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# THE RULE AGAINST BIAS AND THE JURISPRUDENCE OF ARBITRATOR'S INDEPENDENCE AND IMPARTIALITY

*by* Sumeet Kachwaha*

*It is self-evident that there can be no justice if the judge is biased.*

*The subject of judicial bias is vast and complex. Though the policy of the law is clear, addressing bias remains a challenge.*

*This article is in two parts: The first presents the underlying common law principles of judicial bias and their evolution through ages, leading to the current test and the continuing difficulties. The second part focuses on the jurisprudence of arbitrators independence and impartiality.*

*The test of apparent bias for an arbitrator is no different from that applicable to judges or members of judicial tribunals. Arbitratons however are sui generis as a dispute resolution mechanism and as such pose challenges*

*The arbitration jurisprudence of independence and impartiality is founded on two United Nations documents: the UNCITRAL Rules of 1976 and the Model Law of 1985. Substantial build up has come from within the arbitration community (chiefly in the form of the IBA Guidelines). The arbitral community has crafted a tailor made jurisprudence, the central thrust of which is to require proper disclosure. Disclosures however pose issues of their own. Both over and under disclosure are problematic. The IBA Guidelines, following an innovative approach, have become the*

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*gold standard for disclosure and received wide acceptance and judicial recognition. At the same time some shortcomings and criticism have been levelled.*

*The article presents the foundation of the arbitration jurisprudence; approach taken by the arbitral institutes; the salient features of the English appraoch; how different considerations come into play at different stages of the arbitration and a critical review of the IBA Guidelines. An alternate approach to the IBA Guidelines and the disclosure protocols is also suggested.*

*The article explores the consquences of non-disclosure and if sanctions should follow non-disclosure. The conflicting views here are explored and it is commented why the dicta in Halliburton (to mulct an arbitrator with costs of a serious but unsucessful challenge) warrants reconsideration.*

*The article concludes with some recommendations.*

**Keywords:** bias jurisprudence, arbitrator's independence, arbitrator's impartiality, IBA Guidelines.

> **"In connection with British justice … there is a saying, 'it is not enough that justice should be done, it must be seen to have been done'. This really means never mind justice, the main thing is that your decision should look just."**
>
> **George Mikes**[1]

## A. Introduction:

A dispute resolution needs to be credible and credibility is bedrocked on impartiality. The rule against bias thus constitutes the very soul of the justice delivery system. In arbitrations (essentially a private dispute resolution forum), the rule has received special treatment. Though rooted in general law, the arbitration jurisprudence of bias and impartiality has evolved to occupy a universe of its own.

This article is in two parts. The first focuses largely on the principles of apparent bias evolved under the English common law. The second part explores the international arbitration jurisprudence on the subject.

## B. Part I: The test of judicial Bias

Few legal issues have proved to be as elusive as defining what constitutes judicial bias. The policy of the law is fairly straightforward. It has evolved from a fundamental principle of natural justice that no man should be a judge in his own cause (*nemo iudex in re sua*) and the guiding principle (which has indeed become synonymous with the rule) is that justice should

1 *English Humour for Beginners*, 8 (Penguin Random House).

not only be done but seen to be done. The policy is based on preserving the confidence which the general public must have in the judicial system and not let bias distort the law. The principle thus is not only that the judge must not be biased – it is that there must be no *impression* that he is biased. This is for: *'Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: "The judge was biased"'*.[2]

The law thus does not require actual bias to be established. This is considered to be neither desirable nor practical. The law looks at the perception of the situation and the impression it conveys to right minded persons. The struggle faced by the common law courts for well over a century and a half has been firstly to define the threshold or the degree of 'probability' or 'possibility' in determining whether or not there was judicial bias (a given situation may range between a mere suspicion to near certainty). Secondly, from whose perspective is the situation to be judged? Is it of the reviewing court; the party or a third party (the reasonable man – later defined as the 'fair minded' and 'informed observer').

In cases concerning a pecuniary or proprietary interest on the part of the judge courts apply an 'automatic disqualification' rule. This is on the premise that these types of cases will *'inevitably shake public confidence in the integrity of the administration of justice'*.[3] In other situations the approach has meandered but briefly, the current English position is that the court looks at the fair-minded and informed observer's perception of a 'real possibility' of bias.

### 1. *The Automatic Disqualification Rule*

This is a more straightforward application of the principle that no man should be a judge in his own cause. The rule came to be applied as far back as 1852 in the celebrated case of *Dimes v. Grand Junction Canal.*[4] Here, Lord Chancellor Cottenham had affirmed a decree in favour of a canal company in which he was a substantial shareholder. The House of Lords set aside the decree observing:

> *No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim, that no man is to be a judge in his own cause, should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest.*

2 Lord Denning in Metropolitan Properties Co. (FGC) Ltd. *V.* Lannon (1969) 1 QB 577 at 599.

3 *R v. Gough* (1993) A.C. 646 at 661.

4 10 E.R. 301 at 315; (1852) 3 H.L. Cas. 759, at 793.

The court went on to add that its decision would be a lesson to all inferior tribunals – '*to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence*'.[5] Hence the principle, that the appearance of bias is equally bad was recognized from the earliest stages of the rule.

In cases of automatic disqualification, the law does not look into the extent or degree of interest. This was recognized long back (in 1877) in *Serjeant v. Dale*.[6] Here the Bishop of London had a judicial role in setting in motion proceedings against a clergyman. The Bishop was held to be disqualified as he was a patron of the benefices in question. The court held:

> *The law does not measure the amount of interest which a judge possesses. If he has any legal interest in the decision of the question one way he is disqualified, no matter how small the interest may be.*[7]

Later cases have however recognized a *de minimus* exception to the rule.[8]

The principle of automatic disqualification was extended beyond pecuniary or proprietary interest in an exceptional case by the House of Lords in *Pinochet*.[9] Here, Lord Hoffman (a judge who sat in the previous round of the case) was a director and chairman of Amnesty International Charity Ltd, which was under the control of Amnesty International, a party to the proceedings. As he was not a director in the party before him (though in an entity controlled by the party) and nor did he have any pecuniary interest, the question was whether the rule of automatic disqualification would apply. The House of Lords held:

> *If the absolute impartiality of the judiciary is to be maintained, there must be a rule which automatically disqualifies a judge who is involved, whether personally or as a director of a company, in promoting the same causes in the same organisation as is a party to the suit.*[10]

Hence the rule of automatic disqualification was extended to a situation where the decision would lead to promotion of a cause in which the judge was actively involved. The court added a note of caution though, stating that it is important '*not to overstate*' what was being decided.[11] It held that the

5 *Ibid.*, at 793–794.
6 (1877) 2 Q.B.D 558.
7 *Ibid.*, at 567.
8 *See* for instance: *Locabail (UK) Ltd. v. Bayfield Properties Ltd.*, [2000] QB 451, at 473.
9 R *v.* Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte (No.2), [2000] 1 A.C. 119.
10 *Ibid.*, at 135.
11 *Ibid.*, at 136.

facts of the case were exceptional in that Amnesty International had joined in the appeal to argue for a particular result and the judge was closely linked to the party and had an active role in its affairs. Later judgments have also doubted the desirability of extension of the automatic disqualification rule, terming it 'mechanical'. Lord Woolf in R *v.* Gough[12] stated –:

> *the courts should hesitate long before creating any other special category since this will immediately create uncertainty as to what are the parameters of that category and what is the test to be applied in the case of that category. The real danger test is quite capable of producing the right answer and ensure that the purity of justice is maintained across the range of situations where bias may exist.*[13]

## 2. *The Rule in Other Cases of Apparent Bias:*

For cases not falling within the narrow confines of automatic disqualification, the test of apparent bias was not stated with consistence or precision for a long time. Various expressions including 'real likelihood', 'reasonable suspicion', 'real possibility', 'real danger' etc. were used – sometimes interchangeably. Broadly the authorities fell into two categories - 'the reasonable suspicion or apprehension of bias' test and the 'real danger or likelihood of bias' test (i.e., a lower and higher threshold).[14]

## 3. *Justice must be seen to be done:*

In the midst of these formulations (which ran in parallel for some time) came a 1924 decision of the Court of Appeal in R v. Sussex Justices.[15] Here the applicant was convicted for dangerous driving. The clerk of the justices was a member of the solicitor firm acting for the opposite party in a previous civil case for damages arising out of the same incident. The clerk did not in fact advice in the previous proceeding, but he was held to be so related to the case as to be unfit to act as a clerk in the criminal action. The court reiterated the principle that the question was not what actually happened but what appeared to have happened and held:

> *… … … a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.*[16]

12 *R v. Gough* (1993) A.C. 646 at 673.

13 *Ibid.*, at 673.

14 The cases on both sides have been comprehensively noted by the Court of Appeal (Locabail).

15 [1924] 1 KB 256.

16 *Ibid.*, at 259.

This formulation so caught the judicial imagination that it became a ground by itself to invoke judicial bias (instead of being the principle behind the rule against bias). The court had to course correct more than once. In *R v. Camborne Justices,*[17] Slade J. pointed out that the principle (that justice should not only be done but seen to be done) is being urged '*for quashing convictions or invalidating orders on quite unsubstantial grounds and, indeed in some cases, on the flimsiest pretexts of bias*'.[18] While endorsing and fully maintaining the integrity of the principle, the court observed that '*the continued citation of it in cases to which it is not applicable may lead to the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done*'.[19]

### a. *Rival tests*

The fact that there may indeed be rival tests in play came to be recognized in the 1960 case of *R v. Barnsley Licensing Justices.*[20] Lord Devlin here accepted the principle that justice should not only be done but seen to be done as a valid principle, at the same time pointing out that it is not the test for bias. He held that the court is not to inquire what impression might be left in the minds of the applicant or of the general public. The court has to satisfy itself that there was a '*real likelihood of bias*' and not merely satisfy itself that there was '*the sort of impression that might reasonably get abroad*'.[21] He held that real likelihood depends '*on the impression which the court gets from the circumstances*'.[22]

A few years later, Lord Denning joined issue on this in Lannon.[23] Lord Denning acknowledged that '*the law is not altogether clear*' on the subject but he would start with '*the oft-repeated*' saying of Hewart CJ in R v. Sussex Justices[24] - (that it is not merely of some importance but is of fundamental importance that justice should not only be done, but manifestly and undoubtedly be seen to be done). He felt that Devlin J. in Barnsley[25] appeared to have limited this principle considerably but that he would stand by it. He held that the principle in R v. Sussex Justices brings home the point that in considering real likelihood of bias the court does not look at

17 [1955] 1 Q.B 41.; 1954 (2) All ER 850.
18 *Ibid.*, at 51–52.
19 *Ibid.*, at 52.
20 [1960] 2 QB 167 (Court of Appeal).
21 *Ibid.*, at 187.
22 *Ibid.*, at 187.
23 Metropolitan Properties Co. Ltd. *V.* Lannon & Anr. (1969) 1 QB 577 (Court of Appeal).
24 R *v.* Sussex Justices, [1924] 1 KB 256.
25 R *v.* Barnsley Licensing Justices, [1960] 2 QB 167.

the mind of the justice himself. It does not look to see if there was a real likelihood that he did, or would in fact favour one side at the expense of the other: 'The court looks at the impression which would be given to other people … … if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit'.[26] Hence both Lord Denning and Lord Devlin held the test to be the 'impression' of 'real likelihood of bias' but differed fundamentally. Lord Devlin held that what matters is the impression the court gathers and that the court is not concerned with the impression the situation may create in the minds of the applicant or of the public in general, whereas Lord Denning held that the court will look at the impression which would be given to 'other people' (whom he later in the judgment qualified as 'right-minded persons').

Lannon[27] does not shed much light as to the degree of probability the law would look at. Lord Denning held that mere surmizes and conjectures would not be enough and that there must be circumstances from which a reasonable man would think it 'likely or probable' that the justice would favour one side unfairly at the expense of the other.

### b. *The Gough test*

The matter reached the House of Lords in 1993 in R v. Gough.[28] Lord Goff delivering the lead judgment referred to the large number of previous authorities on the subject as 'bewildering in their effect' and said that there was a 'compelling need' for the court to subject the authorities to examination and analysis – 'in the hope of being able to extract from them some readily understandable and easily applicable principles'.[29]

The court re-emphasized the overriding public interest that there should be confidence in the integrity of the administration of justice and recalled the words of Hewart CJ in R v. Sussex Justices.[30] The court recognized the broad two tests currently in play – the 'reasonable suspicion test' and the 'real likelihood of bias' test and that these had their variants and indeed at times the two seem to have been combined.[31] It held that in practice the inquiry is directed as to whether there was such a decree of possibility of bias that the court will not allow the decision to stand. The type of interest in question

26 [1969] 1 QB 577 at 599.
27 [1969] 1 QB 577.
28 R *v.* Gough (1993) A.C. 646 [Gough].
29 *Ibid.*, at 659.
30 [1924] 1 KB 256.
31 R. *v.* Gough (1993) AC 646, at 660.

may vary widely in nature and effect and each case would have to be considered on its own facts.[32]

After considering Barnsley[33] and Lannon[34] the court in Gough held that in fact Lord Denning while purporting to differ with Devlin LJ in fact differed very little, as they both held that the court has to proceed upon an 'impression' derived from the circumstances and whether such an impression reveals real likelihood of bias. The only difference being that Devlin LJ in Barnsley did not believe that the court is to be concerned with the impression of the general public and that it has to decide on the basis of its own impression derived from facts, whereas Lord Denning in Lannon held that the court looks at the impression which would be given to a reasonable man. The court in Gough felt that there could be no difference between an impression derived by a 'reasonable man' (to whom the knowledge derived by the court is imputed) and an impression derived by the court itself.

The Gough court rejected the mere suspicion or even reasonable suspicion tests and held that the test should be stated in the terms of '*real danger*' rather than '*real likelihood*'.[35] Accordingly, Gough set the threshold above the half-way mark – one which provoked more than a reasonable suspicion but short of a probability of bias. More significantly (and this part of Gough became controversial) the court sided with Devlin LJ's view in Barnsley,[36] that it was unnecessary to require the court to look at the matter from the eyes of a reasonable man, as the court itself in such cases personifies the reasonable man. Gough also held that it is desirable that the same test should be applicable in all case of apparent bias, whether it concerned justices or members of inferior tribunal or jurors or arbitrators.

### c. *Dissatisfaction with Gough*

Though the Gough test was formulated with great care and deliberation, it did not meet with all round approval. The High Court of Australia did not follow Gough's 'real danger' or 'real likelihood' test and instead opted for the 'reasonable suspicion' or 'reasonable apprehension' test (a test which the Australian courts were regularly following). Moreover the Australian courts differed from Gough and held that the relevant viewpoint is that of 'public

32 *Ibid.*, at 661–662.
33 [1960] 2 QB 167.
34 [1969] 1 QB 577.
35 R. *v.* Gough (1993) AC 646, at 670.
36 R *v.* Barnsley Licensing Justices, [1960] 2 QB 167.

perception' and not the court's view.[37] As pointed out by the Court of Appeal in Locabail,[38] the Gough formulation has also not been accepted in Scotland (*Doherty v. McGlennan*, 1997 S.L.T. 444) and in South African (*Moch v. Nedtravel Pty Ltd.*, 1996 (3) S.A.1) and these courts have adhered to the 'reasonable suspicion' or 'reasonable apprehension' test, which was felt to be more in harmony with the jurisprudence of the European Court of Human Rights.[39]

Locabail being a decision of the Court of Appeal was bound by Gough but felt that the 'reasonable suspicion or apprehension test' and the 'real danger or likelihood of biased test' would in an overwhelming majority of cases lead to the same outcome – '*provided that the court personifying the reasonable man, takes an approach which is based on a broad sense, without inappropriate reliance on special knowledge, the minutiae of court procedure or other matters outside the ken of the ordinary*'.[40] The Locabail court felt that it would be '*dangerous and futile*' to attempt to define or list the factors which may or may not give rise to real danger of bias and everything will depend upon the facts and circumstances.[41] At the same time it observed:

> *We cannot, … .. conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers … … … … . By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case … ..*[42]

The dissatisfaction with the Gough test came to be re-voiced In Re: Medicaments[43] (a decision of the Court of Appeal). After a review of

37 Webb *v.* The Queen (1994) 181 CLR 41, at 50–51.
38 Locabail (U.K.) Ltd. *v.* Bayfield Properties [2000] QB 451 at 475, 476.
39 *Ibid.*, at 476.
40 *Ibid.*, at 477.
41 *Ibid.*, at 480.
42 *Ibid.*, at 480.
43 In re: Medicaments and Related Cases of Goods (No.2), [2001] 1 WLR 700.

the law, the court came to the conclusion that a 'modest adjustment'[44] of the Gough test was called for in order to align it with the test applied in most of the Commonwealth. This is how the test was proposed: First the court must ascertain all the circumstances which have a bearing on the issue. It must then ask whether those circumstances would lead 'a fair-minded and informed observer'[45] to conclude that there was 'a real possibility or a real danger (the two being the same) that the tribunal was biased'.[46]

With this the ground was laid for the House of Lords to once again review the law and this came about in Porter v. Magill.[47] The court declared intent was to state the test in clear and simple language and bring it in harmony with the test applied in most Commonwealth countries. The House of Lords endorsed the approach taken in Re*: Medicaments*[48] and agreed that the Gough test did require a 'modest adjustment'. It stated the test as follows:

> "The question is whether 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 Porter court emphasized that the challenge is to be examined objectively. It is also felt that the reference to 'real danger' in Gough was not useful.[50]

It would thus be seen that the law took a giant circle back to the viewpoint of the 'fair-minded' person (as propounded by Lord Denning in *Metropolitan Properties Co. Ltd. V. Lannon*[51]*).* The threshold requirement of 'real possibility' (as against probability) remained the same as stated in Gough. The major difference however between the old and the new formulation is that Gough looked at the 'impression' derived by the court (and before that Lord Denning in Lennon, looked at the 'impression' derived by the fair-minded person) but *Porter* (following In Re Medicaments)[52] dropped the element of 'impression' and brought in the concept of an 'informed observer' – one who has considered all the circumstances having a bearing on the issue.

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44 *Ibid.*, at 726.
45 *Ibid.*, at 727.
46 *Ibid.*, at 727.
47 [2002] 1 All ER 465; [2002] 2 AC 357.
48 [2001] 1 WLR 700.
49 [2002] 1 All ER 465, at 507.
50 *Ibid.*, at 507.
51 [1969] 1 QB 577.
52 [2001] 1 WLR 700.

This to my mind is not a 'modest adjustment' – it is a fundamental shift in the law which has also led to some difficulties, expressed in later cases.

## 4. *Post Porter issues*

Essentially the post Porter issues which have troubled jurists is how informed the 'informed observer' is supposed to be and how is the balance to be struck between complacency and suspicion of the fair-minded observer. In R *v.* Abroikov,[53] the House of Lords pointed out that the fair minded and informed observer is in a large measure the construct of the court: '*Individual members of the public, all of whom might claim this description, have widely differing characteristics, experience, attitudes and beliefs which could shape their answer … … ..without being easily cast as unreasonable'*. Thus there are '*difficulties of attributing to the fair-minded and informed observer the appropriate balance between on the one hand complacency and naivety and on the other cynicism and suspicious'*. Decided cases have started throwing up instances of judges differing on their conclusion largely on their perception of the view that the 'fair-minded and informed observer' would supposedly take.[54]

This situation to my mind has arisen due to attempted over-definition of the attributes of the fair-minded observer. To illustrate, the House of Lords in *Helow v. Secretary of State for Home Department*[55] states:

> *The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious … Her approach must not be confused with that of the person who has brought the complaint. The 'real possibility' test ensures that there is this measure of detachment … . But she is not complacent either.*

The court then went on to reflect that the observer must be '*informed*' and elaborated this attribute thus:

> *… she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.*[56]

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53 R *v.* Abdroikov, [2007] 1 WLR 2679 at 2706, per Lord Mance.

54 For a comprehensive review of the cases, *see* Philip Havers QC & Alasdair Henderson, *Recent Development (and Problems) in the Law of Bias*, 16(2) Judicial Rev. 80–93, at 83 (2014).

55 [2008] 1 WLR 2416.

56 *Ibid.*, at 2418.

Hence the 'broad common sense' approach and caution against 'inappropriate reliance on special knowledge' recommended in Locabail[57] has been left behind in favour of the 'fully informed' observer.

### 5. *Comments on the Common Law approach*

Porter[58] remains the last word on the subject in England (a real possibility of bias from the viewpoint of the fair-minded and informed observer who has considered all relevant facts). Porter however (without any discussion or explanation) dropped the element of 'impression' of the fair-minded observer and substituted it with an 'informed decision' which (as seen above) has led to multifold attributes being imputed on the 'observer'. This drags the court into the *minutiae* and the inquiry may well stray into the realm of actual bias. It is a matter of debate if the Porter formulation needs a revisit and the law should lean closer towards Lord Denning's formulation in Lannon[59] (of the '*impression*' the situation will give to right-minded persons of a real likelihood of bias). Be that as it may, the Porter formulation is here to stay as of now.

With this background one may explore the jurisprudence in the realm of arbitration. This presents complexities and features of its own and is dealt with in the part which follows.

## C. Part II: The bias jurisprudence in the realm of arbitration

### 1. *Pitfalls and Challenges:*

Arbitrators (including party nominated ones) are required to be impartial and independent. The path however is strewn with pitfalls and challenges.

First there is the architecture of arbitration which enables parties to select 'their' arbitrator (and potentially influence selection of the presiding arbitrator). Then there is the ecosystem in which arbitrators function. To sit as an arbitrator is a career option and an avowed professional goal to be nurtured from within the arbitration community. A good many arbitrators actively seek appointments and appointments are largely driven by relationships and familiarity. The arbitrators' pool is relatively small (smaller still in high stakes arbitrations). The arbitration fraternity regularly fraternizes in global events, bond and develop camaraderie. They switch and interchange roles and positions (from a fellow lawyer to a co-arbitrator or a presiding arbitrator). In such

57 Locabail (U.K.) Ltd *v.* Bayfield Properties (2000) QB 451 at 477.
58 [2002] 2 AC 357.
59 [1969] 1 QB 577.

environment, the seeds of apparent bias are ingrained in the system. This is not empty cynicism. Empirical studies back the perception that party nominated arbitrators lean in favour of the party nominating them.[60]

While arbitrators are expected to disclose matters likely to give rise to justifiable doubts as to their impartiality and independence,[61] national court formulations for apparent bias are in the form of abstract principles which are not helpful in good many real-life situations. While 'under disclosure' is treacherous, 'over disclosure' is counterproductive and striking the right balance remains elusive.

Then there is the unarticulated premise: does the system bend and stretch principles or tolerate blemishes depending on where the arbitration stands? Do different yardsticks apply at different stages and if so, how should the policy of the law be stated to respond to ground situations?

The arbitration jurisprudence of arbitrator's impartiality and independence (though wedded to national standards) spins on an axis of its own. The arbitration community and arbitral institutes have taken matters in their own hands and rapid strides made. At the same time, there are unanswered questions and work in progress.

This part of the article explores the arbitration jurisprudence and some issues facing the arbitration community.

## 2. *The International jurisprudence on arbitrator's bias*

Considering the antiquity of arbitration as a dispute resolution mechanism, the formulation of the jurisprudence concerning arbitrator's bias is relatively new. Neither the Geneva Convention[62] nor the New York Convention[63] dealt with it directly (though of course enforcement of an award vitiated by bias could well be resisted on the public policy ground or on the ground that the

60 *See* for instance: Alan Redfern, *The 2003 Freshfields – Lecture 'Dissenting Opinions in International Commercial Arbitration'*, 20(3) Arb. Int'l 223, at 234 (2004) citing ICC published statistics; Albert Jan Vanden Berg, *Dissenting Opinion by Party-Appointed Arbitrators in Investment Arbitration – Looking to the Future: Essays on International Law* 82 (Ch. (2) Mahnoush Arsanfani, Brill Academic 2011) – where the author has analysed 150 investment arbitration decisions. Also *see* the Supreme Court of UK in Halliburton *v.* Chubb [2020] UK SC 48, para. 62.

61 Article 12 of the UNCITRAL Model Law on International Commercial Arbitration, 1985 ('UNCITRAL Model Law' or 'Model Law').

62 The Geneva Convention on Execution of Foreign Arbitral Awards, 1927 ('Geneva Convention').

63 Convention on the Recognition and Enforcement of Foreign Arbitral Award, 1958 ('New York Convention').

composition of the tribunal was not in accordance with the agreement of the parties or the law of the country where the arbitration took place).[64]

The subject came for direct treatment for the first time in a United Nations document, the UNCITRAL Rules, 1976,[65] where Article 9 introduced the obligation that a prospective arbitrator shall disclose any circumstance likely to give rise to '*justifiable doubts as to his impartiality or independence*' (and further), an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his impartiality or independence.[66] The language is perhaps inspired from Article 6 (1) of the European Convention on Human Rights – (*'everyone is entitled to a fair … … hearing … … by an independent and impartial tribunal … … '.).* As the UNCITRAL Rules formulation was later grafted into the Model Law[67] (another United Nations Document) and that is now the template for the arbitration laws in about 110 jurisdictions , it can be taken as the foundation for the jurisprudence of arbitrator's impartiality and independence and the challenge procedures.

## 3. *The Model Law*

The Model Law provisions begins with a duty on the arbitrator to disclose *'any circumstances likely to give rise to justifiable doubts as to this impartiality or independence*'.[68] Following this, an arbitrator may be challenged if circumstances exist which give rise to justifiable doubts as to his impartiality or independence. An aggrieved party has a fifteen-day window to raise a challenge, failing which the objection is treated as having been waived.[69] Subject to any agreement to the contrary, the challenge is to be raised before the arbitral tribunal in the first instance. If the challenge is not successful, the aggrieved party has thirty days to invoke the authority of a competent court. In the meanwhile, the tribunal is competent to continue with the arbitral proceedings and render an award. Hence, the keystone to the structure is proper and timely disclosure which in turn triggers a chain of events. There is to be no fence sitting and the intent is to have a decision as soon as practicable. Clearly, the aim is to avoid back ended (and possibly opportunistic) challenges. An arbitrator who has made full and proper disclosure can (if unchallenged) render an unassailable award (even if arguably he would otherwise stand disqualified on the ground of apparent bias).

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64 Article V (1) (d) and (2) (b) of the New York Convention and Art. 1 (2) (c) and (e) of the Geneva Convention.

65 UNCITRAL Arbitration Rules, 1976 ('UNCITRAL Rules').

66 Article 9 and Art. 10 of the UNCITRAL Rules.

67 UNCITRAL Model Law, 1985.

68 Article 12 (1), UNCITRAL Model Law.

69 Article 13 (2), read along with Art. 4, UNCITRAL Model Law.

A standout feature of the Model Law (and prior thereto of the UNCITRAL Rules) is that no distinction is made between a party nominated arbitrator and the third arbitrator. The tribunal as such is required to be impartial and independent. This may seem unremarkable, but the position was not altogether clear till recently. A major jurisdiction, the USA, put its seal of approval on a lesser standard for party nominated arbitrators. As distinguished commentator Professor Park states: '*In the United States, it was the case until recently that party-appointed arbitrators were presumed not to be neutral*'.[70] Indeed, as Professor Park points out, a school of thought continues to believe that party nominated arbitrators can legitimately see themselves as the party's representative on the panel without compromising their independence or impartiality.[71]

While the Model Law established the foundation for the jurisprudence, the build-up was to come at the hands of the arbitral institutions and the arbitration practitioners.

## 4. *Arbitral Institutes: The ICC*

For a long time, the ICC Rules did not contain an obligation on the arbitrator to make a pre appointment disclosure. The 1975 Rules introduced for the first time a requirement for the arbitrator to make a statement disclosing facts or circumstances which may call into question his 'independence' in the eyes of the parties. The decision to confine the disclosure requirement to matters pertaining to lack of independence was deliberate. The desirability of including 'impartiality' (in addition to independence) in the disclosure statement was carefully considered but not introduced for lack of consensus.[72] The apparent reason for the same was that lack of independence could be demonstrated through objective criteria and therefore uncontroversial in evaluation and enforcement. Lack of impartiality on the other hand, pertains to an arbitrator's state of mind and therefore not appropriate in a self-disclosure statement. (The fact that an arbitrator was required to act impartially was stated in the ICC Rules in any event).

The scope of the ICC, disclosure requirement came up for consideration in the seminal English case of *AT&T Corporation v. Saudi Cable Company.*[73] Lord

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70 Prof. William W. Park, *Rectitude in International Arbitration,* 27(3) Arb. Int'l 473, at 486.

71 *Ibid.*, at 486.

72 *See* W. Lawrence Craig, William W. Park & Jan Paulsson, *International Chambers of Commerce Arbitration* 208 (3d edition, Oceana Company Inc).

73 AT&T Corporation *v.* Saudi Cable Company, Court of Appeal (Civil Division), [2000] 2 Lloyd's Rep. 127.

Woolf noted the contrast in the language in the ICC Rules vis-à-vis the Model Law formulation but refrained from expressing any view on the subject. Lord Potter on the other hand was more expansive. He held that '*independence*' connotes an absence of connection with either of the parties and is *'by no means'* coextensive with bias.[74] The ICC Rules he held did not intend to impose a disclosure obligation wider than of lack of independence and that it should be taken as having left the disclosure of matters (other than pertaining to lack of independence) *'to the good faith and judgment of the arbitrator'*.[75]

This controversy is however now in the past. The ICC amended its Rules in 2012 and now every arbitrator is required to sign a statement of impartiality and independence prior to his confirmation. This brings the ICC approach in line with the Model Law (and therefore in sync with most jurisdictions). However, there remains a twist: Insofar as matters which call into question the arbitrator's lack of independence, the disclosure is required to be from the viewpoint of 'the eyes of the parties' but when it comes to lack of impartiality, the disclosure is required to be made from an objective viewpoint of circumstances which could give rise to 'reasonable doubts'. The ICC approach thus continues to be affected by its historical moorings.

The approach of other arbitral institutions is more straightforward with most of them (LCIA, HKIAC and SIAC) adopting the Model Law language and the LCIA clarifying that disclosure is to be of circumstances which are likely to give rise to justifiable doubts *'in the mind of any party'*.[76]

## 5. *The English Approach*

After much deliberation, England restated its arbitration law in a 1996 enactment.[77] The Report on the Arbitration Bill (the DAC Report)[78] states that England chose not to make any wholesale adoption of the Model Law and instead drew from it where advisable.

74 *Ibid.*, at 140, para. 67.

75 *Ibid.*, at 140, para. 71.

76 Articles 5.4 and 5.5, LCIA Arbitration Rules, 2014.

77 Arbitration Act, 1996 (c.23) (1996 Act or the English Act). The Act extends to England, Wales and Northern Island.

78 Departmental Advisory Committee on Arbitration Law Report and the Arbitration Bill and Supplementary Report on the Arbitration Act, 1996 (DAC Report).

Strikingly, the English Act did not adopt Article 12 (1) of the Model Law (the disclosure obligation) and partly adopted Article 12 (2) thereof (dropping lack of independence from the phraseology). Spelling out the reason, the DAC Report states that lack of independence is of no significance unless it gives rise to justifiable doubts as to an arbitrator's impartiality (which in any case is a stated ground for disqualification of an arbitrator). In other words lack of independence, where objectionable, is subsumed in lack of impartiality and therefore need not be stated as a separate ground. While this is perfectly understandable, it is not clear why the disclosure obligation contained in Article 12 (1) of Model Law was not incorporated in the English statute (and the DAC Report throws no light on this).[79]

Under the Model Law structure, disclosure and waiver interface with one another (facts which are disclosed if not objected to within a stated period, are deemed to have been waived). The English statute does not have this interface but retains the general waiver provision.[80] (Indeed, the waiver provision is made more stringent compared to the Model Law). The objecting party cannot object in relation to facts it knew or with reasonable diligence could have discovered – in effect imposing a due diligence obligation on the innocent party.

*The Halliburton ruling:* The gap in the statute has been filled with the courts developing the common law. The Court of Appeal in Halliburton v. Chubb Bermuda Insurance[81] (dealing with an ad hoc arbitration) noticed that the English Act set out no requirement in relation to disclosure but relied on the common law duty of a judge to disclose facts or circumstances which would or might provide the basis for a reasonable apprehension of lack of impartiality.[82] The context here briefly was that an explosion took place at a drilling rig known as the Deepwater Horizon which led to several disputes including a claim between Halliburton (the contractor) and Chubb (the insurance company). The High Court appointed a well-regarded arbitrator (Mr Kenneth Rokison QC) who disclosed that he had previously acted as an arbitrator in several arbitrations in which Chubb was a party, including on one occasion as a party appointed arbitrator by Chubb. The High Court did not

79 The key sections under the English Act being: s. 24 - removal of an arbitrator on the ground of '*justifiable doubts'* as to his impartiality; s. 33 (1) (a): Tribunal's duty to act '*fairly and impartially'* as between the parties and s. 68 (2) (a): Court's power to set aside an award on the ground of serious irregularity (including) where the tribunal has failed to act fairly and impartially between the parties.

80 Section 73 of the English Act.

81 [2018] BLR 375; (2018) EWCA Civ. 817.

82 *Ibid.*, at 386, paras 55 and 56.

consider these matters as an impediment and appointed Mr Rokison as the Chair. While this arbitration was underway, Mr Rokison accepted a nomination from Chubb in a separate claim by Transocean (owner of the rig) which related to the same incident. Mr Rokison disclosed to Transocean his previous appointment but no disclosure was made to Halliburton due to an oversight. Halliburton sought removal of Mr Rokison. Its challenge met with dismissal from the High Court as well as the Court of Appeal.[83]

Halliburton appealed to the UK Supreme Court[84] which too dismissed the challenge. The Supreme Court framed two principal issues as follows:

> *(i) 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, and (ii) whether and to what extent the arbitrator may do so without disclosure.*

Considering the significance of the matter, several arbitral institutions intervened. The LCIA submitted that failure to disclose multiple appointments concerning the same or overlapping subject matters can give rise to appearance of bias, even if the facts or circumstances which should have been disclosed would not by itself give rise to apparent bias. The ICC and the CIArb took similar positions.[85] Two other institutes, GAFTA and the LMAA[86] also intervened and took a different line. They explained that their procedures did not require arbitrators to disclose multiple appointments in relation to the same event or issue and such appointments are often made in chain or string supply contracts where there is a limited pool of specialist arbitrators.[87]

*Duty of Impartiality*: The court held that the duty of impartiality has always been a cardinal duty of a judge and an arbitrator. The objective test of the 'fair minded' and 'informed observer' applies equally to judges and to arbitrators. However, in applying the test to arbitrators, it is important to bear in mind the differences in nature and circumstances between judicial and arbitral determination of disputes. Some differences the court noted being: the courts are open to the public; in contrast, arbitrations are conducted in private and their rulings are not subject to the normal appeal procedures. Further, an arbitrator generally has an

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83 *Supra.*

84 Halliburton Company *v.* Chubb Bermuda Insurance Ltd, [2020] UK SC 48 (Halliburton).

85 *Supra,* para. 42.

86 Grain and Free Trade Association and the London Maritime Arbitrators Association.

87 *Supra,* paras 43 and 44.

interest in obtaining further appointments and nominations give an arbitrator direct financial benefits. Moreover, arbitrators in international arbitrations come from diverse legal traditions and may have divergent views on what is acceptable conduct. Given the particular characteristics of arbitration, there will be circumstances in which an arbitrator is under a duty to make a disclosure where the judge is not.[88]

There is hence a '*premium on frank disclosure*' and a disclosure is a '*means of maintaining the integrity of international arbitrations*'.[89]

An essential issue the court had to address was if under English law, disclosure is a legal duty or merely a good arbitral practice (unlike the Model Law there being no direct provision in the English statute requiring disclosure). The court held the arbitrator's duty regarding disclosure to be a statutory duty and read this in section 33 of the English statute (tribunal's duty to '*act fairly and impartially*'). The court held the duty of disclosure as '*an essential corollary of the statutory obligation of impartiality*[90]'. It also read this as an implied term in the contract between the arbitrator and the parties, that the arbitrator will so act.

As to the threshold for disclosure, the court held that the legal obligation to disclose will arise when the matters to be disclosed '*fall short*' of matters which would cause the court to conclude that there was a real possibility of bias.[91]

*Interplay of confidentiality and disclosure*: It became necessary for the court to consider this as English-seated arbitrations are both private and confidential. The court held that as a general rule, the arbitrator's duty of disclosure would not override his or her duty of privacy and confidentiality under English Law. Hence, prior consent of the concerned parties is required to enable the arbitrator to make a disclosure in relation to a subsequent appointment. The consent may be inferred under certain circumstances, for instance from the arbitration agreement itself or the practice in the relevant field. Where consent cannot be inferred and the arbitrator is not able to obtain consent for disclosure from the concerned parties, he must decline the subsequent appointment.[92]

There may be circumstances in which because of custom and practice of specialist arbitrators (such as in maritime, sports or commodities) multiple

88 *Supra,* paras 55 to 62 and 69.
89 *Supra,* paras 56 and 69.
90 *Supra,* para. 78.
91 *Supra,* para. 116.
92 *Supra,* paras 154 and 88.

appointments are part of the process and known to the participants. Here no duty of disclosure would arise.[93]

## 6. *Disclosure*

While disclosure plays a key role in the schematic structure to address arbitrator's bias, it poses a dilemma of its own. A non-disclosed fact can potentially taint and endanger the award. At the same time, to require (or voluntarily make) an overly wide disclosure is a self-defeative exercise and one which is bound to devalue the process. The Model Law disclosure formulation (adopted widely) affords little guidance here and the body of case law is too thin to offer practical guidance to the conscientious arbitrator. Many arbitral institutions do offer guidance and expand on the disclosure requirements. The ICC goes a step further by illustratively listing out situations and circumstances which call for disclosure.[94] However, the most significant contribution in this direction has come from within the arbitration community in the shape of the IBA Guidelines.[95] Over the years, these have become the ultimate reference tool for disclosure requirements.

## 7. *The IBA Guidelines on conflict of interest in* international arbitration

The IBA Guidelines are special as they are an 'arbitration community' initiative and constitute the most comprehensive exercise undertaken by the practitioners to define as to what may constitute arbitrator's bias and structure the accompanying disclosure obligations.[96]

The Guidelines are in two parts. The first formulates certain General Standards regarding arbitrator's impartiality and independence and the second (called the 'Application Lists') sets out certain situations concerning disclosures and disqualifications. These are categorized into four Lists called the 'Non-waivable Red List', 'Waivable Red List', 'Orange List' and 'Green List'. Both parts are said to reflect the understanding of the IBA Arbitration

93 *Supra,* para. 135.

94 ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitrators under the ICC Rules of Arbitration (1 Jan. 2021).

95 IBA Guidelines on Conflict of Interest in International Arbitration, 2014 ('IBA Guidelines').

96 The Working Group of the 2004 Guidelines comprised of nineteen experts from fourteen jurisdictions and the Sub-Committee for the 2014 revision comprised of twenty-seven experts from seventeen jurisdictions.

Committee as to the 'best current international practices' and based on a cross section of national laws and judgments and the 'experience of practitioners involved in international arbitration'.[97]

The opening sentence of the General Standards makes it clear that it applies to 'every arbitrator' thereby removing any room for a different treatment for a party nominated arbitrator.

Any self-doubt an arbitrator may have as to his or her ability to be impartial or independent, must be resolved by declining to accept the appointment or recusal (if already appointed).[98] Conflict of interest is to be judged from the point of view of 'a reasonable third person having knowledge of the relevant facts and circumstances'.[99] The circumstances are to be such, as would give rise to 'justifiable doubts' as to the arbitrator's impartiality or independence and doubts are said to be 'justifiable' if a reasonable third person (having knowledge of the relevant facts and circumstances) concludes that there is 'a likelihood that the arbitrator may be influenced by factors other than the merits of the case'.[100]

General Standards 3 is concerned with disclosure obligations. An arbitrator is required to disclose facts and circumstances which may give rise to doubts as to the arbitrator's impartiality or independence in the 'eyes of the parties'. As the focal point of the disclosure is from the 'eyes of the parties', it becomes wider than the Model Law standard for disclosure. The Guidelines take care to clarify that a disclosure does not imply the existence of a conflict of interest.[101] Further, an advance declaration or waiver by the parties in relation to possible conflict of interest does not discharge the arbitrator from his disclosure obligation.[102] Finally, the arbitrator is not to take into account whether the arbitration is at a nascent or at a later stage (he is not to be concerned with the consequences of the disclosure).

Part II of the Guidelines is titled: 'Practical Application of the General Standards'. In an innovative and helpful approach, the Guidelines move

97 IBA Guidelines, Introduction to the Guidelines, para. 4.

98 IBA Guidelines Part I: General Standards Regarding Impartiality, Independence and Disclosure, para. 2 (a).

99 IBA Guidelines Part I: General Standards Regarding Impartiality, Independence and Disclosure, para. 2 (b).

100 Article 12, Model Law read along with the IBA Guidelines, Part I: General Standards Regarding Impartiality, Independence and Disclosure, paras 2 (b) and (c).

101 IBA Guidelines, Part I: General Standards Regarding Impartiality, Independence and Disclosure, Explanation to General Standard 3, Clause (c).

102 IBA Guidelines, Part I: General Standards Regarding Impartiality, Independence and Disclosure, para. 3 (b).

away from abstract principles and instead portray varied situations which are categorized into four Lists and labelled as 'Non-Waivable Red List', 'Waivable Red List', 'Orange List' and 'Green List'. The colour scheme is meant to indicate the perceived nature of the situation.

Though the main objective of Part II concerns disclosure obligations, it would seem that it travels beyond that. The opening para of Part II brings out a rolled up two-fold objective: to provide specific guidance *inter alia* to arbitrators, institutions and courts '*as to which situations do or do not constitute conflicts of interest or should or should not be disclosed*'. Thus, the Non-Waivable Red List is not really a disclosure list. It is a disqualification list on the ground of conflict of interest (and absolute in nature as it is not capable of waiver by parties agreement). The Waivable Red List sets out situations which also operate as disqualifications (though capable of waiver – provided it is done expressly).

The Orange List sets out matters which need to be disclosed and are capable of waiver (expressly or through acquiescence). These are said to reflect situations which may in the eyes of the parties give rise to doubts as to the arbitrator's impartiality and independence.[103] The Orange List, however, presents problems of its own. Disclosure is to be from the viewpoint of the parties and therefore, as far as the arbitrator is concerned, is not an indication of a bias situation (otherwise, he would have simply declined the appointment). At the same time, it stands categorized as a situation which can give rise to doubts as to the arbitrator's impartiality or independence. This along with categorization of the situation as an 'Orange' matter puts it in a no man's land, should an arbitrator (notwithstanding a party's objection) choose not to resign. Even though the arbitrator may lawfully continue with the arbitration and render an award, it will not be a happy situation as it has fallen between what is considered acceptable and what is not. This ambiguity is not only due to the colour branding but also as the IBA Guidelines carry a rolled-up objective of not merely specifying the disclosure obligations but laying down general principles (standards) of bias. The latter is perhaps not necessary, considering that the Guidelines itself clarify that they are not legal provisions and are not meant to override applicable national laws.[104]

### a. *An Alternative approach*

In my respectful view, an alternative approach can be considered where the Guidelines are confined to disclosure matters alone. Disclosure

103 IBA Guidelines, Part II: Practical Application of the General Standards, para. 3, read along with General Standard 3 (a).

104 IBA Guidelines, Introduction to the Guidelines, para. 6.

matters should not cross over to disqualification matters (and cloud the purport of the Guidelines). Further, there should be no institutional weight thrown behind a situation (so as not to prejudice or prejudge a situation). The Lists need to be colour blind and basically reduced to two: setting out (illustratively) what needs to be disclosed as a matter of good practice (and not as an admissions of a bias situation) and second, what need not be disclosed. This would also bring the mechanism in line with the way disclosure works in arbitration institutions which require disclosure but do not weigh in one way or the other till there is a challenge and the facts are before it.

### b. *Use and acceptance of the IBA Guidelines*

The IBA has published two full length reports on the global use and acceptance of the IBA Guidelines.[105] The latter report (of 2016) concludes that the Guidelines have gained '*broad acceptance*' and are often used by the international arbitration community (the practitioners, arbitral institutes, tribunals and courts) in their decision making process.

An interesting English case on a national court's approach to the Guidelines is *W Ltd v. M Sdn Bhd*.[106] The fact here in brief being that the arbitrator was a partner in a firm which regularly advised a company having the same corporate parent as the respondent. The firm derived substantial remuneration from this client. The arbitrator had no involvement in the running of his firm and almost exclusively sat as an arbitrator. Though the firm did not advise the parent or the party, the situation squarely fell under paragraph 1.4 of the Non Waivable Red List which states (as a non-waivable matter) if the arbitrator or his firm '*regularly advises the party or an affiliate of the party and the arbitrator or his or her firm derives significant financial income therefrom*'. The arbitrator's position was that he did do a conflict search including on his firm's website but the relevant facts did not show up. He regretted that this had not been disclosed and had he known of the facts he would have disclosed them. The challenge to the award was essentially based on the IBA Guidelines – (the argument being that there is a real possibility of bias, as that is what paragraph 1.4 of the Guidelines state).

The court considered the IBA Guidelines but concluded (on facts) that the fair minded and informed observer would not conclude that there was a real

105 *The IBA Guidelines on Conflict of Interest in International Arbitrations: The First Five Years 2004–2009*, followed by 'Report on the reception of the IBA arbitration soft law products' (Sept. 2016).

106 [2016] C.L.C 437; (2017) 1 All ER (Comm) 981.

possibility of the arbitrator being biased. The court showered high praise on the Guidelines stating: '*The 2014 IBA Guidelines make a distinguished contribution in the field of international arbitration. Their objective, to assist in assessing impartiality and independence, is to be commended*'.[107] At the same time, it pointed out ('*with diffidence*') certain weaknesses in the same. Essentially, the criticism being that paragraph 1.4 of the Non Waivable Red List leaves no room for a case specific judgment and is based on assumptions.[108] The court also pointed out certain anomalies in that potentially more serious matters find their place in the Waivable Red List section (as against the Non Waivable Red List). For instance, if an arbitrator has himself given legal advice on the dispute to a party, it is a Waivable Red List matter (paragraph 2.1.1), so also if a close family member of an arbitrator has a significant financial interest in the outcome of the dispute (paragraph 2.2.2) or if an arbitrator has a close relationship with a non-party who may be liable to recourse on the part of the losing party (paragraph 2.2.3).[109] The court thus felt that Waivable Red List does not '*sit well*' with the Non Waivable Red List. Finally, the court observed that it could have simply said that the IBA Guidelines are not a statement of the English law and therefore need no examination from it.[110] The arbitration however (it noted) is international and the court's role thus also has an '*international dimension*'.[111]

This case is an excellent illustration of the deference and yet balanced approach one may expect from national courts towards the Guidelines.

## 8. *Non-disclosure and Bias*

The Model Law requires a disclosure to be made but does not address the consequences of non-disclosure. The IBA Guidelines clarify that no adverse consequences are to follow merely by reason of non-disclosure:

> *A later challenge based on the fact that an arbitrator did not disclose such facts or circumstances should not result automatically in non-appointment, later disqualification or a successful challenge to any award. Nondisclosure cannot by itself make an arbitrator partial or lacking independence: only the facts or circumstances that he or she failed to disclose can do so.*[112]

107 *Ibid.*, at 443.

108 This conclusion was on a combined reading of para. 2 of Part II read along with General Standards 2 (d) and Explanation to 2 (d).

109 *Ibid.*, at 445.

110 *Ibid.*, at 446.

111 *Ibid.*, at 446.

112 IBA Guidelines Part II: Practical Application of the General Standards, para. 5.

The English Court of Appeal in *AT&T Corporation v. Saudi Cable Co.*[113] dwelt on the subject. Here the Tribunal's chairman sat as a non-executive director in a competitor and business rival of a party (AT&T). The arbitration was held under the ICC rules (which required disclosure), but this fact was not disclosed. AT&T sought removal of the chairman and setting aside of three partial awards rendered by the tribunal.[114]

Parties agreed that the non-disclosure by the arbitrator was inadvertent and innocent. The court held that the test of apparent bias is no different for international arbitrators than the one applicable to justices, jurors or members of other inferior tribunals (this being an affirmation of an obiter in Gough to the same effect).[115] On merits, it held the non-disclosure to be '*extremely unfortunate*'[116] and that had AT&T known of the relevant facts and objected at the outset, the objection would have been regarded as reasonable and sustained.[117] However, when it came to removal of the arbitrator and setting aside of the partial awards, the court held that non-disclosure provided '*the flimsiest of arguments*' that the arbitrator's position (in AT&T's business rival) would affect the way he performed his responsibilities as an arbitrator in its dispute with the respondent. It held that the purpose of the disclosure rules is to enable the parties to confirm the choice of arbitrators on '*a fully informed basis*' but the fact '*that such purpose may have been inadvertently defeated is not in itself sufficient to justify removal of the arbitrator'* otherwise untainted by bias. While ruling on bias, the court took into account that the arbitrator was an extremely experienced lawyer and arbitrator, who could be relied on to disregard irrelevant considerations. Further, his conduct during the course of the arbitration provided no support to suggest that he was prejudiced. The court also took practicalities into account and that to set aside the partial awards and replace the arbitrator at this stage *'would be both a costly inconvenience and substantial injustice to the respondent'*.[118]

Hence, the AT&T court took a wholistic view and rejected the argument that non-disclosure (or incomplete or late disclosure) would necessarily visit the erring arbitrator with detrimental consequences or by itself imperil the resultant award.

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113 [2000] 2 Lloyd's Rep. 127.

114 The case arose under s. 23 of the English Arbitration Act, 1950 (removal of arbitrator and setting aside of the award on the ground of misconduct).

115 R *v.* Gough (1993) A.C 646.

116 [2000] 2 Lloyd's Rep. 127, at 136, para. 44.

117 *Ibid.*, at 141, para. 76.

118 *Ibid.*, at 140, para. 73.

The UK Supreme Court in Halliburton[119] however took a contrary view. It held that failure of an arbitrator to make the disclosure as required is a factor for the court to take into account in assessing whether there is a real possibility of bias. If the non-disclosure is serious enough it can by itself justify the removal of the arbitrator on the ground of justifiable doubts as to his or her impartiality. Even if the undisclosed circumstances do not support the conclusion of apparent bias, the erring arbitrator (if the circumstances so warrant) may face an order for the costs of the (unsuccessful) challenge.[120]

This prospect of punitive consequences being visited on the defaulting arbitrator is a new and far reaching development of the law in Halliburton and potentially controversial as well. Besides, the court did not take into account the views expressed by Lord Woolf in AT&T[121] or the IBA Guidelines which provide to the contrary.[122]

### a. *What else turns on disclosure?*

The English House of Lords had occasion to consider the positive effect of disclosure in a non-arbitration decision.[123] The court highlighted the psychological advantage that a proper disclosure carries: *'it is very important that proper disclosure should be made … … .because the judge shows, by disclosure, that he or she has no need to hide and is fully conscious of the factors which might be apprehended to influence his or her judgment'*[124] and: *'a proper disclosure at the beginning is in itself a badge of impartiality*'.[125] In its subsequent decision,[126] the House of Lords qualified that this however: *'can only be one factor and a marginal one at best'*. The Court of Appeal in Halliburton put it conversely: '*If a disclosure that ought to have been made has not been made, that will mean that the arbitrator will not have displayed the "badge of impartiality" which he should have done. As Lord Bingham observed in Davidson's case, the fact of non-disclosure "must inevitably colour the thinking of the observer"*'.[127]

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119 [2020] UK SC 48 (*Supra*).
120 *Supra,* paras 111.
121 [2000] 2 Lloyd's Rep. 127 (*Supra*).
122 IBA Guidelines Part II: Practical Application of the General Standard, para. 5.
123 Davidson *v.* Scottish Ministers (No. 2), (2005) 1 S. C. (H.L.) 7.
124 *Ibid.*, at 17, para. 19 (per Lord Bingham).
125 *Ibid.*, at 26, para. 54 (per Lord Hope).
126 Helow *v.* Secretary of State for Home Department (2008) UK (H.L.) 62 and (2008) 1 WLR 2416 at 2436.
127 Halliburton Company *v.* Chubb Bermuda Insurance, [2018] BLR 375, at 389, para. 74.

The UK Supreme Court in Halliburton endorsed this: *'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'*.[128]

## 9. *Varying standards at different stages?*

English common law recognizes only one standard of disqualifying bias (and the test for justices, members for tribunals or arbitrators is the same[129]). This standard does not vary depending on the stage of the proceeding.

The normal effect of a finding of bias by a court renders the judgment appealed from a nullity and the trial *coram non judice*. Arbitrations however, are somewhat unique as the consequences of disqualifying an arbitrator escalate as the arbitration progresses. A jurisprudence which has the same approach for non-confirmation of an arbitrator as for setting aside of an award, can work rather harshly on the blameless party.

The Model Law does not touch on this. Moreover, the Model Law does not treat lack of independence or impartiality as an independent ground to set aside an award under Article 34 (that is supposedly subsumed in the public policy ground or in a challenge based on composition of the tribunal not being in accordance with the parties' agreement[130]). Accordingly, there is no separate standard or yardstick prescribed for the guidance of the courts under the Model Law regime in relation to an award challenge application on the ground of lack of independence or impartiality.

Commenting on the ICC approach, distinguished commentators have noted: '*there is substantial evidence that the [ICC] Court of Arbitration is more likely to refuse the formation of an arbitration than to sustain a challenge once an arbitrator has been appointed*'.[131] The IBA Guidelines also recognize this. While clarifying that disclosure or disqualification should not take into account the particular stage of the arbitration, it recognizes that '*as a practical matter*' the arbitration institutions and courts may make a distinction depending on the stage of the arbitration and apply different standards.[132] The Court of Appeal's decision in *AT&T* can be taken as illustrative. The court here

128 [2020] UK SC 48, para. 70.

129 R V. Gough, 1993 A.C. 646 at 670 and AT&T Corporation *v.* Saudi Cable Company, [2000] 2 Lloyd's Rep 127, at 135, para. 39; Halliburton *v.* Chubb Bermuda Insurance Co. Ltd. [2020] UK SC 48.

130 Article 34 (2) (a) iv and 2 (b) ii of the UNCITRAL Model Law.

131 W Lawrence Craig, William W Park & Joan Paulsson, *International Chamber of Commerce Arbitration* 204 (3d ed., Oceana Publications).

132 IBA Guidelines: Explanation to General Standard 3, para. (e). *See also* Gary Born; *International Commercial Arbitration* (2d ed., 12.05 [F] and 26.05 [C]).

acknowledged that had AT&T known of the relevant facts and objected to the appointment, the same would have been upheld. However, this (by itself) it held would not lead to a later disqualification of the arbitrator or setting aside of the partial awards rendered, recognizing that it would be a '*costly inconvenience'* and result in '*substantial injustice'* to the respondent.[133] Thus, while the disclosure standard does not shift, the consequences of the ruling are taken into account by the decision makers.

Compared to the Model Law, the English Arbitration Act[134] presents a more nuanced model as to the approach a national court should take at different stages of an arbitration in a bias challenge situation. Section 24 of the Act provides that a court may remove an arbitrator inter alia on the ground that circumstances exist which can give rise to justifiable doubts as to his impartiality (a standard which has judicially been interpreted to be no different from the general English standard of apparent bias).[135] In contrast, Section 68 provides for challenge to an award on the far narrower ground of 'serious irregularity' (which expression includes failure by the tribunal to comply with its duty to act impartially), provided further that it is such as to cause substantial injustice to the applicant. The DAC Report[136] explains that an application to set aside an arbitral award must also pass the test of causing substantial injustice:

> *The test of "substantial injustice" is intended to be applied by way of support for the arbitral process, not by way of interference with that process. Thus it is only in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of the arbitral process that we would expect the court to take action … … In short, Clause 68 is really designed as a long stop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected.*[137]

A finding of apparent bias thus need not necessarily result in setting aside of the award. If there is no miscarriage of justice, there is no reason why the innocent party must suffer the consequences of the award being set aside. As Lord Woolf held*:*

> *As is apparent from the facts of this case, where millions of dollars have already been incurred in the costs of the arbitration and there have been three decisions, it would achieve injustice not justice if the arbitration awards were to be set aside if such a*

133 AT&T Corporation *v.* Saudi Cable Co. (*supra*), para. 73.

134 Arbitration Act, 1996 (1996 C.23).

135 Laker Airways Inc. *v.* FLS Aerospace & Anr. (1999) 2 Lloyd's Rep. 45, at 48; ASM Shipping Ltd of India *v.* TTMI Ltd of England (2005) EWHC 2238 (Com Ct), Queens Bench Division.

136 Department Advisory Committee on Arbitration Law Report or the Arbitration Bill and Supplementary Report on the Arbitration Act, 1996 (DAC Report).

137 DAC Report, para. 280.

> *course were not justified. It is not to be forgotten that SCC is an entirely innocent party and it is entitled to have its interests considered when the deciding whether to set aside the awards.*[138]

It is not suggested that the law should dilute the standard of bias or prescribe a lower standard for arbitrations at the award challenge stage. A diluted standard of bias will end up diluting the prestige of arbitrations (and of arbitrators) and therefore, not serve the cause of arbitration jurisprudence. The suggestion (as recognized under the English statute) is that at the award challenge stage, other considerations can also legitimately weigh in shaping the verdict.

## D. Concluding thoughts

- Impartiality of a judge is taken for granted in a national court system and rarely ever doubted. Unfortunately, the same degree of confidence is lacking in many arbitrations. This is not good for arbitrations or arbitrators. The arbitration community has done well and richly contributed to the jurisprudence in a manner which could not have been attempted by legislation or national courts alone.
- The Model Law (preceded by the UNCITRAL Rules) recognized the importance of timely disclosure and structured the independence and impartiality jurisprudence on this foundation. At the same time, no distinction was made in the applicable standards in relation to removal of an arbitrator and setting aside of an award. Applying the same standard (of justifiable doubts) without taking into account other considerations, can lead to disproportionate and unfair consequences. The arbitration jurisprudence needs to emphasize that a finding of appatent bias need not necessarily result in setting aside of an award.
- While much thought and, effort has gone into crafting the disclosure requirements, the consequences of non-disclosure need to be addressed. Does non-disclosure carry a legal sanction? Can non-disclosure by itself lead to removal of an arbitrator or imposition of costs (or other sanctions) and if so, in what situations and by what process? Halliburton[139] held that if the non-disclosure is '*close to the margin*' such that: '*one would readily conclude that there is apparent bias in the absence of further explanation*', it can (by itself) justify removal

138 AT&T Corporation *v.* Saudi Cable Company, [2000] 2 Lloyd's Rep 127 at 135, 136, para. 41.

139 [2020] UK SC 48, para. 111.

of the arbitrator. Even if it is not a 'close to the margin' situation, but serious enough, it held that costs of the unsuccessful challenge can be imposed on the arbitrator.

While non-disclosure can and should go in the basket of factors for the 'fair minded and informed' observe to consider, an arbitrator can be removed only upon a finding of apparent bias. The non-disclosure therefore should be such as to lead to a conclusion of apparent bias (either on a standalone basis or along with other factors) in order to justify removal. Further, to mulct an arbitrator with costs for an unsuccessful challenge is a far reaching development of the law. Halliburton's conclusions in this regard are not preceded by any discussion. Many arbitrators may simply wish to resign rather than face the prospect of a costs award – and that too for an unsuccessful challenge – (thereby perhaps achieving for the challenging party an ill-deserved victory). An arbitrator who has been mulcted with costs for non-disclosure would in any case be rendered unfit to continue with the arbitration. To impose costs while rejecting the underlying application for removal will thus produce a lopsided outcome and needs further consideration.

At the same time, to do nothing is to gloss and condone the reckless conduct by the arbitrator and deny the affected party its valuable right of disclosure. There are no easy answers. A delicate balance needs to be struck and perhaps (as before) the best solutions can come from within the arbitral community.

- For sanctions to be workable, there first has to be a referral point of a universally accepted disclosure regime.
- The arbitration community through its various avatars (including the major arbitration institutions) need to come together and arrive at a 'disclosure protocol' which is binding on every arbitrator accepting appointment. An altogether fresh look can be taken to see if an alternate approach is preferable. The consequences of non-disclosure also need to be addressed.
- Disclosure can be a slippery slope, so it is important to reinforce the true purpose of disclosure. The purpose is not to cast a doubt on the arbitrator but to enable parties to take an informed decision. As the IBA Guidelines state *'[disclosure] rests on the principle that the parties have an interest in being fully informed of any facts or circumstances that may be relevant in their view*'.[140] The LCIA Rules clearly bring out the distinction between disclosure and disqualification. (While making disclosure, an arbitrator is to look at the '*mind of*' a party, whereas, a challenge to an arbitrator would lie if

140 IBA Guidelines, Part I: General Standards regarding Impartiality, Independence and Disclosure, Explanation (a) to General Standard 3 (a).

> '*circumstances exist*' that give rise to justifiable doubts as to an arbitrator's impartiality or independence[141]).

The arbitration jurisprudence needs to emphasise this divergence so as to render it supportive of disclosure without casting a shadow on the arbitrator.

Addressing bias remains a challenge. The arbitration community has taken the initiative and much progress made in crafting a tailor-made pragmatic arbitration jurisprudence. Given the nature of the subject, this remains work in progress.

I may conclude by quoting distinguished jurist, Mr Fali S. Nariman:

'*The real trouble about telling judges (or for that matter, arbitrators) how to behave is that the respectable ones do not require the advice, the disreputable ones do not care to heed it*'.[142]

141 Article 5.4 and 10.1 of the LCIA Rules, 2014.

142 Fali S. Nariman, *Standards of Behaviour of Arbitrators* 4(4) Arb. Int'l 311, at 311 (1988).