Dr Youseph Farah, MCiarb
Associate Professor in International Dispute Resolution
International Arbitrator
School of Law, Earlham Hall, UEA
NR47TJ, Norwich
y.farah@uea.ac.uk

Dr Leonardo V P de Oliveira
Senior Lecturer in Law
Department of Law and Criminology
Royal Holloway, University of London
Egham Hill, Egham, TW20 0EX
Leonardo.oliveira@rhul.ac.uk

Title-ARBITRATORS' IMPARTIALITY AND ENGLISH LAW: IS IT TIME FOR A CHANGE?

Abstract: The English Court employs the fair-minded observer to assess whether there was a real possibility that the arbitrator was biased. The Supreme Court in *Magill* v. *Porter* claimed that by adopting the fair-minded observer the English test will conform with Article 6 of the ECHR. This Article shows that the fair-minded may in fact struggle to conform to Article 6, and advocates that the reasonable person construct is a better construct to achieve this objective. We show that as a matter of principle and practice there is no reason for England to adopt a test which diverges with international practice.

Keywords: Arbitrators' impartiality, English law, fair-minded observer, reasonable person.

I. INTRODUCTION

In England, the impartiality test of arbitrators is drawn from that applicable to judges, jury members, adjudicators and public officials alike.[1] In *Porter v Magill*,[2] the House of Lords stipulated that the test of impartiality should enquire whether the circumstances of the case would lead a fair-minded and informed observer to conclude that there was a real possibility that the adjudicator was biased[3]. The UK Supreme Court confirmed the application of this test to arbitrators in *Halliburton v Chubb*.[4] The "real possibility" element of the test, which concerns the threshold that must be met to show bias, has not been pivotal to the enquiry. In fact, in all the cases covered in this study, the courts ignored it. We posit that the more important and contentious question is which agent is responsible for assessing whether there is a "real possibility of bias". English courts hand this responsibility to the fair-minded and well-informed observer - a legal construct which neither the English legal system nor international practice is sufficiently familiar with.

The ECtHR, the International Bar Association Guidelines on the Conflict of Interest in International Arbitration (IBA Guidelines)[5], and the jurisdictions surveyed in this article, employ the reasonable person test when assessing the possibility of bias. Consequently, this piece critically assesses the English impartiality test, measured against metrics developed by the ECtHR, and common international practice.[6] We ask whether the fair-minded and well-informed person can

[1] In *R v Gough* [1993] UKHL 1, AC 646, [1993] 2 All ER 724, Lord Goff stated: "I think it possible, and desirable, that the same test should be applicable in all cases of apparent bias, whether concerned with justices or members of other inferior tribunals, or with jurors, or with arbitrators."
[2] *Porter* v *Magill* [2001] UKHL 67, [2002] 2 AC 357.
[3] *Ibid*, [103], Lord Hope stated: "I respectfully suggest that your Lordships should now approve the modest adjustment of the test in R v Gough set out in that paragraph. It expresses in clear and simple language a test which is in harmony with the objective test which the Strasbourg court applies when it is considering whether the circumstances give rise to a reasonable apprehension of bias. It removes any possible conflict with the test which is now applied in most Commonwealth countries and in Scotland. I would however delete from it the reference to "a real danger"."
[4] *Halliburton Company* v. *Chubb Bermuda Insurance Ltd* [2020] UKSC 48.
[5] IBA Guidelines on the Conflict of Interest (2024) available at https://www.ibanet.org/document?id=Guidelines-on-Conflicts-of-Interest-in-International-Arbitration-2024 last visited on 31 March 2024.
[6] The earliest discussions of the topic object of this article were published by H. Yu and L. Shore ("Independence, Impartiality, and Immunity of Arbitrators: US and English Perspectives" (2003) 52(4) ICLQ, 935) before the seminal decision of *Porter v Magill* and it does not directly tackle the relevance of the Human Rights Act 1998. After the decision in *Porter v Magill,* S. Attril in "Who is the "Fair-Minded and Informed Observer"? Bias After Magill" (2003) 62(2) CLJ, 279, analysed the legal construct in relation to impartiality. Similar assessments were made by D. Sandy ("Independence, Impartiality, Arbitration" [2004] 20(3) Arb Intl, 305) and S. Chehata ("Arbitrators' Neutrality in the United Kingdom and the United States" (2016), 8 Y.B. Arb. & Mediation, 234).

truly be said to conform with the objective requirement advanced by article 6 of the ECHR in the context of arbitration.[7] This Article does not aim to make a change to the application of the test to judges and other public officials. We aim to demonstrate that the lack of transparency, and certain other practices common in arbitration, such as the practice of party appointed arbitrators, uniquely constricts the fair-minded observer from identifying the cases where there is a real possibility that the arbitrator is seen to be impartial. It is concluded that the employment of the reasonable person instead, is better placed to yield outcomes based on commitment to normative ethics than the fair-minded person, in the sense that the reasonable person is more likely to champion important societal norms than the fair-minded person. For example, we advance that the current test disfavours diversity in arbitration by reiterating that in some fields, the pool of arbitrators is small and exclusive, consisting of mainly white males.

To reach this conclusion, this article will begin by unpacking the generic test applied in English law to judges, adjudicators and arbitrators. Then, it will be demonstrated that the English test is not in line with the ECtHR jurisprudence on the matter,and that the approach from common and civil law jurisdictions diverges from the English view. Finally, we will address how the English test has been applied in arbitration, and if the fair-minded construct can truly be said to be in conformity with the objective nature of the impartiality test envisaged in article 6 of the ECHR. It will be established that the English approach on the topic should adjust to converge with best international practice so that London can continue to thrive as an international hub for arbitration.

II. ENGLISH COURTS AND THE IMPARTIALITY TEST

[7] The article states: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…"

Instead of declaring that arbitrators should be independent and impartial, the Arbitration Act (1996) asserted only the requirement for the latter.[8] Whilst this was done deliberately, to avoid any confusion,[9] the rationale was that the lack of impartiality should be the reason to remove an arbitrator, as the lack of independence should give justifiable doubts for the lack of impartiality.[10]

The impartiality of the arbitrator is subject to the same test which is applied to persons or bodies with semi-judicial and judicial capacity such as judges and public officials.[11] There are two types of bias under English law, each receiving a different treatment by the courts. The first contains situations where the judge is said to have an interest in the outcome of the case. In such situations, the partiality of the arbitrator is presumed upon proof of the requisite facts, which call for automatic disqualification.[12] In such cases it is established law that the judge, however small the interest is,[13] should either recuse themselves or be removed.[14] The court usually looks for a financial or pecuniary interest; nonetheless, the rule can be extended to a limited class of non-financial interests.[15] The interest cannot be merely fanciful or trivial, and the complainant will not succeed if it is not possible to show that the interest in the outcome has affected the judge's decision in one way or another.[16] Any doubt with regard to the application of this should be resolved in favour of disqualification.[17] Although situations leading to automatic disqualification are rare (less

[8] Section 24 (1) (a) of the Act states: "24 …(a) that circumstances exist that give rise to justifiable doubts as to his impartiality."
[9] Supplementary Recommendation of the 1996 Departmental Advisory Committee on the Arbitration Law Report on the Arbitration Bill at [102].
[10] Ibid at [103]. The Law Commission maintained the same recommendation in their recent report on the review of the Arbitration Act 1996. See Law Commission, Review of the Arbitration Act 1996: Final Report and Bill, Law Com No 413, 3 September 2023.
[11] *R v Gough* [1993] UKHL 1, AC 646, [1993] 2 All ER 724. The common law test originates from the decision made in *Dr Bonham's Case* (1608) 8 Co. Rep. 107 the Court invoked the Roman law principle of *nemo iudex in causa sua*, that is, a person making decision should not act if he/she has actual, financial, or apparent interest. Same view was taken in *Dimes v Grand Junction Canal Proprietors* (1852) 3 HL Cas 759, (1852) 10 ER 301.
[12] *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, [2000] 1 All ER 65, at [4].
[13] *R v Rand* (1866) LR 1 QB 230. Blackburn J. at [232] stated: "There is no doubt that any direct pecuniary interest, however small, in the subject of inquiry, does disqualify a person from acting as a judge in the matter."
[14] Ibid at [233].
[15] *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 2)* [1999] 2 WLR 272.
[16] *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at [10].
[17] Ibid at [8].

rare perhaps in arbitration), there have been several qualifying situations. In these instances, the court does not apply an appearance of the bias test. Instead, the court employs a factual assessment based on the evidence before it and determines whether the judge has an interest in the outcome of the dispute.[18]

The second category, which is the focus of this article, relates to situations where there is something about what the judge has said or done, or where there are verifiable objective links with the parties that raise the appearance of bias. It is thus an objective test which does not necessarily entail inquiring of the actual intention of the judge, but rather into links with the parties or the dispute that raise justifiable doubts about their impartiality. Unlike the first test, it is not substantive, and all relevant factor that affect the appearance of bias must be considered. Moreover, while demonstrating actual bias is sufficient, the contesting party need only demonstrate the appearance of bias. Protecting the appearance of impartiality is important for three reasons. Firstly, from a practical viewpoint it is extremely difficult to prove actual bias.[19] Secondly, "bias operates in such an insidious manner that the person alleged to be biased may be quite unconscious of its effect"[20], and so, protecting the objective nature of the test removes any of the arbitrator's own subjective beliefs about their impartiality. Third, this approach, in principle, reassures observers and those who are involved in the proceedings that not only justice is done but that it has been "manifestly and undoubtedly be seen to be done",[21] a matter which increases the confidence in the integrity of the administration of justice.

[18] Ibid at [10].
[19] *Lanes Group Plc v Galliford Try Infrastructure Ltd (t/a Galliford Try Rail)* [2011] EWCA Civ 1617 at [46].
[20] *R v Gough* [1993] UKHL1, AC 646, [1993] 2 All ER 724, at [673]. See also *R v Barnsley Licensing Justices, Ex parte Barnsley and District Licensed Victuallers' Association* [1960] 2 QB 167, [187] when Devlin L. J. stated: "Bias is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to affect his mind, although, nevertheless, he may have allowed it unconsciously to do so."
[21] Lord Hewart C.J. in *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256 at [259].

A. Protecting the appearance of impartiality

For many years the English jurisprudence lacked clarity on how to measure the appearance of bias. The cases adopted inconsistent applications, some applying a test that requires "mere appearance" of bias while others applied the suspicion of interference or reasonable apprehension of bias,[22] irrespective of the context.[23] In all such cases, emphasis was placed on the expectation that justice must be seen to be done and therefore nothing should be done to create suspicion about undue interference.

It was not long before the English court walked away from over-emphasising the "mere appearance" of bias in favour of a test that required a real likelihood of bias or a probability of its occurrence. In *R v Barnsely Licensing Justices*,[24] while reiterating the appearance test, the court stated that a real likelihood of bias test should be determined based on the circumstances in which the justices sit. Here the court emphasised that, unlike in *R v Sussex Justices*,[25] it matters not what the parties or members of the public think. The reference to appearance was interpreted to mean that the contestant should be able to establish bias without having the need to prove actual bias. Interestingly, the court formulated the test also in terms of real probability.

Having considered the various tests which were in use, *R v Gough* presented the main two contenders (tests): the real danger of bias and the real likelihood of bias. The former test prevailed, and Lord Goff explained that once the court has ascertained the relevant circumstances, it should then ask itself "whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly

[22] See *R v McLean, ex parte Aikens* (1974) 139 JP 261.
[23] See per Lord Phillips in the *Director General of Fair Trading v Proprietary Association Of Great Britain & Ors* [2000] EWCA Civ 350 on the effect of the *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256.
[24] *R v Barnsely Licensing Justices* [1960] 2 QB 167 at [187].
[25] *R v Sussex Justices* [1924] 1 KB 256.

regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him".[26]

The justification to relegate the mere appearance, probability, or reasonable apprehension tests to no more than a historical relevance was that the tests either laid a very easy threshold to remove the judge, by looking at mere appearance or reasonable apprehension, or a strict one by requiring a probability or real likelihood of bias.[27] Thus, the intention was to situate a threshold of appearance in between the two. The problem here, apart from the "mere appearance test" which is suggestive of a low burden of proof, was that the other thresholds require a possibility of bias occurring and thus they appear to impose the same burden of proof. The conclusion one can make is that the court had never imposed a burden of proof requiring the party challenging the impartiality of the arbitrator to show "on the balance of probabilities" that the arbitrator is bias.

More importantly, it is the legal construct what effectively dominate the enquiry of whether, on the balance of evidence, there is a real danger of bias, noting that the possibility of a matter occurring may include any of the above formulations, that is, mere appearance, reasonable apprehension, real danger, real possibility, or a probability of it occurring. The case of *R v Gough* categorically removed any role for the reasonable person and instead replaced the objectivity metric by assessing the danger of bias occurring from the viewpoint of the court.

Once the Human Rights ACT 1998 (HRA) came to force, the *R v Gough* test was revisited because it was rightly considered that by unjustifiably removing the objective observer, the test did not conform to the objective nature of the impartiality test under the jurisprudence of the ECtHR. Consequently, in *Director General of Fair Trading v Proprietary Association of Great*

[26] *R v Gough* [1993] UKHL 1, AC 646, [1993] 2 All ER 724.
[27] Ibid at [669].

Britain & Ors,[28] the court used a different test by altering the legal construct from which the evidence is assessed. The test was whether the evidence "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".[29] As can be seen, the court emphasised that evidence should be assessed from the fair-minded and informed observer viewpoint and not the courts' view, contrary to what was stipulated under the *R v Gough* formulation. In *Porter v Magill*, the House of Lords adopted the above formulation of the test, however, removing the term "real danger" from the test and keeping "real possibility".[30] The House of Lords stressed, without much analysis or justification, that this alteration of the *R v Gough* test makes the English approach conform with the objective element of the impartiality test under the jurisprudence of the Strasbourg Court.[31]

B. The fair-minded and informed observer

Who is the fair-minded person envisaged under *Porter v Magill*? There is scarce authority prior to *Porter v Magill* to tell us what it means. Therefore, the challenge is to conceptualise the fair-minded element of the test without much help from the jurisprudence of the courts. In the case of *Helow v Secretary of State for the Home Department*,[32] it was explained that they are the type of person who actively looks for the relevant information, or takes "a balanced approach to any information she is given".[33] They also put whatever they have read or seen into its overall social, political or geographical context, and appreciates that "the context forms an important part of the

[28] [2001] EWCA Civ 1217.
[29] Ibid at [85].
[30] *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357.
[31] Ibid at [100], the court stressed the objectivity requirement by relying on the following ECHtR decisions: *Piersack v Belgium* (1982) 5 EHRR 169, 179-180 at [30-31]; *De Cubber v Belgium* (1984) 7 EHRR 236, 246 at [30]; *Pullar v United Kingdom* (1996) 22 EHRR 391, 402-403 at [30] and *Hauschildt v Denmark* (1989) 12 EHRR 266, 279 at [48].
[32] *Helow v Secretary of State for the Home Department* [2008] UKHL 62.
[33] Ibid at [3].

material which she must consider before passing judgment".[34] Thus, not only are they able to assess the situation based on the circumstances of the case, but they are also able to contextualise it and appreciate that the enquiry of whether the appearance of bias exists, or the lack of it, is contextual. They are not complacent or overly suspicious or sensitive to the information received.[35] They are able to distinguish between what is relevant and what is not relevant and weigh the evidence accordingly.[36]

The first impression to make is that the fair-minded person is not the aggregate of the public. Additionally, the fair-minded person is not always reasonable, and vice versa, the reasonable person is not necessarily fair-minded. When carefully considering the attributes of the fair-minded person envisaged under Helo it becomes clear that there is a very narrow group of observers who can be said to be fair-minded. In *Lanes Group Plc v Galliford Try Infrastructure Ltd (t/a Galliford Try Rail)*,[37] L.J. Jackson highlighted the complexity of this legal construct by stating that it requires an ever-growing list of qualities which could lead a judge, when determining how that person would assess the information, to "simply project onto that fictional character his or her personal opinions".[38] The upshot is a test that does not necessarily reflect what the public perceives or desires as the type of dispute resolution system free from the appearance of bias. Moreover, as it will be demonstrated in the next sections, the test is not in line with the ECtHR jurisprudence and international arbitral practice. We posit and establish in other parts of this Article that a greater engagement with the reasonable person, conversely, should help judges to be more "thoughtful about the limits of their own experiences".[39]

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[34] Ibid.
[35] *Halliburton Company* v. *Chubb Bermuda Insurance Ltd* [2020] UKSC 48 at [53].
[36] Ibid at [17].
[37] *Lanes Group Plc v Galliford Try Infrastructure Ltd (t/a Galliford Try Rail),* [2011] EWCA Civ 1617, 137 ConLR 1.
[38] Ibid at [52].
[39] M. Moran, "The Reasonable Person: A Conceptual Biography in Comparative Perspective" (2010) 41(4) LCLR, 1233, 1276.

III.THE ECtHR AND THE TEST OF INDEPENDENCE AND IMPARTIALITY

In the context of the ECtHR, the test is applied in cases of impartiality and also independence, being hard for the test, in both cases, to be dissociated.[40] In two seminal decisions, the ECtHR confirmed that state courts are bound by their international obligations under the ECHR when exercising oversight over proceedings connected with acts or omissions of an arbitral tribunal.[41] Accordingly, courts of signatory states must apply the guarantees secured by article 6 ECHR when deciding questions related to a challenge to the impartiality of an arbitrator. The ECtHR's assessment is informed by metrics such as whether the arbitrators have a financial interest or otherwise in the outcome of the dispute, or whether the arbitrator or the appointing institution offers guarantees excluding any legitimate doubt about the arbitrator's impartiality arising from those links.[42]

Looking at the requirement of independence, in *Langborger v Sweden*,[43] it was declared that "regard must be had, inter alia, to the manner of appointment of its members and their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence".[44] When deciding if the body adjudicating a dispute is independent, the court will factor into the assessment how the adjudicators were assigned; for

[40] *Langborger v Sweeden* (1990) 12 EHRR 416, at [32]
[41] See *Beg S.p.a. v Italy* [2021] ECHR 421 and *Mutu and Pechstein v Switzerland* App no 40575/10 and no 67474/10 (ECtHR 2 October 2018).
[42] See *Gregory v United Kingdom* ECHR 25 (FEB 1997) at [45] and *Delcourt v Belgium* – 2689/65 [1970] ECHR 1 (17 January 1970) at [32-36] where the ECtHR conducts thorough analysis of the institutional links between the office of the Procureur general, the Cassation Court, and the role of the former in the appeal procedure including whether its participation in the deliberation of the Cassation Court gave the appearance of bias.
[43] *Langborger v Sweeden* (1990) 12 EHRR 416.
[44] Ibid at [32]. See also *Findlay v UK* [1997] ECHR 8 at [73].

how long their term will be; if any external influence is being made; and if, the outside world, sees the body adjudicating the dispute as a neutral institution.

Concerning the requirement of impartiality, *De Cubber v Belgium*[45] established two aspects to be examined. Firstly, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect.[46] This model was repeated in other cases with similar wording, and sometimes, expanding the understanding.[47] The test focuses on "the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case".[48] Furthermore, the court will presume that the adjudicator is impartial, which on the balance of things is very difficult to displace.[49] Shifting to the objective element of the impartiality test, in *Hauschildt v Denmark*,[50] the ECtHR determined that:

> [u]nder the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect, even appearances may be of certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and, above all, as far as criminal proceedings are concerned, in the accused.[51]

The ECtHR test of impartiality is concerned with appearances that, although may be detached from any bias, for the external observer, they need to represent a guarantee of fairness in the process. It is not only about the procedure being just, but also about the outsider perception to any evidence

[45] (1985) 7 EHRR 236.
[46] Ibid at [24].
[47] See *Hauschildt v Denmark* (1990) 12 EHRR 266 at [46], *Findlay v UK* [1997] ECHR 8 at [73] and *Kleyn and Others v Netherlands* (2004) 38 EHRR 14 at [190-191].
[48] *Micallef v Malta* (2010) 50 EHRR 37 at [93].
[49] Guide on Article 6 of the European Convention on Human Rights Right to a Fair Trial. 23, at [95] available at https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf (last accessed on 21 December 2023).
[50] *Hauschildt* v *Denmark* (1990)12 EHRR 266.
[51] Ibid at [48].

of impartiality. Thus, the test of impartiality is that an adjudicator is not just actually impartial (subjective approach) but also be seen, appears to be or looks likely to be impartial (objective approach). The objectivity is assessed from the viewpoint of members of the public. What matters is the reasonable impression in the sense that any legitimate concern about the impartiality of the arbitrator must appear reasonable to the objective observer. It is this engagement of the reasonable person construct which safeguards the confidence in the civil justice system and the public's legitimate interest in having a rational and fair civil justice system.

IV. INDEPENDENCE AND IMPARTIALITY OF ARBITRATORS – INTERNATIONAL PERSPECTIVE

The duty imposed on the arbitrator to remain impartial is paramount to safeguarding procedural fairness. Jurisdictions that adopt the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (Model Law) and those maintaining their own traditions, all require the arbitrator to remain impartial.[52] The Model Law, in Article 12, asserts that an arbitrator can only be challenged if there are justifiable doubts regarding their independence and impartiality, without addressing if the test to evaluate independence and impartiality is objective or subjective.[53] Some common law courts, in countries adopting the Model Law, employ tests similar to English law, such as Hong Kong[54] and New

[52] For the jurisdictions that adopted the Model Law, see Section 1036 of the German Code of Civil Procedure, Section 588 of the Austrian Code of Civil Procedure and Section 25 of the Hong Kong Arbitration Ordinance (Cap. 609). For non-UNCITRAL jurisdictions, see Article 13(6) of the Brazilian Arbitration Act 1996, Article 1456 of the French Code of Civil Procedure and Article 18 of the Japanese Arbitration Act.
[53] G Cuniberti, *The UNICTRAL Model Law on International Commercial Arbitration* (Elgar 2022) 156 at para 12.21.
[54] *Jung Science Information Technology Co Ltd v ZTE Corp* [2008] 4 HKLRD 776 at 50

Zealand,[55] whereas other jurisdictions, such as South Africa, when enacting the Model Law into domestic law, added provisions to Article 12 to include the reasonable person as part of the test.[56]

A similar obligation to avoid bias can be found under the rules of all reputable institutions administering arbitration,[57] which is a duty safeguarded by party autonomy, usually given effect by the institutional rules.[58] Yet, despite the (almost) universal recognition of the principle, systems diverge on its scope and meaning. This divergence is somewhat difficult to justify because Article 6 of the ECHR safeguards one fundamental features of the rule that "adjudicative procedures provided by the state should be fair".[59] This section will present the view from five jurisdictions concerning the independence and impartiality of arbitrators and presents the IBA Guidelines to show that leading arbitral jurisdictions and best international practice employ a test that protects the appearance of bias assessed from the viewpoint of the reasonable person.[60]

A. The International practice

The French Cassation Court has assessed the extent to which arbitrators are impartial and independent by applying the test of reasonable doubt.[61] The Cassation Court concluded that the arbitrator should disclose any information that might implicate their independence and impartiality.[62] For instance, in *SA Auto Guadeloupe Investissements v Columbus Acquisitions Inc*

[55] *White v Maiden* [2014] NZHC 3037 (New Zealand) at 7.
[56] South African International Arbitration Act 2017, Schedule 1, Article 12(3): 'For purposes of paragraph (2), ''justifiable doubts'' require substantial grounds for contending that a reasonable apprehension of bias would be entertained by a reasonable person in possession of the correct facts.'
[57] Article 5.3 of the London Chamber of International Arbitration (LCIA) Arbitration Rules 2020, Article 11(1) of the International Chamber of Commerce (ICC) Arbitration Rules 2021, Rule 13.1 of the Singapore International Arbitration Centre (SIAC) Rules 2016, Article 11.1 of the Hong Kong International Arbitration Centre (HKIAC) 2018 Administered Arbitration Rules and Article 18 of the Stockholm Chamber of Commerce (SCC) Arbitration Rules 2017.
[58] Article 12(1) of the UNCITRAL Arbitration Rules 2010.
[59] T. Bingham, *The Rule of Law* (Penguin Books 2010) 90.
[60] See C Connellan, T Crosby and L Amarasekara, 'Approaches to arbitrator bias among national courts: a response to Halliburton v Chubb' (2021) 24 Int ALR 93, where the authors did a survey of how eleven jurisdictions approach the interpretation of arbitrator bias, being six jurisdictions employing a test using reasonable as a ground to evaluate impartiality.
[61] See *Société Tesco v Société Neoelectre Group* 11-20299 Cass Civ, 10 October 2012 and *Société Dukan de Nitya v Société VR Services*, 14-11085 Cass Civ, 18 December 2014.
[62] Article 1456 of the French Code of Civil Procedure.

et al,[63] because the sole arbitrator's firm had previously provided legal services to a company which belonged to the corporate structure of one of the parties, there were reasonable doubts about the arbitrator's impartiality and independence. Similarly, in *Société Saad Buzwair Automotive Co v Société Audi Volkswagen Middle East FZE LLC*,[64] the arbitrator did not disclose he had previously worked for a parent company of one of the parties and the Court understood that this raised reasonable doubts as to his independence and impartiality.

The relevance of the reasonable person construct is equally important in many common law jurisdictions. This is the position under The Australian International Arbitration Act 1974 which adopts the "real danger of bias test".[65] The legislation merged two principles from two different sources. It used the UNCITRAL Model Law as a base to determine independence and impartiality and it imported the English pre-Magill real danger of bias test.[66] In the case of *Hui v Esposito Holdings Pty Ltd*,[67] Justice Beach applied the real danger of bias test through the eyes of the reasonable person construct by assessing whether "a reasonable person would no longer have confidence in the arbitrator's ability to come to a fair and balanced conclusion on the issues if remitted".[68]

In India, the Supreme Court employed the reasonable person construct to assess whether there are justifiable doubts about the impartiality of the arbitrator. In *HRD Corporation (Marcus Oil and Chemical Division) v Gail (India) Limited (Formerly Gas Authority of India Ltd)*[69] since the arbitrator acted as a counsel for the winning parties in an unrelated case, it was decided that there

[63] 14/26279 Cass Civ 1, 16 December 2015.
[64] 18/15759 Cass Civ 1, 3 October 2019.
[65] The same view is taken by the New South Wales Commercial Arbitration Act 2010 in Section 12 (5) and (6).
[66] *R v Gough* [1993] UKHL 1, AC 646, [1993] 2 All ER 724. See S. Luttrell, "Australia Adopts the 'Real Danger' Test for Arbitrator Bias" (2010) 26(4) Arb Intl, 625.
[67] *Hui v Esposito Holdings Pty Ltd* [2017] FCA at [648].
[68] Ibid at [241] and [245].
[69] *HRD Corporation (Marcus Oil and Chemical Division) v Gail (India) Limited (Formerly Gas Authority of India Ltd*, [2017] CA No.-011126-011126.

has been a reasonable basis to conclude that the arbitrator would not act fairly, even in the absence of actual bias.[70]

Singapore applies the reasonable suspicion test to assess impartiality of adjudicators. The test, confirmed in *Re Shankar Alan s/o Anant Kulkarni*,[71] is also applicable to arbitration by enquiring 'whether a reasonable and fair-minded person with knowledge of all the relevant facts would entertain a reasonable suspicion' of bias.[72] The inquiry is done in two stages:

> '(f)irst, the applicant has to establish the factual circumstances that would have a bearing on the suggestion that the tribunal was or might be seen to be partial. The second inquiry is to then ask whether a hypothetical fair-minded and informed observer would view those circumstances as bearing on the tribunal's impartiality in the resolution of the dispute before it.'[73]

The U.S. Supreme Court in *Commonwealth Coatings v Continental Casualty Co*,[74] addressed the issue in a case where one of the party appointed arbitrators had occasionally acted as an engineer consultant for the respondent. It was decided that the arbitrator's failure to disclose such information made him appear biased. Applying Section 10 of the Federal Arbitration Act,[75] and relying on *Turmey v State of Ohio*,[76] the court found 'evident impartiality' based on failure of disclosure by the arbitrator of the previous dealings with one of the parties. Justice Black ruled that it is not possible for arbitrators to cut all their ties with the commercial world, but, due to the

[70] Ibid at [20].
[71] [2007] 1 SLR(R) 85
[72] *PT Central Investindo v Franciscus Wongso and others and another matter* [2014] SGHC 190
[73] Ibid at 19.
[74] *Commonwealth Coatings v Continental Casualty Co* 393 US 145.
[75] 9 US Code § 10.
[76] *Turmey v State of Ohio* 273 US 273 US 510 (1927). The case involved the impartiality of a judge in a trial where a part of the judge's salary was composed of fees collected from convicted defendants.

private nature of arbitration, arbitrators should be under a stricter scrutiny than judges.[77] Evident impartiality received different interpretations in the U.S. lower courts. For instance, in *Morelite Construction Corp v New York City District Council Carpenters Benefit*,[78] the Court of Appeals of the Second Circuit stated that ""evident partiality" within the meaning of 9 USC Sec. 10 will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration."[79] In *Positive Software Sols., Inc. v New Century Mortgage Corporation*,[80] the Court of Appeals of the Fifth Circuit was of the view that evident impartiality should be seen through a "reasonable impression of bias standard" and interpreted practically as opposed to strictly, for example an award should not be vacated on the ground of lack of impartiality where the undisclosed prior relationships between the arbitrator and one of the parties were trivial or insubstantial.[81] Lastly, the Court of Appeals of the Ninth Circuit, in *Schmitz v Zilveti*,[82] took the position of a "reasonable impression of impartiality" when assessing the arbitrator's impartiality.

It can be seen from the above decisions that when assessing the impartiality of the arbitrator, the reasonable standard is preferred. Below, we demonstrate that the reasonable person is also the legal construct adopted by the IBA Guidelines on the Conflict of Interest in International Arbitration (2024).[83]

B. The IBA Guidelines and its application in courts

[77] Ibid.
[78] *Morelite Construction Corp v New York City District Council Carpenters Benefit,* 748 F.2d at [83].
[79] Ibid at [19].
[80] 476 F.3d at [280].
[81] Ibid at [284].
[82] 20 F.3d 1043 (1994).
[83] IBA Guidelines (2024), *supra*, no 5. For the impact of the IBA Guidelines see J. Gill, "The IBA Conflicts Guidelines – Who's Using Them and How" (2007) 1(1) DRI 58 and The IBA Conflict of Interest Subcommittee, a Subcommittee of the IBA Arbitration Committee, "The IBA Guidelines on Conflicts of Interest in International Arbitration: The First Five Years 2004-2009" (2010) 4(1) DRI 5. The Academic Article discussed the 2004 version. We do not see, however, any material changes made to the 2024 version of the IBA Guidelines which affects the point we seek to make.

The IBA Guidelines (2024) sets the basic standard for assessing the impartiality of arbitrators and when a duty of disclosure may arise.[84] It adopts a list of options labelled by different colours, Red, Orange and Green, which enumerate non-exhaustive situations which are indicative of whether or not there are justifiable doubts about the arbitrator's independence and impartiality. Arbitrators can use these lists to determine whether to disclose relevant facts to the parties which may raise justifiable doubts about their impartiality. Justifiable doubts would arise if in a particular case a reasonable third person having considered the relevant facts and circumstances would conclude that "there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision."[85] Important to note that the evidence route is that of "likelihood" of bias judged from the viewpoint of the reasonable person.

Although the IBA Guidelines are only applied in arbitration procedures when parties agree to do so, they have been recognised by courts, most conclusively by the Swiss Courts.[86] For instance, in *Alejandro Valverde Belmonte v INOC et al.*, [87] the Swiss Federal Tribunal, in a case about doping, being one of the arbitrators a former employee of the World Anti-Doping Agency for more than three years, concluded, relying on rule 3.42 of the IBA Guidelines,[88] that despite the previous links this did not render him impartial.[89] In another case challenging the impartiality of a sole arbitrator, appointed by the ICC, who was also a partner in the Zürich office of the CMS network, the IBA Guidelines were applied.[90] The party that prevailed in the arbitration had one affiliate that,

[84] O.L.O. de Witt Wijnen; N. Voser and N. Rao, "Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration" (2004) 5(3) B.L.I., 433, 434. The Academic Article discussed the 2014 version. We do not see however any material changes made to the 2024 version of the IBA Guidelines which affects the arguments we seek to make.
[85] IBA Guidelines on Conflicts of Interest in International Arbitration (2014), Part II: Practical Application of the General Standards, number 2.
[86] See case 4A_506/2007, decided on 20.03.2008 by the Swiss Federal Tribunal at [3.3.21].
[87] 4A_234/2010, decided on 29 October 2010.
[88] The wording of the provision at the time was: "3.4.2 The arbitrator had been associated within the past three years with a party or an affiliate of one of the parties in a professional capacity, such as a former employee or partner."
[89] 4A_234/2010 at [3.4.4].
[90] 4A_386/2015, decided on 7 September 2016.

in the past and in an unrelated matter to the arbitration, received advice from the German member of the CMS network. It was decided that the facts of the case would fall into rule 4.2.1 of the IBA Guidelines[91], which is included on the Green list, where no appearance of bias would be deemed to be present. The ruling suggested that even if the IBA Guidelines are not employed, from the perspective of a reasonable third party aware of the circumstances of the case , the facts "are not of such gravity that upholding the award as to which revision is sought would be incompatible with the notions of justice or fairness."[92] The Swiss Federal Tribunal saw no bias and stressed that at the time of the appointment, the arbitrator was unaware of the work provided by CMS's affiliates, and that it would be impossible for the arbitrator to be aware of all the affairs taking place in CMS.[93]

V. THE ENGLISH TEST OF IMPARTIALITY IN THE CONTEXT OF ARBITRATION

Arbitration is grounded in the autonomy theory, based on the notion that parties have the freedom to choose a dispute resolution mechanism that suits their needs. Not all objectively verifiable links between the arbitrator and the dispute or any of the parties (including their legal representatives) satisfy the appearance test. According to the Arbitration Act 1996, there must be justifiable doubts as to the impartiality of the arbitrator.[94] There must be something more than mere suspicion which casts doubt in the mind of the observer about the fairness of the procedure.

It is neither the arbitrator's views or opinions nor their life experiences, sympathies or thoughts that determine their impartiality. These are relevant yet not conclusive factors. The test

[91] Rule 4.2.1 at the time said: "The arbitrator's law firm has acted against one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator." [2004 version)
[92] 4A_386/2015 at [3.3.3].
[93] Ibid.
[94] Section 24 (1) (a).

requires that all circumstances of the situation judged from the position the arbitrator sits, and that they will be free to measure and weigh different points of view with an open mind.[95] However, there are no policy considerations that tip in favour of adopting a more relaxed impartiality test to arbitrators. Yet, as it will be demonstrated below, decisions from English Courts, post the *R v Gough* case, are strikingly relaxed and call for concern regarding their compatibility with the ECtHR jurisprudence, a scenario which has not changed after the decision of the Supreme Court in *Halliburton v Chubb*. We posit that this laxed approach is not merely caused by erroneous application of the impartiality test, which might indeed be a minor cause, but more evidently this is caused by the non-conformity of the English test with the Strasbourg jurisprudence, and particularly as a result of the absence of the reasonable person from the English test.

A. The scenario post R v Gough and before Porter v Magill

Two Court of Appeal cases were decided before *Porter v Magill* based on the *R v Gough* real danger of bias test. In *AT&T Corp v Saudi Cable Co,*[96] the arbitrator did not disclose that he was a non-executive director of a company that competed directly with AT&T. There was no real danger of bias and the court reasoned that applying a low impartiality threshold will compromise the efficiency of the arbitral proceedings and allow the losing party to challenge an otherwise valid arbitral award.[97] In *Laker Airways Inc v FLS Aerospace Ltd*,[98] though the counsel for one of the parties and one of the arbitrators belonged to the same barrister's chamber, it was decided that there were no justifiable doubts as to the arbitrator's impartiality.

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[95] This view was taken by the Supreme Court of Canda in *R* v *S(RD)* [1997] 3 SCR 484 at [119].
[96] *AT&T Corp v Saudi Cable Co* [2000] 2 Lloyd's Rep. 127, [2000] CLC 1309. The test of reasonable apprehension of bias was impliedly confirmed in *Millar v Dickson* [2001] UKPC D 4.
[97] Ibid *AT&T Corp v Saudi Cable Co* at [44]. Interestingly, at para [40] of the judgment, Lord Wolf stated that. "[if] there are two standards, I would expect a lower threshold to apply to courts of law than applies to a private tribunal whose "judges" are selected by the parties. After all, there is an overriding public interest in the integrity of the administration of justice in the courts."
[98] *Laker Airways Inc v FLS Aerospace Ltd* [2000] 1 WLR 113.

B. The scenario post Porter v Magill

After *Porter v Magill,* several cases were decided adopting the revised formulation of the test. In *ASM Shipping Ltd of India v TTMI of England,*[99] a claim was made that the chairman of the arbitral tribunal had previously represented the defendant in another case, raising a challenge to his impartiality. Morison J declared that the arbitrator should have recused himself from the tribunal and, using a different terminology for the test, asserted that an independent observer, considering the facts, would have shared the feeling of discomfort expressed about his impartiality and would have concluded that there was a real possibility of bias.[100] Although the wording employed was not of a "fair-minded and informed observer" but of an "independent observer", it appears that the decision uses the terms synonymously because when referring to *Porter v Magill*, Morison J was clear to state that the test is of "a fair-minded and informed observer would conclude having considered the facts".[101] Similarly, in *Norbrook Laboratories v Tank Ltd,*[102] the arbitrator, during the procedure, personally contacted a witness but did not inform the parties of such conduct. Colman J declared that there was bias in such conduct and referred to the independent observer.[103]

In *Sierra Fishing Company v Farran,*[104] the use of the language of an "independent observer" changed to the fair-minded observer in *Porter v Magill*. In that case, the arbitrator had been employed by a bank of which the first respondent was chief executive, his father still worked for the bank, his father had acted for the first respondent on personal matters, and he had a financial

[99] *ASM Shipping Ltd of India v TTMI of England* [2006] 1 CLC 656, [2007] EWHC 927 (Comm).
[100] Ibid at [39].
[101] Ibid.
[102] *Norbrook Laboratories v Tank Ltd* [2006] 2 Lloyd's Rep. 485.
[103] Ibid at [145].
[104] *Sierra Fishing Company v Farran* [2015] EWHC 140 (Comm), [2015] 1 All ER (Comm) 560.

interest in his father's law firm. The court understood that there was a real possibility of danger as a fair-minded observer would conclude that the arbitrator is likely to favour the respondent.

C. Halliburton v Chubb and its aftermath

In *Halliburton v Chubb* the UK Supreme Court addressed the question of impartiality of arbitrators for the first time.[105] The case derives from civil claims relating to the accident that sunk the drilling rig Deepwater Horizon in the Gulf of Mexico. Halliburton was part of the joint venture operating the drilling rig, and, after the accident, it settled civil claims in the U.S. related to the misfortune. Halliburton had a Bermuda insurance form with Chubb and when it requested Chubb to make the payment for the settlement, Chubb refused on the basis that the settlement was not reasonable. Transocean, another party to the joint venture, proceeded in the same manner and encountered the same result. The dispute was submitted to arbitration and after the parties nominated their arbitrators, the arbitrators could not agree on the third arbitrator. Subsequently, the third arbitrator was appointed by the High Court.

The arbitrator appointed by the High Court was also appointed by Chubb to resolve another dispute between Transocean and Chubb involving the same cause of action. Although the arbitrator informed the parties in the dispute between Transocean and Chubb of his appointment in the Halliburton and Chubb reference, he did not do the same to the parties in the Halliburton and Chubb arbitration. Moreover, after the two appointments, the arbitrator was again appointed in another dispute between Transocean and another insurer involving the same cause of action, which was also not disclosed to Halliburton. Once Halliburton became aware of the several appointments, and after the arbitrator refused to recuse himself, a court action was triggered to remove the

[105] *Halliburton Company* v. *Chubb Bermuda Insurance Ltd* [2020] UKSC 48.

arbitrator. The case reached the Supreme Court where it was confirmed that when assessing whether there are justifiable doubts about the impartiality of the arbitrator, the *Porter v Magill* fair-minded and informed observer test should be applied, and added that the observer should have regard to the specific features of international arbitration.[106] The decision stated that although the arbitrator's failure to disclose multiple appointments involving one common party could lead to the appearance of bias, it did not think that the fair-minded observer, when considering the facts of the specific case, would conclude that there was a real possibility of bias.[107]

After *Halliburton* v *Chubb*, the High Court applied the impartiality test in two more cases. Both cases had the Premier League as the Respondent. In *Newcastle United Football Company Ltd v Football Association Premier League Ltd & Ors*,[108] after the appointment of the chair arbitrator, the Premier League informed the parties that in the three years prior to the arbitration, they were involved in 12 arbitrations where the chair arbitrator was an arbitrator, and, two years prior to the arbitration, the chair arbitrator gave legal advice to the Premier League in four different occasions. Consequently, counsel for Newcastle requested the chair arbitrator to recuse himself, which led to an exchange of communication between the counsel for the Premier League and the chairperson arbitrator. In the communication, the chairperson asked permission to disclose the work that was provided to the Premier League and if counsel for the Premier League believed the chair arbitrator should recuse himself. The High Court decided that a "fair-minded and informed observer, having considered the facts, would not infer a real risk of bias from the non-disclosure concerned".[109] In relation to the communication, the non-disclosure of confidential information

[106] Ibid, Lord Hodge at [69].
[107] Ibid, Lord Hodge at [131] said: "where an arbitrator accepts appointments in multiple references concerning the same or overlapping subject matter with only one common party, this may, depending on the relevant custom and practice, give rise to an appearance of bias."
[108] *Newcastle United Football Company Ltd v Football Association Premier League Ltd & Ors* [2021] EWHC 349 (Comm) (24 February 2021).
[109] Ibid at [54].

related to previous work done for the Premier League and previous appointments were not circumstances which raise justifiable doubts about the impartiality of the arbitrator. The same view was taken in relation to the communication with counsel about the chair arbitrator recusing himself, it being understood by the court as an error of judgement.[110]

In the other case, *Manchester City Football Club Limited v Football Association Premier League Ltd & Ors*,[111] a challenge to an arbitral award was based on the arbitrator's impartiality related to the method of appointing and reappointing arbitrators in disputes between clubs and the Premier League. The appointments are made through a list that has little input from the clubs. The argument was rejected because the fair-minded and informed observer would not conclude that the appointment and reappointment methods give sufficient reason to conclude that there was a real possibility of bias.

The application of the test by English Courts appears inconsistent and disjointed. It is difficult to rationally distinguish the *Halliburton v Chubb* decision from other court decisions that looked with suspicion on an arbitrator making unilateral contacts with one of the parties without the knowledge of the other party. This is the case of RICS adjudication decisions where the formulation in *Porter v Magill* was also applied. The High Court, for example, refused to enforce an adjudicator's award for reasons of apparent bias because the arbitrator had a lengthy telephone conversation with one of the parties without the knowledge of the other party to the dispute.[112] Similarly, in *Discain Project Services Ltd v Opecprime Developments Ltd*,[113] enforcement of the

[110] Ibid, Judge Pelling QC at [59].
[111] *Manchester City Football Club Limited v Football Association Premier League Ltd & Ors,* [2021] EWHC 628 (Comm).
[112] *Paice and Springall v MJ Harding Contractors,* [2015] EWHC 661 (TCC).
[113]*Discain Project Services Ltd v Opecprime Developments Ltd,* [2000] BLR 402.

adjudicator's decision was refused due to unilateral telephone conversations between one party and the adjudicator.[114]

VI. THE NEED FOR THE REASONABLE PERSON?

The cases assessed above indicate that judges subconsciously adopt a lenient application of the *Porter v Magill* test to arbitration. This does not necessarily arise from a rooted conviction that arbitration requires a laxed impartiality test, or because of erroneous application of the test, but instead out of the employment of a fair-minded observer who should, in accordance with *Haliburton v Chubb*, consider the special realities of international arbitration and the customs and practices of the specific field relevant to the dispute.

As will be seen from the following discussion, the abandonment of the reasonable person contributes to this laxed stance. This over-emphasis on context, and recourse to customs and practices are problematic, and narrows the realm of enquiry from the aggregate of the great mass of mankind to a small group of repeat arbitration users and stakeholders in the system of international arbitration. We submit in the following paragraphs that judges, when deciding cases of impartiality of an arbitrator, should follow a mix of contextual and normative approaches, primarily influenced by the international practice unpacked above.

The main challenge in the application of the test of impartiality is that the court will need to safeguard the appearance of impartiality of the arbitrator on the one hand, and the efficiency of

[114] See also Woods *Hardwick Ltd v Chiltern Air Conditioning Ltd* [2001] BLR 23 where enforcement was refused in RICs proceedings because the arbitrator consulted sub-contractors of both parties without the knowledge of the disputant and *Glencot Developments & Design Co Ltd v Ben Barrett and Son (Contractors) Ltd* [2011] BLR 207, where the High Court refused to enforce an adjudication decision because the adjudicator offered mediation first and after the later failed made a binding decision. The court found that those private discussions could have influenced his decision or that he may have formed a view about any of the parties involved, a typical example where unconscious or insidious bias could exist.

the arbitral procedure on the other hand. There is therefore a normative clash which is often too difficult to reconcile. Be it as it may, a principled approach which safeguards the former must be preferred, even if that comes at the expense of efficiency. A court should neither be overly strict nor lenient when assessing the impartiality of the arbitrator. Instead, it must engage objectively with the facts of the case and assess whether there are objectively verifiable links between the arbitrator and the dispute that raise justifiable doubts about their impartiality.

A. The shortcomings of the fair-minded observer

The House of Lords in *Porter v Magill* did not justify why they have decided to awaken the fair-minded legal construct from its deep sleep. This is even more puzzling when compared with the ECtHR, the IBA Guidelines, and other systems employing the reasonable person test when assessing the impartiality of the arbitrator. The danger is, in terms of the conceptual understanding and practical application of the fair-minded person, that it leaves the door ajar for the court to apply the test from its own viewpoint or apply a standard which is not acceptable to members of the public. Both possibilities have been rejected as unacceptable in *Porter v Magill*, and by the ECtHR.

The evidence suggests that the fair-minded person who is entrusted with performing this balancing act is more willing to be pragmatic than principled, accepting empirically untested practices that prevail in certain sectors, or follow a contextual approach that unjustifiably distinguishes between sectors. For instance, *Haliburton v Chubb* took into consideration the practices of insurance arbitration, when assessing whether the arbitrator's failure to disclose their appointment in other arbitration references involving a common party would raise justifiable doubts about their impartiality.[115]

[115]*Halliburton Company* v. *Chubb Bermuda Insurance Ltd* [2020] UKSC 48, at [45] GAFTA and LMAA submitted "that in their fields of activity the mere fact of appointment in arbitrations with overlapping subject matter but without identity of parties does

The fair-minded person therefore narrows the circle of the relevant observers when assessing impartiality. As a result, there is a higher probability that practices accepted by the specific sector, even if questionable in the eyes of members of the public, or even wrong, may be adjudged to be compatible with the test of impartiality. In these circumstances, the observer becomes a witness of the practice, instead of being the inquisitor of whether it conforms to basic notions of justice. The case law suggests that the court examines whether the fair-minded observer would have knowledge of the practice in question instead of what impression that practice would leave on the observer[116].

While the arbitrator in *Halliburton v Chubb* was expected and trusted to approach matters with an open mind,[117] it is difficult to see how that arbitrator can be seen to decide the dispute only on the evidence which was placed before them in that case.[118] In *Newcastle*, the court understood that this type of communication was a mere error of judgement.[119] The decision not to remove an arbitrator who had taken advice from one of the parties whether to recuse himself after a challenge had been made about his impartiality, once more amplifies the disconnect between the perception of ordinary citizens on impartiality and that of the English Courts. Such inconsistency generates distrust in arbitration as a fair method of dispute resolution.. On 21 November 2023, a new Arbitration Bill was submitted to the House of Lords to amend the Arbitration Act 1996. The bill has proposed an amendment to Section 23 of the Arbitration Act 1996 to regulate the disclosure of information regarding multiple appointments.[120] This attempt to codify the decision in

not give rise to any appearance of bias and is a feature of arbitrations which parties in their fields of operation accept. They submit that the court should respect such party autonomy and that there is no need to impose an obligation of disclosure in their fields of operation."

[116] Attril, "Who is the "Fair-Minded and Informed Observer", *supra,* no 6, p 283.

[117] *Amec v Whitefriars* [2004] EWCA Civ 1418 [20].

[118] *Beumer Group UK Ltd v Vinci Construction UK Ltd* [2016] EWHC 2283 (TCC) [38].

[119] *Newcastle United Football Company Ltd v Football Association Premier League Ltd & Ors*, [2021] EWHC 349 (Comm) (24 February 2021).

[120] The wording of the proposed Section was: "23A Impartiality: duty of disclosure (1) An individual who has been approached by a person in connection with the individual's possible appointment as an arbitrator must, as soon as reasonably practical, disclose to the person any relevant circumstances of which the individual is, or becomes, aware. (2) An arbitrator must, as soon as reasonably practical, disclose to the parties to the arbitral proceedings any relevant circumstances of which the arbitrator is, or becomes, aware. (3) For the purposes of this section— (a) "relevant circumstances", in relation to an individual, are circumstances that might reasonably give rise to justifiable doubts as to the individual's impartiality

Halliburton v Chubb signals that greater transparency is needed in the practice of multiple appointments, which is hard to envisage being achieved through the test of the fair-minded observer. The reasonable person, at least, would find it strange that an experienced arbitrator , dealing with several cases involving the same parties, would simply fail to disclose to each of the parties in the different arbitrations about their multiple appointments.

Moreover, the test in *Porter v Magill* is said to conform to the jurisprudence of the ECtHR. This is not an accurate reflection of the law. The ECtHR places emphasis on the appearance of bias which is assessed from the viewpoint of members of the public - a legal construct which has been abandoned in *Porter v Magill* and *Halliburton v Chubb* in favour of the fair-minded and informed observer. In addition to what was explained above in relation to the ECtHR jurisprudence, the discrepancy can also be demonstrated in the decision of *Beg S.p.a. v Italy*.[121] The case involved an arbitrator that when appointed, was a counsel for the parent company of the defendant in the arbitral proceedings and had also been the vice-chairman and a member of the defendant's board of directors. The ECtHR understood that from a subjective point of view there was no bias, but from the objective spectrum, the arbitrator's "impartiality was capable of being, or at least appearing, open to doubt and that the applicant's fears in this respect can be considered reasonable and objectively justified."[122] When assessing the independence and impartiality of the arbitrator, the ECtHR stated that "even appearances may be of a certain importance, a principle that is reflected in the adage 'justice must not only be done, but it must also be seen to be done.'

in relation to the proceedings, or potential proceedings, concerned, and (b) an individual is to be treated as being aware of circumstances of which the individual ought reasonably to be aware." Available at https://bills.parliament.uk/bills/3515 (last accessed 07 June 2024). Since the British government called a new election for 04 July 2024, it will be up to the new government elected to decide if the bill will continue through its legislative process.

[121] *Beg S.p.a. v Italy* [2021] ECHR 421.

[122] Ibid at [153].

What is at stake is the confidence which the courts in a democratic society must inspire in the public."[123]

In *Halliburton v Chubb,* Lord Hodge asserted that there was no statutory provision to assess the question of multiple appointments, and when explaining what the fair-minded observer needs to do in such circumstance, gave the impression that only an experienced arbitrator can fulfil this role. The view that only a highly qualified person will be able to assess if an arbitrator is impartial is at odds with the idea of "justice be seen to be done".[124] It is, in the words of the ECtHR, "open to doubt"[125] that only an expert can determine if an arbitrator is impartial. Lord Hodge also declared that the "objective test of the appearance of bias is similar to the test of 'justifiable doubts"',[126] making reference to the Model Law and the IBA guidelines, and that the "important point is that the test in English law, involving the fair-minded and informed observer, requires objectivity and detachment in relation to the appearance of bias."[127] This alleged similarity with justifiable doubts is questionable. When there are justifiable doubts, it should be clear that there is impartiality. The fair-minded observer, according to the Supreme Court, "requires objectivity and detachment in relation to the appearance of bias."[128] It is hard to conceive that the fair-minded observer, when detaching themselves from appearance of bias, will be doing the same as evaluating justifiable doubts. There is a real danger that the fair-minded observer would succumb to the assertion that an experienced reputable arbitrator is fully able to act in accordance with the usual practice of London arbitrators in fulfilling their duties under Section 33 of the Arbitration Act 1996, by approaching the evidence and argument in the parallel arbitration with an open mind.[129]

[123] Ibid at [132].
[124] *Beg S.p.a. v Italy* [2021] ECHR 421.
[125] Ibid.
[126] *Halliburton Company* v. *Chubb Bermuda Insurance Ltd* [2020] UKSC 48, , at [54].
[127] Ibid.
[128] Ibid.
[129] *H v L and* others [2017] EWHC 137 (Comm) at [29].

This is not a test which sufficiently values the appearance of impartiality and is overly entrusting of the arbitrator.

Likewise, the fair-minded informed observer considers, when assessing the impartiality of the arbitrator, irrelevant perceptions about the arbitrator's skills, personal attributes, and reputation. This is dangerous for the appearance of impartiality because the objective test, whatever legal construct we adopt, should enquire whether there are verifiable objective links of substance between the arbitrator and the dispute that would raise a real possibility of bias, not whether a particular arbitrator is able to keep the possibility of this occurring under control.

In all the above situations, and indeed when carefully following the reasoning of the court, the fair-minded construct is not capable of remaining completely objective. Perhaps the English courts may merely apply its own view of what is considered fair-minded, which in turn as seen from the evidence we included in the above discussion, will inevitably, consciously or unconsciously, produce results which are disconnected from the views of members of the public.

The root of the problem is the precise formulation of the test, which leads to unacceptable outcomes. The fair-minded observer makes the arbitration circle even smaller than it is proclaimed to be, and its employment generates decisions that are either open to serious discussion, like *Halliburton v Chubb*, or decisions that are hard to make sense of such as *Newcastle*. An alternative argument could be an adjustment of the application of the fair-minded test. The shape of the fair-minded observer in arbitration is of a specialist nature and although parties seek it for exclusivity and specialisation, it does not mean that fundamental principles of justice like transparency and lack of bias can be disregarded.

B. The reasonable person

In Porter v Magill the court acknowledged that the English approach was not comparable, at least until the revision proposed by their justices, with other common law systems such as Scotland and

Canada.[130] The key difference was that most common law jurisdictions applied a test of reasonable apprehension of bias,[131] employing the reasonable person in the assessment of impartiality.[132] Yet, notwithstanding an opportunity to converge with the international practice, and other common law jurisdictions, the Court chose to go on a separate path and completely abandoned the reasonable person construct.

Despite the difficulty in drawing a clear map of the evolution of the test of impartiality and the significance given to the reasonable person under English law, the early years of English jurisprudence demonstrated greater reliance on the reasonable person ("reasonable onlooker")[133] who is advised of the circumstances inquiring whether they will reasonably suspect that the judicial officer was impartial.[134] In *R v Gough*, Lord Goff questioned whether it is useful to assess impartiality through the eyes of a reasonable person, because in cases such as these, the court personifies the reasonable person.[135] In *Locabail (UK) Ltd v Bayfield Properties Ltd* the court clarified that personifying the reasonable person

> takes an approach which is based on broad common sense, without inappropriate reliance on special knowledge, the minutiae of court procedure or other matters outside the ken of the ordinary, reasonably well-informed member of the public, there should be no risk that the courts will not ensure both that justice is done and that it is perceived by the public to be done.[136]

[130] *Porter v Magill* [2001] UKHL 67 at [101].
[131] Used by the Supreme Court of Canada in *Attorney General v Lippé* [1991] 2 SCR 114 which dealt with whether municipal court system in Quebec that made use of part time judges who continued to practice infringed the principle of impartiality.
[132] In *Starrs v Ruxtion* 2000 J.C. 208, [1999] ScotHCHCJ-259 (Scottish High Court of Justiciary). Lord Reed stated: 'My conclusion is fortified by the requirement under art 6 that the tribunal must present an appearance of independence. I understand this requirement to mean that the test of independence must include the question whether the tribunal should reasonably be perceived as independent.'
[133] *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, [2000] 1 All ER 65, at [58].
[134] In *R v Altrincham Justices, ex parte N. Pennington* [1975] QB 549, Lord Widgery C.J. stated: "It is enough to show that there is a real likelihood of bias, or at all events that a reasonable person advised of the circumstances might reasonably suspect that the judicial officer was incapable of producing the impartiality and detachment to which I have referred."
[135] *R v Gough* [1993] UKHL 1, AC 646, [1993] 2 All ER 724, at [670].
[136] *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at [17].

Thus, until *Porter v Magill,* there was not a complete abandonment of the reasonable person, and that the content of the reasonable person was drawn by the Court from the perceptions of the ordinary person. Even the one place where there was a complete abandonment of the reasonable person, *Porter v Magill*, when applying its revised formulation to the facts of the case, their justices used the construct of the "casual observer" to assess whether the casual observer would "form the view after the press conference that the auditor might be biased."[137]

C. The content of the reasonable person

Before understanding the advantages of utilising the reasonable person in the context of the impartiality of the arbitrator, it is important to delve deeper into the meaning of 'reasonableness' throughout the law. Learning from the tort of negligence where the reasonable person is used to test compliance with the duty of care, its content can be unpacked by following one of two methods. The first method essentially relies on an empirical observation of the standard of care exercised under the same or similar circumstances by the great mass of mankind in the sense that the content derives from "reality rather than from morality."[138]This method should produce a 'positive content', whilst the second method produces a 'normative content'. After explaining how each method operates in theory and in practice, we will conclude that both methods are imperfect, and that the ideal content of the reasonable person when testing impartiality should be of a hybrid nature.

C.1 The 'positive content'

[137] *Porter v Magill* [2001] UKHL 67 at [105].
[138] A. D. Miller and R. Perry, "The Reasonable Person" (2012) 87 New York University Law Review, 323, p 326.

When determining the 'positive content' of the reasonable person the court looks for the great mass of mankind, which requires the observation of the reasonable person in the various situations where justifiable doubts over the impartiality of the arbitrator may arise. The real challenge lies in how to aggregate this data, particularly when fact finders often struggle to have full access to the necessary evidence, and usually have cognitive bias embedded in their assessment.[139] Miller and Perry argued that it is impossible to find a positive content and that only a normative content is possible.[140]In *Health Care and Home Limited* v *The Common Services Agency* Lord Reed seemed to express a similar view. Justice Reed argued that the content of the reasonable person cannot be determined by evidence and thus, it is not an empirical enquiry.[141] He then stated that "[t]he behaviour of the reasonable man is not established by the evidence of witnesses, but by the application of a legal standard by the court."[142] Lord Reed was not convinced that it is possible to rely on empirical evidence about human behaviour for the purpose of determining the content of the reasonable person[143].

There is some truth in Miller and Perry's critical view of the positive method. Most people are not familiar with the system of international commercial arbitration, let alone its unique private and confidential natures which had led to the type of problems associated with bias such as the practice of party appointed arbitrators, or the obligation of the arbitrator to keep parallel references confidential.[144] Thus, the reasonable person, if given positive content, may reach wrong judgements about the impartiality of the arbitrator. They may either be overprotective of the

[139] Ibid, A D. Miller and R Perry, "The Reasonable Person", p 34.1
[140] Ibid at p 328.
[141] *Health Care and Home Limited v The Common Services Agency* [2014] UKSP 49 at [26-27].
[142] Ibid at [3].
[143] Jaeger, Christopher Brett, The Empirical Reasonable Person, (2021). 72 Ala. L. Rev. 887, Available at SSRN: https://ssrn.com/abstract=3686146
[144] See *Halliburton Company* v. *Chubb Bermuda Insurance Ltd* [2020] UKSC 48, at [48]. The most recent version of the IBA Guidelines on the Conflict of Interest (2024), *supra*, no 5, requires of arbitrators to decline their nomination, or recuse themselves, if they are unable to disclose relevant information which may raise reasonable doubt about their impartiality due to their duty to uphold confidentiality in relation to other arbitration references which they are involved in.

fairness of the proceedings at the expense of party autonomy and cost-efficiency of proceedings, or too lenient, compromising by that the appearance of impartiality.

Moreover, it is too simplistic to argue that reference to the public under the ECtHR jurisprudence necessarily means reference to the aggregate of the great mass of mankind. Instead, for policy reasons it is preferrable to aggregate the widest group possible of the well-informed observers who are stakeholders in the system of international commercial arbitration.

Fortunately, answers can be found in the practice of international arbitration, which aggregates a wider group of observers than what the fair-minded person was willing to rely on, but a smaller group than that available by the great mass of mankind. The IBA non-waivable Red, Red, Orange and Green lists reflect empirical observations of circumstances raising justifiable doubts about the impartiality of the arbitrator, made by an aggregate group of well-informed reasonable stakeholders in the system of international arbitration such as arbitrators, lawyers, case managers, academics, and arbitral institutions. This empirical content was shown earlier in this Article to have gained recognition in leading jurisdictions in the field of international arbitration[145].

C.2 Normative content

In accordance with this method, the content of the reasonable person is predetermined by a particular normative ethical commitment.[146] People have different ethical commitments, and so the application of this method will not necessarily yield results which are compatible with an ordinary person's judgement under identical circumstances. If this is so, then who decides which normative ethical commitment should prevail? Gardner argues that "[m]ore often finders of fact are invited to use their own judgment not only in deciding whether a defendant was reasonable,

[145] See for example case 4A_506/2007, decided on 20.03.2008 by the Swiss Federal Tribunal at [3.3.21].
[146] A. D. Miller and R. Perry, "The Reasonable Person" (2012), *supra*, no 139.

but also in deciding how to think about whether a defendant was reasonable."[147] According to Hart, judges express through reasonableness their understanding of 'ordinary moral reasoning'.[148]

Realists contend that such legal language, e.g., the reasonable person, is a shell "through which actors exercise the widest sort of discretion to select their favoured outcomes or policies"[149]. Lord Goff in *R v Gough* gave a similar perspective on how to determine the content of the reasonable person by arguing that the court personifies the reasonable person.[150] In *Davis Contractors Ltd v Fareham*, the reasonable person was described as a "legal fiction" who "represents after all no more than the anthropomorphic conception of justice, is and must be the court itself"[151]. These are troubling statements not because it is inconceivable that judges could reflect their own ethical commitment in their reasoning, but because unless this normative ethical commitment is drawn from the prevailing code of ethics, then the assessment cannot be said to be an objective observation, offending Art. 6 of the ECHR.

A more nuanced argument would entail acknowledging that the normative ethical content of the reasonable person does not include a universal code of ethics which prevail in all areas of law. Instead, the reasonable person reflects ethical norms applicable in particular legal contexts. For example, in the tort cases, some may view the normative content as predominately economic. LJ Hand stipulated in *United States* v. *Carroll Towing Co* [152] that "it is negligent to omit a precaution if the reduction in expected accident costs would have been greater than the costs of the precaution". This test is often referred to as the aggregate-risk-utility test, which was also endorsed by Richard Posner, stating that the test has the objective of promoting economic

[147] J. Gardner, "The reasonable person standard", available at https://johngardnerathome.info/pdfs/reasonableperson-iee.pdf (last accessed 21 December 2023) 9. See also J. Gardner, 'The many faces of the reasonable person' (2015) 131 LQR 56.
[148] H. L. A. Hart, *The Concept of Law* 2nd ed (Oxford: Clarendon Press 1994) 124-136 and 133.
[149] Benjamin C. Zipursky, *Reasonableness In and Out of Negligence Law*, 163 U. OF PA. L. REV. 2131 (2015), p 2132.
[150] *R v Gough* [1993] UKHL 1, AC 646, [1993] 2 All ER 724, at [670].
[151] *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696, 728, [1956] 2 All ER 145.
[152] *United States v. Carroll Towing Co*., 159 F.2d 169, 173 (2d Cir. 1947).

efficiencies[153]. Posner also saw the reasonable person as an 'average man rule' used for determining the cost of care under the 'Hand Rule'[154].

This is only one school of thought and in practice courts may follow this approach, ignore it, or adapt it to the context. For example, it is plausible that the normative content which is based on the economic efficiencies ethics is drawn from existing 'social practices and conventions'[155]. Equally the reasonable person may commit to an egalitarian form of ethics[156], or to principles of justice, and decide that the arbitrator must be removed even if it is not economically efficient to do so. Central to these competing ethical commitments is the notion that economic efficiencies ethics must sometimes concede to the need of reaching just outcomes which focuses on everyone's right to equal freedom, dignity, and respect, instead on maximizing the aggregate satisfaction of impartially summed individual interests"[157].

For example, this commitment to justice, and equality is aptly captured in the Non-Waivable Red list of the IBA Guidelines, which captures situations where the arbitrator is said to be a judge of their own cause[158]. In such circumstances economic efficiencies ethics, or party autonomy principles such as the waiver principle should not be given any weight. Clearly, these principles are subordinate to ensuring the overriding desire to ensure that the parties have access to a fair process, and to safeguard the civil justice system.

C.3 the Reasonable person as a hybrid construct

[153] This test was endorsed by Richard Posner & William Landes, The Positive Economic Theory of Tort Law, 15 Ga. L. Rev. 851 (1981). However, it is not without criticism. See Richard W. Wright, Hand, Posner, and the Myth of the 'Hand Formula', 4 Theoretical Inquiries L. 145 (2003) for a critical view of the Hand's Rule and also the subsequent work of Posner endorsing the Rule.
[154] Gilles, S., 'The Invisible Hand Formula', vol.23, No.5 (Aug 1994) Virginia Law Review, 1015, p 1027.
[155] Ibid Gilles, S., 'The Invisible Hand Formula', , p 1020.
[156] See M. Moran, "The Reasonable Person", *supra*, no 39, on the reasonable person as having an egalitarian content.
[157] Richard W. Wright, Hand, Posner, and the Myth of the 'Hand Formula', 4 Theoretical Inquiries L. 145 (2003), pp 146-147.
[158] IBA Guidelines on the Conflict of Interest in International Arbitration (2024), *supra,* no 5.

The above various formulations paint a vibrant picture of the reasonable person. These often concern assessing the conduct of the defendant measured against what a reasonable person in their circumstance would (or would not) do under a particular given case. In a challenge made to the impartiality of the arbitrator, the nature of the enquiry is somewhat different. Indeed, the appearance of bias may be present even where there are guarantees ensuring the impartiality of the arbitrator. Therefore, in most instances no wrongdoing is committed by the arbitrator. The legal standard does not necessarily judge the conduct of the arbitrator, and fundamentally the test is not binary, in the sense that it does not inquire about the effect of the breach of a legal standard by one party on another. Rather, it is about the perception of the observer who is not only conscious about the need to protect the party who brought the challenge, but also about safeguarding the civil justice system. This unique aspect of the enquiry should limit the reliance on various normative contents that may, for instance, be at the centre of the reasonable person's enquiry in tort claims, such as economic-private rationality or economic welfarism theories,[159]and equally increase reliance on empirical positive content. This is drawn from circumstances which describe what would be reasonable from a behavioural perspective, such as those contained under the IBA Non-Waivable Red, Red, Orange, and Green Lists.[160]

Moreover, the positive and normative contents should not be mutually exclusive. Ordinary people commit to positions based on their moral stance. Some will prefer an economic approach which protects the efficiency of arbitration, others may prefer a content that increases diversity in the field of arbitration. Based on the above analysis, the content of the reasonable person should reflect the "reality" of the international practice of commercial arbitration [positive], whilst

[159] On private rationality see R. Posner, "A Theory of Negligence" (1972) 1 Journal of Legal Studies, 29. On the Hand Rule which advocates cost efficiency as a normative content of reasonable person see *United States v Carrol Towing* 159 F.2d 169 (2d Cir. 1947).
[160] IBA Guidelines on the Conflict of Interest in International Arbitration (2024), *supra,* no 5.

advancing a commitment to normative ethics, among these, increased diversity, egalitarianism, economic efficiencies and party autonomy. For example, the reasonable person could adopt a corrective justice approach by advancing an egalitarian content.[161]

It should be emphasised that London is considered a major hub for international arbitration and English Law is a preferred choice-of-law in international contracts.[162] Besides the perception of arbitration as a reliable method to solve disputes, There must be a minimum guarantee of justice in the procedures established to deliver justice. If arbitration appears to lack integrity because there are doubts concerning the impartiality of arbitrators, it will not matter that London is a major hub for international arbitration. This dynamic has also been seen in relation to investment arbitration and especially the current reaction to the Energy Charter Treaty.[163] Once there is distrust in the system, its users will be reluctant to employ it. The proposition made here is that the current approach to the test of impartiality of arbitrators, the fair-minded observer, might lead to unwanted outcomes with ramifications over how justice is being provided and how the public might perceive arbitration as a fair system of dispute resolution.

D. Why employing the reasonable person is preferable over the fair-minded person.

The reasonable person is not a perfect construct. Carol Giligan argued that its content employs masculine metaphors and follows male standards and perceptions.[164] We agree with this critical

[161] M. Moran, "The Reasonable Person", *supra,* no 39.
[162] See the '2018 International Arbitration Survey: The Evolution of International Arbitration', School of International Arbitration, Queen Mary, University of London, at http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF (last visited 07 June 2024) and the 2021 International Arbitration Survey: Adapting Arbitration to a Changing World' at https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf (last visited 07 June 2024), where the results demonstrate that London is the preferred seat of arbitration. See also G. Cunibierti, 'The International Market for Contracts – The Most Attractive Laws' (2014) 34(3) *Northwestern Journal of International Law & Business* (455, 459), where the author shows that English Law is the preferred governing law for international contracts.
[163] For the reluctance towards the employment of investment arbitration, see the use of the of an investment tribunal in the EU-Canada Comprehensive Economic and Trade Agreement and the current move to withdraw from the Energy Charter Treaty made by EU an non-EU member States, at https://www.energychartertreaty.org/treaty/contracting-parties-and-signatories/ (last visited 07 June 2024).
[164] C. Gilligan, *In A Different Voice: Psychological Theory and Women's Development* (Harvard University Press 1982)

view. However, as stated before, the normative content of the reasonable person can be drawn from shared community values, and egalitarian ethics. Thus, the reasonable person can shed its masculine bias and adopt a content which is supportive of the equality and diversity agenda of the international arbitration community. The voices calling for diversity and equality have occupied the centre stage of international arbitration and institutional frameworks[165], and therefore the reasonable person should adapt and commit to this content. Thus, there is a great potential for a normative content adjustment in favour of equality, whilst safeguarding party autonomy, and efficiency[166].

If the advanced proposal to adopt the reasonable person construct would be adopted, it could be argued that a significant amount of new case law based on challenges using the reasonable person construct would be brought before the court. Although it is hard to quantify the repercussions of the proposed change through quantitative data, new case law should not be feared. Setting parameters already based in familiar concepts thatembody transparency and a stronger sense of justice should be welcomed. The reasonable person is more relatable to a regular member of society as opposed to the fair-minded observer. The public connection to the reasonable person can reinforce the acceptance and trust in the arbitral system.

In terms of application to the cases we surveyed earlier in this Article, it becomes apparent that the reasonable person, when equipped with positive and normative contents will not have agreed with the court's findings in *Halliburton v Chubb*[167]. The Court reasoned that a fair-minded person would not have concluded that there is a real possibility of bias where an arbitrator was

[165] Susan D. Franck, et al, The Diversity Challenge: Exploring the "Invisible College" of International Arbitration, 53 Colum. J. Transnat'l L. 429 (2015), p 2015. It is submitted that the International Centre for the Settlement of Investment Disputes ('ICSID') appointments of Chairpersons of ICSID tribunals exhibited greater diversity than those made by co-arbitrators.
[166] For example, the ICC notes for arbitrators at the time of appointment require of the party appointed arbitrators to consider the need to infuse diversity of the tribunal when they select the chairperson.
[167] *Halliburton Company* v. *Chubb Bermuda Insurance Ltd* [2020] UKSC 48.

appointed to multiple related references with one party common to the dispute without the knowledge of the other does. Once more the Court reasoned that the lack of suitably qualified arbitrators with expertise in the concerned area of law justifies the practice.

This outcome disregards the positive content found under the IBA Guidelines[168], and is not conducive to increasing diversity in arbitration. With regards to the former, the reasonable person will not hesitate to conclude that being an arbitrator appointed in multiple disputes concerning the same, or an overlapping subject matter, with only one common party, will generate contacts and meetings which involve the receipt of communication, including submissions, hearings and telephone conversations.[169]With regards to the latter, repeat appointments create conditions where parties are more likely to hire experienced arbitrators – "most of whom are older, white, European/North American men".[170]

This practice also amplifies the illusion that there is a small pool of arbitrators who are qualified to conduct disputes in specific areas of law, such as what was argued and accepted in *Newcastle* and *Halliburton v Chubb.*[171] The Supreme Court accepted this submission, neither based on empirical evidence, nor on a normative commitment, but rather by observing a custom or a practice which prevails in certain areas of practice, witnessed and confirmed by those who maintain such practice and who are possibly guilty of not promoting the equality imperative in

[168] Para 3.1.5 of the IBA Guidelines on the Conflict of Interest (2024), *supra,* no 5, where the arbitrator has a duty to disclose a situation where they 'currently serves, or has served within the past three years, as arbitrator or counsel in another arbitration on a related issue'.

[169] *Beumer Group UK Ltd v Vinci Construction UK Ltd* [2016] EWHC 2283 (TCC) at [31]. See also *Paice and Springall v MJ Harding Contractors* [2015] EWHC 661 (TCC).

[170] G. Anderson, R. Jerman and S. Tarrant, 'Diversity in international arbitration' (*Thomson Reuters Practical Law's Arbitration Global Guide*, 1 March 2020) available at https://uk.practicallaw.thomsonreuters.com/Link/Document/Blob/I653eb295473f11e9adfea82903531a62.pdf?targetType=PLC-multimedia&originationContext=document&transitionType=DocumentImage&uniqueId=0485816b-854c-42c8-be42-bbfc472e2c29&contextData=%28sc.DocLink%29&comp=pluk (last accessed 9 August 2023).

[171] *Halliburton Company* v. *Chubb Bermuda Insurance Ltd* [2020] UKSC 48, , at [43-44] in relation to GAFTA and LMAA interventions. Also, at [133] the Supreme Court refers to Rule 3.1.3 of the IBA Guidelines, which endorses the limited pool of expert arbitrators who can conduct certain types of disputes. See also *Newcastle United Football Company Ltd v Football Association Premier League Ltd & Ors* [2021] EWHC 349 (Comm) (24 February 2021), at [54].

arbitration.[172]Such arguments which are based on the court's subjective perceptions of who the fair-minded person is, have stood in the way of the appointment of talented and qualified arbitrators from minority backgrounds.

However, this attempt to rationalise repeat appointment, or confirming appointments when there are clear links between the parties on the basis of the 'limited pool' or the 'close-knit' argument such as in the cases of Saudi Cable, Laker Airways, Chubb, and Newcastle may sometimes fail even when employing the fair-minded construct. For example, in H1 & Anor v W & Ors the claimant petitioned the court for the removal of an arbitrator under Article 24(1) of the EAA due to statements made by the sole arbitrator during which according to the Claimant raised justifiable doubts as to whether the arbitrator can assess the witness statements impartially. The Court employing the fair-minded person found that the Arbitrator's statements that "he would believe the insured's expert because he knew him and because he is one of Norway's top producers before (i) that evidence had even been called and tested in cross-examination and (ii) he had heard what the insurer's witnesses had to say on that topic, undoubtedly gives an appearance of bias"[173].

The court acknowledged that in the context of the close-knit environment in the media industry profession which the arbitrator and the parties belonged to meant that the arbitrator would have worked or had contacts or some other verifiable links with the witnesses before the appointment should not in itself suggest that there is a real possibility of bias. However, it is one thing to be predisposed to certain evidence, it is another to pre-judge the evidence (or at least give the impression that they will) on the basis of the impression the arbitrator has of the witnesses due to their reputation[174]. Thus, the limited pool defence in this instance did not absolve the arbitrator

[172] *Halliburton Company* v. *Chubb Bermuda Insurance Ltd* [2020] UKSC 48, at [43-44] and [135]. See also *Newcastle United Football Company Ltd v Football Association Premier League Ltd & Ors* [2021] EWHC 349 (Comm) (24 February 2021).
[173] H1 & Anor v W & Ors [2024] EWHC 382 (Comm) (22 February 2024), at [77].
[174] ibid at [77].

of the impression they have given that there is risk that they will not 'shuts her eyes to all considerations extraneous to the particular case' [175].

Be it as it may, a reasonable person committed to a normative ethical theory, would have reached a conclusion that due consideration should be given to equality at the time of the appointment of the arbitrator, and therefore, repeat appointments of a small group of white male arbitrators should be at least questioned and scrutinised.[176] Only then institutions will be able to implement operational rules at the point of appointment, contributing to diversity in international commercial arbitration.[177]

Even if we take the approach of embracing an opposing view to the fair-minded observer, (instead of changing the test), prevailing over questions of black letter law, it is concerning that in this approach, courts are not necessarily bound by practice. English Courts have stated, for instance, that the IBA guidelines do not bind the court, but they can be of assistance.[178] This 'assistance' can be disregarded if the test applied in courts differs from it.

In terms of diversity and inclusion, most arbitral institutions have committed themselves to it's improvement. . For example, the LCIA has recently launched a 'New Equality, Diversity, and

[175] *Ibid* H1 & Anor paras 77-83. See *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at [471].

[176] In 2018, the percentage of women who were appointed in commercial arbitration stood at 16%. Moreover, using ICSID statistics only 4% of arbitration are resolved by entirely non-Anglo-European background (P. Apoorva, "Implicit Bias in Arbitrator Appointments: A Report from the 15th Annual ITAASIL Conference on Diversity and Inclusion in International Arbitration", available at https://arbitrationblog.kluwerarbitration.com/2018/05/07/implicit-bias-in-arbitrator-appointments-a-report-from-the-15th-annual-ita-asil-conference-on-diversity-and-inclusion-in-international-arbitration/ (last accessed 15 June 2023)). See also T. Cole and P. Ortolani, "Diversity in Arbitration in Europe: Insights from a Large Scale Empirical Study" (2015) 12(4) TDM, available at https://www.transnational-dispute-management.com/article.asp?key=2242 (last accessed 03 January 2024), which shows a clear lack of gender and ethnic diversity in arbitration.

[177] On the need to address gender discrimination in arbitration showing the normative imperative, see the 2022 ICCA Report No.8. "Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings", available at https://cdn.arbitration-icca.org/s3fs-public/document/media_document/ICCA-Report-8u2-electronic3.pdf. (last accessed 3 January 2024) at 38. The report, at 58 and 104 shows that appointment of women as arbitrators has improved reaching an average of 26.1% in 2021 of all appointment globally, with significant improvement among institutions who have the highest percentage of appointment of women arbitrators when compared with appointments made by co-arbitrators or parties.

[178] See *W Ltd v M SDN BHD* [2016] EWHC 422 (Comm) at [26], *Sierra Fishing Co v Farran* [2015] EWHC 140 (Comm) at [58] and *A v B* [2011] EWHC 2345 (Comm) at [73].

Inclusion Initiative'[179] and the ICC is also promoting diversity through its Guide of Disability Inclusion in International Arbitration.[180] As commendable as the initiatives are, if a challenge to the arbitrator's impartiality is to be decided in court, the actions from practice will not be effective as long as the test applied is not clear on how such view would be welcomed.

Moreover, although institutions scrutinise the nomination of the arbitrators by the appointing party, including the joint nomination of a chairperson by the party appointed arbitrator, an institution will hardly challenge parties' choice based on a lack of diversity. The nomination should stand unless there are doubts about the impartiality of the arbitrator or on other grounds such as the qualification of the arbitrator. Therefore, due to the prominence of party autonomy in the process of the appointment of arbitrators, an over-reliance on reform coming from the legal community and institutions to increase diversity in arbitration can be likened to asking the tail to wag the dog. However, undoubtedly, good practice leading to greater diversity in arbitration will emanate from the efforts being done by various arbitration institutions, and the legal profession.

As a result, because the reasonable person is a dynamic hybrid construct, it will be constantly evolving, and reshaping its empirical and normative content so that it does not stand in the way of important normative values.

VI. CONCLUSION

The test applied by the ECtHR, international practice, and the IBA rules, measures the impartiality of the arbitrator from the viewpoint of the reasonable person. As a matter of principle, the English impartiality test should employ the reasonable person for it to conform with best

[179] In https://www.lcia.org/News/lcia-unveils-new-equality-diversity-and-inclusion-initiative.aspx (last accessed 10 June 2024)
[180] In https://iccwbo.org/news-publications/news/icc-releases-guide-for-disability-inclusion-in-international-arbitration-and-adr/ (last accessed 10 June 2024)

international practice and avoid running the risk of being an outlier in the international arbitration arena. There are no policy or practical considerations which require the adoption of a different approach.

The reasonable person challenges practices which do not conform to ethical standards, even when these practices prevail in the industry or the specific trade. They are not moved by the life experiences, reputation, or skills of the arbitrator. The reasonable person applies a normative assessment that measures the contested links and appearances between the arbitrator and the dispute against values integral to the civil justice system, such as equality and justice. This normative ethical commitment is so fundamental to the integrity of arbitration, particularly when there is a real constant threat that private interest and economic efficiencies may prevail over important constitutional values.

Conversely, the fair-minded person is a complex creature with sophisticated attributes that very few people have. Its positive content is restricted and is disconnected from the international practice. Employing this legal construct undermines arbitration's potential of becoming a more mainstream dispute resolution mechanism. Moreover, it is important for the English legal system to converge or align with the international practice by using similar tools to assess the impartiality of the arbitrator. The gap between the ordinary citizen and arbitration will therefore widen when policy consideration requires that it become more accessible to the ordinary disputant. Another danger in using the fair-minded person is that the court will assess the degree of appearance (real possibility) from its own eyes,[181] leading to controversial decisions such as those rendered in *Laker Airways Inc v FLS Aerospace Ltd, AT&T Corp v Saudi Cable Co, Halliburton v Chubb* and

[181] Attril, "Who is the "Fair-Minded and Informed Observer", *supra,* no 6, p 280.

Newcastle. Thus, what would appear to be fair and just to a select few people lacking real diversity, risks being rejected by the many.