1 Background

1.1 The underlying dispute arose out of a development agreement. The agreement contained an LCIA arbitration clause, which specified that the language of the arbitration was English and the seat was London.

1.2 The Claimant filed a Request for Arbitration with the LCIA on 11 November 2010. The Respondent did not file a Response to the Request.

1.3 On 1 March 2011, the LCIA notified the parties that it had appointed the Tribunal.

1.4 On 18 March 2011, the Tribunal issued an “Agreed Schedule” and Procedural Order No. 1. Paragraph 2.1 of the Procedural Order provided that “[t]he written submissions shall be accompanied by documentary evidence relied upon by the relevant party”, and paragraph 6.1 provided that “[w]itness statements, reports of experts, documents and authorities in a language other than English will be submitted with a translation in English”.

1.5 Following the filing of the Statement of Case and Statement of Defence, the Tribunal issued an “Amended Agreed Schedule”, which provided for a second round of submissions. The Amended Agreed Schedule also included, at paragraph 4.1, that: “The Arbitral Tribunal shall only grant an extension of a time limit as an exception and provided that the request for an extension is justified, made without undue delay and before the time limit to be extended has lapsed.”

1.6 In accordance with the Amended Agreed Schedule, the Claimant submitted its Statement of Reply on 29 July 2011. In the submission, the Claimant mentioned that some exhibits were filed without a translation but that translations would be filed as soon as possible.

1.7 By email to the parties of 4 August 2011, the Chair of the Tribunal acknowledged receipt of the Statement of Reply, noting, however, that “[certain exhibits...] are without an English translation” and directed the Claimant to “produce such translations by [...] 12 September 2011 in accordance with paragraphs 6.1 of the Procedural Order No. 1 [...]”.

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**Subject:** Challenge to arbitrator’s appointment pursuant to Article 10.4 of the LCIA Rules 1998, based on Articles 10.3 (justifiable doubts as to the arbitrator’s independence and impartiality) and 10.2 (failure by the arbitrator to act with reasonable diligence)

**Division/Court member:** Three-member Division of the LCIA Court

**Summary:** The “justifiable doubts” standard contained in Article 10.3 of the LCIA Rules is an objective one. A procedural decision made by the Tribunal in favour of one party cannot, by itself, establish partiality warranting the removal of an arbitrator.
1.8 By email of 10 August 2011, the Respondent objected to the Tribunal giving the Claimant until 12 September 2011 to submit translations. The Respondent also requested the Tribunal revoke this decision on the basis that the extension was granted without a prior request of the parties, noting that under paragraph 4.1 of the Amended Schedule the Tribunal (and not the Chair alone) shall grant an extension of a time limit only as an exception and provided that the request is justified, made with undue delay and before the time limit has lapsed. It further asserted that, on the basis of these documents (which had not been translated), the Claimant had put forward new claims. It concluded that the documents that had not been translated could not be received or considered by the Tribunal since they were submitted in an inadmissible manner.

1.9 The Claimant responded by email of 11 August 2011, explaining that it had not been able to provide translations of the exhibits in question as they had only been delivered 24 hours before the deadline for the submission of the Statement of Reply, that such documents should be taken into account by the Tribunal and that it had previously made clear in its Statement of Case that its claim would include such new documents.

1.10 The parties made further comments on 12 August 2011.

1.11 By email of 16 August 2011 to the parties (without copy to his co-arbitrators), the Chair stated as follows:

“The Arbitral Tribunal feels the following way:

1. Both parties speak [the language in which the Claimant’s documents are written]. Therefore each party could understand the documents submitted and no harm was done; due process was respected.

2. The Arbitral tribunal follows the procedure, i.e. that all documents should be submitted in English. This has been decided and this decision should be respected.

3. The time limit granted to the 12th September takes into consideration the holiday season. Both Counsel are entitled as everybody else to the summer recess and the Arbitral Tribunal wishes to show the utmost courtesy to all participants in this arbitration.

The Arbitral Tribunal therefore confirms its previous decision”.

1.12 On 18 August 2011, the Respondent filed a challenge against the Chair, under Articles 10.3 and 10.4 of the LCIA Rules.

1.13 On 22 August 2011, the Claimant objected to the challenge and made submissions in response.

1.14 By email of 19 August 2011, the Chair advised, inter alia, that he did not wish to withdraw and that each draft procedural decision had been sent to his co-arbitrators for their prior comments.

1.15 On 6 September 2011, the LCIA notified the parties that, pursuant to Article 10.4 of the LCIA Rules, and Article D.3(c) of the Constitution of the LCIA Court, the LCIA Court had appointed a three-member Division of the Court to determine the challenge brought by the Respondent.
1.16 The parties made further submissions, following which on 21 September 2011, the Division declared the challenge proceedings closed.

1.17 The Division issued its decision on the challenge on 7 October 2011.

2 Decision excerpt

“[...]

B. Discussion

1. The Legal and Regulatory Principles

47. The parties have agreed to arbitration in England under the LCIA Rules. This agreement establishes the applicable framework for the arbitration generally and this challenge in particular.

   (i) The 1996 Arbitration Act

48. Pursuant to Article 16.2 of the LCIA Rules, the underlying arbitration in this case is subject to the law of the seat of arbitration.

49. The arbitration is seated in England. Under Section 2(1) of the 1996 English Arbitration Act, the provisions of the Act apply to arbitrations seated in England.

50. Section 33(1) of the Act is a mandatory provision of the lex arbitri and it provides that an arbitral tribunal shall ‘act fairly and impartially a between the parties’ and that it shall ‘adopt procedures suitable to the circumstances of the particular case’. Under this provision, each party should be given a ‘reasonable’ opportunity of putting its case and of dealing with that of its opponent and suitable procedures should be adopted by the tribunal that avoid unnecessary delay and expense, so as to provide a ‘fair’ means for resolving the particular dispute.

51. Section 33(2) of the 1996 Arbitration Act provides that the tribunal shall comply with that general duty in conducting the arbitral proceedings, and also in its decisions on matters of procedure and evidence, as in the case at hand.

   (ii) The LCIA Rules

52. Under Article 5.2 of the LCIA Rules, all arbitrators conducting arbitration under the LCIA Rules shall be and remain at all times impartial and independent of the parties.

53. Article 10 of the Rules concerns arbitrator challenges. Articles 10.1, 10.2 and 10.3 specify grounds on which an arbitrator may be challenged and ultimately removed from a case, and Article 10.4 describes the procedure for challenging an arbitrator.

54. In the present challenge the Respondent has invoked Articles 10.3 and 10.4 of the Rules. Article 10.3 provides:

   ‘An arbitrator may also be challenged by any party if circumstances exist that give rise to justifiable doubts as to his impartiality or independence. A party may challenge an arbitrator it
has nominated, or in whose appointment it has participated, only for reasons of which it becomes aware after the appointment has been made.’

55. Article 10.4 provides

‘10.4 A party who intends to challenge an arbitrator shall, within 15 days of the formation of the Arbitral Tribunal or (if later) after becoming aware of any circumstances referred to in Article 10.1, 10.2 or 10.3, send a written statement of the reasons for its challenge to the LCIA Court, the Arbitral Tribunal and all other parties. Unless the challenged arbitrator withdraws or all other parties agree to the challenge within 15 days of receipt of the written statement, the LCIA Court shall decide on the challenge.’

56. The Respondent has also alleged that [the Chair] lacked due diligence. The Respondent does not particularise this allegation, and Article 10.3 does not include lack of diligence as a basis for a challenge. Article 10.2 however provides relevantly that:

‘If any arbitrator acts in deliberate violation of the Arbitration Agreement (including these Rules) or does not act fairly and impartially as between the parties or does not conduct or participate in the arbitration proceedings with reasonable diligence, avoiding unnecessary delay or expense, that arbitrator may be considered unfit in the opinion of the LCIA Court’.

57. Hence, although the Respondent has not invoked 10.2 in its Challenge, the Division will also consider whether the Respondent has made out a basis for challenge under that Article’s ‘reasonable diligence’ requirement.

2. The Review Powers of the Division

58. The present Challenge appears to have been filed in a timely fashion, in accordance with Article 10.4 of the LCIA Rules. The LCIA Court President duly referred the matter to the Division, and no objection has been made to the constitution of the Division. The Division therefore considers that it may exercise its powers in accordance with the Rules.

59. The Division’s powers are limited to analysing the Respondent’s challenge to [the Chair] based on the applicable law and Rules, and on information and arguments the parties have submitted. The Division has not made any further factual investigation; it does not exercise appellate review over decisions taken by the Arbitral Tribunal in the exercise of its discretion; and it does not otherwise supervise the manner in which an Arbitral Tribunal exercises its powers, except in limited circumstances of gross irregularity.

3. The Analysis

60. The Division now turns to the analysis of the purported grounds for challenge. For the reasons set forth below, the Division concludes that the Respondent’s challenge is groundless and rejects it.

(i) Alleged justifiable doubts regarding impartiality under Article 10.3

61. Respondent’s principal contention is that, by permitting the Claimant to submit translations of documents by a date subsequent to the Claimant’s Reply, [the Chair] created justifiable doubts
about his impartiality. There is no allegation of doubts, justifiable or otherwise, about [the Chair]’s independence.

62. Respondent offers no analysis of the justifiable doubts standard, nor does it explain why even if [the Chair]’s conduct could be said to have created doubts of some kind, those doubts would be justifiable ones.

63. The ‘justifiable doubts’ standard contained in Article 10.3 is an objective one. Doubts are justifiable only if a reasonable, objective observer would have a legitimate reason to harbour doubts about the arbitrator. Subjective or idiosyncratic doubts of the challenging party are not enough to satisfy the standard.

64. Moreover, those doubts must concern the arbitrator’s impartiality. They must provide a basis for a reasonable, objective observer to believe that the arbitrator is not, or is not capable of being, impartial. Impartiality obligates the arbitrator to be evenhanded and decide the dispute according to its merits rather than on favouritism toward one of the parties.

65. There is no single test or checklist for determining if an arbitrator has created justifiable doubts about his impartiality. For example, an arbitrator may run afoul of the standard if he displays open and unwarranted hostility to a party, publicly disparages a party or consistently and repeatedly decides issues against a party without valid reasons.

66. The facts of this case are different from any such conduct. Here the Respondent’s principal complaint seems to be that [the Chair] communicated to the parties a procedural decision of the Tribunal that the Respondent simply did not like and considers will be inimical to its position. Tribunals necessarily must decide disputed issues. That is their function. Deciding in favour of one party and against another on an issue therefore cannot by itself establish partiality warranting an arbitrator’s removal, for if it did arbitration could not function. The Respondent would have to show something more than merely a procedural decision on an issue adverse to it. The Respondent has, however, made no such showing.

67. The Respondent contends that [the Chair] initiated the extension without request by the Claimant. However, Claimant has stated (without contradiction by Respondent) that it specifically mentioned the missing translations in its Reply and promised that it would submit the translations shortly. In that circumstance it was entirely appropriate for the Tribunal to fix a date for production of the translations. Article 14.1(i) of the LCIA Rules requires the Tribunal at all times to conduct the proceedings in a manner that gives each party ‘a reasonable opportunity of putting its case and dealing with that of its opponent’. Affording a party a reasonable time to submit translations of exhibits on which it relies – whether or not the party had requested such an opportunity – is consistent with that fundamental mandate. Indeed, if the Tribunal had refused to accept translations as Respondent urged, it might have risked violating this fundamental mandate of Article 14.1 as it would have meant that the Claimant would have had to put its case based on documents that at least one Tribunal member could not understand.

68. The Respondent also contends that the September deadline for translations violated an agreement between the parties regarding the procedure. Respondent cites Article 14.2 of the LCIA Rules, which provides:
Unless otherwise agreed by the parties under Article 14.1, the Arbitral Tribunal shall have the widest discretion to discharge its duties allowed under such law(s) or rules of law as the Arbitral Tribunal may determine to be applicable; and at all times the parties shall do everything necessary for the fair, efficient and expeditious conduct of the arbitration.’ (emphasis added)

Based on the bolded language the Respondent essentially contends that the amended Agreed Schedule was an agreement by the parties that was effectively written in stone so as to constrain discretion the Tribunal would otherwise enjoy and that therefore could not be varied by the Tribunal.

69. The Division notes, in this respect that pursuant to Article 4.7 of the LCIA Rules, the Tribunal retains the power to ‘extend (even when the period of time has expired)... any period of time prescribed under these Rules or under the Arbitration Agreement for the conduct of the arbitration’. Exercising this authority that the Rules expressly confer is obviously not a violation of the Rules. Hence even if an agreement on procedure under Article 14.1 may, under Article 14.2, limit the full discretion a Tribunal would otherwise enjoy to specify the procedure, Article 4.7 and even Article 14.1 itself make clear that the Tribunal in carrying out its mandate can vary deadlines even where they have been the subject of party agreement. As a consequence, the Tribunal was in any event free to vary dates established in the Amended Agreed Schedule or Procedural Order No. 1.

70. In addition, the facts indicate no breach of agreed procedural rules by [the Chair] or the Tribunal. Indeed, even assuming for present purposes that a Respondent is correct in its contention that the Amended Agreed Schedule represented a procedural agreement between the parties of the kind Article 14.2 references, here the procedure was followed. The Amended Agreed Schedule provided that it could be varied upon timely request and for good cause. In its Reply the Claimant sought to submit translations later, and the Tribunal was free to conclude that it had good cause to do so given the underlying documents had been created by the Respondent [...] and had been served on the Claimant only three days before its Reply was due. The Amended Agreed Schedule required nothing more.

71. Moreover, the Respondent is not correct to allege it has been prejudiced. Respondent objects that the Tribunal will now be ‘taking into consideration’ documents produced after the deadline, and argues that ‘the attempt of the Claimant to introduce these new claims to this arbitration proceedings raises serious issues that relate to their admissibility’ and to the merits. The Respondent therefore contends that the September deadline acts directly favour the Claimant ‘who is thus enabled to present arguments in relation to the new claims which it attempts to introduce at this stage of the proceedings’. However, such complaints are aimed at the underlying tax assessment documents themselves. On any view, those documents have been produced timely, namely together with the Claimant’s Statement of Reply of 29 July 2011 on the one hand, and could have been submitted later as they were not an intrinsic part of the Statement of Reply on jurisdiction but rather related to other aspects of the case, on the other hand. Yet this challenge is not predicated on the submission of documents as such, but on the submission of translations into English of these documents regularly and timely produced in the [language of the original document]. Translations are only translations; they are not themselves the evidence, but are a means for understanding evidence that is rendered in another language.
Submission of translations so that the documents could be understood by [the Chair] (apparently the only participant in the case who does not read [the language in which the document is written]) in the English language arbitration therefore could not create any ‘new claims’ not already established by the timely submitted documents.

72. At the same time, the Respondent was not at all prejudiced in its ability to prepare its defence. It is undisputed that the Respondent [...] created and issued the... documents, and they were issued in the native language of the Respondent and its Counsel. Hence later submission of the translations could in no way interfere with the Respondent’s possibility to analyze the documents, or with its ability to submit its Second Response on 30 September 2011, as the Agreed Amended Schedule provided. That Second Response therefore afforded the Respondent a reasonable opportunity to address whatever complaints it has had about the [...] documents, whether regarding their admissibility, relevance, merits or otherwise.

73. The Division also rejects Respondent’s contention that [the Chair] breached the arbitration agreement and the LCIA Rules because in his 16 August 2011 email he allegedly did not address Respondent’s objections in a duly reasoned manner, and he did not copy his co-arbitrators.

74. As to the first alleged breach, [the Chair] clearly indicated reasons for rejecting the Respondent’s objection, e.g. both parties speak [the language in which the document is written], no harm was done, due process was respected, the principle that all documents should be filed in English was upheld. As to the second alleged breach, the Tribunal is free to organize its communications with the Parties as it deems fit. Whether or not the co-arbitrators were copied is irrelevant. [The Chair] has stated in his communication to the Parties of 19 August 2011 that all decisions were preceded by proper deliberations with the co-arbitrators. This statement was not questioned by the Respondent in the present Challenge.

(ii) Alleged lack of reasonable diligence under Article 10.2 of the LCIA Rules.

75. Respondent has also summarily asserted that [the Chair] breached his diligence obligation. Even construing this as a challenge under Article 10.2 (although Respondent does not cite that Rule), it is not sustainable. The Respondent does not explain when and how such breach might have occurred. Diligence requires an arbitrator to devote the necessary time and effort to the arbitration. Contrary to Respondent’s vague allegation, the facts before the Division suggest that both [the Chair] and the Arbitral Tribunal have been responsive to both parties’ requests and applications in a diligent manner. For example, [the Chair] communicated on behalf of the Tribunal about the translations within five days of receiving Claimant’s Statement in Reply. He also responded promptly to the Respondent’s objections regarding the translations. Respondent may disagree with the Tribunal’s decision regarding the submission of translations, but it has provided no basis to complain that the Tribunal or [the Chair] lacked diligence in addressing the issue.

V. DECISION

For all the reasons above, the Challenge Division decides unanimously as follows:

1. Respondent’s Application seeking the revocation of the appointment of [the Chair] under Articles 10.3 and 10.4 of the LCIA Rules is denied and dismissed.
2. *The costs incurred by the parties in connection to the present Challenge, as well as any legal fees related thereto, shall be determined as part of the final award in the underlying arbitration.*”