Subject: Challenge to arbitrator’s appointment pursuant to Article 10.4 of the LCIA Rules 1998, based on Article 10.3 (justifiable doubts as to the arbitrator’s independence and impartiality)

Division/Court member: Former Vice President of the LCIA Court (acting alone)

Summary: The applicable test is whether there is a “real possibility” of bias, which requires a review of whether the fears expressed are objectively justified. There are risks when practitioners assume the dual role of arbitrator and counsel, as this may create conflicts. In the present case, the challenged arbitrator gave the appearance of questioning one of the parties’ counsel’s integrity, such that a “fair-minded observer” would conclude that there is a risk of bias.

1 Background

1.1 The underlying dispute arose out of a share purchase agreement and five loan assignment agreements. All of the agreements were governed by English law, and each contained an LCIA arbitration clause. The seat of the arbitration was London and the language was English.

1.2 The Claimants filed two separate Requests for Arbitration with the LCIA on 13 September 2010. The Respondents filed Responses on 18 November 2010.

1.3 On 7 January 2011, the LCA notified the parties that it had appointed the Tribunal in the first arbitration. The parties agreed that the LCIA Court appoint the same Tribunal in the first arbitration as in the second arbitration and, on 21 January 2011, the LCIA notified the parties that it had appointed the Tribunal in the second arbitration.

1.4 On 7 February 2011, the Tribunal confirmed the consolidation of the two cases, pursuant to the Parties’ agreement.

1.5 One of the co-arbitrators (the “Co-arbitrator”) was also sitting as counsel in an unrelated arbitration (the “Other Arbitration”), in which he represented the Respondent, and counsel for the Second Respondent in the LCIA arbitration (the “Second Respondent’s Counsel”) represented the Claimants in the Other Arbitration.

1.6 On 25 April 2012, in the present LCIA arbitration, the Second Respondent filed a challenge against the Co-arbitrator, on the basis of the Co-arbitrator’s stance in the Other Arbitration, in which the Co-arbitrator was seeking to adduce evidence that accused the Claimants in the Other Arbitration and their Counsel (who represented the Second Respondent in the present arbitration) of criminal misconduct.

1.7 On 26 April 2012, the Claimants objected to the challenge.
1.8 On 30 April 2012, the Co-arbitrator informed the LCIA that he was not minded to withdraw from this matter.

1.9 On 9 May 2012, the First Respondent indicated that he agreed to the Second Respondent’s challenge, and also filed his own challenge to the Co-arbitrator.

1.10 On 24 May 2012, the LCIA notified the parties that, pursuant to Article 10.4 of the LCIA Rules, and paragraph D3(b) of the Constitution of the LCIA Court, the LCIA Court had appointed a former Vice President of the LCIA Court, to determine the challenge.

1.11 On 26 May 2012, the former Vice President resigned from this appointment in light of certain circumstances communicated by the Second Respondent the previous day.

1.12 On 29 May 2012, the LCIA notified the parties that, pursuant to Article 10.4 of the LCIA Rules, and paragraph D3(b) of the Constitution of the LCIA Court, the LCIA Court had appointed a former Vice President of the LCIA Court to determine the challenge.

1.13 On the same day the First Respondent requested that the LCIA put in place a three-member Division to decide the challenge against the Co-arbitrator, instead of having the challenge determined by the former Vice President alone.

1.14 Also on 29 May 2012, the former Vice President held a telephone conference to determine the procedure for the challenge, during which a timetable for comments by the parties and the Co-arbitrator was agreed.

1.15 On 1 June 2012, the LCIA informed all concerned that the LCIA Court had decided not to reconsider its decision to have the matter heard by the former Vice President alone.

1.16 The parties and the Co-arbitrator filled their comments in accordance with the agreed timetable.

1.17 On 18 June 2012, the former Vice President heard oral arguments by a telephone hearing. The parties agreed during the hearing that any decision regarding costs incurred in connection with these challenge proceedings would be reserved to the Arbitral Tribunal.

1.18 On 22 June 2012, the former Vice President rendered his decision on the challenge.

2 Decision excerpt

“[...]

III. THE [FORMER VICE PRESIDENT]'S ANALYSIS

48. The relevant provisions of the LCIA Rules regarding challenges are Articles 10.2, 10.3 and 10.4, which provide as follows:

10.2 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,
10.3 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.

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.

49. In light of these provisions, the [former Vice President] must first examine the timeliness of the Respondents’ challenges to [the Co-arbitrator] (A), before examining, as the case may be, the substance of those challenges (B).

A. Timeliness

50. Positions of the parties and [the Co-arbitrator]. Article 10.4 of the LCIA Rules requires, in pertinent part, that any challenge be filed ‘within 15 days […] after becoming aware of any circumstances’ which, under Article 10.3, would ‘give rise to justifiable doubts as to [the arbitrator’s] impartiality or independence.’

51. According to Second Respondent, its challenged is based on [a letter that was sent to the Tribunal in the Other Arbitration]. In light of this, Second Respondent is of the view that its 25 April 2012 letter introducing the challenge was filed within the 15 days required by Article 10.4 of the LCIA Rules and is, therefore, timely.

52. From [the Co-arbitrator]’s point of view, ‘the […] letter can only be fairly understood in the context of the application that was made [a month ago], which did not itself provoke a challenge within the 15-day period set forth in Article 10.4 of the LCIA Rules.’ In [the Co-arbitrator]’s estimation, Second Respondent’s challenge was accordingly filed out of time. It would appear that [the Co-arbitrator] shares the same opinion with respect to the First Respondent’s separate challenge.

53. For its part, the First Respondent submits that its challenge is based on circumstances it ‘found out – only shortly before [the Second Respondent’s Counsel]’s letter of April 25, 2012. First Respondent thus contends that its letter of 9 May 2012, submitting its own challenge to [the Co-arbitrator], was timely filed.

54. Claimants submit that the Second Respondent’s challenge should be summarily rejected as untimely.
55. [Former Vice President]’s analysis. The [former Vice President] is of the view that the challenges have been timely filed.

56. With respect to Second Respondent’s challenge, the main element on which it formulates its challenge is [...] in the [letter provided to the Tribunal in the Other Arbitration] [...].

57. Accordingly [...], the 25 April 2012 letter containing the challenge was timely filed.

58. With respect to First Respondent’s challenge, it is based on the same facts as Second Respondent’s challenge, as well as on [the Co-arbitrator]’s non-disclosure of [the Respondent in the Other Arbitration]’s application to the [Tribunal in the Other Arbitration] regarding the [Complaint].

59. It is not disputed that First Respondent learned of the circumstances underlying the Second Respondent’s challenge ‘shortly before’ 25 April 2012. Accordingly, to the extent First Respondent’s challenge is based on those circumstances, its letter of 9 May 2012, formalizing its own challenge to [the Co-arbitrator], was also filed within the 15-day time limit of Article 10.4 of the LCIA Rules.

60. Similarly, First Respondent would have learned of [the Co-arbitrator]’s non-disclosure of [the Respondent in the Other Arbitration]’s application only ‘shortly before’ 25 April 2012. Accordingly, this portion of First Respondent’s challenge is also timely filed.

61. In light of the above, the [former Vice President] must analyze the circumstances identified by Respondents that allegedly ‘give rise to justifiable doubts’ as to [the Co-arbitrator]’s impartiality and independence.

B. SUBSTANCE

62. The [former Vice President] must first determine the legal standard for analysing the challenges against [the Co-arbitrator] (1), before applying to analyze the facts at issue (2).

1. THE LEGAL STANDARD

63. Positions of the Parties and [the Co-arbitrator]. According to Respondents, arbitrators ‘must be both independent and impartial’, and the test to determine whether there are ‘justifiable doubts’ regarding these elements requires, under English law, an enquiry regarding:

   Whether the fair-minded observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.

64. Respondents emphasize that this test only requires a ‘real possibility’ of bias instead of actual bias, and that this position is supported by the IBA Guidelines on Conflicts of Interest in International Arbitration, which are phrased in terms of the ‘likelihood that the arbitrator may be influenced’ in making his or her decisions.’

65. [The Co-arbitrator] agrees with the legal test set forth by Respondents, but emphasizes that the use of the words ‘real’ and ‘likelihood’ in these tests impose a higher evidentiary bar than a standard based only on the ‘possibility’ of bias.

66. Claimants do not dispute the test set forth by Respondents.
67. [The former Vice President]’s analysis. As Respondents’ challenges have been brought under the LCIA Rules, the [former Vice President] must apply the relevant provisions of those Rules. In addition, as London is the place of arbitration, the [former Vice President] must take into account the relevant provisions of the English Arbitration Act 1996 (the “1996 Act”) namely, sections 33(1)(a) and 24(1)(a).

68. Article 10.2 of the LCIA Rules provides, among other things, that arbitrators must ‘act fairly or impartially as between the parties’:

10.2 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.

69. Section 33 describes the duties of the arbitral tribunal and includes, like the LCIA Rules, the obligation to ‘act fairly and impartially as between the parties’:

33. General duty of the tribunal.

(1) The tribunal shall—

(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent[.]

70. The right to be heard by an independent and impartial tribunal is further reinforced through Article 6(1) of the European Convention on Human Rights, which became part of English law following the passage of the Human Rights Act 1998.

71. In the event that circumstances exist that give rise to ‘justifiable doubts’ as to an arbitrator’s impartiality or independence, Article 10.3 of the LCIA Rules empowers a party to challenge the arbitrator in question:

10.3 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.

72. Section 24(1)(a) of the 1996 Act also foresees the possibility to remove an arbitrator when there are ‘justifiable doubts’ as to the arbitrator’s impartiality:

24 Power of court to remove arbitrator.

(1) A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds—

(a) that circumstances exist that give rise to justifiable doubts as to his impartiality[.]
73. Taking into account the similarities between the relevant provisions of the LCIA Rules and the 1996 Act, the Division must also take into account any relevant case law arising in connection with the 1996 Act.

74. It is not disputed between the Parties and [the Co-arbitrator] that the case law to take into consideration is that set forth in the Gough case, as modified by Porter v Magill. These cases set forth the applicable test to determine whether there are ‘justifiable doubts’ as to an arbitrator’s independence and impartiality. This test demands an enquiry as to:

   Whether the fair-minded observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased (emphases added).

75. As is clear from this text, the applicable test seeks to determine whether there is a ‘real possibility’ of bias, as opposed to actual bias. Furthermore, ‘what is decisive is whether any fears expressed by the complainer are objectively justified’, and ‘not [...] whether the arbitrator did not in fact allow his mind to be affected’ by the relevant circumstances.

76. In order to carry out this test, English courts employ a two-part analysis: first, they examine the relevant circumstances to determine whether they give rise to doubts regarding an arbitrator’s impartiality and independence; and, if so, whether those circumstances would objectively lead one to conclude that there was a ‘real possibility’ – i.e. ‘justifiable doubts’ – that the arbitrator was biased.

77. In this regard, the English courts have stated that ‘if in any case there is a real ground for doubt, that doubt should be resolved in favour of recusal.’

78. The Division will now apply this standard to the undisputed facts set forth above in order to determine the challenge against [the Co-arbitrator].

2. ANALYSIS

79. As an initial matter, the [former Vice President] notes that Second Respondent spent considerable time explaining the ‘exceptional’ nature of the LCIA Case. Indeed, Second Respondent would like the [former Vice President] to take this ‘exceptional’ nature into consideration in coming to its decision on the challenges. This the [former Vice President] will not do, however. The [former Vice President] is of the view that the challenges should not be judged in light of the circumstances created by the Parties, but rather based on the arbitrator’s own actions.

80. This having been addressed, the [former Vice President] will now examine, in accordance with the English Court’s test outlined in ¶ 76 above: (i) the relevant circumstances to determine whether they give rise to doubts regarding [the Co-arbitrator]’s impartiality and independence;

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2 Rustal TradingLimited v Gill & Duffus S.A. WL 1142684 [1999], per The Honourable Mr Justice Moore-Bick.
3 Id.
4 Locabail (UK) v Bayfield Properties Ltd [2000] 1 All ER 65 at para. 77.
and, if so, (ii) whether those circumstances would objectively lead one to conclude that there was a ‘real possibility’ – i.e. ‘justifiable doubts’ – that [the Co-arbitrator] is biased.

(i) Whether the relevant circumstances give rise to justifiable doubts regarding [the Co-arbitrator]’s impartiality and independence.

[...]

84. [...] [T]he Co-arbitrator] referred over and over again to criminal accusations made by [a witness] not only against [the Claimants in the Other Arbitration], but also against [the Second Respondent’s Counsel]. [...]

85. [...] [A]n allegation of fraud, even implied, was present.

86. The [former Vice President] is thus of the view that the circumstances just described call [the Co-arbitrator]’s independence and impartiality into question.

87. Accordingly, in the next section, the [former Vice President] will analyze whether these circumstances raise ‘justifiable doubts’ of a ‘real possibility’ of bias.

(ii) Whether the relevant circumstances would lead one to conclude that there is a ‘real possibility’ that [the Co-arbitrator] is biased

88. Second Respondent has asserted four arguments to explain why the circumstances described above would objectively lead one to conclude that there is a ‘real possibility’ that [the Co-arbitrator] is biased [...]. However, of those arguments, the only one that the [former Vice President] considers it appropriate to examine related to whether it would be ‘clearly unsatisfactory’ for Second Respondent to be forced to appear before an arbitrator ‘who was advancing allegations of professional misconduct against its lawyers on behalf of a client in another case.’

89. Before turning to this question, the Division notes that the issues at stake in these challenge proceedings speak to the risks practitioners run in assuming the dual role of arbitrator and counsel. International arbitral practice allows for this dual role, which creates experience that is beneficial for each side. However, those who sit as both arbitrator and counsel must be cautious, as this dual role may create conflicts, even if inadvertent.

90. In this regard, [the former Vice President] does not agree with Claimants’ position that English law, as articulated in the Fletamentos case, categorically holds that an opinion formulated by an arbitrator with respect to counsel in the context of one case cannot impugn the arbitrator’s independence and impartiality in another case. Rather, the Division is of the view that the Fletamentos case only applies when the lawyers’ skills and capabilities are in question, as

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5 The [former Vice President] is of the view that two of the circumstances identified by Second Respondent [...] are hypothetical and, therefore, not ripe for analysis. As for the remaining point, Second Respondent has suggested that the circumstances of this case are even more sensitive because the previous lead lawyer in this matter was also the lead lawyer in the [Other Arbitration]. The [former Vice President] does not agree; the accusations are made against a lawyer as a rule implicate the firm, and vice versa. Accordingly, the [former Vice President] will not consider the overlap of the lead lawyer in its analysis.
opposed to their character.\textsuperscript{6} It goes without saying that this case very much implicates [the Second Respondent’s counsel]’s character, such that the Fletamentos case provides no defence to the challenges filed.

91. With this in mind, the [former Vice President] now looks to the facts to determine whether ‘the fair-minded observer [...] would conclude that there was a real possibility that the tribunal was biased.’ As noted in ¶75 above, this does not involve examining ‘whether the arbitrator did or did not in fact allow his mind to be affected.’

92. The [former Vice President] has concluded above that [the Co-arbitrator] has taken responsibility for the assertion that [...] [the Second Respondent’s Counsel] committed fraud on the [Tribunal in the Other Arbitration] [...].\textsuperscript{7} Whether or not [the Co-arbitrator] actually believes this allegation is irrelevant what is pertinent is that he has given the appearance of questioning [the Second Respondent’s Counsel]’s integrity. The [former Vice President] thus considers [the Co-arbitrator]’s comments regarding his high personal opinion of [the Second Respondent’s Counsel] to be inapposite [...].

93. As [the Second Respondent’s Counsel] is representing Second Respondent in these proceedings, the Division considers that a fair-minded observer could only conclude that Second Respondent will have, in Second Respondent’s words, ‘one arm tied behind its back because [the Co-arbitrator] is already more readily pre-disposed to disbelieve the submissions’ made by its counsel’ [...]. The [former Vice President] thus cannot accept [the Co-arbitrator]’s statement that there is no risk of bias because ‘his task as arbitrator is not to determine whose lawyers are more credible, but rather which side’s evidence is more believable’ [...].

94. Accordingly, the [former Vice President] accepts the challenge against [the Co-arbitrator].

95. In light of this decision, the [former Vice President] need not address the second ground for challenge raised by the First Respondent, i.e., [the Co-arbitrator]’s non-disclosure regarding the [circumstances in the Other Arbitration]. In addition the [former Vice President] need not address First Respondent’s arguments regarding the [Co-arbitrator]’s reaction to the challenges filed against him.

IV. \textbf{DECISION}

96. In light of the foregoing, the [former Vice President] decides to:

(1) ACCEPT the challenge against [the Co-arbitrator]; and

\textsuperscript{6} The [former Vice President] thus agrees with the position taken by the Second Respondent during the oral hearing regarding the meaning of the Fletamentos case.

\textsuperscript{7} The [former Vice President] notes that the [Tribunal in the Other Arbitration], in its Procedural Order No. 9 determined that [the Claimant in the Other Arbitration], ‘allege[d] the existence of fraudulent behaviour’ by [the Second Respondent’s Counsel] [...]. While the [former Vice President] agrees with this finding, the [former Vice President] has come to this conclusion in [his] own right and has not simply adopted the [Tribunal in the Other Arbitration]’s findings as its own.
(2) In accordance with the Parties’ agreement [...], RESERVE any decision as to costs incurred in connection with these challenge proceedings to the Arbitral Tribunal, to be determined in due course.”