INDIA ADR WEEK 2023 – DAY 6 DELHI

SESSION 2

Session 11:30 am to 12:30 pm

DISCLOSURE AND ARBITRATOR CHALLENGES - WHERE DO WE STAND AFTER HALLIBURTON?

Speakers

Mr. Daniel Sharma, Partner, DLA Piper
Mr. Alexandre Vagenheim, VP Global Legal Data, Jus Mundi
Mr. CV Raghu, Group General Counsel, Samvardhana Motherson Group
Mr. Dheeraj Nair, Partner, JSA Advocates and Solicitors
Dr. John Fletcher, Director, Dispute Resolution, RICS
Ms. Jasleen Oberoi, Executive VP, Legal & Secretarial, JCB
Mr. Rajshekhar Rao, Senior Advocate, High Court of Delhi

HOST: The next session that we have is a panel discussion on Disclosure and Arbitrator challenges - Where do we stand after Halliburton. On the panel, we have Mr. Daniel Sharma, Partner, DLA Piper, Mr. Alexandre Vagenheim, VP Global Legal Data, Jus Mundi, Mr. CV Raghu, Group General Counsel, Samvardhana Motherson Group. Mr. Dheeraj Nair, Partner JSA Advocates and Solicitors, Dr. John Fletcher, Director Dispute Resolution, RICS, Ms Jasleen Oberoi, Executive VP, Legal and Secretarial, JCB, and Mr. Rajshekhar Rao, Senior Advocate, High Court of Delhi. [NO VIDEO OR AUDIO]

DANIEL SHARMA: Good morning, ladies and gentlemen. Welcome to our first panel this morning, working on a specific substantive matter of international arbitration law. And I promise you that it's going to be very interesting. My name is Daniel Sharma. I'm a Dispute Resolution Partner at DLA Piper in Frankfurt in Germany. In my spare time, I also co-head the Firm's Global India Group, which is why I have the pleasure to be in India, relatively often. My own practice is mostly in international arbitration, where I act as Counsel and sometimes conflicts permitting, which is very rare unfortunately also as an arbitrator. Now the topic of our panel is the following, "Disclosure and Arbitrator Challenges - Where do we stand after Halliburton?" Some of you or maybe most of you may have heard of the Halliburton Decision

of the English Supreme Court in 2020. It deals with questions of an arbitrator's potential obligations to disclose potential conflicts or facts that may lead to potential bias or apparent bias. And we are going to discuss the most relevant aspects of this judgment from different perspectives. I'm pleased to share already now, that we will also have a legal tech demo at the end of the session to show how technology can help parties and Counsels in finding the right arbitrators as well. With this let me briefly introduce our distinguished panellists. To my right we have Mr. C V Raghu is the Group General Counsel of Samvardhana Motherson Group, where he drives the legal, secretarial, regulatory, compliance and governance processes across the globe for the group and I understand it's a group that's active internationally. I know it, of course, myself, active in more than 40 countries. So very international practice. Mr. Raghu, is a qualified lawyer from Delhi University and has held various positions in other large MNCs, including American Express and Hindustan Unilever before joining Motherson. He is a tested and successful negotiation and dispute resolution expert. And these are my words. They're not his words. Then we've got Dheeraj Nair. Dheeraj is a Partner with JSA's Dispute Resolution team. He has over two decades of experience in corporate, commercial and constitutional litigation, arbitration, white collar crimes and investigations, and more recently also in insolvency and restructuring practice. His specialization is in shareholders, joint venture, private equity and investment disputes. To his right or to his left from your perspective, Dr. John Fletcher. John is the ADR Product Director and responsible for the Global Dispute Resolution Services of the Royal Institution of Chartered Surveillance in London. And he and his team appoint several hundreds of dispute resolution experts every year. So very experienced and of course, the Halliburton decision had big impact certainly on his practice as well. To his left Jasleen Oberoi. Jasleen has almost 25 years' experience in the legal field, out of which she spent 18 plus years in private practice with stints as Partner in Dua Associates and then Amarchand Mangaldas. Her field of expertise during this period was commercial disputes with special emphasis on ADR and white collar. For the last six years, Jasleen has been in house, heading the legal department of a leading MNC, namely JCB. Welcome Jasleen. To her left Rajshekhar Rao watch as a leading senior advocate in New Delhi. He is well known for his particular expertise in competition matters, but certainly also more broadly as a top member of India's dispute resolution community. Welcome. To his left, Alexandre Vagenheim. Alexandre, VP of Global Legal Data at Jus Mundi, where he leads the company's data, strategy and global relations. He's a French qualified international arbitration lawyer. Prior to his current role, Alexandre represented clients in a wide range of matters in international commercial arbitration, investment disputes and French court litigation. At the former arbitration practice of Castaldi Mourre & Partners in Paris, well known arbitration practice of course. And in addition, with experience as Counsel, Alexandre has acted as Secretary to arbitral Tribunals and as Researchers assistant to the Late Professor Martin Hunter at Essex

Court Chambers in London. Wow, what a distinguished panel. So, with this let me move to the first question, John, that goes to you. You are the director of District Resolution at the Royal Institution of Chartered Surveillance. And so, this English Supreme Court decision must have been of particular interest and importance to you. For the benefit of the audience, maybe you could just brief us about the key takeaways of the decision. And then a specific question to you in your role at RICS, has this Halliburton decision raised any unexpected challenges from the perspective of an institution that appoints arbitrators?

DR. JOHN FLETCHER: Daniel, thank you for that. I see that you are using 20th century technology with an iPad with your questions. I've got 19th century technology with my stuff on paper. And as I can't juggle a microphone and paper, I'm going to stand over here so that I can do it. Hope that's all right. My thanks to MCIA for having organized this absolutely superb conference the last in a whole week of conferences around the country. To you for your very kind introduction, Daniel, and to you, the audience for being here. My wife phoned me last night from the UK, and she said she, my mother-in-law and my daughter all going to be watching the cricket today. Was I going to see any of it? And I said, no, I'd be speaking at a conference. And here you are, as well as attending it. So, Mike, thanks and congratulations to you for having made that sacrifice. Looking at the eminence of this audience I feel I'm intruding by trying to tell you what's in Halliburton. I'm sure you all understand it far better than I do. And I wouldn't presume upon your expertise by telling you. But I've been asked to outline the very basic points. Let me do that. The case is between Halliburton and Chubb insurance, and it arose after the Deep-Water Horizon catastrophe, which is the oil rig that exploded in the Gulf of Mexico, which I'm sure many of you remember. Now, what was irrelevance was that there were a number of arbitrations flowing out of the claims from that disaster. The High Court appointed the chairman in one, he had prior to that been involved in two other arbitrations, and subsequent to that he was involved in another two arbitrations, all flowing from the same disaster. And the point was that although he disclosed the first two arbitrations prior to the one in which he was currently appointed. He did not disclose the involvements in the Fourth and the Fifth arbitration, as it were. Halliburton objected to that. The arbitrator said, all right, he would stand down if both parties agreed to him standing down because he had assumed the responsibility of arbitrator, and he had a responsibility to carry on with it. Clearly the Chubb didn't agree, and so Halliburton brought an application to the High Court to have the arbitrator removed under Section 24(1) of the English Arbitration Act, which says that the removal of the arbitrator should be given in circumstances which give rise to justifiable doubts as to his impartiality. And that's really this point. It all turns on what doubts about the arbitrator give rise to this justifiable belief that there may be or that there are grounds for questioning his impartiality. And that's what the case is all about. So, the High

Court, from which this went on appeal had confirmed the well-established test for what's known as a parent bias, where it says that it's an objective test. In other words, you're not looking at the individual person's state of mind. It is whether a reasonable man, the fair minded and informed observer having considered the facts would conclude that there was and remember here, we're talking about the verb there 'was' not 'may' that there was a real possibility that the Tribunal was biased. That was the traditional test that had always been there. Whether the reasonable man, which is man in the wider sense of the word, to include both sexes, whether the reasonable person being aware of the facts would conclude that there was a real possibility that the Tribunal was based, not that the Tribunal is biased, but that there's a real possibility that it would be biased. It's enormously subtle, but well-established test. Now prior to that, the obligation on an arbitrator to disclose previous involvements had simply been a matter of best practice. The first significant thing that Halliburton really did, I suppose, was that it made it a rule of English Law. Because by enforcing this requirement on the arbitrator to disclose it brought it from being best practiced to being law. And the Court found that while a failure to disclose related appointments was a relevant factor in applying the test for apparent bias. It did not, in and of itself give rise to an inference of apparent bias. So, this is this distinction that's been made by Halliburton, which is that the rule of law says that the arbitrator must disclose any prior involvements which may give rise to a reasonable perception of bias. But the fact that he has not done so, does not of itself disqualify him. What the court has then got to do is go a step further and say that those previous involvements must or do, in fact objectively give rise to a perception of a risk of bias. So, it creates almost a two-step process by which the arbitrator is obliged to disclose anything that may give rise to perception of bias. But what the court has got to decide in order to get rid of the arbitrator is whether those circumstances would give rise or must give rise to perception of bias in the minds of a reasonable person. And that really is the first point of Halliburton. The second point that was really interesting about the case was who intervened in it. So, you had two sets of arbitrary institutions intervening in the process of Halliburton. So, on the one side, you had the LCIA, the CIR and the ICC Court, all of which are generalist appointers of arbitrators, much like we at RICs are. And they took the view that the test should be strictly applied, and that all previous effectively all previous appointments should be disclosed as a matter of course, and that they would potentially give rise to a perception of bias. That was opposed by the London Maritime Arbitrators Association, LMAA and the Grain and Feed Trade Association, who appointed arbitrators to deal with agricultural matters. They were arguing that there are some specialist types of arbitration where multiple appointments are simply commonplace, and they always tend to happen. Now the Court held that one of the deciding factors in deciding whether multiple appointments amounted to something which needed to be disclosed was that you had to look at the sector in which the arbitration was taking place and the type of arbitration you're

talking about. So therefore, if you in the generalist... the generalist type of appointments making appointments like CIR, like LCIA or the ICC courts, there the fact that the arbitrator has been involved in previous cases involving one of the parties is a factor that needs to be disclosed. On the other hand, if you're talking about specialist areas of arbitration then it's so commonplace that it isn't something that would give rise in the mind of a reasonable person to the perception of bias. And that is the complicating issue for organizations like ourselves who are actually appointing arbitrators. So, to go into the second part of your question, for us at RICs in the year prior to COVID, we appointed 5000 arbitrators, adjudicators and mediators, but the bulk of those were adjudicators and arbitrators. This year we will probably appoint 3000. Post COVID the UK economy is down. We are adjudicator nominating authority in every state in Australia and New Zealand. We've just been appointed the nominating authority in Alberta and Canada. We make 75% of the UK construction adjudication appointments, which have more or less taken over from construction arbitration in the UK. We are named in a number of Acts of Parliament to appoint arbitrators when it comes to agricultural matters. So that's what the President of the RICS, whose powers are delegated to me and my department and my director, that's what we do. I mean, we had a bit of a focus moment last year, when the COVID legislation in the UK made the Chartered Institute of Arbitrators and RICs were the two institutions appointed to actually exercise the power that hither to only been exercised by the Supreme Court or by the High Court. In that for a brief period last year, I had the power to dismiss an arbitrator under precisely the same grounds as a court would dismiss an arbitrator under the Arbitration Act, under powers conferred on me and on my opposite member in the CIR under the COVID Rent arias legislation that was brought in as emergency legislation by the Government to deal with the backlog of rent cases. So, we then had to really start looking to where do we sit in this matrix of appointments. Because some of our appointments, if we're doing let's take HS 2 which half of it's been cancelled now. But prior to that, we were looking at 23,000 acquisitions of property in Phase 1 by compulsory purchase order. 17,000 anticipated acquisitions of property in Phase 2, which has not been cancelled under CPO. But each of those compulsory purchase order acquisitions have in them an ability to take the matter to arbitration, and for us to appoint an arbitrator. So, at what point, as an appointing body, do you start to run out of arbitrators? Because clearly all of those cases have got HS 2 or the relevant Government Department. However, you cite it as one of the parties. So after we have appointed one arbitrator to deal with two or three of those cases, are they then excluded from dealing with any further? And very shortly, we would run out of arbitrators capable of doing this work. The other question that we've had to face is that, if we're looking at Rent review arbitrations in the West End of London, there is an expectation almost amongst the public that certain people will probably end up being the arbitrators. And if you're looking at the Duke of Westminster, who owns half of London, at

some point they will have dealt with cases where one of the parties is common. But the fundamental difference is this, the President of the RICs appoints through various delegations. That power comes to me and to my director to make the appointments. So, we are not appointing at the instance of a party requesting the arbitrator, nor is the arbitrator, as in a three-person panel, which you often see being appointed by one of the parties. This is an independent appointment by an institution, by RICs. So again, is the danger raised in Halliburton as relevant when it is an independent appointment by an institution as it would be where you have an appointment with far more involvement by one of the parties seeking the appointment of the arbitrator? And again, this is one of the questions that we are grappling with at the moment, and it varies depending on what type of appointment we're making. We have always used our own guidance on conflicts of interest based on the International Bar association's traffic lights. And I suppose where we find ourselves at the moment, and it's not an entirely comfortable or satisfactory situation. But to be honest is that we aren't facing much challenge coming in from anybody about the appointments that we make. So, you know the *Doctrine of Stare Decisis et non quieta movere,* the second bit of that non quieta movere is the bit that's quite appealing at this point. If it's quiet, don't fiddle with it, don't poke the dog. So, to be quite honest, we're not poking the dog at the moment, but we do have a KC reviewing some of our appointment processes with this particular point in mind. I'm not sure that where it isn't institutional just to bring it back to Halliburton in closing. I'm not sure that where it is an institution making the appointments, the fact that the arbitrator, which is being appointed by the President, has dealt with previous arbitrations before the HS Two or somebody's been involved is a circumstance which, in the minds of a reasonable person, may give rise to a perception of bias. We're not sure. It seems to be quite sort of on the cusp. So, there we are. That's my answer to your question, I hope. I can't give you a definitive answer because we are still wrestling with this three years on, and we are at the moment trying to find the right answer. I hope it will become apparent at some time in the future. Thank you, ladies and gentlemen.

DANIEL SHARMA: Thank you. Thank you very much, John. And that's really very interesting. And it shows that there's no such thing like a rule that fits every situation, every institution, every dispute. So, it remains a topic that will be discussed in the future as well. Dheeraj, my question to you now is, you're a very experienced dispute resolution lawyer and you will have seen Indian courts dealing with some of the issues touched upon by the Halliburton judgment in England, as well, how would you describe the Indian courts approach towards issues of potential appearance of bias and disclosure obligations of arbitrators?

DHEERAJ NAIR: So, thank you so much, Daniel. Good morning to all. I'd like to first of all, congratulate before I answer your question, MCIA for this fantastic week. I think it's a great job done. And thank you everyone, for turning up on a Saturday morning here to hear us also. Having said that, before I just got up here, Daniel said that I could as chair of the panel, he said, I could be as controversial as I want to be. So, I would probably say three things on Halliburton, which may sound little controversial. The first thing is I haven't seen any Indian case so far and I can be corrected by the audience here, where Halliburton has been followed by the Indian Supreme Court, Number one. Number two, Halliburton, as I read it, has set out two things. One is disclosure, and the other is bias. While India may be slightly behind in terms of jurisprudence in certain aspects, but I think on this aspect we were a little ahead on disclosure, five years ahead because we brought in Schedule 5, 6, and 7 within our statute. And in so far as the bias part is concerned in 2017, where we have two judgments, one by Justice Nariman and the other one I think Justice Kaul I think where they dealt with this issue of bias. So, as I said on Disclosure, we already have 5, 6, and 7. So that kind of eliminates, at least to my mind, at the threshold the very potential challenge to a disclosure part of it where the arbitration starts. And Section 12 actually imposes a continuous obligation on the arbitrator to continue to disclose if there is something which comes up during arbitration. So, it's not as if you do it at the beginning and then you stop. So, it is a continuous obligation that he needs to continue with. Once you have crossed Schedule 5, Section 7, in a way 7 is a complete embargo. If you fall under Schedule 7, you cannot be appointed as an arbitrator period, which means you have to deal with 5 and 6, which... and 6 actually starts at the beginning of the arbitration where the arbitrator has to put in all those things which he could potentially think could lead to in bias at a later stage. So, in so far as disclosure part is concerned, the statute takes care of it. In so far as Bias is concerned now, bias is very subjective. And if I might just quote Justice Nariman only where he says and the same test which Halliburton lays down was actually said by him in 2017. Three years before Halliburton came in, where he actually says, that the test is of a reasonable third person coming to a conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case in reaching his or her decision. So, this approach has to be a commonsensical approach while dealing with the issues. So actually, this test even before Halliburton came Justice Nariman had kind of put it there. So, that's one part of it. The other part of it is with respect to the independence. Now again, 2017 judgment I fail to remember who the judge was again Supreme Court, which is a tongue twister named Voice Tree Alpine Something versus DMRC, where they actually said that independence must be built in in the appointment of the arbitrator itself. So, there is no question. If you are appointed as an arbitrator, you have to assume that he's independent. It's built in in his appointment. Impartiality is more subjective and must be tested on the anvil of circumstances and reasonability wherein you have to respect the real and genuine party

autonomy. So, this was the test which was laid down. Now again, you will test each case on the merits of each case, whether there's a bias in this particular case or not. But very quickly, I just want to touch upon one aspect of bias because otherwise bias is very large. In each case, you're going to have a different situation where the bias is still there. One of the things that we've done actually is and which was very common in India, because we have lots of public sector undertakings where the PSUs actually had a clause in their contracts, that their own person, which is the Managing Director or the General Manager, would be appointed as an arbitrator. Now, as far back as 1978, oh sorry, 1984 I think, there is a Supreme Court decision which actually upheld this kind of appointments. But that is before our 96 Act came in. Subsequently, in the 2015, once these schedules came in, this particular clause of appointment of Managing Director or their General Manager was challenged. Now there are two judgments of the Supreme Court which actually led to a situation where these appointments were held to be not valid, which means that a Managing Director himself cannot appoint him as an arbitrator. Subsequently, the law developed, and the law said that even if you as a Managing Director are ineligible to be appointed as an arbitrator, you cannot appoint somebody else as the arbitrator. The law further developed when there was another case where they said that can it be a panel? So, the clause said that the General Manager of the company can actually appoint, can actually give a panel of four people, which is their own employees, retired employees, or serving employees. And from that panel, you can, as in the other party, can choose to. So, there was some kind of a choice given to the parties that you can have four people out of which you will choose two. That stood as the law for the time being. But then came, I think JSW where this issue was again raised. So finally, whether you can appoint your Managing Directors, your employees, your ex-employees, or you can actually delegate their power for them to appoint even from a panel is currently up in challenge before the Constitution Bench of the Supreme Court. So, all this entire issue, I'm hopefully this will be considered very soon, and we will have a clear-cut law on this aspect as well. I think the very point of me being able to appoint my own person is different from party autonomy, because there is some sort of a bias. And this is my view that if you are appointing your own employee or you're whether it's a retired, or whether it's serving, there is an element of bias which may creep in. And why even get into that then? Why don't you just give it to an institution, or maybe the Court to appoint somebody? That's what my view is. So, in short summary, I think our Supreme Court has done a wonderful job in kind of developing this jurisprudence. And I think we are at a stage where at least in so far as disclosure and bias is concerned, we are at a very happy spot in India.

DANIEL SHARMA: Thank you, Dheeraj. It's interesting that the last question that you raised or the last point that you raised is still if I understand correctly, very much open in

India. Very interesting. Thank you. Raj, I have a question for you as well. You're a leading senior advocate of course, and you have certainly come across most of the issues raised in Halliburton as well in your practice. One that's of particular interest to me is that of the repeated appointment of arbitrators by either institutions or the courts whoever is responsible for it. Would you consider this as a problem or under a specific circumstance to be a problem and if so, do you believe this may or should be a convincing ground for challenge for the Indian Courts?

RAJSHEKHAR RAO: Thank you, Daniel. And good afternoon before I start to everybody who's taken time out on a Saturday. We are all prepping for the match, and we are all sitting here. So, I hope I can at least get your attention for the next five minutes. The other thing Daniel... I keep saying the senior advocate leading is a state of mind and I'm still far, far away from that. And as we were repeatedly told you're, only as good as your last brief. So, I'm going to keep this brief now in the process. I'd like to start by saying it's nice to hear what John said, that they have a problem, which I believe is a great problem to have, that in an institutionally appointed process, they haven't had too many challenges or none at all. And I think that is the reflection of a robust arbitral framework. The irony is we believe that fairness is the, you know, is the fundamental foundation of any dispute resolution process. And we still have to have conversations like this to keep reminding ourselves that we are all human and then we tend to kind of fall short from time to time. We moved... and I speak with reference to the Indian experience, the reason we speak increasingly about institutional arbitration and more particularly our most recent amendments, where we are looking at institutionalizing it even further, is because we realize that on the ground notwithstanding the lofty ideals that are expressed in our statutes. On the ground, we see that there is a fundamental disconnect between what ought to be and what is. And this, unfortunately, again, percolates through the framework whether it is a retired judge from the Supreme Court, et cetera. Not to say that we don't have people of integrity. But I think as Dheeraj points out, it's not a question about integrity and that's the point Halliburton makes. It's not a reflection on the individual. It is a reflection on the process. And more importantly, do the two parties who are going to be adjudicated upon feel that they are before somebody who has no preconceived notions or at least when they walk away from that adjudicatory process, whether they win or lose, they walk away with a sense of satisfaction. It's in that context, I believe repeat appointments ex facie both by courts and by institutions should not pose a problem. But having said that really speaking, shouldn't the idea be that repeat appointments per se should not pose a problem if the arbitrator somebody who's standing is recognized? Should it matter that the arbitrator in question has taken a view on a particular subject but is willing to apply it agnostic of his or her views in the facts of a particular case? And therefore, more from a court's perspective, I think

the problem arises when you see a particular court appointing a particular arbitrator to arbitrate a series of disputes. Does that create a cloud over the arbitrators' nexus with the court? Similarly, with an institution, I think I'd be very happy to see a problem that John faces today, where we've got a large pool of arbitrators, and we are still struggling to find people to appoint, which only means that there is space for more. And the idea should be to encourage that. So is the process, do you repeat because you repeat because of the individual or do you repeat because the problem is such that you can't find another? And frankly, if I was somebody who's looking for an objective resolution of a dispute, and I know that there's only one expert, I would rather be I mean, I would be happy to have my dispute adjudicated by the person who knows what this is all about, as long as of course, I have faith and trust in the person's credibility. So, from that perspective Daniel, I think Indian courts, if you were to look at the matter in which Indian courts go about appointing arbitrators in some senses it's a reflection about of the individual's reputation. You will find that some judges over a period of time tend to be appointed from time to time. Some arbitrators tend to be appointed from time to time and fortunately, we are now seeing a trend in India, where non practitioners and practicing lawyers are being chosen over judges and retired judges and that I think is a healthy trend. And that is really what I think we don't have the statistics right now, but it would be useful to see five years down the line, how this process is working. Now from an institutional arbitration perspective, I think it's very, very early in India today, but it is important for any institution that wants to have credibility to convince all participants that the mechanism that they appoint to (A) select their panel, and more importantly, to select the individual from that panel for a particular dispute is robust. And that's the conversation that I think we really need to be having. Because otherwise, I frankly, I like to see a situation where the 7th Schedule notwithstanding, which is a blanket ban on somebody holding office, two parties come and say, no this person is ineligible, in so far as the 7th Schedule is concerned. But we both believe that it would be in our best interest to have our disputes adjudicated by this person. The day we achieve that, as far as a jurisdiction is concerned, I think we've achieved two things. A, we've demonstrated that we are jurisdiction which has credible people. And number 2, we have a system which recognizes that credibility trumps everything, including our statutory ban. It'll be interesting and I'd like to be a fly on the wall or be a participant in that proceeding where somebody says, we both agreed that this person was ineligible. We signed up for it. We don't like the outcome; therefore, we want to challenge. Now, is that something that is even possible? So going by that just to sign off on the two principal points. Institutional arbitration too early as far as India is concerned. But like I said, I think we are a long way from seeing repeat appointments. A statute to that limited extent contemplates and recognizes for some strange reason it restricts itself to maritime disputes. But I'm presuming that that is capable of being expanded to say these are areas where you have a limited pool of practitioners. And I think

again the visibility appears to be it's India centric. And I'm wondering why we're not looking at it as a pool, which may a dispute which has a small pool worldwide. And that is really where I think the challenge is. But if that's the problem I don't see a problem at all as far as the process is concerned. From a court's perspective I don't think I've really seen a case of repeat appointments, particularly in the context of individual disputes. The only one place that we've seen it off late is where you have a long-drawn construction contract going on and you have several disputes arising over a series of the same dispute. Now there is an inherent tendency of courts to want to send subsequent disputes arising out of the same transaction to the same Tribunal. And that's the place where I feel that some discussion needs to be held. Because if I'm now, you know, I've raised dispute 3, by which time the Tribunal has taken a position on dispute 1, which has an impact on future aspects going forward on the same transaction. And surely, as a party, I would believe that I have a serious apprehension. So, if my escalation claim has been rejected for whatever it is worth, do I get escalation for stage 2 and stage 3 from the same Tribunal. On the contrary, if I've been told that the approach to one of the aspects in the dispute is already in a sense cast in stone or because of observations during the course of the hearings, I believe that I may not get a fair outcome. Then do I really want to be sent there? That's the place where I think a lot more time needs to be spent both by court and process on the appointment. And I think if you really want to send it back, please be sure to have the consent of both parties taken in black and white, and perhaps then move forward. I think that's if I've managed to kind of touch on some of those aspects, that's where I am.

DANIEL SHARMA: Thank you very much Raj. I totally agree. I know it from my own practice. For four years I was a member of the appointed committee of the German Institute of Arbitration and so, we had to deal with some of these appointment issues quite often as well. So, one, I think element there are two elements that are important. One is party autonomy of course, in appointing arbitrators, and the other is qualification. And then there are a few other factors that we saw, for example, in Germany, and little wider in Europe, as well, until 15-20 years ago that was that arbitrators were appointed because they were bodies of Counsel or other arbitrators. And fortunately, that's no longer the situation, I would say in Europe. The pool of qualified arbitrators is much larger now and this body system of appointing arbitrators no longer exists. And I very much hope that in other countries we'll get to such a situation as well. So, there's a broad pool of arbitrators. And you need to take care that the pool of arbitrators is always large enough. So, with that Jasleen, my next question would go to you. You have extensive experience both in private practice and as an in-House Counsel. So as a user of arbitration and the whole discussion that we're leading today has an underlying reason, I guess and that's an ethical reason. You told me that when we discussed

the panel and I totally agree with that, there are underlying ethical reasons for arbitrator independence of course, and I would like to ask you for your views on that particular topic.

JASLEEN OBEROI: Thank you, Daniel. And again, good morning, everyone. Thanks for joining us on a Saturday morning. I know it's struggle. It was a struggle for me, but so great to have you all here. It's been a very interesting discussion. And I've been hearing all the insights that have come in that they've got me thinking more which is always good that you come in with that mindset and then you hear others speak and your mind opens a little more. So, coming from, if you are talking about the Indian context and both Dheeraj and Raj who have a lot of experience in that Indian context, have given great perspectives. On paper yes, as Dheeraj said our Supreme Court like it is often ahead of many others and on paper, we are in a good place whether it be both with a statue in terms of disclosure and the concept of fairness. Again, as Raj spoke, courts see mostly we see ad hoc arbitrations in India. They're appointed by High Courts. So again, there's a presumption of the kind of people who are being appointed would be independent and fair. So, in all of that we are happily placed. But to me it always is in what is on paper and what actually translates tends to be different and that's because so much of this is subjective. Because you can have guidelines you can have things. But this is not an objective test, where you have a checklist of things and you'll do tick, tick, tick and it's not going to work that way. So, wherever there's subjectivity, I think then the concept of ethics definitely creeps in. It depends on the person who is playing that role. How do they feel about it? What do they feel is their beholder, responsibility or obligation in the particular thing? How do they want to perceive? So, all of that comes with their own ethical standards. Personally, I feel that in a world we live in today, where everybody knows everything there's no point in hiding things. You may think that I can just slip this through, or this is really something which will not impact this person or my integrity. Who's going to question me as being biased, forget biased even apparent bias. But I'm a firm believer in full and open disclosure. I think Alexandre will be sharing some software, which will be showing that in any way, it's futile to hide. So, when you're in that place, I think being an arbitrator comes with a lot of responsibility. When you are in that place of responsibility it's right at the outset you set out everything. You say I'm an open book and this is where you are and basis of this. You choose me because this is choosing arbitrators is something that's a positive, affirmative act of consent. So, I would think that any responsible or a good arbitrator would have no qualms on issues of disclosure, even on no qualms on issue of dealing with bias or allegations of apparent bias. And that for arbitration to really flourish and be what it was meant to be two parties with consent appoint someone who they think is fair, has the expertise and who's going to give them justice so to say. In that sense, the person who's doing the job needs to step up as well. I think that will help that person more than anything else. Why would any of us, the absolute, distinguished people

who sit in those arbitrators panel, why would they ever want to be accused of bias? Why would they want their decision questioned? So, I think it protects them even more than the litigants or the clients going forward.

DANIEL SHARMA: Thank you very much, Jasleen and I couldn't agree more. Arbitration needs to be a professional process. Ultimately, an Arbitrary Tribunal replaces a state court judge and only if we are sure that the process is professional can there be acceptance for the outcomes of arbitration. And sometimes as a lawyer, I get the question from a client, only from new clients of course, can't we appoint this person or that person he is a friend of mine. And then it's the task of the lawyer to educate the client of course, that it needs to be a professional process. Because you will be involved in other arbitrations, and you don't want the other side as well to appoint good friends in order to hope for a good outcome against the law. Now with that Mr. Raghu, a question to you. You are a very experienced GC and you have seen different company cultures in your long career. As a user of arbitration, what is your view on the Halliburton issues, and what would be your expectations of someone you would consider nominating as a co arbitrator in an arbitration for your internal client.

CV RAGHU: Thanks, Daniel. Good afternoon, everyone. We still about an hour and a half before the India Pakistan match, so this session will be over much before that. Thanks John, thanks Dheeraj, Raj and Daniel for giving a broad perspective on the various jurisprudence what's happening in the Halliburton matter, and what's happening in India. But I think we need to step back a little bit and I say this purely from the contest in which I operate, which is like an in-house Counsel, and how I see arbitration. For me arbitration was never a judicial process arbitration. Arbitration was never evolved to decide constitutional law. Right? It always had the element to finally resolve commercial disputes. Now unfortunately, or fortunately, there's a lot of jurisprudence that is getting written on arbitration. But I don't know what has been the impact on commercial dispute resolution. Okay. So therefore, if you and I say this, I take the risk of saying is on behalf of corporate India, because I've been in this side, do we really want to go in for arbitration unless the stakes are very high? You go to the Chairman, or you go to the promoters and ask them, should we go for arbitration? Their first response is that it's another form of judicial... it's become a second level of judicial proceedings. If that is the case if I have to spend good money after bad money and decide whether it's the process, the people involved, the arbitrators, appointment of arbitrators. The focus has to be resolution of the commercial disputes and not get into the various fancy legal interpretation of the various other elements. Not that that is not important, but somewhere we are losing the woods for the trees. That's one. Coming back to I think in the evolution you see arbitrations and all these judgments that come out and all these precedents are meant for

large stakes but the 80% of the arbitrations are not as large. Therefore, that resolution if happens expeditiously and if it happens independently without bias, as you said to be done very professionally not then my friend is appointed or my relative is appointed as an arbitrator. And to that extent I think the institutional arbitrations have to come in where say a vendor of an OEM stuck for about 10 Cr money and that's in the arbitration. The vendor doesn't have the wherewithal to understand this whole process. He goes to the Counsel he does go and spends. He should have an institution where he goes and says, I have a dispute. The institution picks it up and given the scale and size of the dispute it also gets resolved within his financial means. Otherwise, this institution of or this process of arbitration at some point of time will also end up with the same belief or same fatalistic view nothing happens in the courts nothing will happen in the arbitration. Why should I contest? Things like that. Coming back to your specific question, I went through the Halliburton Judgment it's a lot of good English, a lot of jurisprudence. How much of that... I believe that integrity is something inbuilt either you have it, or you don't have it. You don't want a panel to tell you whether you're biased or you're not biased. And that comes with your actions. That comes with your actions. If a person has done five arbitrations could be the same parties, but the outcome of the arbitration will tell you whether that man or woman has the right integrity and has the courage of conviction to talk on the merits of the matter and not be biased. Who are the parties, what is the parties and that's how you establish. There have been people in the... we've all come across people with very high integrity who somewhat may have the courage to talk their mind. So, you'll have to, and such people need to be rewarded in some other form, not necessarily by the arbitration, but to recognize them. If you don't recognize them, why would people put their neck out and talk the right things. So, I'm not really very first about appointment of arbitrators because the kind of, mostly I have only preferred arbitration when the stakes are very high, and I've gone through institutional arbitration in which I have trusted the institutions to take care of the right appointments. But if you honestly asked my belief unless we get the arbitration down to the next level and the next level, 80%, 85% of your commercial disputes lie, and if you don't make it a tool for them then they'll be writing a lot of books on arbitration, but I don't think it will achieve the purpose for which arbitration started. The courts could do the same purpose.

DANIEL SHARMA: Thank you. Thank you very much, Mr. Raghu. Alexandre, question for you or request you have prepared a tech demo for the audience. That's fantastic. Thank you very much. But you are, of course, an ideal fit for this panel because you are a very experienced arbitration lawyer yourself. You have practiced arbitration law but now you're a tech person and trying to combine both, and we have all had a quick look at your product, and it's very impressive. So, I would like to ask you to give us an insight into that. Please.

ALEXANDRE VAGENHEIM: Thank You, Daniel. I think we're going to see the screen shortly.

[NO VIDEO OR AUDIO FOR THIS PART]

[All right. So let me start to thank MCIA for having us. We've heard this morning Nish announcing our collaboration with MCIA, and we're very proud of that. I think it's very fitting… well thanks for that. Which is great. So, you're going to see it also the Big rave so again, we're very excited with Jus Mundi to announce this partnership with MCIA and announced this new collaboration, and that touches upon two point that I'd like to make on this particular issue of on conflict of interest. One touched upon transparency. And the second one about uniformity and precisely this collaboration with MCIA is really seeking to enhance the accessibility of Indian practice of arbitration by publishing redacted awards and being able to show also the MCIA practice of International Arbitration. So again, very excited for this collaboration. Now coming back, perhaps on the topic of conflict of interest. And where are we standing after Halliburton? So, we at Jus Mundi. So, for those of you who don't know us, we are a tech company, and we develop the most comprehensive database for international arbitration. On the particular topic. So, we have a mission, which is to make international arbitration accessible by making legal research accessible, but also legal professional. And I will touch more upon that part, which is relating to the conflict of interest we're discussing. We have both platforms Jus Mundi and Jus Connect. Jus Mundi to make legal research and Jus Connect is to make research of legal professionals. Onus Connect, you can actually search law firm's experts, lawyers, arbitrators' institution and soon also as Nish announced it earlier. We are also developing the platform to make arbitral Secretary known and visible to the public. This is why we announced it throughout the first training session in Mumbai, and here in Delhi, that we will be putting up all those profiles to be able to showcase this diversity and visibility. I'll take a couple of examples and I try to be entertaining. I know it's Saturday and just before the match. Just to give you example of somebody that we've seen across India week throughout the week in Bangalore, Mumbai. Baiju is the practitioner well known to all of us that gives a little snapshot of his expertise. And obviously we know he has sat in way more than three cases in arbitrator or as Counsel. But this is what's publicly available. And what we are doing is we're aggregating data on a particular person that are publicly available to make sure that you as practitioner, have all the information when you are trying to appoint an arbitrator or when you're choosing a Counsel, or when you're choosing an expert, or if you want, next to a point, an arbitral Secretary. So that's the first step. When we discussed with our user, we realized quickly that they wanted more, and they wanted a tool that allowed them to identify relationships between participants precisely, to be able to determine afterwards whether there

is a conflict of interest, whether to appoint a specific party or not. And we developed this tool, which is called Complete checker which really allows you to do so. And it gives you basically links to a specific database, all the direct and indirect relationship that there exists between participants across the world. And I'll give you two quick examples. So, with your permission, Daniel, I will use an example with you. So, for example, if I want to see if our dear moderator was involved, for example, with a particular person. Let me put Bernahanosio with a famous Belgian arbitrator. I just basically clicked their two names. And I'll see whether there is any relation. And I can see, for example, that Daniel was a counsel in a case for the Respondent, and Danahanoshio was an Arbitrator President. And so, this is really how the tool works. It allows you to pinpoint direct and indirect relationship indirect relationship are all the time where there is a connection, but they were not in the same appearing in the same case. For example, people appearing on a different case but working together in a past or in a present. I'll give you a couple of more example. With Baiju to come back to him for example, I can do the same thing with States and firm taking the example of what are the connection between Baiju as a practitioner and the state of Georgia, and I can see, for example, here that Baiju was counsel in two investment cases against Georgia, and I can do the same, for example, with no firm. What are the connections with determined law firm. I'm taking a global firm, Spanish and Latin American Firms, and I see, for example, that Baiju was a member of Again, this is an investment arbitration. Was a member of the annulment committee and this firm was the Counsel firm for the Claimant again. I'm going to stop here, but I think you understand precisely what's the tool and the power of this tool is making really allowing you to see, for example, I see that decision. I can quickly see here all the participants that were involved in that case, all the lawyers, et cetera this is a whole thing which is unrelated to our present purposes, but I really wanted to show that to you. You also have AI summary of whatever decision you're looking for to assess that relevancy. Two quick example to show you how this is applied in practice by practitioner. And whereas I'm sticking this example, this is Petro Celtic versus Egypt, which is an investment case where actually the parties Jus Mundi to say, well, we don't want this arbitrator. And that challenge was against the famous female arbitrator Bridget Stan, and they use actually our database to say, well, she has been appointed in 118 cases only by States. She is biased in favour of States. We don't want her on our panel. And so, we are seeing. So, the case was settled, and we never had an answer onto that. But what was interesting to see is that how now parties are using technology to actually raise challenge, but the reverse situation is also true, and I'll take this other example, which is endless versus Accidental where actually here the challenge. Arbitrator, who was Larry Shore, another famous practitioner, used again our database to resist that challenge. And here we can see how technology is used also by saying basically that the information was publicly available, that information was available on Jus Mundi. Hence, the party should have known his involvement

in prior project because it enhances and it goes towards a broader disclosure with however, some limited objective criteria that needs to be disclosed in any case. So, this is where we are and this is the impact, at least that we are seeing from the technological aspect. Thank you very much closer with however, some limited objective criteria that needs to be disclosed in any case. So, this is where we are and this is the impact, at least that we are seeing from the technological aspect.

DANIEL SHARMA: Thank you very much thank you very much, Alexandre. Thank you very much panellists. I think it was a very interesting panel. And as I promised at the beginning, we discussed the matter from various perspectives we discussed the matter from various perspectives. Thanks for your interest and with that over to Niti. thanks for your interest and with that over.]

~~~END OF SESSION 2~~~