure; that time sequence explained the arbitrator's omission to disclose; that his response to Halliburton's challenge showed that it was likely that the arbitrations in the other two appointments would be resolved by the preliminary issues, thus preventing any overlap in evidence or legal submissions; there was no secret financial benefit and no basis for inferring unconscious bias as the arbitrator's response to Halliburton's challenge was "courteous, temperate and fair".[69] Hence, the omission to disclose was accidental, rather than deliberate.[70] The finding that disclosure was owed but despite that, there was no apparent bias suggests that the duty to disclose is independent of bias. This seems to contradict the approach found in *Beumer v Vinci.*

Therefore, the Supreme Court's decision divides the legal scholarship into two arguments. The first support the legal stance that the decision is problematic with the IBA Guidelines because according to the Guidelines, multiple appointments concerning the same or overlapping facts or subject matter with one common party can give rise to an appearance of bias and so can failure to disclose such appointments. This was the opinion supported by the LCIA, the ICC and CIArb. On the other hand, and this is the view which the Supreme Court adopted as well, the IBA Guidelines are international principles with an advisory function, which cannot override national law and need to be applied only with their status of guidelines, as their name suggests. This legal stance is convinced that in international arbitration, especially in specific industries, such as commodities, shipping, etc, repeat appointments are a

[69] *Halliburton Co v Chubb Bermuda Insurance Ltd* (2020) UKSC 48, 149-150.

[70] *Halliburton Co v Chubb Bermuda Insurance Ltd* (2020) UKSC 48, 96.

common feature of the process. This view is considerate of the realities in arbitration and the fact that complete independence may be impossible to be satisfied. It is also reflected in the 2014 IBA Guidelines where a comment to para 3.1.3. of the Orange List notes that it may be the practice in certain types of arbitration to draw arbitrators from a smaller or specialist pool of individuals. Especially in the very niche and specialist fields of arbitration, there might be fewer suitable arbitrators to choose from. This presupposes the presence of pre-existing professional connections, acquaintances, and relationships, but it should also strengthen the need to provide full disclosure and enable the parties to decide on the appropriateness of an arbitral appointment.

What happens if the duty of disclosure has been breached, even if the undisclosed facts are insufficient to constitute a finding of apparent bias? While the Arbitration Act 1996 makes no direct reference to the duty to disclosure (and English courts had not established the duty beforehand either), nor does it indicate any direct consequences for a failure to disclose, it is not to say that a breach of this recognised legal duty will remain without sanction. A failure to disclose is a factor that the fair-minded and informed observer will consider in assessing whether there was a real possibility of bias.[71] Still, the Supreme Court found against apparent bias, despite the duty to disclose having been breached. In this regard, Lord Hodge suggested that in circumstances where the lack of disclosure does not lead to a finding of bias and the arbitrator will not be removed from the tribunal, an arbitrator might face an order to meet some or all of the costs of the unsuccessful challenger or bear the costs of their own defence.[72] In this way, non-disclosure is expected to carry greater weight than "a mere deviation from best practice."[73]

What is clear from the Supreme Court's ruling is that the duty to disclose repeat appointments with one common party is a legal duty. This is a big achievement in the field of arbitration conducted under English law. It puts transparency of the arbitral proceedings at the forefront of arbitration. However, the Court did not create a single threshold to guide the scope of this duty. The Court avoided the creation of a uniform approach and instead opted for a nuanced analysis of the facts and

[71] *Halliburton Co v Chubb Bermuda Insurance Ltd* (2020) UKSC 48, 133.

[72] *Halliburton Co v Chubb Bermuda Insurance Ltd* (2020) UKSC 48, 111.

[73] *Id.*

circumstances of the allegation of bias.[74] In fact, the Court assumed that different standards may be required depending on the relevant field of arbitration. This might create the need for further clarifications in future arbitrations, where the parties might rightfully ask the question of what level of disclosure was expected in their arbitration. Overall, the Supreme Court demonstrated a cautious approach by seeking to be inclusive of the different fields of arbitration and by showing deference to arbitral practice.[75] The Supreme Court suggested that it is for the relevant arbitral institutions to amend their rulings accordingly so as to facilitate the process of ascertaining whether certain customs or practice has been established.[76] The decision provided valuable guidance on the arbitrator's duty to disclose and clarified that this duty does not override the arbitrator's duty of privacy and confidentiality. However, the decision left uncertainties as to the exact framework of the duty of disclosure and the facts and circumstances which should be disclosed. The decision gave high importance to ascertaining established customs and practices in the context of the duty to disclose and assessment of bias. The Court noted that the threshold for disclosure is different from the assessment of bias in the sense that there is a broader range of circumstances, which need to be disclosed, but those may not lead to a conclusion of bias.[77] Such an approach may create an opportunity for challenges against arbitrators on grounds of impartiality as a mere delaying tactic. Therefore, the duty to disclose exceeds an allegation of impartiality. The duty to disclose allows the parties to make their own judgement on the arbitrator's impartiality. It contributes to greater transparency and trust in the arbitral process, although it is also balanced against the concept of party autonomy. This strong emphasis which was placed on timely disclosure results from the Court's acknowledgement that there was previous uncertainty in English law on the duty to disclose, which the Court resolved by requiring an assessment of the duty in the context of the relevant field of arbitration, even though this might result in differing conclusions on

74 Campbell, (2021), 219, 222.

75 El Chazli, (2021), 75.

76 *Halliburton Co v Chubb Bermuda Insurance Ltd* (2020) UKSC 48, 135.

77 *Halliburton Co v Chubb Bermuda Insurance Ltd* (2020) UKSC 48, 110, 116.

similar facts.[78] The Supreme Court could have, but it did not discuss in greater depth the practice of repeat appointments of an arbitrator with one common party. Perhaps, this is owed to a careful consideration of other factors, such as the fact that London is amongst the biggest world hubs of international arbitration and hosts different forms of arbitration. This might explain why the Court noted the distinction between arbitrations and the established customs and practices therein. However, other than asserting that there needs to be a careful assessment of the facts and emphasise the importance of disclosure and it is a legal duty of English law, it did not depart from the already established test of apparent bias.[79]

D. The Law Post-*Halliburton* v *Chubb*

The rule on arbitral disclosure was invoked in further cases following the Supreme Court judgement of *Halliburton v Chubb.*

For example, in *Dadoun v Biton*[80] the appellant discovered a letter indicating that the judge had spoken over a meeting to the respondent's brother about the delay of the decision, which according to the judge had no bearing on the actual decision. Nevertheless, the appellant maintained that it was implausible that the discussion was limited to the delivery of the award and that by reference to the timing of the meeting, there must have been also discussion on the merits of the dispute. The claim was one of a breach of section 68 of the Arbitration Act 1996, based on serious irregularity. The court followed the Court of Appeal's decision in Halliburton and maintained that non-disclosure was a factor to be considered regarding apparent bias but was not sufficient to find apparent bias. The court found that the non-disclosure of an insignificant conversation about timing was not something that a fair-minded and informed observer would consider as giving rise to any doubts as to impartiality.[81] Interesting is also the court's finding in *B v J* in which the parties were family members who were shareholders in several companies in the UK and Nigeria. A family dispute arose, and the applicants applied to remo-

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[78] Rich, (2021), U.K. Supreme Court Rules on Arbitrator Bias in Halliburton v. Chubb, Kluwer Arbitration Blog http://arbitrationblog.kluwerarbitration.com/2020/12/01/u-k-supreme-court-rules-on-arbitrator-bias-in-halliburton-v-chubb/ (accessed 30.10.2021).

[79] Campbell, (2021), 219, 223.

[80] *Dadoun v Biton* (2019) EWHC 3441 (Ch); (2019) 12 WLUK 499.

[81] *Dadoun v Biton* (2019) EWHC 3441 (Ch); (2019) 12 WLUK 499, 39-42.

ve a former family accountant sitting as arbitrator. Briggs J maintained that while in most cases an arbitrator would be prohibited from being a witness in the action they were adjudicating on, that was not an absolute rule.[82] Briggs J distinguished between cases where the parties had agreed to nominate an identified arbitrator and cases where the agreement did not specify someone. As the accountant was also named as arbitrator in the parties' agreement, the court found that to order for his removal would be an intrusion into the freedom of contract.[83] This is an interesting decision, which emphasises party autonomy and the deference and respect, which the court showed towards the parties' choice. It illustrates the court's own limitation in arbitral proceedings.

Similarly, the court in *Newcastle United Football Company Ltd v The Football Association Premier League Ltd* upheld that while a failure to disclose may support the conclusion that there is a possibility of bias, it does not necessarily lead to this outcome.[84] The case considered the application of the Halliburton decision in practice and the relevance of the IBA Guidelines in assessing apparent bias. The dispute arose between Newcastle United Football Company (NUFC) and the Football Association Premier League Ltd (PLL) after the proposed sales of the former to a company, which was ultimately controlled by the Kingdom of Saudi Arabia. Arbitration was commenced after PLL decided that, following the share sale in the Kingdom of Saudi Arabia and under section F of the Rules of the PPL by which NUFC is bound, it would become a Director of the NUFC because of its control over the purchasing company. NUFC disagreed with reference to definitions contained in Section A of PLL's Rules. Each party appointed an arbitrator, who then jointly appointed the Chair, known as "MB" and acted as the second defendant in the matter. MB confirmed that there were no circumstances giving rise to justifiable doubts as to his impartiality. Later, the defendant's lawyers informed the appellant's lawyers of matters not previously disclosed by MB. The matters were as follows. In the last three ye-

82 *B v J* (2020) EWHC 1373 (Ch), 33-34; *G Freeman & Sons v Chester Rural DC* (1911) 1 K.B. 783; (1911)2 WLUK 79.

83 *B v J* (2020) EWHC 1373 (Ch), 25-29.

84 *Newcastle United Football Company Limited v The Football Association Premier League Limited* (2021) EWHC 349 (Comm).

ars, PLL's solicitors had been involved in 12 arbitrations in which MB was an arbitrator. MB had been appointed by that law firm in three of those arbitrations, and in two of those that happened after the current appointment. MB had advised PLL four times more than two years prior to the current appointment, including in March 2017, which is over three years prior to the challenged appointment, when he provided advice on the potential amendment of Section F of PLL's Rules. NUFC argued that this information should have been disclosed and invited MB to recuse himself, which he declined.

Further communication between MB and PLL's lawyers followed wherein MB asked for permission to disclose that the earlier advice he had given on the rules was not on Section A, which was the subject of the current arbitration. MB also asked if PLL and their lawyers wanted him to continue to serve as Chair and if the scheduled directions hearing would proceed. PLL's lawyers informed MB that they intended to send NUFC's lawyers a copy of the email correspondence to which MB replied that he would inform them himself. MB did so and confirmed that he would not recuse himself.

NUFC applied to the court under section 24(1)(a) of the Act to remove MB from the tribunal on the grounds of apparent bias based on four factors: (a) his earlier advice on the Section F Rules, which may be of relevance to the case and it would mean that MB had formed a view on Section A; (b) MB's other appointments as arbitrator by PLL's law firm; (c) MB's failure to disclose these events; and (d) the private communications between MB and PLL's lawyers. Moreover, NUFC requested under CPR 62.10(1) that the hearing of the application takes place in public on grounds that the existence of the dispute and its subject matter was already in the public domain.

HHJ Pelling QC, hearing the claim, rejected the application under CPR 62.10(1) that the proceedings be heard in public. The "default position" was that such hearings will be in private and that the fact that the existence of the dispute and its subject matter had entered the public domain was not sufficient to change that. The justification behind that was because "the detail of the dispute" which might be raised in the hearing had not entered the public domain.[85]

[85] *Newcastle United Football Company Limited v The Football Association Premier League Limited* (2021) EWHC 349 (Comm), 22.

On the question of establishing apparent bias, HHJ Pelling QC referred to the IBA Guidelines and re-asserted the position in *Halliburton* that while the Guidelines are not binding, they are a "practical benchmark" against which potential bias can be assessed.[86] On the first factor (a), the court found that MB's past advice to PLL on the Rules did not create a risk of prejudgement as the current dispute related to Section A of the Rules, while the prior advice referred to Section F. On points (b) and (c), the judge considered that the IBA Guidelines did not make disclosure mandatory, given that the advice was provided over three years prior to the appointment and on a different issue. The court also noted that as this was a sports arbitration, the pool of experienced arbitrators was much smaller. This reflects the realities of arbitration where entirely conflict-free appointments may be difficult to achieve given the niche specialism required. Finally, on the question of private communications between MB and PLL's lawyers, HHJ Pelling QC found that MB had to seek PLL's consent to disclose the earlier advice and could therefore not be criticised for doing so without copying NUFC's lawyers. The judge also maintained that MB had made errors of judgement in communicating privately with PLL on his recusal and on the directions hearing. However, it was found that MB's reputation and his content for the communication to be shared with NUFC's lawyers meant that the fair-minded observer would not find evidence of a real risk of bias.[87]

Therefore, it seems that for now, the English courts will be applying the principles of *Halliburton v Chubb* on arbitrator bias and confidentiality of arbitration claims. The *Newcastle United Football Company Ltd v The Football Association Premier League Ltd* was the first to uphold the principles of *Halliburton* on confidentiality and bias of arbitrators. The case demonstrates the difficulty in satisfying the apparent bias test and the highly fact-specific approach adopted by courts.[88] The

[86] *Newcastle United Football Company Limited v The Football Association Premier League Limited* (2021) EWHC 349 (Comm), 48.

[87] *Newcastle United Football Company Limited v The Football Association Premier League Limited* (2021) EWHC 349 (Comm), 60.

[88] Parker & Naish, (2021), *English Court Applies the Principles of Halliburton on Arbitrator Bias and the Confidentiality of Arbitration Claims.* Herbert Smith Freehills. https://hsfnotes.com/arbitration/2021/03/25/english-court-applies-the-

public interest was not sufficient to allow the arbitral proceedings to be heard in public, even though the court later agreed to the publication of the judgement in the confident belief that it will be of no detriment. The decision could be relied on by analogy in other relatively niche fields of arbitration with a smaller circle of practitioners where arbitrators may be repeatedly nominated by law firms and act as expert witnesses or consultants. The judgement shows that each case should be determined on its own facts and circumstances, but it also once again highlights the need to make full and timely disclosures of previous communications, connections, and nominations. This will enable the opposite party to make an informed decision based on the information provided as to whether the appointment can be opposed on grounds of a real risk of bias or not.

II. The Position in India

A. An Introduction to the Indian Saga on Arbitral Bias

India exhibits a long history in demonstrating its indispensable need for its arbitrators to be impartial and independent while also providing disclosure to elements that may give rise to justifiable doubts during the process. However, in the path of succeeding this objective, there were no stringent laws to ascertain that an appointed arbitrator was unbiased. The genesis of such exigency to bring an amendment may be comprehended by going back in time, in reference to the recommendations proposed under the 176th Law Commission Report (2001)[89] by introducing the Arbitration and Conciliation (Amendment) Bill, 2003[90] which addressed the then-existing lacuna. However, due to its contentious propositions, the bill was withdrawn by Parliament. In 2010, a Consultation paper[91] was introduced that identified the wide discretionary powers possessed by the arbitrators with respect to disclosure obligations and employer-employee arbitrations. However, as exactly was the case with the Arbitration and Conciliation Bill of 2003, further reassessment of the proposed amendments in the Consultation paper of

principles-of-halliburton-on-arbitrator-bias-and-the-confidentiality-of-arbitration-claims/#more-12766 (accessed 12.11.2021).

89 The Arbitration and Conciliation (Amendment) Bill 2001.

90 The Arbitration and Conciliation (Amendment) Bill 2003, 75.

91 Consultation Paper (2010), Proposed Amendments to the Arbitration and Conciliation Act 1996, https://www.legallyindia.com/images/stories/docs/Arbitration-Act-LawMin-ConsultationPaper-on-Arb-Act-April2010-1.pdf (accessed 19.12.2021)

2010 were required. Eventually, the Law Commission under its 246th report[92] in 2014, in view of extensive deliberations to the existing inadequacies, challenged the prevailing position of independence and impartiality by proposing the Arbitration and Conciliation (Amendment) Act, 1996.[93] The amendments to this Act, as passed by the Indian Parliament, form the primary legislation that governs domestic and international arbitration and enumerates subjective standards in contrast with the objective standards provided under Model law/UNCITRAL.

B. The 2014 IBA Guidelines in the Indian Legal Landscape

In India, prior to 2015, only about 40% of the cases pertaining to conflict of interests, referred to the IBA guidelines[94]. While countries like China and Sweden have adopted rudimentary clauses on impermissible relationships, India tends to be the only country to have imported the soft key instrument in its legislation in its entirety[95]. By virtue of challenged provisions under the then existing Arbitration Act, the amendment introduced the Orange and Red list as schedules in the Act, thereby making the IBA guidelines a statutory standard on the issue of independence and impartiality of the arbitrators in India.

The Arbitration and Conciliation (Amendment) Act, 1996, constitutes the specific legislation that operationalizes the law of bias by enumerating standards of disclosure, objective degree of bias and grounds of challenge under its provisions, primarily in Sections 12 to 14 of the Act.[96]

By virtue of section 12(1)(a) of the Act, at the time of its appointment, the arbitrator has the obligation, to disclose any past/present, direct/indirect relationship which may be relevant to the subject matter of the dispute and is likely to give rise to justifiable doubts with respect to

92 Law Commission of India, (2014).

93 *Arbitration and Conciliation (Amendment) Act 2015*, 3.

94 IBA Arbitration Guidelines and Rules Subcommittee, (2016), *Report on the reception of the IBA arbitration soft law products*, International Bar Association. https://www.ibanet.org/Document/Default.aspx? DocumentUid=105d29a3-6261-4437-84e2-1c8637844beb (accessed 30.10.2021).

95 Borthakur, (2020), 192-224.

96 *Arbitration and Conciliation (Amendment) Act 1996*, 12 - 14, 3.

his independence and impartiality.[97] Based on the aforesaid, this provision sets forth a rather comprehensive framework of devising disclosure standards as compared to the Model Law. The inclusion of the term 'subject-matter' includes within its ambit those disputes that have priorly been ruled on a similar factual/legal issue. This section entails an objective standard, in determining the relevance of justifiable doubts, inspired by the UNCITRAL Model Law, as is evident from the use of similar terms.

Following the amendment, the legislators included Schedule Five[98] and Schedule Seven[99] into the Act, comprising of 34 clauses derived from the Red and Orange lists as provided under the IBA Guidelines. Schedule Seven comprising 19 clauses, is a modified version of the items listed in the Red List. The Fifth Schedule enumerates clauses that are also provided under the Seventh Schedule, implying that, the aforesaid schedule comprises of clauses that are not only applicable to situations that *may* give rise to reasonable doubts but also under those circumstances, wherein it would *most certainly* give rise to such doubts. The clauses under this schedule elucidate general guidance with respect to determining relationships or interests that may result in justifiable doubts and are, therefore, not binding in nature. Subsection (5) of Sec. 12 of the Act stipulates that any relationship between the parties that comes under the categories defined in Schedule 7 (Red List), would make the person ineligible to act as an arbitrator.[100] This provision creates an exception in the form of a waiver, i.e., an express agreement between the parties following the emergence of a dispute.[101]

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[97] *Arbitration and Conciliation Act 1996*, 12,1, a; (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances, (a) 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.

[98] *Arbitration and Conciliation Act 1996*,V.

[99] *Arbitration and Conciliation Act 1996*,VII.

[100] *Arbitration and Conciliation Act 1996*, s.12.5; Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator.

[101] *Id*.; Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.

The substructure of this Indian statute provides only for disclosure requirements concerning the items listed in the Fifth Schedule[102]. The effect of such items on disqualification is based on justifiable doubts pertaining to impartiality and independence, the assessment of which would be subject to a careful case-by-case analysis. However, under the Seventh Schedule, given the existence of circumstances listed out, the arbitrator gets inadvertently disqualified, unless otherwise agreed by the parties. This scheme of disqualification, without providing an opportunity of due consideration, is paramount to Indian law. Once the existence of such circumstances is proven, the appointment of the arbitrator, irrespective of the circumstances and mitigating factors, goes against the law. This *de jure* ineligibility is founded on the appointment of the arbitrator and leads to its direct termination.

The Amendment to Section 14 provides for the substitution of another arbitrator in the event of termination of a previously mandated arbitrator.[103] Section 13 stipulates the procedure for challenge.[104] Needless to say, that, if the arbitrator is terminated on account of justifiable bias falling within the items listed out under the seventh schedule, a challenge against such items may be raised directly at the court. However, concerning the challenge against items in the fifth schedule, the latter are not permissible to be challenged in the court, until and unless the award/decision has been rendered by the tribunal[105]. The abovementioned legislative policy has been designed so as for judicial intervention to be minimized and party autonomy to be ensured.

[102] *Arbitration and Conciliation Act 1996*, s. 12.1.b; Explanation 1; The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

[103] *Arbitration and Conciliation Act 1996*, s.14.1.a; (1) The mandate of an arbitrator shall terminate, and he shall be substituted by another arbitrator; (a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay.

[104] *Arbitration and Conciliation Act 1996*, s.13.

[105] *HRD Corporation (Marcus Oil and Chemical Division) v Gail (India) Limited* (2018) 12 SCC 471.

C. The Chronicles of Government-Employee Arbitration

One of the most pertinent changes made in the Act through the 2015 amendment, was the innovation of Item 1 listed in Schedule Seven[106]. This item is unique to the Indian context and is not found in the IBA Guidelines. It stems from the age-old trend of judicial precedents set forth by the Indian Courts pertaining to arbitral bias. Most cases brought before the court were related to the challenge of this clause. It is therefore significant to understand the position that the Indian courts have undertaken/adopted when addressing disputes arising out of this clause.

Item 1, Schedule 7

"The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party".[107]

Indian law dispensed its need for an amendment from the disputes emerging from government contracts, which entitled the government to nominate an employee as a sole arbitrator who may have also been associated with the dispute in some capacity[108]. This unhealthy/problematic approach was condoned by the courts for several years and inevitably foreign parties hesitated to conclude contracts with the government. The principle "*Nemo in propria causa judex, esse debet*,"; i.e.; 'no one can be a judge of its own cause', is a well-known maxim used for cases stemming from arbitral bias.

However, the Indian Courts' views, regarding the expansive commentary deliberated over the years, lay in contrast to this principle to a varying degree and extent.[109]

The prevailing Act prior to the amendment also contained provisions with respect to bias and independence. However, it has been observed that on numerous occasions, the Supreme Court applied a strict statutory interpretation of the term *'any other past or present business relationship'* from Entry 1, by iterating that this entry does not include former employee, consultant or advisor within its purview and as such it

106 *Arbitration and Conciliation Act 2015*, VII.

107 *Id.*

108 Krishnan, (2010), 100.

109 Zaiwalla, (2010), 73.

would not be *de jure* ineligible[110]. Hence, the practice of naming an employee as an arbitrator in an arbitration clause included in government contracts, would not ipso facto raise a presumption of bias[111].

"All questions and disputes… shall be referred to the Sole Arbitration of the Project In-charge of the Project concerned of the owner, and if the Project In-charge is unable or unwilling to act, to the sole arbitration of some other persons appointed by the Chairman and Managing Director, NTPC Limited (Formerly National Thermal Power Corporation Ltd) willing to act as such Arbitrator. There will be no objections, if the Arbitrator so appointed is an employee of NTPC Limited (Formerly National Thermal Power Corporation Ltd), and that he had to deal with the matters to which the contract relates and that in the course of his duties as such he had expressed views on all or any of the matters in disputes or difference....."[112]

The clause quoted above is a typical example of a government contract entered upon with a non-state entity. The clause would name a state corporation employee to become a sole arbitrator for the case and would also empower them to nominate another as a sole arbitrator, in the event of their unavailability. It also provided for waivers that prohibited a party from challenging an arbitrator based on their employability with the government or any opinion provided during the dispute. The contractors were left with no choice other than to accept such clauses in order to enter into a tender agreement with the government. The structure of such a clause endowed the government with unilateral power in relation to the appointment of arbitrators. To this end, in several cases in the past, S.C. iterated the interpretation of Entry 1, by reinstating that former/retired/ex-employee would not be disqualified or be made ineligible as arbitrator in order to adjudicate a dispute.[113] Therefore, the

[110] *Reliance Infrastructure Limited V. Haryana Power Generation Corporation (*2016) (6) ARBLR 480 (P&H).

[111] *Union of India v. MP Gupta* (2004) 8 SCC 504; *Ace Pipeline Contract v. Bharat Petroleum* (2007) 10 SCC 504.

[112] *Aravali Power Company Private Limited V. M/s Era Infra Engineering Limited* (2017) 15 SCC 32.

[113] *Hindustan Construction Co v. Ircon International Ltd (2016) 235 DHC 14; Offshore Infrastructure Limited v. Bharat Heavy Electricals Limited (2017) 6 CTC 301;*

literal rule of construction has been applied, over several years in this regard.

D. The Indian Renaissance on Arbitral Bias

The Indian position in the context of arbitration bias began to change after 2009, when the court in *Union of India v. Singh Builders Syndicate*[114], suggested phasing out such clauses from future arbitration contracts with the government, in order to promote compliance with independence and impartiality requirements. Later on, the landmark decision of *Indian Oil Corporation v Raja Transport*[115] was issued, which intercepted scenarios under which an appointment can lead to a presumption of bias. This included any person who had been previously responsible for handling the same subject matter of the dispute and had been reporting to the government directly. In *BSNL v Motorola India*[116], the court condemned the practice of permitting clauses in the arbitration agreement that disallowed the non-state party to object to the appointment of the arbitrator. Further, in *Bipromasz Bipron Trading Sa v Bharat Electronics Ltd*[117], the court disallowed the appointment of an arbitrator who was directly subordinate to its Senior in a statutory corporation, which was also involved in the dispute.

This change in the Indian landscape had just begun and was yet to effectuate its ripple effect. The approach of the Indian courts in this regard depended on a fact-based enquiry in determining an impression of bias as a whole. The Indian landscape began to revolutionise in its true sense after 2015, right after the Indian Arbitration Act was amended by implementing the suggestions made in the 246th Report, in lieu, achieving greater party autonomy and limiting impartiality[118]. The Commission Report recognised that the procedural fairness and nature of the contracts are inclined in favour of the state parties to the dispute.[119] The then pre-

Sandeep Negi v. State of Himachal Pradesh (2018) SCC 661; Assignia-VIL JV v. Rail Vikas Nigam Limited (2016) DHC 677.

[114] *Union of India v. Singh Builders Syndicate* (2009) ALL SCR 1025.

[115] *Indian Oil Corporation v. Raja Transport (P) Ltd* (2009) 8 SCC 520.

[116] *BSNL v. Motorola India* (2008) 7 SCC 431.

[117] *Bipromasz Bipron Trading Sa v Bharat Electronics Ltd* (2012) SC 19.

[118] Law Commission of India, (2014).

[119] *Id.* at 111, 112, 113.

vailing scheme of provisions was in complete disregard of principles of justice and compromised the arbitration process. As a result, the 2015 amendment proposed adoption from the IBA guidelines, the Red and the Orange List. These amendments crystallised the soft law guidelines into black letter law in the Indian context so as to make it mandatory for the courts to rely on them.

The case of *TRF Ltd. v. Energo Engineering*[120] set a welcomed/widely accepted trend of invalidating unequal arbitration agreements between the parties by reinstating that a sole arbitrator once ineligible by the effect of law cannot possess the authority to appoint another arbitrator. Thus, such an appointment would be invalidated by the court. The premise that one of the parties hold an exclusive right to appoint an arbitrator of its choice regardless of the opposite parties' agreement is *per se* unfair. This stance of the court on the unilateral appointment of sole arbitrator syncs/manifests that India coordinated with international standards by applying the *principle of equality.*[121] The essence of this principle that forms a part of transnational procedure public policy, is that the parties may jointly choose a sole arbitrator however, the power cannot be vested solely in one party.[122]

In several cases after application of Entry 1 Seventh Schedule, the Court has ipso facto disqualified the arbitrator rendering him/her automatically ineligible to arbitrate. On the contrary, by applying Item 31, Fifth Schedule[123], the court does not apply the same threshold for retired employees in cases of similar proximity. In the case of *Voestalpine Schienen v Delhi Metro Rail Corporation*[124], the Supreme Court of India was encountered with a situation wherein the arbitration clause provided a list of panel of arbitrators comprising the names of serving/retired engineers in the Indian Railway service, which was an undertaking of the respondent. As per the clause, both parties would choose one arbitrator and would jointly choose the third arbitrator. The court permitted such a

120 *TRF Ltd. v. Energo Engineering* (2017) 8 SCC 377.

121 Ray, (2021).

122 *Id.*

123 *Arbitration and Conciliation Act 1996*, VII.

124 *Voestalpine Schienen v. Delhi Metro Rail Corporation, AIR* (2017) SC 939.

clause of quasi-unilateral appointment[125]. However, it stressed the need for a broad-based panel along with the benefit of conducting due diligence on the arbitrators before appointment by the non-state party. Additionally, by applying the black letter law, the court disallowed the serving employees from serving as arbitrators considering them as de jure ineligible. On the other hand, the Court permitted the appointment of retired engineers from the panel by applying a restrictive interpretation of the clause.

The institution of the seventh schedule guidelines has set the ground for a greater scope of judicial intervention, unlike the case of the fifth schedule, wherein a matter can be taken to the court to seek relief only after the award has been issued by the arbitral tribunal. Such an approach seems to focus mainly on the arbitrator's termination and ineligibility rather than the challenge of its appointment. In *HRD Corporation v GAIL(India) Ltd*,[126] where two out of three arbitrators were challenged, the arisen question before the court was whether a business relationship, wherein the arbitrator provided legal advice to one of the parties in an unrelated matter earlier, could possibly be a ground for the arbitrator to be challenged. The court reasoned that one isolated incident of providing legal advice cannot render the arbitrator ineligible to arbitrate.[127] In the case of the second arbitrator, who was challenged for having prior involvement in a case of the same subject matter, the court reasoned that 'previous involvement' did not include in its ambit delivery of award but instead was limited to consultation.

Hence, the hardening of the soft law instrument into the Indian Arbitration Act, via amendment changed the landscape of the approach that Indian courts undertook to establish principles of justice in matters of bias. While party autonomy is the primary principle in any arbitration agreement, the procedure laid down in the arbitration clause cannot be allowed to override the principles of fairness and impartiality in proceedings.[128]

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[125] Khandekar and Singh,(2021).

[126] HRD, *Supra* note 100.

[127] *Arbitration and Conciliation Act 1996*, s.14, 15.

[128] *Perkins Eastman Architects DPC & Anr v HSCC (India) Ltd* AIR (2020) SC 59; *Proddatur Cable TV Digi Services v SITI Cables Network Ltd* (2020) SCC Online Del 350.

E. Re-evaluating the Indian Law in the light of *Halliburton* v *Chubb*

As discussed above, by virtue of the 2015 amendment, the insertion of Schedule Five and Seven into the Indian Arbitration Act read along with Section 12 creates a duty to disclose upon the arbitrator. However, the 2019 amendment posed the inclusion of Section 42-A into the Act that thrusted the strict duty to maintain confidentiality by the arbitrator on arbitral proceedings.[129] The Indian Courts and the U.K. Courts in the case of HRD Corporation and in Halliburton observe that the duty to disclose information by the arbitrator may be waived in situations wherein it is conventional to have multiple appointments. While it may be a statutory obligation to provide disclosure of information, the characteristic of privacy and confidentiality also holds prime importance and must be balanced with this duty to disclose. The provision entailed under Section 42-A, as such, does not identify the requirement of disclosure unless it is for the purposes of seeking enforcement and implementation of the award. Hence, in the light of the *Halliburton case*, wherein multiple appointments of an arbitrator have been made, this provision obliterates situations wherein the arbitrator in order to prove his impartiality may have to make disclosure of information for the interest of the parties. Further, it also fails to consider those situations under which disclosure could be made based on the consent of the parties. Hence, where consent is precluded, confidentiality must prevail. Multiple appointments of arbitrators neither fall within the red list of the IBA guidelines nor under Schedule Seven of the Indian Arbitration Act that accounts for disqualification of such arbitrators. This situation is rather clipped under Schedule Five that provides a wide room for interpretation and to later set aside the arbitration proceedings under Section 34 of the Act. Therefore, in order to meet new international standards, the Indian arbitration regime must re-examine its approach in upholding a balance between disclosure and privacy. In this context, the judgement on *Halliburton v Chubb* would hold chief importance in determining future Indian disputes on questions arising out of contradictory positions on disclosure requirements and confidentiality.

[129] *Arbitration and Conciliation (Amendment) Act 2019, 4*

III. Chinese Arbitration

Every arbitrator needs to be impartial and independent. This is a universal rule in arbitration.[130] However, there is no universally recognised body governing the behaviour of arbitrators. Therefore, it depends on national law and arbitration rules issued by arbitration institutions to regulate the impartiality and independence of arbitrators.

There is no doubt that *Halliburton v Chubb* could be one of the most important arbitration cases in recent years. It has drawn international attention because it will directly affect one of the most important international arbitration centres – London. Unfortunately, there has not been much discussion of the case in China. One of the reasons is that this case is a relatively new case in a common law country. As a codified law system, Chinese arbitration has a different approach to ensure the impartiality of arbitrators. Another reason is that *Halliburton v Chubb* has great importance to the arbitrator's duty of disclosure however, the Arbitration Law of the People's Republic of China (CAL) does not provide for this duty. It is only provided in the arbitration rules issued by Chinese international arbitration commissions. Therefore, while *Halliburton v Chubb* may contribute to the further development of the impartiality of arbitrators in international arbitration, China may fall behind on this topic.This does not mean that Chinese law neglects the importance of the impartiality of arbitrators. In fact, Chinese law adopts two main mechanisms to ensure the independence and impartiality of arbitrators. The first is through the requirement of high qualifications of arbitrators and the second is the challenge of arbitrators.

A. Qualifications of Arbitrators

Parties are restricted in appointing arbitrators in Chinese arbitration. This is illustrated in two main aspects: a) there are strict requirements for registration of arbitrators and the registered arbitrators compose a 'panel of arbitrators'; and b) the parties can only appoint arbitrators from a 'panel of arbitrators' provided by arbitration commissions.

B. Strict Requirements for Registration of Arbitrators

CAL provided that an arbitrator can only be registered as an arbitrator in an arbitration commission if he meets one of the conditions set

[130] See, Blackaby *et al*., (2015), Chapter 4; Merkin, (2016), Chapter 10.

forth in Article 13[131]. This article has two requirements for registering an arbitrator: he must be of good morals, and he must be of legal professionals[132].

As to the first requirement, it failed to define what morals constitute 'righteous and upright' characters. Neither does it provide the circumstances where a person shall be barred from registering as an arbitrator. According to CIETAC, this requirement generally refers to one person who can insist on conducting arbitrations independently and impartially with the ability to comprehend honestly and to make sound and efficient judgments[133].

As to the second requirement, it has restricted professionals and experts in fields other than the law to become arbitrators. This has greatly compromised party autonomy in Chinese arbitration[134]. One of the advantages of arbitration is that parties can appoint experts in technical and complex disputes to achieve a more just and efficient award. By requiring all arbitrators to be legal professionals have in fact deprived of the parties' autonomy to appoint an appropriate and fit for purpose arbitrator.

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[131] Article 13 An arbitration commission shall appoint its arbitrators from among righteous and upright persons.

An arbitrator shall meet one of the conditions set forth below:

(1) To have passed the national uniform legal profession qualification examination and obtained the legal profession qualification and to have conducted arbitration work for at least eight years;

(2) To have worked as a lawyer for at least eight years;

(3) To have served as a judge for at least eight years;

(4) To have been engaged in legal research or legal education, possessing a senior professional title; or

(5) To have acquired the knowledge of law, engaged in the professional work in the field of economy and trade, etc., and possessing a senior professional title or having an equivalent professional level.

An arbitration commission shall set up panels of arbitrators according to different specialties.

[132] Also known as 'three eight two high' which refers to three requirements of eight years' experience and two requirements of high standard of knowledge.

[133] See CIETAC's Provisions on Appointment of Arbitrators.

[134] Kun, (2016), 75.

Furthermore, a list of qualifications does not prevent confusion in practice. There have been reports of completely opposite judgments rendered by the People's Court regarding the same qualification of arbitrators. For example, whether a civil servant can act as an arbitrator has been debated in courts[135].

It shall be noted that the second requirement does not apply to the registration of foreign arbitrators. Article 67 provides that foreign arbitrators, with special knowledge in the fields of law, economy and trade, science, technology, etc can be registered by the arbitration commissions.

C. The Panel of Arbitrators

Article 13 also provides that an arbitration commission shall set up the panel of arbitrators. This is considered to be a mandatory requirement for parties to appoint arbitrators from the panel[136]. This is compromising party autonomy because it deprives parties of their rights to appoint arbitrators from outside the panels[137]. In a technical and complex dispute, it cannot be guaranteed that competent arbitrators can be appointed from the panels. In order to deal with this disadvantage, many Chinese commissions have provided extensive lists of arbitrators. However, the overly extended lists[138] could be difficult to be used by parties. To this end, the appointment process becomes time-consuming and exhausting to parties. It needs not to mention the fact that it is plainly impossible for a list to include experts from all fields[139]. Although most international arbitration rules, such as CIETAC Rules, provides that parties can

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[135] In a case referenced as A's Application to Set Aside an Arbitral Awards (2016) Shan 08 Special Civil 9, a civil servant (police officer) became an arbitrator and rendered an arbitral award; but the award was revoked by Yulin intermediate People's Court (IPC) for the reason that a civil servant cannot act as a legal practitioner under Chinese law. However, in a case referenced A's Application to Set Aside an Arbitral Awards (2016) E 01 Civil Special 87, Wuhan IPC held that a civil servant could act as an arbitration because he shall not be categorised as a legal practitioner. However, the problem is which qualification does the civil servant falls into remains unclear in both cases.

[136] See, Cohen *et al*., (2004); Lianbin, (2001), 575; Xin, (2004), 91.

[137] Zhanjun, (2015).

[138] For example, CIETAC has more than 1,500 arbitrators in a list of 180 page. To make it worse, it only listed of their fields of expert with no further details.

[139] Thirgood, (2000), 89-101.

appoint arbitrators from outside the panel, the appointment must be confirmed by the chairman of the arbitration commission[140].

Article 13 is considered a compromise of party autonomy in general, but it was considered to be necessary at the time CAL was implemented[141]. There wasn't a modern arbitration system in China until the implementation of CAL. Therefore, the drafters may consider that such an article provides supervision and assurance to the professionalism of arbitrators in China. It positively boosted the reputation of the Chinese arbitration commission and promoted the development of arbitration services in China[142]. However, with the development of arbitration in China, the acceptance and quality of arbitration in China has become higher over time. It becomes questionable whether Article 13 can still ensure the quality of arbitrations nowadays. One of the principles of arbitration –party autonomy, which allows parties to design high quality and efficient dispute resolution with arbitrators, has been severely compromised by Article 13. It could be argued that only allowing parties to practice their autonomy to appoint arbitrators carefully and cautiously would lead to a more just and efficient arbitration. From this point of view, Article 13 could possibly cause parties to become more passive and accepts the selections of arbitration commissions as to the quality of arbitrators more blindly, and this could potentially lead to problems in a later stage of arbitration.

There are also practical problems. Article 13 can hardly prevent arbitrators from acting unrighteous or dishonestly[143]. There are many reported cases[144] of arbitrators accepting bribes or perverting the law in

[140] For example, Article 26 CIETAC Rules 2015; Article 27 SHIAC Rules.

[141] See Xiuqing & Biao, (2016), 84; Guangtai & Taisong, (2019), 141.

[142] *Id.*

[143] Shengcui, (2018), 235.

[144] For example, *Fushile Arbitration case* (2005); *Accepting Bribes and Perverting the Law by Xue Bingfeng and Shu Zhongliang* (2018) Yun01XingZhong703; *Accepting Bribes by Shi Jinxing, Li yubi and Zhu Wangrun* (2019) Gan01XingZhong437 (2019). It shall be noted that accepting bribes and perverting the law are criminal offences in China.

arbitration[145]. It has been pointed out that many countries without similar provisions do not have more unfair or low-quality arbitrations or more corrupted arbitrators[146]. Therefore, there have been suggestions to reform Article 13[147].

D. Withdrawal and Removal of Arbitrators

Before considering the impartiality and independence of arbitrators, it is necessary to touch on one issue considered in the *Halliburton* case[148] under Chinese law: shall the impartiality of the party-appointed arbitrators be assessed the same way as the chairmen arbitrator? The Supreme Court had concluded in Halliburton that 'a party-appointed arbitrator in English law is expected to come up to precisely the same high standards of fairness and impartiality as the person chairing the tribunal'[149]; although it had been argued that some other countries, such as Switzerland and France, have distinguished party-appointed arbitrators from the chairman regarding impartiality and considers that the party-appointed arbitrator is indirectly representing the party.[150]

There is no related provision under Chinese arbitration law regarding this issue, but most Chinese arbitration commissions have made clear in their rules that an arbitrator does not represent any party, and the arbitrator must be independent of all parties and treat each party impartially[151]. However, this may not be the case in practice. It has been reported that a considerable part of arbitrators privately admits that they represent the interest of the parties that appointed them[152].

Nevertheless, the law for challenging the impartiality and independence of arbitrators under Chinese law applies equally to both party-

[145] Article 58 provides that the arbitral award can be set aside on the ground that the arbitrators have demanded or accepted bribes or committed malpractices for personal benefits or perverted the law in the arbitration of the case.

[146] Shengcui, (2018), 235.

[147] See Lianbin, (2001), 575; Hengjuan & Shengcui, (2019), 79, 101.

[148] *Halliburton Company v Chubb Bermuda Insurance Ltd* (2020) UKSC 48.

[149] *Halliburton Company v Chubb Bermuda Insurance Ltd* (2020) UKSC 48, 62.

[150] Chazli, (2021), 75-85.

[151] See for example, Article 24 of CIETAC Rules 2015.

[152] Faqiang *et al*., (2010), 140.

appointed arbitrators and chairmen. There are only 3 provisions under CAL that regulate the challenge of arbitrators: Article 34-36.

Because Chinese arbitration law distinguishes domestic arbitration from foreign-related arbitration, it needs to discuss these two sets of arbitration separately. Chinese domestic arbitration is under stricter law and judicial review, substantial review of the arbitral award is allowed under certain circumstances. As to foreign-related arbitration, which means the arbitration has a foreign element, more party autonomy and court support is provided. Judicial review of the foreign-related arbitral awards is limited to very few grounds that are similar to the UNCITRAL Rules.

E. Domestic Arbitration and the 2014 IBA Guidelines in the Chinese Legal Landscape

In domestic arbitration, if an arbitrator, who falls into the circumstances of Article 34, fails to withdraw from the arbitration proceedings, the arbitral award rendered may be set aside by the people's court. Therefore, it is necessary to examine each circumstance.

Article 34 of CAL provides that in one of the following circumstances, the arbitrator must withdraw, and the parties shall also have the right to challenge the arbitrator:

(1) the arbitrator is a party in the case or a close relative of a party or of its counsel in the case;

(2) the arbitrator has a personal interest in the case;

(3) the arbitrator has other relationship with a party or with its counsel in the case which may affect the impartiality of arbitration; or

(4) the arbitrator has privately met with a party or with its counsel or accepted a dinner invitation or a gift from a party or from its counsel.

Article 34 is considered to be a prohibitive provision which means that if an arbitrator is under any circumstance defined by this article, the arbitrator must withdraw. The parties have no autonomy to allow the arbitrator to continue to act[153]. To make an analogy with IBA Guidelines

[153] Wei, (2011), 149.

on Conflict-of-Interest 2014 (IBA Guidelines), Article 34 can be understood as that the 4 circumstances all fall into the non-waivable red list. There is no waivable red list, orange list or green list.

Article 34(1) clearly fits into the non-waivable red list of IBA Guidelines, and it is reasonable that the arbitrator must withdraw.

Article 34(4) has a special Chinese character. These kinds of behaviour clearly violate the arbitrator's professional ethics, so they must not be allowed. However, prior to the adoption of CAL, unsurprisingly these behaviours were very common in China[154]. Nowadays, meeting an arbitrator privately and bribery still exists in local arbitration commissions. Therefore, this sub-article is in fact vital to preserve the impartiality and independence of arbitrators in China. Article 34(4) has been strictly monitored in domestic arbitrations. In *Wang Zhixiao's Application to Set Aside an Arbitral Award*[155], the arbitral award was set aside because the presiding arbitrator accepted the banquet offered by one party[156] and discussed the arbitration during the banquet[157]. However, this case illustrates a dangerous issue regarding Article 34(4). The party that applied to set aside the arbitral award was the party that offered the presiding arbitrator banquet. It raises the issue of abusing Article 34(4). If one party purposely invites an arbitrator for dinner and uses it as a ground for setting aside the arbitral award in the future if the arbitral award is against the party, will the court support this party? It remains problematic as there has not been any relevant case reported. Nonetheless, Article 34(4) remains a useful tool in Chinese domestic arbitration, especially in local commissions where the quality of arbitrators is not guaranteed.

It can be supported that Article 34(2) is not clear to provide guidelines[158]. It does not define 'personal interest', nor does it provide a list of situations like the IBA Guidelines do. It may be interpreted as any personal interest, no matter how tiny it is. However, even if the arbitrator has a very tiny personal interest in the case, for example, an insignificant

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154 Fang, (2015), 200.

155 Wan08MinTe19, (2016).

156 The banquet was paid by the party.

157 See also *Fushile Arbitration case* (2005); *Wang Xiaozhi's Application to Set Aside an Arbitral Award* (2016) Wan08MinTe19; there are also many unreported local cases that can be found in the news.

158 See Yangyang, (2016), 35; Xin, (2013); Zefan, (2011), 76.

amount of shares, how much would the arbitrator risk to protect that interest as it could ruin the arbitrator's career[159]. Therefore, it is best to leave it to the parties to decide on this matter. But this relies on the disclosure of arbitrators which does not exist under CAL, which is discussed below, so it will be more problematic. There are no reported cases relying on Article 34(2) because it is partly overlapping with Article 34(3). This means the parties would normally rely on Article 34(3) more as it is practically easier to argue that the arbitrator is somehow connected to someone in the arbitration than proving the arbitrator has direct and personal interest in the arbitration itself. This has also caused confusion in the People's Court. The court would use confusing phrases in some judgments such as 'the relationship between the arbitrator and person A has made the court believe that the arbitrator has an interest, therefore the arbitral award shall be set aside.'[160] However, it is suggested that the two need be clearly distinguished because Article 34(2) refers to the interest related to the case itself; and Article 34(3) refers to any connection between personnel of the arbitration. It is dangerous to mix two together as Article 34(2) shall have a higher priority than Article 34(3) in considering whether the arbitrator shall be removed. If an arbitrator has a personal interest in the case itself, it is in human nature the arbitrator is more likely to be biased. However, if the arbitrator only knows one party's lawyer because they work in the same building, it is hard to think that the arbitrator would risk his career to favour that party. The danger is that when Articles 34(2) and 34(3) are mixed together by the People's Court, the court may overly extend the scope of Article 34(3).

Article 34(3) is also unclear itself[161]. It does not define 'other relationships'. It does not clarify how these relationships affect the impartiality of the arbitrator. It also fails to allocate the burden of proof. It leaves the People's Court discretion to decide on these matters. In *Beijing A Advertisement Co. Ltd.'s application to set aside an arbitral award*[162], the presiding arbitrator was appointed by the chairman of the arbitration

159 Wei, (2011), 152.

160 See *Shenzhen Qianhai Huashi Yidong Huliang Ltd case* (2018) Yue03MinTe601; *Aolaobula Coal Ltd case* (2020) Jing04MinTe715.

161 See Hongyu, (2015), 38; Shengcui & Xinquan, (2009); Bowen, (2016).

162 *Beijing First Intermediate Court* (2009)MinTe14189.

commission. The presiding arbitrator had repeatedly acted as Company B's lawyer and arbitrator in previous cases. Company A applied to remove the appointment, but this was refused by the commission. After an award was rendered, Company A applied to the court based on Article 34(3). The court held that apart from showing that there was a relationship between the arbitrator and the party, the applicant also had to prove that this relationship would affect the arbitrator's impartiality. Since Company A could not raise evidence to prove this influence, the arbitrator did not need to withdraw. In *Beijing A Clinic's application to set aside an arbitral award*[163], the arbitrator had a 'teacher-student relationship' with B Medical Institution. The court held that unless Clinic A could prove that this relationship would affect the impartiality of the arbitrator, a normal 'teacher-student relationship' would not affect the outcome of the arbitration. In *Shenzhen Haishi Mobile Internet Co., Ltd.'s Application to set aside an arbitral award*[164], the company for whom the presiding arbitrator works has long-standing business with the law firm representing the other party[165]. Haishi's claim that this relationship would affect the arbitrator's impartiality satisfied the people's court. Therefore, the people's court set aside the award. In *Zeng Huarong, Wang Chunshen's Application to Set Aside an Arbitral Award*[166], the presiding arbitrator and another arbitrator were of 'tutor and tutee' relationship, as well as former colleagues. Zeng and Wang applied to the arbitration commission to remove the arbitrators, but they did not provide any evidence to prove that these relationships would affect the impartiality of the arbitration. Therefore, their application was rejected by the arbitration commission. The court withheld the arbitration commission's decision and refused to set aside the arbitral award. In *China Mobile Ltd Anhui Huainan Branch's Application to Set Aside an Arbitral Award*[167], one of the arbitrators and the representatives of one party are

[163] *Beijing Second Intermediate Court* (2005)MinTe 12032.

[164] (2018)Yue03MinTe601.

[165] The law firm represented the arbitrator's company in at least three litigations between 2012 and 2018.

[166] (2014) HuiZhongfaShen98.

[167] (2016) Wan04MinTe314.

colleagues in a law firm, this relationship was held by the court as it could affect the impartiality of the arbitration[168].

According to case law, it can be said that any relationship between any participants of the arbitration can be referred to Article 34(3) as 'other relationships. If the party believes that the impartiality of the arbitrator will be affected by the relationship, evidence must be provided to prove this allegation. The court will then assess the claim based on the evidence provided. However, the cases do not provide the standard of proof. It can be said that the people's court has great discretion to decide whether the relationships would affect the impartiality of the arbitration[169]. Unfortunately, unlike in some other issues of CAL, the Supreme People's Court of China (SPC) does not issue any opinions or interpretations of CAL to provide guidelines or standards defining Article 34(3). The decision regarding Article 34(3) will remain on a case-by-case basis. A potential issue is that since case law is not followed in China, as China has a codified law system, the more general and vague terms used in this article could lead to different and even controversial court decisions. It may be further argued that Article 34(3) could also be extended to some circumstances which are not required to be disclosed under IBA Guidelines. For example, under IBA Guidelines there is no requirement to disclose when the arbitrator works in the same law firm or chambers as party's representatives; but under the same circumstances in China, the arbitrator may need to withdraw as seen in the above cases.

Article 35 provides that the application to remove an arbitrator shall be made prior to the first hearing. If the matter is known to the party after the first hearing, the application shall be made prior to the end of the last hearing. There are a few issues with this provision. The first issue is that it does not provide the time frame for a summary proceeding, which does not have hearings. The second issue is that Article 35 can be abused by a party in bad faith. The party can wait until the last hearing to bring the matter to the tribunal and if the arbitrator is to be

[168] See also *Dongying Ganglong Decoration Engineering Ltd.'s Application to Set Aside an Arbitral Award* (2006) DongMin2Chu11; *Shandong Tianlun Steel Wire Ltd.'s Application to Set Aside an Arbitral Award* (2005) DongMin2Chun29; *Shandong Construction Engineering Ltd.' Application to Set Aside an Arbitral Award* (2016) Lu04MinTe9.

[169] See Xiaoli, (2007), 1-7; Kaiyuan, (2018), 179.

removed, the previous proceedings may become invalid which will put the other parties in a difficult situation. It would undermine the efficiency of arbitration[170].

Article 36 of CAL provides that the decision as to whether the arbitrator should withdraw shall be made by the chair of the arbitration commission; and if the chair of the arbitration commission serves as an arbitrator, the decision shall be collectively made by the arbitration commission. There is a practical issue with this article. Because Article 34 provides that the arbitrator must withdraw if any of the circumstances apply to the arbitrator, how much power would the arbitration commission have to refuse the application to remove the arbitrator? As to Article 34(1) and (4), it seems that the arbitration commission has no right to reject the application to remove the arbitrator. As to Article 34(2) and (3), it is even more complicated. The arbitration commission can make a decision to refuse to remove the arbitrator. However, this decision is subject to challenges in court seeing that the parties can apply to a court to set aside an arbitral award based on Article 58(2) which provides that an arbitral award can be set aside if the constitution of the arbitral tribunal or the arbitration procedure was not in conformity with the statutory procedure. As it was argued above, the court has the discretion to decide whether the impartiality and independence of an arbitrator will be affected under Article 34 (2) and (3). Therefore, the practicality of Article 36 has been greatly compromised.

It may be concluded that the challenge of arbitrators under CAL has many issues. These provisions were generally transplanted from civil procedures there has a Chinese civil law characteristic. Article 34 has provided little guidance to the interest of arbitrators that need to be considered by the arbitration commission and the People's Court.[171] To give the discretion to the People's Court would require high competency of judges which is hard to achieve in lower courts in China at present.

Another issue with the bias of arbitrators in China is that CAL does not provide any provisions regulating the disclosure of arbitrators. The disclosure is important in challenging arbitrators as it provides necessary information for parties to consider the impartiality and independence of the arbitrators. However, this mechanism, which shall be clo-

[170] See Guanghui & Taisong, (2019), 86; Yangyang, (2016), 35.

[171] See Yifei, (2019); Kaiyuan, (2018), 179; Shengcui & Xinquan, (2009).

sely linked to the withdrawal and removal of arbitrators, is missing under Chinese law.

This means that under CAL, the arbitrators do not have any obligation to disclose any interest they may have in the arbitration. This could lead to a few problems in practice. The first is that there is little legal consequence for non-disclosure. It may depend on the consciousness of the arbitrators to disclose any interest. The second issue is that if the arbitrators do not disclose any information, the parties may want to carry out some investigations themselves. This could lead to false information or other unnecessary matters which may affect the arbitration proceedings. The third issue is that if the arbitrators do not disclose any information and they were later found to be biased, any arbitral award rendered may be set aside by the people's court. This could be contrary to the efficiency of arbitration that parties seek. Therefore, it can be argued that the lack of obligation to disclose under CAL seriously undermined the arbitrators' impartiality and independence in domestic arbitration.

F. Foreign-related Arbitration

In foreign-related arbitration, the parties will normally refer their case to one of the international arbitration commissions in China, such as CIETAC. These arbitration commissions have provided more detailed rules to complement the law. For example, CIETAC has issued Rules for Evaluating the Behaviour of Arbitrators[172], which provides a list of circumstances that constitute 'other relationships' under Article 34(3)[173].

[172] The Newest version became effective on 1 May 2021.

[173] Article 7(4) provides that other relationships mainly include the arbitrator:

1. has previously given advice to parties on this case;
2. has recommended representatives to the parties;
3. has acted as witness, expert, advocate, litigate or arbitration representatives in this case or its relevant cases;
4. is working or has previously worked with the parties or representatives within last two years;
5. is the current or has worked as the legal advisor of the party or the party's related units within last two years;
6. has close relatives working in the party's or the party's representative's company;
7. or close relatives have right of recourse towards any party;

Therefore, the arbitrators of these arbitration commissions shall have a better understanding of Article 34(3) and apply to withdrawal. The list also helps parties to identify the possible biases of arbitrators in their arbitration.

Furthermore, international arbitration commissions in China require arbitrators to disclosure any circumstance which may lead to reasonable doubt over the arbitrator's impartiality or independence. The arbitrators must disclose such circumstances whenever they become aware of the circumstance during the arbitration proceedings[174]. However, it may be argued that the rules are stricter compared to IBA Guidelines because they require the arbitrators to disclose some frequently occurred circumstances in international arbitration which are not required by IBA Guidelines[175]. For example, the arbitrator is a formal colleague of another arbitrator shall be disclosed by the requirement of CIETAC Rules but is not needed in IBA Guidelines[176].

As to Article 36, it is the same in foreign-related arbitration to let the chairman of the arbitration commission[177] make the decision whether or not the arbitrator shall withdraw or be removed. However, this decision is normally not subject to any judicial review in foreign-related arbitration. This means that the decision is final and binding on the arbitrators and parties. Unlike domestic arbitration cases, in foreign-related arbitration, because the decision made by the chairman of the arbitration commission is in accordance with CAL and arbitration rules, it will not be considered as a ground for setting aside the arbitral award by the people's court. It may be argued that theoretically, a decision may be accounted to the ground of serious irregularity for setting aside an arbitral award as the decision may be made against the rule. For example, the

8. or close relatives are joint right holders, joint obligors or have other joint interest with the party or the party's representatives;

9. other circumstances that might affect the impartiality of the arbitrators.

[174] See, for example, Article 31 CIETAC Rules 2015.

[175] Fang, (2015), 197.

[176] See, for example, Article 6(2) of CIETAC Rules for Evaluating the Behaviour of Arbitrators.

[177] Or the arbitration commission collectively.

chairman of the arbitration commission refuses to remove an arbitrator under circumstances that the arbitrator shall be removed[178].

In practice, there has not been any foreign-related case reported to SPC based on that the decision to keep or remove the arbitrator made by the chairman of the arbitration commission is not in conformity with the arbitration rules. There are some reasons for no reported case. For example, the arbitrators are carefully chosen by the parties; the arbitrators are professionals who closely observe their independence and impartiality; the challenge of arbitrators are swiftly and cautiously dealt with by international arbitration commissions, etc. However, domestic cases have shown that the bias of arbitrators is a factual problem in Chinese domestic arbitration. Nevertheless, very few domestic cases are related to the mainstream international arbitration commission such as CIETAC, BAC etc. This has further confirmed that the international arbitration commissions in China can monitor the impartiality and independence of arbitrators. Therefore, the bright side is that the impartiality and independence of arbitrators in foreign-related arbitration may be well preserved.

However, the "dark side" is that Chinese arbitration may not have attached great importance to the impartiality and independence of arbitrators. This is illustrated in the lack of provisions regulating the challenge of arbitrators under CAL. SPC also failed to issue interpretations or opinions to stress the importance of the impartiality and independence of arbitrators which may lead to contempt or ignorance by lower courts, especially local courts where some of the judges are hardly competent to deal with important arbitration issues.

It may be argued that the bias of arbitrators has not drawn the attention of Chinese arbitration because there are other more fundamental issues that require urgent clarification from SPC. However, arbitration is only as good as the arbitrator. The bias of arbitrators is as important as any other issues of Chinese arbitration and has been discussed by academics frequently, especially the need for a disclosure mechanism.[179]

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[178] Such as the arbitrator is a close relative to one party, which falls into compulsory circumstances to remove the arbitrator in both Article 34(1) and arbitration commission rules.

[179] See Bo, (2011); Xin, (2013); Shengcui & Xinquan, (2009); Zhanjun, (2011), 79.

One recent case has brought this important issue into the sight of Chinese arbitration. In the Court of Arbitration for Sport decision in the matter *World Anti-doping Agency v. Sun Yang and Fédération Internationale de Natation (2021)*, after an arbitral award was rendered, Sun Yang appealed to the Swiss court claiming that the president of the arbitral panel was biased. The appeal was withheld, the president was removed by the court and the other panel members stepped down. A new panel was appointed and re-arbitrated the case in May 2021. Although this is not a Chinese arbitration case, it has received extensive coverage and discussion in China because Sun Yang is a very famous Chinese athlete. Through this case, the general public started to realise the importance of the duty of impartiality of arbitrators, especially that, unlike domestic judges who can hardly be proven biased, if any circumstance gives the appearance of bias in arbitration, it shall be sufficient enough to remove that arbitrator[180].

It is not hard to reach the conclusion that the two mechanisms adopted by CAL to preserve the impartiality of arbitrators are not adequate. The strict requirements for the register of arbitrators merely stop arbitrators from acting in favour of one party in domestic cases. The procedure for challenging an arbitrator is vague and confusing which could lead to potential problems as discussed. Article 34 has been another provision of Chinese arbitration law that fails to provide clarity and guidance. Neither does it provide a comprehensive list of conflicts of interest, nor does it provide any party autonomy to decide whether the arbitrator shall be removed. Domestic cases have shown that the bias of arbitrators can be identified in many cases, especially local arbitrations. Although there have not been many cases related to those high standard international arbitration commissions, nor any reported case in foreign-related arbitration, the risk of a biased arbitrator only remains underwater. It may become to the attention of SPC if one foreign-related case is brought in front of the People's Court and it is believed that SPC will handle the case thoroughly and it may then lay down the decision as a model case or even release an opinion to address the bias of arbitrators. As it is, for now, one may only rely on CAL and commission rules to hold the impartiality of arbitrators.

[180] *Swiss Supreme Court's Decision on Sun Yang case*, 15.

G. A comparison of Chinese law and English Law

It can be seen from the above that Chinese arbitration law is relatively outdated compared to English Law when regulating arbitrators. Although it has provided a list regulating when arbitrators shall withdraw, the list is stricter than English law and the IBA Guidelines. This is also true in practice as the case law shows that under many circumstances when arbitrators may not need to withdraw under English law or IBA Guidelines, they had to withdraw under Chinese law. The high requirements of qualifications of arbitrators in China have a special Chinese characteristic that represents the lack of confidence in the qualities of arbitrators, especially in domestic arbitrations.

The lack of duty to disclose under Chinese law has also long been criticised. Although arbitration commissions provide such rules, they may lack legal protection. The developments in the impartiality of arbitrators are falling behind some other arbitration developments in China, such as mediation-arbitration and online arbitration. Therefore, the *Halliburton v Chubb* case shall be brought to attention in order to encourage the Chinese arbitration's developments regarding the impartiality of arbitrators. The duty of disclosure, without a doubt, must be introduced to Chinese arbitration.

H. The Consultation for a Proposed Reform

The issues regarding the bias of arbitrators as discussed above are among many issues of CAL that need to be reformed or revised. The call for reform of CAL has been in China for a long time, on 30th July the Ministry of Justice of the People's Republic of China published Arbitration Law of the People's Republic of China (Revised) (Draft for Solicitation of Comments) (the Draft)[181] after consulting judiciary, arbitration commissions, legal professionals, and academics. It needs to be clarified that the Draft does not have any legal effect as it is for solicitation and consultation purposes. For it to become effective, it has to go through the legislative procedures in the National People's Congress. During these procedures, there may be additions, deletions, or changes to the articles.

[181] http://www.moj.gov.cn/pub/sfbgw/zlk/202107/t20210730_432958.html; (last visited on 10.12.2021).

Nevertheless, this Draft still represents the directions of the reform, and it has potentially addressed many issues of the current CAL.

The Draft has made some progress in regulating the bias of arbitrators. It has addressed some of the issues in both mechanisms. The first change that it made is that the parties no longer need to appoint arbitrators from the Panel of Arbitrators as the Panel only serves as recommendations[182]. This change means that party autonomy is valued in the appointment of arbitrators, and it provides flexibility to the parties. The second change is that the Draft has introduced the duty of disclosure into CAL. Article 52 provides that the arbitrator shall disclose any circumstances, which may lead to reasonable doubt to the arbitrator's independence or impartiality, to the parties in writing. This is an important change as the Draft follows the international practice of disclosure which provides grounds for withdrawal or removal of arbitrators. The fourth change is regarding the time limit to apply to remove the arbitrator. Article 54 provides that the party shall apply to remove an arbitrator prior to the first hearing. If the situation is known to the party after the first hearing, the party shall make the application within 10 days of becoming aware of the situation. This change attempts to avoid abuse of application to remove arbitrator in the final hearing. The right to decide whether to remove the arbitrator was solely given to the arbitration commission which in a way avoids confusion[183].

However, some other concerns remain unchanged. There is no change as to the qualifications of arbitrators. Another main issue of CAL, Article 34 of CAL, remains unchanged[184]. This means that the situations in which the arbitrators must withdraw in Chinese arbitration are still ambiguous and may be too strict. Overall, the Draft shows a welcomed trend of reform by addressing some of the issues of CAL, but the changes are not enough to make a fundamental improvement of regulating the bias of arbitrators. Whether the Draft will be altered or changed remains unclear, thus the reform of CAL is still in the mist but gradually revealed.

[182] Article 18 of the Draft.

[183] Article 55 of the Draft.

[184] It is now Article 53 of the Draft.

Conclusion

The arbitrator's duty to remain impartial and objective constitutes a challenging issue under all the three jurisdictions examined above. *Halliburton* has marked a turning point and can be considered as of great prominence for numerous reasons; by way of answering the introductory question, the Supreme Court places the arbitrator's duty to be impartial closer to being classified as a legal one. Moreover, it reformed the common law test, so as to be more pragmatic while simultaneously introducing a flexible approach to each case' circumstances by also rendering the relevant field of arbitration, a factor to be considered when investigating whether the arbitrator is biased.

As is evident, whereas India has incorporated the IBA Guidelines to a great extent in its legislation and subsequently Indian Courts seem to also accept their value, in England, such instrument is deployed mainly as a material, which facilitates arbitrators in performing their tasks, since English case-law seems to have the lead in paving the way towards forming the framework regarding arbitrator's duty to be impartial. Further, as the subject of arbitrator's bias is an issue, which seems to attract less legislative interest in China, there is little information confirming that the Chinese legislator has indeed embraced the relevant IBA Guidelines in Chinese Arbitration Law. As far as the *Halliburton case* is concerned, the common denominator between Chinese and Indian Arbitration Law is that, from now on the aforementioned case will serve as a pivotal benchmark so as for the duty of disclosure to be established in both legal systems.

Hence, as the case is with China and its potential steps towards introducing a legal framework tackling the issue of bias adequately, it remains for each jurisdiction's arbitration practice to cast light on the way such arbitrator's duty is shaped or/and whether there is the need for further regulation of the matter.

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