1 \textbf{Background}

1.1 The underlying dispute arose out of a distribution agreement and a manufacturing agreement between the parties, relating to the supply of the Claimant’s manufacturing requirements for certain products. The agreements were governed by the laws of the State of New York.

1.2 The Claimant commenced arbitration pursuant to identical arbitration agreements in both the distribution agreement and the manufacturing agreement, which expressly provided for the application of the UNCITRAL Rules in force at the time of the commencement of the arbitration. The rules in force at the time of the commencement of the arbitration were the UNCITRAL Arbitration Rules 1976. The language of the arbitration was English and the seat of arbitration was New York or London.

1.3 By letter of 9 September 2010 to the LCIA, the Claimant stated that it had appointed an arbitrator, the Respondent had also appointed an arbitrator and that it objected to the Respondent’s appointment of its arbitrator. The Claimant requested the LCIA Court, as the appointing authority designated by the parties, to decide this challenge.

1.4 On 22 October 2010, the LCIA notified the parties that, in accordance with the Constitution of the LCIA Court, the President of the Court had, pursuant to Article D.2 of the Constitution of the LCIA Court, designated a Vice President of the LCIA Court to determine the Claimant’s challenge.

1.5 The parties were invited by the Vice President to make further submissions on the challenge. The Vice President received further comments from the parties on 25 and 26 October 2010.

1.6 The Vice President rendered his Decision on the challenge on 28 October 2010.
2 Decision excerpt

“[...]

12. NOW THEREFORE, having carefully considered all of the submissions and the supporting documents provided by the parties, I HEREBY REJECT THE CHALLENGE against [the Respondent’s appointed arbitrator] in the above mentioned arbitration, for the following reasons.

13. The standard to be applied to the challenge is expressed in Article 10(1) of the UNCITRAL Arbitration Rules, which provides:

‘Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence.’

14. The test of impartiality and independence should be objectively justifiable. In that regard, I have been guided by the more detailed elaborations on the issue provided by the IBA Guidelines on Conflicts of Interest in International Arbitration (the ‘IBA Guidelines’), to which both Parties made reference in their communications. As expressed in the IBA Guidelines, General Standard 2:

‘Doubts are justifiable if a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.’

15. Such a test, I believe, is necessary to achieve the appropriate balance between the parties’ confidence in the impartiality and independence of the arbitrators, the ability of the parties or arbitral institutions to select arbitrators who in their view possess the necessary character and professional experience, and an arbitral process that is fair and efficient. An objective test also promotes consistency in the application of the standards of impartiality and independence.

16. The documents presented in the challenge of [the Respondent’s appointed arbitrator] make reference also to [the Claimant’s appointed arbitrator]. The Claimant stated that, if there should be ‘any suggestion that it would be ‘extremely unfair’ to remove [the Respondent’s appointed arbitrator] but allow [the Claimant’s appointed arbitrator] to remain, [the Claimant] is prepared to ask [its appointed arbitrator] to stand down and to appoint another arbitrator’ [...]. The Respondent stated in reply that it did not believe that the solution suggested by the Claimant presented the optimum solution of the issue, and that both [the Claimant’s and the Respondent’s appointed arbitrator’s] nominations should be upheld so that the arbitrators chosen by the parties can serve on the Tribunal [...], to which the Claimant responded that there was no rationale for the Respondent’s view [...]. However, since there has been no challenge to the [Claimant’s appointed arbitrator]’s appointment, I have limited my considerations to the question of whether the challenge to [the Respondent’s appointed arbitrator] should be sustained.

17. The Claimant, in challenging [the Respondent’s appointed arbitrator], invoked the so-called ‘Orange List’ in the IBA Guidelines and in particular the following two paragraphs:
‘3.1.3 The arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties […].’;

[...] 

‘3.1.5 The arbitrator currently serves, or has served within the past three years, as an arbitrator in another arbitration on a related issue involving one of the parties […].’

18. I understand that there are currently three arbitrations afoot between the parties. The arbitration that was initiated first is known as the ‘Distribution Agreement arbitration’. The more recent arbitration is known as the ‘Manufacturing Agreement arbitration’ and the most recent arbitration initiated in August 2010, in which [the Respondent’s appointed arbitrator] has been challenged and the LCIA has been called upon to take a decision on the challenge, is […] the [present arbitration]. [The Respondent’s appointed arbitrator] was appointed by the Respondent in each of the three arbitrations. His appointments in the Distribution agreement arbitration and the Manufacturing Agreement arbitration were not challenged by the Claimant. The Claimant appointed [the same arbitrator] in the Manufacturing Agreement arbitration and the [present arbitration]. [The Claimant’s appointed arbitrator] has not been challenged in either of these two arbitrations. The final hearing in the Distribution Agreement arbitration took place in June 2010. The award is expected in the next few months. The Manufacturing Agreement arbitration is at a relatively early stage: the final hearing is scheduled to take place in February 2011. The [present arbitration] is at an even earlier stage, the Notice of Arbitration having only been served by the Claimant on 10 August 2010 […].

19. The Claimant stated that there was a strong likelihood that the witnesses for both parties in the [present arbitration] would include witnesses who have already given evidence before [the Respondent’s appointed arbitrator] in the Distribution Agreement arbitration and from whom he would hear in the Manufacturing Agreement arbitration (scheduled for a hearing in February 2011). The Claimant also stated that, particularly given the Respondent’s attack on the Claimant’s witnesses in the Distribution Agreement arbitration (the Claimant added that, of course it did not yet know the Tribunal’s reaction to that), it was right to raise the question whether or not it was appropriate for one arbitrator to become so closely involved with all the disputes between the parties. The Claimant further stated that, more importantly, it was inevitable that [the Respondent’s appointed arbitrator] would form a view about the witnesses before him and about their evidence and credibility based upon his prior perception of them […]. The Respondent replied that neither it nor [the Respondent’s appointed arbitrator] believed that his impartiality or independence in relation to the [present arbitration] was in any way compromised by his two nominations in the other two arbitrations […]. The Claimant argued that, given the degree of similarity of subject matter in the three arbitrations, doubts have arisen on the specific facts of the case. In addition, the Claimant said that [the Respondent’s appointed arbitrator] would no doubt form a view about the credibility of these witnesses and (more generally) as regards the weight to be given to their evidence. The same point, in the view of the Claimant, applies in respect of the submissions made on law or to be made by the parties in those separate arbitrations. Thus, in the estimation of the Claimant, by the time of any final hearing in the [present arbitration], [the Respondent’s appointed arbitrator] will have sat through some four weeks of hearings in the Distribution Agreement arbitration and the
Manufacturing Agreement arbitration and will (necessarily) have formed a view on the merits in those two arbitrations. In such circumstances, and in particular given the close proximity in time in which all three references will be heard, the Claimant was concerned that, consciously or sub-consciously, [the Respondent’s appointed arbitrator]’s ability to evaluate afresh the evidence and submissions on law he is to hear in the [present arbitration] will be hampered by his appointment to the earliest two disputes [...]. The Claimant also stated that the [present arbitration] is a discrete dispute, by comparison to the Distribution Agreement arbitration […], but also that all three arbitrations involve the same parties, refer to similar issues and will most likely involve some or all of the same witnesses appearing on both sides.

20. The Claimant suggested that the factual issues involved in the [present arbitration] were complex and that they were concerned that [the Respondent’s appointed arbitrator] had, or would have acquired, by virtue of his involvement in the two earlier arbitrations, a degree of specialisation that would put him in an advantageous position vis-à-vis his co-arbitrators in the [present arbitration]. Given that all three arbitrators must only consider the facts and evidence presented in the [present arbitration], there was in the Claimant’s submission at the very least justifiable likelihood that [the Respondent’s appointed arbitrator] will be unable to evaluate the evidence in isolation, because of his prior involvement in the two other disputes. In the Claimant’s view, the risk was significant enough to justify [the Respondent’s appointed arbitrator]’s removal from these proceedings.

21. I consider that, to the extent there would arise an advantage for [the Respondent’s appointed arbitrator] vis-à-vis his co-arbitrators (because of knowledge acquired by him in the previous two arbitrations), I cannot accept that this would, in and of itself, affect [the Respondent’s appointed arbitrator]’s impartiality and independence. It may happen that one arbitrator has knowledge that another member of the arbitral tribunal does not have. This, absent other circumstances, is not a reason to remove the arbitrator. Prior knowledge limited to one arbitrator might be a problem if it is, for example, tainted because it was obtained ex parte or there are other reasons that may give rise to justifiable doubts about the arbitrator’s impartiality or independence, but not merely because other members of the tribunal do not have that knowledge. In this case, it followed from the circumstances of the case that both [the Claimant’s appointed arbitrator] and [the Respondent’s appointed arbitrator] have, or will have had, prior knowledge about which the Claimant is concerned. However, it can be assumed that the knowledge has been, or will have been, obtained in an inter partes adversary process (although [the Claimant’s appointed arbitrator] would have such knowledge to a lesser degree inasmuch as he would obtain it only in the Manufacturing Agreement arbitration, and not also in the Distribution Agreement arbitration).

22. In my view, on the basis of the information presented to me, knowledge and impressions, including those obtained in related arbitrations, do not by themselves make [the Respondent’s appointed arbitrator] biased or less independent, unless there existed particular additional circumstances suggesting otherwise. No such circumstances have been suggested and I have found no reason to believe that [the Respondent’s appointed arbitrator] would not be able to treat the three arbitrations as different cases to be decided each on their own merits.
23. It was suggested that there ‘are significant practical differences between the roles played by [the parties’ respective appointed arbitrators] thus far’ [...]. It was not explained what those differences were. However, absent any allegation that the role played by [the Respondent’s appointed arbitrator] was inappropriate or showed bias, I note that it is not uncommon for arbitrators to have different attitudes or assume different roles in an arbitration, for example, as regards how proactive they are or how many and what kind of questions they ask. Such differences, in and of themselves, do not justify the removal of an arbitrator.

24. I also note that, when the Claimant appointed [its arbitrator] in the [present arbitration] on 10 August 2010 (which was after it had appointed him in the prior Manufacturing Agreement arbitration), it must have been known that [the Claimant’s appointed arbitrator] would bring to the [present arbitration] knowledge or impressions from the Manufacturing Agreement arbitration. Apparently, the Claimant did not think that was a problem. Yet when about a week later, on 17 August 2010, the Respondent appointed [its arbitrator], the Claimant took the view that the knowledge and impressions of [the Respondent’s appointed arbitrator] from the previous two arbitrations may be a problem. The Claimant did not offer a good explanation for its inconsistent behaviour. The Claimant offered to eliminate that imbalance when, as noted above, it subsequently stated that it was prepared to ask [its appointed arbitrator] to stand-down in the [present arbitration] and appoint another arbitrator. However, once [the Claimant’s arbitrator] has been validly appointed, I do not consider that the Claimant should be able to undo that appointment. The arbitrator has been appointed and should discharge his mandate.

25. Finally, I wish to clarify that repeated appointments by a party of a particular arbitrator should not be taken lightly. Such cases often raise doubts, and not infrequently justified doubts, as to the arbitrator’s independence and impartiality. However, it appears to me that multiple appointments of the same arbitrator typically raises doubts about the arbitrator becoming beholden to the party for future possible appointments. In this case, no suggestion in that direction has been made and I have no reason to think that this was a source of concern. Here the party had a concern about the knowledge derived by that arbitrator from participation in previous cases. Such knowledge, however, in my opinion and as foreseen in the IBA Guidelines, is not an automatic reason for disqualifying an arbitrator, unless there exist other circumstances suggesting that the knowledge could be used to an unfair advantage of a party. Since I have not discerned any such circumstances, I have rejected the challenge.

Costs

26. [...]

27. In accordance with Articles 38 and 40 of the UNCITRAL Arbitration Rules, the power to fix and apportion costs, including the fees and expenses of the appointing authority and any other costs associated with the challenge, is reserved to the Arbitral Tribunal. Accordingly, I do not find it appropriate to rule on the apportionment of the costs of this challenge, as requested by the Respondent [...].”