

# Arbitrator Disclosure: When in doubt do not leave it out!



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## Introduction

Timely and complete disclosure is central to ensuring fairness in arbitration. Non-disclosure or late disclosure prevents parties and arbitrators from having an opportunity to clarify the underlying relationship at an early stage. Certain matters, by themselves or in combination with other circumstances, can lead to a finding of apparent or actual bias, particularly when not disclosed. Even more prejudicial is when the result is an application to set aside an award, as in the present case.

In *Aiteo Eastern E & P Company Limited v Shell Western Supply and Trading Limited and others* [2024] EWHC 1993 (Comm)<sup>2</sup> the High Court examined non-disclosures by an arbitrator, the Rt. Hon. Dame Elizabeth Gloster DBE (**'DEG'**) of multiple engagements with Freshfields Bruckhaus Deringer LLP (**'Freshfields'**)

The dispute pertained to two facility agreements totalling some USD 2 billion granted to Aiteo Eastern E & P Company Limited (**'Aiteo'**) for the purchase of an interest in certain Nigerian oil fields: an Offshore Agreement with *Shell Western Supply and Trading Limited* (**'Shell'**) and an

Onshore Agreement with a group of lenders (**'Lenders'**). Both provided for arbitration under the ICC Rules.

Shell and the Lenders each commenced arbitration (the **'Offshore Arbitration'** and the **'Onshore Arbitration'** respectively) claiming Aiteo had failed to make the requisite payments. Both Shell and the Lenders were represented by Freshfields.

Ultimately, four partial awards were rendered by the Tribunal: the Offshore Jurisdiction Award dated 15 March 2022 and the resulting Award on Costs dated 22 July 2022; the Consolidation Award dated 22 July 2022; and the Onshore Jurisdiction Award dated 25 August 2023.<sup>3</sup>

## DEG's Appointments and Disclosures

Before examining the standards applied and the High Court's decision, it is useful to set out the dates and the substance of the appointments and disclosures for context.

Freshfields initially nominated DEG as arbitrator in both the Offshore and Onshore Arbitrations: In the Arbitrator

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<sup>2</sup> *Aiteo Eastern E & P Company Limited v Shell Western Supply and Trading Limited and others* [2024] EWHC 1993 (Comm) (**'Aiteo v Shell'**).

<sup>3</sup> Ibid [2].

Statement<sup>4</sup> DEG submitted to the ICC, she disclosed that she had been appointed by Freshfields in two unrelated arbitrations in the past two years.

Based on this disclosure, Aiteo objected to DEG's nomination. On 17 June 2021 the ICC Court decided she could serve as arbitrator in either arbitration but not both. Consequently, she was appointed to the Offshore Arbitration.<sup>5</sup>

In June-July 2020, DEG had provided expert advice to a client of Freshfields in an unrelated matter, which she had omitted to disclose to the ICC - albeit mistakenly (**'First Advice'**).<sup>6</sup>

In June 2021, in an unrelated arbitration, Freshfields replaced the counsel representing the party that had appointed DEG in that arbitration.<sup>7</sup>

From 25 February 2022 to 21 March 2022, DEG was instructed by Freshfields to give an expert declaration in foreign law proceedings in an unrelated matter (**'Second Advice'**). In March 2022, the Tribunal rendered the Offshore Jurisdiction Award. DEG only disclosed the Second Advice in December 2023. She stated it "did not cross my mind at the time to disclose this retainer."<sup>8</sup>

Subsequently, on 29 April 2022, DEG disclosed that she had recently been appointed as presiding arbitrator in an unrelated ICC arbitration in which Freshfields was also counsel for a party.<sup>9</sup>

DEG was also instructed by Freshfields to provide another expert opinion in October 2023 (**'Third Advice'**), but only disclosed the instruction in November 2023 after the engagement had been completed.<sup>10</sup>

Following the November 2023 disclosures, Aiteo requested further details. Ultimately, it transpired that DEG had received some nine overlapping appointments and expert instructions from Freshfields prior to and over the course of the arbitral proceedings.<sup>11</sup>

Shortly thereafter, on 12 December 2023, Aiteo lodged a challenge with the ICC under Article 14(1) of the ICC Rules, claiming there were justifiable doubts as to DEG's independence and impartiality. The challenge was accepted and DEG was replaced as arbitrator on 13 February 2024.<sup>12</sup>

Before lodging its claim under s. 68 of the Arbitration Act 1996 (**'Act'**) for the 4 partial awards to be set aside - the subject of the present decision, Aiteo brought two successive substantive jurisdiction challenges under s. 67 of the Act for the Offshore Jurisdiction Award, and then the Consolidation Award to be set aside.<sup>13</sup>

### The Standards for Disclosure

Insofar as this is an ICC arbitration, one must first look to the disclosure requirements in the arbitral rules chosen by the parties. Article 11 of the ICC Arbitration Rules (**'ICC Rules'**) states that arbitrators must disclose "any facts or circumstances which might ... call into question the arbitrator's independence in the eyes of the parties or "give rise to reasonable doubts as to the arbitrator's impartiality".<sup>14</sup> This disclosure must be done "immediately".<sup>15</sup>

Also to be considered are the IBA Guidelines on Conflicts of Interest in International Arbitration (**'IBA Guidelines'**), which are good practice but secondary to the ICC Rules

4 ICC Arbitrator Statement Acceptance, Availability, Impartiality and Independence.

5 *Aiteo v Shell* [15]–[16].

6 *Ibid* [14].

7 *Ibid* [18].

8 *Ibid* [20], [28(c)].

9 *Ibid* [21].

10 *Ibid* [28].

11 These include the first two appointments initially disclosed, the Offshore Arbitration and the Onshore Arbitration nomination, for which DEG was not appointed after the ICC Court's decision that she could only sit on one tribunal.

12 *Aiteo v Shell* [29], [34].

13 *Ibid* [24]. Aiteo had first challenged the tribunal's jurisdiction and then brought the s 67 applications in April and August 2022 to set aside the tribunal's two jurisdiction awards, and was granted leave to appeal. Interestingly, the jurisdictional challenges were based on the unilateral arbitration clauses in the agreements, which also engendered related proceedings in Nigeria and the United Kingdom.

14 *Aiteo v Shell* [67]. This was the 2014 version of the ICC Rules in effect at the time.

15 *Aiteo v Shell* [111]; International Chamber of Commerce, *ICC Rules of Arbitration* (adopted 1 March 2017) art 11(2) (**'ICC Rules'**). The applicable ICC Rules in this case are the 2017 rules.

and national law. The High Court further confirmed that irrespective of either, disclosure was required at common law.<sup>16</sup>

In the High Court's view, the First Advice and the Second Advice should have been disclosed by DEG.<sup>17</sup> And while the Third Advice was disclosed it was done after the fact – neither before or even at the time of accepting the engagement.<sup>18</sup>

While DEG did disclose her presiding arbitrator appointment in April 2022, the High Court opined that this further highlighted that fact that “the full cumulative picture was not disclosed to Aiteo or the ICC.”<sup>19</sup>

Even though the disclosure errors might be considered inadvertent, there were three separate failures to make timely disclosure,<sup>20</sup> patent inconsistencies in the disclosures and a failure to comply with the substance or timeframes set out in the applicable rules, and this, despite the fact that the advice went beyond mere overlapping appointments. This pattern reflected a continuing professional relationship between Freshfields and DEG, particularly at the time the tribunal was deciding on its own jurisdiction.<sup>21</sup>

### Apparent Bias and the Fair-Minded and Informed Observer Standard

The obligation of impartiality is a core principle of international arbitration.<sup>22</sup>

However, failure to disclose is not automatically synonymous with apparent bias in and of itself. The timing of the disclosure, the substance of the events and the existence of a pattern of disclosure errors are contributing factors.

The assessment used to determine whether there is a real possibility of bias is an objective one: it is the assessment of the fair-minded and informed observer – a judicial construct – who, after acquiring a full understanding of the facts, evaluates them impartially.<sup>23</sup>

This is the standard expounded in the seminal case of *Halliburton*.<sup>24</sup> The fair-minded observer must be neither “complacent nor suspicious” and must consider the practices of international arbitration, in which proper disclosure is necessary to maintain the integrity of the arbitral proceedings and ensure the ultimate enforceability of awards.<sup>25</sup>

Turning to how the informed observer would perceive these circumstances, there are several relevant factors to examine.

First, the High Court noted that the cumulative appointments and engagements by a single firm in a relatively short time coupled with the non-disclosures would be highly relevant for the informed observer in weighing the risk of a real possibility of bias.<sup>26</sup>

Second, the High Court examined the importance to the analysis of the decision of the ICC Court to remove DEG, noting that it is rare for such challenges to succeed.<sup>27</sup> Consequently, the fair-minded and informed observer would accord considerable respect to that decision.<sup>28</sup>

Importantly, in reviewing the specific characteristics of arbitration, the High Court articulated the difference between a judge and an arbitrator, particularly since the latter is remunerated by the parties. If the arbitrator relies on arbitral work then he or she would have a financial interest in obtaining further appointments and may be susceptible to avoiding decisions that could alienate the appointing party, particularly when there are multiple

16 *Aiteo v Shell* [60]–[61],[70]. *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] UKSC 48 (“*Halliburton*”).

17 *Aiteo v Shell* [93],[98].

18 *Ibid* [111].

19 *Ibid* [107].

20 *Ibid* [112]. The appointment of Freshfields as replacement lawyers was not considered as creating a relational contact.

21 *Aiteo v Shell* [98].

22 *Ibid* [44], citing *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] UKSC 48 (“*Halliburton*”) [151]. Furthermore, this duty applies equally to all arbitrators, including party-appointed arbitrators.

23 *Aiteo v Shell* [45]–[46],[48].

24 See also *Porter v Magill* [2001] UKHL 67.

25 *Aiteo v Shell* [47].

26 *Ibid* [168],[170].

27 *Ibid* [137].

28 *Ibid* [138].

overlapping appointments, as in the case at hand. Thus, even if inadvertent, this situation corroborates the real possibility of unconscious bias.<sup>29</sup>

Another factor for the observer to bear in mind was DEG's reputation and experience. However, while relevant, this is not a significant nor a determinative factor in the High Court's opinion.<sup>30</sup>

In the final analysis, the High Court determined that in light of all of the facts, "this case falls on the wrong side of the line,"<sup>31</sup> noting that the observer's reasoning would inevitably be coloured by the failures to disclose and the decision of the ICC Court to remove DEG.<sup>32</sup>

While not relevant to the outcome, it is of interest to note how the High Court dealt with the argument that the ICC Court's decision to replace DEG was *res judicata*. The High Court disagreed, stating that the ICC Court is not a conventional court: its purpose is to administer the resolution of disputes by arbitral tribunals, whose role is to determine legal rights.<sup>33</sup> Consequently, decisions of the ICC Court are not legal, but administrative, and therefore cannot be used to establish *res judicata*.<sup>34</sup>

### The Appropriate Remedy Under s. 68 of the Act

In deciding if a challenge under s. 68 should be upheld, substantial injustice must first be demonstrated pursuant to s. 68(2). A finding of substantial injustice depends on the nature of the irregularities and the circumstances of the case.<sup>35</sup>

That said, once apparent bias has been established, such as in the present case, substantial injustice should be inferred unless there are circumstances which rebut it.<sup>36</sup>

The High Court applied this reasoning to each of the partial awards, noting that Section 68 (3) of the Act provides that a court may set aside an award or declare it to be of no effect if there is a serious irregularity only if it is inappropriate to remit the matters in question to the tribunal for reconsideration.<sup>37</sup>

### The Onshore Jurisdiction Award

It is well accepted that a party has a fundamental right to have its case decided by a tribunal that is unaffected by apparent bias.<sup>38</sup> In this case Aiteo, succeeded in showing apparent bias on the part of one member of the tribunal.<sup>39</sup>

Although the tribunal had been reconstituted, the High Court held that procedural unfairness could not be retrospectively cured.<sup>40</sup> In light of this, and also referring to Article 15(4) of the ICC Rules, the High Court ordered that the Onshore Jurisdiction Award be remitted for reconsideration by the newly constituted Tribunal.<sup>41</sup>

Conversely, the High Court decided neither to set aside or remit the other awards for the reasons set forth hereafter.

### The Offshore Jurisdiction Award

As stated above, Aiteo filed a s. 67 challenge to the Offshore Jurisdiction Award. After a full re-hearing of the jurisdictional challenge, the application was rejected, and there was no application for permission to appeal.<sup>42</sup>

This the High Court determined that there was no substantial injustice with respect to the Offshore Jurisdiction Award. As a result, there was no substantial

<sup>29</sup> Ibid [47],[173].

<sup>30</sup> Ibid [178],[179].

<sup>31</sup> Ibid [166].

<sup>32</sup> Ibid [88]; citing *Halliburton* [117]-[118]. A failure to disclose is a factor in deciding whether there are justifiable doubts as to an arbitrator's impartiality, and that it may "in certain circumstances amount to apparent bias. Moreover, the High Court refrained from attempting to determine the extent of the impugned arbitrator's influence over the tribunal, which it stated is almost impossible to quantify: at [225].

<sup>33</sup> *Aiteo v Shell* [130].

<sup>34</sup> Ibid [126].

<sup>35</sup> Ibid [219].

<sup>36</sup> Ibid [226].

<sup>37</sup> Ibid [282].

<sup>38</sup> Ibid [221]. The High Court went further to affirm that the principle is equally applicable in the case where one member of a tribunal is biased as in the case of a sole arbitrator.

<sup>39</sup> *Aiteo v Shell* [281].

<sup>40</sup> Ibid [199].

<sup>41</sup> Ibid [245],[285].

<sup>42</sup> Ibid [229]. Interestingly, the jurisdictional challenge was based on the asymmetrical arbitration clauses in the facility agreements.

injustice in relation to the costs award either. Both applications were therefore dismissed and the awards upheld.<sup>43</sup>

### The Consolidation Award

Aiteo's sole argument was that if the tribunal had no jurisdiction to issue the Offshore Jurisdiction Award, then it could not order consolidation. Since it was held that the tribunal did have jurisdiction, the s. 67 challenge to the Consolidation Award was also rejected.<sup>44</sup>

Notwithstanding, the High Court did examine what it termed was an "unusual circumstance" based on a clause in the Offshore Facility Agreement that required each arbitrator to "decide for himself or herself whether to accede to the Consolidation Application". The arbitrators would then deliberate and reach a collegiate view.<sup>45</sup>

The fact that each arbitrator reviewed the application independently meant that the apparent bias of DEG could not have tainted the tribunal's decision. Therefore, any inference of substantial injustice was rebutted. Additionally, Aiteo did not challenge the Consolidation Award, which further reinforced the High Court's conclusions.<sup>46</sup>

Finally, three awards were upheld and one remitted for reconsideration.

### Conclusion

Parties have a legitimate interest in being fully informed of all circumstances and to be satisfied that an arbitrator is and will remain independent and impartial.

*Aiteo v Shell* illustrates the importance for arbitrators to not take disclosure obligations lightly. Arbitrators should err on the side of complete and timely disclosure and diligently comply with the disclosure obligations in the governing institutional rules, the law of the seat and the IBA Guidelines, if applicable, and if not, as a useful guide.

Additionally, arbitrators should be aware that the analysis is an objective one, irrespective of whether they or their co-arbitrators might think they are impartial, as 'public perception of the possibility of unconscious bias is the key.'<sup>47</sup>

While arbitrators oft times fear that over disclosure will prevent them from being appointed, those who do make disclosures consider themselves to be impartial and independent, or else they would decline to serve.<sup>48</sup>

This case should serve as a clarion call, particularly to arbitrators with multiple overlapping appointments. Repeated curial challenges increase time and cost for the parties and hamper the efficiency of the proceedings, not to mention the reputational cost for the arbitrator, which can be just as detrimental.

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43 *Aiteo v Shell* [230],[234].

44 *Ibid* [235].

45 *Ibid* [237],[238].

46 *Ibid* [243]. Another potential hurdle for Aiteo was the time limit on s. 68 challenges imposed by s 73(1) of the 1996 Act; at [265], The High Court allowed the extension of time based on the so-called "Kalmneft factors" and the fact that it was reasonable to wait for the ICC ruling on the challenge and that the delay was caused by DEG's failure to timely disclose; at [268], at [252].

47 *Aiteo v Shell* [178].

48 *Ibid* [74]; International Chamber of Commerce, *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration* (1 January 2019) para 26.