Subject: 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 or impartiality)

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

Summary: A Tribunal has the discretion to make decisions regarding matters of evidence and procedure. One must examine the parties’ arguments in connection with the decisions and the reasons behind the decisions in order to analyse whether there was any bias. In this case, there were no indications of bias or improper motivations behind the Sole Arbitrator’s decisions.

1 Background

1.1 The underlying dispute arose out of a service agreement in relation to securing contracts for the provision of floating production, storage and offloading facilities. The contract was governed by English law and contained an arbitration clause which referred to the “London Chamber of International Arbitration (“LCIA”), 70 Fleet Street, London”. The seat of the arbitration was London and the language was English.

1.2 The Claimant filed a Request for Arbitration with the LCIA on 9 February 2012. The Respondent filed Response on 12 March 2012, in which it contested the Tribunal’s jurisdiction.

1.3 On 11 April 2012, the LCIA notified the parties that the LCIA Court had appointed the Sole Arbitrator.

1.4 In the latter part of 2012 and early 2013, the Claimant sought to admit documents from another arbitration between the same parties (the “Previous Arbitration”) to show that a senior executive of the Respondent gave untruthful testimony in the Previous Arbitration.

1.5 At the procedural hearing on 5 and 6 February 2013, the Sole Arbitrator rejected the Claimant’s applications to admit the documents from the Previous Arbitration on the grounds that they were either confidential or privileged. The Claimant was, however, permitted to provide information from the Previous Arbitration provided that the information was confined to specific and narrow passages from the documents in question, but not the documents in their entirety. The Claimant subsequently made reference to the Previous Arbitration, and advanced the allegations against the senior executive of the Respondent in its witness statements.

1.6 On 28 August 2013, in advance of a 3-day jurisdictional hearing commencing on 9 September 2013, the Respondent submitted its opening submissions and the hearing bundles it prepared, which included an award from the Previous Arbitration (the “Previous Arbitration Award”).
1.7 On 2 September 2013, the Claimant filed its opening submissions which, inter alia, objected to the Respondent’s inclusion of the Previous Arbitration Award in the hearing bundles and to the Respondent’s reliance on the Award in its opening submissions. The Claimant asserts that the hearing bundles were agreed between the parties without any mention in the index of the Previous Arbitration Award.

1.8 The Respondent filed a reply to the Claimant’s submissions on 4 September 2014.

1.9 On 5 September 2013, the Sole Arbitrator wrote to the parties in respect of the Respondent’s inclusion of the Previous Arbitration Award, noting that it was the Claimant that originally sought to introduce information from the Previous Arbitration and that the Respondent had now introduced the Previous Arbitration Award to reply to points raised by the Claimant, namely the Respondent argued that the Award established the credibility of its witness. The Sole Arbitrator declined the Claimant’s application, stating that “there could be no good reason for excluding the [Previous Arbitration Award].”

1.10 On 7 September 2013, the Claimant filed a further application requesting the Sole Arbitrator to review his decision of 5 September 2013 to allow the introduction of the Previous Arbitration Award.

1.11 On 9 September 2013, the hearing on jurisdiction commenced. In the morning, the parties made submissions including on the introduction and reliance on the Previous Arbitration Award. The Sole Arbitrator again refused to exclude the Previous Arbitration Award and allowed the Respondent to enter into evidence two other documents from the Previous Arbitration which also dealt with the credibility of its witness. In addition, the Sole Arbitrator took several decisions concerning the taking of evidence by witnesses which did not follow the proposals by the Claimant.

1.12 Shortly after the lunch recess on the first day of the hearing, the Claimant provided the Sole Arbitrator and the Respondent a letter in which the Claimant applied for the revocation of the Sole Arbitrator’s appointment.

1.13 The Sole Arbitrator declined to resign or adjourn the jurisdictional hearing and the Claimant ceased to participate in the hearing. The Sole Arbitrator’s and parties’ comments on the challenge were recorded in the transcript of the hearing. The Sole Arbitrator confirmed by email later that day that he would not withdraw as arbitrator.

1.14 By email of 10 September 2013, the Respondent advised that it did not agree to the challenge. The Respondent also submitted a more detailed letter opposing the challenge on 12 September 2014.

1.15 The Claimant subsequently expanded its grounds for the challenge in its letters of 11 and 30 September 2013.

1.16 On 24 September 2013, 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.

1.17 On 26 September 2013, the former Vice President invited the parties and the Sole Arbitrator to make further comments. The Claimant sent its further submissions in its letter of 30 September 2013, whereas the Respondent and the Sole Arbitrator remained silent.
1.18 On 3 October 2013, the former Vice President closed the challenge proceedings and on 10 October 2013 he rendered his decision.

2 Decision excerpt

“[...]

III. ANALYSIS AND FINDINGS CONCERNING THE CHALLENGE

30 The views and evidence provided by the Parties have been carefully evaluated. The reasons below summarize the points considered determinative of the conclusions and the final decision. The facts or arguments advanced by the Parties that are not expressly addressed in the reasons below are such that they would not have changed the decision.

A. Timeliness of the challenge

31 According to Article 10.4 of the LCIA Rules, a party who intends to challenge an arbitrator must do so 15 days after becoming aware of any circumstances giving rise to the challenge. The Claimant states that it bases its challenge on the Sole Arbitrator’s decision of 5 September 2013. The challenge of 9 September is therefore timely.

32 Given the 15-day deadline, the Sole Arbitrator’s earlier decision may be presumed free of allegations of unfairness. Nevertheless, it is recognized that the issue of fairness of the decision of 5 September may not be evaluated in isolation, without regard to the earlier decisions. Therefore, I consider that the Claimant could validly refer in its arguments also to the Sole Arbitrator’s earlier decisions, but that those decisions are relevant only if considered together with the grounds put forward within the 15-day deadline.

B. Request for a suspension of the proceedings

33 In concluding its letter of 11 September 2013, the Claimant requested that the LCIA Court, in addition to revoking [the Sole Arbitrator]’s appointment, also restrain the Sole Arbitrator from any further proceeding in this matter [...]. As noted in the Procedural directions of 26 September 2013, the request is to be considered a request for suspending the proceedings until the challenge has been decided.

34 Under the LCIA Rules, the conduct of the arbitral proceedings, which includes any decision to suspend the proceedings, falls within the exclusive jurisdiction of the Arbitral Tribunal, in this case the Sole Arbitrator. I therefore declined to consider that request of the Claimant.

C. The Sole Arbitrator’s impartiality

1. General considerations

35 In considering the merits of the Claimant’s challenge I have balanced the Sole Arbitrator’s duties in conducting the proceedings and his powers and discretion in discharging the duties.

36 The LCIA Rules provide 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(2)). More particularly, the tribunal has ‘the power, on the application of any party or of its own motion, but in either case only after giving the parties a reasonable opportunity to state their views’; [...] ‘to allow any party, upon such terms (as to costs and otherwise) as it shall determine, to amend any claim, counterclaim, defence and reply’; [...] ‘to conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the initiative in identifying the issues and ascertaining the relevant facts and the law(s) or rules of law applicable to the arbitration, the merits of the parties' dispute and the Arbitration Agreement’; [...] ‘to order any party to produce to the Arbitral Tribunal, and to the other parties for inspection, and to supply copies of, any documents or classes of documents in their possession, custody or power which the Arbitral Tribunal determines to be relevant’; and [...] ‘to decide whether or not to apply any strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material tendered by a party on any matter of fact or expert opinion; and to determine the time, manner and form in which such material should be exchanged between the parties and presented to the Arbitral Tribunal’ (Article 22).

37 In exercising those powers, the arbitral tribunal has a general duty at all times ‘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 ‘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(1)(i) and (ii)).

38 Given that the Claimant points to several procedural decisions taken by [the Sole Arbitrator] and argues that they show bias, I have carefully studied the Parties’ arguments presented to [the Sole Arbitrator] in connection with the impugned decisions as well as [the Sole Arbitrator]’s reasons for taking the decisions. In doing so I have been vigilant for indications of bias or improper motivation, while being conscious that [the Sole Arbitrator] has had the best and the most complete impression of the circumstances underlying his decisions and that only he has jurisdiction to take them.

2. The Sole Arbitrator’s decisions related to the [Previous Arbitration]

39 The Respondent sought to include in the hearing bundle three documents: the [Previous Arbitration Award]; the transcript of the cross-examination of [the Claimant’s counsel] [...] and the Claimant’s post hearing brief in the [Previous Arbitration]. As regards the [Previous Arbitration Award], the Sole Arbitrator, in explaining his reasons for allowing it in the present proceedings, noted that the award was being relied on by the Respondent to rebut an attack that the Claimant was making on the Respondent’s key witness [...] where the Claimant was asserting that [he] had lied in the [Previous Arbitration] proceedings and that his evidence amounted to bad faith [...]. Further, he pointed out that the Claimant was the originator of any material from the [Previous Arbitration] proceedings coming into these proceedings, which the Respondent opposed, but the Sole Arbitrator was sympathetic to the Claimant and permitted the Claimant to make its attack, which it then did, but what the Claimant did was to make very serious allegations against [the Respondent’s key witness]. He held that the Claimant could not
launch the attack and then ask that the Respondent not be permitted to defend itself against such an important attack.

As to the transcript of the cross-examination of [the Claimant’s counsel] in the [Previous Arbitration], and the Claimant’s post-hearing brief in that Arbitration, the Sole Arbitrator observed that the documents have long been in the hands of the Claimant. The Respondent was ready to make those documents available immediately, which, given that the Claimant was familiar with them, was not an imposition on the Claimant. The Sole Arbitrator also calibrated the way those two documents may be used, which applied also to the [Previous Arbitration] Award. The documents may be used, in the same way as the [Previous Arbitration] Award, to rebut the attack on [the Respondent’s key witness]. However, where the Respondent would want to use them other than to rebut the attack on [the Respondent’s key witness], he would need to ask on each specific occasion when he seeks to deploy those documents for specific permission, and the Sole Arbitrator would take a decision on a case-by-case basis. The Sole Arbitrator made it clear that the Respondent did not have an open-ended permission to use those documents in that second way […]

The decisions referred to above in paras. 39 and 40 were within the discretion of the Arbitrator regarding matters of evidence and I see no indication of bias or other improper motivation in the decision. In particular, I find that comparing the decisions with Arbitrator’s earlier decisions, as the Claimant does, does not support the Claimant’s allegation of bias because the circumstances and the merits of the impugned decisions and the earlier decisions were different.

Regarding the Sole Arbitrator’s leave to the Respondent to make an amendment to its pleading […], the Sole Arbitrator found that the Respondent requested to have the statement of defence amended […]. The amendment was sought in the Respondent’s Reply submissions sent on 4 September 2013, paras. 6 and 7. The explanations given by the Sole Arbitrator were detailed and reasonable. He pointed out that the amendment that was sought to be introduced in the statement of defence was foreshadowed in clear terms in a witness statement of about a year ago. The Sole Arbitrator established that there was nothing new there and that he saw no difficulty in permitting the pleading to be brought into line with the long-established witness statement […].

In my opinion, the Sole Arbitrator’s permission to allow the amendment was within the Sole Arbitrator’s discretion and shows no indication of bias.

3. Proposed testimony by video link from [the witness’ country]

The Claimant argues that the Sole Arbitrator showed a lack of impartiality against the Claimant also in how he dealt with the Claimant’s proposal that his witness […] give testimony by video-link from [the witness’ country]. The Claimant’s criticism is that the Sole Arbitrator accepted a condition imposed by the Counsel for the Respondent that such evidence would only be allowed if arrangements could be made between the Parties for a representative of the Respondent to fly from London to [the witness’ country] to be present while the testimony was being given. According to the Claimant, the possibility raised by the Sole Arbitrator that a local lawyer be retained for that purpose was obviously the more reasonable course, but this was rejected by Counsel for Respondent based on irrelevant considerations. […]
I have considered the detailed discussions on the issue at the Jurisdictional Hearing on 9 September in the morning [...]. It is clear that examining the Claimant’s witness over a video link would have reduced the time and cost needed for the testimony, and that [the Sole Arbitrator] was ready to accommodate the Claimant’s wish to use the video link for that purpose. However, Counsel for the Respondent insisted that, in order to preserve the integrity of the examination of the witness, he was entitled to have someone from his team to be present in [the witness’ country] when testimony was given; he did not regard it as acceptable to use for that purpose a local representative of the Respondent in [the witness’ country], who would have to be identified and instructed on short notice.

The Sole Arbitrator’s considerations at the Jurisdictional Hearing were as follows:

‘...What is clear is that the respondent, for very understandable reasons, will only accept video link conference evidence if it can have its own representative present in [the witness’ country] when that evidence is given, and I cannot see how as a matter of fairness I can prevent the respondent doing that. Given those circumstances, we need to factor in flights, hotel arrangements, visas and so on and the parties are going to discuss this at lunchtime so this aspect will be dealt with after lunch.’ [...]

In considering the Sole Arbitrator’s stance, it is necessary to bear in mind that the Claimant’s proposal that the witness be heard over video was made late. The Jurisdictional Hearing was scheduled to start in the morning of Monday, 9 September 2013, and the Claimant sent an email on Sunday, 8 September, at 22:31, requesting that, because of certain commitments of the witness, she testify on Tuesday afternoon, 10 September, by video or audio link. The message did not make it clear that the witness was not in London as expected. Only during the Hearing on Monday morning the Claimant clarified that the witness should testify from [the witness’ country] [...]. In those circumstances, and given the highly contentious nature of the disputed facts that were to be addressed by the testimony and the fact that the witness accounts of those facts diverged, it is understandable that the Sole Arbitrator showed deference to the Respondent’s position that the video-link testimony could proceed only if there was a member of the Respondent’s team present in [the witness’ country] during the testimony and that the timing of the testimony had to take into account the travel arrangements that were to be made on short notice. In my view, the Sole Arbitrator’s decision was within the bounds of his discretion and does not give rise to justifiable doubts as to his impartiality.

4. Hearing timetable and order of witnesses

As to the Claimant’s argument that [the Sole Arbitrator] decided the order of witnesses for the Jurisdictional Hearing before the Claimant had an opportunity to comment, I note that the Respondent requested on Thursday, 5 September 2013, that the order of witnesses be resolved prior to the Hearing[...]. The request for an early decision appeared reasonable and in the interest of both Parties given that the Parties in their recent correspondence disagreed as to the order of witnesses and that it was helpful to the Parties and the witnesses to know as soon as possible the likely day on which particular testimony would be given. On 5 September at 11:25 am, [the Sole Arbitrator] asked the Claimant to give its position by Friday, 6 September, 12 noon, so that an early decision may be made. On 6 September, the Sole Arbitrator, noting that no reply from the Claimant had been received, sent out his directions determining the order of
witnesses. The Sole Arbitrator’s directions were sent out at 13:16; within about 7 minutes (at 13:23) […] a representative of the Claimant, sent an email stating that […] the Claimant’s lead Counsel, was on the previous day travelling […], that he had not seen the Sole Arbitrator’s email, and that the Claimant requests if it can have until the end of Friday, 6 September, to respond. At 13:33, the Sole Arbitrator replied expressing regret that he was not informed earlier that the deadline could not be met and suggesting that the position be reviewed on Monday at the outset of the Hearing. Indeed, the matter was discussed on Monday morning. Both Parties articulated their reasons in considerable detail and the Sole Arbitrator thoroughly explained his decision, in which he had to balance the interests of both Parties and the widely accepted principles governing the taking of evidence of witnesses […]. I find the Claimant’s objections unfounded.

5. **Refusal to adjourn the proceedings on 9 September 2013**

49 In the view of the Claimant, [the Sole Arbitrator]’s decision to proceed with the Jurisdictional Hearing after he was notified that the Claimant is requesting the LCIA Court to revoke his appointment further testifies to his lack of fairness and impartiality […].

50 The Hearing transcript of the proceedings on 9 September reflects an extensive discussion of the merits of the Claimant’s request for adjournment of the proceedings, the Respondent’s opposition to adjournment, the reasons for the challenge, including [the Sole Arbitrator]’s explanations why he thought that the challenge was unfounded and that there was no realistic possibility that the challenge would result in bringing the proceedings to a halt […]. The Sole Arbitrator encouraged the Claimant to continue participating in the proceedings, which the Sole Arbitrator decided would not be adjourned, pointing out that that was the only way in which the Claimant was going to be able to cross-examine and put its case to the Respondent’s witnesses […]. Nevertheless, the Claimant withdrew and the proceedings continued without its representatives.

51 I do not find that the Sole Arbitrator’s decision to continue the proceedings was improperly motivated or that it gives rise to justifiable doubts as to his impartiality.

D. **Costs**

52 The Parties have made no submissions as to costs. Pursuant to Article 28.1 of the LCIA Rules, the costs of the arbitration are to be determined by the LCIA Court in accordance with the Schedule of Costs. Article 28 of the LCIA Rules further provides that the Sole Arbitrator has the power to apportion between the Parties the costs of the arbitration as determined by the LCIA Court. The matter of costs, including any apportionment of the arbitration costs, is therefore reserved to be determined by the Sole Arbitrator in accordance with Article 28 of the LCIA Rules.

IV **DECISION**

53 Based on the foregoing considerations, the challenge to the Sole Arbitrator is dismissed.

54 In accordance with Article 28 of the LCIA Rules, the determination of costs of the present challenge is reserved for the LCIA Court, and the apportionment of the costs between the Parties is reserved for the Sole Arbitrator.”