LCIA Reference No. 111996, Decision Rendered 22 April 2013

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<th>Subject:</th>
<th>Challenge to sole 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)</th>
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<td>Division/Court member:</td>
<td>Vice President of the LCIA Court (acting alone)</td>
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| Summary: | If a party fails to respond efficiently and expeditiously to the Tribunal’s directions, despite being given ample opportunity to do so, it would not be improper for the sole arbitrator to decide not to accept that party’s untimely request to postpone a conference call, which purpose was to reschedule a hearing for the second time, at the request of that party.

Membership by an arbitrator to a society that promotes friendship and bilateral relations between the country of one party and another country is not of a nature that could make the arbitrator beholden to the country of that party and therefore does not compromise the arbitrator’s independence. |

1 **Background**

1.1 The underlying dispute arose out of a long standing agency/distributor relationship between the parties. The Claimant relied on an exchange of correspondence between the parties as evidence of an agreement between the parties to refer their dispute to arbitration before a sole arbitrator and under the LCIA Rules. The seat of arbitration was stated to be London and the language of the arbitration was stated to be English.

1.2 The Claimant filed a Request for Arbitration with the LCIA on 23 November 2011, naming the Respondent and another party as respondents. No Response was filed.

1.3 On 2 February 2012, the LCIA notified the parties that the LCIA Court had appointed the Sole Arbitrator.

1.4 On 17 April 2012, the Sole Arbitrator issued a partial award relating to the payment by the Claimant of a substitute deposit, following the failure by the Respondents to pay their share of the advance.

1.5 On 5 May 2012, the Sole Arbitrator issued a second partial award on jurisdiction, which ruled that the second party named as a Respondent in the Request was not a party to the arbitration, therefore leaving only one respondent.

1.6 On 17 August 2012, the Sole Arbitrator decided he would determine two preliminary issues and a preliminary hearing was later scheduled for 6 and 7 November 2012.
1.7 On 8 October 2012, the Respondent’s counsel on record at the time informed the Sole Arbitrator that they no longer represented the Respondent.

1.8 On 9 October 2012, the Chief Executive Officer of the Respondent wrote to the Sole Arbitrator to protest the proceedings and stated that they had not requested any lawyer to represent them in this matter.

1.9 On 22 October 2012, the Sole Arbitrator reminded the parties that the preliminary hearing would be held on 6 and 7 November 2012.

1.10 On 31 October 2012, the Respondent’s new counsel wrote to the Sole Arbitrator to request the postponement of the 6 and 7 November hearing.

1.11 On the same day, the Sole Arbitrator replied that “[i]t is the Respondent’s responsibility to choose a lawyer in time to represent him adequately for a hearing he has known about for a long time. It has not done so”. The preliminary hearing was nevertheless adjourned and, on 17 December 2012, the Sole Arbitrator issued a third partial award in which he ordered the Respondent to pay the Claimant’s wasted costs of the adjournment.

1.12 The preliminary hearing was rescheduled for 28 February and 1 March 2013.

1.13 On 21 January 2013, the Respondent requested an extension of time for the filing of scheduled submissions and requested again for the hearing to be postponed to a mutually agreeable date in April 2013.

1.14 On 5 February 2013, the Claimant wrote that it had no objection to the Respondent’s further request for adjournment, as it considered that it was of the utmost importance for the Respondent to be properly legally represented, and proposed the parties advise the Sole Arbitrator within one week which dates should be avoided and that a procedural telephone hearing be held within two weeks.

1.15 On 6 February 2013, the Sole Arbitrator agreed to the further adjournment of the hearing and stated that the schedule proposed by the Claimant seemed sensible.

1.16 The Respondent did not reply to the Sole Arbitrator’s message of 6 February 2013 and remained passive until 21 February 2012. Further it failed to empower a representative to communicate with the Sole arbitrator for fixing the dates for the preliminary hearing.

1.17 During that period there were a number of messages sent by the Sole Arbitrator and the Claimant as regards the date for the preliminary hearing, pursuant to which the Sole Arbitrator decided to hold a conference call on 25 February 2012 to determine the procedural timetable and the hearing date.

1.18 On 21 February 2013, the Respondent stated that the management of the Respondent were currently out of the country, that they would be back in the first week of March and that the Respondent would respond properly to the relevant issues the week beginning 11 March 2013.

1.19 The Sole Arbitrator replied that he would not delay the conference call, which was held on 25 February 2013, as scheduled.
1.20 After the conference call, in which only the Claimant participated, the Sole Arbitrator proposed two alternative dates for the preliminary hearing and requested the Respondent to indicate its choice by 4 March 2013, stating that were the Respondent not to reply the hearing would take place on 7 to 8 May 2013.

1.21 Having not received a response from the Respondent, the hearing was fixed for 7 to 8 May 2013.

1.22 By letter of 8 March 2013, the Respondent filed a challenge to the Sole Arbitrator requesting the revocation of his appointment.

1.23 By letter of 21 March 2013, the Claimant disagreed with the challenge.

1.24 On 21 March 2013, the Sole Arbitrator declined to withdraw as arbitrator.

1.25 On 2 April 2013, the LCIA notified the parties that, pursuant to Article 10.4 of the LCIA Rules, and paragraph D.3(a) of the Constitution of the LCIA Court, the LCIA Court had designated a Vice President of the LCIA Court to determine the challenge.

1.26 The parties and the Sole Arbitrator made submissions on the challenge in accordance with a schedule fixed by the Vice President.

1.27 On 22 April 2013, the Vice President rendered his decision on the challenge.

2 Decision excerpt

“[...]

NOW THEREFORE, having considered all the arguments and relevant circumstances, I REJECT THE CHALLENGE AGAINST [THE SOLE ARBITRATOR] for the following reasons:

1. I understand that the Respondent is challenging [the Sole Arbitrator] on the basis of Article 10 of the LCIA Arbitration Rules, which reads:

Article 10 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.

2. It follows from the challenge that the main reasons or the triggering event for it was the conference call of 25 February 2013. The 15-day deadline for filing the challenge thus expired on 12 March 2013. Because the challenge was sent on 11 March 2013 (and dated 8 March 2013), it is timely under Article 10.4 of the LCIA Rules.

3. I have carefully considered the Parties’ submissions and the Sole Arbitrator’s comments on the challenge. Given that some of the Respondent’s allegations may be understood as arguing that the decisions of the Sole Arbitrator on jurisdiction, costs and other matters show bias and violations of the LCIA Rules, the LCIA Secretariat has provided me with a copy of the entire file, which I have also carefully reviewed in order to ascertain whether there are indications of circumstances that give rise to justifiable doubts as to the Sole Arbitrator’s impartiality or independence, as argued by the Respondent.

4. The reasons below summarize the points considered determinative of the conclusion reached. The arguments that are not expressly addressed in the reasons are such that they would not have changed the conclusion.

Appointment of the Sole Arbitrator

5. The Respondent’s view is that [the Sole Arbitrator] was not properly appointed. The Respondent argues, for example, that [the Sole Arbitrator] ‘was exclusively nominated and appointed by [the Claimant/the Claimant’s Counsel] for engagement as sole arbitrator by the LCIA’ […].

6. On 5 April 2013, the Respondent essentially repeated that allegation and added that the appointment was made ‘unfortunately without any input by [the Respondent] as required, since the issue of validity of the arbitration had not been established or agreed to by [the Respondent] at the time’ […].
7. The Claimant rejects the Respondent’s view, submitting that ‘[t]he tribunal was appointed by the LCIA Court in accordance with Article 5 of the LCIA Rules’ and that ‘[n]either the Claimant nor [the Claimant’s Counsel] appointed nor indeed could have appointed, the Tribunal’ […].

8. The basis of the Respondent’s argument is surprising because there is no doubt, as the record shows, that [the Sole Arbitrator] was appointed by the LCIA Court in accordance with the Articles 5.3 and 5.4 of the LCIA Rules. Neither the Claimant nor its representatives played any role, let alone any improper role in the process. The Parties’ arbitration agreement states that ‘[t]he number of arbitrators shall be one’. In the circumstances, the default procedure under Articles 5.3 and 5.4 of the LCIA Rules is that the LCIA Court selects and appoints the sole arbitrator. That is exactly what happened in this case.

Disputed independence of the Sole Arbitrator

9. In its letter of 8 March 2013, the Respondent states ‘[w]e note also the allegations that the sole arbitrator has had several professional interactions with [the Claimant’s Counsel] in the past which has not been denied’ […]. The Respondent does not, however, provide any evidence for its allegation, and only suggests that ‘this needs to be verified properly’ […]. In its reply of 21 March 2013, the Claimant denies any impropriety and refers to the statement of independence signed by [the Sole Arbitrator] […].

10. It should be noted that there is an obvious typographical error in the Claimant’s letter of 21 March 2013, ‘[t]he Claimant states that ‘the sole arbitrator has had several professional interactions with [the Claimant’s Counsel] in the past which has not been denied’ (emphasis added). The Claimant was clearly quoting the Respondent. Nevertheless, in its letter of 5 April 2013, the Respondent proceeded to characterize the Claimant’s obvious mistake as an ‘unequivocal statement of admission by [the Claimant’s Counsel]’, which ‘confirms the Respondent’s fears regarding the partiality and bias of [the Sole Arbitrator]’. The Claimant denies that any statement of admission had been made by [the Claimant’s Counsel] […]. The Respondent’s presentation of its own statement as an admission by the Claimant indicates its careless approach to arguing the case. No indications could be found of disqualifying contacts between [the Sole Arbitrator] and the Claimant or its representatives. There is no reason to doubt the statement of independence of [the Sole Arbitrator] and his subsequent explanations in his letter of 11 April 2013.

11. In its letter of 5 April 2013, the Respondent also demanded ‘to be furnished with the details of the said professional interactions’ as well as ‘with all Arbitral proceedings, awards and decisions given by [the Sole Arbitrator] in all the Arbitration in which [the Claimant’s Counsel] had participated’ […]. Such materials have not been provided to the Respondent. For the avoidance of doubt, it is emphasized that it would in any case be improper for the Respondent to be given any materials from arbitrations in which it has no part.
Nationality of the Sole Arbitrator

12. The Respondent, noting that the dispute is between a Nigerian and a British company, has stated that the Claimant is a ‘British/Irish owned company’, without offering any substantiation for its statement. Further the Respondent argues that the Sole Arbitrator has his ‘nationality tied to the British hegemony’, that the Sole Arbitrator is ‘a member of the British-[Country X] society which aims to promote friendship and bilateral relations between the UK and [Country X] in all fields of human endeavours especially commercial areas for the benefit of the UK and [Country X]’, and that, as a result, the Respondent ‘has not been accorded the requisite level playing field in the entire Arbitration process’ […].

13. The Claimant submits that it is an English registered company and that it is not Irish […].

14. Where the parties are of different nationalities, Article 6.1 of the LCIA Arbitration Rules provides that sole arbitrators or chairmen are not to be appointed if they have the same nationality as any party. The nationality of the parties is understood to include that of controlling shareholders or interests (Article 6.2 of the Rules). [The Sole Arbitrator], an Irish national, has been appointed on the understanding that the Claimant is a company incorporated in England and that the Respondent is a company incorporated in Nigeria. Indeed, at the beginning of the proceedings, by a letter dated 24 November 2011, the Parties were invited by the LCIA to advise, at their earliest opportunity, whether the LCIA should be considering any other nationalities in light of Article 6.2 concerning controlling shareholders or interests. Since no Party reacted to the invitation, the LCIA proceeded on the basis that no nationalities other than British and Nigerian had to be considered for the purposes of Article 6.2 of the Rules, and was therefore satisfied that [the Sole Arbitrator] could be appointed as sole arbitrator in this case.

15. As to the membership in a society such as the British-[Country X] society, I consider that it is not of a nature that could make [the Sole Arbitrator] beholden to the UK and therefore does not compromise his independence.

16. As regards the Respondent’s comment that [the Sole Arbitrator]’s Irish nationality is ‘tied to the British hegemony’, I find it unconvincing and, in any event, consider that his Irish nationality is not indicative of his lacking independence or violation of Article 6.1 of the LCIA Rules.

Conduct of the proceedings and decisions

17. The Respondent raises several complaints as regards the way the Sole Arbitrator has conducted the case, including his failure to take a decision on jurisdiction at the inception of the proceedings; the way he dealt with the deposit of £60,000 as a condition for the adjournment of the hearing scheduled for 6 and 7 November; and his treatment of the allegations of bribery […]. Further, the Respondent alleges that the arbitration is being used with a view to stifling the business of the Respondent, or that the LCIA Rules have been breached with the result of a financial loss for the Respondent, and that the Sole Arbitrator, instead of determining all the
issues at once and perhaps in one sitting, has decided to deal with certain preliminary issues first [...].

18. As regards the way the Sole Arbitrator has dealt with the issue of jurisdiction, I note that the LCIA Rules give the Arbitral Tribunal broad discretion: ‘The Arbitral Tribunal shall have the power to rule on its own jurisdiction, including any objection to the initial or continuing existence, validity or effectiveness of the Arbitration Agreement’ and ‘The Arbitral Tribunal may determine the plea to its jurisdiction or authority in an award as to jurisdiction or later in an award on the merits, as it considers appropriate in the circumstances’ (Article 23.1 and 23.3 of the LCIA Rules, emphasis added). As regards [the Sole Arbitrator]’s other decisions, I note that, according to the LCIA Rules, the Arbitral Tribunal has a general duty at all times ‘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’ and that ‘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.’ (Article 14.1(ii) and 14.2, emphasis added).

19. Based on the review of the file, no indication has been found that [the Sole Arbitrator] acted outside his powers or that his decisions were improperly motivated. It should be noted that the determination of jurisdiction and other decisions fall entirely within the province of the Sole Arbitrator and that the purpose of the review of the file has been limited to ascertaining whether there are any circumstances giving rise to justifiable doubts as to the Sole Arbitrator’s impartiality or independence.

Telephone conference of 25 February 2013

20. It appears that the scheduling of the conference call in February 2013 was the main reason for the Respondent’s challenge of the Sole Arbitrator. The circumstances around it are therefore laid out here in more details [sic].

21. It is noted that the preliminary hearing was originally scheduled for 6 and 7 November 2012. It was adjourned on short notice at the request of the Respondent, which wasted costs in the amount of £41,665, as found by the Sole Arbitrator in his Partial Final Award of 17 December 2012. The preliminary hearing was then rescheduled for 28 February-1 March 2013, and then, once again adjourned at the request of the Respondent.

22. On 5 February 2013, the Claimant stated that it had no objection to the adjournment as it considered that it is of the utmost importance that the Respondent be properly legally represented. The Claimant however requested that new dates for the preliminary hearing be agreed as soon as possible, and suggested that this could be done as follows: ‘within one week (i.e. by 12 February 2013) the parties advise which dates should be avoided’, or that ‘within two
weeks (i.e. by 19 February 2013) a telephone conference be held at which a date can be fixed and further appropriate directions decided.

23. **On 6 February 2013, the Sole Arbitrator informed the Parties that he found the Claimant’s suggested method sensible.**

24. **The Respondent, on whose behest the preliminary conference had been adjourned, did not react.**

25. **On 14 February 2013, the Claimant wrote that it was currently ‘free to attend a preliminary hearing on any dates in May, June and September’, and suggested that a telephone conference be held ‘next week on to Wednesday, Thursday or Friday’ [i.e. on 20, 21 or 22 February] to fix a date for the preliminary hearing. On the same day, [the Sole Arbitrator] indicated the times at which he was available on 20, 21 or 22 February and added that he was available for a conference call all day on Monday and Tuesday, i.e. 18 and 19 February. Still on the same day (14 February), the Claimant replied that it could attend the conference on Monday and Tuesday all day, or on Wednesday, Thursday or Friday from 5.30 pm; and [the Sole Arbitrator] suggested to the Parties that the conference call be held on Monday or Tuesday at the Parties’ mutual convenience.**

26. **The Respondent did not respond to any of the above communication.**

27. **On 18 February 2013, the Claimant sent a message to […] the counsel of record for the Respondent, requesting him to confirm his availability for the conference call. No response came from either the Respondent or [the counsel on record for the Respondent].**

28. **On 20 February 2013, the Claimant wrote to the Sole Arbitrator: ‘in the absence of a response from [the counsel on record for the Respondent]/or the Respondent we would be grateful if you could fix an oral hearing for further directions’.**

29. **On 20 February 2013, [the Sole Arbitrator] suggested a conference call on 25 February 2013. He urged the Respondent to participate to permit them to fix a convenient hearing date. On the same day, the Claimant proposed to hold the conference call at 11am on Monday 25 February ‘if that is convenient to you and the Respondent’; and [the Sole Arbitrator] confirmed the time and date.**

30. **Between 6 February 2013, when the discussion described above about fixing the dates for a preliminary hearing started, and [the Sole Arbitrator]’s email of 20 February 2013, there was no reaction from the Respondent. It was only on 21 February 2013 that the Respondent wrote to the Sole Arbitrator ‘to respond timely to guide the disposition of the tribunal to current mails’, and stated that ‘[t]he management of [the Respondent] are currently out of Nigeria following the Tribunal’s approval of the postponement of pending issues as agreed to by both parties’. The Respondent also stated that ‘the management will be back in Nigeria in the first week of March & will respond properly to issues in view promptly in the week beginning Monday 11th**
March 2013. In addition, the message contained the following: ‘Our company has however noted a trend where the Claimants appear to be dictating to the Tribunal at will, and we wish to urge the tribunal to kindly note of this observation seriously and kindly ensure that such tendencies are not encouraged for its implications. The tribunal must be seen to be transparently fair to both parties’.

31. On 22 February 2013, the Sole Arbitrator replied to the Respondent stating that ‘[t]his matter has been too long delayed, in large part by [the Respondent]’s serial changes of lawyers’ and that it was ‘time to set (re-set) hearing dates’. He pointed out that the Respondent ‘has a lawyer of record […]. It can either instruct him to represent it on Monday’s conference call, choose a new lawyer to do so, or represent itself with a person it authorizes to do so. Wherever the [Respondent’s] responsible executives may be in the world, modern communications permit them to participate in the conference call. I look forward to [the Respondent’s] participation’.

32. On 23 February 2013, the Respondent wrote to insist at length that 25 February 2013 was not acceptable for it until it had taken due legal advice. On the same day, the Sole Arbitrator responded that the point of the telephone call on 25 February was to set new dates for the preliminary hearing and that ‘it is not too much to ask both parties now for simple submissions on the dates they favour, to attempt to find mutually agreed-upon dates, and failing that, to set dates that are, in the opinion of the Tribunal, fair and adequate’ and that ‘in these days of instant telephone and email communications, it is not too much to ask the parties to instruct someone to participate in a conference to address this simple question’. He pointed out that, failing the Respondent’s participation in the conference call, he would have to make his decision on the basis of the information he would have then available.

33. Also on 24 February 2013, the Respondent stated: ‘the new dates of hearing proposed by [the Claimant] & agreed to by [the Respondent] & the Tribunal for June or September 2013’. In response, on 25 February 2013, the Claimant stated that ‘for the avoidance of doubt, [the Respondent] did not agree to the dates which we had proposed. We never received a response from you.’ On the same day, the Respondent replied that ‘we hereby reconfirm the acceptance of [Respondent] for a date in September as proposed by the Claimant which has not been disputed or controverted at any time.’ The Respondent then stated that ‘[t]he Tribunal had agreed with this request in principle and the only issue for discussion now is agreeing to a schedule which we appeal should be taken in the week beginning 11th March 2013.’ At the end the Respondent added that ‘[a]s soon our management returns to the country, we would agree to a new date for a conference call to find best resolution to the dispute between two partners with over 25 years relationship. We agree that a lot more is at stake and it would be sensible to allow time at this stage to review and come back to the arbitration for conclusive process, after a respite period.’

34. The conference call was held on 25 February 2013. After the call, the Sole Arbitrator wrote to the Parties as follows: ‘The Respondent, although fully aware of the scheduled call, and having been notified in advance, failed to participate. The purpose of the call, as previously announced,
was to set the hearing dates in this long-delayed matter and to provide a schedule for the events leading up to those hearing dates. I used as a model the schedule agreed with [the counsel on record for the Respondent], for the hearings previously set to begin on 28 February, a date which was subsequently postponed.’ Further, the Sole Arbitrator offered two alternative schedules for submissions leading up to the preliminary hearing on 6-7 May 2013 or on 13-14 May 2013. The Sole Arbitrator clarified that the Respondent could choose either schedule and that it must indicate its choice by 4 March 2013. In the event that it did not make a choice by that time, the earlier alternative would apply. On the same day (25 February) the Sole Arbitrator amended the first alternative to 7-8 May (6 May being a Bank Holiday in London) and noted: ‘It is also clear that, despite [the Respondent’s] contention, that there has been no agreement to any dates for the hearing between the parties or with the Tribunal, in September or otherwise.’ Subsequently, arrangements were made for a preliminary hearing to take place on 7-8 May 2013.

35. The consideration of the above messages leads to the conclusion that, contrary to the view expressed by the Respondent, neither Party could regard September 2013 as the month when the preliminary hearing should be held. Until any hearing dates have been accepted by the Tribunal, they are proposals only.

36. Given the repeated requests by the Respondent for the adjournment of the preliminary hearing, there is nothing improper in the Sole Arbitrator’s wish to re-schedule the preliminary hearing during a conference call. Further, given the Respondent’s failure to react in good time to the messages concerning the conference call to be held in February 2013 (see above paragraph 30), there is also nothing improper in the Sole Arbitrator’s decision not to accept the Respondent’s untimely request to postpone the conference call to until after 11 March 2013.

37. There is no basis for the Respondent’s allegations that the Sole Arbitrator’s actions as regards the conference call and the scheduling of the preliminary hearing show bias or a lack of independence. The conference call had a simple purpose and the Respondent did not cooperate as the Sole Arbitrator was entitled to expect. Generally, according to the LCIA Arbitration Rules “at all times the parties shall do everything necessary for the fair, efficient and expeditious conduct of the arbitration[”] (Article 14.2). In the circumstances surrounding this case in general, and the scheduling of the preliminary hearing in particular, the Respondent did not respond efficiently and expeditiously to the Sole Arbitrator’s directions either itself or through its representative, despite being given ample opportunity to do so.

Conclusion

38. […]

39. Therefore, and because there are no circumstances that might give rise to justifiable doubts as to the Sole Arbitrator’s impartiality or independence, the Respondent’s challenge is rejected.
Costs

40. As to costs, I reserve any decision as to which party should bear the costs and expenses generated by this challenge, including the legal fees incurred by each party, for determination by the Sole Arbitrator in the underlying arbitration."