LCIA Reference No. 111933, Decision Rendered 23 August 2012

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<th>Subject:</th>
<th>Challenge to Tribunal’s appointment pursuant to Article 10.4 of the LCIA Rules 1998, based on Article 10.2 (failure by an arbitrator to act fairly and impartially as between the parties)</th>
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<td>Division/Court member:</td>
<td>Vice President of the LCIA Court (acting alone)</td>
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<td>Summary:</td>
<td>The standard to be applied is an objective one. A tribunal has not failed to act fairly and impartially if it has weighed the countervailing concerns of the parties and explored various options to try and accommodate one party’s lead counsel’s availability for the hearing, even if it ultimately decides to maintain hearing dates on which that party’s lead counsel is not available.</td>
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1  **Background**

1.1 The underlying dispute arose out of a contract for the supply and purchase of wafers for use in solar panels. 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 10 August 2011. The Respondent filed a Response on 15 September 2011.

1.3 On 26 September 2011, the LCIA notified the parties that the LCIA Court had appointed the Tribunal, which comprised three members.

1.4 On 24 April 2012, the Tribunal issued Procedural Order No. 4 by email to the parties, in which it indicated:

“The arbitration should be ready for the final hearing in September. We will aim to have a single hearing in September which in our view would be more efficient than the three separate hearings proposed by the Respondent. [...] In any case the procedure should be completed within September.

We note that the parties each consider that 5 days will be sufficient, but we draw to your attention that it seems currently to be proposed that there will be evidence from 9 witnesses of fact and 4 experts, as well as legal submissions. Please confirm, therefore, the estimate of 5 days or, if on reflection your view is that some additional time will be required, please say so [...] Once the hearing dates are fixed, we will require the parties to agree a timetable and to adhere to it, in order that the evidence and submissions will be completed within the time fixed.

The Tribunal is currently available for most of September. Please confirm (or otherwise) your estimate of the time required, and if there are any dates in September which you would wish to
avoid, by 30 April 2012. We will do our best to accommodate your respective availability, but can make no promises. If there are problems with some witnesses’ availability to travel to London, giving evidence by video conference will be acceptable […]

13. The oral hearing will be held in September 2012 on dates to be notified […]

“19. The parties are at liberty to make minor adjustments to the timetable by agreement between themselves, but any such adjustments must be reported to the tribunal and must not prejudice the dates fixed for the oral hearing.” (Emphasis added)

1.5 The Claimant replied on 30 April 2012 confirming the availability of its fact and expert witnesses and legal representatives for a hearing during the period 17 to 28 September 2012.

1.6 The Respondent also replied on 30 April 2012 that it considered a single 5 day hearing would be sufficient and stated, “[d]ue to professional commitments already made, we confirm [the Respondent’s] legal representatives availability for the hearing during the period 24 of September to 28 of September, 2012”.

1.7 By email of 2 May 2012, the Tribunal indicated that it had reconsidered Procedural Order No. 4, but maintained the terms of the Order. It also stated:

“We need to hold the hearing in September if at all possible and we are available during the two weeks beginning on 10 and 17 September. We are not available during the weeks beginning 3 and 24 September, but could if necessary sit during the last week of August (not the Monday, which is a bank holiday in England), although it would be preferable not to have to do so. If the hearing is not held during this period, there are likely to be very considerable difficulties in finding suitable dates within a reasonable period thereafter. At present our view is that five days should be sufficient, although we can if necessary reserve slightly longer and review the position once the Respondent has served its statements.

Before we fix the hearing for dates during the two weeks beginning on 10 and 17 September, we wish to know:

1. precisely what problems this would cause for each party in terms of counsel or witness availability -- though it may be that, whatever the difficulties, there will be no real alternative;

2. whether the parties are available during the last week of August; and

3. what availability the parties have during October to December -- though we make clear that at present the tribunal has no availability at all during this period.” (Emphasis added).

1.8 By email of 4 May 2012, the Claimant replied that its witnesses and experts confirmed they were available for a hearing during the two weeks commencing 10 September and 17 September. It also confirmed that its witnesses, experts and counsel had good availability in the period October to December, provided the dates on which one witness was not available in the period October to December and stated that its preference would be for the hearing to take place in September, if at all possible, rather than be delayed until later in the year.
1.9 By email of 4 May 2012, the Respondent requested the Tribunal to reconsider the week beginning 24 September 2012 for holding the hearing, stating that its counsel who would lead the hearing was not available in the weeks beginning 10 and 17 September 2012 as he must attend an international arbitration in the United States of America and a second counsel had to attend different court cases in progress which would prevent him being out of Spain in those same two weeks. It also stated that holding the hearing in the last week of August was impossible due to the entire month of August being vacation time in Spain, with none of the witnesses or experts being available at that time. Further, in case the Tribunal could not hold the hearing in the week of 24 September, the Respondent stated it was available on weeks beginning 15 and 22 October 2012 and weeks beginning 19 and 26 November.

1.10 By email of 6 May 2012, and in reply to the Respondent’s email of 4 May 2012, the Claimant advised that it would be willing for the hearing to be held in Spain if it would assist in fixing the hearing dates for the weeks commencing 10 and 17 September 2012, noting that it would also be cost efficient considering a number of fact and expert witnesses and the Respondent’s counsel were based in Spain.

1.11 On 8 May 2012, the Tribunal issued Procedural Order No. 5, which stated:

“The tribunal has reviewed the information provided by the parties as to their availability. Unfortunately there is no ideal solution, but in the circumstances we consider that we must hold the hearing in September, during the only two weeks when the tribunal is available. We hope that the recent addition of new members to the Respondent’s team will mean that the difficulties previously advised can be overcome. We are grateful to the Claimant for the suggestion that, if it assists the Respondent’s team, the hearing can be held in Madrid – obviously this will not affect the seat of the arbitration, which will remain London whatever [sic] the hearing is held.

Accordingly we rule as follows. This is Procedural Order No. 5.

1. The hearing will be held beginning on 10 September 2012, with a provisional estimate of 7 working days. (Emphasis added)

2. If both parties agree by 18 May 2012 that 5 days will be sufficient to conclude the hearing, 17 and 18 September will be released and we will hold the hearing from 10 to 14 September 2012.

3. The Respondent must advise by 18 May 2012 whether it wishes to hold the hearing in Madrid.

4. The procedure set out in Procedural Order No. 4 will continue to apply.”

1.12 On 19 June 2012, the Tribunal issued Procedural Order No. 6, where it provided further details regarding the hearing, which had been scheduled (by Procedural Order No. 5) to begin on 10 September and stated that the hearing would be held from 10 to 14 September and on 17 and 18 September 2012 in London.

1.13 On 6 July 2012, the Respondent indicated the names of the witnesses of the opposing party whom it wished to cross-examine and confirmed that it wished to ask all of its witnesses oral questions in chief.
1.14 In an email of 24 July 2012, the Respondent’s lead counsel reiterated that he would have to attend a hearing in the United States of America during the two weeks from 10 September to 21 September 2012, which had been agreed by a procedural order dated 23 January 2012. He advised that in light of the Tribunal’s decision to maintain the hearing dates of 10-14 September, he had tried to change the dates of the hearing in the United States of America, but that given the number of witnesses and experts summoned this was not possible. He was informed that since the hearing for the other case was fixed well before the hearing in this arbitration the hearing date for the other hearing could not be justifiably changed. Further, since he is one of the arbitrators in the other case, he could not be replaced. In conclusion, he requested the Tribunal reconsider the dates of the hearing on 10 to 14 September and indicated his and the Respondent’s availability in October and November, stating that they took account of the Claimant’s availability as indicated on 4 May 2012.

1.15 By email of 26 July 2012, the Tribunal advised that it had considered the Respondent’s request carefully, but that the dates currently fixed were the only dates when the Tribunal was available. Should the hearing be adjourned, the Tribunal advised that it would be necessary to reconstitute the Tribunal and while this could be done, it would certainly be inconvenient. The Tribunal stated that if it considered it to be necessary in the interests of justice and fairness to both parties to move the hearing dates to when the Respondent’s lead counsel could be present at the hearing, it would not hesitate to do so, even if it meant that one Tribunal member had to resign, however this was not the case. The Tribunal stated that the hearing had now been fixed for some considerable time and that even without the Respondent’s lead counsel, the Respondent was still represented by two leading law firms. The Tribunal therefore declined the Respondent’s request, stating that the position would be different if the parties were to agree alternative dates for the hearing and make a joint request to adjourn the September dates, although in that event the Tribunal would have to be reconstituted.

1.16 By email of 27 July 2012, the Respondent’s lead counsel replied, inter alia, that one of the main rights of parties in proceedings is to have the ability to be defended by counsel of their choice and whether or not that counsel belongs to a big or small law firm does not change this since it is the individual counsel that represents the party before the judge or the arbitrator, and not the law firm. He asserted that the inflexibility of the Tribunal was unacceptable and detrimental to the Respondent. He stated that back in May the Respondent had informed the Tribunal that its lead counsel had booked the week of 10 to 14 September 2012 for a hearing in another arbitration which had been scheduled for months and provided alternative dates in October and November, many of which coincided with those dates on which the other party was available. He asserted that the Panel had nonetheless decided to maintain the dates of 10-14 of September despite the facts that the dates proposed by the Respondent meant a minimum delay of the proceedings, claiming that it did not have any other dates available. He further stated that now the Tribunal has again rejected his new perfectly justified request.

1.17 The Respondent’s lead counsel further stated that the Tribunal had previously refused to allow the Respondent to bring a counterclaim in this arbitration against another party to the contract out of which the dispute arose, forcing the Respondent to file a new claim. However, he stated that the two cases could not subsequently be consolidated since the Chair refused to accept appointment in the second case, for lack of availability, even though in the Respondent’s view the two proceedings had an identical subject matter. He concluded that the Respondent’s right to a fair defence had been “systematically impaired for strict Panel availability reasons (availability being indeed one of the
requirements all arbitrators are expected to fulfill, as well as independence, impartiality and capacity).”

1.18 By email of 2 August 2012, the Tribunal replied to the Respondent’s lead counsel’s complaint of 2 August 2012, by thanking him but stating that the Tribunal did not accept the contents of his email.

1.19 On 6 August 2012, the Respondent filed a challenge against all three members of the Tribunal on the basis of Article 10.2 of the LCIA Rules, and requesting the revocation of their appointments as arbitrators. The Respondent submitted, inter alia, that the Tribunal had put its own convenience above the interests of justice and fairness by maintaining the 10-14 September dates and thus violated the right of the Respondent to be defended by its counsel of choice. It also requested the postponement of the hearing until the challenge had been decided.

1.20 The Claimant responded to the challenge on 8 August 2012, submitting that it did not believe that the Respondent had any grounds for asserting that the Tribunal had acted against the interests of fairness and opposing the Respondent’s request to postpone the September hearing.

1.21 On 8 August 2012, the LCIA drew to the Respondent’s attention the 15-day period within which a challenge should be brought under Article 10.4 of the Rules and requested the Respondent to clarify when it became aware of the circumstances giving rise to justifiable doubts about the independence and impartiality of the members of the Tribunal.

1.22 On the same day, the Respondent replied that as it had received the notification of the Tribunal’s decision to refuse the adjournment of the hearing until October 2012 on 26 July 2012 the challenge had been filed within the 15 days prescribed in Article 10.4 of the Rules.

1.23 Also on 8 August 2012, the Claimant stated that the circumstances giving rise to the challenge was Procedural Order No. 5 of 8 May 2012, which set the dates for the hearing, therefore the challenge was made out of time since the deadline for any challenge would have been 22 May 2012.

1.24 On 9 August 2012, the Chair indicated that he would be willing to stand down if requested to do so by parties or the LCIA Court, regardless of the validity or timeliness of the challenge. On 10 August 2012, the co-arbitrators indicated that they considered that the challenge had no substance the Tribunal had acted fairly at all times and endorsed the decisions the Tribunal had taken until then. They also indicated that they would accept any decision taken jointly by the parties or the LCIA Court in this matter.

1.25 On 17 August 2012, the LCIA notified the parties that, pursuant to Article 10.4 of the LCIA Rules, and the Constitution of the LCIA Court, the LCIA Court had designated a Vice President of the LCIA Court to determine the challenge.

2 Decision excerpt

“[...]

NOW THEREFORE, the considerations regarding the challenge are as follows:
The views and evidence provided by the Parties have been carefully evaluated. The reasons below summarize the points considered determinative of the conclusion reached. The facts or arguments advanced by the Parties that are not expressly addressed in the reasons are such that they would not have changed the decision.

Timeliness of the challenge

The Claimant, in its response to the challenge sent by email on 8 August 2012, argued that the challenge was out of time because the circumstance giving rise to the challenge was Procedural Order No. 5 of 8 May 2012 in which the Tribunal set the dates for the final hearing, and that, thus, the Respondent should have advanced any challenge no later than 22 May 2012.

The LCIA requested the Respondent to clarify the date upon which it had become aware of the circumstances said to give rise to the challenge […]. The Respondent replied on 8 August 2012 to the effect that the basis of its challenge was the Tribunal’s notification of the refusal to adjourn the hearing, which the Respondent received on 26 July 2012. Therefore, according to the Respondent, the Statement of Challenge of 6 August 2012 had been filed within the time prescribed in Article 10.4 of the LCIA Rules […].

It is considered that, because the Respondent states that it bases its challenge on the Tribunal’s message of 26 July 2012, the challenging Party is entitled to have the challenge decided with respect to that message. The message is therefore regarded as timely. This, however, implies that, a challenge based on an [sic] earlier Tribunal’s decisions would have been time-barred and, further, that the earlier decisions may be presumed free of allegations of unfairness. Nevertheless, it is recognized that the issue of fairness of the message of 26 July cannot be evaluated in isolation, without regard to the earlier circumstances that led to it. Therefore, it is considered that the Respondent could validly include in its arguments also to the Tribunal’s earlier decisions or actions of members of the Tribunal, but that those decisions or actions alone may not be considered a valid basis of the challenge.

Standard to be applied

According to the challenge, the standard to be applied in the present challenge is expressed in Article 10 of the LCIA Arbitration Rules (Revocation of Arbitrator’s Appointment):

10.1 If either (a) any arbitrator gives written notice of his desire to resign as arbitrator to the LCIA Court, to be copied to the parties and the other arbitrators (if any) or (b) any arbitrator dies, falls seriously ill, refuses, or becomes unable or unfit to act, either upon challenge by a party or at the request of the remaining arbitrators, the LCIA Court may revoke that arbitrator’s appointment and appoint another arbitrator. The LCIA Court shall decide upon the amount of fees and expenses to be paid for the former arbitrator’s services (if any) as it may consider appropriate in all the circumstances.

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.

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.’

6 In particular the Respondent alleges that the Arbitral Tribunal acted unfairly by depriving the Respondent of its right to be represented in the final hearing by its lead counsel [...], and thereby violated the standard of fairness as expressed in Article 10.2 of the LCIA Rules.

7 The invoked standard should be regarded as an objective one in that the Tribunal could be held to have failed to act fairly if a reasonable third party, informed of all the circumstances giving rise to the challenge, would reach the conclusion that the Tribunal did not act fairly. An objective standard, as opposed to a subjective opinion of the challenging party, is necessary to maintain the appropriate balance between the parties’ confidence that the Tribunal will at all times ‘act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent’ and the Tribunal’s duty ‘to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the parties’ dispute’ (Article 14 of the LCIA Rules).

Merits

8 Initially, it should be noted that the Arbitral Tribunal, already on 24 April 2012, in its Procedural Order No. 4, placed emphasis on holding the hearing in September and stressed that in any case the procedure should be completed within September [...]. In addition, the Tribunal requested the Parties to indicate if there were any dates in September which they would wish to avoid, but that it could make no promises. In their replies to the Order on 30 April 2012, the Parties did not indicate the dates to be avoided but rather the September dates on which they would be available [...]. By focusing on the available dates, as distinguished from dates to be avoided, the Parties did not give the Tribunal early and unequivocal information about when the Parties were not available and the reasons therefor.

9 On 2 May 2012, the Tribunal wrote that the meeting needed to be held in September if at all possible and that the members of the Tribunal were available during the two weeks beginning
on 10 and 17 September, but that they were not available during the weeks beginning 3 and 24 September. The Tribunal added that, if the hearing were not held during that period, there were likely to be very considerable difficulties in finding suitable dates within a reasonable period thereafter. Furthermore, the Tribunal stated that before it would fix the dates during the two weeks beginning on 10 and 17 September, it wished to know ‘precisely what problems this would cause for each party in terms of counsel or witness availability -- though it may be that, whatever the difficulties, there will be no real alternative’. The Tribunal also enquired about the Parties’ availability during October to December, though it made clear that at present the tribunal had no availability at all during that period. [...] On 4 May 2012, the Claimant confirmed its availability during the weeks commencing 10 and 17 September, while indicating that it was generally available from October to December, but expressing strong preference for the hearing to take place in September if at all possible, rather than be delayed. Later in the day on 4 May, the Respondent requested the Tribunal to reconsider its decision with a view to holding the hearing in the week beginning 24 September 2012 (those dates fell within the period during which the Claimant had indicated earlier that it was also available) [...]. In that message the Respondent also stated that ‘[the Respondent’s lead counsel], who will lead the hearing, is not available during the weeks beginning 10 and 17 September, since he must attend an International Arbitration based in Miami’ and that ‘[another of the Respondent’s counsel] must attend different court cases in progress, which prevent him from being out of Spain during those same two weeks’. Further, the Respondent indicated the weeks in October and November in case that hearing could not be held during the week beginning on 24 September.

In response to those messages, the Tribunal on 8 May 2012 issued Procedural Order No. 5 [...], in which it noted that unfortunately there was no ideal solution, but in the circumstances it considered that the hearing must be held in September, during the only two weeks when the Tribunal was available. The Tribunal expressed the hope that the recent addition of new members to the Respondent’s team will mean that the difficulties previously advised could be overcome. Accordingly, the Tribunal ruled that the hearing would be held beginning on 10 September 2012, with a provisional estimate of 7 working days. On 19 June 2012, the Tribunal issued Procedural Order No. 6, in which it, inter alia, added certain details to its earlier order, such that the hearing will be held from 10 to 14 September and on 17 and 18 September. Thereafter, on 6 July 2012, the Respondent indicated the names of the witnesses of the opposing Party whom it wished to cross-examine and confirmed that it wished to ask all of its witnesses oral questions in chief [...].

This was a situation where the Arbitral Tribunal had to weigh several countervailing concerns and where there were no ideal solutions. The record shows that the Tribunal explored various options (e.g. postponing the hearing, in particular if the Parties would agree thereon at the likely cost of having to reconstitute the Tribunal, and holding the hearing in Madrid at the end of August), but that ultimately, exercising its discretion, the Tribunal decided on the dates that in its view were the best under the circumstances.

That Tribunal’s decision, evaluated in the light of the standard of fairness, as expressed in the LCIA Rules, suggests that the Tribunal did not violate its duty to act fairly and impartially as
between the parties. This view is strengthened in particular by the fact that since 24 April 2012 the Respondent was aware that the hearing would be in September; since 2 May 2012 that the Tribunal was available only during the two weeks beginning on 10 and 17 September and was not available during the weeks beginning 3 and 24 September and in October and November; and since 8 May 2012 that the hearing would start on 10 September. Yet, when the Respondent on 6 July 2012 sent specific comments on the examination of witnesses at the hearing [...], it did not mention any difficulty about the timing of the hearing. The Respondent’s 6 July message was sent more than 8 weeks after the Tribunal had considered the specific timing difficulties of [the Respondent’s lead counsel and second counsel] and ruled (on 8 May) that, in the circumstances of the case, the hearing had to start on 10 September. Therefore, at least on 6 July, if not earlier, the Tribunal had reasons to believe that the hearing starting on 10 September would be manageable, on the basis of which the Tribunal and the other participants in the arbitration could make plans for the hearings. In those circumstances, there were major countervailing considerations against [the Respondent’s lead counsel]’s request to move the hearing to October or November […], including that the Tribunal had indicated already on 2 May that it was currently not available in October and November, that not holding the hearing in September would in the view of the Tribunal cause various problems and that for some time persons other than those on the Respondent’s team could assume that the hearing would start on 10 September 2012. In such a situation, it would be unreasonable to second guess the Tribunal’s decision to decline to reschedule the hearings. The Tribunal also properly explained why it was unable to accede to [the Respondent’s lead counsel]’s request. For example, it said ‘… if we considered it to be necessary in the interest of justice and fairness to both parties to move the hearing to dates when [the Respondent’s lead counsel] can be present to represent the Respondent, we would not hesitate to do so, even if it did mean that one of the arbitrators would have to resign. In our view, however, that is not the position. As it is, the hearing has now been fixed for some considerable time and even without [the Respondent’s lead counsel] the Respondent is still represented by two leading law firms.’ The Tribunal added that ‘The position would of course be different if both parties were to agree alternative dates for the hearing and make a joint request to the tribunal to adjourn the September dates, although in that event, there would as mentioned above need to be a reconstitution of the tribunal.’ […]

Conclusion and decision

On the basis of the above considerations, it is concluded that the Tribunal’s scheduling decisions were not improperly motivated and were within the bounds of the Tribunal’s powers provided in Article 14, paragraph 1 and 2:

“14.1

“The parties may agree on the conduct of their arbitral proceedings and they are encouraged to do so, consistent with the Arbitral Tribunal’s general duties at all times:

(i) to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent; and
(ii) to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the parties' dispute.

“Such agreements shall be made by the parties in writing or recorded in writing by the Arbitral Tribunal at the request of and with the authority of the parties.

“14.2

“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.”

15 Therefore, the challenge to the three members of the Arbitral Tribunal is rejected.

Costs

16 The decision as to the allocation of the costs caused by this challenge, including the LCIA’s administrative charges and my fees, as well as the Claimant’s legal and other costs, are to be determined by the Tribunal.”