

Kluwer Arbitration Blog

Keeping Up Appearances: Apparent Arbitrator Bias and the Requirements of Disclosure Examined by the English Commercial Court

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In *Aiteo Eastern E & P Company Ltd v Shell Western Supply and Trading Ltd & Ors* [2024] EWHC 1993 (Comm) (01 August 2024), the Commercial Court considered in detail the principles set out in *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] UKSC 48 (“*Halliburton*”) on the question of apparent bias of an arbitrator in a challenge brought under s.68 Arbitration Act 1996 (the “*Arbitration Act*”).

This article will examine the background of the case and the key principles reviewed and approved by the Commercial Court in relation to arbitrator bias and the requirements of disclosure. With numerous countries vying to compete with England and Wales to be leading centres of arbitration, this judgment demonstrates the Court’s willingness to support arbitration. The question of repeat appointments, particularly in specialised areas, is not considered by the IBA’s [Guidelines on Conflicts of Interest in International Arbitration](#) as necessarily indicative of impropriety, but this case shows that disclosure of those appointments is key.

Background

A Nigerian company, Aiteo Eastern E&P Company Ltd (“Aiteo”), entered into two financing contracts relating to its acquisition of an interest in certain oilfields in Nigeria and associated facilities. The first was with Shell Western Supply & Trading Ltd (“Shell” and the “Offshore Facility”), while the second was with a group of lenders (the “Onshore Lenders” and the “Onshore Facility,” together the “Contracts”). Both the Offshore and Onshore Facilities provided for disputes to be settled by ICC arbitration or, at the financing parties’ exclusive option, the courts of England or Nigeria, respectively. The Contracts explicitly allowed for consolidation of proceedings.

Disputes arose, resulting in the commencement of two ICC arbitrations in December 2020, the “Offshore Arbitration” and the “Onshore Arbitration.” The present challenges relate to the appointment of Rt. Hon Dame Elizabeth Gloster DBE (“DEG”) as arbitrator in the Offshore Arbitration.

DEG was nominated by Shell in the Offshore Arbitration. The Onshore Lenders also nominated DEG in the Onshore Arbitration and both requested consolidation of the references. Freshfields

Bruckhaus Deringer LLP (“Freshfields”) represented the parties that nominated DEG as arbitrator. The claimant parties in the arbitrations are below referred to jointly as the “Lenders.”

Following her nomination, DEG completed an ICC Arbitrator Statement Acceptance, Availability, Impartiality and Independence (“ICC Statement”) for both references, making certain disclosures. Aiteo objected to DEG’s nomination in both references, on the basis that it also objected to consolidation and to have the same arbitrator in both references would be inappropriate. The ICC decided DEG could be arbitrator in one but not both references. A separate tribunal was constituted for each reference, with the appointment of a presiding arbitrator in the Onshore Arbitration put on hold, pending the application for consolidation. Four partial awards were rendered in the references, as follows:

1. the Offshore Jurisdiction Award (15 March 2022);
2. the Offshore Jurisdiction Award on Costs (22 July 2022);
3. the Consolidation Award (22 July 2022); and
4. the Onshore Jurisdiction Award (25 August 2023).

Aiteo was unsuccessful in each and made an application under s.67 Arbitration Act to challenge both the Offshore Jurisdiction Award and the Consolidation Award on grounds of substantive jurisdiction. Neither application was successful.

DEG’s Disclosures

DEG disclosed in her ICC Statement that she “had been party appointed in two other unrelated arbitrations in the last 2 years by clients represented by Freshfields.”

On 10 November 2023 DEG made a disclosure that she had recently been instructed by Freshfields to provide an expert opinion on English law in the context of potential foreign insolvency proceedings. Aiteo requested further information. DEG responded on 9 December 2023, making further disclosures.

DEG’s Removal as Arbitrator

On 12 December 2023, Aiteo lodged a challenge to DEG’s appointment as arbitrator pursuant to Article 14(1) of the ICC Rules, on the basis that there were justifiable doubts as to the independence and impartiality of DEG, contrary to Article 11 of the ICC Rules.

The ICC Court made the decision to remove DEG as a co-arbitrator, which was communicated to the parties by email on 18 January 2024. The decision was made without reasons (as none were requested by the parties). It was not, therefore, possible to determine the test that had been applied.

Proceedings Before the Commercial Court

Applications under s. 68 of the Arbitration Act

On 31 January 2024, Aiteo filed a challenge to all four partial awards under s. 68 Arbitration Act, accompanied by an application under s.80 for an extension of time. These applications were held in a single “rolled-up” hearing before Mr Justice Jacobs.

Challenging an Award—Serious Irregularity

Aiteo asserted that there had been a serious irregularity, namely the apparent bias of DEG, in that DEG had failed to disclose and/or failed to make timely disclosure of several matters, namely:

1. DEG gave expert advice in June-July 2020 to a client of Freshfields which DEG disclosed to Freshfields and their clients but failed to disclose in her ICC Statement and to Aiteo.
2. In June 2021, in an unrelated arbitration, Freshfields replaced legal counsel previously representing the party who appointed DEG.
3. DEG gave an expert declaration on the instruction of Freshfields in foreign law proceedings which took place in the period from 25 February 2022 until 21 March 2022 and was not disclosed.
4. DEG disclosed on 29 April 2022 that she had been appointed by the ICC as presiding arbitrator in an unrelated ICC arbitration, in which Freshfields was acting for one of the parties. This disclosure was not made late, but Aiteo contended that it contributed to the overall picture of a professional connection between DEG and Freshfields.
5. DEG was instructed by Freshfields to give an expert opinion on English law in the period 17 October 2023 to 25 October 2023 which was not disclosed until 10 November 2023.

It was common ground that the relevant test for apparent bias was derived from *Halliburton*, i.e., “whether the fair-minded and informed observer, having considered the facts, would consider that there was a real possibility that DEG was biased.” The principal issues were [10]:

1. Would the fair-minded and informed observer consider that there was a real possibility that DEG was biased?
2. If so, had Aiteo established that the serious irregularity relied upon has caused or will cause substantial injustice to Aiteo?
3. Should an extension of time be granted?
4. If Aiteo was successful, what order, if any, should be made?

Fair-Minded Observer

Jacobs J concluded that the fair-minded and informed observer would consider there was a real possibility that DEG was biased. This decision was based on the following key factors:

1. DEG’s failure to disclose relevant professional engagements with Freshfields in a timely manner. The Court confirmed, in making this finding, that there was a duty to do so under English law, as was the case in *Halliburton* [49];
2. The observer would consider the cumulative picture, and six or seven appointments or engagements in a short period would be significant;
3. DEG’s approach to disclosure was inconsistent; and
4. The ICC Court’s decision to remove DEG as arbitrator was relatively unusual and would influence the observer’s view.

Substantial Injustice

Aiteo argued that a finding of a lack of impartiality would constitute, in itself, substantial injustice. Jacobs J did not agree, preferring the Lenders’ approach, that “[e]ven if substantial injustice is inherently likely, or would normally be inferred based on the character of the irregularity, that likelihood or inference is rebuttable” [202]. Substantial injustice must be shown separately from

any finding of apparent bias. Under this limb, Jacobs J found in relation to each of the three substantive partial awards, as follows:

1. Offshore Jurisdiction Award: this award had been fully reheard in the Commercial Court following Aiteo's application under s.67, that decision stood and was unaffected by any bias. The challenge on the Offshore Jurisdiction Award on Costs was therefore also dismissed;
2. Consolidation Award: a decision had been reached by each member of the tribunal considering the question independently and individually, accordingly, there was no substantial injustice; and
3. Onshore Jurisdiction Award: Aiteo's arguments were reasonably argued, even if the Lenders' arguments had considerable strength, they therefore deserved consideration by a tribunal unaffected by bias.

Extension of Time

Applying the "*Kalmneft* factors," the extension of time was granted, and Aiteo's approach was found by the Court to be reasonable.

Res Judicata

The decision of the ICC Court to remove DEG did not create an issue estoppel such that the Lenders were precluded from contesting the argument that there was apparent bias. Jacobs J found that the ICC Court's decision was administrative and procedural and that the decision was also not necessarily binding.

Remedy

The judge remitted the Onshore Jurisdiction Award back to the (newly reconstituted) Tribunal for reconsideration. This was appropriate in all the circumstances and consistent with the ICC Rules.

Comment

London continues to be a leading hub for arbitration, renowned for its robust legal framework and experienced arbitrators. However, the global landscape is evolving, with other jurisdictions becoming increasingly competitive in offering arbitration services. While the Courts in England and Wales generally refrain from interfering with arbitration proceedings, they do possess supportive powers to ensure the process remains fair and efficient. A significant concern for parties, particularly those with limited arbitration experience, is the potential for arbitrator bias. The pool of specialized arbitrators is relatively small, and the repeated appointment of the same arbitrators by certain firms may appear unusual to those unfamiliar with the English legal system. However, this practice does not inherently indicate bias. Crucially, the disclosure of any circumstances that may give rise to a question about an arbitrator's impartiality is essential to maintain the integrity and trust in the arbitration process. This transparency helps to mitigate concerns and uphold the high standards expected in international arbitration.

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