Subject: Challenge to arbitrator’s appointment pursuant to Article 10.4 of the LCIA Rules 1998, based on Articles 5.3 (requirement to declare any circumstances likely to give rise to any justifiable doubts as to an arbitrator’s impartiality or independence) and 10.3 (justifiable doubts as to the arbitrator’s independence and impartiality)

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

Summary: There is no obligation on an arbitrator to disclose the activities of other barristers in the same chambers and the non-disclosure by an arbitrator of activities of other barristers in the same chambers does not give rise to “justifiable doubts” under LCIA Rules Article 5.3’s disclosure requirements. Further, the relevant circumstances in each case should be considered in deciding whether or not a justifiable doubt may be raised by barristers from the same chambers acting as arbitrator and party counsel in the same proceeding.

Two international arbitration practitioners in the same proceeding appearing together on an educational panel covering an unrelated topic is a common occurrence that neither requires disclosure nor raises a justifiable doubt as to impartiality or independence.

1 Background

1.1 The underlying dispute arose out of a loan note and a settlement deed. The arbitration clause contained in the settlement deed provided that disputes would be resolved by arbitration under the LCIA Rules. The seat in of the arbitration was London and the language was English.

1.2 The Claimant commenced a related proceeding in May 2007 against the Respondent (the “2007 Arbitration”). The Claimant nominated an arbitrator and the Respondent failed to make a nomination, but specifically agreed that the LCIA Court should proceed to make the selection. The LCIA Court selected an arbitrator on behalf of the Respondent (the “Co-arbitrator”) and appointed the Tribunal in July 2007. The Respondent raised no objection to the Co-arbitrator during the course of the 2007 Arbitration.

1.3 The Claimant filed a second Request for Arbitration with the LCIA on 9 July 2008 and nominated the same arbitrator as it had in the 2007 Arbitration. The Respondent did not nominate an arbitrator. The LCIA selected the same arbitrator that it selected in the 2007 Arbitration on behalf of the Respondent and the two arbitrators selected the same chairperson (the “First Chair”).

1.4 On 5 September 2008, the LCIA notified the parties that it had appointed the Tribunal, comprising the same Tribunal members as the Tribunal in the 2007 Arbitration.
1.5 The Respondent did not participate in the first phase of the present arbitration culminating in the First Partial Award, dated 11 August 2009. Shortly after the issue of the First Partial Award, the Tribunal stayed the arbitration upon the request of the Claimant, pending the outcome of an appeal in the Privy Council (the “Previous Appeal”) on the ground that the ruling might impact the Claimant’s claims in the arbitration.

1.6 The stay was lifted in December 2011, at which stage the Respondent decided to participate in the arbitration and retained legal representatives.

1.7 On 19 February 2013, the First Chair made a disclosure that he had been instructed by the law firm which represented the Claimant in this arbitration (the “Claimant’s Counsel”) during the period this arbitration had been stayed. Following exchanges between the parties and the First Chair, he withdrew from the Tribunal on 24 February 2012.

1.8 On 27 February 2012, the Respondent requested that the LCIA reconstitute the entire Tribunal, pursuant to the original nominating process with each party nominating an arbitrator and the nominees selecting the chairperson. The grounds for the Respondent’s request was that it was now participating and had not named any arbitrator to the Tribunal and the arbitration was starting a new phase.

1.9 On 29 February 2012, the LCIA advised the parties that the LCIA Court had rejected the Respondent’s request, stating that only the First Chair needed to be replaced and that the replacement chairperson would be selected by the co-arbitrators.

1.10 Also on 29 February 2012, the Respondent requested that it be allowed to nominate a replacement for the First Chair and that the Co-arbitrator become the chairperson.

1.11 On the same day, the LCIA informed the parties that the LCIA Court also rejected the Respondent’s second request and invited the co-arbitrators to proceed to select a chairperson.

1.12 On 7 March 2012, the Respondent asked whether it might propose a list of candidates for consideration by the co-arbitrators. On 8 March 2012, the co-arbitrators stated that they would afford the parties an opportunity until 12 March 2012 to agree upon a list of candidates for their consideration, but would not consider a list provided unilaterally by one party helpful in absence of agreement between the parties.

1.13 On 9 March 2012, the Respondent asserted that the present situation was unfair and unjust and stated that it would not participate unless the whole Tribunal was reconstituted. The Respondent further stated that the LCIA had rendered the composition of the Tribunal improper ab initio by selecting a British national so that the Respondent faced the prospect of two British nationals selecting the chairperson. In response, the LCIA noted that the Co-arbitrator was of Australian nationality.

1.14 On 11 March 2012, the Respondent informed the LCIA that the chambers of which the Co-arbitrator is a member (the “Chambers”) had been adverse to the Respondent in prior litigation and had represented and/or advised an individual (“Mr X”) whose interests include the Claimant. The Respondent asserted that this disqualified the Co-arbitrator and reiterated its request for reconstitution of the entire Tribunal.
1.15 On 13 March 2012, the Respondent stated that it would file a formal challenge if the Co-arbitrator did not step down and requested the Co-arbitrator to answer thirty questions. The questions related to, inter alia, whether the Co-arbitrator had conducted conflicts checked before appointment and the scope and results of the check, whether various members of the Chambers had acted for or against either of the parties, whether his conflicts checks prior to his appointment included whether any member of the Chambers had advised the Claimant and/or Mr X, the manner in which the Chambers is organised and information about its marketing practices, whether the Co-arbitrator has been referred work from, been instructed by any client of, or collaborated with, any other members of the Chambers and whether he had ever been instructed by the Claimant’s Counsel.

1.16 On 21 March 2012, the LCIA wrote to the parties communicating a message from the Co-arbitrator. The Co-arbitrator confirmed, inter alia, that he had conducted a conflicts check before his appointment and signed a declaration confirming that he knew of no circumstances that would likely give rise to any justifiable doubts as to his independence and impartiality and that this remained accurate, that his conflicts check was limited to his own practice as a sole practitioner, that to the best of his knowledge he had never worked on matters related to Mr X or any entity in which Mr X has an interest, or with which he was affiliated, that to the best of his knowledge he had never been instructed by the Claimant’s Counsel and that he was an Australian national.

1.17 On 26 March 2012, the Respondent filed a request for reconsideration of the LCIA Court’s decision not to reconstitute the entire Tribunal and a challenge to the Co-arbitrator.

1.18 On 27 March 2012, the LCIA notified the parties that the LCIA Court had revoked the appointment of the First Chair and appointed a replacement chairperson (the “Second Chair”), by the joint nomination of the co-arbitrators.

1.19 On the same date, the Respondent asserted that the Second Chair should not have been appointed before the challenge against the Co-arbitrator had been resolved, and requested the 15 day period under Article 10.4 be suspended until the challenge had been resolved so that, were the Respondent to be successful and therefore allowed to nominate an arbitrator, it may then file a challenge against the Second Chair within the time prescribed under the Rules.

1.20 On 29 March 2012, the LCIA rejected the Respondent’s request on the basis that there could be no prejudgment of the outcome of the challenge, and the challenge did not suspend the arbitration proceedings.

1.21 On 10 April 2012, the Claimant filed its submissions on the challenge.

1.22 Also on 10 April 2012, the Respondent filed a “Challenge to the Nomination of the Chair”. On 11 April 2013, the LCIA identified this filing as not being a challenge to the Second Chair under Article 10.4 of the LCIA Rules, but as being an opposition to the manner and timing of the Second Chair’s appointment.

1.23 On 11 April 2012, the Respondent requested the right to reply to the Claimant’s submissions. The LCIA advised that it would be for the Division to decide whether it required any further submissions.
1.24 On 17 April 2012, the LCIA notified the parties that, pursuant to Article 10.4 of the LCIA Rules, and paragraph 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 Respondent’s challenge.

1.25 The Respondent made further submissions in reply on 17 May 2012. The Co-arbitrator did not submit any further comments.

1.26 The Division issued its decision on the challenge on 1 June 2012.

2 Decision excerpt

"[...]

III Discussion

33. Based on the exchange of correspondence among the parties and the LCIA, the Division is tasked with the responsibility to decide the following matters:

(i) the [Respondent]’s challenge to [the Co-arbitrator];
(ii) the [Respondent]’s request for reconsideration of the LCIA’s decision not to reconstitute the entire Tribunal; and
(iii) the [Respondent]’s objection to the appointment of [the Second Chair] as Tribunal Chair.

34. The [Respondent] has requested a hearing on its Challenge. [...] The Division, however, granted the [Respondent]’s request to submit a reply, and finds that both parties have amply set forth their respective positions in the existing written record. The Division, therefore, concludes that there is no need for further argument, oral or written.

A. The Challenge to [the Co-arbitrator]

35. The [Respondent] bases its challenge to [the Co-arbitrator] on two alternative grounds that circumstances exist which give rise to justifiable doubts concerning [the Co-arbitrator]’s impartiality or independence:

(i) [The Co-arbitrator] has refused to answer questions from, and disclose information to, the [Respondent] that directly relate to the [Respondent]’s articulated circumstances that give rise to justifiable doubts concerning his impartiality or independence; and
(ii) The evidentiary record confirms that circumstances exist that give rise to justifiable doubts concerning the impartiality or independence of [the Co-arbitrator]. [...]

36. Before considering the [Respondent]’s grounds, the Division addresses the [Claimant]’s contention that the Challenge should be dismissed as untimely.

37. Article 10.4 of the LCIA Rules provides:

‘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.’ (Emphasis added).

The LCIA confirmed that, when considering when a party becomes aware of circumstances for the purposes of an Article 10 challenge, it takes into account not only when the relevant party actually became aware but also whether it could have discovered those circumstances by exercising reasonable diligence at the time. [..]

38. Here, the [Respondent]’s challenge is based on the involvement of [the Chambers] in [a previous appeal in the Privy Council] and in activities concerning [Mr X]. The... appeal, in which the [Respondent] itself participated, occurred in 1994 [...], while the allegations of [the Chambers]’ involvement with [Mr X] derive from press articles dating back to 2001 [...]. The [Respondent] does not dispute either date.

39. Furthermore, the timing of the [Respondent]’s communication of its having ‘just learned’ of these circumstances in March 2012 is troubling. As Claimant notes, the [Respondent]’s objections were first articulated some three-and one-half years after [the Co-arbitrator]’s appointment in the related 2007 Arbitration, some two-and-one-half years after his appointment in the present arbitration and, in any event, more than three months after the [Respondent] started participating in this proceeding in December 2011. Moreover, the objections were only advanced following the LCIA’s decision not to permit the [Respondent] to nominate an arbitrator. Indeed the [Respondent] went so far as to propose that [the Co-arbitrator] be realigned as Tribunal Chair in order to allow the [Respondent] to make a nomination.

40. The [Respondent], in the Division’s view, gives no compelling reason for waiting until March 2012 to object to [the Co-arbitrator] based on information as to which the [Respondent] had either personal (in the case of the [Previous Appeal]) or public (in the case of [Mr X]) knowledge of long standing. Although the [Respondent] asserts that it is also moving on the manner in which [the Chambers] conducts its business [...], this alleged circumstance is no recent event, as shown by Respondent’s reliance on a brochure [which stated when the Chambers was founded] [...].

41. The Division is, therefore, of the opinion that a finding of untimeliness would be justified. Nonetheless, the Division is hesitant, given the circumstances of this case, to dismiss the challenge without consideration and determination of its substantive merits. The Division will therefore proceed to address the grounds of the challenge.

1. Failure to Disclose

42. Article 5.3 of the LCIA Rules requires an arbitrator to disclose at the initiation of the arbitration ‘any circumstances’ that are ‘likely to give rise to any justifiable doubts as to his impartiality or independence.’ The arbitrator’s duty to disclose is ongoing throughout the arbitration, as further stated in Rule 5.3: ‘Each arbitrator shall thereby also assume a continuing duty forthwith to disclose any such circumstances to the LCIA Court, to any other members of the Arbitral Tribunal and to all the parties if such circumstances should arise after the date of such declaration and before the arbitration is concluded.’

43. The [Respondent] alleges that [the Co-arbitrator] has failed to disclose information and to answer its questions as to ‘whether [the Chambers] functions in a manner such that it must be
considered to be a collaborative venture under Hrvatska Elektroprivreda, d.d. v. The Republic of Slovenia, ICSID Case No. ARB/05/24 (6 May 2008), so that [the Co-arbitrator] may be disqualified based on the activities of his fellow barristers at [the Chambers]’. [...] 

44. It is not disputed that [the Co-arbitrator] has declined to answer the [Respondent]’s questions (Nos. 6-23) concerning the activities of other barristers in his chambers or the operations of his chambers. Nor has he answered questions (Nos. 24-28) concerning his own practice that do not relate to past or present dealings with the parties and counsel to this proceeding or to [Mr X]. But, it is hotly disputed whether he is under any obligation to do so for purposes of Article 5.3 of the LCIA Rules.

45. The crux of the [Respondent]’s challenge is that – contrary to established English legal practice – [the Chambers] is not to be regarded as a group of barristers acting as independent practitioners and so, for conflict purposes, it is not only the matters which [the Co-arbitrator] is engaged on which are relevant but also those of the other members of his Chambers. To advance this proposition, the [Respondent] relies almost exclusively on Hrvatska, in which the respondent’s counsel retained a barrister from the same chambers as the President of the tribunal in connection with the substantive hearing. The claimant sought, and the tribunal granted, an order precluding the barrister’s participation on the grounds that, in the circumstances of the case, the claimant would otherwise have a justifiable doubt as to the President’s impartiality and independence.

46. In speaking of a barrister’s relationship with chambers, the Hrvatska tribunal made the following observations:

‘17. Barristers are sole practitioners. Their Chambers are not law firms. Over the years it has often been accepted that members of the same Chambers, acting as counsel, appear before other fellow members acting as arbitrators....

18. It is, however, equally true that this practice is not universally understood let alone universally agreed, and that Chambers themselves have evolved in the modern market place for professional services with the consequence that they often present themselves with a collective connotation....

31. The Tribunal does not believe there is a hard-and-fast rule to the effect that barristers from the same Chambers are always precluded from being involved, respectively, as counsel and arbitrator in the same case. Equally, however, there is no absolute rule to the opposite effect. The justifiability of an apprehension of partiality depends on relevant circumstances....’

47. Hrvatska does not endorse the [Respondent]’s novel, if not unprecedented, proposition that a barrister can be disqualified from acting as an arbitrator solely because of the activities of other barristers in the same chambers, regardless of the relationship of those activities to the arbitration proceeding. To the contrary, Hrvatska explicitly affirms that chambers are not law firms and that barristers are independent practitioners. Hrvatska does not establish, nor did it seek to propound, a ‘collaborative venture test’ by which chambers would be deemed to be law firms for conflict purposes. If that had been the case, the same chambers relationship between President and counsel there would have resulted in automatic disqualification (because they came from a chambers that marketed itself
with a collaborative connotation), not in a fact-based determination. The [Respondent] has taken Hrvatska’s reference to certain chambers marketing themselves with a collective connotation and used it to craft a test of its own devising, and propounding intrusive interrogations of [the Co-arbitrator] based upon it, notwithstanding Hrvatska’s injunction to avoid any such ‘hard-and-fast’ rule.

48. Instead, Hrvatska holds that the acknowledged independence of barristers in chambers ought not to be used as a shield to preclude a fact-based enquiry as to whether a justifiable doubt may be raised by barristers from the same chambers acting as arbitrator and party counsel in the same proceeding. There is no suggestion, however, that any barrister from [the Chambers], other than [the Co-arbitrator], has acted in the present proceeding. Hence, the Division finds that there is no basis to impose upon him an obligation to disclose the activities of other barristers in his chambers; therefore, non-disclosure of such activities does not give rise to ‘justifiable doubts’ under Article 5.3’s disclosure requirement.

49. Accordingly, the Division finds that the [Respondent] has not established a ground under the LCIA Rules to challenge [the Co-arbitrator] on the basis of failure to disclose information.

2. Appearance of Partiality

50. The [Respondent] also challenges [the Co-arbitrator] under Article 10.3 of the LCIA Rules, which provides, in relevant part, as follows:

‘An arbitrator may also be challenged by any party if the circumstances exist that give rise to justifiable doubts as to his impartiality or independence...’

51. In deciding what such circumstances are under Article 10.3 of the Rules, the LCIA Court may have regard both to the position under English law (which is the lex arbitri) and to relevant international standards.

52. The [Respondent] contends that the [Claimant] mistakenly relies on an English ‘apparent bias’ test based on claims of actual bias. [...]. But, there is no question that English law is in accord with international standards in taking into account justifiable doubts based on an ‘appearance of bias,’ as is succinctly stated in a case cited by the [Respondent]:

Arbitrators must not only be fair, but must be seen to be fair: a clear distinction is to be drawn between actual or alleged partiality and the appearance of partiality. K/S Norjarl A/SA v. Hyundai Heavy Industries Co. Ltd., [1992] Q.B. 863 867 Court of Appeals (Civil Division) 1991-02-21

53. The [Respondent] relies on the ‘appearance of bias’ criterion because, as it candidly acknowledges, it ‘is not arguing that [the Co-arbitrator] is actually biased or that there is a real possibility that he is biased... The basis of this challenge to [the Co-arbitrator] is his perceived appearance of partiality and lack of independence as a result of the conflicts of his fellow barristers at [the Chambers] [...]. The alleged conflicts, as previously noted, have nothing to do with this arbitration and the [Respondent] has, indeed, affirmed the Partial Award in which the [the Co-arbitrator] participated. Rather, the [Respondent] asserts, on the purported authority of Hrvatska, that [the Co-arbitrator] cannot be deemed as independent practitioner from his fellow barristers because his chambers is a ‘collaborative venture’.
54. As previously discussed, Hrvatska does not enunciate any ‘collaborative venture’ disqualification test. What Hrvatska does counsel against, though, is any ‘hard-and-fast rule employing the rubric of barrister independence to summarily dismiss a challenge based on the activities of barristers from the same chambers as the arbitrator. Instead, the relevant circumstances should be considered in each case. The Division agrees.

55. The Division finds the following to be the relevant circumstances in this case:

(i) There is no suggestion in the record that [the Co-arbitrator] has acted for or against either party to this proceeding.

(ii) There is no evidence that [the Co-arbitrator] has acted on any matters related to [Mr X] or any entity in which he is interested or which he is affiliated.

(iii) There is no suggestion that any other barrister in [the Chambers] is acting for or against either party in this arbitration (unlike the situation in Hrvatska).

(iv) The London chambers system of barristers acting as independent practitioners is familiar to the [Respondent] (unlike the party in Hrvatska to whom it was ‘fully foreign’). [The country from which both parties originate] is a former British colony and, even after independence [...], the Privy Council remained its final court of appeal [...]. The [Respondent] has instructed English barristers to represent it in appeals before the Privy Council, including the [Previous Appeal]. Indeed, barristers from [the Chambers] appeared on opposing sides of the [Previous Appeal] without objection from the [Respondent].

56. The Division finds that, under the totality of the relevant circumstances in this case, the fact that other barristers in [the Chambers] have acted or may have acted on behalf of [Mr X] or parties adverse to the [Respondent] in other matters, does not raise the appearance of bias nor a justifiable doubt as to [the Co-arbitrator]’s impartiality or independence.

57. The [Respondent] further objects that [the Co-arbitrator] and the [Claimant]’s lead counsel [...] appeared together on a three-person faculty panel at a [conference...] in 2010, while this arbitration was ongoing [...]. [The Co-arbitrator] confirmed no other past instruction from, nor present involvement with, with [the Claimant’s lead counsel’s law firm]. The mere fact of two international arbitration practitioners in the same proceeding appearing together on an educational panel covering an unrelated topic is a common occurrence that neither requires disclosure nor raises a justifiable doubt. Moreover, the [Respondent] cites no authority to the contrary.

58. Accordingly, the Division determines that Respondent has not set forth any ground under the LCIA Rules to challenge [the Co-arbitrator]’s impartiality or independence.

B. Request for Reconsideration of Decision Not to Reconstitute Entire Tribunal

59. The premise of the [Respondent]’s request is that, after the [First Chair] resigned as Chair and had to be replaced, the LCIA should have, ‘to give full effect to the parties’ agreement’, allowed the parties to re-designate the ‘wing’ arbitrators who, in turn, would select the Chair. [...]. The [Respondent] contends that the LCIA has the discretion to undertake such course of action under Article 11.1 of the LCIA Rules, which provides in relevant part:
‘... if an appointed arbitrator is to be replaced for any reason, the LCIA Court shall have a complete discretion to decide whether or not to follow the original nominating process.’

60. The [Respondent]’s premise is not tenable. [The First Chair]’s resignation necessitated the replacement of the Tribunal Chair only. The parties’ arbitration agreement provides that the two wing arbitrators are to select the Chair. Thus, when the LCIA exercised its discretion to invite the wing arbitrators [...] to select [the First Chair]’s replacement, it simply followed the ‘original nominating process’ for selecting the Chair, in accordance with both the arbitration agreement and Article 11.1 of the Rules.

61. What the [Respondent] seeks is to construe the term ‘original nominating process’ in order to grant the LCIA ‘sufficient flexibility’ to allow a wholesale reconstitution of the Tribunal whenever only one arbitrator, namely, the Chair, needs to be replaced. [...] No such construction is warranted. Article 11.1, in providing for the circumstances where ‘an appointed arbitrator is to be replaced’, does not, thereby, authorize the LCIA to replace all three arbitrators. Indeed, the result of the [Respondent]’s proposed construction would be to increase the potential of the disruption of orderly proceedings.

62. The [Respondent] contends that reconstitution of the entire Tribunal should be permitted in this instance because the arbitration is entering ‘a new phase’ [...] But, again, nothing in the parties’ arbitration agreement authorizes reconstitution of the entire Tribunal in the event of a new phase in the same arbitration. Nor do the LCIA Rules.

63. The [Respondent] further argues that, because the arbitration agreement calls for ‘the two parties’ arbitrators’ to select the Chair, the LCIA must now allow it to designate a party arbitrator (in place of [the Co-arbitrator], whom the LCIA appointed following the [Respondent]’s failure to nominate an arbitrator within the prescribed time period) who can then participate in selecting the Chair. [...] The [Respondent] relies on Article 5.5 of the LCIA Rules, which provides that ‘[t]he LCIA Court will appoint arbitrators with due regard for any particular method or criteria of selection agreed in writing by the parties.’

64. This argument is also without merit. While the parties’ arbitration agreement expressly gave the [Respondent] a right to nominate an Arbitrator, it also expressly incorporated the LCIA Rules, which provides a procedure for the LCIA’s appointment of an arbitrator when a party fails to exercise its right. That is, precisely, what happened here. [The Co-arbitrator]’s appointment occurred in full compliance with both the parties’ agreement and Article 5.5. The need to replace [the First Chair], therefore, affords no new right on the [Respondent]’s part to replace [the Co-arbitrator].

65. The Division affirms the LCIA’s prior decision not to reconstitute the entire Tribunal, and rejects the Respondent’s request for reconsideration of that decision.

C. Objection to Appointment of [the Second Chair] as Tribunal Chair

66. The basis of the [Respondent]’s objection to [the Second Chair]’s appointment is that Respondent has the right to select [the Co-arbitrator]’s replacement and that the LCIA, by moving forward with the selection of the Chair before resolution of Respondent’s challenge to [the Co-arbitrator], deprived the replacement arbitrator of the opportunity to participate in the Chair’s selection. [...] But, in view of the Division’s decisions above to deny the [Respondent]’s challenge and
its request to reconstitute the Tribunal, the [Respondent]’s objection is, essentially, moot because the Respondent has no right to replace [the Co-arbitrator].

67. The Division notes the exchange of correspondence between the [Respondent] and LCIA Secretariat as to whether [the Second Chair]’s appointment was premature during the pendency of the challenge to [the Co-arbitrator] or would itself have been subject to challenge in the event of a successful challenge to [the Co-arbitrator]. The latter challenge having failed, however, the Division sees no need to take a position on either question.

68. The Division dismisses Respondent’s objection to the appointment of [the Second Chair] as Tribunal Chair.

IV. DECISION

69. In conclusion, the Division determines that all branches of relief sought by Respondent, namely (i) the challenge to [the Co-arbitrator], (ii) the request for reconsideration of the LCIA’s decision not to reconstitute the entire tribunal, and (iii) the objection to the appointment of [the Second Chair] as Tribunal Chair, are DENIED.”