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CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION PART I

In Memory of Francisco Orrego Vicuña

Articles

State Courts' Attitude to Arbitrator Challenge Applications: Rich Tapestry of Arbitrator Bias Standards

Lord Goldsmith QC, PC, Natalie Reid & Maxim Osadchiy*

ABSTRACT

The exact phrasing and application of arbitrator bias standards often vary across jurisdictions. This lack of uniformity is not conducive to predictability and finality of arbitrations, and does not build confidence in the integrity of a process still largely defined by party selection of the decision-makers. The article examines key aspects of the legal framework governing arbitrator challenge applications in four leading arbitral jurisdictions: the United States, England and Wales, France, and Singapore. It questions whether the textual differences in the formulation of arbitrator bias standard(s) in these jurisdictions are in fact significant, or could actually lead to conflicting outcomes. The article concludes that while the lack of consistency is less acute than is commonly perceived, there would be benefit in greater uniformity. To that end, the authors call for wider reception of soft law instruments in this area where appropriate, consistent with both the longstanding view of arbitration as the preferred method for resolving cross-border business disputes in these and other leading jurisdictions, and increasing interest and acceptance of commercial arbitration in emerging jurisdictions.

1 INTRODUCTION

In 1967, in the landmark *Prima Paint Corp. v Flood & Conklin Manufacturing Co.* decision that established what later became known in the United States as the "separability principle," Justice Black, dissenting with the majority, observed with notorious scepticism:

> … the arbitrators who the Court holds are to adjudicate the legal validity of the contract need not even be lawyers, and in all probability will be nonlawyers, *wholly unqualified to decide legal issues*, and, even if qualified to apply the law, not bound to do so. I am by no means sure that thus forcing a person to forgo his opportunity to try his legal issues in the

* Lord (Peter) Goldsmith is London Co-Managing Partner and Chair of the European and Asian Litigation Practice at Debevoise & Plimpton LLP. Ms. Reid is a Partner in the International Dispute Resolution Group at Debevoise & Plimpton LLP. Mr. Osadchiy is a Senior Associate at Debevoise & Plimpton LLP. The authors are grateful for the assistance of Svetlana Portman, Amina Afifi and Agustin Spotorno of the same firm. The views expressed herein are those of the authors alone.

Goldsmith QC, PC, Lord; Reid, Natalie & Osadchiy, Maxim, 'State Courts' Attitude to Arbitrator Challenge Applications: Rich Tapestry of Arbitrator Bias Standards'. *BCDR International Arbitration Review* 6, no. 1 (2019): 127–148.

> courts where, unlike the situation in arbitration, he may have a jury trial and right to appeal, is *not a denial of due process of law.*[1]

Thankfully, the advancement of arbitration law and practice in recent years and a nearly tectonic shift in attitudes towards arbitration—recognising it as indispensable to efficacious resolution of cross-border disputes[2]—have rendered some of the more extreme forms of judicial scepticism largely extinct.[3] Yet, the broader debate over the place and role of arbitration in modern world is very much alive, and continues at full pace today.[4] One salient aspect of that debate is the treatment of arbitrator challenge applications by national courts.

There is general consensus that courts—the guardians of public order[5]—are free to review questions of arbitrator bias.[6] Yet the test they apply—its exact formulations and application in practice—is far from certain or settled, and is often believed to vary from country to country. This uncertainty is not conducive to the predictability and finality of the process; and does not advance the New York Convention's objective of ensuring uniform treatment of arbitral awards. It could also lead to confusion among arbitration users and arbitrators, undermining the trust in the system which is already facing problems in "maintaining coherence in its jurisprudence and confidence in its efficacy as a dispute-resolution mechanism."[7]

This article proceeds in three further sections. Section 2 examines key aspects of the legal framework applicable to arbitrator challenges in four leading arbitral

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1 *Prima Paint Corp v Flood and Conklin Manufacturing Co*, 388 US 395 (1967) (emphasis added). *See also Commonwealth Coatings Corp v Continental Casualty Co*, 393 US 145, 89 Sct 337 (1968) ("[the courts] should . . . be more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review.").

2 Sundaresh Menon, 'International Arbitration: The Coming of a New Age for Asia (and Elsewhere)' (Keynote Address, Joint Plenary Opening Session A1, International Council for Commercial Arbitration, Congress, Singapore, 11 June 2012) 17 <www.arbitration-icca.org/media/0/13398435632250/ags_opening_speech_icca_congress_2012.pdf> (accessed 9 September 2020).

3 *See e.g. Enviro Petroleum Inc. v Kondur Petroleum SA*, 91 F.Supp.2d 1031, 1036 (S.D.Tex 2000), in which the US District Court for the Southern District of Texas described: "[a] mechanism is provided [in the parties' ICC arbitration agreement] for a party fearing bias to make written challenges to the selection of an arbitrator. In short, *it would be the height of arrogance for this Court to assume that the rules and procedures of the ICC governing international arbitration are incapable of giving Enviro a 'fair shake' and that only this Court can provide an impartial and neutral forum.*" (emphasis added).

4 Julian DM Lew, 'Does National Court Involvement Undermine the International Arbitration Process?' (2009) 24 AUILR 489; Elizabeth Gloster, 'Symbiosis or Sadomasochism? The Relationship Between the Courts and Arbitration' (2018) 34 Arbitration International 321.

5 Jan Paulsson, *The Idea of Arbitration* (OUP 2013), 245.

6 Judge Dominique Hascher, 'Independence and Impartiality of Arbitrators: 3 Issues' (2012) 27 AUILR 789, 803. *See also* Lord Steyn, 'England: The Independence and/or Impartiality of Arbitrators in International Commercial Arbitration' in International Chamber of Commerce, *Independence of Arbitrators* (International Court of Arbitration Bulletin 2007) 18 Special Supplement 91, 95 ("a legal court has the final determination as a matter of public policy").

7 Jonathan Mance, 'Arbitration: A Law unto Itself?' (2016) 32 Arbitration International 223, 241.

jurisdictions: the United States, England and Wales,[8] France, and Singapore. Section 3 identifies key themes common to the jurisdictions surveyed and some differences in the way these jurisdictions approach arbitrator challenge applications. It questions whether the textual differences in the formulation of arbitrator bias standard(s) in these jurisdictions are in fact significant, and could result in conflicting outcomes. Section 4 examines efforts to address the lack of uniformity in national standards regarding arbitrator bias, focusing, in particular, on the development of soft law instruments in this area.

The article concludes that while the lack of uniformity in national standards regarding arbitrator bias in the jurisdictions surveyed is perhaps less acute than is commonly perceived, there would be benefit in greater uniformity. Indeed, while the outcomes of arbitrator challenge applications are likely to be broadly similar most of the time in most of the cases in most of the jurisdictions surveyed, the difference in the formulation of the arbitrator bias standard(s) means that there is at the very least potential for inconsistent results. Against this backdrop, the article calls for wider reception of soft law instruments where appropriate, consistent with the continued trend towards greater confidence in arbitration as the proven and reliable dispute resolution mechanism it is.

2 ARBITRATOR BIAS STANDARD(S): SURVEY OF JURISDICTIONS

2.1 United States: Evident Partiality

In the United States, arbitrator challenges are governed by the Federal Arbitration Act ("FAA") and case law.[9] The statutory threshold for vacating an award under the FAA is evident partiality.[10] The court may vacate the award "[w]here there was evident partiality or corruption in the arbitrators, or either of them."[11] Despite this express statutory language, courts have struggled to develop a uniform standard

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8 For brevity, in this article England and Wales is referred to as England.

9 Mark W Friedman and Floriane Lavaud, 'Arbitration Guide: IBA Arbitration Committee: United States' (Updated January 2018) 4.

10 *Standard Tankers, ETC v Motor Tank Vessel, Akti*, 438 F. Supp 153 (EDNC 1977) 159 (confirming the 'evident partiality' test).

11 FAA, s 10. Section 10 of the FAA applies to awards made in the United States. The grounds for refusing enforcement of foreign arbitral awards are set out in the New York Convention: Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, entered into force 7 June 1959, 330 UNTS 3. The relevant grounds for challenges based on lack of impartiality are found in Article V(1)(*d*) (irregularities in composition or procedure of the tribunal) and/or Article V(2)(*b*) (awards against public policy of the enforcing State). *See* J Stewart McClendon, 'Enforcement of Foreign Arbitral Awards in the United States' (1982) 4 Nw. J. Int'l L. & Bus. 58, 65.

and have adopted conflicting tests on what constitutes 'evident partiality.'[12] As a result, the law in this area remains unsettled.[13]

The long-standing court guidance on the application of the 'evident partiality' standard was laid down over a half a century ago by the US Supreme Court in the *Commonwealth Coatings v Continental Casualty Co.* case.[14] In a dispute concerning a services contract, the chairman of the tribunal failed to disclose his prior service as an engineering consultant for one of the parties, and was challenged on that basis.

The question that split the Supreme Court Justices—and many judges in the United States for decades to come—was over the scope of arbitrators' disclosure obligations and the consequences of the failure to disclose. In a 6-3 decision, delivered for the majority by Mr Justice Black, the Court held that the chairman's failure to disclose his prior work for one of the parties—albeit sporadic[15]—was sufficiently serious to constitute 'evident partiality,' and vacated the award.[16] Although the award was unanimous and the Court found there was no actual bias,[17] the majority nonetheless held that *any* relationship that might create an "impression of possible bias" should be disclosed; and that an arbitrator's failure to disclose such a relationship would be sufficient to set aside an award for lack of impartiality.[18] The minority, led by Mr Justice Fortas, held that an arbitrator's non-disclosure *alone*—*i.e.*, with no suggestion that the non-disclosure indicates partiality or bias—would not warrant a vacatur. *Commonwealth Coatings* therefore set a high bar with respect to arbitrator disclosure,[19] mandating vacatur of awards where arbitrators failed to disclose the relevant circumstances.

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12 *Monster Energy Co, f/k/a Hansen Beverage Co v City Beverages, LLC, d/b/a Olympic Eagle Distributing: On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit: Petition for a Writ of Certiorari* (US Supreme Court 28 May 2020) (Monster Energy US Supreme Court Petition).

13 Mark Kantor, 'Arbitrator Disclosure: An Active but Unsettled Year' (2008) 5(4) TDM. *See also* Mitchell L Lathrop, 'Arbitrator Bias in the United States: A Patchwork of Decisions' (2013) 80 DCJ 146.

14 *Commonwealth Coatings* (n 1).

15 Despite the sporadic nature of the relationship, the Court pointed out that the prime contractor's patronage "was repeated and significant, involving fees of about $12,000 over a period of four of five years." *Commonwealth Coatings* (n 1) [2].

16 The Court held that "where the arbitrator has a substantial interest in a firm which has done more than trivial business with a party, that fact must be disclosed" and that "[i]f arbitrators err on the side of disclosure, as they should, it will not be difficult for courts to identify those undisclosed relationships which are too insubstantial to warrant vacating an award." *Commonwealth Coatings* (n 1) [14].

17 *Commonwealth Coatings* (n 1) [17].

18 *Commonwealth Coatings* (n 1) [3]. The thrust of the majority's position appears to be that arbitrators should be subject to a more rigorous scrutiny than judges when it comes to questions of impartiality: "[i]t is true that arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work deciding cases, but we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review… ."

19 Nigel Blackaby and others (eds) *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) para 4.104. *See also* Seung-Woon Lee, 'Arbitrator's Evident Partiality: Current U.S. Standards and Possible Solutions Based on Comparative Reviews' (2017) 9 Arb. L. Rev. 159.

Since *Commonwealth Coatings,* federal courts in the United States have generally followed the Supreme Court's approach with respect to arbitrator disclosure but often disagreed as to the consequences of the failure to disclose where there is no evidence of actual bias.[20] Some lower courts find evident partiality any time an arbitrator fails to disclose information that might create *an impression of possible bias*.[21] Others will vacate an award only when a reasonable observer would *have to* conclude the arbitrator was partial towards one of the parties.[22] The rationale is that applying a threshold as low as the *reasonable impression of bias* may jeopardise the finality of arbitration, leading to the proliferation of potentially expensive and vexatious satellite litigation over an arbitrator's "complete and unexpurgated business biography."[23]

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[20] Peter B Rutledge and others, 'Part II Country Reports, 15 United States of America, III The Arbitral Tribunal' in Frank-Bernd Weigand and Antje Baumann (eds) *Practitioner's Handbook on International Commercial Arbitration* (3rd edn, OUP 2019) paras 15.77–15.81. The fact that *Commonwealth Coatings* was a majority decision with Justices expressing diverging views on the scope of disclosure and the consequences of failing to disclose has contributed to the 'Circuit split' on the issue. As *Monster Energy* put it in its Supreme Court petition, "[t]he Court's decision was so fractured and its reasoning so opaque that lower courts cannot agree on which rationale is controlling, much less on what standard to derive from it." *See* Monster Energy US Supreme Court Petition (n 12).

[21] *New Regency Prods., Inc. v Nippon Herald Films, Inc.* 501 F.3d 1101, 1111 (9th Cir. 2007) (noting "evident partiality" of an arbitrator is "distinct from actual bias" and explaining that "failure to disclose facts that show a reasonable impression of partiality is sufficient to support vacatur, notwithstanding the lack of evidence of [an arbitrator's] actual knowledge of those facts."); *OOGC Am. LLC v Chesapeake Expl., L.L.C.*, No. CV H-17-248, 2018 WL 6333830 (US District Court (S.D. Tex.), 2018) (vacating an award due to an arbitrator's failure to disclose "relationships or circumstances that would lead a reasonable, disinterested person to question his impartiality"). *See also* Monster Energy US Supreme Court Petition (n 12), p. 2 (discussing a split among the circuits regarding the "evident partiality" standard). But *see OOGC America, L.L.C. v Chesapeake Exploration, L.L.C.* (5th Cir. No. 19-20002, September 14, 2020) (appellate decision, discussed below, overturning the Texas district court decision).

[22] *See e.g. Nationwide Mutual Ins Co v Home Ins Co*, 429 F.3d 640, 644–45 (6th Cir. 2005) (opting for a more stringent standard, namely "whether a reasonable person *would have to conclude that the arbitrator was partial to one party to the arbitration*," and thus holding that arbitrator's previous service in six matters as arbitrator for one of the parties and social engagements with a party's attorneys at events did not require vacatur); *Uhl v Komatsu Forklift Co*, 512 F.3d 294 (6th Cir. 2008) (refusing to vacate an award where the arbitrator had acted as co-counsel with the attorney for plaintiff on the basis that the facts did not reach the level of evident partiality; namely, that a reasonable party would have to conclude that the arbitrator was partial to the other party); *See Morelite Constr. Corp. v N.Y.C. Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984) (holding that the FAA requires a showing of something more than the mere appearance of bias to vacate an arbitration award and that evident partiality "will be found where a reasonable person *would have to conclude* that an arbitrator was partial to one party to the arbitration"); *JCI Commc'ns, Inc. v Int'l Bhd. of Elec. Workers, Local* 103, 324 F.3d 42, 51 (1st Cir. 2003) (stating that evident partiality means a situation in which "a reasonable person *would have to conclude* that an arbitrator was partial to one party to an arbitration."); *Freeman v Pittsburgh Glass Works, LLC*, 709 F.3d 240, 251-53 (3rd Cir. 2013) (adhering to the more stringent standard and holding that "[t]he word 'evident' suggests that the statute requires *more than a vague appearance of bias*. Rather, the arbitrator's bias must be sufficiently obvious that a reasonable person would easily recognize it."). *See also ANR Coal Co. v Cogentrix of N.C., Inc.,* 173 F.3d 493, 500 (4th Cir. 1999); *See also Cooper v WestEnd Capital Mgmt., L.L.C.,* 832 F.3d 534, 545 (5th Cir. 2016).

[23] In the words of the Fifth Circuit: "Awarding vacatur in situations such as this would seriously jeopardize the finality of arbitration. Just as happened here, losing parties would have an incentive to

The lack of a uniform arbitrator bias standard arose with particular force in *Monster Energy v City Beverages*.[24] In a dispute over termination of a distribution agreement between Monster Energy and City Beverages, a sole arbitrator with JAMS[25] issued an award in favour of Monster Energy. The company sought to confirm the award but City Beverages opposed, asserting evident partiality on the basis of the arbitrator's failure to disclose his ownership interest in JAMS.[26] The district court dismissed the challenge (and confirmed the award) but the Ninth Circuit, by majority, reversed, and vacated the award.[27] According to the Ninth Circuit, the arbitrator's failure to disclose his ownership interest, coupled with the fact that JAMS has administered 97 arbitrations for Monster Energy over the past five years, created a reasonable impression of bias, warranting vacatur.[28] Monster Energy petitioned to the Supreme Court for review, urging the Court to provide the long absent guidance to lower courts on the meaning of "*evident partiality*."[29] The Supreme Court declined to grant certiorari, however, leaving the split among the circuits regarding the applicable arbitrator bias standard unresolved.

As a result, "*evident partiality*" challenges remain ripe ground for disgruntled litigants, often producing conflicting outcomes across different circuits. The Fifth Circuit's recent decision in *OOGC America, L.L.C. v Chesapeake Exploration, L.L.C.* illustrates the point.[30] The dispute concerned allegedly excessive fees paid to, *inter alia*, FTS International Inc., an oilfield services company allegedly controlled by Chesapeake, under a suite of agreements relating to an oil and gas

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conduct intensive, after-the-fact investigations to discover the most trivial of relationships, most of which they likely would not have objected to if disclosure had been made. Expensive satellite litigation over nondisclosure of an arbitrator's "complete and unexpurgated business biography" will proliferate. Ironically, the "mere appearance" standard would make it easier for a losing party to challenge an arbitration award for nondisclosure than for actual bias." *Positive Software Solutions, Inc v New Century Mortgage Corp*, 476 F 3d 278 (5th Cir. 2007), cert. denied, 127 S Ct 2943, 285, 286. *See also* Judge Friedland's dissenting opinion in *Monster Energy Co v City Beverages, LLC,* No 17-55813 (9th Cir. 2019), warning that the impression of possible bias standard that the majority adopted requires redoing myriad arbitrations, "prolong[ing] disputes that both parties have already spent tremendous amounts of time and money to resolve." App. 25a (Friedland J, dissenting).

24 Monster Energy US Supreme Court Petition (n 12).

25 JAMS, formerly known as Judicial Arbitration and Mediation Services, Inc., is an alternative dispute resolution provider, based in the United States.

26 *Monster Energy Co v City Beverages, LLC,* No 17-55813 (9th Cir. 2019).

27 *Ibid*.

28 *Ibid*.

29 *Ibid*. at 2. Notably, in what appears to be a historic first, JAMS intervened and filed an amicus submission in support of Monster Energy's petition. JAMS argued that the Ninth Circuit will "open the floodgates to unhappy litigants asserting post-hoc claims of nondisclosure … without any showing that the non-disclosed information created any reasonable appearance of partiality at all." *Monster Energy Co, f/k/a Hansen Beverage Co. v City Beverages, LLC, d/b/a Olympic Eagle Distributing: On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit: Brief of JAMS, Inc as Amicus Curiae in Support of Petitioner* (June 2020).

30 *OOGC America, L.L.C. v Chesapeake Exploration, L.L.C.* (5th Cir. No. 19-20002, September 14, 2020).

project. The underlying arbitration clause provided that "an arbitrator must not have performed material work for affiliates for the preceding five years." An arbitrator selected by Chesapeake failed to disclose his ties to FTS, including his recent representation of that company, and OOGC sought to vacate awards rendered by the tribunal on grounds of "evident partiality." The district court upheld the motion and vacated the awards[31]—a decision consistent with the likely outcome in other circuits.[32] The Fifth Circuit disagreed, overturning the vacatur and confirming the awards. In a unanimous decision, the Court held that the "*evident partiality*" standard is "stern," requiring "specific facts from which a reasonable person would have to conclude that the arbitrator was partial" to its opponent.[33] Because OOGC's arguments were "more speculative" than "concrete," the Court found that OOGC had not met the stringent standards necessary to make "[t]he draconian remedy of vacatur" appropriate.[34]

2.2 England: Real Possibility

In England, arbitrator challenges are governed by the English Arbitration Act 1996 ("EAA") and case law. Section 24(1)(a) of the EAA allows a party "to apply to the court to remove an arbitrator" where "circumstances exist that give rise to justifiable doubts as to his impartiality." Further, section 68 of the EAA allows a party to challenge an award on the grounds of serious irregularity affecting the tribunal, the proceedings or the award, which includes arbitrator bias.[35]

The EAA has a number of distinct features. Insofar as relevant to arbitrator challenges, three are of note. The *first* is that the EAA does not contain an express duty of arbitrator disclosure, unlike the UNCITRAL Model law and the FAA. That duty, however, is implied. As the UK Supreme Court clarified most recently in *Halliburton Co v Chubb Bermuda Insurance Ltd*, "there is a legal duty of disclosure in English law which is encompassed within the statutory duties of an arbitrator under section 33 of the 1996 Act and which underpins the integrity of English-seated arbitrations."[36] The arbitrators are held to the same strict disclosure

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31 *OOGC Am. LLC* (n 21).
32 *Ibid*.
33 *OOGC America, L.L.C* (n 30).
34 *Ibid*.
35 EAA, s 68 does not expressly mention arbitrator bias. However, serious irregularity includes a situation where there is "(a) failure by the tribunal to comply with section 33 (general duty of tribunal)." Section 33(1)(a), in turn, provides that the tribunal shall "act fairly and impartially as between the parties giving each party a reasonable opportunity of putting his case and dealing with that of his opponent."
36 *Halliburton Company v Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd)* [2020] UKSC 48 [81] (per Lord Hodge). Lord Hodge further clarified that disclosure is not just a question of

standard that applies to judges[37] and must disclose matters which might reasonably give rise to justifiable doubts as to their impartiality.[38] Such disclosure extends to matters known to the arbitrator at the relevant time but generally does not include a duty to make reasonable enquiries.[39]

The *second* relevant feature of the EAA is that it does not contain a requirement that an arbitrator be independent; only that he or she be impartial. The rationale is that "there may well be situations in which parties desire their arbitrators to have familiarity with a specific field, rather than being entirely independent."[40] *Finally*, an application to remove an arbitrator or set aside an award for bias requires a showing of 'substantial injustice' to the applicant.[41] This requirement, which is not found in any of the other jurisdictions surveyed, arguably could make it harder to challenge an arbitrator for bias in England.[42]

The EAA's "justifiable doubts"[43] provision has been interpreted by the Court of Appeal to mean "facts or circumstances which would or might lead the fair-minded and informed observer,[44] having considered the facts, to conclude that

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best practice but is a matter of legal obligation under English law, unless the parties have waived their right to disclosure [78].

37 *Halliburton* (n 36) [70] (per Lord Hodge) ("An arbitrator, like a judge, must always be alive to the possibility of apparent bias and of actual but unconscious bias."). Lord Hodge also observed, referring to Lord Hope's famous pronouncement regarding the importance of a proper disclosure at the beginning of the process in *Davidson v Scottish Ministers*, that that position "mutatis mutandis applies to the arbitrator as much as to the judge."

38 *Halliburton* (n 36) [107-115] (per Lord Hodge).

39 *Halliburton* (n 36) [107] (per Lord Hodge). In so finding Lord Hodge followed the Court of Appeal's formulation of the duty of disclosure, albeit with a qualification that there may be circumstances "in which an arbitrator would be under a duty to make reasonable enquiries in order to comply with the duty of disclosure," as he explained in more detail in the judgement.

40 The Rt Hon Lord Justice Saville, Chairman, Departmental Advisory Committee on Arbitration Law, *Report on the Arbitration Bill* (February 1996). *See also Stretford v Football Association Ltd* [2007] EWCA Civ 238, [2007] 2 All ER Comm 1 ("lack of independence is only relevant if it gives rise to [justifiable] doubts, in which case the arbitrator can be removed for lack of impartiality").

41 EAA, ss 68(2) and 24(1). Robert Merkin and Louis Flannery, *Arbitration Act 1996* (5th edn, Routledge 2014) 86.

42 Pedro Sousa Uva, 'A Comparative Reflection on Challenge of Arbitral Awards through the Lens of the Arbitrator's Duty of Impartiality and Independence' (2009) 20(4) Am. Rev. Int'l Arb. 479, 482-487. *See* however *Cofely Ltd v Bingham* [2016] EWHC 240 (Comm) 116 ("Where there is actual or apparent bias there is also substantial injustice and there is no need for this to be additionally proved").

43 The term 'justifiable doubts' is nowhere defined in the EAA, or in the UNCITRAL Model Law. *See* Audley William Sheppard and James Dingley, *Quick Answers on Appointment and Challenge of Arbitrators – United Kingdom* (Kluwer Law International 2020) (stating that there is no statutory definition under the EAA and that "the test for impartiality has been developed in case law.").

44 In *Helow v Secretary of State for the Home Department and Another (Scotland)* [2008] UKHL 62 [1] (per Lord Hope of Craighead) famously described the 'fair minded and informed observer' as: "[A] relative newcomer among the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively. Like the reasonable man whose attributes have been explored so often in the context of the law of negligence, the fair minded observer is a creature of fiction. Gender-neutral (as this is a case where the complainer and the person complained about are both women, I shall avoid using the word 'he'), she has attributes which many of us might struggle to attain to."

there was a *real possibility* that the arbitrator was biased."[45] The objective '*real possibility*' test involving the fair-minded and informed observer is well-settled in English law[46] and applies equally to judges and arbitrators.[47]

It was not until recently, however, that English judges adopted this test.[48] Initially, some 65 years ago, the 'real likelihood of bias' test was established in *R v Camborne Justices ex. Pearce*.[49] Three decades later, however, that test was changed to 'reasonable suspicion of bias.'[50] Subsequently, following the House of Lords' decision in *R v Gough,*[51] English courts adopted a more stringent 'real danger' test: "whether, having regard to the relevant circumstances, there [is] a *real danger* of bias on the part of the relevant member of the tribunal in question in the sense that he might unfairly regard or have unfairly regarded with favour or disfavour the case of a party to the issue under consideration by him."[52] The test was then again reformulated by the Court of Appeal in *Re Medicament* to an arguably more lenient "real possibility of bias" test, that is: whether "the relevant circumstances would lead a fair minded and informed observer to conclude that there was a *real possibility* that the tribunal was biased."[53] This test was later endorsed by the House of Lords in *Porter v Magill*,[54] and has largely been followed since.[55]

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45 *See also Laker Airways Inc v FLS Aerospace Ltd* [1999] EWHC B3 (Comm) [71] (where Rix J held that the statutory standard is an objective one and that "appear to reflect the common law in England regarding questions of bias.").

46 *Halliburton* (n 36) [69] (per Lord Hodge).

47 *Halliburton* (n 36) [55] (per Lord Hodge). ("But in applying the test to arbitrators it is important to bear in mind the differences in nature and circumstances between judicial determination of disputes and arbitral determination of disputes.").

48 In adopting the 'real possibility' test, the English courts sought to align English law on arbitrator bias with the ECtHR's jurisprudence. *See* Sheppard and Dingley (n 43) 9.

49 [1955] 1 QB 41, [51]. *See* Chan Leng Sun, 'Arbitrators' Conflicts of Interest: Bias by Any Name' (2007) 19 SAcLJ 245, 249.

50 *R v Mulvihill* [1990] 1 All ER 436, 441. *See also* Ronán Feehily, 'Neutrality, Independence and Impartiality in International Commercial Arbitration, A Fine Balance in the Quest For Arbitral Justice' (2019) 7 Penn. St. J.l. & Int'l Aff. 88, fn 68.

51 [1993] 2 All ER [724].

52 *Ibid*. [725].

53 *Re Medicaments and Related Classes of Goods* (No 2) [2001] ICR 564 (emphasis added). *See also Halliburton Co v Chubb Bermuda Insurance Ltd* [2018] EWCA Civ 817, [2018] 1 WLR 3361 (explaining that the test entails "taking a balanced and detached approach, having taken the trouble to be informed of all matters that are relevant" – *see*, for example, *Helow v Secretary of State for the Home Department* [2008] 1 WLR 2416 at [2]-[3], per Lord Hope").

54 [2002] 1 All ER 465. Lord Hope in that case expressed reluctance in keeping the expression 'real danger'; thus holding that it no longer served a useful purpose and was not in line with the jurisprudence of the European Court of Human Rights ("ECtHR").

55 *See*, more recently, *Halliburton* (n 36) [67] (per Lord Hodge). *See also Helow v Secretary of State for the Home Department and Another (Scotland)* [2008] UKHL 62, [14] (per Lord Hope) ("The legal test to be applied in cases of apparent bias is to be found in the speech of my noble and learned friend"), Lord Hope of Craighead, in *Porter v Magill* [2002] 2 AC 357, 494 ("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."). *See*, similarly, *ASM Shipping Ltd of India v TTMI Ltd of*

Most recently, English courts had to grapple with the issue of arbitrator disclosure obligations in multiple references concerning the same or overlapping subject matter. In the *Halliburton* case mentioned above, Halliburton brought an insurance claim against Chubb in connection with the Deepwater Horizon incident in the Gulf of Mexico in April 2010. Following the tribunal's constitution[56] and without Halliburton's knowledge, the chair had accepted appointments in two other references arising from the same Deepwater Horizon incident (in one case as Chubb's party appointed arbitrator). Halliburton applied to the High Court for removal of the chair under section 24 of the EAA, arguing that the overlapping references had given rise to justifiable doubts over the chair's impartiality. The High Court rejected the challenge and so did the Court of Appeal. According to the Court of Appeal, the chair's non-disclosure of his appointments in related references concerning overlapping subject matter did not, in and of itself, give rise to an appearance of bias.[57] Permission to appeal to the Supreme Court was granted and a hearing took place in November 2019.[58]

In an eagerly anticipated judgment notable for its careful and extensive treatment of the topic of apparent bias, the Supreme Court held that while the acceptance of appointments in multiple references concerning the same or overlapping subject matter with only one common party may in certain circumstances give rise to an appearance of bias (and may therefore have to be disclosed),[59] whether it actually does is a determination sensitive to the facts, as well as custom and practice in the relevant field of arbitration.[60] Considering the chair's failure to disclose his appointments in related references, the Supreme Court found that the chair was under a duty to disclose those matters,[61] and that duty was breached when he failed to do so. However, because at the date of the hearing of Halliburton's removal application the chair had already explained his failure to disclose[62]—an explanation accepted by Halliburton's lawyers—the

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England [2005] EWHC 2238 (Comm); *Norbrook Laboratories Ltd v Tank* [2006] EWHC 1055 (Comm), [2006] 2 Lloyd's Rep 485.

56 Notably, the chair of the tribunal was appointed by the High Court, as the parties were unable to agree on the candidate and asked the Court to make the requisite appointment which it did, choosing Chubb's preferred candidate, "M." Halliburton did not seek to appeal the Court's order.

57 *Halliburton* CA (n 53) [50].

58 Notably, the case, which garnered much attention in the arbitration community, saw interventions from a number of international bodies, including the ICC and the LCIA.

59 *Halliburton* (n 36) [131] (per Lord Hodge).

60 *Halliburton* (n 36) [87] [136] (per Lord Hodge). The Supreme Court noted that parties may be taken to accede to such customs and practices when submitting their disputes to the relevant institutions (thereby accepting that overlapping appointments do not call into question the relevant arbitrator's fairness or impartiality). *Halliburton* (n 36) [91] (per Lord Hodge).

61 *Halliburton* (n 36) [145] (per Lord Hodge).

62 According to the Supreme Court, it is that date—and not the date when the disclosure duty arose—that is relevant to assessing if there is a real possibility that an arbitrator is biased. *Halliburton* (n 36) [123] (per Lord Hodge). ("[T]he Court of Appeal was correct … to apply the test for apparent

Supreme Court saw no basis to conclude that "the fair-minded and informed observer would infer from the oversight that there was a real possibility of unconscious bias on [the chair's] part."[63] The Supreme Court therefore dismissed the appeal.

The Supreme Court judgement brings crucial and welcome guidance in an area of law that has long been perilously uncertain. In affirming the existence and clarifying the scope and boundaries of arbitrator disclosure duties, the Supreme Court established a valuable framework for dealing with arbitrator bias issues in England, bringing the English law position largely in line with international best practice. While the Supreme Court's application of that framework to the facts may raise questions, one can perhaps agree with the view that "[i]f the world of arbitration was holding its breath as to what *Halliburton v Chubb* would mean for London as a leading place of arbitration, it can now let out a sigh of relief."[64]

2.3 France: Reasonable Doubts

In France, arbitrator challenges are principally governed by the French Code of Civil Procedure ("FCCP").[65] Article 1456 of the FCCP requires arbitrators to disclose "any circumstance that may affect [their] independence or impartiality" and allows for the removal of an arbitrator within one month of the disclosure or "the discovery of the fact at issue."[66] Further, Article 1502 of the FCCP allows a party to challenge an award on the grounds that the "arbitral tribunal was not properly constituted," which encompasses arbitrator bias.[67]

The arbitrator bias standard that French courts apply is 'reasonable doubts.'[68] The *Court of Cassation*, the highest court in France, has recently explained the test

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bias by asking whether "at the time of the hearing to remove" the circumstances would have led the fair-minded and informed observer to conclude that there was in fact a real possibility of bias.").

63 *Halliburton* (n 36) [149] (per Lord Hodge).

64 Comment by Constantine Partasides QC, counsel to the ICC International Court of Arbitration (intervener), Halliburton v Chubb: comments from counsel, <https://globalarbitrationreview.com/halliburton-v-chubb-reactions-of-those-involved> (accessed 4 December 2020).

65 Court practice is less important in France than in England and the United States, France being a civil law country. That practice has however contributed to the development of the existing international arbitration framework in France. *See* Alexandre Bailly and Xavier Haranger, *Arbitration Procedures and Practice in France: Overview* (Thomson Reuters 2020).

66 French Code of Civil Procedure ("FCCP"), art 1456. A translation is available on the website of the Arbitration Institute of the Stockholm Chamber of Commerce <https://sccinstitute.com/media/37105/french_law_on_arbitration.pdf> (accessed 9 September 2020). Denis Bensaude, 'French Code of Civil Procedure (Book IV), Article 1456' in Loukas A Mistelis (ed), *Concise International Arbitration* (2nd edn, Kluwer Law International 2015) 1147-49.

67 FCCP, art 1456. *See* Dominique Hascher and Béatrice Castellane, *French Case Law Annual Report* (2011) 4. *See* Hascher (n 6) 797, 799, 802, 804.

68 Hascher and Castellane (n 67) 3. *See Cour de Cassation* [Cass.] 1e civ, Mar. 16, 1999 (1999) Rev Arb 308 (France) ("the duty of the judge on appeal is to assess whether the circumstances were likely to

thus: whether the arbitrator's failure to disclose "is likely to cause, *in the minds of the parties*, a reasonable doubt as to its independence and thus its impartiality."[69] The test is largely subjective:[70] it focuses on doubts 'in the eyes' or 'the minds' of the parties[71] rather than those of an objective 'fairly-minded observer.' This test is relatively well-settled and applies both to arbitrator's disclosure and challenges.

An arbitrator's continuous duty of disclosure is strict, and failure to disclose the relevant circumstances may lead to a setting aside of the award.[72] Lack of disclosure *alone*, however, would not warrant a set-aside.[73]

An important exception to an arbitrator's duty of disclosure in French law—also known as the *notoriété* exception—is that circumstances which may affect an arbitrator's independence and impartiality, which are public knowledge and "easily accessible"[74] at the time of arbitrator's appointment, need not be disclosed.[75]

A recent decision of the newly created International Chamber of the Paris Court of Appeal sheds further light on arbitrators' duty of disclosure and the *notoriété* exception. In *Société D v Société E*, a Brazilian company sought to set aside a series of awards made against it by a Paris-seated tribunal on the basis of the arbitrator's failure to disclose links with one of the respondents.[76] The Court found that, while the undisclosed information was in the public domain, it was not "easily accessible," and therefore, did not fall within the *notoriété* exception. The Court held that the arbitrator should have disclosed that information to the

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cause either party to have *a reasonable doubt as to the independence and impartiality of the arbitrator.*") in Hascher (n 6) 798.

69 *Cour de Cassation*, Case 14-26279 (emphasis added). *See similarly Etat du Qatar v Creighton*, Cass. 1re civ 16 March 1999, Rev Arb 1999, 308 ("it is incumbent upon the judge of the lawfulness of the arbitral award to assess the independence and impartiality of the arbitrator *by pointing out any circumstance of such a nature as to alter his/her judgment and create a reasonable doubt in the eyes of the parties on these qualities, which pertain to the very essence of arbitral function*").

70 This is not entirely settled, however. On occasion, French courts have also made reference to the objective 'fair-minded observer' test. *See e.g. Emivir, Loniewski, Gauthier v ITM* (2011) (in Hascher and Castellane (n 67) 5.

71 *See also* Bensaude (n 66) 1148.

72 Paris Court of Appeal, Judgment of 14 October 2014, Case 13/13459. *See also Cour de Cassation*, Case 14-26279 (emphasis added). *See similarly Etat du Qatar v Creighton*, Cass. 1re civ. 16 March 1999, Rev Arb 1999, 308.

73 Decision of International Chamber of the Paris Court of Appeal in *Société D v Société E,* N° RG 19/07575 N° Portalis 35L7-V-B7D-B7WDI, 25.02.2020 Cour d' Appel de Paris Chambre commerciale internationale Pôle 5 - Chambre 16 (involving Brazilian company, *Dommo Energia*), <www.cours-appel.justice.fr/paris/25022020-rg-1907575-sentence-arbitrale-internationale-international-arbitral-award> (accessed 9 September 2020).

74 Paris Court of Appeal, Judgment of 2 July 2013, Case 11/23234, *La Valaisanne Holding LVH* (6 May 2014) Case 12/21230; *Société D v Société E.*

75 *Société D v Société E.*

76 The links were that the arbitrator had worked for a Saudi law firm that was affiliated with another law firm that had connections with the respondent (two of its shareholders were clients of that law firm) from 2012 to 2015 (two and a half years before the arbitration began).

parties, and that the parties did not have to investigate the relevant facts themselves.[77] However, because the arbitrator's undeclared activity had not given rise to any direct or indirect link with one of the parties,[78] the non-disclosure did not give rise to a reasonable doubt in the mind of the parties as to the arbitrator's impartiality and independence.[79] The Court, therefore, declined to set aside the award.

2.4 Singapore: Reasonable Suspicion

In Singapore, arbitrator challenges involving international arbitrations[80] are governed by the Singapore International Arbitration Act ("SIAA") and case law. The SIAA incorporates the UNCITRAL Model Law almost in its entirety, including provisions on arbitrator bias.[81] The SIAA therefore provides for an arbitrator's continuing duty to disclose—and allows a party to challenge if there are—"any circumstances likely to give rise to justifiable doubts as to his impartiality or independence." Further, a party may seek to set aside an award on the basis that the composition of the tribunal was not in accordance with the law or the parties' agreements, which includes arbitrator bias.[82]

The arbitrator bias standard is not set out in the SIAA[83] but has been developed by courts.[84] Some 30 years ago, in *Turner Asia Pte Ltd v Builders Federal*, the Supreme Court of Singapore was asked to consider an application to remove an arbitrator based on alleged bias following his '*sarcastic, to the point of being hostile'*

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77 *Société D v Société E* (the International Chamber held that accessing the public information involved several operations similar to 'investigative measures' which could not characterise 'easily accessible' information and thus could not fall within the *notoriété* exception and should have been disclosed).

78 *Ibid*.

79 *Ibid*.

80 Singapore International Arbitration Act 1994, Art. 5 ("SIAA"). For its part, the Singapore Arbitration Act governs domestic arbitrations seated in Singapore where the SIAA does not apply. *See* Alvin Yeo and Lim Wei Lee (2018) Arbitration Guide, IBA Arbitration Committee, pp. 4-5 <https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Arbcountryguides.aspx> (accessed 9 September 2020).

81 SIAA, Art. 3 (Model Law to have force of law); First Schedule (UNCITRAL Model Law on International Commercial Arbitration).

82 The SIAA does not list arbitrator bias as a separate set aside ground. Award challenges based on arbitrator bias would fall under the set aside ground in Article 34(2)(a)(iv) of the incorporated Model Law: the composition of the tribunal or the arbitral procedure was not in accordance with the law or the parties' agreements. *See* SIAA, First Schedule (Art. 34(2)(a)(iv)).

83 Nish Kumar Shetty and others 'Quick Answers on Appointment and Challenge of Arbitrators – Singapore on Appointment and Challenge of Arbitrators' [2018] Kluwer Law International, 1, 5.

84 Alvin Yeo and Lim Wei Lee, 'Part II Country Reports 12 Singapore, III The Arbitral Tribunal' in Frank-Bernd Weigand and Antje Baumann (eds) *Practitioner's Handbook on International Commercial Arbitration* (3rd edn, OUP 2019) para 12.103. *See also* Nish Kumar Shetty (n 83) p. 5.

language against one of the parties.[85] Following review of numerous—and possibly conflicting—authorities from a number of Commonwealth jurisdictions, Chao Hick Tin JC chose to adopt the *Sussex Justices 'reasonable suspicion'* test,[86] namely: "whether the events in question give rise to a *reasonable apprehension or suspicion* on the part of a fair-minded and informed member of the public that the judge was not impartial."[87] Notably, the learned Justice also cited (with approval) the test applied by Ackner LJ in 1983 in the English case *Regina v Liverpool City Justices ex parte Topping*,[88] which was also based on the '*reasonable suspicion*' test employed in *Sussex Justices*.[89]

The '*reasonable suspicion*' test remains good law today.[90] The Singaporean High Court in *PT Central Investindo v Franciscus Wongso and others* confirmed as much recently.[91] The test has been applied both to judges and arbitrators.[92] The test is objective—"a reasonable and fair-minded person with knowledge of the relevant facts"—and would on its face, appear to be less stringent than the English 'real possibility' test and more akin to the 'reasonable doubts' test employed in France.

3 ARBITRATOR BIAS STANDARD(S): A CLOSER LOOK AT SEMANTICS

The survey of the leading arbitral jurisdictions in Section 2 above reveals that, while the general framework applicable to arbitrator challenges is in some respects similar, there are differences in the way national courts approach—or could approach—arbitrator challenge applications with potentially significant ramifications for the conduct of arbitrations and enforcement of arbitral awards.

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85 *Turner (East Asia) Pte Ltd v Builders Federal (Hong Kong) Ltd & Anor (No. 2)* [1988] 2 MLJ 502 [512] ("*Turner*"); *R. v Sussex Justices Ex p. McCarthy* [1924] 1 K.B. 256.

86 *Turner* (n 85) [512]. *R. v Sussex Justices Ex p. McCarthy* [1924] 1 K.B. 256 (In *Sussex Justices* the essential facts were that the acting clerk to the magistrates was a member of the firm of solicitors representing a party that had an interest in the outcome of the litigation. At the conclusion of the evidence the magistrates retired to consider their decision and the clerk accompanied them so as to be available should they desire to be advised on any point of law. As it transpired, the magistrates arrived at their decision without consulting the clerk at all. The decision *was nevertheless set aside on the basis that justice must not only be done but also be seen to be done*.).

87 *R. v Sussex Justices Ex p. McCarthy* [1924] 1 K.B. 256.

88 [1983] 1 WLR 119.

89 *Turner* (n 85) [503]. *See*, generally, Sam Luttrell, *Bias Challenges in International Commercial Arbitration: The Need for a "Real Danger" Test* (International Arbitration Law Library, Kluwer Law International 2009) 163-185.

90 *Re Shankar Alan S/O Anant Kulkarni* [2006] SGHC 194 [76] ("it is settled law in Singapore having regard to several pronouncements of the Court of Appeal that the "reasonable suspicion" test is the law of Singapore"). *See also PT Central Investindo v Franciscus Wongso and others* [2014] 4 SLR 978.

91 [2014] 4 SLR 978.

92 Chan Leng Sun (n 49) 249. Furthermore, the Singapore Court of Appeal in *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 2SLR 310 [83] applied the same "reasonable suspicion test" in determining whether there was apparent bias of a judge.

All of the jurisdictions surveyed require arbitrators to disclose facts and circumstances which may affect their independence and impartiality.[93] Each jurisdiction establishes the broad statutory standard of arbitrators' independence and impartiality and allows challenges against arbitrators and/or awards for violation of this standard.[94] Courts generally would not set aside an award on the basis of an arbitrator's failure to disclose the relevant circumstances *alone*; and require more—typically "*something of substance*"[95]—to apply this drastic remedy. The arbitrator bias standard is not statutorily defined, and has instead been developed by case law. This in turn has led to what appears to be the most important difference in the way national courts approach—or could approach—challenge applications, namely: the standard that courts apply when deciding challenge applications differs across the jurisdictions surveyed.

Before we delve into these differences and discuss their implications, there is one further important similarity arising from the survey worth pointing out. Across all of the jurisdictions surveyed, the courts' attitude to challenge applications appears to have evolved considerably over the last few decades. The antiquated sentiment that arbitrators are inherently inferior to judges[96] and must for this reason be subject to more rigorous scrutiny appears not to have survived the test of time. For disqualification and disclosure purposes alike, arbitrators today are largely held to the same standard as judges, as examples from England[97] and Singapore[98] illustrate. In other respects too, the courts' attitude to challenge applications seems to have moved towards a more arbitration-friendly paradigm, as is evident from the reformulation of the tests in England and the US, for example.[99] Indeed, as public perception of arbitration as a mechanism for resolving private disputes has shifted towards the establishment of an entire framework built

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93 In England though the duty to disclose only extends to matters that may affect arbitrator's impartiality and stems from case law rather than statute (the EAA). *See* sub-section 2.2 'England: Real Possibility'.

94 In the US and France such challenges are generally only available after the award is rendered.

95 *Halliburton* (n 36) [77].

96 *Commonwealth Coatings* (n 1) [3] ("[the courts] should […] be more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review.").

97 *See Halliburton* (n 36) [70] (per Lord Hodge). *See also Laker Airways Inc* (n 45) (per Rix J) ("Indeed, it would be strange if the test in arbitration were different from that which applies generally in the administration of justice").

98 Chan Leng Sun (n 49). *See* Turner (n 85).

99 *See Re Medicaments* (n 53), *Porter* (n 55), *Helow* (n 55), *ASM Shipping* (n 55), *Norbrook Laboratories* (n 55) *and Halliburton* (n 53) (England); *see New Regency Prods* (n 21); and *OOGC Am. LLC* (n 21). *See also* fn 22 above. *See* KP Noussia, 'Bias of arbitrators revisited' [2018] *Journal of Business Law* 1, 18 (United States).

upon supporting international arbitration and its enforcement,[100] so did the courts' attitude towards challenge applications.[101]

As to the applicable arbitrator bias standard(s), the survey reveals that they diverge considerably across the jurisdictions surveyed. While English courts apply the "*real possibility*" test—requiring, in addition, a showing of 'substantial injustice'[102]—courts in France and Singapore employ the "*reasonable doubts*" and "*reasonable suspicion*" tests, respectively.[103] Judges in the United States employ yet another standard: "*evident partiality*."[104] What is more, arbitrator bias standard(s) vary not only *across* but sometimes even *within* jurisdictions. In the United States, for example, courts have adopted conflicting tests as to what constitutes "evident partiality."[105] Similarly, while Singapore and England both have the Model Law "justifiable doubts" provision, the "law that informs [the application of that provision] is different seat-to-seat."[106]

The difference in the arbitrator bias standards raises three distinct questions. *First*, does it denote an *ultimately* different attitude to arbitrator challenge applications? *Second*, to the extent it does, what does it mean for arbitration users and the arbitration system as a whole? *Third*, what can be done to improve consistency and enhance predictability of the arbitrator challenge outcomes?

At first blush, the answer to the first question may seem obvious. One need not be a lawyer to immediately observe that different formulations may invite different lines of enquiry and produce different results. Those who have studied the topic of arbitrator bias acknowledge as much.[107] Indeed, a '*real possibility*' of something happening, for example, is not exactly the same as someone having a '*reasonable suspicion*' of something happening.[108] One can therefore easily imagine a

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100 Sundaresh Menon (n 2).

101 In this respect, challenge applications are much like a barometer of the national court's attitudes to arbitration: perhaps even more so than typical award enforcement or set-aside applications as they place arbitrators—the essential cogs in the international arbitration machinery—at the centre of courts' review.

102 *See above* sub-section 2.2 'England: Real Possibility'.

103 *See above* sub-section 2.3 'France: Reasonable Doubts', and sub-section 2.4 'Singapore: Reasonable Suspicion'.

104 *See above* sub-section 2.1 'US: Evident Partiality'.

105 *See above* sub-section 2.1 'US: Evident Partiality'.

106 Sam Luttrell, 'Go Back to Gough: The Need for the "Real Danger"' Test for Arbitrator Bias in the Common Law Seats of the Asia Pacific' [2008] Asia Pac L Rev 15, 176. *See also* Sam Luttrell, *Bias Challenges in International Commercial Arbitration: The Need for a "Real Danger" Test* (International Arbitration Law Library, Kluwer Law International 2009), p. 185.

107 Luttrell (2008) (n 106); Luttrell (2009) (n 106); *see also* Chan Leng Sun (n 49) 249 (*citing Metropolitan Properties v Lannon* [1969] 1 QB, p. 606 (per Edmund-Davies LJ) ("That the different tests, even when applied to the same facts, may lead to different results is illustrated by *R v Barnsley Licensing Justices* itself, as Devlin Q made clear in the passage I have quoted").

108 Luttrell (2008) (n 106) 164 (stating that while a reasonable suspicion may be reasonably founded in the mind of a person, the facts upon which the suspicion is based "may not necessarily interact to produce the result that the suspected outcome is a *real* possibility.").

situation where an award made in say Hong Kong is refused enforcement in the United States (on the "*impression of bias*" variation of the "*evident partiality*" test) but is nonetheless enforced in England (on the more lenient "*real possibility*" of bias test). Different arbitrator bias standards would therefore yield potentially contradictory results depending on where an award creditor seeks to enforce it. That would not be conducive to predictability and finality of the process.[109] It could also undermine the New York Convention's very objective of ensuring uniform treatment of arbitral awards.[110] At a more practical level, a divergence in the applicable arbitrator bias standard(s) could lead to a significant confusion among arbitration users (over arbitrator selection) and arbitrators alike (over disclosure obligations).

These concerns need to be put into context, however. As an initial matter, the vast majority of awards in international arbitration are complied with voluntarily.[111] In most cases, therefore, the enforcement question does not even arise. Further, while diverging tests *might* lead to conflicting outcomes, there do not seem to be any reported cases where that has in fact happened.[112] In fact, a closer look at the jurisdictions surveyed reveals that they all strive to uphold the *same* overarching policy underpinning the courts' review of arbitrator challenges—justice must not only be done, but must be *seen* to be done[113]—thus

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[109] Lord Neuberger, 'Arbitration and the Rule of Law' (Hong Kong Lecture at the Chartered Institute of Arbitrators Centenary Celebration, 20 March 2015) ("The predictability of arbitration on the international stage is one of its central merits as a dispute resolution process. Arbitration famously favours finality.").

[110] Gary Born, *Selection, Challenge and Replacement of Arbitrators in International Arbitration* (2nd edn, Kluwer International 2014), p. 1793 (acknowledging that an apparent lack of uniformity in national standards is inconsistent with the objectives of the New York Convention and UNCITRAL Model Law which aim is to adopt "uniform international standards for the conduct of international commercial arbitration.").

[111] *See* Loukas Mistelis, 'Reflections: Competition of arbitral seats in attracting maritime arbitration disputes' in Miriam Goldby and Loukas Mistelis (eds) *The Role of Arbitration in Shipping Law,* p. 140. *See* Queen Mary, University of London & PWC 'International Arbitration: Corporate Attitudes and Practices, available at <https://www.pwc.co.uk/assets/pdf/pwc-international-arbitration-2008.pdf> (accessed 6 October 2020) (stating that "84% of the participating corporate counsel indicated that, in more than 76% of their arbitration proceedings, the non-prevailing party voluntarily complies with the award.").

[112] Although the continuous divide between English and French judges over the degree of connection to one of the parties sufficient to impugn arbitrator's impartiality could be said to illustrate a conflicting outcome, albeit in slightly different scenarios. Compare *W Ltd v M SDN BHD* [2016] EWHC 422 (Comm) (no apparent bias where the arbitrator used the administrative support of a firm, of which he was a partner, when that firm had provided legal advice to an affiliate of one party) with *Cour de Cassation*, Civ. 1, 16 December 2015, N° D14-26.279 (sole arbitrator's failure to disclose his firm's indirect connections to one party was sufficient to refuse enforcement of the underlying award).

[113] William Park, *Arbitrator Bias*, No. 15-39 Boston University School of Law, Public Law Research Paper (2015), available at: <https://scholarship.law.bu.edu/faculty_scholarship/15>, p. 66 (accessed 6 October 2020). *See also* Chan Leng Sun (n 49) 261 ("Despite differences in wordings in different jurisdictions […] there is on the whole a common understanding on what apparent bias is. *It is an objective test, guided by the maxim that justice must not only be done, but must be seen to be done.*").

following the *same* objective test for arbitrator bias.[114] It is therefore not clear if the standards surveyed are in fact that different and prone to conflicting outcomes.[115]

In England and Singapore, for example, it has been suggested that, despite the semantical differences in the respective tests, "no judge is likely to find that an arbitrator has failed under one test but not the other,"[116] not least because both are based largely on the same English authorities.[117] Notably, even those courts which have recognised that there was a difference between a '*reasonable suspicion*' and a '*real possibility*' admitted that in practice the evidence presented might lead to the same conclusion either way.[118] Relatedly, and again using England as an example, the transition from the '*real danger*' to '*real possibility*'[119] appears to have made little difference in practice. Indeed, in *Director General of Fair Trading*, Lord Phillips MR recognised that there is no real difference between the two,[120] a sentiment shared by commentators.[121]

This common law analogy has its limits, of course. France and the United States are non-Model Law jurisdictions and developed their law on arbitrator bias largely independently of the rest of the common law world. Moreover, the U.S. judges' continuous struggle with the "*evident partiality*" standard shows that sometimes even the *same* standard can produce conflicting arbitrator bias outcomes.[122] While it is true that the law of bias in the United States is 'simply unsettled,'[123] and that the predominant 'reasonable observer' approach appears to

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[114] The situation is assessed based on how it would be perceived by a reasonable and fair-minded third party having knowledge of the facts. France arguably applies both objective and subjective test. *But see Société D v Société E* where the Court appears to have endorsed the 'objective' approach to arbitrator bias, despite a long line of French cases focusing instead on the "minds of the parties" or the "parties' eyes." *See above*, sub-section 2.3 'France: Reasonable Doubts'.

[115] Merkin and Flannery (n 41) 86-88.

[116] Chan Leng Sun (n 49) 256.

[117] In *Turner* (n 85), Chao Hick Tin JC of the Supreme Court of Singapore held that the test for determining bias of an arbitrator (*i.e.*, the "reasonable suspicion" test) was that propounded in *R v Liverpool City Justices ex p Topping* [1983] 1 WLR 119 (England). *See* Chan Leng Sun (n 49).

[118] *Re Shankar Alan S/O Anant Kulkarni* [2006] SGHC 194 at [56]. ("It is true that in very many cases, there may be no difference to the outcome of the case which test one applies, but that merely means that, in those cases, the degree of evidence in fact presented leaves a sufficient impression that whichever test was applied the result would have been the same.").

[119] *See* sub-section 2.2 'England: Real Possibility'.

[120] *Director General of Fair Trading v The Proprietary Association of Great Britain and another* - [2000] All ER (D) 2425 ("[T]he court should first ascertain all the circumstances which had a bearing on the suggestion that the tribunal was biased. It must then ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility, or a real danger, *the two being the same*, that the tribunal was biased") (emphasis added).

[121] Merkin and Flannery (n 41) pp. 86-88. (The authors suggest rather "to concentrate on the specific circumstances as they have arisen in the various cases in order to ascertain whether on any given facts it would be reasonable to fear that the arbitrator might unfairly regard a party or a party's case with favour or disfavour").

[122] *See above* sub-section 2.1 'US: Evident Partiality'.

[123] *See above* sub-section 2.1 'US: Evident Partiality'. *See* Mark Kantor (n 13) p. 1. *See* Mitchell Lathrop (n 13).

be broadly in line with the objective arbitrator bias standard applied across the jurisdictions surveyed, the simple fact is that the application of *one and the same* statutory test has led to inconsistent results. The examples of England and Singapore support the point: while both have adopted the Model Law "justifiable doubts" language, each has developed its own arbitrator bias standard.[124]

Drawing the threads together: while the lack of uniformity in national standards regarding arbitrator bias in the jurisdictions surveyed does not necessarily suggest an ultimately different *approach* to challenge applications, there would be benefit in greater uniformity in this area. Indeed, while the challenge outcomes are likely to be broadly similar most of the time in most of the cases in most of the jurisdictions surveyed, the difference in the formulation of the tests means that there remains a *potential* for inconsistent outcomes. Against this backdrop, the next and final section of the article will consider some of the most potent steps aimed at improving consistency in this area.

4 ARBITRATOR BIAS STANDARD(S): TOWARDS GREATER UNIFORMITY

Various efforts have been made to address the lack of uniformity in national standards regarding arbitrator bias, and clarify the scope of arbitrators' disclosure obligations and disqualification standards.

Some have advocated the development of one single transnational standard for arbitrator bias and the creation of appeal tribunals—akin to the ICSID Annulment Committee—to administer the application of this standard.[125] Others have suggested the creation of a multilateral convention setting out a test for arbitrator bias.[126] There have also been calls for a more widespread publication of reasoned institutional decisions and court judgements dealing with challenge applications.[127]

One initiative that has fared particularly well, it seems, has been the development of soft law instruments in this area, most notably, the IBA Guidelines on Conflicts of Interest in International Arbitration (the "Guidelines").[128] Adopted in 2004 and revised in 2014, this instrument offers critical guidance on arbitrator

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[124] *See* sub-section 2.2 England: Real Possibility', and sub-section 2.4 'Singapore: Reasonable Suspicion'.

[125] Pedro Sousa Uva, 'A Comparative Reflection on Challenge of Arbitral Awards through the Lens of the Arbitrator's Duty of Impartiality and Independence' [2009] Am. Rev. Int'l Arb. 479, 482. *See also* Seung-Woon Lee, 'Arbitrator's Evident Partiality: Current US Standards and Possible Solutions Based on Comparative Reviews' [2017] 9 Arb. L. Rev. 159.

[126] Chan Leng Sun (n 49).

[127] Catherine A. Rogers, 'Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct' [2005] Stan. J. Int'l L. 53, p. 112.

[128] The discussion focuses on the Guidelines because this soft law instrument is by far most widely accepted in this area, and has been studied extensively by scholars and the IBA itself. The assumption is

bias standards and disclosure and, usefully, the application of these standards in practice.[129] The Guidelines are arguably the most widely accepted instrument in this area today,[130] and seem to be growing in popularity.[131]

The courts' reception of the Guidelines has not been uniform, however.[132] In France, Italy and the Netherlands, for example, there seem to be no reported cases where courts referred to the Guidelines.[133] In some other jurisdictions, however, courts have clearly recognised the value of this instrument.[134] The Swiss Federal Supreme Court, for example, stated that while "the Guidelines do not have force of law," they "constitute a *valuable working tool* to contribute to the uniformization of standards in international arbitration in the area of conflicts of interests …" and "*should impact the practice of the courts and institutions* administrating arbitration proceedings … ."[135] Some courts embraced the Guidelines even more fully and in fact *relied* on them in their decisions on arbitrator challenges.[136]

Overall, however, it would seem that references to the Guidelines by national courts worldwide are relatively rare.[137] Despite the clear and recognised utility of this instrument for resolution of conflicts of interest issues, most courts remain reluctant to engage with the Guidelines in their consideration of challenge applications. Indeed, some judges appear allergic to the very idea of deploying international instruments such as the Guidelines in their domestic decision making

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that the conclusions reached with respect to the Guidelines will extend *a fortiori* to other, less known or recognised, instruments in this area.

129 IBA Guidelines, Introduction, para 2 and Part II, paras 2-7.

130 According to the Survey on the Use of Soft Law Instruments in International Arbitration on the Kluwer Arbitration Blog between February and March 2014, about 37% of respondents use the Guidelines regularly and another 37% apply them occasionally. Elina Mereminskaya, 'Results of the Survey on the Use of Soft Law Instruments in International Arbitration', Kluwer Arbitration Blog, June 6 2014 available at <http://arbitrationblog.kluwerarbitration.com/2014/06/06/results-of-the-survey-on-the-use-of-soft-law-instruments-in-international-arbitration/> (accessed 6 October 2020).

131 *See* IBA Arbitration Guidelines and Rules Subcommittee 'Report on the Reception of the IBA Arbitration Soft Law Products' (September 2016), p. 31.

132 Born (n 110) 1851.

133 *See* IBA Arbitration Guidelines and Rules Subcommittee, 'Report on the Reception of the IBA Arbitration Soft Law Products' (September 2016), p. 60. In the Netherlands, however, there appears to be at least one case where a court affirmatively refused to apply the IBA Guidelines.

134 *See e.g. New Regency Productions v Nippon Herald Films* 501 F.3d 1101 (9th Cir. 2007).

135 *See e.g. Adrian Mutu v Chelsea Football Club Ltd*, 28 ASA Bull. 520, 528 (Swiss Federal Tribunal) (2010) (emphasis added).

136 *See e.g. Applied Industrial Materials Corp. v Ovalar Makine Ticaret Ve Sanayi A.S. and others*, District Court, SDNY, 28 June 2006, No 05 CV 10540 (RPP) (vacating an award for lack of disclosure *expressly relying* on the IBA Guidelines). *See also* Gabrielle Kaufmann-Kohler, 'Soft Law in International Arbitration Codification and Normativity' [2010] Journal of International Dispute Settlement 1, p. 14.

137 *See* IBA Arbitration Guidelines and Rules Subcommittee, 'Report on the Reception of the IBA Arbitration Soft Law Products' (September 2016), p. 32. Unsurprisingly, most such references come from jurisdictions where many international proceedings are held, such as Switzerland, England and the United States. *See* The IBA Guidelines on Conflicts of Interest in International Arbitration: The First Five Years 2004-2009, 4 Disp. Resol. Int'l 5 (2010), p. 6.

processes.[138] These parochial sentiments, while not unfamiliar to international arbitration, are, on the whole, regrettable and myopic. It is true that circumstances may not always be right to deploy the Guidelines—the specific conflicts issue may not be covered, the Guidelines may not be germane to the dispute,[139] or the applicable national standard may differ from that in the Guidelines.[140] It is also true that the Guidelines are expressly made non-binding and to rely on them to decide arbitrator challenge applications may be contrary to the nature of this instrument.[141] But to not consider the Guidelines at all when deciding the challenge applications or outright deny the utility of this instrument would seem odd. Indeed, given the continuing trend towards a more pro-arbitration paradigm and the broader acceptance of arbitration as the preferred method for resolving cross-border disputes, to continue not to pay due regard to the Guidelines would be to step into the future with the mind still fixed on the past.

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138 *See e.g. HSN Capital LLC (USA) v Productora y Comercializador de Television SA de CV (Mexico)* Case No 8:05-CV-1769-T-30TBM, 2006 WL 1876941 (MD Fla); *see Bureau Veritas-Inspection-Valuation Assessment and Control-BIVAC BV* [unknown], Rb Rotterdam, 11 May 2011, ECLUI:NL:RBROT:2011:BQ6204; *see* IBA Arbitration Guidelines and Rules Subcommittee 'Report on the Reception of the IBA Arbitration Soft Law Products' (September 2016), p. 60.

139 *See e.g. ASM Shipping* (n 55) [39].

140 *See e.g. Halliburton* (n 36).

141 Masood Ahmed, 'Judicial Approaches to the IBA Guidelines on Conflicts of Interest in International Arbitration' [2017] Eur. Bus. L. Rev. 649 (suggesting that it is improper for national courts to implicitly ascribe 'quasi-hard law' status to the Guidelines).