Subject: Challenge to arbitrator’s appointment pursuant to Article 11(1) of the UNCITRAL Rules 1976, based on Article 10(1) (justifiable doubts as to the arbitrator’s independence and impartiality)

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

Summary: Where an arbitrator has publicly made negative comments about the parent company of one of the parties, in particular how it is managed, the way it conducts its business and how experts in arbitration view that company, a fair minded and informed observer would conclude that there is a real possibility that the arbitrator is biased vis-à-vis that party.

1 Background

1.1 The underlying dispute arose out of an engineering, procurement and construction contract (the “EPC Contract”), two assignments and two subcontracts. The agreements were governed by the law of the country of origin of the Claimant and the Second Respondent. The seat of the arbitration was London and the language was English. The arbitration clauses provided for arbitration under the UNCITRAL Rules 1976, and for administration of the arbitration by the LCIA.

1.2 The Second Respondent is a wholly owned subsidiary of one of the other parties to the EPC Contract (the “Second Respondent’s Parent Company”).

1.3 The Claimant commenced arbitration by a Notice of Arbitration dated 4 March 2015. The LCIA received a copy of the Notice on 10 April 2015. In the Notice, the Claimant appointed an arbitrator (the “Co-arbitrator”).

1.4 On 22 May 2015, the Second Respondent submitted its Response to the Notice of Arbitration. In the Response, the Second Respondent appointed an arbitrator. Also in the Response, the Second Respondent challenged the appointment by the Claimant of the Co-arbitrator on the basis of the comments made by the Co-arbitrator about the Second Respondent’s Parent Company in three publications. The Second Respondent stated that it had become aware of the publications only after 12 May 2015, when it hired its legal representatives.

1.5 On the same day, the First Respondent advised that it had no objection to the Co-arbitrator’s appointment, but reserved its rights to jointly appoint with the Second Respondents and a third party.

1.6 On 5 June 2015, the Second Respondent notified the arbitrators of its challenge.

1.7 9 June 2015, the Claimant responded to the challenge and advised that it did not agree to the challenge.
1.8 On 10 June 2015, the First Respondent stated that it did not oppose the appointment of the Co-arbitrator.

1.9 On 12 June 2015, the LCIA informed the parties, among other things, that the Co-arbitrator had confirmed that he did not intend to withdraw, and that both arbitrators had confirmed that they consent to the appointment, are impartial and independent of each of the parties and know no circumstances likely to give rise to justified doubts as to their impartiality or independence.

1.10 On 18 June 2015, the LCIA notified the parties that, pursuant to Articles 11 and 12 of the UNCITRAL 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.

1.11 On 22 June 2015, the former Vice President rendered his decision on the challenge.

2 Decision excerpt

“[...]”

I. Legal Framework

31. In making its decision on Respondent 2’s challenge which is based on Respondent 2’s understanding ‘that [the Co-arbitrator] would be partial in an arbitration proceeding involving a company of the [Second Respondent’s Parent Company] group’, the Vice President has taken into consideration in particular the following provisions:

1. UNCITRAL Rules

32. The challenge of arbitrators is dealt with in Articles 10 to 12 of the UNCITRAL Rules which provide as follows:

‘Article 10

1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrators [sic] impartiality or independence.

(…)

Article 11

1. A party who intends to challenge an arbitrator shall send notice of his challenge within fifteen days after the appointment of the challenged arbitrator has been notified to the challenging party or within fifteen days after the circumstances mentioned in articles 9 and 10 became known to that party.

2. The challenge shall be notified to the other party, to the arbitrator who is challenged and to the other members of the arbitral tribunal. The notification shall be in writing and shall state the reasons for the challenge.

3. When an arbitrator has been challenged by one party, the other party may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his office. In neither
case does this imply acceptance of the validity of the grounds for the challenge. In both cases the procedure provided in article 6 or 7 shall be used in full for the appointment of the substitute arbitrator, even if during the process of appointing the challenged arbitrator a party had failed to exercise his right to appoint or to participate in the appointment.

Article 12

1. If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge will be made:
   
   (a) When the initial appointment was made by an appointing authority, by that authority;
   
   ‘(...’

2. Arbitration Act

33. Section 33(1)(a) of the Arbitration Act 1996 (England & Wales) ("Arbitration Act"), being a mandatory provision of the arbitration law at the seat of arbitration, provides that ‘[t]he tribunal shall act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent.’

34. Pursuant to Section 24(1)(a) of the Arbitration Act, a party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on the grounds ‘that circumstances exist that give rise to justifiable doubts as to his impartiality.’

35. Pursuant to Section 24(2) of the Arbitration Act, ‘[i]f there is an arbitral or other institution or person vested by the parties with power to remove an arbitrator, the [otherwise competent] court shall not exercise its power of removal unless satisfied that the applicant has first exhausted any available recourse to that institution or person.’

36. The relevant test for an application under section 24(1)(a) of the Arbitration Act is ‘whether a fair-minded and informed observer, having considered the facts, would consider that there was a real possibility that the tribunal was biased’. ¹ This is an objective test, which was approved by the House of Lords in Porter v Magill, modifying the common law test in R v Gough². The Court of Appeal confirmed in Locabail (UK) Ltd v Bayfield Properties Ltd³ and AT&T Corporation v Saudi Cable Co⁴ that that test applies to arbitrators as well as judges.

II. Discussion

37. Respondent 2’s challenge of [the Co-arbitrator] is made in respect of three statements by [the Co-arbitrator]. However, before assessing whether these statements individually or collectively give rise to justifiable doubts as to [the Co-arbitrator]’s impartiality, it must be assessed whether the challenge has been raised in time.

¹ Porter v Magill, [2002] 2 AC 357.
³ [1999] EWCA Civ 3004.
1. **Timeliness of the Challenge**

38. Pursuant to Article 11(1) of the UNCITRAL Rules, a party who intends to challenge an arbitrator must send notice of its challenge within 15 days after the appointment of the challenged arbitrator has been notified to the challenging party or within 15 days after the circumstances mentioned in articles 9 and 10 became known to that party.


40. Respondent 2 submits that it only learned about the statements of [the Co-arbitrator] on which it bases its challenge after 12 May 2015. In its submission of 9 June 2015, Claimant objects to this submission stating that the authority granted to Respondent 2’s lawyers was already signed in July 2014 and that ‘[Second Respondent’s Parent Company] is the largest state company in [the Second Respondent’s country], and has on its staff a special department to monitor and filter daily, in all the media, all that is published in its name’.

41. In the Vice President’s view, Claimant’s submission does not exclude that Respondent 2 had become aware of [the Co-arbitrator]’s statements after 12 May 2015. In this respect it must be noted that the relevant point in time under Article 11(1) of the UNCITRAL Rules is when the circumstances underlying the challenge ‘became known’ to the challenging party. This requires actual knowledge.

42. Based on the documents on record the Vice President considers it plausible that Respondent 2 became aware of [the Co-arbitrator]’s statements only after 12 May 2015. The doubts raised by Claimant in this respect are speculative and unsubstantiated. It therefore will be assumed that Respondent 2 obtained actual knowledge of Respondent 2’s statements on 13 May 2015.

43. Pursuant to Article 2(2) of the UNCITRAL Rules, a period of time under these UNCITRAL Rules begins to run on the day following the day when a notice, notification, communication or proposal is received. This means that the 15-day time period started on 14 May 2015 and ended 29 May 2015 at the earliest.

44. While it is true that Respondent 2 sent the challenge to the arbitrators only after the expiry of the deadline, it must be taken into consideration that at the time the challenge was submitted the arbitrators had not yet submitted their respective statements of consent to their appointments. Furthermore, Respondent 2 had submitted copies of the Response for the appointed arbitrators to the LCIA. In these circumstances, Respondent 2’s challenge must be considered to have been made in time.

2. **Grounds for Challenge**

45. Consequently, it must be determined whether the statements of [the Co-arbitrator] referred to by Respondent 2 individually or collectively constitute grounds for challenge. As far as, like in the present case, the impartiality of an arbitrator is concerned, Article 11 of the UNCITRAL Rules and Article 24(1) and (2) of the Arbitration Act are in agreement. Under both sets of provisions there must be circumstances that give rise to justifiable doubts as to the impartiality of the arbitrator.
46. **The requirement under the UNCITRAL Arbitration Rules that arbitrators must be impartial has been further described as follows:**

‘Impartiality is both a state of mind and attitude which is inspired by such state of mind and is eventually apparent to the parties. The arbitrator must be indifferent to the parties’ identity status and nationality; the arbitrator must hear and be seen to hear the parties without any favour, decide and be seen to decide the merits without any favour, based on the record, to the exclusion of any factors unrelated thereto. Impartiality may be compromised by (...) the fact that the arbitrator has expressed a clear-cut view on an issue which is dispositive of the case and on which an arbitrator must by definition) have an open mind.5

47. **The challenging party need not prove the partiality of an arbitrator; however, there must be objective circumstances which are proved and from which an inference of lack of impartiality may be drawn. Doubts as to the impartiality which arise only from a subjective standpoint of the challenging party are sufficient if they are ‘justifiable’ from an objective standpoint.**6

48. **As stated before, in England, where the present arbitration is seated, the relevant test is ‘whether a fair-minded and informed observer, having considered the facts, would consider that there was a real possibility that the tribunal was biased.’**7

49. **Respondent 2 relies on [...] three [...] statements by [the Co-arbitrator] as giving rise to such apparent bias[.]**

1. [In the first publication, the Co-arbitrator states that in an arbitral dispute between the first Second Respondent’s Parent Company and a small contractor, experts tend to favour the Second Respondent’s Parent Company].

2. [In the second publication, the Co-arbitrator states that it is valid to consider the news regarding the lawsuits filed in the country X against the Second Respondent’s Parent Company due to the losses arising out of these frivolous acts of mismanagement that have already been evidenced by confession].

3. [In the third publication, the Co-arbitrator states that any attempts to grant privileges to the Second Respondent’s Parent Company is strongly opposed to the principle of equality and that the existing tax privileges granted to Second Respondent’s Parent Company are already unconstitutional and against all principles of equal treatment and tax equality by the government].

50. **The Vice President notes Claimant’s arguments that, in the first article, [Second Respondent’s Parent Company] serves as ‘an example of big business and the article criticizes imbalance problems in arbitration involving a small business in relation to a corporate giant, which is certainly not the case here’, in the second article, [the Co-arbitrator]’s criticism is ‘addressed to the [Second Respondent’s country]’s government, because it does not follow a constitutional**

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7 Porter v Magill, 1200212 AC 357.
norm’ and the third article ‘revolves around the rights, according to the author, of [Second Respondent’s Parent Company] shareholders to be reimbursed of the financial damage caused by the mismanagement of the […] Government [of the Second Respondent’s country], which has interfered with the management of [Second Respondent’s Parent Company].’ The Vice President further notes that Claimant considers it therefore ‘unfair to infer that [the Co-arbitrator] has grudgingly mistreated [Second Respondent’s Parent Company] while choosing such a theme to his article, because [Second Respondent’s Parent Company] is the largest and best known company in [the Second Respondent’s Country], and, in fact goes through internal corruption issues, as widely published by national and international media.’

51. The Vice President also notes that [the Co-arbitrator] has been practicing as attorney for over 45 years and is professor of commercial law at [a university in the Second Respondent’s country]. No doubts exist as to the qualifications of [the Co-arbitrator].

52. However, this does not change the fact that [the Co-arbitrator], in each of the above publications, has made critical remarks aimed specifically and namely at [Second Respondent’s Parent Company], as correctly observed by Respondent 2.

53. While [the Co-arbitrator]’s remarks seem to have no connection with the case at hand, they nevertheless negatively describe the way [Second Respondent’s Parent Company] is managed, pursues it [sic] business and is perceived inter alia by experts in arbitral proceedings. In particular the statement that [Second Respondent’s Parent Company], under the control of the Government [of the Second Respondent’s country] ‘seems to have moved away from, or flagrantly despised’ corporate governance justify doubts as to whether [the Co-arbitrator] in the present arbitration is able to hear the case in an unbiased manner with an open mind. Consequently, a fair minded and informed observer would conclude that there is a real possibility that [the Co-arbitrator] is biased vis-à-vis Respondent 2.

III. Decision

54. For this reason the Vice President hereby decides as follows:

Respondent 2’s challenge of [the Co-arbitrator]’s appointment as an arbitrator in the present arbitration is granted.”