“*Appear as you are or be as you appear*”: Sound advice to arbitrators considering independence and impartiality disclosures? A comparative analysis advocating for uniformity and addressing participants’ legitimate expectations.*

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ABSTRACT*: The process of arbitration is shrouded in secrecy and mystery for the non-participants. Consequently, it has come under heavy fire for the lack of transparency the system entails, especially in respect of the appointment of arbitrators. Rules around their duties of disclosure are therefore of critical importance, in particular to ensure just and effective dispute resolution, and so that disputants have complete faith in the process. Only then will legitimacy concerns be fully eradicated. This article, adopting an interdisciplinary approach by seeking inspiration and steer from the works of the great eastern philosopher Rumi, considers the shortcomings of the near universal, objective legal test in respect of the duty of disclosure by arbitrators, and queries whether such serve the legitimate expectations of the disputants, the enablers and ultimate users of the process. The article concludes by advocating in favour of a hybrid test, encompassing both objective and subjective considerations.*

1. Introduction

An arbitration is often said to be as good as its arbitrator(s).[1] This stems not only from the fact that arbitrators assume the role reserved ordinarily for state judges as the ultimate arbiters of dispute (through party agreement), but also (and more so) because of the extensive flexibility of the arbitral process and the arbitrators’ wide ranging powers and privileges over the procedure, mostly regarded as near ‘untouchable’ in any appellate or challenge procedure. Consequently, it is of critical importance that arbitrators appointed to serve are competent, willing and able to serve, free from any outside interference or pressure. One can only serve without outside interference or pressure if one is free from dependence and partiality.[2] To put it differently, arbitrators must be independent of the parties and impartial of them. They must resist temptations of favouritism in all manner and form. Lacking such qualities could seriously jeopardise the validity of their determination, and likely permit the aggrieved party

* Jalāl al-Dīn Muḥammad Balkhī / Rumi, also known as “Mevlana”, a renowned 13th Century Persian / Turkic philosopher and poet. The full poem, commonly attributed to Rumi, reads: “*Be like the sun for grace and mercy. Be like the night in covering other’s faults. Be like water in generosity. Be like death to rage and anger. Be like the Earth for modesty. Appear as you are or be as you appear*” (translated by author).

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[1] See, e.g., Gillian Eastwood, 'A Real Danger of Confusion? The English Law Relating to Bias in Arbitrators', in William W. Park (Ed), *Arbitration International* (2001) 17(3) 287 – 312, 291-292; David Hacking, ‘Arbitration is Only as Good as Its Arbitrators’, in Stefan Kröll, Loukas A. Mistelis, Perales Viscasillas Maria del Pilar & Vikki M. Rogers (Eds), *Liber Amicorum Eric Bergsten – International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (Kluwer Law International 2011), 223-230; Ali Yesilirmak, ‘Transparency and Stakeholders’ Role in the Selection of the Arbitral Tribunal’, in Stavros Brekoulakis, Romesh Weeramantry, Lilit Nagapetyan (Eds), *Achieving the Arbitration Dream: Liber Amicorum for Professor Julian D.M. Lew KC* (Kluwer Law International, 2023), 285-293.
[2] See Daze C. Nga and Peace O. Adeleye, 'The English Supreme Court’s Decision in Halliburton v. Chubb: An Examination of the Issues Arising from Arbitrators’ Acceptance of Multiple Appointments in Related Arbitrations and Arbitrator’s Duty to Disclose' (2022) 88(1) *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, 201 – 218, 202-203.

to successfully challenge and/or set aside the arbitral award rendered, depending on the seriousness and consequences of the violation. Given the importance of the matter, the appropriateness and effectiveness of the legal test adopted to assess independence and impartiality of arbitrators, and relatedly the imposition of duties of disclosure on arbitrators of matters that raise independence and impartiality issues, are of paramount importance.

This paper accordingly analyses the appropriateness and justifiability of the duty imposed on arbitrators as regards the required disclosure of facts and circumstances relevant to assessing their independence and impartiality, particularly focusing on whether such duty imposed serves the intended purpose and the legitimate expectations of the users of the arbitration system. This is done through the lens of the great Persian / Turkic philosopher and poet Rumi's teachings, in which the learned scholar advocates for maximum transparency and openness, a cry echoed by many in the arbitration world today querying the legitimacy of the process[3]. In particular, this paper assesses the appropriateness of the rules concerning the arbitrators' duties of disclosure and considers whether arbitrators should be duty bound to disclose all relevant facts the parties have a legitimate expectation to know, even where on its face the facts do not appear to the arbitrators to be relevant and therefore not warranting disclosure on the more widely adopted objective standard. That approach would arguably be more in line with Rumi's advocated view that there is virtue in being as open and revealing as is possible; in other words, to appear as one is or being as one appears, and thereby facilitating greatest transparency that is both possible and desirable in the circumstances.

In light of the above, this paper considers whether the proper approach to disclosures in arbitrations should be one that focuses on the legitimate expectations of the actual disputant parties, which would result in the creation of a hybrid approach involving both objectivity and subjectivity, as opposed to an assessment wholly objective that focuses on the assessment of the uninterested reasonable person. It is suggested that the hybrid approach is to be favoured over an approach that simply disregards any known or assumed legitimate expectations of the actual parties, considering the consensual nature of arbitration and the potential for exploitation of arbitrators' personal interests. Arbitration must respond to the legitimate expectations of its users if it is to remain as a viable option to resolving disputes outside of the national courts. This is ever more pressing given the current legitimacy crisis calls reverberating ever more forcefully.

In pursuit of the above objective, this article will consider and analyse the various rules and principles adopted by the English, German and Swiss legal systems, with a particular focus on English law. These jurisdictions are selected for their 'arbitration friendly' approach both in legislation and judicial application, and also for a fair coverage of both common and civil law jurisdictions. Their legal systems are rich with arbitration related jurisprudence, with the rules and practices the fruits of decades' long process of trial and error. An examination of their rules should therefore give one a fair flavour of the generally adopted rules concerning arbitrators' duty to disclose in the arbitration friendly jurisdictions. The rules and requirements set out in arbitral institutions' rules and other applicable soft-law

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[3] See, Yesilirmak (n 1); Remy Gerbay, *The Functions of Arbitral Institutions* (Kluwer Law International, 2016), 197; Victoria Udoh, *Transparency in Arbitration, Desired or Necessary?* (September 9, 2020). Available at SSRN: https://ssrn.com/abstract=3689698 or http://dx.doi.org/10.2139/ssrn.3689698; Catherine A Rogers, *Transparency in International Commercial Arbitration*, 54 U. Kan. L. Rev. 1301 (2006); and Srishti Kumar and Raghvendra Pratap Singh, *Transparency and Confidentiality in International Commercial Arbitration* (2020) 86(4) Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 463 – 481.

instruments concerning disclosures required of arbitrators in connection with the duty of independence and impartiality will similarly be explored. The exercise is intended to enable an assessment of whether there is sufficient degree of uniformity between the various laws and rules, or whether divergent approaches have been adopted and, if the latter, whether efforts to standardise should be championed.

The paper will conclude by setting out various proposals and suggestions for possible implementation in the future to ensure that arbitration maintains its position as the preferred form of alternative dispute resolution and is able to address the growing legitimacy related criticisms levelled against it.[4] This paper will advocate that only in circumstances where arbitrators are as they appear or appear as they are, i.e. are fully transparent in their dealings and connections concerning the disputes over which they adjudicate, will all members of the arbitration community, particularly the parties appointing them and/or whose disputes they determine, have faith and trust in the system and only then can arbitration continue to prosper and assist in the resolution of complex, commercial disputes. Admittedly the difference between the two "appearances" are subtle, but one thing that is clear is that Rumi's line of thinking dictates total and complete alignment, not different shades of the same thing.

2. Nature and scope of duty of independence and impartiality

A fundamental feature of arbitration, and its principal difference from most other alternative dispute resolution mechanisms, such as mediation and conciliation, is that it is intended to result, and usually does result, in a final and binding determination of the dispute.[5] It therefore, in a sense, imitates judicial determination and, for that reason, the duty imposed on arbitrators in respect of independence and impartiality has been transported into the arbitration arena. It is a requirement imposed almost universally, referred by some as the "*cardinal duty*".[6] The rationale for the requirement is said to relate to the "*integrity and fairness of the arbitral process*".[7]

It is critical to note, at the outset, that the twin-concepts of independence and impartiality, though often intertwined and used interchangeably, mean different things, and separately focus on objectivity and subjectivity of knowledge or one's state of mind. Redfern and Hunter explain this as follows:

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[4] See Thomas H. Webster, *'Efficiency in Investment Arbitration: Recent Decisions on Preliminary and Costs Issues*' (2009) 25(4) Arbitration International 469; David Collins, *'The line of equilibrium: improving the legitimacy of investment treaty arbitration through the application of the WTO's general exceptions'* (2016) 32(4) Arbitration International 575; Malcolm Langford, Cosette D. Creamer and Daniel Behn, 'Regime Responsiveness in International Economic Disputes' in Szilard Gaspar-Szilagyi, Daniel Behn and Malcom Langford (eds), *Adjudicating Trade and Investment Disputes: Convergence or Divergence?* (Cambridge University Press 2020), 245 and 267 *et seq*; and Yesilirmak (n 1).

[5] See, e.g., 'Chapter 1: Overview of International Commercial Arbitration', in Gary B. Born, *International Commercial Arbitration*, Third Edition (Kluwer Law International 2021).

[6] *Halliburton Company v Chubb Bermuda Insurance Ltd (Formerly known as Ace Bermuda Insurance Ltd)* [2020] UKSC 48, [49]. See also, 'Chapter 2: Agreement to Arbitrate', in Alan Redfern, Nigel Blackaby and Constantine Partasides, *Redfern and Hunter on International Arbitration*, Seventh Edition (Oxford University Press, 2022), 226. See also, Article 12 of the UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments) as adopted in 2006, accessed via https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf on 28 April 2023. In fact, traces of the need for arbitrators to be independent and impartial are said to be found in Ancient Greek and Roman times; see, Born (n 5), §12.05.

[7] Born (n 5), §12.05.

> "*'Independence' is generally considered to be concerned with the relationship or links between an arbitrator and one of the parties, whether financial or otherwise. This is thought to be susceptible to an objective test, as it has nothing to do with an arbitrator's state of mind. By contrast, the concept of 'impartiality' is considered to be connected with actual or apparent bias of an arbitrator—either in favour of one of the parties, or in relation to the issues in dispute.*"[8]

English law stipulates for an express requirement of independence and impartiality of arbitrators. The English Arbitration Act 1996 (the "1996 Act") provides that the tribunal is under a general duty to "*act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent*".[9] Relatedly, section 68 of the 1996 Act permits a party to arbitral proceedings to challenge an award rendered by the arbitrator(s) on the ground of serious irregularity affecting the tribunal, the proceedings or the award, and sub-section (2) explains that serious irregularity in the context could mean, *inter alia*, a failure by the tribunal to comply with section 33, which imposes a general duty on the tribunal extending to the duty to act fairly and impartially. Furthermore, section 24(1)(a) states that a party to arbitral proceedings is entitled to apply to the court to seek the removal of an arbitrator where "*circumstances exist that give rise to justifiable doubts as to [the arbitrator's] impartiality*".

Although this lacks an express acknowledgement of the duty of independence in the statute, it does not detract from the legal duty imposed on arbitrators when dealing with arbitrations seated in the UK; as was recently confirmed by the UK Supreme Court, under English law "*arbitrators [are] under a duty to act independently and impartially and owe[] no allegiance to the party which appointed them*".[10] Born considers that the matter is given undue attention and attributed unworthy importance; he expresses that the enquiry is essentially focused on ascertaining whether "*the arbitrator is unbiased and fair-minded*".[11] Thus, according to Born, a requirement that arbitrators be impartial encapsulates within it the requirement for independence.

Swiss and German laws, by way of example, also impose mirroring duties of independence and impartiality on arbitrators appointed to preside over disputes seated in those jurisdictions. Swiss law, for instance, provides that an arbitral tribunal member may be challenged "*if circumstances exist that give rise to legitimate doubt as to his or her independence or impartiality*".[12] However, it should be noted that the duty of independence

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[8] Redfern and Hunter (n 6), 226.

[9] Section 33(1)(a). Sub-section (2) elaborates that "*The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.*"

[10] *Halliburton* (n 6), [29]. Note, however, that the drafters of the 1996 Act considered it unnecessary to include the express reference to independence in the legislation because it was considered superfluous, for the following reason: "*It seems to us that lack of independence, unless it gives rise to justifiable doubts about the impartiality of the arbitrator, is of no significance. The latter is, of course, the first of our grounds for removal. If lack of independence were to be included, then this could only be justified if it covered cases where the lack of independence did not give rise to justifiable doubts about impartiality, for otherwise there would be no point including lack of independence as a separate ground*." (UK Departmental Advisory Committee on Arbitration Law, *Report on the Arbitration Bill (1996)*, [101]).

[11] Born (n 5), §12.05.[A][2].

[12] Article 180(1)(c), Swiss Private International Law Act of 18 December 1987 (SR / RS 291), accessed via https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/en on 28 April 2023. For the mirroring position in respect of domestic arbitrations, see Article 367(1) of the Swiss Code of Civil Procedure of 19 December 2008, entered into force on 1 January 2011 (SR / RS 272), accessed via

and impartiality casts a wider net; the duty extends to all circumstances that are likely to give rise to doubts, whereas a successful challenge against an arbitrator would require justifiable, legitimate grounds for doubts as to independence and/or impartiality.[13] The legal standard in assessing the independence and impartiality of an arbitrator is an objective one; as such, an arbitrator need not actually be biased, it is sufficient if there are circumstances that give rise to the appearance of partiality and risk of bias.[14] For instance, the Swiss court found in an action where the wife of a party-appointed arbitrator was employed as a lawyer in the law firm representing that party that there were facts or circumstances giving rise to justifiable doubts as to independence and impartiality of the arbitrator concerned.[15] There was a similar ruling in a case where the arbitrator had communicated *ex parte* with a party and the said party having made a renewed application for provisional measures shortly thereafter.[16] Whether in those cases the arbitrator in question lacked the expected qualities as regards independence and impartiality was immaterial.

In the same vein, German law stipulates that in circumstances where the court is to appoint an arbitrator, the court must "*take account of all factors ensuring the appointment of an independent and impartial arbitrator*".[17] In corroboration, section 1036(2) of the German Civil Code states that an arbitrator may be challenged where circumstances exist that give rise to justifiable doubts as to their impartiality or independence. Unsurprisingly, this is an extension of the constitutional principle that decision makers ought to be independent and impartial of the disputants, whether in court litigation or arbitration.[18] Similar to the position under Swiss (and English) law, the assessment is focused on an objective analysis, i.e., whether there exists a concern as regards independence and impartiality from the perspective of the reasonable person (in the position of the complainant party), as opposed to whether such is the subjective view of any of the parties. Accordingly, it has been expressed that "*purely subjective concerns are…neither adequate nor sufficient for a challenge*"; the determination is to be focused on "*whether objective grounds exist from the standpoint of a calm and reasonable party*".[19]

Reflective of the general approach adopted by the various legal jurisdictions in respect of the requirement for arbitrators to be independent and impartial, arbitral rules and "soft laws" impose mirroring requirements. The International Chamber of Commerce's (the "ICC") Rules of Arbitration (2021) (the "ICC Rules") stipulate, for instance, that "*[E]very arbitrator must be and remain impartial and independent of the parties involved in the arbitration*."[20] In similar vein, and in slightly more fleshed-out manner, the London Court of

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https://www.fedlex.admin.ch/eli/cc/2010/262/en on 28 April 2023. Note, for completeness, that the domestic statute refers to "*reasonable doubt*", whereas in the international arbitration focused statute the reference is to "*legitimate doubt*".

[13] See, e.g., Patricia Nacimiento, Amelie Abt and Max Stein, 'Part II: Commentary on the German Arbitration Law (10th Book of the German Code of Civil Procedure) - Chapter III: Constitution of the Arbitral Tribunal', in Patricia Nacimiento, Amelie Abt and Max Stein (Eds), *Arbitration in Germany: The Model Law in Practice*, Second Edition (Kluwer Law International, 1998), 180.

[14] Nathalie Voser and Eliane Fischer, 'Chapter 4: The Arbitral Tribunal', in Elliott Geisinger, Nathalie Voser and Angelina Petti (Eds), *International arbitration in Switzerland: a handbook for practitioners*, Second Edition (Kluwer Law International, 2013), 64.

[15] Ibid, 65.

[16] Ibid.

[17] Section 1035(5), Book 10, German Code of Civil Procedure of 5 December 2005, accessed via https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html on 28 April 2023.

[18] Nacimiento (n 13), 180.

[19] Ibid, 187.

[20] Article 11(1).

International Arbitration's (the "LCIA") Arbitration Rules (2020) (the "LCIA Rules") state that "*[A]ll arbitrators shall be and remain at all times impartial and independent of the parties…*".[21] The LCIA Rules further explain that an arbitrator may be removed from office where "*circumstances exist that give rise to justifiable doubts as to that arbitrator's impartiality or independence*"[22], somewhat mirroring the stipulation in section 24(1)(a) of the 1996 Act.

Lastly, the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration (2014) (the "IBA Guidelines on Conflicts" or "Guidelines"), a piece of "soft-law" legislation[23], which *"set[s] out good arbitral practice…recognised internationally*"[24], recognise the importance of tribunals being and appearing to be independent and impartial. It contains general standards (and explanatory notes thereon) in respect of disclosure of material information, in addition to the listing of specific situations indicating whether such warrant disclosure or disqualification of an arbitrator by way of colour codes, essentially to determine whether a certain matter must, should or need not be disclosed by an arbitrator.[25] The specific situations considered in the IBA Guidelines on Conflicts are not intended to act as an exhaustive list, but merely indicative of the types of situations that usually arise and the importance to be attributed to each in respect of disclosures and removal of arbitrators.[26]

General Standard 1 of the IBA Guidelines on Conflicts stipulates that "*[E]very arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated.*" The General Standard 1 further states that an arbitrator must decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator, if it has "*any doubt as to [its] ability to be impartial or independent*". [27] The same equally applies in circumstances where the facts or circumstances are such that a reasonable third person having knowledge thereof would consider that such give rise to "*justifiable doubts as to the arbitrator's impartiality or independence*", unless there is a valid party waiver[28].[29] There would exist justifiable doubts if a reasonable third person, with knowledge of 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*".[30] Justifiable doubts would exist as a rule where the matter falls within the situations described in the "Non-Waivable Red

[21] Article 5.3.
[22] Article 10.1.
[23] The IBA Guidelines on Conflicts expressly state that they are not intended to displace applicable national laws or arbitral rules chosen by the parties (Introduction, paragraph 6).
[24] *Halliburton* (n 6), [71]. See also, Hew R. Dundas, 'An English Judicial Perspective on the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration: W Ltd v M Sdn Bhd', in Michael O'Reilly (Ed), (2016) 82(3) *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, 331-337; Ned Beale, James Lancaster, et al., 'Removing an Arbitrator: Recent Decisions of the English Court on Apparent Bias in International Arbitration', 2016 (34(2) ASA Bulletin, (Association Suisse de l'Arbitrage), 322-341, 328.
[25] Note that the "*Guidelines apply to international commercial arbitration and investment arbitration, whether the representation of the parties is carried out by lawyers or non-lawyers, and irrespective of whether or not non-legal professionals serve as arbitrators*" (Introduction, paragraph 5).
[26] See, IBA Guidelines on Conflicts, Introduction, paragraph 7.
[27] General Standard 2(a).
[28] See, General Standard 4.
[29] General Standard 2(b).
[30] General Standard 2(c).

List".[31] Note that the test focuses on the 'reasonable third person' meaning that the test is an objective one[32]; although there is also involved some element of subjectivity given the focus on the arbitrator's own assessment in respect of any doubts regarding its ability to be impartial or independent. The test is not therefore focused (somewhat in line with the tests imposed by the national laws considered above), on the presumed intentions or known legitimate expectations of the parties, objectively ascertained, but instead on the state of mind of and assessment by the arbitrator and/or the presumed assessment by the objective person making an analysis on the basis known facts and circumstances. The expectation of the parties, on an objective standard, in respect of the qualities and attributes to be possessed by the arbitrator(s) is disregarded as part of the assessment.

3. Duty to disclose conflict of interests: disregard of parties' legitimate interests

As alluded to above, an arbitrator is required to disclose certain facts and circumstances that could have a bearing on its perceived independence and/or impartiality. A failure to do so could result in the removal of the arbitrator(s) or the setting aside or successful challenge of the award rendered. This part considers the specifics of that duty of disclosure and analyses whether such takes into account in any way or form the actual disputants' legitimate expectations.

A. The IBA Guidelines

The IBA Guidelines on Conflicts recognise the importance of relevant information being made available to the parties, primarily to protect awards against challenges based upon alleged failures to disclose, and to promote a level playing field among parties and among counsel engaged in international arbitration.[33] Lack of transparency often results in disgruntled parties and, in some cases, in successful appeals or challenges against arbitral awards. General Standard 3(a) of the IBA Guidelines on Conflicts regulates the issue of arbitrator disclosures, as follows:

> "*If facts or circumstances exist that may, **in the eyes of the parties**, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties, the arbitration institution or other appointing authority (if any, and if so required by the applicable institutional rules) and the co-arbitrators, if any, prior to accepting his or her appointment or, if thereafter, as soon as he or she learns of them.*" (Emphasis added)

The Guidelines suggest that where there is any doubt as to whether a certain fact or circumstance should be disclosed, such doubt should be resolved in favour of disclosure.[34] The same guidance echoes implicitly from General Standard 3(a) quoted above. That does not mean, however, that disclosure equates to or implies the existence of doubts as to the impartiality or independence of the arbitrator. The Guidelines make it clear that disclosure is not to be construed in such a way, and that consequently "*the standard for disclosure differs from the standard for challenge*".[35] Notwithstanding the above, there is no duty to disclose a fact or circumstance (such as those set out in the Green List) that could never lead to

[31] General Standard 2(d).
[32] Explanation to the General Standard 2, (b).
[33] See, IBA Guidelines on Conflicts, Introduction, paragraph 1.
[34] General Standard 3(d).
[35] See, foreword to IBA Guidelines on Conflicts. See also, Explanation to the General Standard 3(c).

disqualification under the objective test set out in General Standard 2. It is noteworthy that the General Standard 3(a) quoted above seemingly refers to the perception of the actual parties, as opposed to what would have been expected by the parties from the viewpoint of the reasonable person, i.e., embodying a subjective analysis approach as opposed to an objective analysis. This is in stark contrast to the general approach adopted by national laws, as will be observed from Part B below.

It is not entirely clear why the IBA Guidelines take a different, divergent approach. It may be due to the need to give the Guidelines a broad appeal, particularly aiming for nations where the test around impartiality and independence disclosure is focused on subjectivity and/or the parties' expectations from arbitrators. The IBA approach certainly has its strong attractions.[36] In a system of dispute resolution that owes its existence entirely to party consent, it is not only fair and just, but also reasonable for the parties' legitimate expectations to be considered as part of the disclosure process. The legitimate expectations of the actual disputant parties deserve more credit and attention than those of the uninterested reasonable person. It goes without saying that what is not advocated is that all subjective considerations of the parties be accommodated by arbitrators when assessing their disclosure obligations. Some level of reasonableness and rationality is required to ensure that the "*innermost hopes, fears and perceptions of a purely subjective nature*" are not accounted as part of the assessment, and in doing so disregarding the individuality or idiosyncrasies of the individual parties.[37]

Part II of the Guidelines provide for examples demonstrating the practical application of the general standards set out in Part I, which essentially regulate for various conflict issues that may arise, in a non-exhaustively listed fashion, and whether such issue would require an arbitrator to stand down from service or, alternatively, make the relevant disclosure(s) and continue to serve. This is done by way of colour-coded buckets, as follows: (i) red list, sub-categorised as non-waivable and waivable red lists; (ii) orange list; and (iii) green list. A matter would fall within the red list if there exists "*an objective conflict of interest … from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances*". The non-waivable red list pertains to issues that potentially contravene the overriding principle that no person can be its own judge. As the name-tag suggests, such issues are non-waivable and the arbitrator is precluded from accepting an appointment in such circumstances even where the parties are aware and accept the appointment with full knowledge of the relevant facts and circumstances. For instance, a case would fall into the non-waivable red list category where the arbitrator has a significant financial or personal interest in one of the parties or the outcome of the case, or the arbitrator (or its firm) regularly advises the party or its affiliate and significant financial income is derived therefrom (r. 1.3 and 1.4). The waivable red list matters concern situations that are serious but not as severe, such as where the arbitrator has provided legal advice on the dispute to one of the parties or was otherwise previously involved in the matter (r. 2.1), the arbitrator holds shares in one of the parties or its affiliate (r. 2.2.1) or the arbitrator is a lawyer in the same law firm as the counsel to one of the parties (r. 2.3.3). These situations are capable of being waived by the parties "*only if and when the parties, being aware of the conflict of interest situation, expressly state their willingness to have such a person act as arbitrator*".[38] Full knowledge of the facts and a clear expression of waiver is required in such cases.

[36] See, Daniel Greineder, 'Through a Glass Darkly: Making Sense of Arbitrator Disclosure', in Matthias Scherer (ed), ASA Bulletin, (Kluwer Law International, 2023) Vol 41(2), 334 – 355, 345.
[37] Ibid.
[38] Guidelines, Part II, para 2.

The orange list specifies, again in a non-exhaustive fashion, certain circumstances wherein disclosure is required from the arbitrator because the relevant fact may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence. If, following proper disclosure, the parties do not timely object to the arbitrator's appointment, they are deemed to have accepted the arbitrator.[39] The Guidelines expressly note that disclosure in such circumstances is not to be construed as the existence of a conflict of interest. It will therefore not, by itself, result either in the disqualification of the arbitrator, or in a presumption regarding disqualification.[40] It is merely aimed at promoting disclosure and permitting a dialogue whereby the parties are permitted to air any concerns they may have, which would then be considered by the arbitrator(s) and a determination made as to whether the concern or challenge etc. is valid or wholly misplaced. Examples of circumstances falling within the orange list are where the arbitrator has acted as counsel for a party in the last three years or provided legal advice to such party on an unrelated matter (r. 3.1.1), where the arbitrator has served as counsel against one of the parties or its affiliate within the past three years in an unrelated matter (r. 3.1.2) and where the arbitrator and another arbitrator are lawyers in the same law firm (r. 3.3.1).

Finally, the green list stipulates for circumstances where no appearance and no actual conflict of interest exists from an objective point of view, with the arbitrator being under no duty to disclose. An example green list circumstance is where the arbitrator has previously expressed a legal opinion (such as in a law review article or public lecture) concerning an issue that also arises in the arbitration (but such opinion not being focused on the case) (r. 4.1.1). Another green list circumstance is where the arbitrator and counsel for one of the parties have previously served together as arbitrators (r. 4.3.2).

The above scrutiny of the IBA Guidelines exemplifies how an objective rule on analysing conflict scenarios could work together with a requirement of disclosure that focuses on the legitimate expectations of the actual disputants. If the actual parties' understanding and expectations is considered relevant in respect of an 'orange category' assessment, there is no reason why the actual parties' legitimate expectations in respect of matters for disclosure can or should not be given due attention more broadly. This demonstrates that the current objective / reasonable person test used by some prominent arbitral jurisdictions for ascertaining conflicts, such as is the position in England, Switzerland and Germany (see Part B below), is capable of working alongside a test for disclosure that allows for subjectivity, i.e., the legitimate expectations of actual disputants. The IBA Guidelines have been in existence for some years now and there has been no suggestion that the focus on the actual disputants' expectations give rise to confusion, unwanted complications or insurmountable obstacles. The approach the Guidelines take is therefore to be commended and applauded for paving the way for greater transparency in respect of arbitrator conflicts.

B. The English, German and Swiss approach(es)

The legal test for disclosure under English law in respect of the independence and impartiality of arbitrators, focused on the assessment of a fair-minded and informed observer, is similar to the test of justifiable doubts adopted in the IBA Guidelines on Conflicts, and also

[39] Guidelines, Part II, para 3.
[40] Guidelines, Part II, para 4.

in most continental / civil law jurisdictions[41].[42] The test focuses on whether a fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the arbitrator in question was biased.[43] Unpacking the test, the Supreme Court explained in *Halliburton* that the reference to fair-minded "*means that the observer does not reach a judgment on any point before acquiring a full understanding of both sides of the argument"*.[44]

The fair-minded observer must, by necessity, be informed of all matters that are relevant before it can take a balanced approach to matters put before it. However, the fair-minded and informed observer need not trouble itself with the any legitimate expectations the actual parties had in mind when contracting, even if known and undisputed. Although such an approach may be considered as harnessing certainty and predictability, it is questionable whether such justifies the disregard of the actual parties' legitimate expectations in a system that exists at the mercy of the parties. Certainty of outcome should not be the ultimate goal. The common understanding or agreement of the parties connected to a contractually agreed dispute resolution mechanism must be given due consideration.

Given the importance of the *Halliburton* case under English law in respect of arbitrator disclosures, and in particular the remarks made by their Lady and Lordships on the premium on frank disclosure applicable to arbitrators compared to those applicable to judges, a detailed scrutiny of the case and its outcome is warranted. In that case an arbitrator (Kenneth Rokison QC), who had been appointed by the High Court following the parties' failure to agree on the chairman of the tribunal, had not disclosed that he had been appointed as arbitrator in two separate, but factually related arbitration proceedings, concerning the Deepwater Horizon incident that occurred in the Gulf of Mexico in 2010. The arbitration had arisen from Chubb's refusal to pay out to Halliburton under a policy of insurance contending that the settlement reached by Halliburton with third party claimants was unreasonable and therefore relieved itself from compensating Halliburton under the terms of the policy. The arbitration clause, contained in the Bermuda Form insurance policy, provided for an *ad hoc* arbitration seated in London, with New York law being designated as the applicable law.

In the first of the two factually related proceedings, the arbitrator had been appointed by Chubb in proceedings between Chubb and Transocean Holdings LLC (Transocean), with Chubb again in its capacity as insurer. The parties had similarly contracted on the basis of the Bermuda Form insurance policy, with mirroring terms as to applicable law and seat of arbitration. It is noteworthy that both Halliburton and Transocean had provided overlapping services to BP Exploration and Production Inc (BP) in connection with the oil rig works at the Gulf of Mexico.[45] In the second (separate but related) proceedings, Transocean and its insurer (an unrelated third party) jointly appointed the said arbitrator (i.e. Kenneth Rokison QC) to resolve a dispute between the parties in connection with the contract of insurance entered into. That appointment was one that was on the same layer of insurance as the claim brought by Transocean against Chubb.

Upon becoming aware, some 17 months into the arbitration process, of the arbitrator's appointment in the later references arising from factually related circumstances, in November

[41] See below in respect of the position concerning the continental / civil law jurisdictions.
[42] See, *Halliburton* (n 6), [54].
[43] Ibid, [52].
[44] Ibid.
[45] *Halliburton* (n 6), [7].

2016 Halliburton applied to the High Court to remove the arbitrator. The application was premised on section 24(1)(a) of the 1996 Act, which provides that "*[A] party to arbitral proceedings may … apply to the court to remove an arbitrator on any of the following grounds… that circumstances exist that give rise to justifiable doubts as to his impartiality*". It was not alleged by the claimant (Halliburton) that there was actual bias or lack of impartiality of the arbitrator, rather that the application was founded on a submission that his conduct had given rise to an appearance of bias.[46]

That Court (Popplewell J) refused the application to remove the arbitrator.[47] Halliburton's appeal to the Court of Appeal was similarly dismissed[48]. The Court of Appeal found, in disagreement with the lower court, that while the arbitrator ought to have disclosed his appointments in the subsequent references, an objective observer would not in the circumstances conclude there was a real possibility that he was biased. Halliburton thereafter elevated its appeal to the Supreme Court. The appeal was unanimously dismissed by the Supreme Court.[49] The Court held that, at the date of the hearing to remove the arbitrator, the fair-minded and informed observer would not have concluded that circumstances existed that gave rise to justifiable doubts about his impartiality. The Court did hold, however, that the arbitrator was under a legal duty to disclose his appointment in that particular case and had breached his duty by failing to make the required disclosure. The leading judgment was delivered by Lord Hodge (with whom Lady Black and Lords Reed and Lloyd-Jones agreed), with Lady Arden delivering a concurring judgment. The Supreme Court considered and distilled the applicable legal principles in respect of the duty of impartiality of arbitrators and the related obligation of disclosure. The Court confirmed that, in the case of an allegation of apparent bias, the legal test is whether the fair-minded and informed observer (also referred to as the objective observer), having considered the facts, would conclude that there was a real possibility that the tribunal was biased.[50]

Although the objective test of the fair-minded and informed observer applies equally to judges and arbitrators, the Court was at pains to note that there are variations between the two, which need be kept in mind when it comes to applying the test to arbitrators.[51] First, there is a 'premium on frank disclosure' in arbitrations given that, unlike in litigation, arbitrations are ordinarily conducted privately and confidentially. Second, an arbitrator's award is less likely to be appealed or challenged on a point of fact or law, in comparison to a court judgment. Third, an arbitrator has a personal or financial interest in obtaining further appointments as arbitrator, which could influence their decisions or case management style, whereas state judges' remuneration and retirement rights are protected by law and funded by taxation. Fourth, arbitrators tend to substantially vary both in terms of their experience as arbitrators and their legal and jurisdictional background; they may therefore have divergent views on what constitutes ethically acceptable conduct. Fifth, in repeat appointment cases where one of the parties is not a party to the other related proceedings, such party lacks the ability to inform itself of the issues and allegations in the other proceedings given the usually private and confidential nature of arbitration, whereas access to documents and information

[46] *H v (1) L, (2) M, (3) N, (4) P* [2017] EWHC 137 (Comm), [3].
[47] Ibid.
[48] *Halliburton Company v (1) Chubb Bermuda Insurance Limited, (2) M, (3) N, (4) P* [2018] EWCA Civ 817.
[49] *Halliburton* (n 6) 48.
[50] Ibid, [52]. Note that this was a pre-existing legal test which was accepted as being correct by the parties in *Halliburton*; see, *Porter v Magill* [2001] UKHL 67. The question for the Supreme Court was rather its application in the factual setting of repeat appointments of arbitrators.
[51] *Halliburton* (n 6), [55]-[62].

in connection with court litigation is possible with greater ease. Finally, in international arbitration there are differing understandings of the role and obligations of the party-appointed arbitrators, with some understandings bordering advocations of actual bias. In such cases, the chairperson is said to have a particular role in making sure that the tribunal acts fairly and impartially. However, this is not to be construed as an acceptance or indication that a party-appointed arbitrator is to abide by lower standards of fairness and impartiality that are expected of chairing arbitrators. Courts, in addressing an allegation of apparent bias in an English-seated arbitration, are expected to have regard to the particular characteristics of international arbitration described above.

The Supreme Court thought it necessary to point out that although the IBA Guidelines on Conflicts and major institutional rules refer to the existence of circumstances that may give rise to doubts as to the arbitrator's impartiality or independence in the eyes of the actual parties concerned (i.e., a subjective analysis), English law adopts an objective approach and is disinterested with what the actual parties' expectations were.[52]

In respect of disclosures of matters or circumstances that could arguably be said to give rise to a real possibility of bias, the Court made some additional remarks noteworthy of further analysis. Disclosure of material facts or circumstances is a legal duty in English law, as opposed to being merely good arbitral practice.[53] This emanates from the arbitrators' duty to act fairly and impartially, and the consequent term implied into contracts between parties and arbitrators that the arbitrator will so act, which implied term cannot be adhered to in circumstances where the arbitrator fails to disclose material circumstances that could justify its removal under the section 24 procedure. The court reasoned that unless there is disclosure, the parties may often be unaware of matters which could give rise to justifiable doubts about an arbitrator's impartiality and entitle them to a remedy from the court.[54] Further, whilst the statutorily imposed duty on the arbitrator to act fairly and impartially arises on its appointment, disclosures must be made pre-appointment to allow the arbitration system to operate smoothly. Indeed, the making of such disclosure is recognised as good practice.[55]

Relevantly, in its recently issued final report containing its recommendations to reforming the 1996 Act, the Law Commission explains that "*disclosure should be made prior to appointment to the person seeking to make the appointment, because the impartiality of the arbitrator is obviously relevant to the decision whether or not to appoint….and that] [A]fter appointment, disclosure should also be made to the parties, who might not have been the person making the appointment.*"[56] The Law Commission recommends that the duty of pre-appointment disclosure be given statutory footing, which would be "*on surer ground than a contractual duty*" given the difficulties in establishing a contractual basis prior to appointment between the relevant parties, as well as "*ensur[ing] that the duty is owed to all parties*".[57] Furthermore, codification of the obligation to disclose is considered to be more in line with international best practice and would provide for increased accessibility compared with the position under the current case law.[58]

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[52] Ibid, [72].
[53] Ibid, [76].
[54] Ibid, [78].
[55] Ibid, [79].
[56] Law Commission Report on "Review of the Arbitration Act 1996: Final report and Bill" dated 5 July 2023 (Law Com No 413), para 3.48 (the "Law Commission's Report").
[57] Ibid, paras 3.49-3.50
[58] Ibid, para 3.66.

The Court in *Halliburton* explained that disclosure by an arbitrator requires the consent of the relevant parties where the information required to be disclosed is subject to an arbitrator's duty of privacy and confidentiality.[59] Moreover, absent contrary agreement, multiple appointments are to be disclosed.[60] Multiple appointments are defined as acceptance of appointments in multiple references concerning the same or overlapping subject matter with only one common party. Finally, in assessing whether there is a real possibility that an arbitrator is biased, the fair-minded and informed observer is to have regard to the facts and circumstances known at the time of the hearing to remove the arbitrator.[61]

It is unfortunate that the Supreme Court did not explain in sufficient detail why it considered it appropriate that English law should adopt an approach different to that taken by the IBA and major arbitral institutions in respect of adherence to the possibility of bias and related disclosure obligations, disregarding how matters are perceived by the actual parties, given in particular the accepted attributes of arbitration in difference to the court litigation process. This is especially so given that the Supreme Court had accepted that there is a 'premium on frank disclosure' in arbitrations given its private and confidential nature.[62] This requires stricter rules around disclosure of any conflicts of interest by arbitrators. In fact, the Supreme Court recognised that an arbitrator has a personal and financial interest in obtaining further appointments as arbitrator, and that interest opens it up to possible manipulation and exploitation or, at the very least, likely of having an influence on their decisions or case management style, which is less of a concern with judges whose remuneration and retirement rights are set and protected by laws. The issue is exacerbated by the fact that there are varying degrees and understanding by arbitrators of the roles and obligations of party-appointed arbitrators in international arbitration where arbitrators tend to be from different legal backgrounds and with varying levels of experience, with some understandings bordering advocations of actual bias, that a focus on their adherence to legitimate party expectations is essential to ensure a level playing field.

There would be some comfort on the parties' part if the least careful arbitrator in the observance of disclosure duties accorded, at the very least, to the parties' minimum level of legitimate expectations, whether known or capable of objective ascertainment. It is suggested that the difference in interest in the process and/or increased risk of exploitation is sufficient reason to impose on arbitrators a more onerous duty of disclosure, one that takes into account the legitimate expectations of actual disputants to the extent known or should have been known by a diligent arbitrator. This would also address, to some considerable extent, the criticisms levelled at arbitration as regards the lack of transparency in the system and the resultant legitimacy crisis. It is unfortunate that the Law Commission's Report takes the test for disclosure set out by the Supreme Court in *Halliburton* at face value and does not consider whether the test ought to be reformulated.[63] It is clearly an opportunity missed.

The position under German law resembles that under English law, as vocalised and clarified in *Halliburton*. Section 1036 of the German Civil Code states as follows:

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[59] *Halliburton* (n 6), [88].
[60] Ibid, [87] and [95].
[61] Ibid, [121]-[123].
[62] For more on the topic, see: Dogan Gultutan, "Confidentiality of arbitrations under English law: sufficiently sacrosanct to warrant legislative shielding? A critical analysis from a Rumian perspective", (2023) 29(1) *International Trade Law & Regulation* 5-26.
[63] See, Law Commission's Report, para 3.38 et seq.

"*A person who is approached in connection with a possible appointment as an arbitrator is to disclose any and all circumstances likely to give rise to doubts as to their impartiality or independence.*"

This is similar to the English approach in respect of the requirement for arbitrators to disclose relevant matters in at least two substantive respects. First, the test under German law is also an objective test. It is unconcerned with whether the actual arbitrator considered that there was or could arise a justifiable doubt as to its impartiality or independence in respect of the relevant factual matter. Second, like English law, German law (and, in similar fashion, likely so in most other jurisdictions whose arbitration laws are premised upon the UNCITRAL Model Law) is disinterested with the expectation of the parties, whether objectively or subjectively construed. In other words, the actual parties' expectations as to the necessity and/or appropriateness of a disclosure of the relevant matters is irrelevant; so is the expectations of the parties objectively ascertained, i.e. what a reasonable person in the position of the relevant party would have expected disclosure of in the interests of fair and transparent proceedings. As such, Redfern and Hunter explain that under German law "*the standard for disclosure is not what the arbitrator or potential arbitrator considers should be disclosed, but more importantly what a reasonable third person having knowledge of the relevant facts and circumstances would expect to see disclosed*".[64] The focus is on reasonable third person who is unconnected with the dispute.

Similarly, under Swiss law a person appointed as arbitrator must disclose the existence of circumstances that could give rise to legitimate doubt as to his or her independence or impartiality.[65] The legislation consequently provides that an arbitrator may be challenged "*if circumstances exist that give rise to legitimate doubt as to his or her independence or impartiality*".[66] This resembles both the generally adopted common law approach (including English law) as well as the approach of the civil law and Model Law jurisdictions.[67] The rules do not cater for the legitimate expectations of the actual disputant parties.

4. Appropriateness of unitary test focused on parties' expectations

The adoption of a test directing disclosure by arbitrators of all relevant facts and circumstances parties legitimately expect to be informed of is strongly advocated for, ideally through an international effort of reform spearheaded by UNCITRAL or, failing which, by arbitral institutions in their rules. The current, widely-adopted test focusing on the assessment of the reasonable person unconnected to the dispute[68] is unsatisfactory. The justification for the disregard of the legitimate expectations of the actual parties to the arbitration agreement, whether actually known or capable of reasonable assumption by the arbitrators, is not made out in current arbitral jurisprudence or practice. Given the contractual nature of arbitration and the inherent and increased risks of bias, favouritism and possibility for exploitation as regards arbitrators in comparison to state judges, a risk explicitly recognised by the UK Supreme Court in *Halliburton*, it would be wise for the parties' legitimate expectations to be borne in mind when determining any requisite disclosure of possible conflicts of interest. In a world where the transparency of arbitration and arbitrators' conduct is being questioned, any

[64] Redfern and Hunter (n 6), 227.
[65] Article 179(6), PILA.
[66] Article 180(1)(c), PILA.
[67] Born (n 5), §12.05.[3][B].
[68] See, e.g., Born (n 5), §12.05, and §12.05.[A] [3][B].

possible reform that would instil greater trust in the system by engaging the system participants and their views insofar is possible should be thoroughly explored. On that basis, it is highly questionable why no one has to date thoroughly explored whether a hybrid-approach focusing on both objective and subjective elements, accommodating for the actual parties' legitimate expectations, whether actually known by the arbitrators or capable of reasonable assumption, may be appropriate in certain cases.

The virtues of transparency and openness has been preached long before international commercial arbitration gained prominence and before legitimacy criticisms were being aired against the system of arbitration. It is therefore no surprise that the closed-nature of arbitration and its disregard of party expectations has attracted heavy criticisms.

The celebrated philosopher Rumi declared many centuries back that:

Man is hidden behind his words
his tongue is a curtain over the door of his soul.
When a gust of wind lifts the curtain
the secret of the interior is exposed,
you can see if there is gold or snakes
pearls or scorpions hidden inside.
(…)
While the eye perceives reality directly
The ear relies on the promise of words.[69]

Rumi continues his preaching for the utterance of the truth with the following words:

False words disturb the heart
only truth brings peace.
False words are like straw stuck in the mouth
that the heart tries desperately to spit out.[70]

Rumi's words apply as much to arbitrators in respect of their disclosure to parties as it applies to any other dealings in life where one occupies a position of power and trust. Arbitrators must, accordingly, be encouraged through rules and regulations to reveal the hidden truth and enlighten the parties of the relevant matters; only with truth will there be peace and acceptance and a sense of fairness and justice of process. Otherwise, infelicity and disquietude will flourish, resulting in an increase in challenges against arbitrators' awards. More concerningly, the appropriateness of closed-system commercial arbitration will be ever more questioned, fuelling the legitimacy debate. Although that debate is currently predominantly focused on investment arbitrations, that system has largely cross-fertilized from its 'commercial cousin', adopting its flaws. It is therefore be able to insulate itself from those criticisms for much longer.

The fact that the IBA Guidelines on Conflicts afford some weight to whether a matter would "*in the eyes of the parties… give rise to doubts as to the arbitrator's impartiality or independence*" demonstrates that the subjective assessment, i.e., one focused on the

[69] *Rumi's Little Book of Life: The Garden of the Soul, the Heart, and the Spirit* (Amatyllis, 2021), translated into English by Maryam Mafi and Azima Melita Kolin, 28.
[70] *Id*, 93.

legitimate expectations of the parties involved, is indeed workable and pragmatic.[71] It is not a utopic proposition anchored on centuries old theoretical thought. The position advocated is therefore not indefensible or, at the very least, unworthy of proper consideration. Furthermore, the Guidelines stipulate that an arbitrator must decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator, if it has "*any doubt as to [its] ability to be impartial or independent*", again reflective of the Guidelines' focus on subjectivity where such appears appropriate to adopt.[72] Accordingly, it is incomprehensible why the legal jurisdictions considered (and many others) take a substantively different approach, wholly disregarding the subjective assessment and disengaging the actual participants and drivers of the system. Such an approach unfortunately dilutes the effectiveness of the IBA approach. Lack of uniformity in rules and treatment is far from ideal. This is particularly so in respect of arbitrator appointments which often give rise to cross-jurisdictional legal issues arising from the cross-jurisdictional presence of arbitrators, the parties who appoint them and their counsel. Without uniformity, one risks unfairness and arbitrary practice.

Note must be made, however, that the above referred dictations contained in the IBA Guidelines on Conflicts suggest a wholly subjective assessment of issues pertaining to independence and impartiality, which is not what this paper advocates. Rather, it is suggested that whilst the assessment should mainly remain one of objective analysis, it should nevertheless be designed so as to accommodate the reasonable expectations the actual disputant parties have, encompassing both actual and presumed knowledge as to such expectations. Only then will arbitration as a system be well-placed and able to serve the interests and expectations of its real beneficiaries, and providing for greatest transparency possible. It is party consent that enables the arbitration process and gives competence to the arbitrators. It would not be unreasonable to expect, therefore, that the rules address the reasonable and legitimate expectations of the enablers of the private process of arbitration, which would logically encompass rules concerning the ultimate arbiters of the relevant dispute.

The view propounded is not without its supporters, albeit in spirit. For instance, Born argues that parties should be at liberty to agree among themselves in a fashion so as to heighten the standard expected of arbitrators in respect of their independence and impartiality. He reasons that "*[I]t is difficult to see why parties should not be permitted to agree upon a standard of heightened impartiality for all arbitrators, with the arbitrators being free from any conceivable prior connection with, or predisposition towards, either party*".[73] He explains that presently there is no reported authority denying effect to an agreement imposing heightened standards of impartiality and independence and that, in his opinion, there would be no justification for reading national arbitration legislation as requiring such a result. Consequently, Born's view seems to be that express party agreement imposing a heightened impartiality requirement should be given effect. This view seems sensible, and essentially premised on the contractual nature of arbitration. The underlying principle of contract law of freedom of contract dictates that parties are at liberty to agree on whatever they desire, subject to limited mandatory rules of law. There is no reason why an agreement to arbitrate cannot be premised on an understanding that such agreement is subject to the arbitrators selected to resolve a contractual dispute adhere to certain standards that exceed minimum legal standards.

[71] General Standard 3(a), IBA Guidelines on Conflicts.
[72] General Standard 2(a).
[73] Born (n 5), §12.05.[C].

Concurrence with Born's line of reasoning dictates that implied agreement to such end should also be recognised, which would in almost all cases encompass the aligned reasonable expectations of the actual disputant parties. It is difficult to see how one could plausibly give weight to express agreement of the parties, but not to those that are to be rightly implied. Park speaks on similar lines in his dissenting speech in the "reference 1" arbitral proceedings that ultimately came before the UK Supreme Court in *Halliburton*.[74] Noting his "*profound disquiet about the arbitration's fairness*", Park made the following remark as to the importance of living up to the expectations of the parties to an arbitration:

> "*…arbitrators who decide cases cannot ignore the basic fairness of proceedings in which they participate. One side secured appointment of its chosen candidate to chair this case, over protest from the other side. Without any disclosure, the side that secured the appointment then named the same individual as its party-selected arbitrator in another dispute arising from the same events. The lack of disclosure, which causes special concern in the present fact pattern, cannot be squared with the* ***parties' shared ex ante expectations*** *about impartiality and even-handedness*." (Emphasis added)

The importance attributed by Park to the expectations of actual disputants in an arbitration is readily discernible from the extensively quoted text above that formed part of his dissent. It is also noteworthy that Park refers to the "*parties' shared ex ante expectations*", suggesting that disputant parties by default have certain expectations of the process, which may or may not completely align with the expectations a reasonable, but detached person may have. Arbitration must focus its efforts on being "*party-centric*" if it is to live up to and honour its origins. Yesilirmak reinforces that view with his emphasis on the need to ensure greatest transparency in the process of arbitrator appointments for the benefit of the parties.[75]

Scholars rightly acknowledge that given the nature of arbitration and the manner in which arbitrators are selected for appointment for service, there is an enhanced risk of apparent bias contemplation.[76] They are not public servants and are not reimbursed through the public purse, but are paid commercial rates, either directly or through arbitral institutions.[77] Although commercial lawyers are permitted to act as judicial officers in certain jurisdictions as needs arise, the commercial nature of the adjudication is not as visible or readily observable. As such, it could be said that arbitrators should be more closely regulated and their obligations to disclose have wider coverage in comparison to those of members of the judiciary, especially in circumstances where such can be justified by reference to the expectations of the parties. This argument applies with greater force in circumstances where the arbitrators are or should have been aware of the parties' reasonable expectations on or before their appointment.

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[74] *Halliburton* (n 6), [26].
[75] Yesilirmak (n 1).
[76] See, e.g., Beale (n 24), 324.
[77] See, Beale (n 24), 324-325. Eastwood (n 1), explains (at 291): "*An arbitrator's position and status vis-à-vis the parties appearing before him is also radically different from that of a judge. Parties to international arbitrations choose their arbitrators (or, at least, usually prescribe their preferred qualifications and nomination procedures) and also pay them for their time. They thus have a contractual interest in ensuring that the arbitration is carried out in accordance with their agreement or, put more simply, that they 'get what they bargained for'.*"

For the reasons enumerated above, the author agrees that the law should be more imposing in respect of regulating arbitrators' conduct and disclosure.[78] It is an area open for exploitation given the personal and financial interests involved. The simple and incontestable fact that there are a plethora of reported cases around the globe concerning the independence and impartiality of arbitrators, and comparatively very little as regards same issues concerning judges, speaks in support of a different and more 'tightened' set of rules aimed at arbitrator disclosures that would justify party expectations.[79] Given the direct and commercial-like, contractual link between the parties and arbitrators, it is considered just and reasonable that the parties' expectations be respected as part of the process given their centrality to it. Relevantly, Born refers to a French court decision, whereby the court imposed liability on an arbitrator for failure to disclose a conflict of interest, noting that "*[t]he relationship between the arbitrator and the parties, which is contractual in nature, justifies his liability being assessed in the light of the ordinary legal conditions [for breach of contract]"*.[80] Such an outcome would be unthinkable in the context of court litigation and a judge's failure to disclose a conflict of interest. The stance advocated chimes with Lord Woolf MR's remarks in the *AT&T*[81] case, wherein his Lordship had expressed the view that "*[I]f 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.*" This statement is an accurate reflection of the contractual nature of the arbitrator selection and appointment and that the system mechanically operates in a different fashion than that of the judicial system. This justifies the imposition of rules that cater, insofar as possible, for party expectations in arbitration to ensure maximum protection of the parties' interests and of the requirements of fairness and justice.

Furthermore, Eastwood concedes that although English judges explain that there is a single test regarding the applicable test for independence and impartiality in respect of both judges and arbitrators, particularly in relation to apparent bias cases, the 1996 Act applies "*a different test for cases of apparent bias in relation to arbitrators than that set out in the common law applying to judges and other adjudicators. An arbitrator may be removed where 'circumstances exist that give rise to justifiable doubts as to his impartiality', whereas a judge may be removed if there appears to be a 'real danger of bias'.*"[82] Of relevance, the foremost arbitral institution requires arbitrators considering accepting appointments as arbitrators to "*disclose…any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties…*"[83] This demonstrates that in practice a heightened threshold applies to arbitrators in respect of conflicts disclosures. This is principally to reflect the parties' legitimate expectations and the inherent risks of bias and exploitation involved. The law should reflect practice and respond to the expectations of the users of arbitration by adopting a hybrid approach, essentially one that caters for the legitimate expectations of the actual parties.

It is noteworthy that English law, for instance, is not unaccustomed to giving due weight to the reasonable expectations of the parties in cases where, as a general rule, an objective assessment is called for but where such would be inappropriate in the circumstances. The approach suggested for arbitrator independence and impartiality

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[78] See section 3 above.
[79] See, contra, Eastwood (n 1), 290.
[80] Born (n 5), §13.04[A][3].
[81] *AT&T Corporation v Saudi Cable Company* [2000] All ER(D) 657, [39]-[40].
[82] Eastwood (n 1), 291.
[83] Article 11(2), ICC Rules of Arbitration.

disclosure rules can therefore be traced into English contract law, the rules and principles of which forms the basis for the agreement to arbitrate, i.e., the consensual nature of arbitration. The adoption of a subjective approach of analysis in cases where objectivity is afforded primacy is reflected in the decision rendered in *Hartog v Colin Shields*[84]. In that case the court adopted a subjective approach to contract formation matters, even though it had been settled practice for such matters to be subjected to a purely objective analysis, essentially to prevent observable injustice. A similar approach may be adopted in respect of arbitrators' duties of disclosure, which duty currently rests solely on objective pillars. The imposition of subjectivity could help prevent injustice and create a more transparent environment in which the arbitral process could operate.

It should be noted, for completeness of debate, that this paper does not advocate full and complete disclosure of the most trivial matters, i.e., matters which it is abundantly clear the parties would not have cared for and would not have expected disclosure of. Whether a matter is trivial and unworthy of disclosure would ideally be assessed in light of the parties' legitimate expectations, known or presumed. In this respect, this paper concurs with the views of the UK Supreme Court in *Halliburton* that "*to require disclosure of some matter which was trivial and could not materially support a conclusion that there was a real possibility of bias, would be to risk causing the parties unnecessary concerns about an arbitrator's impartiality and also to encourage vexatious challenges by a party to the arbitrator's position.*"[85] There is a fine balance to strike.

However, where it can be said with some certainty that the actual disputant parties, acting reasonably, would expect to be informed of certain matters pertaining to the arbitration process, even in circumstances where the detached reasonable third person would not regards such matter as sufficiently important to warrant disclosure assessing matters on the purely objective scale, and such expectation is either known or presumed to be known by the arbitrations, there ought to be disclosure. This is required to ensure fairness of process, adherence to parties' legitimate expectations and greater transparency. This accords to what Redfern calls the recent trend in arbitration, that is arbitrators being subjected to a higher scrutiny and being expected to err in favour of disclosure if they have any doubt as to whether a disclosure should be made.[86] The change in attitude can be explained, in part, by the heightened expectations as regards transparency from arbitrators and arbitral institutions in respect of the arbitral process.[87] Redfern recognises this aspect of arbitration and how it therefore differs from court litigation, noting that "*[F]or parties who have chosen to submit their dispute to arbitration rather than to the courts, it is 'their' arbitration and 'their' tribunal.*"[88] Unlike the chicken or the egg causality dilemma, an arbitral tribunal owes its existence to party agreement and must, accordingly, respect and adhere to its 'creator's' legitimate expectations. It is axiomatic that parties must be equipped with all relevant information that they have a legitimate basis to knowing if the arbitration system is to be truly regarded as 'their arbitration'.

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[84] *Hartog v Colin & Shields* [1939] 3 All ER 566. See also, *Statoil ASA v Louis Dreyfus Energy Services LP* [2008] EWHC 2257 (Comm) [87]; and *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] 1 SLR 502. See further, Ewan McKendrick, *Contract Law: Text, Cases and Materials*, Tenth Edition (OUP, 2022), 19.
[85] *Halliburton* (n 6), [108].
[86] Redfern and Hunter (n 6), 227.
[87] See, Gerbay (n 3), 197; Yesilirmak (n 1).
[88] Ibid, 228.

5. Conclusion

Rumi has often, and rightfully so, preached on the importance of revealing the truth and connectedly, not intentionally concealing matters which the counter-party desires or ought to know. One who does not appear as one truly is, deceives the other and gives cause for mistrust and disengagement. That has been the result of the currently dominant rules concerning arbitrator disclosures of potential conflicts of interest. The sole focus on an objective assessment on disclosures of potential conflicts of interests, ignores the legitimate expectations of the parties involved. No valid reason has to date been advanced to justify such side-lining of party expectations. This naturally impacts the perceived fairness of the process of arbitration and, in part, explains why challenges against arbitral tribunals are much more common as opposed to challenges against state court judges. Whether those challenges succeed is neither here nor there; the success of a challenge against an arbitrator largely depends on the legal test applicable to such challenge. What is clear is that growing number of challenges against arbitrators, both in commercial and investment arbitrations, signify an increasing feeling of displeasure with the forced disengagement and exclusion of parties from the dispute resolution process. This paper has advocated the view that time has come for a change of approach. The parties' legitimate expectations should be catered when determining whether an arbitrator ought to disclose certain facts. This is required to give the participants and ultimate users of the process a sense of fairness and justice. It will also ensure that the process serves it ultimate purpose of providing a platform for parties to resolve their disputes in a way that suits them best. It is submitted that the suggested approach will also assist in de-fuelling legitimacy cries currently raised in respect of international arbitration insofar as relating to arbitrator disclosures, and may have a domino effect into other areas of the process. In the words of Rumi, "only *truth [will] bring[] peace"*.[89]

[89] Rumi (n 69) 93.