Neutral Citation Number: [2024] EWHC 1993 (Comm)

Case No: CL-2024-000050

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 01/08/2024

Before :

MR JUSTICE JACOBS

- -

Between :

AITEO EASTERN E & P COMPANY LIMITED — **Claimant**

- and -

Defendants

(1) SHELL WESTERN SUPPLY AND TRADING LIMITED
(2) AFRICA FINANCE CORPORATION
(3) ECOBANK NIGERIA LIMITED
(4) FIDELITY BANK PLC
(5) FIRST BANK OF NIGERIA LIMITED
(6) GUARANTY TRUST BANK LIMITED
(7) STERLING BANK LIMITED
(8) UNION BANK OF NIGERIA PLC
(9) ZENITH BANK PLC

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- -

Ricky Diwan KC (instructed by **Stewarts Law LLP**) for the **Claimant**
Ben Juratowitch KC and Belinda McRae (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Defendants**

Hearing dates: 15th – 16th May 2024

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Approved Judgment

This judgment was handed down remotely at 9.00am on Thursday 1st August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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MR JUSTICE JACOBS

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MR JUSTICE JACOBS:

A: Introduction

1. The Claimant in these proceedings ("Aiteo") applies, pursuant to s. 68 of the Arbitration Act 1996 ("the 1996 Act"), to set aside 4 partial awards ("the Awards" and each an "Award") rendered by a three member arbitration tribunal ("the Tribunal") appointed by the leading arbitral institution, the International Chamber of Commerce ("ICC"). Aiteo also applies to extend the time to make this application, pursuant to s. 80(5) of the 1996 Act.

2. The 4 Awards arise out of two ICC arbitral references that were consolidated by the Tribunal. They comprise the following, which are described in more detail below: (i) the Offshore Jurisdiction Award dated 15 March 2022; (ii) the Offshore Jurisdiction Award on Costs dated 22 July 2022; (iii) the Consolidation Award dated 22 July 2022; and (iv) the Onshore Jurisdiction Award dated 25 August 2023. In relation to all of those Awards, Aiteo was the unsuccessful party. The Tribunal accepted the arguments of the opposing parties, who comprise a number of lenders ("the Lenders") who provided loans to Aiteo.

3. The grounds for the s. 68 challenge are that there was a serious irregularity affecting the Tribunal within the meaning of s. 68(2)(a) of the 1996 Act. That irregularity is that there was apparent (not actual) bias on the part of one of the members of the Tribunal, the Rt. Hon Dame Elizabeth Gloster DBE ("DEG"). An important and unusual feature of the present case is that a successful challenge to DEG was made to the ICC Court, which is the ICC body responsible for dealing with challenges to arbitrators pursuant to Article 14 of the rules which govern ICC arbitrations, namely the ICC Rules of Arbitration ("the ICC Rules"). The applicable ICC Rules in the present case are the 2017 rules. Challenges are often made, but rarely succeed. The ICC Court gave its unreasoned decision, upholding the challenge on its merits. The challenge was made upon substantially the same grounds as those advanced on the present application under s. 68. Aiteo contends that this decision gives rise to a *res judicata* or issue estoppel whose effect is to preclude the Lenders from contesting Aiteo's case that there was apparent bias on the part of DEG. Alternatively, Aiteo contends that the decision of the ICC Court is a significant factor in support of its case that there was a serious irregularity.

4. Aiteo also contends that the serious irregularity, on which it relies, has caused it substantial injustice, because it has been deprived of its fundamental right to present its case and have its case determined by a tribunal that has complied with its duty of impartiality under s.33 of the 1996 Act, being a principle of fundamental and mandatory importance as recognised in s.1(a) the 1996 Act.

5. The allegation of apparent bias is based upon professional connections between DEG and the solicitors firm representing the parties that nominated DEG as arbitrator, Freshfields Bruckhaus Deringer LLP ("Freshfields"), coupled with the fact that timely disclosure of some of these connections was not made. Aiteo contends that in the period 2018-2023, DEG had received a total of 7 arbitral nominations/appointments and expert instructions, in which Freshfields were acting, plus the appointment in the arbitral reference giving rise to the present challenge. Aiteo contends that there were therefore 8 relevant "relational contacts". This included 2 expert instructions and one

arbitral appointment during the currency of the arbitral proceedings. In fact, the Lenders had sought to appoint DEG to both ICC arbitration references between Aiteo and the Lenders (which would have created 9 "relational contacts"), but the ICC Court rejected this and required the Lenders to elect to nominate DEG in one but not both references. Aiteo contends that the full picture with respect to the professional connections between Aiteo and Freshfields emerged only on 9 December 2023, as a result of DEG's responses to some detailed questions asked by Aiteo's solicitors ("Stewarts"). They also contend that it is relevant that the disclosures made during the course of the ICC arbitral references were all made not in advance of accepting the appointment or instruction, so that objection could have been taken or commitments obtained, but after the fact in various instances.

6. As far as concerns the extension of time sought under s. 80 (5), Aiteo submits that it is just to grant an extension of time so as to enable the present challenge to be brought.

7. The applications, both under s. 68 and s. 80(5) are resisted by the Lenders. They argue, in summary, that there is no *res judicata* or issue estoppel which precludes them resisting Aiteo's argument that there was apparent bias on the part of DEG. They submit that, applying the English law test for apparent bias, a reasonable and fair-minded observer would not conclude that there is a real possibility of bias. They also contend that, for various reasons, Aiteo has failed to establish "substantial injustice", and that this is the case even if there was apparent bias on the part of DEG. They resist the application for an extension of time principally on the ground that the application lacks merit.

8. Aiteo's Claim Form, seeking relief under ss. 68 and 80, was issued on 30 January 2024. A number of witness statements were made by the partners at Stewarts and Freshfields with responsibility for the case: Mr Daniel Kevyn Wilmot for Aiteo, and Mr Ryland William Thomas KC for the Lenders. However, the parties' arguments at the hearing made little reference to those witness statements, since the underlying facts were not in dispute and the arguments were essentially legal arguments as to the impact of those undisputed facts. Aiteo's case was argued by Mr Diwan KC, and the Lenders' case by Mr Juratowitch KC and Ms McRae. I am grateful to all counsel for their careful and thorough written and oral submissions.

9. In Section B, I summarise the factual background. In Section C, I set out the key principles concerning apparent bias in relation to arbitrators as derived from the leading decision: *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] UKSC 48 ("*Halliburton*"). It is common ground that the relevant test is whether the fair-minded and informed observer, having considered the facts, would consider that there was a real possibility that the tribunal was biased.

10. I then address the principal issues between the parties which are as follows:

    (1) Would the fair-minded and informed observer consider that there was a real possibility that DEG was biased? (Section D).

    (2) If so, has Aiteo established that the serious irregularity relied upon (i.e. apparent bias on the part of DEG) has caused or will cause substantial injustice to Aiteo, so as to make it appropriate to grant relief under s. 68 (3) of the 1996 Act? (Section E).

(3) Should an extension of time be granted to Aiteo to make the s. 68 application? (Section F)

(4) If Aiteo is successful in relation to the previous issues, what order, if any, should be made under s. 68 (3)? (Section G)

B: Factual background

The Agreements

11. Aiteo is a company incorporated in the Federal Republic of Nigeria. On 2 September 2014, Aiteo entered into a number of agreements, comprising:

1 an Offshore Facility Agreement with the Shell Western Supply and Trading Ltd ("Shell"), the 1st Defendant in these proceedings, and restated most recently on 31 December 2016 ("the Offshore Facility Agreement"); and

2 an Onshore Facility Agreement with the 2nd to 9th Defendants ("the Onshore Lenders") restated most recently on 31 December 2016 ("the Onshore Facility Agreement").

These facility agreements provided funding of approximately USD 2 billion to Aiteo for the purchase of an interest in certain Nigerian oil fields and related facilities.

12. The Offshore Facility Agreement was governed by English law and provided for disputes to be elected to be resolved by way of ICC arbitration seated in London. The Onshore Facility Agreement was governed by Nigerian law and also provided for disputes to be resolved by way of ICC arbitration seated in London.

The commencement of the arbitration proceedings

13. The Lenders asserted breaches of the facility agreements by Aiteo relating to non-payment of principal, interest and default interest, and breach of other terms of the contract. As a consequence, on 11 December 2020, two sets of arbitration proceedings were commenced. Shell commenced an ICC arbitration pursuant to the arbitration agreement of the Offshore Facility Agreement ("the Offshore Arbitration"). The Onshore Lenders commenced an ICC arbitration pursuant to the arbitration agreement of the Onshore Facility Agreement ("the Onshore Arbitration"). Shell nominated DEG as arbitrator in the Offshore Arbitration, and the Onshore Lenders did likewise in the Onshore Arbitration. The Lenders also requested the consolidation of both arbitration references.

14. DEG completed and signed the ICC standard forms headed "ICC Arbitrator Statement Acceptance, Availability, Impartiality and Independence" ("ICC Arbitrator Statement") for both the Offshore Arbitration and Onshore Arbitration on 23 December 2020. She disclosed that she "had been party appointed in two other unrelated arbitrations in the last 2 years by clients represented by Freshfields". DEG did not, however, disclose the fact that, in June-July 2020, she gave expert advice in conference to a client of Freshfields in an unrelated matter. Aiteo contends that this should have been disclosed, and that it is relevant to the question of apparent bias. The factual position in relation to this and the other non-disclosures relied upon, and the parties' arguments in that regard, are addressed in Section D below.

15. Aiteo objected to DEG being nominated as arbitrator in both the Offshore and Onshore Arbitrations. This was on the basis that they objected to consolidation of the two arbitrations and therefore it was inappropriate for one member of the tribunal in both arbitrations to have access to information from both arbitrations. The ICC Court decided that DEG could be the party-nominated arbitrator in either the Offshore or Onshore Arbitration but not in both. The ICC Court's decision was communicated to the parties by the ICC Secretariat in a letter dated 17 June 2021. The role of the ICC Court is relevant to Aiteo's *res judicata*/issue estoppel argument, and is further discussed in Section D below.

16. The ICC Court's decision led to Shell maintaining the nomination of DEG in the Offshore Arbitration. The Tribunal in the Offshore Arbitration was ultimately constituted on 17 August 2021. It comprised DEG (appointed by Shell), the Rt. Hon. Lord Neuberger (appointed by Aiteo) and Geoffrey Ma Tao-li BM KC SC (presiding). DEG is a former distinguished judge of the Commercial Court and the Court of Appeal. Lord Neuberger is also a distinguished English judge, having served as judge in the Chancery Division of the High Court, Court of Appeal (including as Master of the Rolls) and as President of the UK Supreme Court. Geoffrey Ma Tao-li's career in Hong Kong had been similarly distinguished and had followed a similar path to Lord Neuberger. He had served as judge in the High Court, the Court of Appeal (including as Chief Judge, which is broadly equivalent to the position of Master of the Rolls) and then for 10 years as Chief Justice of the Hong Kong Court of Final Appeal.

17. In the Onshore Arbitration, the other Lenders nominated Ian Glick KC in the Onshore Arbitration, with Aiteo nominating Dr. Ucheora Onwuamaegbu, and both nominations were confirmed by the ICC Court on 11 August 2021. At the request of the Onshore Lenders, the ICC Secretariat refrained from asking the ICC Court to appoint a presiding arbitrator in the Onshore Arbitration pending the consolidation application in the Offshore Arbitration.

18. During this period, in June 2021, in an unrelated arbitration, Freshfields replaced legal counsel previously representing the party appointing DEG. This was not disclosed. As discussed in Section D, this is relied upon by Aiteo in the context of its apparent bias argument.

The Offshore Jurisdiction Award

19. On 15 March 2022, the Tribunal in the Offshore Arbitration determined, in an Award, that it had jurisdiction over the parties to the Offshore Arbitration ("the Offshore Jurisdiction Award").

20. At around the time that the Offshore Jurisdiction Award was rendered, in the period 25 February 2022 to 21 March 2022, DEG was being instructed by Freshfields to give an expert declaration in foreign law proceedings in an unrelated matter. This was only disclosed on 9 December 2023. This engagement, and DEG's failure to disclose it, is also relied upon by Aiteo in relation to apparent bias, and is discussed in Section D below.

21. Shortly after the rendering of this award, on 29 April 2022, DEG disclosed that she had recently been appointed by the ICC as presiding arbitrator, following nomination by the co-arbitrators, in an unrelated ICC arbitration in which Freshfields are acting

for one of the parties. Although this appointment was disclosed, Aiteo contended that it was relevant to the overall picture of professional connections between DEG and Freshfields. They argue that although there is no detailed evidence as to the actual process which led to DEG's appointment, the process of selecting the presiding arbitrator in an international arbitration, particularly an ICC arbitration, is usually made through a mechanism involving consultation of the parties to the arbitration, and thereby those instructing them (here, Freshfields), with the parties relying upon recommendations from those they instruct. Accordingly, they argue that this appointment is relevant because Freshfields would likely have had had input into the selection of DEG as presiding arbitrator.

July 2022: Awards in relation to costs and consolidation

22. On 22 July 2022, consequential upon the Offshore Jurisdiction Award, the Tribunal in the Offshore Arbitration rendered an Award on Costs incurred in relation to Aiteo's unsuccessful jurisdictional arguments.

23. On the same day, the Tribunal in the Offshore Arbitration rendered an Award on the question of consolidation ("the Consolidation Award"), by which it ordered consolidation of the Onshore Arbitration with the Offshore Arbitration. The approach of the Tribunal to the arguments about consolidation is relevant to the question of substantial injustice discussed in Section E below.

Court challenge under section 67 to the awards of the Tribunal

24. On 11 April 2022, following the rendering of the Offshore Jurisdiction Award, Aiteo filed a claim under s. 67 of the 1996 Act seeking to set it aside. As is well-known, an arbitration tribunal cannot finally determine its own jurisdiction, and the current position under English law is that a jurisdictional challenge under s. 67 requires a re-hearing of the jurisdictional arguments and a fresh determination by the court. The court is, therefore, not simply reviewing the tribunal's jurisdictional conclusions. This is relevant to the parties' arguments on "substantial injustice" discussed in Section E below.

25. On 19 August 2022, following the publication of the Consolidation Award, Aiteo filed a further claim under s. 67 of the Arbitration Act 1996 seeking to set aside that award. This was again a jurisdictional argument, and it was dependent upon the success of Aiteo's challenge to the Offshore Jurisdiction Award. The argument was that if the Tribunal had no jurisdiction in that reference, then it followed that it could not issue an award which consolidated the two references.

26. The s. 67 applications were argued before Foxton J. On 17 November 2022, Foxton J dismissed both of Aiteo's applications: see [2022] EWHC 2912 (Comm).

Onshore Jurisdiction Award

27. By an Award dated 25 August 2023 ("the Onshore Jurisdiction Award"), the Tribunal (having previously ordered consolidation) determined that it had jurisdiction over disputes under the Onshore Arbitration. There was no s. 67 challenge in relation to this award.

Events of late 2023 and the removal of DEG as arbitrator

28. 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. As a result of this disclosure by DEG, on 4 December 2023 Aiteo requested further information regarding the disclosure given and any other appointments or instructions involving Freshfields. On 9 December, DEG gave a full response to the questions which Aiteo had asked. That response brought to light a number of matters on which Aiteo relied:

    (a) The expert instruction disclosed on 10 November 2023 took place in the period 17 October 2023 to 25 October 2023. The disclosure thus took place several weeks after the instruction had been completed.

    (b) In June-July 2020 (as described above) DEG gave expert advice in conference to a client of Freshfields in relation to English law (with no involvement thereafter). DEG indicated that the disclosure was made to Freshfields and the Lenders, but inadvertently DEG's clerk did not make this disclosure in the ICC Arbitrator Statements submitted to the ICC nor to Aiteo.

    (c) Also, as described above, DEG was instructed by Freshfields, in the period from 25 February 2022 until 21 March 2022, to provide an expert declaration in foreign law proceedings. DEG said that it "did not cross my mind at the time to disclose this retainer. If I should have done so, I can only apologise".

    (d) In the unrelated arbitration described above, Freshfields, in June 2021, replaced legal counsel previously representing the party appointing DEG.

29. On 12 December 2023, Aiteo lodged with the ICC a challenge to DEG pursuant to Article 14(1) of the ICC Rules. Aiteo's challenge was supported by a detailed submission running to 17 pages. Aiteo challenged DEG on the basis that, objectively viewed from the perspective of the informed third person, there were justifiable doubts as to the independence and impartiality of DEG. Aiteo also made the point that there was in substance no difference between the relevant test under the ICC Rules and the test under English law. The underlying facts relied upon in the ICC challenge are essentially repeated in the context of the present s. 68 application. There are only relatively minor differences. In the ICC challenge, reliance was also placed upon the fact that DEG had given the well-known annual Freshfields QMUL (Queen Mary University of London) arbitration lecture in 2017. That point is no longer made by Aiteo. In addition, the argument based upon the arbitration where Freshfields replaced existing counsel, subsequent to DEG's appointment as arbitrator in that case, was not advanced in the ICC challenge.

30. The three arbitrators were asked by the ICC Secretariat to provide any comments on the challenge. On 18 December 2023, DEG's fellow arbitrators wrote a letter to the ICC Court, stating that in their dealings and deliberations with DEG, she had not displayed any lack of independence or impartiality or bias or apparent bias in her functions as an arbitrator.

31. On 19 December 2023, the Lenders responded to the application in a detailed submission running to 13 pages. Aiteo points out that the Lenders did not challenge

Aiteo's argument as to the test to be applied nor that it was in substance the same as the English law test. The Lenders opposed the challenge, and its core arguments were substantially the same as those which have been advanced in relation to the s. 68 application.

32. On 20 December 2023, DEG wrote a letter to the ICC Court in which she said that she did not consider that the relevant facts and circumstances, objectively assessed, gave rise to justifiable doubts as to her impartiality or independence. In his submissions, Mr Juratowitch recognised that DEG's own view, as expressed here, was not a significant point; since it is never an answer for an arbitrator to assert impartiality.

33. On 22 December 2023, Aiteo responded to the Lenders' submissions.

34. Such challenges are to be determined by the ICC Court. By a decision of 17 January 2024, communicated by the ICC Secretariat on 18 January 2024, the ICC Court determined that the challenge was "admissible" and upheld the challenge on its merits.

35. No reasons were given by the ICC Court because neither party had requested reasons in advance of its decision. The "Notes to Parties" published by the ICC in both 2017 and 2021 state that a request for reasons "must" be made in advance of the decision in respect of which reasons are sought. The Lenders subsequently sought reasons for the decision in a letter of 23 January 2024. That request was not supported by Aiteo. In its response on 26 January 2024, Stewarts stated:

> "What would be highly unsatisfactory and unfair would be a situation in which the ICC Court was not now in a position to provide the full scope of the reasons it would have given had a timely request been made without in effect impermissibly reconstituting the ICC Court that made the decision. The Respondent would request clarification as to how the ICC Court would propose addressing these concerns were (which does not appear possible in any event) it to entertain the Claimants' request in order to safeguard the Respondent's position as the successful party."

36. On 26 January 2024, the ICC Secretariat declined the Lenders' request on the basis that a request must be made before (underlined in the communication to the parties) the ICC Court's decision and this was not subject to any exceptions. The ICC Secretariat referred to paragraph 49 of the Notes to parties under the 2021 ICC Rules and paragraph 16 of the Notes under the 2017 ICC Rules.

The application under s. 68 of the 1996 Act

37. 13 days after being notified of the decision of ICC Court in respect of the challenge, Aiteo filed the present s. 68 challenge on 31 January 2024 and accompanying extension of time application. Following submissions made in correspondence between the parties, I decided that the applications under ss. 68 and 80 should be determined in a single "rolled up" hearing.

Subsequent developments in the arbitration

38. Following the ICC Court's acceptance of Aiteo's challenge, DEG needed to be replaced as arbitrator. The Lenders nominated Mr Colin Edelman KC as a replacement arbitrator on 30 January 2024. On 13 February 2024, the ICC confirmed Mr Edelman as co-arbitrator, and the Tribunal in the consolidated arbitrations was thereby reconstituted.

39. On 21 March 2024, there was a hearing in the consolidated arbitrations in respect of the implications for that arbitration of the disqualification of DEG and Aiteo's s. 68 challenge, including whether the consolidated arbitrations should be stayed pending the outcome of the s. 68 proceedings. On 22 March 2024, the Tribunal directed that there should not be a stay. It set a date for the filing of Aiteo's statement of defence and counterclaim, as well as other procedural steps. However, it acknowledged that its decisions in relation to procedure and other matters were subject to the effect of a decision in Aiteo's favour in the s. 68 application. On 22 April 2024, Aiteo served its statement of defence and counterclaim.

Proceedings in Nigeria

40. Alongside the arbitration proceedings and the s. 67 challenge described above, there have been proceedings commenced by Aiteo in Nigeria. It is not necessary to describe these in detail. They did, however, lead the Lenders to apply, successfully, for anti-suit injunctive relief to the (English) Commercial Court. An anti-suit injunction was granted by Cockerill J, on a without notice application, on 14 December 2020. A final anti-suit injunction was granted by Sir Nigel Teare on 1 April 2022 (reflected in his order dated 12 April 2022). On 10 May 2022, Males LJ granted permission to Aiteo to appeal against one aspect of Sir Nigel Teare's order. However, that appeal fell away after Foxton J's decision on Aiteo's s. 67 challenge.

C: Legal principles in relation to apparent bias

The Halliburton case – the key principles

41. The leading decision in the context of challenges to an arbitrator for apparent bias is *Halliburton Co v Chubb Bermuda Insurance Ltd.* [2020] UKSC 48 ("*Halliburton*"). That decision was published on 27 November 2020, shortly before DEG's signature of her ICC Arbitrator Statement in the present case. *Halliburton* had been argued in the Supreme Court approximately one year earlier, and it was a decision which was keenly awaited by those who practice in the field of arbitration, and which provoked much discussion afterwards.

42. The case concerned an application under the Arbitration Act 1996 s. 24 to remove an arbitrator (Mr Rokison QC) who had previously been appointed by the High Court to serve as third arbitrator and chairman in the reference. In the present case, there is no s. 24 removal application, because DEG has already been removed by the ICC Court and been replaced by Mr Edelman KC. However, it was common ground that the principles set out in *Halliburton* were equally applicable in the present context of an application under s. 68.

43. The leading judgment was given by Lord Hodge, and he summarised the applicable principles at the conclusion of his judgment. References in square brackets in this section are to the paragraphs of the judgment.

44. The obligation of impartiality is a core principle of arbitration law, and in English law the duty of impartiality applies equally to party-appointed arbitrators and arbitrators appointed by the agreement of party-appointed arbitrators, by an arbitral institution, or by the court: [151].

45. The English courts, in addressing an allegation of apparent bias in an English-seated arbitration will apply the objective test of the fair-minded and informed observer: [69]. This test is whether the fair-minded and informed observer, having considered the facts, would consider that there was a real possibility that the tribunal was biased: see [52], applying *Porter v Magill* [2001] UKHL 67.

46. The courts have given guidance on the nature of this "judicial construct": [52]. The observer does not reach a judgment on any point before acquiring a full understanding of both sides of the argument. The conclusions which the observer reach must be justified objectively. The fair-minded and informed observer is neither complacent nor unduly suspicious: [52] – [53].

47. When addressing such an allegation of apparent bias, the court will also have regard to the particular characteristics of international arbitration discussed in paragraphs [56] – [68] of the judgment. Those characteristics highlight the importance of proper disclosure as a means of maintaining the integrity of international arbitration: [69]. Those characteristics include: that arbitration is a private process with limited public oversight; that there are limited powers of appeal; that the arbitrator has a financial interest in obtaining further appointments, and that the arbitrator may have an interest in avoiding action which would alienate the parties to an arbitration; that arbitrators come from many jurisdictions, and there may be divergent views as to what constitutes ethically acceptable conduct; that in English law all arbitrators should comply with the same high standards of impartiality; that there is the possibility of opportunistic or tactical challenges.

48. Accordingly, the assessment of the fair-minded and informed observer, as to whether there is a real possibility of bias, is an objective assessment which has regard to the realities of international arbitration and the customs and practices in the relevant field of arbitration: [152].

49. Where there are circumstances which might reasonably give rise to a conclusion by the objective observer that there was a real possibility of bias, the arbitrator is under a legal duty to disclose (as in *Halliburton*) appointments in multiple references concerning the same or overlapping subject matter. There is a legal duty of disclosure which is a component of the arbitrator's statutory duty to act fairly and impartially: [152] – [153].

50. A failure by an arbitrator to make disclosure is a factor for the fair-minded and informed observer to take into account in assessing whether there is a real possibility of bias: [155]. The fair-minded and informed observer in assessing whether an arbitrator has failed in a duty to make disclosure must have regard to the facts and circumstances as at and from the date when the duty arose: [156]. The fair-minded

and informed observer assesses whether there is a real possibility that an arbitrator is biased by reference to the facts and circumstances known at the date of the hearing to remove the arbitrator.

Halliburton – other aspects of the Supreme Court's judgment

51. In the course of their submissions, each side relied upon or emphasised particular statements made in the judgment of the Supreme Court in support of their argument as to what the fair minded and reasonable observer would conclude. The principal references, and the particular points made, were as follows.

52. When explaining the differences between court resolution and arbitration, Lord Hodge identified [56] the private nature of arbitration with limited public oversight, and the difficulty – in the absence of disclosure by an arbitrator – of discovering the existence of the arbitration, the evidence, the legal arguments advanced, or the award. He said, in a passage on which Aiteo relied:

> "That puts a premium on frank disclosure".

53. At [59], Lord Hodge described the differences between the state's employment and funding of a judge's salary with the position of an arbitrator. This paragraph is quoted in Section D3 below. Aiteo relied upon this paragraph in support of an argument as to the impact of (what it alleged were) the significant number of professional contacts between DEG and Freshfields.

54. At [67], Lord Hodge addressed the relevance of the reputation and experience of the arbitrator:

> "The fair-minded and informed observer would also be aware that in international arbitration the parties to an arbitration and their legal advisers may often have only limited knowledge of the reputation and experience of a professional who is appointed by an institution or by the court to chair their arbitration. While many parties and their advisers who are engaged in high value international arbitrations devote considerable resources to researching the background of people who might be suitable for selection as party-appointed arbitrators or as nominees for third party appointment, there is no basis for assuming that that practice is universal. The professional reputation and experience of an individual arbitrator is a relevant consideration for the objective observer when assessing whether there is apparent bias as an established reputation for integrity and wide experience in arbitration may make any doubts harder to justify. But the weight which the fair-minded and informed observer should give to that consideration will depend upon the circumstances of the arbitration and whether, objectively and as a generality, one could expect people who enter into references of that nature to be informed about the experience and past performance of arbitrators. In the context of many international arbitrations, it is likely to be a factor of only

> limited weight. The weight of that consideration may also be reduced if the circumstances give rise to a material risk of unconscious bias on the part of a person of the utmost integrity: *Almazeedi v Penner* [2018] UKPC 3 at [1], per Lord Mance JSC."

55. The Lenders emphasised the integrity and distinction of DEG as an experienced judge. Aiteo submitted that this was only a factor of limited weight, and drew particular attention to the final sentences of paragraph [67].

56. At [68], Lord Hodge drew attention to the possibility of opportunistic or tactical challenges.

> "On other hand, the objective observer is alive to the possibility of opportunistic or tactical challenges. Parties engage in arbitration to win. Their legal advisers present their cases to the best of their ability, and this pursuit can include making tactical objections or challenges in the hope of having their dispute determined by a tribunal which might, without any question of bias, be more predisposed towards their view or simply to delay an arbitral determination."

57. The Lenders also referred to the statement in [68] that "a court, when asked to remove an arbitrator, needs to be astute to see whether the ground of real possibility of bias is made out". Their point, in substance, was that the challenge made by Aiteo was opportunistic and tactical. Aiteo disputed this, drawing attention to the fact that the ICC Court had accepted that the challenge was well-founded and had removed DEG.

58. At [70], Lord Hodge began the court's discussion of the role of disclosure. He said:

> "An arbitrator, like a judge, must always be alive to the possibility of apparent bias and of actual but unconscious bias. The possibility of unconscious bias on the part of a decision-maker is known, but its occurrence in a particular case is not. The allegation, which is advanced in this case, of apparent unconscious bias is difficult to establish and to refute. One way in which an arbitrator can avoid the appearance of bias is by disclosing matters which could arguably be said to give rise to a real possibility of bias. Such disclosure allows the parties to consider the disclosed circumstances, obtain necessary advice, and decide whether there is a problem with the involvement of the arbitrator in the reference and, if so, whether to object or otherwise to act to mitigate or remove the problem."

59. Later in that paragraph, Lord Hodge said that:

> "…the obligation of impartiality continues throughout the reference and the emergence during the currency of the reference of matters which ought to be disclosed means that an arbitrator's prompt disclosure of those matters can enable him or her to maintain what Lord Hope calls the "badge of impartiality"."

60. At [71] – [72], the court discussed both the arbitral rules chosen by the parties, and the IBA Guidelines on Conflicts of Interest in International Arbitration ("the IBA Guidelines"). The IBA Guidelines applicable at the time of DEG's appointment, and the Supreme Court's judgment in *Halliburton,* were those adopted by the IBA in 2014. Since that time, in 2024, a revised version has been adopted and published.

61. Lord Hodge at [71] said that the IBA Guidelines set out good arbitral practice which is recognised internationally. But they did not override national law or the arbitral rules chosen the parties. It was common ground that, in the present case, the parties' agreement to ICC arbitration meant that the parties, and the arbitrator, were contractually bound by the provisions of the ICC Rules. Article 11 of the ICC Rules (set out in full below) applied what Lord Hodge described as a "subjective approach" to the duty of disclosure, with a focus on the perception of the parties. He contrasted this subjective approach with the objective test of looking to the judgment of the fair-minded and informed observer.

62. Ultimately, a key part of Aiteo's case was that there was, here, a failure by DEG to make the disclosure which the ICC Rules required, and that this was highly material to the assessment of the informed observer. The Lenders contended that there was no failure in the present case, but that even if there was it was inadvertent. In that regard, paragraph [73] of *Halliburton* is relevant:

> "It is also clear that an arbitrator may fail to make disclosure for entirely honourable reasons, such as forgetfulness, oversight, or a failure properly to recognise how matters would appear to the objective observer. But as Lord Bingham stated in *Davidson* 2005 1 SC (HL) 7, para 19, "However understandable the reasons for it, the fact of non-disclosure in a case which calls for it must inevitably colour the thinking of the observer"."

63. Aiteo also contended that, irrespective of the ICC Rules, disclosure was required at common law. In that regard they drew attention to paragraphs [107] and following of Lord Hodge's speech which addressed the content of the common law duty.

> "[109] There will be matters between the two extremes of which Lord Mance spoke. There will be matters which, if left unexplained, would give rise to justifiable doubts as to an arbitrator's impartiality. They must be disclosed and neutralised by explanation. Similarly, there will be matters, which are more than trivial, which an arbitrator ought to recognise could by themselves or in combination with other circumstances (including a failure to disclose those matters) give rise to such justifiable doubts, if later discovered.
>
> …
>
> [111] It has been suggested that the breach of a legal obligation to disclose a matter which might, but on examination after the event did not, give rise to a real possibility of bias would be a legal wrong for which there was no legal sanction. I do not

> agree for two reasons. First, in a case in which the matter is close to the margin, in the sense that one would readily conclude that there is apparent bias in the absence of further explanation, the non-disclosure itself could justify the removal of the arbitrator on the basis of justifiable doubts as to his or her impartiality.
>
> …
>
> The existence of such a duty provides support to the fairness and impartiality of arbitral proceedings under English law by allowing non-disclosure to carry greater weight in the basket of factors to be assessed under section 24(1)(a) of the 1996 Act than a mere deviation from best practice."

64. Lady Arden gave a separate speech, agreeing with Lord Hodge but adding some points of her own. The Lenders referred to the nature of the duty of disclosure in paragraph [160]:

> "In my consideration of the issues I have found it useful to dissect the particular characteristics of the duty of disclosure. It is not an unconditional duty, or a duty in the usual sense of the word, but a part of a bigger picture. The duty is not the primary duty. The primary duty is to act fairly and impartially as arbitrator (section 33 of the Arbitration Act 1996 ("the 1996 Act"), set out in para 49 above). An arbitrator who acts with actual or apparent bias does not act impartially. As hereafter explained, to remove any doubt about apparent bias, an arbitrator may wish to disclose matters to the parties. It is from that consequence of the impartiality duty that a duty of disclosure can be said to arise, but it is not an independent, self-contained duty."

65. In the course of his submissions, Mr Juratowitch emphasised that a failure to disclose did not automatically lead to an adverse conclusion on impartiality by the independent observer. He also said that the mere fact that something was disclosed does not mean that it was in fact disclosable.

66. The Lenders also referred to the ultimate decision of the Supreme Court in relation to the arbitrator in *Halliburton.* The court concluded [147] that the arbitrator's original failure to disclose "may well" have led to the conclusion that there was a real possibility of bias, but that it was not necessary to express a concluded view on this "as that is not the correct time to ask the question". The court then looked at the position at the date of the hearing at first instance, and held that it was not persuaded that the fair minded and informed observer would infer from the arbitrator's oversight that there was a real possibility of unconscious bias on the part of the arbitrator. Amongst the factors relevant to this conclusion was the lack of clarity in English case law as to whether there was a legal duty; the course which the arbitration had taken; the arbitrator's measured response to Halliburton's robust challenge; and the absence of any basis for inferring unconscious bias in the form of subconscious ill-will.

D: Would the fair-minded and informed observer consider that there was a real possibility that DEG was biased?

D1: Disclosure issues

67. A principal plank of Aiteo's argument, in relation to the application of the fair-minded and informed observer test, concerns DEG's failure to make timely disclosure of a number of instructions by Freshfields additional to those which she did disclose. This section describes the chronological sequence of relevant events relating to the disclosures made or not made by DEG, and addresses the parties' arguments in that regard. Articles 11 and 14 of the ICC Rules are important in that context, and it is appropriate to set them out in full here:

> "**Article 11**
>
> General Provisions
>
> 1 Every arbitrator must be and remain impartial and independent of the parties involved in the arbitration.
>
> 2 Before appointment or confirmation, a prospective arbitrator shall sign a statement of acceptance, availability, impartiality and independence. The prospective arbitrator shall disclose in writing to the Secretariat 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, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality. The Secretariat shall provide such information to the parties in writing and fix a time limit for any comments from them.
>
> 3 An arbitrator shall immediately disclose in writing to the Secretariat and to the parties any facts or circumstances of a similar nature to those referred to in Article 11(2) concerning the arbitrator's impartiality or independence which may arise during the arbitration.
>
> 4 The decisions of the Court as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final.
>
> 5 By accepting to serve, arbitrators undertake to carry out their responsibilities in accordance with the Rules.
>
> 6 Insofar as the parties have not provided otherwise, the arbitral tribunal shall be constituted in accordance with the provisions of Articles 12 and 13.
>
> **Article 14**
>
> Challenge of Arbitrators
>
> 1 A challenge of an arbitrator, whether for an alleged lack of impartiality or independence, or otherwise, shall be made by the

> submission to the Secretariat of a written statement specifying the facts and circumstances on which the challenge is based.
>
> 2 For a challenge to be admissible, it must be submitted by a party either within 30 days from receipt by that party of the notification of the appointment or confirmation of the arbitrator, or within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based if such date is subsequent to the receipt of such notification.
>
> 3 The Court shall decide on the admissibility and, at the same time, if necessary, on the merits of a challenge after the Secretariat has afforded an opportunity for the arbitrator concerned, the other party or parties and any other members of the arbitral tribunal to comment in writing within a suitable period of time. Such comments shall be communicated to the parties and to the arbitrators."

The two prior arbitral appointments by Freshfields

68. It is appropriate to start by considering the arbitrator's initial disclosure in December 2020, when she signed her statement of independence. DEG considered that it was appropriate to tick the "Acceptance with disclosure" box on the ICC Arbitrator statement: i.e. the form headed "ICC Arbitrator Statement Acceptance, Availability, Impartiality and Independence". She disclosed two arbitral appointments by Freshfields in the previous 2 years. Although Mr Juratowitch did not formally accept that these two appointments were "legally disclosable – disclosable as a matter of law", he realistically accepted that "this would be a different case as a matter of overall judgment of all the facts and circumstances" if those appointments had not been disclosed.

69. In my view, those two appointments were clearly disclosable, and DEG was right to recognise, when she signed the ICC Arbitrator Statement, that they should be disclosed in both of the arbitrations where she was now being nominated by Freshfields for appointment by the ICC. There are a number of routes by which that conclusion would be reached.

70. One route is to consider the IBA Guidelines which were then current. Those Guidelines make it clear that repeat appointments by the same firm of solicitors is an "orange list" matter which should be disclosed. The benchmark for disclosure in this respect, under paragraph 3.3.8 of the IBA Guidelines, is that the arbitrator "has, within the past three years, been appointed on more than three occasions by the same counsel, or the same law firm". Mr Juratowitch accepted, rightly in my view, that the "more than three occasions" would include the current proposed appointment. Here there were two, simultaneous, proposed appointments in different but related arbitrations. There would be a possible line of argument (as to some extent argued in the Lenders' skeleton), if disclosure had not been made, along the following lines: (i) the two simultaneous nominations should only count as one appointment for the purposes of paragraph 3.3.8 and (ii) the formal appointment in an ICC arbitration is made by the ICC, and that the party and its firm of solicitors has only made a nomination rather than an appointment. However, I consider that the fair-minded

observer would not have been impressed by either line of argument if DEG had failed to disclose the prior 2 appointments, within a 2-year period, which brought the total, including the present two nominations, to 4.

71. The other route involves consideration of the ICC Rules, in conjunction with the guidance provided by the ICC. It was common ground that the ICC Rules operate contractually, both between the parties themselves and so far as concerns the position of the arbitrator. Article 11 requires the disclosure of "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, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality". *Halliburton* indicates that the reference to "eyes of the parties" connotes, certainly as far as independence is concerned, an element of subjectivity; it requires consideration of how the parties might view matters, not simply how a fair-minded observer might do so.

72. When considering the terms of Article 11, it is in my view relevant to consider the guidance which the ICC provides, both in the standard form ICC Arbitrator Statement signed by DEG, and also in the "Note to Parties and Arbitral Tribunals on the Conduct in the Arbitration" ("the Note") which is referred to therein.

73. The text of the ICC Arbitrator Statement, under the heading "Independence and Impartiality" states:

> "INDEPENDENCE and IMPARTIALITY
>
> In deciding which box to tick, you should take into account, having regard to Article 11(2) of the Rules, whether there exists any past or present relationship, direct or indirect, whether financial, professional or of any other kind, between you and any of the parties, their lawyers or other representatives, or related entities and individuals. Any doubt must be resolved in favour of disclosure. Any disclosure should be complete and specific, identifying inter alia relevant dates (both start and end dates), financial arrangements, details of companies and individuals, and all other relevant information. In deciding which box to tick and as the case may be in preparing your disclosure, you should also consult with care the relevant sections of the Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration."

74. The version of the Note current at the time was dated 1 January 2019 and runs to 34 pages. A later version, to which I was referred at the hearing, is dated 1 January 2021, and runs to 40 pages. Section III, is headed Arbitral Tribunal, and the paragraphs quoted below were materially identical in each version. It provides (using the 2019 version):

> "A - Statement of Acceptance, Availability, Impartiality and Independence

18. All arbitrators, including emergency arbitrators, have the duty to act at all times in an impartial and independent manner (Articles 11 and 22(4)).

19. The Court requires all prospective arbitrators to complete and sign a Statement of Acceptance, Availability, Impartiality and Independence ("Statement") (Article 11(2)).

20. The parties have a legitimate interest in being fully informed of all facts or circumstances that may be relevant in their view in order to be satisfied that an arbitrator or prospective arbitrator is and remains independent and impartial or, if they so wish, to explore the matter further and/or take the initiatives contemplated by the Rules.

21. An arbitrator or prospective arbitrator must therefore disclose in his or her Statement, at the time of his or her appointment and as the arbitration is ongoing, any circumstance that might be of such a nature as to call into question his or her independence in the eyes of any of the parties or give rise to reasonable doubts as to his or her impartiality. Any doubt must be resolved in favour of disclosure.

22. A disclosure does not imply the existence of a conflict. On the contrary, arbitrators who make disclosures consider themselves to be impartial and independent, notwithstanding the disclosed facts, or else they would decline to serve. In the event of an objection or a challenge, it is for the Court to assess whether the matter disclosed is an impediment to service as arbitrator. Although failure to disclose is not in itself a ground for disqualification, it will however be considered by the Court in assessing whether an objection to confirmation or a challenge is well founded.

23. Each arbitrator or prospective arbitrator must assess what circumstances, if any, are such as to call into question his or her independence in the eyes of the parties or give rise to reasonable doubts as to his or her impartiality. In making such assessment, an arbitrator or prospective arbitrator should consider all potentially relevant circumstances, including but **not limited to** the following:

- The arbitrator or prospective arbitrator or his or her law firm represents or advises, or has represented or advised, one of the parties or one of its affiliates.

- The arbitrator or prospective arbitrator or his or her law firm acts or has acted against one of the parties or one of its affiliates.

- The arbitrator or prospective arbitrator or his or her law firm has a business relationship with one of the parties or one of its affiliates, or a personal interest of any nature in the outcome of the dispute.

- The arbitrator or prospective arbitrator or his or her law firm acts or has acted on behalf of one of the parties or one of its affiliates as director, board member, officer, or otherwise.

- The arbitrator or prospective arbitrator or his or her law firm is or has been involved in the dispute, or has expressed a view on the dispute in a manner that might affect his or her impartiality.

- The arbitrator or prospective arbitrator has a professional or close personal relationship with counsel to one of the parties or the counsel's law firm.

- The arbitrator or prospective arbitrator acts or has acted as arbitrator in a case involving one of the parties or one of its affiliates.

- The arbitrator or prospective arbitrator acts or has acted as arbitrator in a related case.

- The arbitrator or prospective arbitrator has in the past been appointed as arbitrator by one of the parties or one of its affiliates, or by counsel to one of the parties or the counsel's law firm.

24. In assessing whether a disclosure should be made, an arbitrator or prospective arbitrator should consider relationships with non-parties having an interest in the outcome of the arbitration. The Secretariat may in this respect assist prospective arbitrators by identifying relevant entities and individuals in the arbitration. Such an indication does not release an arbitrator or prospective arbitrator from his or her duty to disclose with respect to other relevant entities and individuals he or she may be aware of. In case of doubt with respect to such an indication made by the Secretariat, an arbitrator or prospective arbitrator is encouraged to consult the Secretariat.

…

27. When completing his or her Statement and identifying whether he or she should make a disclosure, both at the outset of the arbitration and subsequently, an arbitrator or prospective arbitrator should make reasonable enquiries in his or her

> records, those of his or her law firm and, as the case may be, in other readily available materials."

75. The checklist in paragraph 23 of the Note includes (the final bullet point) a past appointment as arbitrator by the law firm of one of the parties. Unlike the IBA Guidelines, there is here no reference to a number of appointments or a time period. It does not follow from the Note that an arbitrator is bound to disclose all prior appointments, however distant in time or few in number. Indeed, the Note does not positively require disclosure of any of the other matters set out on the checklist, as opposed to identifying matters for consideration. (This is a point which was accepted by Flaux J in *A v B* as discussed below [2011] EWHC 2345 (Comm) [55]-[56] and [78]). However, the checklist clearly provides very useful guidance to any arbitrator as to the types of matters which should be considered as part of his or her consideration of "all potentially relevant circumstances". The text of the ICC Arbitrator Statement itself says that any doubt must be resolved in favour of disclosure.

76. Against this background, it was in my view clearly appropriate, under the applicable ICC Rules and bearing in mind the guidance given in the Arbitrator Statement and the Note (which in my view must be taken as representing good current arbitral practice) for DEG to disclose the two relatively recent appointments by Freshfields, which brought the total number of appointments or nominations for appointment (including the current nomination) to 4, within a relatively short space of time. As Mr Juratowitch's submissions acknowledged, the Lenders' present case would certainly have been problematic if disclosure of these 2 appointments had not been made.

77. However, the disclosure was in fact made, and no criticism can be made of the arbitrator in relation to the two prior appointments. The question which arises is whether, as Aiteo contends, the disclosure was incomplete, because of the non-disclosure of a further recent professional relationship between DEG and Freshfields.

Expert advice given to a client of Freshfields

78. In DEG's 9 December 2023 e-mail, she disclosed that in "June-July 2020, she gave expert advice in conference to a client of Freshfields in relation to English law, on a matter in relation to which she has had no continuing involvement since that date". She had made this disclosure to Freshfields itself prior to the date of her nomination by Freshfields in the present case, and in that connection had told Freshfields that she would "probably wish to disclose" both the two prior arbitral appointments by Freshfields as well as the June-July expert advice. When nominated, DEG had instructed her clerk to disclose this expert instruction, but inadvertently her clerk had not done so. DEG accepted that it was her responsibility to check that the disclosure statement sent out under her electronic signature was correct. She said that none of the people at Freshfields in relation to the June-July 2020 advice were involved in the present arbitration.

79. Although Mr Juratowitch argued to the contrary, I have no doubt that the June-July 2020 engagement should have been disclosed. Albeit that the engagement had concluded, it was relatively recent and spanned a period of two months. While DEG referred to this engagement as involving her giving "expert advice", I did not understand this to be an engagement which related to the provision of expert advice

on English law for the purposes of proceedings in a foreign court. There is a contrast between DEG's description of this engagement, and her description of the two later engagements described below. The June-July "expert advice" engagement was, therefore, similar to the ordinary case of a barrister being engaged by a firm of solicitors to give advice, as to English law, to a client. It has for some time been common for retired judges to accept instructions to give advice to clients on English law in a variety of contexts, although it is still considered inappropriate for retired judges to appear in court or arbitration hearings as counsel. Accordingly, DEG's engagement here was not out of the ordinary. An advisory engagement of this kind, whether in respect of a barrister or retired judge, gives rise to a closer and different relationship to that which exists between arbitrator and the firm of solicitors which has appointed him or her. Thus in contrast to an arbitral appointment, an advisory engagement for a client requires the advisor, whether barrister or retired judge, to consider the client's best interests and to advise and assist accordingly. It may also involve, as here, one or more conferences with the client. It is equivalent or at least very similar to a relationship, to use the words of the IBA Guidelines, of "co-counsel" between the barrister or retired judge and the law firm which has instructed him or her.

80. The Note advises a prospective arbitrator to consider, in the non-exhaustive checklist, the circumstance where the arbitrator or prospective arbitrator has a "professional … relationship with counsel to one of the parties or the counsel's law firm". Mr Juratowitch submitted that there was, in relation to this engagement, no professional relationship; because "relationship" indicates something that is enduring and ongoing, whereas this (and the other later expert engagements) were particular instructions for particular periods of time. I disagree. It is in my view important that the checklist in the Note does not purport to be an exhaustive list: there is bold text in the words "including **but not limited to**" the circumstances in the checklist. Furthermore, the Statement requires the arbitrator to give consideration to "any past or present relationship" between the prospective arbitrator and a party's lawyers (my emphasis). It also advises that any doubt must be resolved in favour of disclosure, and also that the disclosure should be "complete". Against a background where this was a relatively recent engagement, and where the disclosure of the two arbitral appointments did not give a complete picture of the past and present professional relationships between DEG and Freshfields taken as a whole, I see no force in an argument that this engagement did not require disclosure.

81. Furthermore, DEG did not take the position, as expressed in the 9 December 2023 e-mail, that this engagement did not require disclosure. She recognised at the time of the nomination that it was something that she would "probably wish to disclose"; and she did in fact make the disclosure to Freshfields when she said this. There is nothing to suggest that DEG then, for some reason, took a different view as to the need for disclosure. On the contrary, she had instructed her clerk to make a disclosure to the ICC, and thereby to all parties in the arbitration. Inadvertently, this was not done, with DEG accepting that she bore responsibility for this omission.

82. Mr Juratowitch relied upon two authorities in support of an argument that English law did not require disclosure of this instruction (or indeed the later two expert instructions). He referred to the decision of the Court of Appeal in *Locabail (UK) Ltd*

v Bayfield Properties [2000] QB 451, and to the decision of Flaux J in *A v B* [2011] EWHC 2345.

83. In *Locabail*, a very powerful Court of Appeal was considering the circumstances in which judges should recuse themselves. In *Locabail* at [25], Lord Bingham said:

> "It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the case to be decided… Nor, at any rate ordinarily, could an objection be soundly based on … previous receipt of instructions to act for or against any party, solicitor or advocate in a case before [the judge]".

84. I did not consider that this statement, made in 1999 in the context of considering the position of judges in the English court system, can simply be transplanted into the context of international arbitration some 25 years later. *Locabail* was not considering the circumstances in which it would be appropriate for an arbitrator to make disclosure, and there have been many significant developments in that context in the past 25 years, including of course the recent decision in *Halliburton* which emphasises the relevance and importance of (in the present case) the terms of the ICC Rules to which the parties have agreed, and international arbitral guidelines and practice. The above passage in any event emphasises that each case depends on its particular facts, and the present case involves a number of repeat arbitral appointments and instructions to advise and as an expert in foreign proceedings.

85. The decision of Flaux J in *A v B*, relied upon by Mr Juratowitch, is closer to home, in that it did concern an international arbitration. The arbitration in that case involved a party represented by the law firm Dewey & Lebeouf LLP ("Dewey"). The arbitrator was a practising QC. The arbitrator had previously, some time prior to the arbitration, been instructed by Dewey, but the case had been stayed pursuant to a settlement agreement. During the course of the arbitration, the case (and the arbitrator's involvement as counsel) revived. There was disclosure of this by the arbitrator, but at a relatively late stage, after the hearing and shortly before the award was to be issued. This was an LCIA arbitration, and a challenge to the arbitrator failed before a distinguished international arbitrator who was appointed by the LCIA to consider the matter. The application to remove the arbitrator, and a challenge to his award, also failed in the application which was made to Flaux J.

86. I do not consider that the decision of Flaux J can be interpreted as meaning that prior (or current) instructions to a barrister, by a firm of solicitors acting for a party in an arbitration where the barrister is an arbitrator, need never be disclosed. It seems to me that all must depend on the facts. I can well see that, in the present case, if the only past or present relationship between DEG and Freshfields had been the June-July 2020 engagement, there might well be a reasonable argument that disclosure was not required. If this had been the only relationship, it is also very difficult to see that (even absent disclosure) a challenge would have succeeded before the ICC, or indeed in court. But that is not the factual position here, and indeed the present is a case where (as further discussed below) the challenge before the arbitral institution succeeded.

87. Furthermore, the decision in *Halliburton* means that the law has moved on, in important ways, since 2011. The present case requires consideration of the ICC Rules, which formed part of the parties' contractual relationship, but which (although referred to in argument) were not directly relevant to the argument in *A v B*. It also, in my view, requires consideration of the terms of the Note, which was neither relevant nor referred to in *A v B*.

88. There are also, in my view, aspects of the successful argument advanced by counsel instructed by Dewey in that case, and accepted by Flaux J, which would now require reconsideration (and, arguably, seem questionable) in the light of *Halliburton* and other cases. For example, Flaux J placed emphasis on the "way in which the legal profession in this country operates in practice", and in that context he quoted extensively from the decision of the Court of Appeal in *Taylor v Lawrence* [2003] QB 528: see paragraphs [28] – [29]. The judgment of the Supreme Court in *Halliburton* highlights the significant differences between court procedures and arbitration: "in applying the [fair-minded observer] test to arbitrators it is important to bear in mind the differences in nature and circumstances between judicial determination of disputes and arbitral determination of disputes", and the "premium on frank disclosure" (*Halliburton* at [55] – [56].) Another example is Flaux J's statement at [72] that "disclosure and apparent bias are quite separate questions". It is now clear, however, that the fact of non-disclosure must inevitably colour the thinking of the observer (*Halliburton* at [73]), that 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" (*Halliburton* at [117]- [118]).

89. A third example is Flaux J's approach to unconscious bias in paragraph [60] of his judgment, where he accepted the argument that:

> "since the alleged predisposition to favour [Dewey] is necessarily unconscious, any possibility that the arbitrator's judgment was, to use [counsel instructed by Dewey's] word "skewed" would be entirely theoretical. If the alleged predisposition is "unconscious", it is difficult to see how the arbitrator can have had the relevant predisposition or, at least, it seems to me that the independent observer would not consider on the present facts that any such predisposition was made out".

90. It seems to me, however, that the courts recognise that unconscious bias can indeed operate so as to affect the approach of a judge, and it is not theoretical simply because it is unconscious. A recent example of the recognition of unconscious bias is the decision of the Privy Council in *Almazeedi v Penner* [2018] UKPC 3. The case concerned Sir Peter Cresswell, a former judge of the (English) Commercial Court, and indeed described by the Privy Council as a distinguished former judge. He had presided over a number of hearings in the Cayman Islands, as a judge of the Financial Services Division of the Grand Court of the Cayman Islands, in a case concerning the winding up of a company. The preference shareholders of the company were in the main Qatari interests with strong Qatari state connections. The challenge arose in relation to the judge's position as a judge in Qatar. The challenge succeeded in the (Cayman Islands) Court of Appeal (which included another former judge of the

English Commercial Court, Sir Bernard Rix). Lord Mance (giving the judgment of the majority of the Privy Council) approved at [1] the approach of the Court of Appeal:

> "There is no suggestion of actual bias; but, as the Court of Appeal pointed out in the present case (para 61), if a judge of the utmost integrity lacks independence, "then there is a danger of the unconscious effect of that situation, which it is impossible to calibrate or evidence."

91. In *Almazeedi*, the Court of Appeal had also referred, as quoted in paragraph [18], to the "insidious and unconscious working of the bias due to an insufficient lack of independence". Lord Mance (at [32]) described the relevant issue as being "whether the fair-minded and informed observer would see a real possibility that the judgment of an experienced judge near the end of his career would be influenced, albeit sub-consciously" by his concurrent appointment in Qatar. The majority of the Privy Council's conclusion was set out in paragraph [34]:

> "In the result, the Board, with some reluctance, has come to the conclusion that the Court of Appeal was right to regard it as inappropriate for the judge to sit without disclosure of his position in Qatar … and that this represented a flaw in his apparent independence … The judge not only ought to have disclosed his involvement with Qatar before determining the winding-up petition. In the Board's view, and at least in the absence of any such disclosure, a fair-minded and informed observer would regard him as unsuitable to hear the proceedings from at least 25 January 2012 on. The fact of disclosure can itself serve as the sign of transparency which dispels concern, and may mean that no objection is even raised."

92. *Almazeedi* (which of course post-dates Flaux J's decision in *A v B*) was referred to on a number of occasions in the Supreme Court's judgment in *Halliburton*: see paragraphs [67], [70] and [110]. At paragraph [67], Lord Hodge stated that the professional reputation and experience of the arbitrator is a relevant consideration, but that the "weight of that consideration may … be reduced if the circumstances give rise to a material risk of unconscious bias on the part of a person of the utmost integrity". Whilst the facts of *Almazeedi* are very different to those concerning DEG here, the case illustrates a number of points which are of some relevance to the parties' arguments: the potential significance of unconscious bias; the possibility of a material risk of unconscious bias even in the case of a person of the utmost integrity and distinction; and the interrelationship between non-disclosure and the fair-minded observer's conclusion on real possibility of bias. All of these points are also apparent from *Halliburton* itself. The approach in those later cases is, in my view, significantly different to that taken by Flaux J in *A v B*. I therefore agree with Mr Diwan's submission that it would indeed be dangerous to place any weight on the result or central analysis in *A v B*, in the light of *Halliburton*.

93. Accordingly, I do not accept Mr Juratowitch's argument, based on *Locabail* and *A v B*, that English law did not require disclosure of DEG's instruction by Freshfields in June-July 2020 (or indeed the later two expert instructions). Furthermore, I do not

consider that it is appropriate to approach this issue by considering what the position would be under English law divorced from the terms of the ICC Rules; bearing in mind that the parties, as well as the arbitrator when accepting appointment, were bound by those Rules. The more significant question, therefore, is whether the June-July 2020 engagement was disclosable under Article 11 of the ICC Rules; because it was a fact or circumstance which "might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties" or because it was a circumstance that "could give rise to reasonable doubts as to the arbitrator's impartiality". In approaching that question, I consider that the guidance provided by the ICC in the standard form ICC Arbitrator Statement, and the Note, is relevant. Against that background, I consider that the June-July 2020 engagement by Freshfields was indeed disclosable, not least because the disclosure of the two prior arbitral appointments by Freshfields did not provide the full picture of the professional engagements or relationships between DEG and Freshfields in the relatively recent period prior to her nomination by Freshfields in late 2020. Indeed, DEG's own approach at the time was to consider that it should have been disclosed, and in my view that approach was sound. There was, however, an (inadvertent) failure to disclose it to Aiteo or the ICC.

94. However, I agree with Mr Juratowitch that this non-disclosure is by no means determinative of the answer to the question which the fair-minded observer must consider. It is, however, relevant to the observer's consideration of that question that not only was there a non-disclosure to the ICC and Aiteo, but also that this was asymmetrical in the sense that there had been a disclosure to those at Freshfields who were responsible for appointing DEG in the present case.

June 2021

95. In her 9 December 2023 e-mail, DEG disclosed that in June 2021 Freshfields replaced legal counsel previously representing the party which had appointed her in an arbitration. This arbitration had started before the Offshore Arbitration had started, and was wholly unrelated to this arbitration or the parties involved. Although Mr Diwan sought, rather lightly, to make something of this in the context of the overall picture of "relational" contacts between DEG and Freshfields, I do not consider (and the observer would not consider) that this is a point of any significance at all. DEG had been appointed as arbitrator by a different firm of lawyers. Once appointed, she was bound to carry out her duties as an arbitrator. The appointment of Freshfields as replacement lawyers did not create any or any material relational contact of any kind.

February/March 2022 – expert declaration in foreign law proceedings

96. In her 9 December 2023 e-mail, DEG disclosed that in the period 25 February 2022 to 21 March 2022, she was instructed to provide an expert declaration in foreign law proceedings which had nothing to do with the current arbitrations or any of the parties involved therein. The involvement ceased from 21 March 2022, when the expert declaration was sent out. To the best of her knowledge, information and belief, none of the persons involved at Freshfields (who were identified by DEG in her 9 December 2023 e-mail) were involved in the present arbitrations. DEG said that it did not cross her mind at the time to disclose this retainer. If she should have done, then she could only apologise.

97. It was, unsurprisingly, common ground that an arbitrator's duty of disclosure does not cease upon appointment, but applies to circumstances which subsequently arise. This is clear from Article 11(3) of the ICC Rules.

98. In my view, there was again a failure by DEG to disclose a circumstance which should have been disclosed. This engagement was, to use the words of the Note, a professional relationship between Freshfields and DEG. It occurred during the currency of the arbitration, and indeed at a time when there was important activity taking place in relation to the arbitration: the tribunal's partial award, which determined that it had jurisdiction over the parties to the Offshore Arbitration dispute, was issued on 15 March 2022.

99. The Lenders' principal argument, as to why this engagement was not disclosable, was essentially based upon the nature of this engagement. They submitted that an engagement of a person to provide an expert opinion for foreign proceedings requires the expert to give an independent view to the foreign court, and duties in that respect are owed to the foreign court itself. They also relied heavily on the fact that the 2014 IBA Guidelines referred to an expert instruction in a very limited way. Under the 2014 IBA Guidelines, a "Waivable Red List" item includes (at paragraph 2.1) the case where the arbitrator has given legal advice, or provided an expert opinion, on the dispute to a party or an affiliate of one of the parties. By contrast, in the 2024 revision of the IBA Guidelines, the question of expert work is addressed in a different way: an Orange List item is (paragraph 3.2.9) that the "arbitrator has, within the past three years, been appointed as an expert on more than three occasions by the same counsel, or the same law firm". Paragraph 3.2.9 is in an overall section headed "Relationship between an arbitrator and another arbitrator or counsel". Mr Juratowitch submitted that, in 2022 prior to the publication of the 2024 revision, there was uncertainty as to whether an expert instruction required disclosure, and that DEG's approach should not be judged with the benefit of the knowledge of what the 2024 IBA Guidelines contained.

100. I agree that the fair-minded and informed observer would assess the position on disclosure without regard to any hindsight wisdom gained as a result of the 2024 revision of the IBA Guidelines. However, I do not consider that there is (or that the observer would consider there to be) any material difference, as far as disclosure is concerned, between the June-July 2020 engagement and the February-March 2022 engagement.

101. It is true that an English lawyer providing an expert opinion for the purposes of foreign court proceedings will – irrespective of the actual requirements or practices of the foreign court – consider that he or she is duty bound to apply the same approach to the giving of expert evidence as the English court requires from experts under CPR Part 35: for example, that the opinion must be the person's true and complete professional opinion, that it is the duty of experts to help the court on matters within their expertise and that this duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid. However, when an expert on English law is engaged by a law firm in connection with foreign proceedings, the relationship which exists is usually not vastly different to that which exists when a barrister or retired judge is asked by a law firm to advise on English law in other contexts. It is likely to have considerable similarities with an engagement such as that which occurred in June-July 2020. Thus, it will involve advice being

given by the expert, in conjunction with the law firm, to the client, as to the relevant English law. There may well be conferences or other communications where the issues in the foreign litigation are discussed, and where consideration is given as to the points that can properly be made in support of the case on English law which the client is hoping to advance. The expert report may go through a number of drafts. This is again a closer and different relationship to that which exists between arbitrator and the firm of solicitors which has appointed him or her. Thus in contrast to an arbitral appointment, it is or has elements of an advisory engagement for a client which requires the advisor, whether barrister or retired judge, to consider the client's best interests and to advise and assist accordingly, albeit that the end product is a report for a foreign court. If the expert is required to give live evidence in the foreign proceedings, it is likely that discussions will continue between the expert and the law firm in relation to that aspect of the case. Accordingly, there are aspects of the relationship which are similar to a "co-counsel" relationship, albeit that the expert will consider that his or her overriding duty is to the foreign court.

102. It is also true that the 2014 IBA Guidelines only addressed the position of an expert briefly, in the context of giving advice to a party or its affiliate in connection with the dispute itself. It is not surprising that this is a Red List item, although it is surprising that it is waivable. However, I do not consider that the 2014 IBA Guidelines mean that the February-March 2022 engagement was not disclosable, or even that there was some material doubt as to whether it was disclosable. This was an instruction which occurred in the context of two prior arbitral appointments by Freshfields which (as the Lenders accept) were disclosable, and the prior June-July 2020 engagement by Freshfields which was also (in my view) disclosable. The February-March 2022 engagement was another professional engagement by Freshfields, and both the Note and the terms of the ICC Arbitrator Statement would point very clearly in the direction of disclosure. Furthermore, I do not consider it appropriate to put each of these engagements (arbitrator appointments, engagement to provide English law advice, engagement to provide English law advice for a foreign court) into different silos, with a minimum threshold in each silo before any of them require disclosure. They form part of an overall picture and were therefore different aspects of the relationship between DEG and Freshfields. As Mr Diwan submitted, it is necessary to consider the "cumulative" position.

103. As with the non-disclosure of the June-July 2020 engagement, the non-disclosure of the February-March 2022 engagement does not in itself provide the answer to the question which the observer must consider and answer. Again, it appears that this non-disclosure was inadvertent rather than deliberate. DEG said in her 9 December 2023 email that it did not cross her mind to disclose this retainer, and that if she should have done then she could only apologise. The inadvertent nature of this non-disclosure is, clearly, a matter which the observer would consider relevant. However, as Mr Diwan submitted, it is also relevant that the arbitrator's approach to disclosure in relation to these engagements was inconsistent and somewhat haphazard. Thus, she had intended to disclose the June-July 2020 engagement, but did not do so until she was asked questions in late 2023. She did disclose in November 2023, as discussed below, her October 2023 engagement to provide an expert opinion in the context of potential foreign proceedings. This disclosure was voluntary, in the sense that it was not in response to any questions asked, albeit that it was only made after the engagement had been concluded. It is not clear why it did cross DEG's mind to

disclose this October 2023 engagement, but did not cross her mind to disclose the somewhat longer February-March 2022 engagement. It is not unusual, however, for things to occur to a person in one context, having slipped their attention in a different context, and I suspect that this is the most likely explanation here.

The April 2022 disclosure

104. On 29 April 2022, DEG made a further disclosure, namely that she had "recently been appointed by the ICC as presiding arbitrator (following nomination by the co-arbitrators) in a wholly unrelated ICC arbitration, which does not relate to Nigeria, in which Freshfields are acting for one of the parties". She added that she did not consider that this gave rise to any conflict of interest, but that "I thought it appropriate to disclose this appointment to the parties".

105. Mr Diwan submitted that this appointment as presiding arbitrator added to the cumulative picture of relational contacts between DEG and Freshfields.

106. I do not consider that this appointment is, or that the observer would consider this to be, a point of any significance in relation to the question to be considered by the observer. This appointment was not a nomination by Freshfields, but rather by the two co-arbitrators. Furthermore, in its submission to the ICC in response to Aiteo's challenge to DEG, it was made clear that Freshfields was not the party that proposed DEG in relation to this appointment. It is true, as Mr Diwan submitted, that it is common for the party-appointed arbitrators in international arbitrations to discuss, with their appointing parties, potential candidates for the position of chair or presiding arbitrator. There is no evidence that this actually happened in this case. However, even if it did happen, any involvement by Freshfields was very different to the appointments or nominations by Freshfields of DEG as a party appointed arbitrator, or their engagement of DEG to give advice or expert evidence.

107. To my mind, the more significant point is that this appointment as presiding arbitrator was disclosed in April 2022, in circumstances where a more significant contact shortly before then – namely the February-March 2022 engagement in the context of foreign proceedings – was not disclosed. Accordingly, the arbitrator's disclosure in April 2022 serves to highlight the fact that, albeit inadvertently, the full cumulative picture was not disclosed to Aiteo or the ICC.

November 2023

108. On 10 November 2023, DEG's clerk wrote to the parties, on behalf of DEG, as follows:

> "I write to inform you that I wish to disclose the following.
>
> I have recently been instructed by Freshfields in a wholly unrelated case to provide an expert opinion on English law in the context of potential foreign insolvency proceedings, in relation to issues wholly unrelated to the issues arising in the arbitration to which this email relates. I am of the view that this creates no possible conflict of interest so far as my duties as an independent arbitrator are concerned".

109. It was this disclosure that gave rise to further questions asked of DEG, and to the information which she provided in her 9 December 2023 email. In that email, she explained (in relation to this engagement) that she had been first approached on 15 October 2023, and formally instructed by Freshfields on 17 October 2023. She identified the lawyers at Freshfields who were involved, and none of them were involved in the arbitration. She also described the short lifespan of this engagement. The point on which she was asked to advise was a short one. Her opinion was sent out on 25 October 2023. There was one, possibly two, virtual conference calls and some emails during the period 17 – 25 October 2023.

110. It appears, from DEG's description of the engagement, that this was an engagement to advise on English law in connection with foreign proceedings, rather than to provide an expert opinion for a foreign court. This was, therefore, similar to the June-July 2020 engagement and was, or was akin to, a relationship of co-counsel advising a client. DEG's description of one or more virtual conference calls, and email exchanges, confirms what I have already said about the way in which such engagements progress.

111. It follows from the earlier discussion, concerning the June-July 2020 and February-March 2022 engagements, that DEG was correct to consider that this October 2023 engagement was disclosable. It is, however, a fair criticism of her approach that no disclosure was made at the time that she was considering accepting this engagement, or at the time when she was formally instructed. Article 11(2) requires disclosure "immediately" of facts or circumstances which may arise during the course of the arbitration. Mr Diwan submitted that immediate disclosure would have provided Aiteo with an opportunity to object to DEG's proposed engagement. He also made the point that one approach that is sometimes taken in arbitrations, when disclosure is made, is for a party to say that there will be no objection to a particular engagement or arbitral appointment, but that it should be the last. I thought that these were fair points.

112. Accordingly, these were in my view three separate failures to make timely disclosure.

D2: The ICC decision and its relevance

113. It was common ground, based on *Halliburton*, that the fair-minded and informed observer would know that the ICC had accepted the challenge to DEG and had removed her. Mr Diwan's initial argument was that the decision of the ICC Court created a *res judicata* whose effect was to preclude the Lenders from successfully making any argument on the issue of apparent bias. However, even if this case was not accepted, Mr Diwan submitted that this was a relevant fact that the observer would take into account.

114. Mr Juratowitch submitted that there was no *res judicata*. Whilst accepting that the observer would know of the ICC decision, he submitted that it was not a matter for the observer to consider, because the observer could not delegate his or her functions. Mr Juratowitch submitted, in the alternative, that the decision of the ICC was only as relevant as it was persuasive. It was an unreasoned decision, and for that reason alone could not be persuasive. It was not clear what test the ICC had actually applied to determine the challenge, but there was nothing which suggested that it had applied the fair-minded and informed observer test that is required under English law. Mr

Juratowitch drew attention to what he submitted were material differences between the ICC Rules (which refer to both independence and impartiality), and the test under English law which is only concerned with impartiality. He also referred, in that context, to the "subjective" element concerning disclosure in Rule 11(1), and contrasted it with the objective approach of the observer under English law.

Res Judicata

115. I have no hesitation in rejecting Aiteo's *res judicata* argument. I start by describing the nature of the ICC Court which made the decision to uphold Aiteo's challenge to DEG, and the factual background relating to that decision.

116. The ICC Court is not a conventional court which convenes a hearing and hears evidence and argument with a view to reaching a decision on the legal rights of the parties. The role of the International Court of Arbitration, defined therein as the "Court", is addressed in Article 1 of the ICC Rules:

> "**International Court of Arbitration**
>
> 1 The International Court of Arbitration (the "Court") of the International Chamber of Commerce (the "ICC") is the independent arbitration body of the ICC. The statutes of the Court are set forth in Appendix I.
>
> 2 The Court does not itself resolve disputes. It administers the resolution of disputes by arbitral tribunals, in accordance with the Rules of Arbitration of the ICC (the "Rules"). The Court is the only body authorized to administer arbitrations under the Rules, including the scrutiny and approval of awards rendered in accordance with the Rules. It draws up its own internal rules, which are set forth in Appendix II (the "Internal Rules").
>
> …
>
> 4 As provided for in the Internal Rules, the Court may delegate to one or more committees composed of its members the power to take certain decisions, provided that any such decision is reported to the Court at its next session.
>
> 5 The Court is assisted in its work by the Secretariat of the Court (the "Secretariat") under the direction of its Secretary General (the "Secretary General")."

117. The Statutes of the International Court of Arbitration, set out in Appendix 1 to the ICC Rules, state the function of the Court as follows:

> "**Function**
>
> The function of the International Court of Arbitration of the International Chamber of Commerce (the "Court") is to ensure

> the application of the Rules of Arbitration of the International Chamber of Commerce, and it has all the necessary powers for that purpose.
>
> As an autonomous body, it carries out these functions in complete independence from the ICC and its organs.
>
> Its members are independent from the ICC National Committees and Groups."

118. Article 2 provides as follows:

> "**Composition of the Court**
>
> The Court shall consist of a President, Vice-Presidents, and members and alternate members (collectively designated as members). In its work it is assisted by its Secretariat (Secretariat of the Court)."

119. The website of the ICC identifies the names of the President, Vice-Presidents and members and alternate members. In addition to the President, there are 17 Vice Presidents from a variety of countries, including the UK. There are members from approximately 118 countries around the world, and many of these countries have a member and an alternate member. The alternate member for the UK is, currently, DEG herself. Article 1 of The Internal Rules of the Court, as set out in Appendix 2 to the ICC Rules, contain various provisions concerning the "Confidential Character of the Work of the International Court of Arbitration". It is permissible, under Article 2 of the Internal Rules of the Court, for a member of the Court (such as DEG) to act as arbitrator, if proposed by one or more of the parties. Article 4 of the Internal Rules provides for the establishment of a Committee of the Court. Article 5 concerns the role of the Court Secretariat.

120. The procedure for a "Challenge of Arbitrators" is set out in Article 14. Article 14(1) provides for a challenge to be made by submissions to the ICC Secretariat of a written statement specifying the facts and circumstances on which the challenge is based. Article 14(2) provides for the circumstances in which a challenge is "admissible", by laying down a timetable for the making of a challenge. Article 14(3) sets out certain procedures where there is a challenge.

121. In accordance with those procedures, submissions were made by the legal representatives of Aiteo and the Lenders, principally Stewarts for Aiteo and Freshfields for the Lenders. The comments of DEG and the other members of the tribunal were also sought and provided. The Court's decision was communicated by e-mail dated 18 January 2024, in the following terms:

> "**Court's Decision**
>
> On 17 January 2024, the International Court of Arbitration of the International Chamber of Commerce ("Court"):
>
> 1. decided that the challenge filed against Dame Elizabeth Gloster, acting as co-arbitrator nominated by Claimants, is

> admissible (Article 14(3); and
>
> 2. accepted the challenge on the merits (Article 14(3)).
>
> We invite Claimants to nominate a co-arbitrator **within 15 days.**"

122. The authors of the leading textbook on *res judicata*, *Spencer Bower and Handley: Res Judicata* 6th edition, address in Chapter 2 the issue: "What constitutes a *res judicata*". They state:

> "[2.01] A *res judicata* is a decision on the merits, pronounced by a tribunal which is judicial in the relevant sense."

A footnote, concerning "decision on the merits", states:

> "This includes final judgments by default or consent and arbitral awards, but excludes decisions on procedural grounds and decisions which are not final".

123. When addressing the issue "What is a judicial tribunal", the authors state:

> "[2.02] It is immaterial for present purposes whether the tribunal is a court of record or not, or whether it is a superior court or not, or whether it is or is known as a court. Nor does it matter whether the tribunal, if English, has civil or criminal jurisdiction; nor (with certain exceptions) whether the tribunal is English or foreign. It does not matter whether the tribunal has permanent jurisdiction or only jurisdiction over a particular dispute or disputes."

124. At paragraph 2.03, the authors identify a large number of tribunals established by statute which "may be 'judicial' for present purposes". They quote from a number of authorities in Australia, Canada and England. In *Administration of the Territory of Papua and New Guinea v Daera Guba* (1972) 130 CLR 353, Gibbs J said (at paragraph 16.03):

> "The use of the phrase "judicial tribunal" in this context is convenient as indicating that an estoppel of this kind does not result from a mere administrative decision, but the question whether such an estoppel is raised is not answered by inquiring to what extent the tribunal exercises judicial functions, or whether its status is judicial or administrative … The doctrine of estoppel extends to the decision of any tribunal which has jurisdiction to decide finally a question arising between parties, even if it is not called a court, and its jurisdiction is derived from statute or from the submission of parties".

125. At paragraph 2.05, the authors state:

> "Every domestic tribunal, including any arbitrator, or other person or body of persons invested with authority to hear and

> determine a dispute by consent of the parties, court order, or statute, is a 'judicial tribunal' for present purposes and its awards and decisions conclusive unless set aside".

126. The equivalent sentence, in the 5th edition of *Spencer Bower* was approved by the Court of Appeal in *Unite the Union v McFadden* [2021] EWCA Civ 199, para [65]. That case was concerned with a question of whether the doctrine of *res judicata* applied to a trade union's disciplinary proceedings, in circumstances where the union's first set of proceedings had been declared to be null and void because the rule, pursuant to which they had been brought, was inapplicable to the conduct alleged. The Court of Appeal held that it was permissible for the union to bring a second set of proceedings under different rules, and that the union was not precluded from doing so because of *res judicata*. The leading judgment was given by Singh LJ, who identified the "dividing line" between cases where *res judicata* applied, and those where it did not.

127. Singh LJ said that it was clear that the doctrine of *res judicata* could apply outside the context of traditional courts and tribunals. The doctrine applied "where a body is given jurisdiction to determine any issue which establishes the existence of a legal right": see [54]. That would include an arbitrator: see paragraph [65]. On the other side of the dividing line "are purely consensual arrangements where there is no independent body entrusted with the function of adjudicating on the legal rights of the parties": see [57]. The distinction was between a body "which is independent of the parties and is invested by law with the power to determine an issue which establishes the existence of a legal right, and other bodies, which are not": see [58]. The Court of Appeal held that, in that case, there was no independent body invested by law with jurisdiction to determine the legal rights of the parties: see [61].

128. The requirement for a judicial decision to be "on the merits" is addressed in *Spencer Bower* at paragraph 6.02, where the authors quote from the House of Lords decision in *DSV Silo-und Verwaltungsgesellschaft mbH v Sennar (Owners), The Sennar* [1985] 1 WLR 490. Lord Brandon said (at 499):

> "… a decision on procedure alone is not a decision on the merits. Looking at the matter positively a decision on the merits is a decision which establishes certain facts as proved or not in dispute, states what are the relevant principles of law applicable to such facts, and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned".
>
> Lord Diplock said (at 494):
>
> "What it means in the context of judgments delivered by courts of justice is that the court has held that it has jurisdiction to adjudicate upon an issue raised in the cause of action to which the particular set of facts give rise".

129. Applying these principles, the decision of the ICC Court does not give rise to a *res judicata.*

130. First, the ICC Court is not determining a legal right. It is the arbitrators who determine the parties' legal rights. Article 1 of the ICC Rules makes it clear that the role of the ICC Court is not to resolve disputes, but to administer the resolution of disputes by arbitral tribunals. Accordingly, the ICC Court's decision is of an administrative character (to adopt the approach of Gibbs J in *Daera Guba*). It is deciding upon the composition of a tribunal which will be the body that will decide the parties' legal rights.

131. It is true, as Mr Diwan submitted, that the ICC Court is taking an important decision which is directed towards protecting the right of both parties to have a fair hearing before an impartial tribunal. However, the fact that an important decision is being taken, with an impact upon the rights and position of a party, does not mean that the ICC Court is a judicial tribunal. There are many important decisions, with an impact on the rights of the parties, which are taken by bodies which are not judicial. This is illustrated by the decision in the *Unite* case, and also the decision of Elias LJ in *Christou v London Borough of Haringey* which was discussed and applied in *Unite*. The ICC Court is not (to apply the approach in paragraph [58] of *Unite*) determining an issue which establishes the existence of a legal right. This is so notwithstanding that the ICC Court's decision, as to the composition of the tribunal, is for the purpose of protecting Aiteo's right to a fair hearing before an impartial tribunal. A trade union carrying out disciplinary proceedings is also required to observe the principles of natural justice and to provide a fair hearing but this does not mean that its decisions give rise to a *res judicata*: see *Unite* at [69].

132. Secondly, the ICC Court's decision is of a procedural character. It is not a decision on the merits. It is not, to apply the approach of Lord Brandon in *The Sennar*, a decision which establishes certain facts as proved or not in dispute, states what are the relevant principles of law applicable to such facts, and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned.

133. These conclusions are, in my view, reinforced by the absence of any authority which suggests that the decisions of an arbitral institution, responsible for administering an arbitration, give rise to a *res judicata*. In my view, the approach taken by the Departmental Advisory Committee ("DAC"), and the Arbitration Act 1996 s. 24, demonstrate that decisions – in particular in the context of challenges for impartiality – do not give rise to *res judicata*. An application for removal of an arbitrator pursuant to s. 24 must await the decision of the arbitral institution. The existence of a right under s. 24 to apply to the court for removal, following an arbitral institution's decision not to remove, is in my view inconsistent with the suggestion that the decision of the arbitral institution is binding. In paragraph 107 of its report, the DAC also noted the possibility of such a challenge, but stated that these would rarely succeed.

> "We have also made the exhaustion of any arbitral process for challenging an arbitrator a pre-condition of the right to apply to the Court. Again, it would be a very rare case indeed where the Court will remove an arbitrator notwithstanding that that process has reached a different conclusion".

134. If, however, there was a *res judicata,* then it would be difficult to see how a subsequent s. 24 challenge could ever succeed. I do not accept Mr Diwan's argument

that the effect of s. 24 is to reverse the *res judicata* that would ordinarily arise from the decision of the arbitral institution. There is nothing in the drafting of s. 24, or the DAC report which preceded it, which suggests that this is correct. The more obvious analysis is that s. 24 implicitly recognises, correctly in my view, that the arbitral institution's decision on the challenge does not give rise to a *res judicata.*

135. In addition to the principles of *res judicata*, Mr Diwan also referred in the course of his submissions to the doctrines of issue estoppel and abuse of process. However, I did not understand him to submit that these doctrines gave rise to any argument separate and distinct from his *res judicata* argument. In my view, they carry the case no further forward.

The relevance of the ICC decision to the approach of the fair-minded and informed observer

136. The conclusion that the ICC Court's decision does not have a *res judicata* does not answer the question: what, if any, relevance does the decision have to the approach of the fair-minded and informed observer? In my view, the observer would pay regard to the decision, and indeed it is difficult to see how the observer's approach could not, at least to some degree, be coloured by the decision taken by the arbitral institution, here the ICC Court, which has determined the challenge. An informed observer would recognise that the ICC Court had considerable experience of determining challenges, inevitably far more experience than the observer. He or she would also recognise that the ICC is one of the world's leading arbitral institutions, and that the parties must have had faith in that institution since they agreed to submit their disputes to ICC arbitration.

137. The informed observer would also appreciate that the ICC's decision to remove DEG is a relatively rare example of a challenge that succeeded. The ICC publishes data as to the number of challenges, and their degree of success. The data reveals, unsurprisingly, that there are a fair number of challenges each year, and also that they rarely succeed. The latest dates for which statistics are available are 2018 – 2020. In 2018, there were 45 challenges, with 7 successful. In 2019, there were 52 challenges with 6 successful. In 2020, there were 92 challenges (29 in the same case), with 5 successful. I was told that data for earlier years would show a similar pattern of a challenge succeeding in only a relatively small minority of cases. Mr Juratowitch submitted that the absence of data for more recent years (beyond 2020) meant that I could not conclude that the pattern revealed by data for earlier years had necessarily continued. The implicit suggestion was that the ICC Court may, in more recent years, have been more willing to uphold challenges. However, there was no evidence which showed this, and I consider that a reliable conclusion could be drawn (and would be drawn by the observer), on the basis of data going back many years, as to the rarity of a successful challenge. Indeed, I note that as long ago as 2001, *Mustill & Boyd: 2001 Companion Volume to the Second Edition*, stated (page 171):

> "The continuing deterioration in the spirit of arbitration entails that objections are now being made on the grounds of supposed interest or bias which would never have been put forward in the past. These are, we hope and believe, largely rejected, and they serve the purpose only of wasting time and money".

138. Against this background, I consider that the fair-minded and informed observer would accord considerable respect to the decision of the ICC Court, and realistically could not avoid being struck by the fact that this was one of the rare challenges that succeeded. However, the observer would recognise that he or she should make up his or her own mind on the basis of the underlying facts, and that it would be wrong to reach a conclusion simply by reference to what the ICC Court had decided. The decision of the ICC Court could serve as a useful cross-check on the observer's own conclusions based on the underlying facts, but ultimately the observer needed to make up his or her own mind. If appropriate, that might lead the observer to conclude (as Mr Juratowitch submitted) that the arbitral institution had reached the wrong conclusion.

139. This approach is in my view broadly consistent with the approach to the decisions of arbitral institutions which can be seen in the 1996 Act, and the case-law thereunder. Thus, as previously discussed, a challenge under s. 24 must await the decision of the arbitral institution. If the challenge is rejected by the arbitral institution, then (as stated by the DAC) a successful s. 24 challenge would be rare. In fact, I was referred to no examples, in the nearly 30 years since the 1996 Act was passed, where the English court has taken a different view to that reached by the arbitral institution. In *A v B*, the LCIA had rejected the challenge, and Flaux J reached the same conclusion on the s. 24 application. In *P v Q* [2017] EWHC 194 (Comm), a challenge had to some extent succeeded before the LCIA in that the chairman had been replaced. The LCIA had appointed a 3-person "Division" to consider the challenge, which was upheld to that extent. However, the challenge was rejected by the LCIA Division in so far as it concerned the other two arbitrators, and this then led to a s. 24 application concerning those arbitrators and the newly appointed chairman. The application was dismissed. Popplewell J said:

> "This Court should be very slow to differ from the view of the LCIA Division. The LCIA Division was the parties' chosen forum for resolution of the question in issue. It had considerable experience and was well placed to judge how much time would be required for a co-arbitrator properly to consider interlocutory issues of this type".

He then referred to paragraph 107 of the DAC report, quoted above. At paragraph [70(6)] of his judgment, Popplewell J repeated the need to be "slow to differ" from the conclusion of the LCIA Division.

140. Popplewell J's comments were made in the context of an institutional challenge which had failed. Paragraph 107 of the DAC report is also considering that scenario. However, I do not consider that there is a fundamental distinction between an institutional challenge that fails and one that succeeds. It would create a surprising asymmetry if respect was to be accorded to the decision in the former case, but not in the latter. In my view the observer would accord (and the English court in applying the 'observer' test should accord) considerable respect to the decisions of the arbitral institution in both cases, albeit that it is possible (notwithstanding that respect) for a different view to be reached.

141. Mr Juratowitch submitted, however, that the absence of a reasoned decision meant that, in the present case, the ICC Court's decision should be accorded little or no

weight by the observer or the court applying the observer test. I disagree. The reason for the unreasoned decision is that both Aiteo and the Lenders decided not to ask, in advance, for a reasoned decision. Each party was therefore content for the ICC Court to provide an unreasoned decision, thereby no doubt trusting that the considerable experience of the ICC Court would result in a proper decision, whether or not reasoned. Against a background where the question of removal was fully argued out by way of detailed submissions being provided by each side, the mere fact that the ICC Court's decision was unreasoned would not unduly concern the observer. The observer would see that the relevant facts were not substantially in dispute, and would attach significance to the result: i.e. the ICC Court's ultimate decision on those facts as to whether or not it was acceptable for DEG to continue.

142. This focus on the result is consistent with the English court's approach which can be seen in an earlier case on arbitrator bias, where the issue was whether or not it was permissible for a barrister arbitrator to continue, in circumstances where a party was represented by another barrister in the same chambers: *Laker Airways Ltd v FLS Aerospace Ltd* [2000] 1 WLR 113. Rix J attached importance to the reports of a decision of the LCIA, which had considered that this was acceptable, even though it appears that a fully reasoned decision was not available. Indeed, when considering that issue in paragraph 102 of its report, the DAC referred to a decision made in chambers (and unreported) by Sir Michael Kerr, the chair of the DAC and a former judge of the Commercial Court. Again, no reasoned decision seems to have been available.

143. Mr Juratowitch's point on the unreasoned decision needs to be considered, however, in combination with his argument that the requirements of the ICC Rules, as to independence and impartiality, are not precisely the same as the test which the observer is to apply. The central point here is that Article 14 of the ICC Rules, which addresses "Challenge of arbitrators", refers to both impartiality and independence. Similarly, the disclosure requirements in Article 11 refer to both of these concepts. However, the observer test is not concerned with independence as a separate concept, but only with the question of impartiality.

144. There is much discussion in academic writing, and to some extent in the case-law, as to the distinction and interrelationship between the concepts of independence and impartiality. Some judges have considered the two concepts to be so closely related that they amount to the same thing. For example, in *ASM Shipping v TTMI Ltd* [2005] EWHC 2238 (Comm), Morison J said in terms that they were the same. I consider, however, that the approach of English law is that they are not necessarily the same. The cases do not provide a clearcut definition of "independence". The DAC report indicates that the concept is uncertain:

> "[102] We can see no good reason for including "non-partiality" lack of independence as a ground for removal and good reasons for not dong so. We do not follow what is meant to be covered by lack of independence which does not lead to the appearance of partiality. Furthermore, the inclusion of independence would give rise to endless arguments, as it has, for example, in Sweden and the United States, where almost any connection (however remote) has been put forward to challenge the "independence" of an arbitrator. For example, it

> is often the case that one member of a barristers' Chambers appears as counsel before an arbitrator who comes from the same Chambers. Is that to be regarded, without more, as a lack of independence justifying the removal of the arbitrator? We are quite certain that this would not be the case in English law. Indeed the Chairman has so decided in a case in Chambers in the Commercial Court. …We would further note in passing that even the oath taken by those appointed to the International Court of Justice, and indeed to our own High Court, refers only to impartiality."

145. In its recent "Review of the Arbitration Act 1996: Final report and Bill", the Law Commission declined to recommend any amendment of the 1996 Act so as to introduce a statutory duty of independence. It identified, in "broad terms", the difference between the two concepts:

> "… impartiality is the idea that arbitrators are neutral as between the arbitrating parties, and independence is the idea that arbitrators have no connection to the arbitrating parties or to the dispute".

146. In *Halliburton*, Lord Hodge said at [126]:

> "The 1996 Act contains no provision which directly addresses the arbitrator's independence and prior knowledge, but it imposes the centrally important obligations of fairness and impartiality. Therefore, an arbitrator would be in breach of the requirements of the 1996 Act if his or her lack of independence compromised the duties of fairness and impartiality".

147. –It is, however, also clear from paragraph [54] of *Halliburton* that there is not a great deal of difference between the English law "observer" test, and institutional rules and guidelines which refer to impartiality and independence.

> "This objective test of the appearance of bias is similar to the test of "justifiable doubts" which is adopted in the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration 1985 (as amended in 2006), article 12(2) ("the UNCITRAL Model Law"), the IBA Guidelines (General Standard 2(c)) and article 10.1 of the LCIA Arbitration Rules (2014). It is not necessary to determine whether the tests as to the nature of the doubts in the UNCITRAL Model Law, the IBA Guidelines and the LCIA Rules are precisely the same as those of English law. The important point is that the test in English law, involving the fair-minded and informed observer, requires objectivity and detachment in relation to the appearance of bias."

148. The IBA Guidelines General Standard 2(c), referred to in the above passage, states:

> "Doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented to the parties in reaching his or her decision".

149. The immediately preceding paragraph in the IBA Rules, in which the expression "justifiable doubts" appears, refers to both impartiality and independence. In dealing with the circumstances in which the arbitrator shall decline appointment or refuse to continue, General Standard 2(b) states:

> "The same principle applies if facts or circumstances exist, or have arisen since the appointment, which, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances, would give rise to justifiable doubts as to the arbitrator's impartiality or independence".

150. Similarly, Article 10.1 of the LCIA Arbitration Rules (2014) refers to "justifiable doubts as to the arbitrator's impartiality or independence".

151. Furthermore, in its written submissions in support of the challenge to DEG, Aiteo relied upon the test set out in General Standards 2(b) and 2(c) of the IBA Guidelines, and submitted that this was "consistent with the English law position". In the Lenders' responsive submission, there was no challenge as to the standards that were to apply, and no suggestion of any significant difference between the ICC Rules, the IBA Guidelines, and the English law test.

152. Against this background, the informed observer would not consider that there was clear blue water between the question that he needed to consider, and the question which the ICC Court, applying its Rules, had to consider. Any theoretical differences between the two questions would not cause the observer to cast aside the ICC Court's decision, and to pay it no regard.

153. The matters set out in Section D1 and D2 above provide the backdrop to the application of the observer test in the circumstances of this case.

D3: Application of the informed observer test in the present case

Aiteo's argument in summary

154. Aiteo relied upon the cumulative combination of repeat appointments, repeat expert instructions, all part of a continuum of conduct, with material failures of disclosure, and the apparent belief that it was open to the arbitrator to continue to take on appointments and instructions with belated disclosure after the fact. Mr Diwan submitted that this combination takes the case well over what, in the eyes of the fair-minded observer, would be considered acceptable and instead would lead the observer, having regard to the realities of international arbitration and the customs and practice of the relevant field of arbitration, to conclude that there was a real possibility of bias.

155. In those circumstances, it was unsurprising that the ICC Court challenge was successful, even though statistically the success rate of an ICC Court challenge is low. The ICC Court had taken the view that the Article 14(3) test had been satisfied, and this was indicative of international arbitral practice.

156. In relation to disclosure, Mr Diwan submitted that there were material and serious failings in disclosure. The disclosures were given after the fact, in some cases years after the fact, and so there was no opportunity to make a challenge or seek confirmation or assurances as to the arbitrator's future intentions. He said that it was possible, and not unusual, when an arbitrator discloses a desire to take on a further appointment or engagement in the course of an ongoing arbitration, for a party to say: "yes but no more". Here, the arbitrator's pattern of conduct would indicate to the informed observer that there was a failure to appreciate or pay attention to the cumulative effect of continuing to accept appointments and instructions during the currency of the arbitration and the purpose of disclosure. The arbitrator seems to have thought that disclosure after the fact was an acceptable course and that it did not matter how many "relational contacts" were engendered.

The Lenders' argument in summary

157. On behalf of the Lenders, Mr Juratowitch made his submissions by reference to 7 broad points, all of which led to the conclusion that the informed observer would not conclude that there was a real possibility of bias. A general point was that Aiteo had failed to explain why any of the contacts between DEG and Freshfields, or any of the non-disclosures, mattered for the purposes of the observer's consideration of the issue. None of the points relied upon by Aiteo would lead to the conclusion that there was a real possibility of bias. He submitted that the central problem with Aiteo's case was that it did not say how or why a fair-minded observer would reach the conclusion that there was a real possibility of bias towards clients of Freshfields. It was not axiomatic that one should go from a number of relational contacts, and failures to disclose (if there were such failures) to the conclusion for which Aiteo argued.

158. Mr Juratowitch's seven points were as follows.

159. *(1) The character of the contacts*. DEG's arbitral appointments and expert engagements were all ordinary professional contacts between DEG and a law firm. He submitted that there was no English authority which had held that there was apparent bias in the context of ordinary professional contacts between an arbitrator and a law firm. There were, here, a number of ordinary engagements over a period of years. The only conclusion that the observer would draw would be that DEG was a busy arbitrator, and that Freshfields is a global law firm with a busy arbitration practice. It was no surprise that Freshfields ended up before DEG in multiple arbitrations in various different configurations. Mr Juratowitch referred to the fact that DEG had also been appointed by the opposing party in two arbitrations where Freshfields were acting, and she had also been appointed as chair in a further arbitration (which had been disclosed). DEG's December 2023 disclosure also indicated that, prior to the arbitration, she had been engaged by Aiteo's solicitors, Stewarts Law. The contacts with Freshfields therefore needed to be seen as part of this wider picture of an arbitrator with a range of professional contacts.

160. *(2) Disclosure.* The Lenders submitted that there were no failures by DEG to disclose matters which should have been disclosed. She did disclose her various arbitral appointments. Aiteo's argument focused on the engagements as an expert adviser or expert witness. However, these were not disclosable under the IBA Guidelines, or at least there was a lack of clarity as to whether they were disclosable. In any event, even if there was a failure to make disclosure, this did not automatically lead to the conclusion that there was a real possibility of bias. It was only one factor to be considered. It was also relevant, here, that DEG's failures to disclose were inadvertent rather than deliberate. In short, there was nothing that DEG disclosed on 9 December 2023 which could lead to an adverse conclusion on impartiality. Mr Juratowitch also emphasised, in relation to the disclosures that were made, that the fact that an arbitrator makes a disclosure does not mean that it was actually disclosable. A failure to disclose something that was not disclosable is not important.

161. *(3) Reputation.* Mr Juratowitch relied upon DEG's reputation as an experienced and very distinguished judge, accustomed to dealing impartially with all the cases before her. As a former judge of the Commercial Court and Court of Appeal, and now an arbitrator with a busy practice, DEG would be entirely used to having the same law firms and the same barristers appearing before her regularly in unrelated matters, and would think nothing of it. The observer would think that any inadequacies in her disclosure would not be capable of suggesting any bias.

162. *(4) Reaction when questions asked.* When DEG was asked a series of detailed questions following her November 2023 disclosure, she responded promptly, courteously and fully. She apologised for inadvertently having failed to disclose the first expert engagement, which she had intended to disclose. She said that if she should have made further disclosures, then she apologised for not having done so.

163. *(5) DEG's conduct in the arbitration.* This arbitration had involved a number of hearings and deliberations with co-arbitrators. Mr Juratowitch accepted that DEG's own views as to apparent bias were not significant. However, it was material that both of her distinguished co-arbitrators had said that she had not displayed any lack of independence or impartiality or bias or apparent bias during the conduct of the case.

164. *(6) Lack of dependency.* DEG was a long way from being in any way dependent on Freshfields for her appointments as arbitrator. The 3 appointments by Freshfields were only a small proportion of the 42 appointments which she disclosed on her ICC Arbitrator Statement. (I should explain that the ICC requires arbitrators to disclose their current workload, in order to be satisfied that they have sufficient time to devote to the arbitration). It was likely that someone with the high reputation of DEG would be offered more appointments than she had the capacity to accept.

165. *(7) Aiteo's conduct overall.* The observer would be alive to the fact that opportunistic or tactical challenges are made. In that context, the observer would take into account the history of the arbitrations, which involved attempts to delay the arbitration through unsuccessful jurisdictional challenges. Aiteo and its shareholder had also, on different grounds, sought and obtained without notice injunctive relief against DEG in the Nigerian courts. The observer would be sceptical as to whether this was a tactical challenge designed further to delay the arbitration, rather than being motivated by any objectively reasonable belief that there was a real possibility of bias.

Discussion

166. I consider that Aiteo's submissions, as to the conclusion to be reached by applying the fair-minded observer test, are more persuasive than those of the Lenders. There are, as in many cases of this kind (see e.g. *Almazeedi*) arguments that can fairly be made on each side, and it is therefore a question of whether the case falls on one side of the line or the other. I consider that the observer would consider that, when considering the facts in the round, this case falls on the wrong side of the line, and that there was a real possibility of unconscious bias. The observer's view to that effect would be confirmed and reinforced by the decision of the ICC Court to remove DEG.

167. I consider that the application of the observer test in the present case does require, as Mr Diwan submitted, consideration of the combination of arbitral appointments and advisory/ expert engagements by Freshfields. At times in his argument, Mr Juratowitch suggested that the arbitration appointments were of no significance, because all material appointments were disclosed. Aiteo knew about the two appointments prior to December 2020, as well as Freshfields' nomination of DEG in both of the present arbitrations between Aiteo and the Lenders. However, I do not consider that this means that these appointments fall to be disregarded, and that the sole focus must therefore be on the advisory/expert engagements. I consider that the cumulative picture is relevant. (I return to this point in Section D4 below).

168. As far as concerns that cumulative picture, the observer would consider that the relevant appointments/ engagements by Freshfields numbered 6 or 7: 3 arbitral appointments (including the Offshore Arbitration); 3 advisory/ expert engagements; and the nomination, unsuccessful in the event, in the Onshore Arbitration. The observer would consider that this was a significant number of appointments and engagements by a single firm in a relatively short space of time. DEG had retired from the Court of Appeal in June 2018, and therefore the 6 or 7 appointments/ engagements were within a period of around 5 years or thereabouts.

169. If there had been timely disclosure of the entire picture, as it developed, then it may be that the observer would consider that DEG was on the right side of the line, bearing in mind that the individuals at Freshfields involved in the advisory/ expert engagements were different to those involved in the Offshore Arbitration. In particular, I do not think that the observer would have been unduly concerned if the only expert/ advisory engagement had been the first one, which predated and was concluded prior to the present appointment. There might, however, have been a degree of concern at the second and third advisory/ expert engagements, given that these occurred during the currency of the arbitration, and in the course of heavily contested applications leading to partial Awards, and also because such engagements result in a closer relationship than that of arbitrator/ appointor. Had there been disclosure prior to accepting either of these later appointments, then it would have been a reasonable position for Aiteo to take, in the context of the present hard-fought arbitration, that the arbitrator should best avoid such engagements; or, at least, that one or perhaps both of them could be accepted by the arbitrator, but no more.

170. However, there was no disclosure of the first two appointments, until DEG responded to the questions asked in December 2023. And although there was disclosure of the third appointment, this occurred only after the assignment had been accepted and completed. The observer would in my view regard these non-disclosures as highly

relevant to the question of real possibility of bias, and as adding to the cumulative picture of a significant number of arbitral appointments by Freshfields.

171. There were also features of the non-disclosures or late disclosures which (as Mr Diwan put it) would be "aggravating". The non-disclosures occurred against the backdrop of the (then) relatively recent decision in *Halliburton*, which squarely raised and addressed the importance of disclosure in the context of international arbitrations. Indeed, the arbitrator's ICC Arbitrator Statement was signed only a few weeks after the *Halliburton* decision had been published. Furthermore, the observer would be concerned as to the asymmetric approach to disclosure of the prior expert/ advisory engagement that had been revealed by the arbitrator's 9 December 2023 e-mail. The engagement had been disclosed to those at Freshfields who were proposing DEG for appointment, but it was not disclosed to Aiteo or the ICC. DEG rightly accepted that she should take responsibility for the failure to make the disclosure that she had intended to make, and that it could not simply be laid at the door of her clerk. As to the later engagements, DEG had acted inconsistently. She was correct in considering that the third engagement did require disclosure, and indeed made that disclosure albeit late. The recognition of a need for disclosure in the case of the third engagement served to raise question-marks as to why the earlier two appointments had not been disclosed. Whilst the observer would accept that the non-disclosures were inadvertent, this would not diminish their significance in the context of a case based upon unconscious and apparent bias. As Lord Bingham said in the judgment quoted in paragraph [73] of *Halliburton*:

> "However understandable the reasons for it, the fact of non-disclosure in a case which calls for it must inevitably colour the thinking of the observer".

172. Mr Diwan also attached significance to DEG's approach to disclosure of her expert/ advisory engagements, which he described as inconsistent and haphazard, as giving rise to a further matter which would concern the observer. He said that DEG's failure to recognise that these engagements were in fact disclosable, including in her December 2023 e-mail, was indicative of a wider problem: namely that DEG's attitude seems to have been that she could continue to accept engagements of that kind from Freshfields without any disclosure. I was not persuaded that this was a strong point. In the context of a case where DEG has already been removed as arbitrator, and where the issue concerns the impact of alleged apparent bias on past awards, I consider that the focus of the observer test should be upon what has happened in the past, rather than on the possibility that further engagements might have been accepted in the future without disclosure. However, this does not mean that an arbitrator's failure to appreciate the need for disclosure is irrelevant. Where an arbitrator makes disclosure, that will often indicate an awareness of the possibility of unconscious bias. A person who recognises that possibility thereby demonstrates a degree of self-awareness which may itself serve to prevent any unconscious bias actually impacting on that person's decisions. This point was well made, in a different context, in the judgment of the majority of the Canadian Supreme Court in *R v Chouhan* [2021] SCC 26, paragraph [49]:

> "Jury instructions can respond to a significant danger of biased reasoning, which is that many biases are unconscious: individuals often do not recognise they hold a particular bias

> and would like, and honestly, deny it if asked. And jurors must be made aware of their own unconscious biases if the influence of biased reasoning is to be eliminated" (internal citations omitted).

It seems to me that this is one reason why, as Lord Bingham said, the fact of non-disclosure will colour the thinking of the observer.

173. I do not accept (and the observer would not agree) that these cumulative appointments, coupled with non-disclosure, had no significant bearing on the question of real possibility of bias. When issues of apparent bias arise, the court is concerned not only with "justice being done, but with justice being "manifestly and undoubtedly seen to be done"": *R v Abdroikov* [2007] UKHL 37, paragraph [49] (Baroness Hale). I therefore do not accept that Aiteo failed to explain why any of the contacts between DEG and Freshfields, or any of the non-disclosures, mattered for the purposes of the observer's consideration of the issue. Mr Diwan submitted, and I agree, that the rationale for the potential relevance of cumulative appointments, and non-disclosures, is self-evident and supported by the discussion in *Halliburton* concerning the interest in an arbitrator receiving repeat appointments and not antagonising his or her appointor. Lord Hodge said the following at [59]:

> "Thirdly, a judge is the holder of a public office, is funded by general taxation and has a high degree of security of tenure of office and therefore of remuneration. An arbitrator is nominated to act by one or both of the parties to the arbitration either directly or by submitting names to the appointing body, whether an institution or the court, for appointment. The arbitrator is remunerated by the parties to the arbitration in accordance with the terms set out in the reference, and often is ultimately funded by the losing party. He or she is appointed only for the particular reference and, if arbitral work is a significant part of the arbitrator's professional practice, he or she has a financial interest in obtaining further appointments as arbitrator. Nomination as an arbitrator gives the arbitrator a financial benefit. There are many practitioners whose livelihood depends to a significant degree on acting as arbitrators. This may give an arbitrator an interest in avoiding action which would alienate the parties to an arbitration, for example by assertive case management against the wishes of the legal teams who are presenting their clients' cases. It also may give those legal teams an incentive to be more assertive of their side's interests in the conduct of the arbitration than might be the case in a commercial court."

174. I therefore agree with Mr Diwan's submission that the observer will be asking a more sophisticated question than simply: "is this arbitrator biased in favour of Freshfields' clients". The present case concerns appearance of bias and unconscious bias, and the question for the observer is whether there is a real possibility that the arbitrator's approach and decision-making is guided by matters other than the merits and to avoid alienation. The matters relied upon by Aiteo are relevant to that question.

175. Although I do not accept Mr Juratowitch's overarching argument, it is necessary to consider the significance, in the evaluation of the observer, of the 7 matters to which he referred.

176. *Professional engagements.* I do not accept that the "professional" nature of DEG's engagements by Freshfields is a matter of any weight. I do not see why this makes any difference. In all cases where an arbitrator is appointed, the engagement will be a "professional" one. Many of the examples given in the IBA red and orange lists are professional engagements, but that does not mean that they are not disclosable. Furthermore, the ICC's standard form Arbitrator Statement, and the Note, draw no distinction between professional and other relationships.

177. *Disclosure.* I have addressed this in Section D1 above, and reject the argument that no disclosure was required. I accept, however, that this is not determinative as to the result which the observer would reach.

178. *Reputation.* I agree that DEG's reputation and indeed great distinction as a judge is a relevant factor for the observer. However, it is again not a determinative factor. There is, clearly, no rule – or indeed even presumption – that distinguished judges cannot be affected by unconscious or apparent bias. The *Pinochet* case involved a successful application to set aside the decision of the House of Lords: *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119. It is true that the application succeeded on the basis that Lord Hoffmann was a judge in his own cause. However, in *Meerabux v A-G of Belize* [2005] UKPC 12 Lord Hope of Craighead said at [22] that if the House of Lords had been able to apply the "real possibility of bias" test, the case would likely have been decided on the basis of apparent bias. Lord Hoffmann and the other members of the House of Lords are, of course, judges of the highest possible calibre and reputation. *AWG Group Ltd v Morrison* [2006] EWCA Civ 6 concerned a Chancery Division judge, Evans-Lombe J, who was described by the Court of Appeal (see [17]) as very experienced. There were no question-marks against his integrity. Nevertheless, it was held that he should have recused himself on the grounds of apparent bias. The applicant did not advance a case of actual bias, but succeeded because of the possibility of subconscious bias. In *Lawal v Northern Spirit Ltd* [2003] UKHL 35, the House of Lords was concerned with whether there might be apparent subconscious bias in the context of lay members of the Employment Appeal Tribunal. In giving the leading judgment, Lord Steyn said [14] that: "Public perception of the possibility of unconscious bias is the key". The House of Lords upheld the case on unconscious bias, despite accepting that the relevant "wing members" of the Employment Appeal Tribunal were of "very high calibre and standing": see [19]. In *Almazeedi v Penner*, discussed above, the Privy Council accepted a challenge to Sir Peter Cresswell, a very experienced former judge of the Commercial Court, on the basis of apparent (unconscious) bias.

179. In *Halliburton*, the Supreme Court described the arbitrator as having a "long-established reputation for integrity and impartiality": see [6]. However, this played no real part in the Supreme Court's reasons (see [149]) for rejecting the case of unconscious bias. At [67], Lord Hodge said that in the context of many international arbitrations, reputation and experience is likely to be a factor of only limited weight. I accept that DEG's reputation and experience is a factor in the present case that the observer would bear in mind, but I do not consider that it would be accorded significant let alone decisive weight. When DEG was appointed in late 2020, she was

at a very early stage of her career as an arbitrator, and there is nothing which indicates that she had acquired (to use the words of Lord Hodge in paragraph [67]) "an established reputation for integrity and wide experience in arbitration".

180. *Response to questions when asked*. It is fair to say that DEG did respond promptly, courteously and fully to the questions which she was asked in December 2023. I agree that this is a factor which the observer would take into account.

181. *DEG's conduct in the arbitration*. The comments made by DEG's distinguished co-arbitrators would also be a factor which the observer would take into account. However, the observer would in my view attach more importance to the objective facts to which Aiteo referred (the number of appointments and the failures to disclose) rather than the subjective impressions of DEG's co-arbitrators.

182. *Lack of dependency*. It is true that there is nothing to suggest that DEG was dependent on Freshfields for a significant amount of work. However, it is clear that apparent subconscious bias can operate in circumstances where there is no dependency, as illustrated for example by *AWG* and *Almazeedi*.

183. *Aiteo's overall conduct*. It is true that the observer would be on the lookout for opportunistic and tactical challenges. However, the observer would readily conclude, in circumstances where the ICC Court had accepted Aiteo's challenge, which it does infrequently, that there was real substance to this challenge. The observer would not consider it appropriate to be distracted by the alleged need to carry out a trawl of the history of the arbitration and related proceedings in order to consider whether the challenge was opportunistic.

184. Ultimately, I consider that – essentially for the reasons that were given by Mr Diwan as summarised above – the observer would consider that there was a real possibility of unconscious bias, notwithstanding that there were some factors which would favour a different conclusion. The observer would feel comfortable in reaching that conclusion in circumstances where the ICC Court had removed DEG as arbitrator. Any possible doubt as to the answer to the question for the observer would be resolved by the consideration of the decision of the ICC Court, which would strike the observer as rational and well-founded.

D4: The Lenders' argument based on s. 73 of the 1996 Act and related points

185. Section 73(1) of the 1996 Act imposes a limit on challenges under s. 68.

> "Loss of right to object.
>
> (1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection—
>
> (a) that the tribunal lacks substantive jurisdiction,
>
> (b) that the proceedings have been improperly conducted,

> (c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or
>
> (d) that there has been any other irregularity affecting the tribunal or the proceedings,
>
> he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection."

186. The Lenders submit Aiteo is not entitled to object under s. 68 where it continued to take part in the arbitration without raising the objection on which it now relies. The Lenders say (correctly) that DEG did disclose, in her ICC Arbitrator Statement, the two arbitral appointments by Freshfields prior to her appointment in the Offshore Arbitration. She also made a further disclosure, on 29 April 2022, concerning her appointment as presiding arbitrator in another arbitration. They also say (correctly) that Aiteo continued to participate in the Offshore Arbitration thereafter, without raising any objection arising from those disclosures.

187. They submit that s. 73 is engaged because Aiteo kept "those grounds for objection up its sleeve". They also submit that Aiteo could have made enquiries then about any relationship between DEG and Freshfields, and did not do so. In consequence, neither the disclosed prior arbitral appointments, nor DEG's nominations by the Lenders in both the Offshore Arbitration and the Onshore Arbitration, can form any basis for Aiteo's challenge, and they should be excluded from the objective observer's assessment as legally irrelevant. Alternatively, the fact that Aiteo had not previously challenged DEG on the basis of these arbitral nominations, confirmations and appointments is a specific factor to be taken into account in the objective observer's assessment. The only available grounds on which to seek to impeach DEG's impartiality are the three disclosures (concerning advisory/ expert instructions) which were disclosed in November and December 2023. (The Lenders accept that reliance could also be placed by Aiteo on the disclosure in December 2023 of the case where Freshfields replaced lawyers previously instructed. However, I have already concluded that this is of no significance).

188. I reject this argument. As Mr Diwan submitted, the disclosures made in November and December 2023 were the "tipping point". It was only at that stage that the full picture emerged. Prior to that time, Aiteo only had part of the picture. It did not make, and no doubt considered that it could not make, a successful challenge based on that partial picture. It does not follow, however, that when the full picture emerged, Aiteo were somehow precluded from relying on all the facts which showed apparent bias. I see nothing in s. 73 of the Act, or Aiteo's conduct in not making a prior challenge, which leads to the conclusion for which the Lenders contend. I also reject, as discussed in Section F below, the argument that Aiteo could have asked further questions. In short, Aiteo were entitled to proceed on the basis that DEG had made appropriate disclosures, and there was nothing to put Aiteo on enquiry that she had not and that further questions should be asked.

E: Substantial injustice

E1: Aiteo's arguments

189. Mr Diwan accepted that, in the context of a s. 68 challenge to set aside an award for serious irregularity where the relevant irregularity was apparent bias, there was a need for an applicant to show substantial injustice. However, in the present case the serious irregularity has caused Aiteo substantial injustice "ipse jure", because it means that Aiteo has not had the opportunity to have its case heard, considered and determined by an impartial tribunal and has instead had 4 Awards rendered by a Tribunal one member of which is not impartial. In support of this position, Aiteo made a number of points.

190. First, the fair-minded observer test applied to arbitrators under s.24 of the 1996 Act is the same test applied to judges, with there being no difference with the common law test. Accordingly, the same principles that underlie the common law test underlie s.24. He submitted that, at common law, the principles that no man may be a judge in his own cause, and that justice must not only be done but also be seen to be done, has the result that such a person is automatically disqualified, and any judgment rendered by that person is automatically set aside. He referred to a number of cases involving alleged bias on the part of judges. For example, in *AWG Group v Morrison* (the case involving Evans-Lombe J discussed in Section D above), Mummery LJ said that if the principle of judicial impartiality was breached, then "the judge is automatically disqualified from hearing the case. It is not a discretionary decision reached by weighing various relevant factors in the balance": see paragraph [6] and also paragraph [20].

191. Secondly, Mr Diwan submitted that his argument, that the lack of impartiality of itself constitutes substantial injustice under the 1996 Act, was reinforced by:

(a) S.1(a) which underlines that one of the fundamental guiding principles of the 1996 Act is the fair resolution of disputes by an impartial tribunal.

(b) S.24(1)(a) which provides for the removal of an arbitrator if circumstances exist that give rise to justifiable doubts as to an arbitrator's impartiality, without needing to establish any separate substantial injustice. This was to be contrasted with s. 24(1)(d) (failure to properly or expeditiously conduct the proceedings), which does require the separate establishment of substantial injustice. The question of impartiality is binary. If it exists, then that takes the position beyond the acceptable per se. By contrast, questions of procedural proprietary are matters of fact and degree.

(c) The fact that s.24(1)(a) is inseparably connected to a s. 68(2)(a) challenge that is based on a lack of impartiality on the part of the tribunal, with the two operating and to be construed together.

192. In his oral submissions, Mr Diwan recognised that s. 68 did indeed contain a requirement of substantial injustice. In the context of bias, however, he submitted that this would likely only be relevant when the bias was causally unconnected with the award under challenge. Thus, a challenge to an award for apparent bias would fail, for lack of substantial injustice, where (for example) there had been an award and there

then occurred subsequent events and disclosures which gave rise to apparent bias, but which had not been present at the time when the award was made. Apart from this limited category of bias causally unconnected to the award, there was no real room for "substantial injustice" to operate in the context of apparent bias.

193. Third, Mr Diwan submitted that this argument was supported by the decision of Morison J in *ASM Shipping v TTMI Ltd* [2005] EWHC 2238 (Comm) at paragraph [39(3)], where the judge said:

> "(3) In my judgment, if the properly informed independent observer concluded that there was a real possibility of bias, then I would regard that as a species of 'serious irregularity' which has caused substantial injustice to the applicant. I do not accept Mr Croall's submission that even if that conclusion was reached the court must then inquire as to whether substantial injustice has been caused. In my judgment there can be no more serious or substantial injustice than having a tribunal which was not, ex hypothesi, impartial, determine parties' rights. The right to a fair hearing by an impartial tribunal is fundamental; the Act is founded upon that principle and the Act must be construed accordingly. In these circumstances, upon a proper construction of ss 1, 33 and 68(1) and (2), if the tribunal were not impartial, then the requirements of s 68(1) and (2) are satisfied. … It is contrary to fundamental principles to hold that an arbitral award made by a tribunal which was not impartial is to be enforced unless it can be shown that the bias has caused prejudice. The problem with unconscious bias is that it is inherently difficult to prove and the statements made about it by the judges themselves cannot be tested. Nor can the court know whether the bias actually made any difference or not."

194. Mr Diwan also referred to Morison J's rejection of the argument (see paragraph [35]) that the outcome would have been the same, because the other two arbitrators had said they would have arrived at the same conclusion if they had been sitting as sole arbitrators.

195. Fourth, Mr Diwan submitted that this analysis, and the decision of Morison J in *ASM,* was not impacted by two more recent cases upon which the Lenders had relied: *RAV Bahamas v Therapy Beach Club* [2021] UKPC 8 and *Africa Sourcing Cameroun Ltd v LMBS* [2023] EWHC 150 (Comm) (Sir Ross Cranston). He submitted that no support could be drawn from these cases. The *RAV* case was not an impartiality case concerning appearance of bias, but a case where the tribunal had overlooked an issue and determined matters in the award without giving a party the opportunity to address them. In that case the Privy Council: (i) observed that *in general* (which Mr Diwan emphasised) there will be no substantial injustice if it can be shown that the outcome of the arbitration would have been the same regardless of the irregularity; and (ii) recognised that some irregularities may be so serious that substantial injustice is inherently likely or likely in the very nature of things, in which case substantial injustice may be inferred from the nature of the irregularity and that inference may be

so strong that it almost goes without saying. The Privy Council also endorsed a passage from Colman J in *Bulfracht (Cyprus) Ltd v Boneset Shipping Co Ltd* [2002] EWHC 2292 (Comm), which in addressing the question of substantial injustice, posed the question whether the substance and nature of the injustice goes well beyond what could reasonably be expected as an ordinary incident of arbitration. Mr Diwan submitted that bias falls within the *Bulfracht* principle: where bias has been found, the nature of the injustice always goes beyond what could reasonably be expected as an ordinary incident of arbitration and arises by definition.

196. In relation to *Africa Sourcing*, Mr Diwan said that Sir Ross Cranston had rejected the case of appearance of bias on the facts. Accordingly, any statements as to the correctness or otherwise of *ASM Shipping* were obiter. Furthermore, the argument advanced in that case was deficient: the court was not apprised of the common law principles and the implications of those principles for the s. 24 test or the distinction between s. 24(1)(a) and s. 24(1)(d). Mr Diwan also advanced various criticisms of the judgment of Sir Ross Cranston in that case.

197. Fifth, he submitted that it cannot as a matter of principle be right to try to consider the extent to which the impugned arbitrator influenced the decision making of the non-impugned arbitrators. This is for two reasons: (i) there should be no difference in the situation between a sole arbitrator scenario and three-member tribunal because a party is entitled to all members of the tribunal respecting the duty of impartiality; and (ii) it leads to questions as to the degree of influence of the impugned arbitrator on the other arbitrators, which is impossible to quantify.

198. Sixth, the court may also wish to bear in mind that had DEG made proper disclosure at the time of accepting the appointment, there was the real possibility that her appointment would not have been confirmed and/or would have been challenged. There is also the possibility that she would have been required to give commitments not to accept any further appointments or instructions during the currency of the arbitration. This all had the potential to change the landscape of the arbitration including on consolidation because the Onshore Tribunal may then have been constituted first.

199. In his oral submissions, Mr Diwan also addressed the Lenders' argument that there were particular features of the present case which meant that substantial injustice had not been shown. In relation to the Offshore Jurisdiction Award, he submitted that Foxton J's decision rejecting the s. 67 challenge was of no significance. That decision was, as he submitted, "parasitic" to that Award. When dealing with a s. 67 challenge, the court is not exercising an original jurisdiction: it is dealing with an existing award. As a matter of fundamental principle, the court's subsequent decision, in relation to an award where a member of the tribunal was biased, should not be a relevant factor in the context of something as fundamental as bias. He submitted that the s. 67 judgment did not retrospectively cure the substantial injustice flowing from the apparent bias which infected the award which was under challenge before Foxton J. The Offshore Jurisdiction Award went to court on a s. 67 challenge before Aiteo was aware of the relevant facts. Had the facts been known, there would have been a successful s. 68 challenge and the s. 67 application would not have been required: there would have been no valid award to challenge under s. 67.

200. He also addressed the Lenders' argument, based on paragraph 51 of the Consolidation Award (set out below), that each of the members of the Tribunal had separately considered the question of consolidation. He submitted that this was a dangerous route to follow. Arbitrators can always say this in an award to try to protect themselves. But in any event, the court could not know the course that deliberation actually took. For example, one of the tribunal members may not have felt strongly about a particular point, giving only a lukewarm "yes" to the argument. The court should not speculate about and delve into the mindsets of the arbitrators in the context of a matter as fundamental as apparent bias.

201. In relation to the Onshore Jurisdiction Award, he submitted that this award was itself dependent on the Consolidation Award. That was because the Tribunal was only dealing with the Onshore Arbitration because of the Consolidation Award. If that Consolidation Award was set aside, then the Onshore Award must also be set aside. In those circumstances, the Offshore Tribunal should not have been dealing with the Onshore Arbitration at all. The "de novo" point was also not available in relation to the Onshore Jurisdiction Award. Although the Tribunal had held that there was a *res judicata* arising from Sir Nigel Teare's judgment, this was not the equivalent of the "de novo" point that arises in relation to the Offshore Jurisdiction Award. It was simply the Tribunal's conclusion on one of a number of substantial issues that had been argued before it, and where Aiteo was entitled to have the benefit of a determination by a tribunal in which all 3 members were unaffected by apparent bias.

E2: The Lenders' arguments

202. On behalf of the Lenders, Mr Juratowitch submitted that Aiteo's argument, that any failure of impartiality on DEG's part necessarily satisfies the second limb of the s. 68 test, was incorrect and inconsistent with modern case-law. The correct position was as follows. A finding of breach of natural justice may be more inherently likely to lead to a finding of substantial injustice, depending on the specific conduct alleged. However, any such likelihood does not remove the need to prove that this requirement is independently met, with appropriate evidence. Even if substantial injustice is inherently likely, or would normally be inferred based on the character of the irregularity, that likelihood or inference is rebuttable.

203. The 1996 Act itself did not lend any support to Aiteo's argument. It is true that there is no substantial injustice criterion in s. 24(1)(a), in contrast to s.24(1)(d). However, Aiteo's claim is brought under s. 68(2), not s. 24(1)(a). There is no escaping the fact that s. 68(2) plainly does include a statutory requirement of substantial injustice. Aiteo's argument seeks to conflate the court's enquiry under ss. 24 and 68, but there is good reason why they are distinct and impose distinct requirements. It is one thing to remove an arbitrator on grounds of an actual or perceived failure of impartiality; it is another to decide to set aside a tribunal's awards on that ground.

204. As far as the *ASM Shipping* case is concerned, there is now more recent authority. The Privy Council in *RAV Bahamas* in 2021 held that a case will only satisfy s. 68(2) "if the court considers that it 'has caused or will cause substantial injustice'"; and that in general, there will not be substantial injustice if "the outcome of the arbitration would have been the same regardless of the irregularity" (paragraphs [33] and [37]). Whilst the Privy Council recognised that some irregularities may be "so serious that substantial [in]justice is 'inherently likely' or 'likely in the very nature of things' to

result" (paragraph [35]), this does not mean that the requirement is omitted altogether. Rather, it means that a finding of substantial injustice may be more likely in a particular category of case, rather than that it will inexorably follow. It all depends on the particular irregularity alleged and the particular circumstances of the case.

205. The analysis of the position by Sir Ross Cranston in *Africa Sourcing* is to the same effect and is correct. Earlier authority interpreting *ASM Shipping* does not suggest that it establishes an inflexible legal rule, but rather that substantial justice will "normally be inferred" from a finding of apparent bias. Naturally, any such inference may not be available on the facts.

206. There was also, he submitted, no *Bulfracht* principle which in some way qualifies the requirement to prove substantial injustice. In *Bulfracht,* Colman J said that s. 68 "involves a two-stage investigation", the second being "whether the incidence of such irregularity has caused or will cause substantial injustice". The passage from that case, approved by the Privy Council in *RAV Bahamas*, simply confirmed the point explained by the Departmental Advisory Committee in its report on the 1996 Act. Colman J summarised this as being that "the Court's intervention would be engaged not merely in those cases where some injustice has been caused to the applicant by the incidence of the serious irregularity but where the substance and nature of the injustice goes well beyond what could reasonably be expected as an ordinary incident of arbitration." None of this means that a serious irregularity characterised as involving apparent bias will always and by definition constitute substantial injustice.

207. Accordingly, any finding of apparent bias on the part of DEG did not automatically lead to the conclusion that there was substantial injustice.

208. Mr Juratowitch then advanced a number of arguments as to why there was no substantial injustice on the particular facts of this case.

209. First, he submitted that even if the court found that the objective observer would have concluded that there was a real possibility that DEG was biased, the character of her conduct is such that substantial injustice is not inherently likely and/or any inference of substantial injustice is rebuttable in this specific case. The facts relied upon by Aiteo in relation to apparent bias would, he submitted, be at the low end of the spectrum of severity insofar as allegations of apparent bias are concerned.

210. Secondly, he submitted that Aiteo has not alleged, let alone proved, that the outcome of the awards may well have been different without the alleged irregularity. In fact, the outcome would have been the same regardless of DEG's involvement. In that regard, Mr Juratowitch made the general point, relying on *RAV Bahamas*, that where arbitrators had failed to deal with a point in an award, the point needed to be reasonably arguable before there would be substantial injustice. He submitted that the same approach should be taken in the context of apparent bias, and in that regard relied upon the approach of Sir Ross Cranston in *Africa Sourcing.* He submitted that it was incumbent on Aiteo to show that, without DEG, the result of the 4 Awards might well have been different. He accepted that, in a case involving apparent bias, a party might get some help from an inference that there was substantial injustice, on the basis that the award was influenced by an arbitrator who was apparently biased. However, this was only a starting point in showing that the outcome might well have

been different, and that could not be shown in the present case even with the help of such an inference.

211. He also submitted that all of the awards were unanimous, and that there was no suggestion of bias on the part of the other two very distinguished tribunal members. It was therefore not credible to suggest that the outcome might well have been different.

212. He also made specific points in relation to each of the awards.

213. In relation to the Offshore Jurisdiction Award, and the related costs award, he relied upon the fact that there had been a re-hearing of the jurisdictional issue before Foxton J, and Aiteo's challenge to jurisdiction failed. There had been no application for permission to appeal against Foxton J's decision. He also submitted that even if that award was set aside, and the matter sent back to the Tribunal, it would be bound by Foxton J's decision. In other words, Foxton J's decision would itself give rise to a *res judicata*.

214. In relation to the Consolidation Award, he referred to the approach of the 3 arbitrators in the Award itself. Because of the nature of the argument advanced in that case, each arbitrator separately considered whether he or she would consolidate, and each of them accepted the Lenders' argument in that regard. Mr Juratowitch described this as a "serendipitous" point, in that it only arose because of the unusual argument in that case. Nevertheless, it was an important and indeed decisive point when considering whether the outcome might well have been different. The court could therefore be confident that the answer would have been the same, whether or not DEG was on the panel. There was, he submitted, "real time" evidence that each arbitrator considered that consolidation was appropriate.

215. In relation to the Onshore Jurisdiction Award, the Lenders submitted that Aiteo's arguments (all rejected by the Tribunal) lacked merit and were not reasonably arguable. They involved re-running arguments that had been rejected in the Consolidation Award. The Tribunal had also correctly held that there was an issue estoppel arising from the decision of Sir Nigel Teare on the application for an anti-suit injunction. Sir Nigel had had to satisfy himself that there was a valid arbitration agreement, in order to grant the anti-suit relief sought. He rejected Aiteo's argument, and Aiteo could not now argue the same point. Aiteo's argument, concerning the Lenders' conduct in relation to the Nigerian proceedings, was also correctly and swiftly despatched by the Tribunal.

E3: Discussion

Substantial injustice and apparent bias.

216. I do not accept Aiteo's argument that a decision, favourable to Aiteo, on apparent bias in itself answers the question of substantial injustice. I agree with the Lenders' submission that the question of substantial injustice must always be addressed separately.

217. A materially identical argument, to that advanced by Aiteo, was considered and rejected by Sir Ross Cranston in *Africa Sourcing* at paragraphs [69] – [70]. His decision also helpfully summarises the effect of the *RAV Bahamas* case. He said as follows under the heading "Application of s. 68 to bias":

"[67] In giving the opinion of the Privy Council in *RAV Bahamas v Therapy Beach Club Inc* [2021] UKPC 8, Lords Hamblen and Burrows synthesised the relevant considerations in the application of the equivalent provision to section 68 in the Bahamian legislation at issue in that appeal. Without citation of the underlying authorities they are: (i) the test of "serious irregularity" is intended to limit judicial intervention to cases where the arbitral tribunal has gone so wrong in its conduct that justice cries out for it to be corrected:[30]; (ii) the test of serious irregularity imposes a high threshold to be surmounted:[31]; (iii) the focus is on due process, not the correctness of the decision reached:[32]; (iv) even if a case falls within one of the categories provided in sub- section 68(2) , that will only amount to a serious irregularity if the court considers that it has caused substantial injustice - a state of affairs which is 'more than some injustice':[33]; (v) there will be substantial injustice where it is established that, had the irregularity not occurred, the outcome of the arbitration might well have been different. In general, there will be no substantial injustice if it can be shown that the outcome of the arbitration would have been the same regardless of the irregularity:[34], [37]; (vi) some irregularities may be so serious that substantial justice is 'inherently likely' or 'likely in the very nature of things' to result:[35]; (vii) in such cases substantial injustice may be inferred from the nature of the irregularity and that inference may be so strong that 'it almost goes without saying': [35], [36].

[68] Apparent bias on the part of an arbitration tribunal would amount to a breach of the general duty in section 33 and would constitute an irregularity under section 68(2)(a) of the Act.

[69] Mr Kulkarni submitted that a finding of apparent bias would lead to the necessary additional requirement in section 68(2) of substantial injustice being assumed without the need to establish it separately. Consequently, the award could be remitted for serious irregularity for the dispute to be heard by another Board of Appeal. Mr Kulkarni cited three High Court decision in support of his submission: *Norbrook Laboratories Ltd v Tank* [2006] EWHC 1055 (Comm), [144] , per Colman J, citing Morison J in *ASM Shipping Ltd of India v TTMI Ltd* [2005] EWHC 2238 (Comm) ; *Cofely Ltd v Bingham* [2016] EWHC 240 (Comm), [116] , per Hamblen J (as he then was); and *Dadoun v Biton* [2019] EWHC 3441 (Ch), [36] , per Mr Michael Green QC (as he then was).

[70] I am not persuaded that all these authorities are as clear as Mr Kulkarni suggested that in an apparent bias case substantial injustice follows as a matter of course. In *Norbrook Laboratories Ltd v Tank* , although Colman J said that he

> agreed with what Morison J had said in *ASM Shipping Ltd of India v TTMI Ltd*, he went on to refer to sole arbitrator cases, but also expressed the principle as being that with bias 'in any award already made, substantial injustice will *normally* be inferred and where an award has yet to be made substantial injustice will *normally* be anticipated' (my emphasis): [145]. The passage Mr Michael Green QC relied on from *Russell on Arbitration* in *Dadoun v Biton* is similarly qualified, 'substantial injustice will normally be imputed as a matter of course' para 7-129.
>
> [71] In any event, there is no support in *RAV Bahamas v Therapy Beach Club Inc* [2021] UKPC 8 for the suggestion that in a section 68 application a finding of apparent bias in an arbitration tribunal will lead as a matter of course to a finding of substantial injustice. Rather, as we have seen, the effect of the Privy Council advice is that a case within section 68(2)(a) will not constitute a serious irregularity unless the court considers that it has caused substantial injustice, although the nature of the irregularity may be such that the inference of substantial injustice almost goes without saying. Moreover, there will be no substantial injustice if it can be shown that the outcome of the arbitration would have been the same regardless of the irregularity. This court follows a Privy Council authority like *RAV Bahamas* in preference to any High Court authority to the contrary: *Willers v Joyce* [2016] UKSC 44, [12], [16]."

218. Accordingly, Sir Ross Cranston considered that, in a case of apparent bias, substantial injustice will normally be inferred or anticipated, but that there is no absolute rule that it will always be held to exist. I consider that this is correct as a matter of law, and that it is consistent with the authorities to which he referred in paragraph [70] of his judgment. In so far as there is a conflict between the approach in *Africa Sourcing,* and the more categoric approach of Morison J in the earlier case *ASM Shipping*, I consider that I should follow the later decision of Sir Ross Cranston which fully considers the authorities: see *Colchester Estates (Cardiff) v Carlton Industries PLC* [1986] Ch 80, and *Patel v Secretary of State for the Home Department* [2012] EWCA Civ 741 paragraph [59]**.**

219. I have not been persuaded by any of the arguments advanced by Mr Diwan as to why the decision of Sir Ross Cranston on this issue is incorrect in law. On the contrary, I agree with the submissions of Mr Juratowitch as summarised above. The short answer to the argument is that s. 68(2) clearly does include a statutory requirement of substantial injustice. This must therefore be shown in the context of any challenge under s. 68. There is nothing in the statute which suggests that, in the context of s. 68, certain irregularities automatically result in a finding of substantial injustice. Whether such a finding is appropriate must, in my view, depend upon the nature of the irregularity and the circumstances of the case, both of which are infinitely variable. No assistance, in relation to allegations of bias, can be derived from s. 24 of the 1996 Act. I am not here concerned with an application under s. 24, because DEG has been removed as arbitrator. Instead, I am considering the effect of her removal on the

awards of the Tribunal, and that is a matter governed by s. 68. There is also no reason, in my view, why consideration of "substantial injustice" should be confined, in the manner proposed by Mr Diwan, to the question of whether there is a causal connection between the apparent bias and the award under challenge.

220. Nor can any assistance be derived from the case-law concerning judges who are potentially affected by apparent bias. Such situations are governed by the common law. Here, I am dealing with arbitrators and a specific statute, the 1996 Act, which imposes a requirement of "substantial injustice".

221. However, although substantial injustice must be shown, the effect of the authorities summarised in paragraph [70] of *Africa Sourcing* is that this will normally be inferred in a case where there is apparent bias on the part of the arbitral tribunal. The reasons are essentially those articulated by Morison J in *ASM*, namely the fundamental right of a party to have its case decided by an unbiased tribunal. I agree with Mr Diwan that this principle is equally applicable in the case where one member of a 3-person tribunal is biased as in the case of a sole arbitrator.

222. In *RAV Bahamas,* the Privy Council considered that the nature of the irregularity and failure of due process in that case – namely the tribunal's failure to deal with an issue which would potentially halve the damages – meant that it was "inherently likely" that there had been substantial injustice: see paragraph [69]. The concept of "inherently likely" is explained earlier in the *RAV Bahamas* judgment at paragraphs [35] – [37]; i.e. something which is likely in the very nature of things. In such cases, substantial injustice can be inferred from the nature of the irregularity. However, even in cases where a tribunal's failure to deal with a substantial issue meant that substantial injustice was inherently likely, the Privy Council recognised that the award might still be sustainable. At paragraph [70], the court said that it "might be otherwise if it was shown that the point in issue was not reasonably arguable".

223. I consider that the case where there is apparent bias which affects one member of an arbitration tribunal is also a situation where it is inherently likely that there has been substantial injustice. However, there may be particular reasons why the position "might be otherwise". I do not think that an exhaustive list of such situations can or should be identified. I agree with Mr Juratowitch that one such situation, potentially applicable in a case of apparent bias as well as a case where a tribunal has failed to address an issue, is where a point is not reasonably arguable. However, I do not consider that the court should, in an apparent bias case, be required to carry out a lengthy review of the merits of arguments advanced before the arbitrators in order to decide whether a point was reasonably arguable. Ultimately, it was for the tribunal to decide the parties' arguments, and the parties were entitled to a determination by a tribunal where each member was unaffected by actual or apparent bias.

224. In *Africa Sourcing*, Sir Ross Cranston held, on the facts, that there was no apparent bias on the part of the tribunal members. He also considered, albeit briefly, what the position would have been, on the question of substantial injustice, in the event that he had held that there was apparent bias: see paragraphs [91] – [93]. He said that the process error in that case was not so egregious that substantial injustice would be inferred. It therefore needed to be established, and he said that there was no reason to believe that the outcome of the arbitration would have been any different, and he referred to a number of matters which led to that conclusion.

225. I do not regard those paragraphs as laying down any general principles as to how to determine whether substantial injustice exists in a particular case. I also have some reservations as to whether it is appropriate, once apparent bias is established, to evaluate how egregious the relevant non-disclosure is when considering the question of substantial injustice. The seriousness or otherwise of a non-disclosure is, in my view, a matter to be considered when deciding whether the reasonable observer test is satisfied. Once that test is satisfied, then I do not think that (at least in most cases), the significance of the non-disclosure would then re-emerge so as to affect the determination of whether or not there was substantial injustice. I am also not persuaded that, generally speaking and except where the facts are unusual, the court should be drawn into trying to work out how the other (non-biased) members of the tribunal would have decided a case on the merits. Again, speaking generally, once the court concludes that a party's position was (to use the words of *RAV Bahamas*) reasonably arguable, it follows that the outcome of the arbitration might well have been different if the case had been argued before arbitrators who were all free from apparent bias. I therefore agree with Mr Diwan that the court should not be drawn into, or at least should be very reluctant to be drawn into, trying to consider the extent to which the impugned arbitrator influenced the decision-making of the non-impugned arbitrators. As he said, it will usually be impossible to quantify the degree of influence of the impugned arbitrator on the other arbitrators

226. Against this background, I consider that, in the present case, substantial injustice would indeed normally be inferred as being "inherently likely" or "likely in the very nature of things", and that it should be inferred here unless there are circumstances which rebut it. This leads to consideration of the Lenders' argument that there are particular features of the present case which do indeed rebut that inference. I shall deal with each of the Awards in turn.

The Offshore Jurisdiction Award

227. It is well-established that an arbitral tribunal cannot finally determine its own jurisdiction. S. 30 of the 1996 Act provides, however, that unless otherwise agreed by the parties, the tribunal has competence to rule on its own jurisdiction. This is usually called competence to rule on its own competence, or competence-competence (or kompetenz-kompetenz). In response to a jurisdictional objection, a tribunal can rule in an award dealing solely with jurisdiction, or it can deal with jurisdiction as part of an award which also deals with the merits of the dispute. In the present case, the tribunal dealt with Aiteo's jurisdictional challenge in a partial award. Such an award can be challenged under s. 67 of the 1996 Act, and this is what Aiteo did in the present case.

228. The court's approach to challenges under s. 67 has long been that there is a full re-hearing. (The Law Commission has recommended changes to this approach, but these have not yet been enacted). The established legal position in that regard was confirmed by the decision of the Supreme Court in *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] UKSC 46: see paragraphs [26] (Lord Mance), [96] (Lord Collins), and [159] – [160] (Lord Saville). At [160], Lord Saville referred to the need for an "independent investigation" by the court of the jurisdictional issue. The court therefore considers the jurisdictional issue for itself "de novo". He said:

> "[159] In these circumstances, I am of the view that to take as the starting point the ruling made by the arbitrators and to give that ruling some special status is to beg the question at issue, for this approach necessarily assumes that the parties have, to some extent at least, agreed that the arbitrators have power to make a binding ruling that affects their rights and obligations; for without some such agreement such a ruling cannot have any status at all. As the Departmental Advisory Committee on Arbitration Law put it in para 138 of its 1996 Report on the Arbitration Bill, an arbitral tribunal may rule on its own jurisdiction but cannot be the final arbiter of jurisdiction, "for this would provide a classic case of pulling oneself up by one's own bootstraps".
>
> [160] In my judgment therefore, the starting point cannot be a review of the decision of the arbitrators that there was an arbitration agreement between the parties. Indeed no question of a review arises at any stage. The starting point in this case must be an independent investigation by the court of the question whether the person challenging the enforcement of the award can prove that he was not a party to the arbitration agreement under which the award was made. The findings of fact made by the arbitrators and their view of the law can in no sense bind the court, though of course the court may find it useful to see how the arbitrators dealt with the question. Whether the arbitrators had jurisdiction is a matter that in enforcement proceedings the court must consider for itself."

229. When the s. 67 challenge to the Offshore Jurisdiction Award came before Foxton J, he duly carried out that independent investigation. Indeed, his judgment does not refer to any of the reasoning of the Tribunal in that award. Foxton J rejected the jurisdictional challenge, and there was no application for permission to appeal against his decision.

230. I consider that the fact that there was a full re-hearing of Aiteo's jurisdictional challenge, and that the challenge was rejected upon that re-hearing, means that any argument on "substantial injustice" in relation to the Offshore Jurisdiction Award must fail. The jurisdictional issue has been fully considered afresh by a court, which is unaffected by any apparent bias on the part of DEG and indeed where the reasoning of the tribunal played no part in the court's analysis.

231. In *Royal & Sun Alliance Insurance Ltd v Tughans* [2022] EWHC 2589, Foxton J reached a similar conclusion, as to the "curative" effect of a court decision in the context of a s. 68 application, in the context of a challenge under s. 69 of the 1996 Act:

> "[91] Where the serious irregularity arises in relation to the arbitral tribunal's treatment of a point of law (e.g. allowing one party an insufficient opportunity to present its legal argument or to respond to the other party's legal argument), but the court has granted leave to appeal under s.69 of the 1996 Act, the de novo hearing before the court will generally be sufficient to

> "cure" any substantial injustice. In particular, the court is highly unlikely to be receptive to the argument that the loss of the opportunity to obtain a different outcome from the arbitrator which did not meet the threshold for a s.69 challenge is capable of amounting to substantial injustice (*Sunrock Aircraft v Scandinavia Airlines System Denmark-Norway-Sweden* [2007] EWCA Civ 882, [36]- [42])."

232. Furthermore, I agree with Mr Juratowitch that if the jurisdictional issue were to be reconsidered by the newly reconstituted Tribunal, in consequence of the Offshore Jurisdiction Award having been set aside or remitted, the Tribunal would be bound by the decision of Foxton J. Indeed, the setting aside of the Offshore Jurisdiction Award would not have the consequence that Foxton J's judgment was set aside, or that it ceased to give rise to a *res judicata* or issue estoppel as between the parties. Another way of looking at the same point is to say that, in the light of the decision of Foxton J, it can now readily be seen that Aiteo's argument, that the Tribunal had no jurisdiction, is not reasonably arguable.

233. I disagree with Mr Diwan's submission that the subsequent re-hearing before Foxton J did not cure the unfairness of the jurisdiction issue having originally been considered by a tribunal where one member was affected by apparent bias. A "competence-competence" award made pursuant to s. 30 of the 1996 Act is only the first stage in the determination of the tribunal's jurisdiction. Where a party challenges that award, it is the second stage which is critical. If, as here, there has been a full re-hearing of the jurisdictional issue before a court which is unaffected by any bias, and which is required to consider the matter afresh, any bias that might have affected the tribunal's own assessment of its jurisdiction ceases to be of any significance, and in my view does not give rise to substantial injustice.

234. The Tribunal also made an award of costs against Aiteo in relation to its unsuccessful jurisdictional challenge. It was common ground that my conclusion as to substantial injustice, in relation to the Offshore Jurisdiction Award, would be equally applicable to this costs award, which was simply consequential on the Offshore Jurisdiction Award. Accordingly, since there was no substantial injustice in relation to the Offshore Jurisdiction Award, there was no substantial injustice in relation to the costs award.

The Consolidation Award

235. As explained in Section B above, the Consolidation Award was rendered at a time when the s. 67 challenge to the Offshore Jurisdiction Award had been issued but not yet determined. An application under s. 67 was made to challenge the Consolidation Award. This application was, as Foxton J said in paragraph [43] of his judgment, parasitic on the challenge to the Offshore Jurisdiction Award. Aiteo's argument was, in summary, that if the Tribunal had no jurisdiction to issue the Offshore Jurisdiction Award, then it followed that they could not order consolidation. Since Foxton J held that the Tribunal did have jurisdiction, the s 67 challenge to the Consolidation Award also failed.

236. However, the principal arguments which Aiteo had advanced before the Tribunal, in opposing consolidation, were not arguments about the substantive jurisdiction of the

Tribunal. They could not be advanced by way of a s. 67 challenge, bearing in mind that s. 30 of the 1996 Act contains fairly narrowly defined categories of what constitutes the "substantive jurisdiction" of an arbitration tribunal. Accordingly, there was and could be no "de novo" rehearing of Aiteo's consolidation arguments before Foxton J. Accordingly the Lenders needed to make, and did make a different argument on "substantial injustice" in relation to the Consolidation Award; in other words different to their argument, which I have accepted, concerning the Offshore Jurisdiction Award itself.

237. The Lenders' argument here focused on an unusual paragraph (paragraph 51) which was contained in the Consolidation Award:

> "Out of an abundance of caution, the Tribunal members have agreed that each of them would decide for himself or herself whether to accede to the Consolidation Application, and that we would thereafter discuss the question and reach a collegiate view. We took that course, and, fortunately, each of us, individually and independently, reached the same conclusion, adopting the reasoning as set out above and, accordingly, whether the decision should be that of Dame Elizabeth or (as we have concluded) that of the Tribunal as a whole, makes no difference to the outcome in this case, an outcome which we explain in Part G of this Award."

238. This paragraph was unrelated to, and did not arise in any way from, any concerns as to the independence or impartiality of any of the Tribunal members. The members of the Tribunal were not seeking to influence or pre-empt any arguments which might arise in relation to issues of impartiality. Rather, the paragraph arose because of the terms of the relevant arbitration clause which provided for possible consolidation, and the argument that was advanced in relation to the effect of that clause.

239. The relevant clause was clause 41.1.7 in the Offshore Facility Agreement:

> "Where Disputes arise under this Agreement and under any of the Onshore Facility Agreement and Intercreditor Agreement which, in the absolute discretion of the first arbitrator to be appointed under any of the disputes, are so closely connected that it is expedient for them to be resolved in the same proceedings, that arbitrator shall have the power to order that the proceedings to resolve that dispute shall be consolidated with those to resolve any of the other disputes (whether or not proceedings to resolve those other disputes have yet been instituted), provided that no date for exchange of expert witness statements has been fixed. If he so orders, the parties to each dispute which is the subject of his order shall be treated as having consented to that dispute being finally decided:
>
> (A) by the arbitrator who ordered the consolidation unless the ICC decides that he would not be suitable or impartial, and

> (B) in accordance with the procedure, at the seat and in the language specified in the arbitration agreement in the contract under which the arbitrator who ordered the consolidation was appointed, save as otherwise agreed by all parties to the consolidated proceedings or, in the absence of such agreement, ordered by the arbitrator in the consolidated proceedings."

240. The argument before the Tribunal focused on the words "the first arbitrator". The question was whether this meant (i) DEG, who was the first arbitrator to be appointed under the Offshore Facility Agreement, or (ii) the (whole) Tribunal appointed under the Offshore Facility Agreement, that tribunal having been constituted before the tribunal in the Onshore Arbitration had been constituted. This was an issue of construction, which the Tribunal resolved in favour of the view that it was the whole Tribunal, rather than DEG alone, which should decide consolidation. Thus, the reference to the "first arbitrator to be appointed in any of the disputes" was to the first duly constituted three-member tribunal and not to the first individual arbitrator who happened to be appointed. It was in the context of that argument that, as stated in paragraph 51, the Tribunal members agreed that each of them would decide for himself or herself whether to accede to the consolidation application. Each did so "individually and independently".

241. Paragraph 51 was contained in Section E of the Consolidation Award headed: "The Identity of "The First Arbitrator"". Section F of the Award addressed the issue: "Is There Power to Consolidate". A variety of arguments were advanced by Aiteo in support of the submission that there was no such power, and these were all rejected. Section G of the Award addressed the issue: "Should Consolidation Be Ordered." Again, the arguments advanced by Aiteo against consolidation were rejected. This led to the Tribunal's decision that there should indeed be consolidation.

242. In my view, there is an unusual circumstance here which means that any inference of substantial injustice, arising from the apparent bias of one member of the Tribunal, is rebutted. Here, because of the nature of the argument advanced, each member of the Tribunal did in fact consider the question of whether to accede to the application "individually and independently", prior to discussing the question and reaching a collegiate view. There is no reason for the court to doubt that this is indeed what happened. In these unusual circumstances, it is clear that the Tribunal did in fact reach its conclusion, that there should be consolidation, independently of the individual views of DEG. In those circumstances, I consider that Aiteo has failed to show substantial injustice in relation to the Consolidation Award. I accept Mr Diwan's point that it is necessary for the court to tread carefully when considering statements by the tribunal members, unaffected by apparent bias, that they would have reached the same conclusion irrespective of the involvement of the member affected by apparent bias. Here, however, the statement was not made in response to any challenge, but rather in "real time" solely because of the nature of the issue being argued.

243. My above conclusion is to some extent reinforced by the fact that there was no challenge to the Consolidation Award, at the time, under s. 68. Ordinarily, I would not regard it as a powerful point that a party has decided not to pursue a challenge in court. A party may well consider that it is not worth issuing proceedings in relation to a point which is reasonably arguable. For example, the point may be reasonably

arguable, but the party may consider that the prospects of success are not sufficiently strong to justify the expense of commencing proceedings. Or a party may consider that, notwithstanding a decision which might be appealable, it can live with the result. In the present case, however, Aiteo did decide to challenge the Consolidation Award, and it issued proceedings under s. 67. If there had been a reasonably arguable case that the Tribunal had no power to consolidate (as had been argued before the Tribunal), then it would have been a simple matter to have raised that point by way of an application under s. 68(2)(b), and it would not have involved substantial additional expense. Such application could and would have been addressed at the same time as the s. 67 challenge.

The Onshore Jurisdiction Award

244. Neither of the points, which rebut the case of substantial injustice in relation to the Awards considered above, is available in relation to the Onshore Jurisdiction Award. This Award is lengthy, running to some 80 pages and with 303 footnotes. It deals with a variety of arguments, which the Tribunal grouped into 3 issues. I do not consider it necessary to describe these issues, and the parties' arguments, in detail. It suffices to say that the Onshore Lenders were successful on each of the issues. On the first issue, the Tribunal considered that the principal arguments had already been substantially addressed in the Consolidation Award, although it did not reject Aiteo's case on the basis of abuse of process. On the second issue, the Tribunal said that there was a valid arbitration agreement between the parties, and it considered that an issue estoppel arose from the decision of Sir Nigel Teare to grant anti-suit injunctive relief. On the third issue, which concerned the Onshore Lenders' conduct in Nigeria in relation to the Nigerian proceedings, the Tribunal said that Aiteo's arguments led nowhere.

245. I do not consider it appropriate for the court to carry out a detailed review of the merits of all of the parties' arguments which were addressed by the Tribunal. Having read the Onshore Jurisdiction Award, I cannot conclude that the principal points raised by Aiteo, in relation to Issues 1 and 2, were not reasonably arguable. I can see that the same might not be true of the argument raised under Issue 3, which the Tribunal addressed briefly and readily dismissed. But that argument was not Aiteo's principal argument. In my view, its principal arguments were ones which Aiteo was entitled to have considered by a Tribunal which was unaffected by apparent bias, and in my view they need to be reconsidered. (I deal with remedies in Section G below). I can see that the Onshore Lenders' jurisdictional arguments had very considerable strength, and that the newly constituted Tribunal's answer on reconsideration may well be the same as that given in the Onshore Jurisdiction Award. However, that does not mean that there is nothing that can reasonably be argued by Aiteo, or that its arguments are unworthy of consideration by a tribunal unaffected by apparent bias. I consider that an inference of substantial injustice does arise from the fact that the arguments were addressed by a tribunal where one member was affected by apparent bias, and that there is nothing which rebuts this inference in the case of the Onshore Jurisdiction Award. The question of the relief to be granted in that respect will be addressed in Section G, after I have considered the question of whether there should be an extension of time.

F: The application for an extension of time

Legal principles

246. S.70(3) of the 1996 Act imposes a 28-day time limit from the date of the award on applications under ss. 67-69. The court is, however, given a discretion under s. 80(5) and CPR r. 62.9(1) to extend that time limit.

247. In *AOOT Kalmneft v Glencore International AG* [2002] 1 All ER 76, Colman J identified certain factors which are relevant to the exercise of the court's discretion, and his judgment and those factors continue to be cited to this day. I was referred to a number of other authorities where these principles have been restated and to some extent elaborated upon: see in particular *Terna Bahrain Holding Company WLL v Al Shamsi* [2012] EWHC 3283 (Comm) (Popplewell J) and more recently *Hays v Bloomfield Investments* [2022] EWHC 1648 (Comm) (Henshaw J).

248. The so-called "*Kalmneft* factors" are as follows:

i) the length of the delay;

ii) whether, in permitting the time limit to expire and the subsequent delay to occur, the party was acting reasonably in all the circumstances;

iii) whether the respondent to the application or the arbitrator caused or contributed to the delay;

iv) whether the respondent to the application would by reason of the delay suffer irremediable prejudice in addition to the mere loss of time if the application were permitted to proceed;

v) whether the arbitration has continued during the period of delay and, if so, what impact on the progress of the arbitration or the costs incurred in respect of the determination of the application by the Court might now have;

vi) the strength of the application;

vii) whether in the broadest sense it would be unfair to the applicant for him to be denied the opportunity of having the application determined.

249. The weight to be attributed to each factor will depend on the facts of the case. All factors are relevant for consideration: *Hays* at [33], citing *Allawi v Pakistan* [2019] EWHC 430 (Comm).

250. In *Kalmneft* itself, Colman J's list of factors (in paragraph [59]) was preceded by the statement that each case turns on its own facts, and that the list of factors were those which were "likely to be material". It would therefore be wrong to treat the factors as though they were a statutory list. Prior to identifying these factors, Colman J drew upon the philosophy of the 1996 Act. He said this:

> "50. In determining the relative weight that should be attached to discretionary criteria the starting point must be to take into

account the fact that the 1996 Act is founded on a philosophy which differs in important respects from that of the CPR.

51. Thus, the twin principles of party autonomy and finality of awards which pervade the Act tend to restrict the supervisory role of the Court and to minimize the occasion for the Court's intervention in the conduct of arbitrations. Nowhere is this more clearly demonstrated than in s. 68 itself where there was superimposed upon the availability of a remedy for what used to be called "misconduct" by the arbitrator and was redefined as "serious irregularity" a requirement that it had caused or would cause substantial injustice to the applicant. No longer was it enough to demonstrate failure by the arbitrator scrupulously to adhere to the audi alterem partem rule.

52. Section 12 also reflects this general approach by redefining the circumstances in which the Court will extend the time for the commencement of arbitration fixed by the arbitration agreement: as explained in *Harbour & General Works Ltd. v. Environment Agency*, [2000] 1 Lloyd's Rep. 65 at p. 69. Further, the relatively short period of time for making an application for relief under ss. 67, 68 and 69 also reflects the principle of finality. Once an award has been made the parties have to live with it unless they move with great expedition. Were it otherwise, the old mischief of over long unenforceability of awards due to the pendency of supervisory proceedings would be encouraged.

53. At this point it is necessary to have in mind the general principles set out in s. 1 of the 1996 Act:

> (1) The provisions of this Part are founded on the following principles, and shall be construed accordingly —
>
> (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
>
> (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;
>
> (c) in matters governed by this Part the court should not intervene except as provided by this Part.

54. The reference to unnecessary delay is pertinent to identifying the relevant discretionary criteria.

55. The need for expedition in proceedings before the Court is reflected in pars. 9 and 12 of Appendix 19 of the Commercial

> Court Guide. This states under the heading Arbitration Matters: Related Practice:
>
> Progress —
>
> > (9) In arbitration matters it is the particular duty of the Court to see that court proceedings are not a cause of delay.
> >
> > (10) A hearing date must (where applicable) be applied for promptly after the issue of the required practice form (whether serving as an arbitration claim form or an application notice) or after obtaining permission to appeal under the Arbitration Acts 1979 and 1996.
> >
> > (12) A failure to act with all deliberate speed founds the Court's discretion to strike out. When it comes to the attention of the Court that delay is occurring, the Court may itself direct that the matter be listed for hearing.
>
> 56. It is however also to be remembered that the threshold requirement set out in s. 79(3)(b) for extension of time limits to which s. 79 relates — "that a substantial injustice would otherwise be done" is not expressed to be applicable to extensions of time under s. 80(5). In that respect therefore a lower unfairness threshold must be presumed to have been intended.
>
> 57. In approaching the identification of the applicable criteria it is also important to take into account the fact that, at least in international arbitrations, English arbitration is probably the most widely chosen jurisdiction of all. It is chosen because of the ready availability of highly skilled and experienced arbitrators operating under a well- defined regime of legal and procedural principles in what is often a neutral forum. Supervisory intervention by the Courts is minimal and well-defined and the opportunities for a respondent with a weak case to delay the making of an award or to interfere with its status of finality are very restricted. Accordingly, much weight has to be attached to the avoidance of delay at all stages of an arbitration, both before and after an interim or final award. If the English Courts were seen by foreign commercial institutions to be over-indulgent in the face of unjustifiable non-compliance with time limits, those institutions might well be deterred from using references to English arbitration in their contracts. This is a distinct public policy factor which has to be given due weight in the discretionary balance."

251. When applications for an extension of time are resisted, there is inevitably a tendency for the party opposing the extension to emphasise the importance of speed and finality. These are unquestionably important considerations. As Popplewell J said in *Terna* at [27]:

> "Section 70(3) of the Act requires challenges to an award under sections 67 and 68 to be brought within 28 days. This relatively short period of time reflects the principle of speedy finality which underpins the Act, and which is enshrined in section 1(a). The party seeking an extension must therefore show that the interests of justice require an exceptional departure from the timetable laid down by the Act. Any significant delay beyond 28 days is to be regarded as inimical to the policy of the Act."

252. However, as the full quotation from *Kalmneft* shows, it is important not to lose sight of the whole of the first principle identified in s.1 of the 1996 Act, namely that:

> "(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense". (Emphasis supplied)

253. Mr Diwan was therefore right to emphasise, in his submission, that "English law places a very significant weight on the duty of impartiality, and that is a matter to be taken into account in the round in this context".

Discussion

254. Although I will consider each of the *Kalmneft* factors separately, I consider that a very significant factor in this case, favouring the grant of the extension, is that (as I have concluded above) there was apparent bias on the part of one member of the Tribunal, and that therefore Aiteo did not obtain the resolution of its disputes by an impartial tribunal. As appears below, I consider that other factors also favour the grant of an extension, and that there are no strong factors against it and certainly none which outweigh those factors which favour the extension. Accordingly, this is an appropriate case in which to grant an extension of time.

255. *(i) Length of delay.* The Lenders submit that the delay in this case is very substantial, when viewed against the yardstick of 28 days from the date of the various Awards. The longest delay, on their case, is 686 days (nearly 2 years), with the shortest delay amounting to 158 days (over 5 months).

256. I agree with Aiteo that this is a very superficial position for the Lenders to adopt, on the facts of the present case. Here, essentially as a result of prior non-disclosures by DEG, Aiteo was not in a position to make its challenge to DEG until the disclosures of 10 November 2023 and 9 December 2023, with the full picture only emerging on the latter date. This is not a case where, as in many of the authorities, a party simply let time go by after the publication of an award, and then woke up to the need to apply under s. 68.

257. Even if it were right to focus on the length of the delay between the time that the Awards were published and the time that the application was made, I do not consider that this can be a significant factor, militating against the grant of an extension, in the context of a case of apparent bias based on facts which only became known towards the end of that period.

258. A related argument advanced by the Lenders, in the context of the delay on which it relies, is that in a "fresh evidence" case, the fresh evidence needs to be transformational or seismic or a "game-changer" if it is to counteract the effect of a very long delay. This argument is based upon the decision of Sir Michael Burton in *State A v Party B & Anr* [2019] EWHC 799 (Comm). In that case, the tribunal had issued a partial award in 2015 on jurisdiction, holding that it had jurisdiction. There was no s. 67 challenge at the time. A substantive hearing of the arbitration took place in 2017 and 2018. An application was then made for a 959-day extension to challenge the 2015 jurisdictional award under s. 67. The applicant had by that time, in 2018, obtained a further document, a letter, which it contended made a significant and decisive difference to the tribunal's conclusion on jurisdiction. Sir Michael Burton declined to extend time. He said:

> "53. However, I am persuaded by Mr Foxton's submissions that there should be provision and leeway in the Colman Guidelines for relativity. The longer − the more 'colossal' − the delay or passage of time, the more transformational or seismic must be the fresh evidence sought to be relied upon. It may be that, in a case in which there is a short delay and the parties have not, as they have in this case, steamrollered through at enormous expense to a further hearing, then the strength of the case required for an extension may be less, or the role of factor (vi) may not be 'primary'. However:
>
> > (i) The very fact that, if permitted to proceed, a s. 67 application would be a rehearing and allow fresh evidence underlines the greater need for a proper threshold, a sensible and properly controlled gateway, before it can be allowed to go further.
> >
> > (ii) In my judgment, factor (vi) must be one of the primary factors where there has been substantial delay, and Mance LJ's dicta in Nagusina should, in my judgment, be so interpreted. To that extent I would disagree with the words of Eder J and Popplewell J.
>
> 54. In my judgment, in this case where the delay has been 'colossal' and there would undoubtedly be prejudice to the Respondents by virtue of the costs which would be wasted, the strength of the case must be the greater, and the fresh evidence must indeed be transformational."

259. He went on to say that the arbitrators would have reached the same jurisdictional conclusion even if they had seen the letter. The letter did not "seismically or otherwise, totally change the aspect of the case".

260. I do not doubt the correctness of Sir Michael Burton's approach, but I do not consider that it is of any real significance in the context of the present case. This is not an application to reopen a previous award on the basis of fresh evidence alleged to show that the arbitrators in the award should have reached a different decision. The reference to "totally change the aspect of the case" was derived from the cases (e.g.

Phosphate Sewage Co Ltd v Molleson (1879) 4 App Case 801) where fresh evidence is sought to be adduced in order to reverse an earlier decision on the basis that it was wrongly decided in the light of the fresh evidence. In *State A*, Sir Michael Burton was also there dealing with an extension requested for a s. 67 challenge which would involve a re-hearing of the jurisdictional arguments. Hence, he referred in paragraph [53(i)] for the need, in that context, for "a sensible and properly controlled gateway". Moreover, this part of the judge's judgment was in the context of explaining why, in a "fresh evidence" case of that kind, the merits of the s. 67 application were a very significant factor.

261. In the present case, however, Aiteo is not seeking to rely on fresh evidence to reverse a previous award on its merits. Nor is this a s. 67 case. Since this is a rolled-up hearing, the merits of the application have been determined and (as further discussed below in the context of factor (vi)) Aiteo's s. 68 application would, assuming an extension is granted, succeed in respect of one of the Awards. Finally, and in any event, I consider that the information which came to light with DEG's disclosures in November and December 2023 was transformational in that it did entirely change the aspect of the case, as far as a possible challenge to DEG for apparent bias is concerned. In short, prior to those disclosures, there was insufficient material to advance a challenge to DEG. After the disclosures, there was material which was sufficient to persuade the ICC Court that DEG should be removed and which has persuaded me (see Section D above) that there is a sustainable case of apparent bias.

262. The Lenders advanced a further point in relation to delay: irrespective of the prior delay, they also rely upon the delay between 9 December 2023 (when the full facts became known) and 30 January 2023 (when the s. 68 application was made). I address this point below, in the context of *Kalmneft* factor (ii).

263. *(ii) Whether, in permitting the time limit to expire and the subsequent delay to occur, the party was acting reasonably in all the circumstances*. Since the full facts were not known until 9 December 2023, I do not see any basis for suggesting that Aiteo acted unreasonably during the period up until that date. Mr Juratowitch submitted during the course of his submissions, somewhat faintly, that Aiteo failed to ask questions which it could have asked DEG, and which were in due course asked following DEG's disclosure in November 2023. There is in my view no substance to that point. Aiteo had received disclosures from DEG, and it had no reason to believe that there were other matters which had not been disclosed. They were entitled to proceed on the basis that DEG had made all appropriate disclosures. There was in my view nothing which should reasonably have prompted Aiteo to ask further questions any earlier than it did.

264. I next turn to the delay after 9 December 2023. Aiteo submitted that it acted reasonably and promptly after becoming aware of the full facts on 9 December 2023. The Lenders dispute this. They submit that Aiteo should have brought its s. 68 claim at that point, rather than awaiting the decision of the ICC Court on the challenge to DEG. This was, they argued, a tactical choice as to sequencing. They also submit that Aiteo had provided no explanation for the nearly two-week delay between notification of the ICC Court's decision (18 January) and the issue of the s. 68 challenge (30 January).

265. I consider that Aiteo did act reasonably and promptly, and I reject the Lenders' arguments on this point. I agree with Mr Diwan's submission that it was both reasonable and efficient for Aiteo to await the outcome of the ICC challenge, and that it would have been unsatisfactory and inefficient to launch a s. 68 challenge without knowing whether it had succeeded or not. I accept that it would have been theoretically possible for Aiteo to draft and issue a s. 68 challenge, based upon the facts known as at 9 December 2023, prior to the ICC Court's decision. However, to do so would, in practical terms, have been pointless. There is, in this context, an interrelationship between s. 24 of the 1996 Act and a s. 68 challenge based on an argument of apparent bias. There could be no question of the court removing DEG as arbitrator, pursuant to s. 24 (2), prior to the ICC Court's determination of the challenge. A complaint about impartiality under s. 68 could achieve nothing whilst DEG remained in place, and had neither been removed by the ICC Court nor by the English court pursuant to a challenge which could itself only be made after the ICC Court's decision. This is because, as Mr Diwan submitted, it was only by removal of DEG (by one route or the other) that a differently constituted tribunal would come into existence. It is difficult to see the point of a s. 68 challenge when the existing Tribunal remained in place. Furthermore, it was only when the challenge succeeded before the ICC Court that Aiteo could have any degree of confidence that an application under s. 68 would have a real prospect of success and that such an application was justified. Overall, I have no doubt that it was reasonable for Aiteo to await the ICC Court's decision on the challenge.

266. Thereafter, Aiteo did move very quickly. The s. 68 application, which required a carefully drafted Claim Form and detailed supporting evidence from Mr Wilmot, was issued within 8 working days of the ICC Court's decision. Mr Wilmot's evidence, unsurprisingly, was that this was a sensitive matter requiring careful consideration: as he says, any challenge to a sitting arbitrator gives rise to obvious sensitivities. It is true, as Mr Juratowitch submitted, that Aiteo's evidence did not specifically address this short period of time. However, I do not regard this as a significant point. It is obvious from the materials which had to be submitted in support of the s. 68 application that a significant amount of work was required. I find it difficult to categorise this further period, realistically, as a period of "delay" at all. In any event, the question posed by *Kalmneft* factor (ii) is whether Aiteo acted reasonably, and I consider that they did.

267. Furthermore, when considering the arguments in relation to the period between 9 December 2023 and 30 January 2024, or between 18 January 2024 and 30 January 2024, it is important to have a sense of perspective. There is a 28-day period for making challenges under ss. 67 – 69. This 28-day period runs from that date of the award. This is because it is only at the date of the award that party is able to see whether there are any grounds for an application. Here, it was only on 9 December 2023 that Aiteo had the full picture and therefore could see whether there were grounds to challenge DEG. A prompt challenge was then made to the ICC Court, which was the appropriate and essential place to start. When that challenge succeeded, a prompt application under s. 68 was made. The application was therefore made well within 28 days of the ICC Court challenge succeeding. Even if one were to count 9 December 2023 as the starting point for the 28 days, the application would be 24 days beyond this. In the present case, I would not consider this to be a decisive point.

268. *(iii) Whether the arbitrator or the respondent has caused or contributed to the delay.* Aiteo contends that the significant delay in the making of the application (i.e. leaving out of account the period after 9 December 2023) was caused by DEG, because the relevant disclosures were made belatedly. I agree. The Lenders accepted in their skeleton argument that DEG's conduct "contributed to" the delay. In so far as the Lenders argued that Aiteo itself contributed to that delay, by failing to probe DEG further and earlier on the disclosures that she did make, I reject that case for reasons already given in relation to *Kalmneft* factor.

269. Mr Diwan also submitted that Freshfields itself also bore some responsibility: they could have mitigated the arbitrators' failings in disclosure by making disclosures that would have brought things to the fore promptly. Mr Juratowitch submitted that the fact that certain lawyers at Freshfields, not involved in the arbitration, had personal knowledge of DEG's expert instructions does not change the causation analysis: if any disclosures were to be made, they were to be made by DEG. I do not consider that I need to resolve this argument, since it carries the case no further forward. The important point is that, in relation to the period up to the disclosures on 9 December, DEG caused the delay, and Aiteo bore no responsibility.

270. *(iv) Irremediable prejudice beyond mere loss of time.* Aiteo submitted that there was no such prejudice in this case. In its written submissions, the Lenders made three points on prejudice.

271. First, an argument was advanced that there was a potential limitation issue affecting enforcement against Aiteo in Nigeria, arising from a Nigerian court having construed a limitation period as running from the date on which the original cause of action arose, rather than the date of the award. However, a written undertaking dated 3 November 2023 had been given by Aiteo, that it would not resist enforcement before the Nigerian courts of any merits award on this basis. However, the Lenders submitted that it was unclear whether Aiteo would contend that the undertaking would be ineffective in the event that the Consolidation Award is set aside, so that there were two arbitration references rather than one consolidated reference. This point having been taken, Stewarts wrote to Freshfields on 14 May 2024 stating that the existing undertaking covered both underlying arbitration references and therefore not simply the consolidated reference. However, they also made it clear that they would not be advancing the possible (and in their view incorrect) argument that the Lenders had identified. In the light of this letter, I consider that the Lenders' point falls away, and that there is no irremediable prejudice here. Indeed, Mr Juratowitch in his oral submissions did not refer to this point, or suggest that any difficulties remained following Stewarts' 14 May 2024 letter.

272. Secondly, the Lenders submitted that Aiteo might take the point that, if the Consolidation Award was set aside, there would no longer be a power to consolidate pursuant to the relevant contractual provisions, because a date for witness statements had been fixed. Mr Diwan confirmed in his oral submissions that this was not a point that Aiteo would take, even assuming that it was available to be taken at all. Again, Mr Juratowitch did not refer to this point in his oral submissions, or suggest that any difficulties remained following Mr Diwan's statement on this issue. In my view, this point also fell away and is not the basis for an argument of irremediable prejudice.

273. Thirdly, the Lenders submitted that if Aiteo were to prove its claim in full, the significant costs that the Lenders have incurred to date would likely be wasted. These include the costs arising out of the arbitration itself and various proceedings before this court. I consider that this is a very weak point on irremediable prejudice. If (as here) there has been apparent bias affecting an Award, and substantial injustice is shown, I cannot see that it is realistic for a party to oppose an application for an extension of time on the basis that costs, incurred in obtaining the award affected by apparent bias, would be wasted.

274. In any event, I was not persuaded that significant costs would be wasted in circumstances where (as discussed below in Section G) the appropriate remedy in the present case would be for the award to be remitted to the (reconstituted) Tribunal for reconsideration. Such money as has been spent by the Lenders in relation to preparing and advancing their arguments first time around, and obtaining decisions in their favour, would mean that the hard work had been done and would not need to be repeated.

275. *(v) Whether the arbitration has continued during the period of delay, and the impact on the progress of the arbitration or the costs incurred*. I do not consider that this is a significant factor here. If one or more of the Awards were tainted by apparent bias, and there were some disruption to the progress of the timetable in consequence of remission of the Awards for reconsideration, that would not be a significant reason for declining to grant an extension of time so as to permit the challenge. The downside of disruption would be significantly outweighed by the upside and importance of the dispute being determined by an impartial tribunal.

276. Furthermore, I do not consider that any real disruption to the arbitration would be likely to occur even if Aiteo's application had succeeded in full. The arbitration has of course been continuing during the period of DEG's involvement. It has also continued during the period subsequent to her removal and replacement by Mr Edelman KC earlier this year. No hearing date has been affected, and it appears to me to be unlikely that any hearing date will be affected. The arbitration is still in the stage where preparations are being made for a final merits hearing, and those preparations can continue. The merits hearing has now been fixed for 10-21 March 2025. The (newly constituted) Tribunal has refused an application for a stay, and set a procedural timetable leading to the merits hearing. In rejecting the stay application, the Tribunal said this in its letter dated 22 March 2024:

> "There are insufficiently cogent or compelling grounds for a stay. Obviously, if the Claimants succeed, further time would then have been lost. We accept, on the other hand, that the Respondent may succeed in the s.68 application. However, on this assumption, even if in the meantime the arbitration were to continue, there would not necessarily be any, or any significant, wastage of costs and time. This is because the next steps in the procedural timetable in this arbitration deal with the filing of pleadings; specifically, the filing of the Respondent's Statement of Defence and Counterclaim. At some stage of the resolution of the disputes between the parties, in whichever forum or fora this resolution eventually takes place (to put the matter neutrally), the parties will still have to file pleadings or their

> equivalent. In other words, to require the parties to prepare and file pleadings at this stage would not likely be a waste of costs or time at all. In fact, Mr Masefield suggested that the Respondent' s legal team would be working on the Statement of Defence and Counterclaim even if a stay were to be granted."

277. The Tribunal's point, that the work required to bring this case to a hearing needs to and can take place in any event, applies generally. This work can continue alongside any reconsideration of any of the Awards. The result of this judgment is that the Tribunal will only need to reconsider one of its prior awards. Although timetabling remains a matter for the Tribunal, I can myself see no reason why this reconsideration should cause any significant interference or adjustment of the timetable that the Tribunal has laid down. Indeed, even if Aiteo's s. 68 application had succeeded in full, and even if a possible adjustment of the timetable for the arbitration were then required, I do not consider that that would be a reason to refuse an extension of time in the context of a case of apparent bias. Again, the downside of disruption must give way to the importance of determination of the dispute by an impartial tribunal.

278. *(vi) The strength of the application*. A number of cases have addressed the relevance of this factor, in circumstances where (as here) there has been a "rolled-up" hearing. In *The French State v The London Steam-Ship Owners' Mutual Insurance Association Ltd* [2023] EWHC 2474 (Comm), Butcher J said at [32] that the position when there was a rolled-up hearing was different to the case where the extension application preceded the determination of the merits of the challenge to the award.

> "The position, however, is different where, as has happened in the current case, the application for an extension of time has been listed for hearing at the same time as the challenge application itself, and the Court has heard full argument on the merits of the challenge application. In such circumstances the Court is in a position to decide not merely whether the case is "weak" or "strong", but whether it will or will not succeed if an extension of time were granted. The Court is in a position to decide whether the challenge is a good or a bad one. If the challenge is a bad one, this should be determinative of the application to extend time. Whilst it may not matter in practice whether the extension is allowed and the application dismissed, or whether the extension is simply refused, logical purity suggests that it would be wrong to extend time in those circumstances: there can be no justification for departing from the principle of speedy finality in order to enable a party to advance a challenge which will not succeed."

279. I have concluded that Aiteo's claim for relief under s. 68 does have merit, and succeeds in relation to one of the Awards. Although its claim in relation to the other Awards has failed, because of Aiteo's failure to show substantial injustice, the claim did succeed on the issue of apparent bias. I consider that this degree of success, and strength of the application, is sufficient to justify granting an extension, certainly in the absence of any other factor or factors strongly pointing against it. I do not consider that there are any such factors.

280. I have considered whether, in view of Aiteo's failure in relation to 3 of the Awards, an extension should only be granted in relation to the Award where they have succeeded. It was not, however, suggested in argument that it would be appropriate to seek to sub-divide a s. 68 application in this way, with an extension being granted for one part but refused for another. I think that, in circumstances where (as here) there is a single s. 68 application, the question of extension should be considered in the context of the application as a whole. Where there has been a rolled-up hearing, and the application has succeeded in a material respect, the extension should be granted even though the application has failed in other respects.

281. *(vii) Whether in the broadest sense it would be unfair to Aiteo to be denied s. 68 relief.* Aiteo has succeeded in showing apparent bias on the part of one member of the Tribunal, and also substantial injustice in relation to one of the Awards, and in my view it would be unfair in the broadest sense to deny Aiteo s. 68 relief by refusing an extension of time.

G: The relief to be granted.

282. Section 68 (3) of the 1996 Act provides:

> "(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may—
>
> (a) remit the award to the tribunal, in whole or in part, for reconsideration,
>
> (b) set the award aside in whole or in part, or
>
> (c) declare the award to be of no effect, in whole or in part.
>
> The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration."

283. Paragraph 49 of the Claim Form was in the following terms:

> "Accordingly, pursuant to s.68 of the Arbitration Act 1996, the Claimant seeks an order setting aside the Partial Awards and/or declaring them to be of no effect and the relevant elements of the proceedings pertaining to the Partial Awards will need to be conducted afresh. It will then be a matter for the parties in conjunction with the tribunal when constituted to fix directions for consideration of the appropriate directions for and determination of the matters afresh. 2 It would not be appropriate, in the circumstances, for the matter to be simply remitted to the tribunal to be constituted for reconsideration, given that the serious irregularity pertains to the proceedings themselves and the Partial Awards."

284. The parties' arguments did not address the question of relief in any real detail. Indeed, Mr Juratowitch suggested that the question of relief and s. 68(3), if any, should be

considered at the hearing consequential on this judgment. He did, however, make the point that, under s. 68 (3), it was for the applicant to establish that reconsideration would not be an appropriate remedy. Mr Diwan said that he reserved the right to say that it would be too late to deal with the issue of relief at the consequential hearing: relief was part of the application, and should therefore be determined now. I consider that the point is straightforward and I can determine it now.

285. I am in no doubt that the appropriate order is for the Onshore Jurisdiction Award to be remitted to the newly constituted Tribunal for reconsideration. I have not been satisfied that it would be inappropriate to remit the matters in question to the Tribunal for reconsideration. On the contrary, an order for remission would be consistent with Article 15(4) of the ICC Rules which provide:

> "When an arbitrator is to be replaced, the Court has discretion to decide whether or not to follow the original nominating process. Once reconstituted, and after having invited the parties to comment, the arbitral tribunal shall determine if and to what extent prior proceedings shall be repeated before the reconstituted arbitral tribunal."

286. The question of whether the court should confine its remedy to remission, or should set aside an award, was addressed in detail by Akenhead J in *Secretary of State for the Home Department v Raytheon Systems Ltd* [2015] EWHC 311 (TCC). He referred to various authorities, and identified the important question as being whether a "reasonable person would no longer have confidence in the arbitrators' ability to come to a fair and balanced conclusion on the issues if remitted". That was a case which involved the tribunal's failure to deal with an important argument, and Akenhead J decided to set aside the Award on the basis that the existing tribunal could not come to a fair and balanced conclusion and that the matter should be considered afresh.

287. I do not consider that this test is directly applicable in the present case, because there is a more significant factor at play. Here, there has (rightly) been no challenge to any member of the reconstituted Tribunal, which remains in place. Thus, the ICC has not been asked to remove Lord Neuberger or the Hon Geoffrey Ma. There would therefore be no basis for this court to say that the parties' dispute should go to some different tribunal. Indeed, even if the test in *Raytheon* were to be applied, I have no doubt that the reconstituted Tribunal will be able to come to a fair and balanced conclusion on reconsideration.

288. It is a matter for the Tribunal to decide when that reconsideration should take place. Bearing in mind the arguments (see Section F) about potential disruption, I note that there is no reason why the reconsideration should necessarily take place at a separate hearing in advance of the merits hearing. It is always open to the Tribunal to decide to deal with a jurisdictional objection at the time of the merits award, and to deal with it in that award. I am not here suggesting that this is what the Tribunal should decide to do: it is for the Tribunal to decide. However, the fact that the reconsideration of the jurisdictional issues might take place at the merits hearing, is a further reason why the grant of an extension of time will not disrupt the progress of the arbitration.

289. It may well be, however, that the Tribunal will consider it appropriate to reconsider the matter, pursuant to the remission, in advance of the merits hearing. It will of course be for the Tribunal to decide upon the extent to which it will require or permit further oral argument on those jurisdictional issues, or whether it will decide the matter on the basis of written submissions. Either way, the Tribunal will be able to take steps which avoid any disruption to the progress of the arbitration.

290. Whether the matter is dealt with in advance of the merits hearing, or at the merits hearing itself, it would be appropriate for the Tribunal's decision following remission to be contained in a further Award. Mr Juratowitch indicated that if this were to happen, that further Award would potentially be susceptible to challenge by Aiteo (or indeed the Lenders) under s. 67. I mention this point because it is in my view a further reason why remission is appropriate. Aiteo is not disadvantaged by remission and reconsideration by the Tribunal, because the further competence-competence award will itself be susceptible to a s. 67 challenge.

CONCLUSION

291. I extend time for Aiteo to make the s. 68 application. I remit the Onshore Jurisdiction Award to the Tribunal for reconsideration pursuant to s. 68 (3). I dismiss the application in so far as it concerns the three other Awards. I reserve all questions of costs and other consequential matters to a further hearing.