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Public Sector Undertakings and Multiple Appointments of Arbitrators: Mapping the Duty of Disclosure

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ABSTRACT

This paper assesses the practice of Public Sector Undertakings appointing the same arbitrator in multiple arbitrations. While notable safeguards have been placed in PSU-party arbitrations, even with the onset of the 2015 Amendment and the consequent case laws there are still certain grey areas in the de facto administration of PSU-party arbitration. Even though Courts recognize the 'apprehension of bias' principle, it is not harnessed in instances such as this. This is seen as the Indian Supreme Court tackled the question of multiple appointments in HRD Corporation v. Gail, however, while the court focused on a 'commonsensical approach' in interpreting the clauses of the Fifth Schedule of the Arbitration Act, 1996 to eliminate the existence of circumstances leading to justifiable grounds, the reasoning did not reflect the arbitrator's duty to disclose the circumstances that propelled an apprehension of bias. In context of the recent UK Supreme Court judgement of Halliburton v. Chubb, it is argued that the provisions of Section 12 of the Act and the Schedules should not be interpreted technically and the apprehension of bias that affects the overall credibility of the arbitration procedure should be the guiding principle in disclosure requirements. In situations where one party has a higher degree of bargaining power there must be consciousness to preserve the purpose of credibility and overall fairness.

I. INTRODUCTION

Public Sector Undertakings ('PSU') continue to be a formidable part of the Indian economy. In terms of quantity there are 339 Central PSU's[2] alone, along with many more State PSU's. The government in its enterprise form in the course of business is also naturally party to disputes that may occur akin to other non-governmental enterprises where arbitration may be employed to resolve these commercial disputes. Within arbitration, appointment of arbitrators

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[2] Enterprises Survey 2018-19, Department of Public Enterprises. Government of India. Volume 1. Accessed: <https://dpe.gov.in/sites/default/files/PE_seurvey_ENG_VOL_1.pdf>

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has been a topic of much controversy, further in ad hoc arbitration appointment of arbitrators where PSU's are a party has been of augmented controversial value given the higher bargaining power at a PSU's disposal.

Certain safeguards have already been incorporated through the joint efforts of the legislature and the judiciary such as in context of unilateral appointment of arbitrators et al, as explained later in this article. However, there is a need to engage with certain other safeguards such as the duty of disclosure arbitrators. This article in light of the U.K Supreme Court's decision of *Halliburton v. Chubb*[3] delves into the realm of an arbitrator's duty of disclosure in situations of multiple appointments of the same arbitrator. The underlying idea being in Lady Arden's concurring opinion in Halliburton that the duty of disclosure may be a secondary obligation that arises from the arbitrator's primary duty to act fairly and impartially. Therefore, first this article reviews the safeguards against PSU's already in place, the second section sheds light on the apprehension of bias in relation to PSU parties in the case of multiple appointments. The third Section then maps out the jurisprudence on the duty of disclosure in multiple appointments and finally, this paper re-imagines the law in context of *Halliburton v. Chubb.*

II. POSSIBLE SAFEGUARDS IN PSU-PARTY ARBITRATION

This section aims to bring to light safeguards that have been inculcated in law and practice directly relevant to PSU- party arbitrations. Arbitration agreements embody autonomy whereas neutrality and impartiality can be said to be cornerstones of arbitration proceedings. Therefore, agreement on terms to pursue ad hoc arbitration where PSU's are party should be considerate of all three aspects in balance. The problem is appropriately captured by the Supreme Court in *Indian Oil Corporation v. Raja Transport*[4] in noticing that contractors in their anxiety to secure contracts from PSU's agree to certain arbitration clauses, however thereafter when disputes occur, they litigate to secure an 'independent' arbitrator[5]. Therefore, while it may be argued that the parties are at liberty to agree to any terms, it is inferred that it is necessary that they may not be at the expense of neutrality and impartiality of arbitration proceedings to improve the credibility of the mechanism of Arbitration.

The amendment of 2015 to the Arbitration and Conciliation Act, 1996 ('Act') internalized the International Bar Association Guidelines on conflict of interest within Section 12 of the Act. This brought two major changes in Section 12, 1) in expanding disclosure requirements of the arbitrators under Section 12(1) and 2) in rendering certain categories of relationships of

[3] Halliburton Company v. Chubb Bermuda Insurance Ltd. [2020] UKSC 48
[4] Indian Oil Corporation Ltd. V. Raja Transport (2009) 8 SCC 520
[5] Ibid.

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arbitrators as ineligible as set out in the 19 grounds in the Seventh Schedule of the Act. The latter being a direct check on PSU appointment of different relationships of arbitrators. This amendment brought in the needed changes especially in context of PSU-party arbitrations where earlier noticing the ground reality the court commented that PSU's should reconsider their policies of arbitration which entailed employee-arbitrators[6] who are now banned post-amendment amongst other categories.

Post-amendment on the issue of unilaterally appointed arbitrators the court in *TRF Ltd. v. Energo Engineering Products*[7] ('TRF') held that an arbitrator who is *de jure* disqualified cannot further nominate an arbitrator expanding the scope of the some of the categories mentioned in the Seventh Schedule in preventing indirect seepage of bias and upholding the principle of independence. Strengthening the ruling in TRF, the court in *Perkins Eastman Architects Ltd. v. HSCC*[8] levied a bar on one party possessing exclusive power to appoint a sole arbitrator under Section 12(5). Even though in light of the aforementioned judgements unilateral appointments are forbidden, the court also created an exception through both these judgements in allowing appointments where both parties are given the choice to nominate arbitrators.

Further, in *Voestalpine Schienen GMBH v. DMRC*[9] the court faced a situation where the petitioner challenged the appointment of arbitrators from a panel of retired railway and government engineers. Although the court held that in this case the appointment would not be unilateral since a choice was given however the court engaged with notions of apprehension of bias and held that the panel must be 'broad based'. This was applied by the court in *SMS Ltd. v. Rail Vikas Nigam*[10] seeing that the panel provided did not pass the test of neutrality as the majority within the selection had a relationship with the respondent, the court disallowed such appointment. While all these judgements attempt to foster neutrality and may be seen as contributing to safeguards against unequal appointments by PSU's giving a 'choice' to the other party in appointment must not be taken literally disregarding the principles of true impartiality and neutrality.

In continuation of the plea above against formalism in considering the choice given to parties in appointments there may be a situation where a party is given an option to appoint an arbitrator from a panel pre-selected by PSU's where such choice may only be illusory. This

[6] Ibid.
[7] (2017) 8 SCC 377
[8] 2019 SCC OnLine SC 1517
[9] 2017 SCC OnLine SC 172
[10] 2020 SCC OnLine Del 77

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was the case in *Central Organization for Railway Electrification v. ECI SPIC-SMO-MCML*[11], where the PSU provided only four names to select arbitrators from. Justifying the procedure, the court held the power was counter-balanced as the opposing party had the power to choose from within the panel which can be seen in direct contravention to the principles afore-stated. Therefore, while the law and Court have made safeguards in PSU-party arbitrations, however, even with the onset of the 2015 Amendment and the consequent case laws there are still many unanswered questions and certain grey areas in the *de facto* administration of PSU-party arbitration, even though Courts recognize the 'apprehension of bias' principle, it is not implemented to the fullest.

III. THE APPREHENSION OF BIAS

The *Central Organization* case relates to the apprehension of bias in pre-selected panels by PSU's, however, this principle also must cover situations where the panel comprises of arbitrators that have been appointed previously by the same PSU-party. Although this may not amount to *ipso facto* 'justifiable doubts' as to the independence and neutrality of an arbitrator, this may weaken the perception of neutrality in the mind of the opposing party that already has unequal bargaining power. Such apprehension of bias has been previously read into appointment of arbitrator's cases by the Supreme Court in various circumstances. The court in the *Voestapline* case cited the reason behind its directive of requiring a 'broad panel' as to mitigate any misapprehensions that the principle of impartiality and independence have been compromised. Similarly, in *Afcons Infrastructure v. Cherian Varkey Construction*[12], even though 'former-employees' did not fall within the scope of Section 12(5) read with the Seventh Schedule, but the court considered that such an appointment undeniably gave rise to apprehensions (whether justifiable or not) which given the lack of confidence by certain parties may have a schizophrenic effect on the credibility of the proceedings.

In these two cases mentioned above, although not in terms of Sections 12(1) and 12(5) of the Act, it may be said that the courts' respective inclinations were based on circumstances that *likely gave rise to justifiable doubts as to independence or impartiality* and not *de jure* deemed ineligibility. The difference between the former and the latter within the meaning of Section 12(1)(a) read with the Fifth Schedule and Section 12(5) read with the Seventh Schedule respectively becomes the requirement of disclosure and absolute bar of an arbitrator. It is argued that the provision of Section 12(1)(a) read with the Fifth Schedule should not be

[11] 2019 SCC OnLine SC 1635
[12] (2010) 8 SCC 24

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interpreted technically and the apprehension of bias that affects the overall credibility of the arbitration procedure should be the guiding principle in disclosure requirements. Distinguishing the apprehensions of bias in requiring disclosure from conclusive justifiable doubts, the test of disclosure has always been whether the circumstances are 'likely' to give rise to justifiable doubts where the standard requiring that these circumstances 'exist' is found in Section 12(3).

The apprehension of bias is also what guided the Supreme Court's decision in *Haliburton v. Chubb*, where the court rightly saw that the circumstance where the acceptance of multiple appointments involving a common party and the same or overlapping subject-matter gives rise to an appearance of bias. In the facts of the case, the appointed arbitrator Mr. Rokinson had overlapping arbitrations with one common party where the court saw that it might have reasonably given rise to a real possibility of bias and the failure to make that disclosure was seen as a breach of the arbitrator's duty. Although delving into the circumstances the court concluded differently, however the court's reasoning is useful in reminiscing important principles. Hence, not only was it seen that such a situation with overlapping subject-matter is 'likely' to require disclosure of a possible conflict of interest but it was seen as a duty emanating from the arbitrator's primary duty to act fairly and impartially to prevent apprehension of bias.

IV. DUTY OF DISCLOSURE IN MULTIPLE APPOINTMENTS: THE INDIAN SCENARIO

Pre-Amendment

Before the Amendment of 2015 to the Act, in *Amarchand Lalit Kumar v. Sh Ambica Jute Mills*[13] the Supreme Court saw that an appointment of an arbitrator as to the independence cannot be countered on the ground that he was an arbitrator in other matters. Relying on this judgement the Delhi High Court held that the appointment was valid and interestingly considered that if facts such as an arbitrator who consistently finds the award in favor of the party on whose panel, he is on are disclosed, this may be seen as an instance that vitiates the objectivity of such an arbitrator[14]. However, the feasibility of this especially in ad hoc arbitration may be questioned since proceedings are not of public record with the burden of proof on the parties alleging bias. It may be noted that on this inherent conflict between confidentiality and disclosure the court in Haliburton saw that confidentiality is an important principle and must be reconciled with the duty of disclosure. Further, in *Novel Granites Ltd. v. Lakshmi General Finance Co Ltd*[15]., the Madras high court held that in situations of multiple

[13] AIR 1966 SC 1036
[14] G. Vijayaraghavan v. MD Corporation 2000 SCC OnLine Del 526
[15] Civil Appeal No. 11126 of 2017

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appointments since it was not contrary to the provisions of the Act it was completely valid.

Post-Amendment

In *HRD Corporation v. GAIL*[16], the Supreme Court had an opportunity to gauge the same issue post-amendment. The facts of this case may be of relevance as HRD challenged the appointment of one Justice T.S Doabia as an arbitrator on the grounds that he was appointed by GAIL which happened to be a PSU, previously on another matter. However, the arbitrator had disclosed his previous engagement with GAIL. The Supreme Court compared and contrasted the Fifth and the Seventh Schedule in detail. With regards to the multiple appointment of Justice Doabia the court found that given the identical clauses 1 to 19 in both the schedules such an appointment doesn't fall in any of the categories. For example, entry 16 of both the schedules required a continuous relationship in the nature of commercial association and therefore the court did not see a previous appointment as a 'business relationship'.

Moreover, it was considered that if there are no 'justifiable doubts' the proceedings must continue under Section 13(4) and it is only at the post-award stage that the party may challenge the arbitrator's appointment on grounds contained in the Fifth Schedule. However, while the court focused on a 'commonsensical approach' in interpreting the clauses of the Fifth Schedule to eliminate the existence of circumstances leading to justifiable grounds, the reasoning did not reflect the arbitrator's successful fulfillment of his duty to disclose the circumstances that propelled an apprehension of bias. While the court technically focused on the differences between the Fifth and the Seventh schedule it missed an opportunity to instill the principles underlying the provisions. As held in *Aussie Airlines Pty. Ltd. v. Australian Airlines Pty. Ltd*[17]*.,* the purpose of disclosure is itself defeated if it is construed only in relation to circumstances leading to disqualification.

V. RETHINKING THE LAW IN LIGHT OF HALLIBURTON V. CHUBB

The reasoning in *HRD Coorporation v. GAIL* limits the understanding of circumstances that likely give rise to justifiable doubts to the Fifth Schedule. The Court must be careful in this context to construe the circumstances given as exhaustive as Explanation 1 to Section 12(1) sees the Fifth Schedule as a 'guide'. Although it may be argued that the Schedule doesn't provide for a residuary category, however, this would preclude the possibility of including constructive bias or the apprehension of bias in the requirement of disclosure.

In this context as rightly noticed in the High Court judgements of *Yashwitha Constructions Pvt.*

[16] 2018 (12) SCC 471
[17] [1996] FCA 813: 139 ALR 663

Ltd. v. Simplex Concrete Piles India Ltd.[18] and *Murlidhar Roongta v. S Jagannath Tibrewala*[19] in line with the principles in Haliburton the right test would be to see whether the party to the dispute would have a reasonable apprehension in their mind as to the independence and impartiality. This again cannot be achieved unless the duty of disclosure is seen as not only as supplementary to grounds of disqualification, but rather as complementary in fostering a credible and legitimate appointment policy for parties who may already feel unequally situated against the other. Also, the Indian and the UK courts in *HRD Corporation* and in *Haliburton*, respectively note that this duty to disclose may also be waived in case it is customary to have multiple appointments of the same arbitrator. However, in situations where one party has a higher degree of bargaining power the Court must be conscious to preserve the purpose of credibility and overall fairness. It may be interesting to note the hypocrisy of such PSU appointment culture inter parties as the guidelines for Commercial disputes[20] intra-government enterprises disallows the reappointment of the same arbitrator.

However, the duty of disclosure in multiple appointments also meets its nemesis in the duty of confidentially. One solution may be to take consent of the parties in disclosing a previous arbitration, however, if consent is barred, then the principle of confidentiality must prevail. This is because multiple appointments don't fall under the 'red list' of the IBA guidelines on Conflict of Interest or Schedule 7 of the Arbitration Act that automatically disqualifies an arbitrator. Since this situation is pinned under Schedule 5, this gives slightly more wiggle room to later set aside arbitration proceedings under Section 34 of the Act. However, since this article has professed the importance of the perception of neutrality in arbitral proceedings and also keeping in mind the objective of efficiency and speedy resolution of arbitrations, this perhaps remains a grey area.

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[18] AIR 2005 AP 325
[19] (1) ARBLR 103 Bom 2005
[20] Settlement of commercial disputes between Public Sector Enterprises inter se and Public Sector Enterprise(s) and Government Department(s) through Permanent Machinery of Arbitrators (PMA) in the Department of Public Enterprises. DPE O.M No. DPE/4 (10) 2001- PMA-GL-I. 22 January, 2004. Accessed at: <Sehttps://dpe.gov.in/sites/default/files/Guideline-260.pdf>

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