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 arbitrator’s independence and impartiality)

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

Summary: The test to be applied for a challenge is an objective test. The fact that an arbitrator acted as counsel against one of the parties in a previous arbitration is not, by itself, enough to give rise to ‘justifiable doubt’ as to that arbitrator’s independence and impartiality. However, where an arbitrator has previously satisfied himself that there is evidence of a party’s fraud, there is a real possibility or real danger that such arbitrator would be influenced by that evidence, consciously or unconsciously, when adjudicating on a further dispute involving the same party. The outcome might be different if it was clear that no witness evidence would be required or that the issue would be a purely legal or contractual interpretation without any factual evidence.

1 Background

1.1 The underlying dispute arose out of a contract between the parties for the sale and supply of alumina. The contract, which was governed by English law, contained an LCIA arbitration clause which provided that the language of the arbitration was English and the seat of the arbitration was London.

1.2 The Claimant filed a Request for Arbitration with the LCIA on 22 February 2012. In the Request, the Claimant nominated an arbitrator.

1.3 The Respondent filed a Response on 28 March 2012, in which it also nominated an arbitrator (the “Co-arbitrator”).

1.4 In accordance with the arbitration agreement in the contract, the parties’ nominees selected the Chair.

1.5 On 2 May 2012, the LCIA notified the parties that the Tribunal had been appointed by the LCIA Court. The notice enclosed copies of each arbitrator’s curriculum vitae and Statement of Independence and Consent to Appointment.

1.6 The Co-arbitrator made a disclosure, to which the parties’ attention was drawn in the notice, and which read, in material part, as follows:

“[...] out of an abundance of caution because about 5 years ago I acted as Counsel for the Respondent in a case in which the Claimant was a company in the [Claimant] group (I do not recall the precise identity of the company) and an Indian Company was the Respondent.”
"I am, as the Statement of Independence makes clear, independent and impartial of each of the parties to this arbitration, and I am quite sure that my involvement as Counsel in the previous case is not a circumstance that is likely to give rise to any justified doubts as to my impartiality or independence."

1.7 On 16 May 2012, the Claimant challenged the appointment of the Co-arbitrator under Article 10.3 of the Rules.

1.8 By letter of 28 May 2012, the Respondent rejected the Claimant’s challenge.

1.9 On 30 May 2012, the Respondent’s nominated arbitrator confirmed that he was not minded to withdraw from the Tribunal and that he did not consider that circumstances exist giving justifiable doubts as to his independence or impartiality.

1.10 On 19 June 2012, the LCIA notified the parties that, pursuant to Article 10.4 of the Rules, and paragraph D.3(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 against the Co-arbitrator.

1.11 The former Vice President invited submissions on the challenge from the parties and from the Co-arbitrator.

1.12 Following receipt of submissions, a telephone hearing in relation to the challenge took place on 25 July 2012.

1.13 The former Vice President issued his decision on the challenge on 31 July 2012.

2 Decision excerpt

"[...]

ANALYSIS

A. Timeliness of Challenge

56. Article 10.4 of the Rules requires that any challenge to the appointment of an arbitrator must be raised within 15 days of the formation of the Arbitral Tribunal or, if later, within 15 days after becoming aware of the circumstances giving rise to the challenge.

57. In this case the Tribunal was appointed on 2 May 2012, as indicated in the LCIA’s letter of the same date. The Claimant’s Challenge, which was initiated by letter dated 16 May 2012, was therefore made within the deadline set by the Rules.

B. Jurisdiction

58. The [former Vice President] was appointed in accordance with the terms of Article 10 of the Rules, and neither party has objected to this appointment. The [former Vice President]
therefore has jurisdiction to determine the Challenge in accordance with the provisions of the Rules.

C. The applicable legal test

59. The [former Vice President] has considered the submissions made by each side as to the applicable legal test, together with each of the authorities to which they refer, and thanks the parties for their clear arguments and helpful guidance on the applicable principles of law.

60. The central provision governing the Challenge is Article 10.3 of the Rules, which provides that:

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

61. The parties agree that, in determining whether circumstances exist that give rise to ‘justifiable doubts’, the [former Vice President] is entitled to have regard to English law on bias and challenges to judges or arbitrators, as English law is the law of the seat of the Underlying Arbitration.

62. Both parties also agree that the applicable test should be taken from the judgment of Lord Hope of Craighead in the decision of the House of Lords in Porter v Magill. I am therefore required first to ascertain all the circumstances which have a bearing on the question whether [the Co-arbitrator] is biased, following which the [former Vice President] must ask:

   ‘whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility…’

   that [the Co-arbitrator] is biased.

63. The [former Vice President] also accepts the additional points of authority to which the parties have referred. In particular, note has been taken of requirements that the [former Vice President]:

   a. considers whether there is a real possibility of either conscious or unconscious bias;

   b. resolves any doubts in favour of recusal;

   c. has regard to the comments made by the Court of Appeal in Locabail to the effect that, ‘at any rate ordinarily, [no objection could] soundly be based on […] previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him…’ (emphasis added).

64. With respect to the IBA Guidelines to which the Respondent has referred, the [former Vice President] accepts the Claimant’s argument that they are guidelines only and that the [former Vice President] is not bound to follow them. Equally, however, the [former Vice President] agrees with the Respondent that the IBA Guidelines represent international best practice. They are generally helpful when considering issues of conflicts of interest or the impartiality and

---

1 Porter v Magill at 494F
independence of arbitrators. In the event, for the purposes of this Challenge, the [former Vice President] finds that the provisions of the IBA Guidelines are not materially different to the position at English law.

D. The [former Vice President]’s Analysis of the Challenge

65. The important fact at the centre of the Challenge is that [the Co-arbitrator] acted as counsel against the Claimant in the Previous Arbitration. By itself, however, that fact is not enough to give rise to ‘justifiable doubt’ as to [the Co-arbitrator]’s independence and impartiality. Following the English authority to which the [former Vice President] has been referred, and in particular the decision in Locabail, it is clear that, ‘at any rate ordinarily’, no concerns as to independence or impartiality will arise where an arbitrator has previously appeared as counsel for or against a party in an unrelated matter. This is particularly so when the previous case was resolved approximately four years ago.

66. The next question the [former Vice President] must ask [himself] is whether there is anything in the facts presented before [him] that would render these circumstances out of the ordinary and therefore justify the recusal of [the Co-arbitrator].

67. The [former Vice President] first notes the comments of [the Co-arbitrator] on the Challenge, as communicated in his two letters. However, the [former Vice President] accepts the submission of the Claimant that, in making a decision, the [former Vice President] can have no regard to [the Co-arbitrator]’s comments as to his subjective state of mind or his recollection of the Previous Arbitration. The test to be applied is an objective test concerned with the views of the fair-minded observer, not with the subjective views of the arbitrator.

68. Turning to the factual submissions of the parties, the Claimant makes, in essence, three points about [the Co-arbitrator]’s role in the Previous Arbitration:

a. that [the Co-arbitrator] in his role as counsel advanced a case of fraud against [the company in the Claimant group] on behalf of his client;

b. that [the Co-arbitrator] was instrumental on putting the case of fraud together for his client, on the basis that no case of fraud was alleged by his client until [the Co-arbitrator] became involved in the proceedings at a late stage; and

c. that the Previous Arbitration between the Claimant and [the Co-arbitrator]’s client was ‘hotly contested’.

69. However, the [former Vice President] accepts the submission of the Respondent that regard can only be had to the first of these points. Neither the [former Vice President] nor the Respondent have any access to the papers and materials from the Previous Arbitration that would enable verification of whether [the Co-arbitrator] was the originator of the fraud allegation, or whether the Previous Arbitration was unusually bad tempered or aggressive. The [former Vice President] cannot make any finding based on these submissions without having access to the record of the Previous Arbitration and allowing the opportunity for the Respondent to examine and make submissions on the same. The [former Vice President] therefore places no weight on the second and third factual points made by the Claimant.
Accordingly, the only material fact to consider is that [the Co-arbitrator] advanced a case of fraud on behalf of his client against the Claimant.

The Claimant argues (and the Respondent accepts) that, before [the Co-arbitrator] could have advanced a case of fraud on behalf of his client in the Previous Arbitration, his professional conduct obligations required him first to obtain clear instructions to do so from his client and then to satisfy himself that he had before him reasonably credible material which, as it stood, established a prima facie case of fraud. On this basis, as [the Co-arbitrator] must previously have been satisfied that there was evidence that the Claimant was guilty of fraud, the Claimant submits that there is justifiable doubt as to [the Co-arbitrator]'s impartiality in the Underlying Arbitration.

The Respondent rejects this argument, submitting instead that the mere fact of alleging fraud on his clients instructions does not demonstrate any personal animus on the part of [the Co-arbitrator] toward the Claimant; that [the Co-arbitrator] was not permitted to run any fraud case in the Previous Arbitration, as permission to amend the pleadings was refused; that the Previous Arbitration was a long time ago; that the Underlying Arbitration will not involve consideration of fact evidence, but rather will turn on questions of contractual interpretation and witness evidence; and that accordingly there can be no reasonable apprehension of a real possibility of bias on the part of [the Co-arbitrator].

The [former Vice President] finds the Claimant’s argument persuasive. The [former Vice President] considers that an informed and fair-minded observer would conclude that, where an arbitrator has previously satisfied himself that there is evidence of a party’s fraud, there is a real possibility or real danger that such arbitrator would be influenced by that evidence, consciously or unconsciously, when adjudicating on a further dispute involving the same party. The allegation of fraud, to which the advocate must satisfy himself that he had before him reasonably credible material which established a prima facie case of fraud, takes this case out of the ordinary commercial dispute to which Locabail refers. It is not necessary to determine whether the arbitrator has any real animus towards a party. Rather, because the arbitrator must have considered evidence and have come to the conclusion that credible evidence existed that the party had committed fraud, the fair-minded observer would consider that there is a real possibility that the arbitrator would approach further evidence from the same entity or individuals in a different, less open manner.

In this case, it is too early in the proceedings to know what witness evidence, if any will be required. The Claimant has made the point that it may wish to lead factual evidence as the case develops, and that such factual evidence may come from the team that was involved in the Previous Arbitration. The [former Vice President] agrees that the Claimant must be free to present such testimony from its witnesses as it considers necessary without fear that any such evidence will be considered by one arbitrator in a consciously or unconsciously biased manner.

Accordingly, while the outcome may have been different if it was already clear that no witness evidence at all would be required in the Underlying Arbitration or that the issue would be a purely legal or contractual interpretation without any factual evidence, the [former Vice President] considers that [the Co-arbitrator]'s role in the Previous Arbitration gives rise to

Neither party referred directly to the source of this rule, but it is found in Paragraph 704(c) of the Code of Conduct published by the Bar Standards Board.
circumstances which the informed and fair-minded observer would consider to give rise to a real possibility that [the Co-arbitrator] would be unconsciously biased. Accordingly, the circumstances give rise to justifiable doubt as to [the Co-arbitrator]’s impartiality and independence in the Underlying Arbitration.

76. In coming to this conclusion, the [former Vice President] accepts entirely that [the Co-arbitrator] acted in a professional and proper manner in the Previous Arbitration and that he legitimately concluded that, given the passage of time, his lack of memory of the Previous Arbitration, the nature of the issues in this case and his considerable experience acting as a fair and impartial arbitrator, he could determine the issues in the Underlying Arbitration without any bias. However, because of the higher requirement needed for a barrister to allege fraud and the objective standards to be used in determining a challenge to an arbitrator, the [former Vice President] comes to the conclusion that the challenge to [the Co-arbitrator] must be accepted.

77. The [former Vice President] does not consider that this conclusion is affected by the timing of the Previous Arbitration. It is true that, under the IBA Guidelines, interactions between an arbitrator and a party are generally considered not to give rise to any justifiable doubt as to the arbitrator’s independence if they occurred more than three years in the past. However, the IBA Guidelines also make clear that they provide only general guidance, and that the independence and impartiality of an arbitrator must be assessed in each case according to its own particular facts. The [former Vice President] considers that, in cases such as the present, where the challenged arbitrator has previously alleged fraud against the same party that is now appearing in an arbitration before him, a three year period may not be sufficient to remove any doubts as to independence and impartiality. Given the fact-dependent nature of challenges to the independence and impartiality of arbitrators, it is impossible to put a precise limit on the time period that must elapse before an informed and fair-minded person would cease to apprehend a real possibility of bias. In some cases, the period may be short; in others, the period may be significantly longer. However, in the present case, where the same team at the Claimant that was involved in the Previous Arbitration – indeed, some of the same individuals – are also involved in the Underlying Arbitration, the [former Vice President] considers that the passage of four years would not prevent an informed and fair-minded individual from considering a real possibility of bias to exist.

78. Equally, the [former Vice President] has considered the Rustal case, relied upon by the Respondent, in which the court considered a challenge to an arbitrator who had, two years previously, been involved in a dispute with one of the parties to the arbitration, in which the arbitrator had advanced an allegation of fraud. The court held that the dispute was not ‘recent’ and that there were no other grounds to suspect that the arbitrator was not impartial or independent, dismissing the challenge. The [former Vice President] accepts the argument of the Claimant, made at the hearing on 25 July 2012, that the Rustal case is distinguishable from the present Challenge. In Rustal the fraud alleged was minor – the changing of a date -- and was admitted by the respondent entity. As the Court itself stated, ‘it was not a case where there was a heated dispute about the probity of one party’s conduct’. That is not the case with the present Challenge, where the allegation of fraud was opposed in the Previous Arbitration. Furthermore, the Rustal decision reinforces that issues of impartiality and independence are fact-dependent. On this basis, the [former Vice President] does not consider that the decision in Rustal would change the conclusions set out above.
Finally, the [former Vice President] does not accept that the fact that [the Co-arbitrator] was not actually permitted to advance a case of fraud in the Previous Arbitration would prevent a fair-minded observer from apprehending a real possibility of bias. [The Co-arbitrator] must have satisfied himself that evidence of fraud existed before he first advanced the fraud claim. That the claim was subsequently refused cannot alter the initial analysis that [the Co-arbitrator] conducted.

Applying the relevant legal test to the facts, therefore, the [former Vice President] finds that [the Co-arbitrator]’s role in advancing a case of fraud against the Claimant in the Previous Arbitration would lead a fair-minded and informed observer to conclude that there was a real possibility of unconscious bias, and that there are thus justifiable doubts as to his independence and impartiality in the Underlying Arbitration.

IV DECISION

On the basis of the above analysis, the [former Vice President] ACCEPTS the Challenge brought by the Claimant against [the Co-arbitrator].

As to costs, the [former Vice President] RESERVES any decision as to the costs and expenses generated by this Challenge, including the legal fees incurred by each party, for determination by the Tribunal in the Underlying Arbitration.”