1. **Background**

1.1 The underlying disputes arose out of two facility agreements and a surety and undertaking agreement, for the financing of a copper mine. The agreements were governed by English law, the seat in each of the arbitrations was London and the language was English. The arbitration clause in each agreement provided for LCIA arbitration but clauses were not identical.

1.2 The Claimant filed three Requests for Arbitration with the LCIA in July 2013. Two Respondents were common to two arbitrations and some Respondents were only named in one of the arbitrations. The Respondents in each case did not file a Response.

1.3 By letter to the LCIA on 14 August 2013, the Claimant proposed to all Respondents that they consent to the consolidation of the three arbitrations so that they could be heard as a single set of proceedings. The Respondents did not give such consent, therefore the Claimant proposed that the three arbitrations run concurrently, with a common arbitrator being appointed to each arbitration.

1.4 On 14 October 2013, the LCIA notified the parties that it had appointed the Tribunal in all three cases. The LCIA Court had appointed the same arbitrator as the sole arbitrator in arbitration numbers 132445 and 132446 and as Chairman in arbitration number 132455 (the “Arbitrator”).

1.5 On 30 October 2013, the First Respondent in arbitration 132445 and the only Respondent in 132456 (the “Common Respondent”) challenged the Arbitrator’s appointment in those two arbitrations. The Common Respondent was not a party to arbitration 132446 and asserted that, by participation in arbitration 132466, the Arbitrator would hear evidence which would have to be concealed from the Common Respondent. Further, the Common Respondent submitted, in respect of arbitration 132455, that the Arbitrator would have heard evidence and submissions which he will have to conceal from his fellow arbitrators.

1.6 On 8 November 2013, the Claimant asserted that there was a common factual matrix in the three disputes and the evidence was likely to be the same therefore there would be no concealment
of submissions or secret hearings. Finally, the Claimant said it would consider adding the Common Respondent as a respondent in 132466.

1.7 The Claimant did not agree to the challenge and the Arbitrator did not resign.

1.8 On 25 November 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.

1.9 On 26 November 2013, the Claimant filed an Amended Request for Arbitration in arbitration number 132466 adding additional claimants and the Common Respondent as an additional respondent. The Claimant also filed amended Requests in arbitrations 132445 and 132455 adding additional claimants and an additional respondent.

2 Decision excerpt

“[…]

III ANALYSIS

3.1 It would have been more efficient for these three arbitrations to be consolidated. The possibility of inconsistent arguments and evidence not available to all parties and to all arbitral decision makers would thus have been eliminated. Duplication of arguments and expense would also have been reduced.

3.2 As noted above, [the Claimant] requested the Respondents consent to consolidation, but the Respondents refused. Moreover, since there are three different arbitration agreements, with two providing for a sole arbitrator and one for a three person tribunal, all parties would have to agree on which format to follow. Without such agreement and consent, Section 35(2) of the Arbitration Act 1996 forbids consolidation. The Respondents were within their rights to refuse consolidation.

3.3 In exercising its discretion under Article 5.5 of the Rules, the LCIA appointed an arbitrator common to all three arbitrations.

3.4 The question I am to determine is whether this appointment of [the Arbitrator] results in a situation in which, by its nature, gives rise to ‘justifiable doubts as to his impartiality or independence?’

3.5 I am initially skeptical of [the Common Respondent]’s argument that such appointment would necessarily result in fatal procedural irregularities, even prior to [the Claimant]’s Amendment of its Requests for Arbitrations, which proposed that [the Common Respondent] become a party to all three arbitrations. [The Common Respondent]’s reliance on Norbrook Laboratories seems exaggerated in this situation, especially since Norbrook dealt with ex parte contact between an arbitrator and a witness, not with an arbitrator. I further tend to believe that [the Common Respondent]’s horror of secret evidence’ in this situation is not much more than an advocate’s ‘arm waving.’ Finally, I do not find [the Common Respondent]’s citation of the IBA Guidelines on Conflicts of Interest applicable in this situation. However, I have not considered this question closely, because it is not the situation presently before me, in which [the Common Respondent] is now named as a Respondent in all three cases.
3.6 Thus, I am not required to decide on the propriety of the situation prior to the [Claimant]’s filing of Amended Requests for Arbitration. If the Amendment the Request in Arbitration No. 132446 is effective, [the Common Respondent] will have direct knowledge of all of the evidence, rulings and comments of the tribunals in all three arbitrations.

3.7 Moreover, it does not follow that if [the Arbitrator] knows what went on in the other two arbitrations, he is disqualified from sitting in all three. The law does not require an ignorant arbitrator. It merely requires that he maintain required confidences, which I have no reason to believe that [the Arbitrator] will not do.

3.8 [The Common Respondent] (and the other Respondents) could have remedied all of the problems it imagines by agreeing to consolidation of the three proceedings. It exercised its right not to do so. The LCIA then properly chose a pragmatic, second-best solution: a common arbitrator in all three arbitrations.

3.9 In the face of [the Common Respondent]’s continued objections, [the Claimant] then asserted a right to name [the Common Respondent] as Respondent in the one, closely related arbitration in which [the Common Respondent] had not been previously named. If it had the right to do so, [the Claimant] obviated all of the inconveniences of which [the Common Respondent] complains, and the problems [the Common Respondent] envisioned go away.

3.10 The question is whether [the Claimant] has the right to amend its Requests for Arbitration.

3.11 Are the Amended Requests for Arbitration effective, or are they, as [the Common Respondent] insists, a ‘nullity’? If not a ‘nullity’, do they constitute an abuse of process? And, indeed, is [the Common Respondent] a party to the arbitration agreement in Arbitration No. 132446 in the first place?

3.12 While [the Claimant] is probably correct in asserting that these questions can best be dealt with by the tribunals themselves and not in the context of these challenge proceedings, I might decide differently on the challenges themselves, if I felt that there was not, at least a prima facie case that [the Claimant] prevails on all three questions. In any such event, I would have had to look more closely at the situation that would prevail if the Amended Requests for Arbitration were ineffective. Thus, I will examine briefly the three questions.

3.13 First, is there a prima facie case that [the Common Respondent] is a party to the arbitration agreement in Arbitration No. 132446? [The Common Respondent] alleges that [the Common Respondent] became a party to the Facility Agreement which is the subject of this arbitration by Amendment No. 1 dated 1 June 2012, and it has furnished the text of the arbitration agreement that it claims is applicable. Thus, without finally deciding whether [the Common Respondent] is party to this arbitration agreement (or indeed, to any arbitration agreement with [the Claimant]), I am comfortable in passing this issue to the tribunals.

3.14 Second, are the Amended Requests “nullities”? Other than Nomihold, [the Common Respondent] offers no legal support for this proposition other than its bald statement that [the Claimant] is legally prohibited from amending its original Request for Arbitration. The LCIA Rules make no provision for amendment of a Request for Arbitration. Neither do they permit it nor do they prohibit it. They are simply silent on the issue. I am aware of other instances in which such amendments have been made. In this preliminary phase of the arbitration in which neither side has filed its Statement of
Case or Statement of Defence, I can see no prejudice to [the Common Respondent] in permitting such amendment. Moreover, the learned judge’s ruminations in Nomihol are clearly dicta, in which he muses not that such amendments are a nullity, but rather that they may constitute new requests for arbitration. Hence, I am again comfortable in passing the issue to the tribunal to determine, if [the common Respondent] wishes further to pursue it.

3.15 Third, the question of whether the Amended Requests constitute an ‘abuse of process’ is clearly an issue for the relevant tribunal, which has the power to order [the Claimant] to pay [the Common Respondent] the costs of any such abuse if the tribunal determines that they are, in fact, abusive.

3.16 There is one final issue which I consider trivial in the extreme. However, since the parties deal with it in their submissions, so will I.

3.17 [The Common Respondent] contends that I should not consider a letter from [the Claimant] dated 20 November 2013. The background to this contention is this.

3.18 On 19 November 2013, counsel at the LCIA wrote to the parties stating ‘Please be advised that no further material may be submitted with respect to the challenge. I am in the process of referring the matter to the LCIA Court, who will then revert to the parties should any additional information or submissions be required.’

3.19 This was clearly a procedural instruction, as the LCIA secretariat attempted to establish order before passing the matter to me, as the representative of the LCIA Court.

3.20 However, on 20 November 2013, [the Claimant] wrote a letter to the LCIA submitting further documents for the record and making further arguments. [The Claimant] stated that it had previously reserved its right to submit further documentation, and as result, did so. Such documents and the letter of November 20 were in due course submitted to me.

3.21 I find that [the Common Respondent] was in no way prejudiced by [the Claimant]’s submission of the 20 November letter, and that [the Common Respondent] had ample opportunity to reply to it and did in fact do so. I am grateful to both parties for the full documentation they have submitted, upon which I base my decision. I would not be inclined to exclude the 20 November letter nor any other relevant evidence (such as [the Common Respondent]’s letter of 19 December which was also filed in contravention the relevant instructions).

3.22 Thus, I regard this issue (if it rises to the level of an issue) as irrelevant to my decision.

3.23 In sum, I find nothing in the appointment of [the Arbitrator] in the present situation which results in procedural irregularity or unfairness to [the Common Respondent], nor do I find the existence of any circumstances that that give rise to justifiable doubts as to his impartiality or independence.

IV DECISION

4.1 On behalf of the LCIA Court, for the reasons stated above, I reject the challenge to the appointment of [the Arbitrator] as Sole Arbitrator in Arbitration No. 132445, and as Chairman of the Tribunal in Arbitration No. 132455.”