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: Where an overseas office of the arbitrator’s law firm is instructed by a party in the arbitration in an unrelated matter, the ongoing commercial relationship between the law firm and the arbitrator, on the one hand, the party on the other hand, reinforces the danger as to the arbitrator’s independence or impartiality. Such circumstances are sufficient to give rise to justifiable doubts as to arbitrator’s impartiality and independence. Such conflicts may be best resolved internally (within the law firm) and not be resolved at the expense of the opposing party.

1 Background

1.1 The underlying dispute arose out of a contract for the sale and purchase of coal, governed by English law. The dispute resolution clause required certain disputes to be referred to an expert and other matters to be referred to arbitration under the LCIA Rules. The clause also provided that the seat of such arbitrations be London and the language of such arbitrations be English.

1.2 The Claimant filed a Request for Arbitration with the LCIA on 2 September 2011. The Respondent did not file a Response to the Request.

1.3 On 18 October 2011, the LCIA notified the parties that the LCIA Court had appointed a three-member Tribunal.

1.4 On 23 July 2012, one of the co-arbitrators (the “Co-arbitrator”) disclosed that one of his partners in the Dubai office of his law firm had been instructed by the Claimant in this case in relation to a separate and unrelated dispute. The Co-arbitrator stated that the Dubai office intended to accept the instruction “[i]n circumstances where there is neither a legal or commercial conflict”. The Co-arbitrator specified that the matter would be handled from the Dubai office and that there would be no practical risk of any confidential information being inadvertently accessed either by himself or the Dubai office as a “Chinese Wall” would be put in place.

1.5 On 25 July 2012, the Respondent invited the Co-arbitrator to withdraw from the Tribunal, considering that there was a risk of apparent and/or actual conflict of interest, and reserved its rights under Article 10.4 of the LCIA Rules.

1.6 On the same day, the Claimant stated that it disagreed with the Respondent’s proposed course of action and that it did not see any conflict in the circumstances.
1.7 On 26 July 2012, the Co-arbitrator confirmed that he was not prepared to withdraw from the Tribunal.

1.8 On 31 July 2012, the Respondent formally challenged the Co-arbitrator, pursuant to Article 10.4 of the LCIA Rules, and invited the Co-arbitrator to reconsider his decision not to withdraw.

1.9 On the same day, the LCIA requested the Claimant to confirm whether it still disagreed with the challenge and the Co-arbitrator to confirm whether he was still not prepared to stand down, for the purposes of Article 10.4 of the LCIA Rules.

1.10 On 2 August 2012, the Claimant confirmed that it did not agree to the challenge.

1.11 On 14 August 2012, the Co-arbitrator confirmed that the recent exchanges had not changed his mind about his original decision that there are no grounds to stand down.

1.12 On 23 August 2012, the LCIA notified the parties that, pursuant to Article 10.4 of the LCIA 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 filed by the Respondent.

1.13 The former Vice President invited the parties to inform him before 3 September 2012 whether they wished to communicate any additional information. The parties confirmed that they did not have any further information to communicate to the former Vice President, although the Respondent attached several legal authorities to its email to the former Vice President. The former Vice President advised that he would proceed to render his decision shortly unless the Claimant objected to the submission of these documents before 3 September 2012.

1.14 On 31 August 2012, the Claimant confirmed that it did not object to the submission of the documents by the Respondent.

1.15 On 4 September 2012, the former Vice President rendered his decision on the challenge.

2 Decision excerpt

“[...]”

III. Reasoning

(a) Criteria to be applied

23. Since the seat of arbitration is London and since the arbitration is conducted under the LCIA Rules\(^1\), both the English Arbitration Act 1996 and the LCIA Rules will be relevant. Reference shall also be made to legal authorities submitted by the Respondent (the Claimant provided none) and, as additional guidance, to the 2004 IBA Guidelines on Conflicts of Interest in International

\(^1\) See clauses 18.1 and 27.5.2 of the contract, as well as the preamble of the LCIA Rules which provides that ‘[w]here any agreement, submission or reference provides in writing and in whatsoever manner for arbitration under the rules of the LCIA or by the Court of the LCIA (“the LCIA Court”), the parties shall be taken to have agreed in writing that the arbitration shall be conducted in accordance with the following rules [...]’.
Arbitration which purport to and actually do reflect best practices in the international arbitration community.

(b) Procedural requirements of the challenge

24. The Respondent’s challenge is brought under Article 10.4 of the LCIA Rules, which reads as follows:

‘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 Articles 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 the written receipt of the written statement, the LCIA Court shall decide upon the challenge’.

25. The above procedural requirements are met. Following [the Co-arbitrator]’s disclosure on 23 July 2012, the Respondent invited [the Co-arbitrator] to withdraw on 25 July 2012 and sent its formal challenge to the LCIA Court, the Tribunal and the Claimant on 31 July 2012, i.e. within 15 days after becoming aware of any circumstances referred to in Article 10.3 of the LCIA Rules. Moreover, the arbitrator did not withdraw and the Claimant did not agree to the challenge.

(c) The challenge

26. It should be emphasized, from the very beginning, that the only purpose of this determination is to decide whether the challenge must be granted or denied and that [the Co-arbitrator]’s conduct is not in any way impugned by the present decision. As a matter of fact, [the Co-arbitrator] has acted diligently and most ethically in the circumstances. First [the Co-arbitrator] disclosed forthwith that one of his partners has been instructed by [the Claimant] in relation to a separate dispute. Secondly, the Respondent has not challenged [the Co-arbitrator] (as well as his firm’s) intent and readiness to put in place a ‘Chinese Wall’ to prevent any undue access to confidential information. Thirdly, there is nothing in the record and no reason to believe that [the Co-arbitrator] could have prevented the firm’s Dubai office from accepting the instruction.

27. In fact, it is not entirely clear whether the Dubai office accepted the instruction at this stage, for [the Co-arbitrator] stated that ‘[i]n circumstances where there is neither a legal or commercial conflict, our Dubai office intend to accept the instruction’ [...]. For the purposes of this determination, however, the Division will proceed on the basis that the Dubai office accepted the instruction: precisely, there is no indication that [the Co-arbitrator] would be in a position to oppose the Dubai’s office decision to accept the assignment so that, for the purposes of this challenge, it is necessary to assume, for the sake of reasoning, that this eventuality will occur. On the other hand, the Claimant was in a position at all times to render the whole question moot by deciding not to instruct the Dubai office.

28. Article 10.3 of the LCIA Rules reads as follows:

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
29. It is generally accepted that the LCIA Court applies the concept of arbitral independence as an ‘objective test for the existence of circumstances that created the appearance of potential bias on the part of the arbitrator’, whereas impartiality is ‘subjective in nature, and requires the LCIA Court to apply a test for the actual presence of bias by the arbitrator, as demonstrated by the actions of the arbitrator, rather than simply the appearance of potential bias’ (Walsh T. and Teitelbaum R., The LCIA Court Decisions on Challenges to Arbitrators: An Introduction, Arbitration International, Volume 27 Number 3, 2011, at pp. 287-288; see also Sutton D., Gill J. and Gearing M., Russel on Arbitration, 23rd Edition, 2007, at pp. 157-158 and 166-167).

30. Here the issue is to determine whether there are justifiable doubts as to [the Co-arbitrator]’s impartiality or independence under Article 10.3 LCIA Rules given that one of the arbitrator’s partners in [the Dubai office of the arbitrator’s law firm] has been instructed by the Claimant […] in another dispute […].

31. No additional information is given with respect to the ‘separate and unrelated dispute’ for which the Dubai office has been instructed. The important point, however, is that the Dubai office has been instructed by [the Claimant], from which it follows that there is a commercial relationship between the two, even if the precise nature or extent of this relationship is unknown.

32. The Respondent goes further and argues that there is ‘a direct relationship’ between [the Co-arbitrator] and [the Claimant] on the basis that there is no legal distinction between [the Co-arbitrator]’s London office and the Dubai office, the latter being a licensed branch of [the Co-arbitrator’s law firm] […].

33. It is open to question whether a ‘direct’ relationship can be said to exist between [the Co-arbitrator] and [the Claimant] on the sole basis that the Dubai office is a licensed branch of [the Co-arbitrator’s law firm] whether there is effectively ‘no legal distinction’ between the London and Dubai offices (in the absence of additional and precise information regarding the firm’s legal structure). Moreover, the Respondent itself refers to and emphasizes Rule 3 of the IBA Guidelines of Ethics for International Arbitrators, which provides as an example of an ‘indirect relationship’ the case where the arbitrator’s business partner has a business relationship with one of the parties.

34. Regardless of whether the relationship is direct or indirect, the Respondent quite pointedly relies on the Practitioner’s Handbook on International Arbitration and Mediation (2nd Edition, Rhoads and Others, 2007), which states at p. 359 that ‘[t]he interests and relationships of a law firm generally should be imputed to any member of that firm’.

35. It may be noted that the General Standard 6 of the 22 May 2004 IBA Guidelines on Conflicts of Interest (hereafter ‘the IBA Guidelines’) also provides, in pertinent part, that

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2 The parties have not referred to these authorities. They are only mentioned here with a view to summarizing and clarifying the concepts of independence and impartiality under English law and the LCIA Rules.
When considering the relevance of facts or circumstances to determine whether a potential conflict of interest exists or whether disclosure should be made, the activities of an arbitrator’s law firm, if any, should be reasonably considered in each individual case. Therefore, the fact that the activities of the arbitrator’s firm involve one of the parties shall not automatically constitute a source of such conflict or a reason for disclosure.

36. The explanation to General Standard 6 states, in pertinent part, that:

The growing size of law firms should be taken into account as part of today’s reality in international arbitration. There is a need to balance the interests of a party to use the arbitrator of its choice and the importance of maintaining confidence in the impartiality and independence of international arbitration. In the opinion of the Working Group, the arbitrator must in principle be considered as identical to his or her law firm, but nevertheless the activities of the arbitrator’s firm should not automatically constitute a conflict of interest. The relevance of such activities, such as the nature, timing and scope of the work by the law firm, should be reasonably considered in each individual case. The Working Group uses the term ‘involvement’ rather than ‘acting for’ because a law firm’s relevant connections with a party may include activities other than representation on a legal matter.

37. Here, the precise nature, value and scope of the work carried out by [the Co-arbitrator]’s law firm for the Claimant […] are unknown. Neither is it known or alleged that [the Claimant] is a regular or former client of the firm. Under the IBA Guidelines, it is thus not entirely clear whether the situation would fall within section 2.3.6 of the ‘Waivable Red List’ where “[t]he arbitrator’s law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties” or within section 3.2.1 of the ‘Orange List’ “[t]he arbitrator’s law firm is currently rendering services to one of the parties or to an affiliate of one of the parties without creating a significant commercial relationship and without the involvement of the arbitrator’.

38. Only under the first situation (i.e. section 2.3.6) would the Respondent’s express agreement or waiver have been necessary in order for [the Co-arbitrator] to continue to act as arbitrator. In this case, there has been no such waiver on the part of the Respondent. By contrast, under section 3.2.1, the fact that the Respondent expressed its objection that [the Co-arbitrator] continue to act as arbitrator would not be outcome-determinative.

39. Irrespective of whether the situation would fall within section 2.3.6 or 3.2.1 of the IBA Guidelines, the law firm is known to have been ‘instructed’ by [the Claimant]. [The Co-arbitrator] referred to his ‘firm’s involvement in this new matter’ […], from which it would follow that the assignment is sufficiently important for [the Co-arbitrator]’s firm to accept the instruction in spite of this ongoing arbitration proceedings in which [the Co-arbitrator] is sitting as arbitrator.

40. Even more important is the timing of the work done and to be done by the law firm. Indeed, the law firm has been instructed by [the Claimant] at a time when [the Co-arbitrator] is both a current (not former) partner at the law firm and currently acting as arbitrator in the dispute opposing [the Claimant] and [the Respondent].

41. The commercial relationship between the law firm and arbitrator, on the one hand, and the Claimant […], on the other, is thus ongoing, which reinforces the danger as to [the Co-
It may be said that such conflicts are bound to arise, especially in large international law firms. But this risk is known by their lawyers and such conflicts, whenever they arise, may be best dealt with internally (i.e. within the law firm) and not be resolved at the expense of the opposing party whose trust in the arbitrator’s impartiality or independence might be otherwise be broken.

It follows that the circumstances are sufficient to give rise to justifiable doubts as to [the Co-arbitrator]’s impartiality and, more concretely, independence within the meaning of Article 10.3 LCIA Rules.

It should be noted that neither Party stated that the test for arbitral removal under the English Arbitration Act 1996 or case law would produce a different outcome, even though the Respondent did refer to legal literature in respect of Section 24 of the English Arbitration Act.

Several Divisions of the LCIA Courts have held that the test for English courts is ‘whether the fair-minded and informed observer, having considered the facts, would conclude that there [i]s a real possibility that’ an arbitrator appears to be dependent on a party or is partial to a party (Walsh T. and Teitelbaum R., The LCIA Court Decisions on Challenges to Arbitrators: An Introduction, Arbitration International, Volume 27 Number 3, 2011, at pp. 288).

On the facts of the case, the answer to those tests would be positive and thus the outcome would be identical to the one reached on the basis of Article 10.3 LCIA Rules.

The present determination is made despite the quite advanced stage of the proceedings. However, the final hearing is scheduled for 12 November 2012, which should afford enough time to select a replacement arbitrator who will by then be ready and familiar with the case.

In fact, timing is not without significance. First, it is unlikely that an arbitral institution would have appointed [the Co-arbitrator] had the Claimant instructed the Dubai office at the beginning of this arbitration. Secondly, if that issue were now left open until it becomes clear whether the Dubai office is actually instructed, the potential negative impact on the proceedings would be even greater because the evidentiary hearing would draw even closer or, worse, have already been held. Thirdly and more generally, it is in the interest of all parties that the arbitration results in a valid award that will not be subject to a challenge at a later date for alleged bias.

IV. Decision

For the above reasons, [I uphold] the challenge and [declare] that the costs and expenses generated by the challenge, as well as any legal fees related to it, should be determined by the arbitral tribunal.”