INTER-RELATION BETWEEN DISCLOSURE AND CONFIDENTIALITY

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Introduction

One of the defining features of arbitration is its ability to offer '*privacy'* and '*confidentiality*' as compared to litigation in domestic courts. Both of these principles are quintessential for a fair and impartial hearing. Principles of '*transparency', 'confidentiality'* and '*privacy* are sought to be achieved by way of the requisite need of disclosure to be lmao made by the arbitrators. Parties, arbitrators, and courts face a complex decision as to *what information* the arbitrator should disclose and what *standards* should apply to the disclosure. The 2015 Amendment[1] to the Arbitration and Conciliation, 1996 ["**Arbitration Act**"] now casts a solemn duty on an arbitrator to be impartial between the parties. It requires specific disclosure by the proposed arbitrator under Section 12(1) to that extent. The principle of confidentiality applies to information being disclosed prior to publication of award including the time when the arbitral proceedings are conducted and also to the information on the award arising out such proceedings. Without narrating the settled law concerning disclosure, we discuss the scope of disclosure and confidentiality under various heads including the nature of disclosure, the stage at which disclosure should be made, the standard applicable in relation to disclosure, and the interplay between disclosure and confidentiality.

Scope of Disclosure

> *"[T]he duty to act independently and impartially involves Arbitrators owing no allegiance to the party appointing them. Once appointed they are entering independent of their appointing party and bound to conduct and decide the case fairly and impartially. They are not in any sense… a representation of the appointing party or in some way responsible for protecting or promoting the party's interest."*[2]
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> *- Popplewell J.*

The ramification of non-disclosure in terms of Section 12 of the Act is no longer *res integra.*[3] Non-compliance with section 12 read with schedule 5 and schedule 7 not only results into termination

[1]The Arbitration and Conciliation (Amendment) Act, 2015.
[2] *Halliburton Company v Chubb Bermuda Insurance Ltd* [2018] EWCA Civ 817.
[3]*HRD Corporation (Marcus Oil and Chemical Division) v GAIL (India) Limited (formerly GAS Authority of India Ltd)* (2018) 12 SCC 471; *Omaxe Infrastructure and Construction Ltd v Union of India & Anr* 2018 SCC OnLine Del 8914; *Bharat*

of ongoing arbitral proceedings irrespective of their stage, but also results into setting aside of the award.[4] *Raison d'être* for Section 12 of the Act is that independence and impartiality of an arbitrator must be squarely and unequivocally established. Having regard to the said raison d'être and Section 12 being the heart and soul of the Act, the following issues need to be addressed:

i. Whether an arbitrator is under a legal duty to disclose when the duty to make such disclosure arises and the perversity of current practice followed by the arbitrators;

ii. What does the phrase '*disclose in writing any circumstances'* mentioned in Section 12 mean;

iii. Which test is applicable at the preliminary stage of '*likely to give rise to justifiable doubts*';

iv. Whether and to what extent an arbitrator may accept appointments in multiple references concerning the same or overlapping subject matter with only one common party without thereby giving rise to an appearance of bias;

v. Whether and to what extent the arbitrator may do so without disclosure in relation to issue 4;

vi. What are the "standards" to apply in disclosure; and

vii. How far the obligations to respect the privacy and confidentiality of an arbitrator constrain his or her ability to make disclosure and would demonstrate a lack of impartiality?

i. Duty and stage of disclosure and perversity of current practice followed by arbitrators

The duty to disclose has been held to be a legal duty,[5] we do not intend to venture into the same. Rather, we intend to elaborate on the *stage of disclosure* and the *current practice*. Prospective arbitrators who are sought to be appointed by the parties, generally accept the appointment and declare themselves to be '*the arbitrator(s)*' without disclosure in terms of Section 12. Accordingly, they begin issuing procedural orders and direct the parties to appear before them. It is only at the first sitting that the; arbitrators make the disclosure. We would ponder upon the perversity of nature of disclosure in the subsequent part.

We are pained to state that even Hon'ble High Courts and the Hon'ble Supreme Court of India, when approached under Section 11, generally pass an order worded as "*Upon consent of the parties,*

Broadband Network Limited v United Telecoms Limited (2019) 5 SCC 755; *Proddatur Cable TV Digi Services v Siti Cable Network Limited* (2020) 267 DLT 51; *Haryana Space Application Centre (HARSAC) & Anr v Pan India Consultants Pvt Ltd* Civil 2021 3 SCC 103.

[4]ibid.

[5]ibid.

Mr X is appointed as arbitrator. A copy of the order to be provided to Mr X. Parties shall appear before Mr X and Mr X is to make disclosure under Section 12. Application is disposed of accordingly."

Section 11 (8) uses the phrase "*before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator*", which casts a mandatory obligation on the court to have the disclosure before appointing a person as arbitrator. Section 12 uses the phrase "*approached in connection with his possible appointment as an arbitrator*". The Fifth and Seventh Schedules of the Act are based upon the principles of the IBA Guidelines on Conflict of Interest in International Arbitration ["**IBA Guidelines**"]. General Clause 3 of IBA Guidelines *inter alia* provides that the arbitrator *shall disclose* such *facts or circumstances* if any, *before accepting his or her appointment* or, if thereafter, as soon as they learn of them. By no stretch can '*consent*' recorded in the court orders be said to mean that the parties, without having any knowledge/information, waive the mandatory pre-requisite requirement of Section 12. At the highest and in any case, the '*consent*' is only for the court to consider the prospective arbitrator and nothing more. The obligation under Section 11(8) has multi-faceted objectives, including the following:

(i) power and/or function conferred upon court cannot be delegated to prospective arbitrators, and such delegation is *per incuriam*;

(ii) the court must examine the information/circumstances which are disclosed by the prospective arbitrator especially because entries/items mentioned in Schedules 5 and 7 of the Act are not exhaustive in nature; weed out any prospective arbitrator who suffers from ineligibility to act as arbitrator and not to appoint an arbitrator in relation to whom circumstances exist which give rise to justifiable doubts;

(iii) not to dispose of the application unless an independent and impartial arbitrator is appointed;

(iv) disposal of the application, without the appointment of an independent and impartial arbitrator, exposes the parties to wasted cost and time in so far as the parties are then compelled to approach the court again under Section 14 or file an application before '*arbitrators*' under Section 13 and upon rejection of the application by '*arbitrators*' follow the drill of Section 34.

Prospective arbitrators assume themselves to be '*arbitrator*s' and invariably end up wearing the '*arbitrator hat*' without appreciating that they are still at the stage of '*possible appointment as an arbitrator*'. Such practices followed by courts in appointing the arbitrator and party arbitrators are per incuriam and contrary to the intent of the Act. Prospective arbitrators should make prior

disclosure to the parties and/or the court at the stage of '*possible appointment*' itself and not thereafter.

ii. Meaning of 'disclose in writing any circumstances' under Section 12 and the test to be applied at the stage of 'likely to give rise to justifiable doubts.'

> "*Under the common law, judges should disclose facts or circumstances which would or might provide the basis for a reasonable apprehension of lack of impartiality.*"[6]

The disclosures made by the arbitrators are generally worded as "*there is no circumstances or interest which give rise to justifiable doubts under Schedule 5 read with Schedule 7*" or '*I/we do not fall within any of the grounds/ circumstance contemplated under Schedule 5 read with Schedule 7*."

Section 12 requires the prospective arbitrator '*to disclose in writing any circumstance*' that gets reinforced by the Sixth Schedule which mentions '*disclosing circumstance*'. The intention of the legislature is to ensure disclosure of *information/ circumstance* by the prospective arbitrator and it was not envisaged that the prospective arbitrator would pass an order declaring that no circumstances exits which give rise to justifiable doubts and is not ineligible to act as arbitrator, rather than disclosing the information.

Non-disclosure of the '*circumstance*' defeats the legislative intent. The only reason that items appear in the Fifth Schedule as well as the Seventh Schedule is for the purpose of disclosure by the arbitrator, as unless the arbitrator discloses in writing his involvement in terms of items 1 to 34 of the Fifth schedule, such disclosure would be lacking. In such case the parties would be put at a disadvantage as such information is often within the personal knowledge of the arbitrator only.[7]

General Clause 3 of IBA Guidelines *inter alia* provides if the '*facts or circumstances exist*' that may, *in the eyes of the parties*, give rise to doubts as to the Arbitrator's impartiality or independence, the Arbitrator *shall disclose* such '*facts or circumstances*.'

In light of the aforesaid legislative intent as declared by the Hon'ble Supreme Court of India in *HRD Corporation* read with the IBA Guidelines, it is apparent that the proposed arbitrator is required to disclose the circumstance/information/fact, which need not be limited to the items narrated in the Fifth Schedule. At the stage of proposed appointment warranting disclosure, the test of '*in the eyes of parties*' stands applied to determine what matters can be said to give rise to bias

[6] *Halliburton Company* (n 2).
[7] *HRD Corporation (Marcus Oil and Chemical Division)* (n 3).

and further cause doubts to a prospective arbitrator's independence or impartiality. Therefore, the duty to disclose rests on the principle that the parties have an interest in being fully informed of all facts and circumstances and the proposed arbitrator is duty-bound to put himself in the shoes of the parties at the time of disclosing circumstance/information/fact.

Accordingly, the breach of a legal obligation to disclose a matter, being a legal wrong, is an apparent bias since the non-disclosure itself justifies the removal of the arbitrator on the basis of justifiable doubts to independence and impartiality.[8] Additionally, non-disclosure owing to hindsight/ inadvertence/honest mistake without any wrongdoing or actual bias falls within the contour of '*apparent unconscious bias',* and the arbitrator being guilty of non-disclosure must bear the cost of parties.[9]

Further, the duty to disclose, being continuous in nature, requires the arbitrator to make disclosure not only to the parties in prospective arbitration about the ongoing arbitration but also extends to informing the parties in ongoing arbitration of the prospective arbitration to ensure independence and impartiality. The same becomes more relevant in the case of multiple references concerning the same or overlapping subject matter, which is examined in the next issue.

iii. Appointment in multiple references concerning the same or overlapping subject matter and duty to disclose

The pertinent issue for consideration is what matters are relevant and material to an assessment of an arbitrator's impartiality which may or may not reasonably lead to such an adverse conclusion. Whether and to what extent an arbitrator may disclose the existence of a related arbitration without obtaining the express consent of the parties to that arbitration depends upon whether the information to be disclosed is within the arbitrator's obligation of privacy and confidentiality and, if it is, whether the consent of the relevant party or parties can be inferred from their contract having regard to the customs and practices of arbitration in their field.

The importance of disclosure of information/circumstance at the appropriate stage becomes more crucial when it comes to the appointment of a prospective arbitrator in multiple references concerning the same or overlapping subject matter, whether or not one of the parties is a common

[8] *Halliburton Company v Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd)* [2020] UKSC 48.
[9] ibid.

party. Non-disclosure thereof stands covered under '*apparent bias*' or '*apparent unconscious bias*' as explained herein above.[10]

In case of multiple references concerning the same or overlapping subject matter in which the same arbitrator is a member of the tribunal, the party which is not common to the various arbitrations has no means of informing itself of the evidence led before and legal submissions made to the tribunal (including the common arbitrator) or of that arbitrator's response to that evidence and those submissions in the arbitrations in which it is not a party.[11] The common party to two overlapping references might obtain an advantage over its opponent in one or the other arbitration by having access to information about the common arbitrator's responses to the evidence led or the arguments advanced in the arbitration which was the first to be heard, can be a cause of concern to the other party in the arbitration in which the evidence and legal submissions are heard later.[12]

Failure to disclose by the common arbitrator to the party who is not the common party to the references deprives that party of the opportunity to address and perhaps resolve the matter which should have been disclosed.[13] Therefore, the question as to what is the sufficient "*information*" which the proposed arbitrator needs to disclose and what are the "*standards*" that are applicable becomes more crucial and is being addressed in the next issue.

iv. <u>What are the "standards" to apply in disclosure?</u>

> *"[t]he obligation of disclosure extends … to matters which may not ultimately prove to be sufficient to establish justifiable doubts as to the arbitrator's impartiality. However, a failure of the disclosure may then be a factor in the latter exercise".*[14]

An arbitrator, like a judge, must always be alive to the possibility of "*Apparent bias*" and of actual but "*unconscious bias*". The possibility of unconscious bias on the part of a decision-maker is known, but its occurrence in a particular case is not.[15] One way in which an arbitrator can avoid the appearance of bias is by disclosing matters which could arguably be said to give rise to a real possibility of bias.[16] Such disclosure allows the parties to consider the disclosed circumstances,

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[10]*Halliburton Company* (n 8).
[11]ibid.
[12]*Halliburton Company* (n 8); *See also Guidant LLC v Swiss Re International SE* [2016] EWHC 1201.
[13] *Halliburton Company* (n 8).
[14]*PAO Tatneft v Ukraine* [2019] EWHC 3740 (Ch).
[15]*Halliburton Company* (n 8).
[16]ibid.

obtain necessary advice, and decide whether there is a problem with the arbitrator's involvement in the reference and, if so, whether to object or otherwise to act to mitigate or remove the problem.[17]

The professional reputation and experience of an individual arbitrator is a relevant consideration for the objective observer when assessing whether there is apparent bias as an established reputation for integrity and wide experience in arbitration may make any doubts harder to justify.[18] But the weight which the fair-minded and informed observer should give to that consideration will depend upon the circumstances of the arbitration and whether, objectively and as a generality, one could expect people who enter into references of that nature to be informed about the experience and past performance of arbitrators.[19] The weight of that consideration may also be reduced if the circumstances give rise to a material risk of unconscious bias on the part of a person of the utmost integrity.[20]

An arbitrator may fail to disclose for entirely honourable reasons, such as forgetfulness, oversight, or a failure to properly recognize how matters would appear to the objective observer.[21] However, the fact of non-disclosure in a case that calls for it must inevitably colour the thinking of the observer.[22] Duty of disclosure arises out of the parties' interest in being fully informed and disclosure does note the existence of a conflict of interest.[23] There would be matters which, if left unexplained would give rise to justifiable doubts as to an arbitrator's impartiality. They must be disclosed and neutralized by explanation.[24] Similarly, there will be matters, which are more than trivial, which an arbitrator ought to recognize could by themselves or in combination with other circumstances (including a failure to disclose those matters) give rise to such justifiable doubts, if later discovered.[25] Having regard to aforesaid wide range of information which is to be disclosed in light of the private nature of the arbitration, it becomes important to see whether an arbitrator can make the disclosure without obtaining the consent of the parties in the ongoing arbitration.

[17] *Halliburton Company* (n 8).
[18] ibid.
[19] ibid.
[20] *Almazeedi v Penner* [2018] UKPC 3.
[21] *Halliburton Company* (n 8).
[22] ibid.
[23] *Halliburton Company* (n 8).
[24] ibid.
[25] *Halliburton Company* (n 8).

Confidentiality

There are two crucial stages of confidentiality, firstly, confidentiality prior to the publication of an award, including the time when the hearings are ongoing including notes of evidence and other documents disclosed or generated in arbitration, and secondly, confidentiality after the award is published.[26] Prior to the 2019 Amendment,[27] confidentiality did not have any statutory force. Strangely, it is still a toothless provision in so far as it does not provide for consequences of breach of confidentiality.

Section 42-A is a non-obstante clause that deprives the parties of their autonomy and this provision supersedes any other law. The only exception statutorily carved is for implementation and enforcement of the award. Surprisingly, Section 42-A does not carve out an exception for any other matter including (i) challenge under Section 34 and further proceeding under Section 37, (ii) extension of time under Section 29A, (iii) proceedings under Sections 14 and 15. The non-obstante clause being later in time may be said to prevail over all the other provisions including other non-obstante provisions. In view of non-exception, Section 42-A raises the question of whether "*transparency*" is more important or "*confidentiality*". Having left with no judgment in India and any statutory provision, we turn to the development in another common law country.[28]

Recently, the Hon'ble Supreme Court of the United Kingdom dealt with the interplay between disclosure and confidentiality.[29] It was held that as a general rule the duty of privacy and confidentiality is not understood to prohibit all forms of disclosure of the existence of a related arbitration in the absence of express consent.[30] However, the duty of disclosure does not give an arbitrator a carte blanche to disclose whatever is necessary to persuade a party that there is no justification for doubts about his or her impartiality.[31] If an arbitrator needs to disclose more detail about another arbitration to comply with the duty of disclosure, the arbitrator or proposed arbitrator must obtain the consent of the parties to the arbitration or proposed arbitration about which he or she is making a disclosure.[32]

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[26]ibid.
[27]The Arbitration and Conciliation Act 1996, s 42-A.
[28]*Ayyasamy v A Paramasivam* (2016) 10 SCC 386.
[29]*Halliburton Company* (n 8).
[30]ibid.
[31]*Halliburton Company* (n 8).
[32]ibid.

Consent of the common party can be inferred from its action in seeking to nominate or to appoint the arbitrator.[33] The consent of the other party is not required for such limited disclosure.[34] However, if the information to be disclosed is subject to an arbitrator's duty of privacy and confidentiality, disclosure can be made only if the parties to whom the obligations are owed give their consent.[35] In such a circumstance, if a person seeking appointment as an arbitrator in a later arbitration does not obtain the consent of the parties to a prior related arbitration to make a necessary disclosure about it, or the parties to the later arbitration do not consent to the arbitrator's disclosure of confidential matters relating to that prospective appointment to the parties to the earlier arbitration, the arbitrator will have to decline the second appointment.[36]

Disclosure, being mandatory, though arising to a material extent from the voluntary decision of the proposed arbitrator to pursue another arbitration, needs to be acknowledged by the legislature as well as the court in India. Accordingly, the legislature/court must step in to fill the void in view of the aforesaid development.

Conclusion

In order to achieve the legislative intent underlying the statutory duty of the arbitrator to act fairly and impartially, there is a necessity for pre-appointment disclosure. Impartiality would not be complete without transparency. Therefore, if India is to emerge as a hot seat for arbitration, '*disclosure*' and '*confidentiality*' must be given their due importance so that the parties even in International arbitration choose to arbitrate in India for guaranteed neutrality and impartiality.

The aforesaid can never be achieved unless the prospective arbitrator make disclosure and provide the information to the parties rather than passing an order that he is not ineligible to act as arbitration and none of the items in term of Fifth and Seventh Schedule are attracted. It can't lost sight of the fact that the aforesaid practice is per incuriam and the items set out in the said schedules are merely illustrative and not exhaustive in nature. Similarly, the Hon'ble High Court and Supreme Court of India must appoint and dispose of application only upon receipt of disclosure and satisfaction in terms of the Act. We need amendment to section 42A to iron out certain creases as mentioned in '*Confidentiality*' chapter.

[33] *Halliburton Company* (n 8).
[34] ibid.
[35] *Halliburton Company* (n 8).
[36] ibid.