**Subject:** Challenge to Tribunal’s appointment pursuant to Article 10.4 of the LCIA Rules 1998, based on Articles 10.2 (deliberate violation of the Arbitration Agreement, and failure to act with reasonable diligence, avoiding unnecessary delay and expense) and 10.3 (doubts as to impartiality of the Chair)

**Division/Court member:** Three-member Division of the LCIA Court

**Summary:**

Tasks of the Tribunal Secretary which go beyond purely administrative, such as drafting orders, and which do not infringe the guidance and expectations of the LCIA Notes, do not constitute delegation by the Tribunal of its role to the Tribunal Secretary.

Tribunals should take care when eliciting views from a tribunal secretary as to aspects of the arbitration that it is not seeking a contribution to the decision-making process. An email which seeks the view of the Tribunal Secretary does not, on its own, evidence that the Tribunal Secretary contributed to decision making. Further the integrity of a member of the Tribunal’s decision-making function cannot be measured by the number of hours spent on a particular decision, alone.

Where a co-arbitrator spends less time on a decision than the Chair and the Tribunal Secretary, this does not indicate that the Co-arbitrator has delegated their decision making function. It is entirely in keeping with the way a tribunal works, and in accordance with the obligation under Article 10.2 to use reasonable diligence and avoid unnecessary delay and expense, for co-arbitrators to deal with matters promptly if they agree with a decision drafted by the Chair and spend more time on decisions where they have comments and considered additional drafts.

Where an arbitrator divulges that he is sitting as an arbitrator in an ongoing case, a fact that had not been publicly reported, and does not qualify statements about issues that have not been decided in the case, circumstances exist which give rise to justifiable doubts as to that arbitrator’s independence and impartiality.

Where a procedural order provides that the arbitration proceedings are considered confidential, the identification by the Chair that he is a member of the Tribunal may be a breach of confidentiality, and therefore the arbitration agreement. However, where that breach was not deliberate, it falls short of the requirement under Article 10.2 for the removal of the arbitrator.
1  **Background**

1.1 The underlying arbitration related to a dispute arising out of a joint venture framework agreement and a shareholders’ agreement, which were governed by English law. The agreements contained LCIA arbitration clauses, which provided for a London seat and that the language of the arbitration be English. The arbitration proceeded under the LCIA Rules 1998.

1.2 The arbitration was commenced by a Request for Arbitration submitted by the Claimant on 28 April 2014. On 29 May 2014, the Respondent submitted a Response, which included counterclaims.

1.3 The LCIA Court constituted a three-member Tribunal on 31 July 2014 to hear the claim and counterclaim.

1.4 On 22 August 2014, the Tribunal issued Procedural Order No. 1, in which it, amongst other things, appointed a Tribunal Secretary, with the consent of the parties.

1.5 On 6 October 2014, the Chair of the Tribunal, with the consent of the co-arbitrators, presided alone over a procedural hearing following which the Tribunal issued Procedural Order No. 2 which set out a schedule agreed by the parties in respect of an application by the Respondent for a stay of the arbitration.

1.6 In accordance with Procedural Order No. 2, the Respondent submitted an application in which it requested the stay of this arbitration in favour of a parallel arbitration. The parties made further submissions on the application and the Tribunal held a hearing, following which, on 16 December 2014, the Tribunal denied the Respondent’s application. The Tribunal also, amongst other things, ordered the parties to confer and seek to agree on procedures for sharing evidence, submissions, transcripts and other materials between this and the parallel arbitration.

1.7 The Respondent subsequently made an application to the Tribunal relating to the provision of documents to the Tribunal and Respondent in the parallel arbitration (the “Record Sharing Issue”) and a second stay application. The Tribunal issued its decision on the Record Sharing Issue on 28 June 2015 (the “Record Sharing decision”) and denied the stay application on 24 July 2015 (the “Second Stay Decision”).

1.8 Further, the Tribunal issued three decisions on document production, dated 17 October 2015, 15 February 2016 (the “Second Decision on Document Production”) and 18 March 2016.

1.9 By email dated 22 March 2016, and in response to a request by the Tribunal for confirmation, the Respondent advised that it would fully comply with the Tribunal’s three decisions on document production by the deadline set by the Tribunal, subject to certain comments and the redaction of certain personal documents. It further stated that it would, amongst other things, comply with the privilege log by the first UK business day after 24 March 2016.

1.10 On 23 March 2016, the Chair erroneously sent an email to a member of the Respondent’s legal team which was meant for the Tribunal Secretary (the “Misdirected Email”). The email requested the Tribunal Secretary’s “reaction” to the Respondent’s latest correspondence.
1.11 By email of 24 March 2016, the member of the Respondent’s legal team, to whom the Chair’s email was sent, emailed the Chair advising the Chair of the Misdirected Email. On the same day the Chair thanked the member of the Respondent’s legal team for advising the Chair of the error.

1.12 On 29 March 2016, the Respondent’s legal representatives wrote to the Tribunal referring to the Misdirected Email. The letter requested detailed clarifications or disclosures relating to the tasks that had been delegated by the Tribunal or the Chair to the Tribunal Secretary, the disclosure of communications between the Chairman, Co-arbitrators and the Secretary relating to the tasks and role of the Tribunal Secretary and document production and the Tribunal’s subsequent decisions, and the time sheets of the Tribunal Secretary and each member of the Tribunal to date.

1.13 On 8 April 2017, the Chair responded on behalf of the Tribunal confirming the Misdirected Email was never sent to the Tribunal Secretary; clarified the role of the secretary; stated that the Tribunal had not delegated its function to the Tribunal Secretary; stated that no communication existed between the members of the Tribunal as to the Tribunal Secretary’s role and tasks delegated to him; stated that all communications between the members of the Tribunal fell within the confidentiality of the Tribunals’ deliberations; and referred to the LCIA’s periodic updates in relation to the time spent by the Tribunal Secretary and the Tribunal members.

1.14 On 12 April 2016, the Respondent requested further clarifications and information from the Tribunal. The Chair responded on behalf of the Tribunal on 21 April 2016.

1.15 The Respondent submitted its challenge against all three members of the Tribunal on 5 May 2016, pursuant to Article 10.4 of the LCIA Rules 1998.

1.16 By email of 7 May 2016, the Tribunal confirmed that each member of the Tribunal would not withdraw as members of the Tribunal.

1.17 On 16 May 2016, the Claimant submitted its written response to the challenge submitted by the Respondent and requested the LCIA Court to reject the challenge.

1.18 By email and letter of 27 May 2016, the LCIA notified the parties and the Tribunal that, pursuant to Article 10.4, and Article D.3(c) of the LCIA Constitution of the LCIA Court, the LCIA Court had appointed a three-member Division of the Court to determine the challenge.

1.19 A preliminary directions hearing was held on 13 June 2016. By email of 14 June 2016, the Division set out a procedural timetable to be followed in resolving the challenge.

1.20 On 20 June 2016, the co-arbitrators stated that they endorsed the conduct of the Chair and the Tribunal Secretary and provided their joint comments in relation to the parties’ submissions. On the same date, the Chair wrote that he was setting out the comments of the Tribunal and that, except where otherwise indicated, the entire letter represented the comments of all three members of the Tribunal.

1.21 After receipt of submissions from the parties on 27 June 2016 regarding document disclosure, the Division wrote to the parties on 28 June 2016 informing them of its decision that it did not consider that it had power to require the Tribunal members to disclose documents. The Division noted the absence of such power under the LCIA Rules and that the Division had not been cited any previous
challenge cases where disclosure was ordered. The Division also advised the parties that it had decided to hold an in-person hearing on 19 July 2016.

1.22 The Respondent made further submissions on the challenge on 30 June 2016 and the co-arbitrators, the Chair and the Claimant responded to these further submissions on 11 July 2016. As before, the Chair stated that he was setting out the comments all three members of the Tribunal, except where otherwise indicated. The Respondent submitted further comments on 14 July 2016, concluding the written submissions requested by the Division.

1.23 On 19 July 2016, the in-person hearing took place as scheduled and the parties made their oral submissions.

1.24 The Division made its decision on the Respondent’s challenge on 4 August 2016.

2 Decision excerpt

"III. The Division’s Analysis

204. As can be seen from the parties’ written submissions summarised above, [the Respondent] bases its challenge on five Grounds, and the Division addresses each in turn below, by reference to the parties’ written submissions and to the oral submissions made at the hearing. Before we do so, however, we address the issue raised by [the Claimant] that the challenge has been brought out of time, again by reference to the parties’ written and oral submissions.

A. Timeliness

205. It was common ground that Article 10.4 of the LCIA Rules applies and that a challenge has to be brought within 15 days of the challenging party becoming aware of the circumstances in question.

1. Grounds 1, 2 and 3

206. In relation to Grounds 1, 2 and 3 of the challenge, it was [the Claimant]’s position that [the Respondent] became aware of the circumstances in question by 8 April 2016 at the latest. [...] 

207. [The Respondent]’s position was that it was not until 28 April 2016 that it had up to date details of the time spent by the arbitral tribunal, and that the arbitral tribunal’s letter of 8 April 2016 did not provide details of all the circumstances pertaining to the use of the Tribunal Secretary. [...] 

208. Making a challenge to an arbitrator, or, as in this case, to the whole arbitral tribunal, is a serious and difficult decision. It should not be made on speculation, but on facts, and deciding when sufficient facts have been established to make a challenge is not always straightforward. Equally, however, the relatively short time limit of 15 days for making challenges under the LCIA Rules is there for good reason. It is to ensure that a party acts promptly once it has knowledge of the circumstances on which the challenge is based. This is both to ensure that the issue is dealt with as soon as possible, for the obvious reasons of good and efficient process, but also to ensure that a party does not delay bringing a challenge until a strategically convenient moment.
The chronology of this challenge, on Grounds 1, 2 and 3, is such that, if [the Claimant] is correct, [the Respondent] would be 2 weeks late in bringing its challenge.

However, there is no doubt, that the time records that [the Respondent] had in its possession prior to 28 April 2016 were not up to date and did not include, for instance, all the time that might have been spent by the Chair, the Tribunal Secretary and [one of the co-arbitrators] on the Second Decision on Document Production. Equally, whilst the letter from the arbitral tribunal of 8 April 2016 dealt with many of the questions raised by [the Respondent] in the letter of 29 March 2016, it did not provide the details sought of [the Tribunal Secretary]’s time records. The arbitral tribunal explained that time records were sent to the LCIA, and [the Tribunal Secretary]’s up to date time records were provided, along with the up to date time records of the members of the arbitral tribunal, by the LCIA on 28 April 2016. [...]

In our judgment, what [the Respondent] did, following its letter of 29 March 2016, up to receipt of the time records from the LCIA on 28 April 2016, can, fairly, be characterised as gathering information. It was faced with a difficult and serious decision as to whether to challenge the entire tribunal in this arbitration and it wanted, quite rightly, to be as sure as it could be of the facts upon which it would rely. Those facts were obtained quickly, without any delay on the part of [the Respondent].

Challenges to arbitral tribunals should not be brought lightly, and should be brought on as complete a set of facts as it is possible to obtain. It is not in the interests of parties, arbitrators or the LCIA to have challenges brought on the basis of uncertain allegations which, had more time been taken to establish the factual background, might not have been brought at all. Equally, however, it is not in anyone’s interests to have challenges delayed whilst every last detail is chased down, if the basic circumstances which give rise to the challenge are already known. A balance has to be achieved and, in our judgment, that is what [the Respondent] achieved in the timing of its challenge on these Grounds. It had some of the information it needed in early April 2016, but it was not until 28 April 2016 that it had all the necessary information to seek to bring the challenge it has made on Grounds 1, 2 and 3.

Accordingly, for the reasons set out above, we find that the challenge brought by [the Respondent] on Grounds 1, 2 and 3 is not barred by the operation of Article 10.4 of the LCIA Rules.

2. Grounds 4 and 5

The challenge on these Grounds is brought on the basis of remarks made by the Chair [which were later reported on] [...]. [The Respondent] says it did not know about these remarks until 1 May 2016 and that the test under Article 10.4 of the LCIA Rules is actual knowledge. [The Claimant] says [the Respondent] must have known about the remarks before 1 May 2016 and, even if it didn’t, it ought reasonably to have known, and that the test under Article 10.4 of the LCIA Rules is constructive knowledge. [The Claimant] also asks the Division to draw adverse inferences from the circumstances which [the Respondent] says led to it discovering what had been said by the Chair.

[...]
217. In support of the submission that the test under Article 10.4 is constructive knowledge, [Counsel for Claimant] referred to section 73(1) of the Arbitration Act 1996 which provides:

(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection—

(a) that the tribunal lacks substantive jurisdiction,

(b) that the proceedings have been improperly conducted,

(c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or

(d) that there has been any other irregularity affecting the tribunal or the proceedings,

he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection.

218. [Counsel for Claimant] also referred to LCIA Reference 81224 of 15 March 2010, where the Vice President of the LCIA hearing that challenge had relied upon section 73(1) of the Arbitration Act 1996 in deciding that the party making the challenge could, with reasonable diligence, have known about the circumstances which gave rise to the challenge several months before the challenge was brought, and concluded that this precluded the challenge from being brought.

219. [Counsel for Respondent] responded [that becoming aware requires actual knowledge of the facts and referred to an authority in the UNCITRAL Arbitration Rules].

220. The UNCITRAL case referred to by [Counsel for Respondent] is PCA CASE No 2013-09, CC/Devas (Mauritius) Ltd, Devas Employees Mauritius Private Limited and Telcon Devas Mauritius Limited v The Republic of India. The case considered Article 11(1) of the UNCITRAL Arbitration Rules which provides:

‘A party who intends to challenge an arbitrator shall send notice of his challenge within fifteen days after the appointment 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.’

221. H.E. Judge Peter Tomka, the President of the International Court of Justice, stated:

‘In my view, the text of Article 11(1) is clear enough when it speaks of “the circumstances ... became known to the party”. According to one leading commentary on the UNCITRAL Rules, Article 11 requires actual knowledge of the fact(s) invoked as a basis for the challenge. Thus, the Parties agree that these facts, which I have found to be those relevant to the timeliness evaluation, became known to the Respondent on May 11, 2013, at which point the Respondent informed the Claimants about its forthcoming challenge, which was then formally raised at the First Procedural Meeting of the Tribunal on May 15, 2013. The Respondent’s Request is therefore timely pursuant to Article 11 of the 1976 UNCITRAL Arbitration Rules.’
222. The wording in the UNCITRAL Arbitration Rules ‘became known’ and in the LCIA Rules ‘becoming aware’ are similar and, in the judgment of the Division, have a similar intent, namely that a party should acquire actual knowledge. Neither provides specific wording which would give rise to a constructive knowledge requirement. There are no words such as ‘ought reasonably to have known’ or, in the words of Article 73(1) of the Arbitration Act 1996, ‘with reasonable diligence have discovered’.

223. However, section 73 of the Arbitration Act 1996, which lays down the reasonable diligence test, is a mandatory provision as provided for by Schedule 1 of the Act and, in accordance with section 4(1), has effect notwithstanding any agreement to the contrary by the parties. Accordingly, the Division must conclude whether [the Respondent] ‘did not know and could not with reasonable diligence have discovered the grounds for the objection.’

[...]

228. [...] [The Division finds that] [the Respondent] did not have actual knowledge of the Chair’s remarks [...] until 1 May 2016.

229. The question thus arises, could [the Respondent], by the exercise of reasonable diligence, have discovered the Chair’s remarks prior to the start of the 15 day time limit?

[...]

234. The Arbitration Act 1996 makes it clear that the burden of proof is on the challenging party to show that ‘he did not know and could not with reasonable diligence have discovered the grounds for the objection’. [The Respondent] has affirmed that it did not know, until 1 May 2016, about the Chair’s remarks, and the Division has found that to be the case. [...] The test is reasonable diligence and, in our judgment, it is taking reasonable diligence too far to require constant monitoring of the many and varied [remarks made by arbitrators].

235. [The Claimant] has not produced any evidence that realistically shows that [the Respondent] ought to have known about the Chair’s remarks before it actually discovered what was said and, although the burden of proof is on [the Respondent], the Division is satisfied that, in its reposts to the assertions made by [the Claimant], it has met that burden in that it has demonstrated that reasonable diligence would not have led it to discover the [remarks].

236. Accordingly, the Division finds that [the Respondent] did not have constructive knowledge of the Chair’s remarks prior to 1 May 2016, when it obtained actual knowledge, and, in consequence, for the reasons set out above, we find that the challenge brought by [the Respondent] on Grounds 4 and 5 is not barred by the operation of Article 10.4 of the LCIA Rules.

B. Ground 1: the arbitral tribunal’s inappropriate use of an arbitral secretary

237. This Ground was more fully stated by [the Respondent] in its challenge of 5 May 2016 as;

‘The Tribunal has improperly delegated its role to the Secretary of the Tribunal by systematically entrusting the Secretary with a number of tasks beyond what is permissible under the LCIA Rules and the LCIA policy on the use of arbitral secretaries.’
238. At the hearing, [Counsel for Respondent] referred to the LCIA Notes for Arbitrators dated 29 June 2015. He said that the arbitral tribunal had confirmed their relevance to the role of the Tribunal Secretary, and that the arbitral tribunal had never suggested to the parties that it intended to deviate from the role of the Tribunal Secretary as described in the Notes, at paragraphs 68 to 73.

239. [Counsel for Respondent] submitted that, as described in the Notes, the tasks to be performed by a Tribunal Secretary were all of an administrative nature. He confirmed that the Notes ‘are broad principles by which arbitral tribunals should be guided in the conduct of LCIA arbitrations’ (Page 11, lines 4-5) and that ‘were there to be a great departure from that, that would have to be something which was notified to the parties and with which they agreed.’ (Page 11, lines 10-12).

240. [Counsel for Respondent] submitted that the Chair’s description of the way in which he worked with [the Tribunal Secretary], ‘cheek by jowl’ painted a picture of the Tribunal Secretary working extremely closely with the Chair, discussing Decisions with him, and being heavily involved in the drafting. That, he submitted, amounted, de facto, to the Tribunal Secretary being a fourth member of the arbitral tribunal.

241. [Counsel for Respondent] also referred to the Young ICCA Guide on Arbitral Secretaries and, in particular, Article 1(6) which states:

‘Where an arbitration is proceeding under institutional arbitration rules, any rules and policies of the institution relating to arbitral secretaries shall apply’.

242. He submitted that this meant that the institutional rules should apply exclusively, [but clarified that it was possible to supplement the provisions, if not undermined]. […]

244. [Counsel for Respondent] also referred to the time records of the Tribunal Secretary as compared to the members of the arbitral tribunal and submitted [that it is properly to be inferred that the Tribunal Secretary was a de facto fourth member of the Tribunal]. […]

245. [Counsel for Respondent] concluded his submissions on this aspect by saying that the material before the Division showed that the Tribunal Secretary [had done the heavy lifting in respect of drafting and this went beyond the permissible tasks of a Tribunal Secretary under the LCIA].

246. [Counsel for Respondent] confirmed that, so far as the material before the Division was concerned, it was the time records of the arbitral tribunal and [the Tribunal Secretary], both the hours recorded and the descriptions of what the Tribunal Secretary was doing, and the various statements made by the arbitral tribunal in their comments as to the way the arbitrators had worked with [the Tribunal Secretary] as set out in paragraph 61 of [the Respondent]’s submissions of 30 June 2016.

247. […]

248. Great reliance is placed by [the Respondent] on the LCIA Notes. It says that what [the Tribunal Secretary] has done, and the tasks that have been entrusted to him, go beyond what is contained in the Notes and it says this is not what it contracted for when agreeing to an LCIA arbitration.
249. However, both when this arbitration was commenced, on 28 April 2014, and when [the Tribunal Secretary] was appointed Tribunal Secretary pursuant to Procedural Order No 1, on 22 August 2014, the LCIA Notes had not been issued. As has been stated above, they were not issued until 29 June 2015, one day after the Record Sharing Decision, which is the first of the Decisions upon which this challenge is based.

250. Neither party, nor the arbitral tribunal, has made any suggestion that there was any discussion at the time [the Tribunal Secretary] was appointed Tribunal Secretary, and it is clear to the Division that there was none. It appears, at least from the submissions now made by the parties, and from the comments of the arbitral tribunal, that there were very different expectations as to the role to be played by [the Tribunal Secretary] as Tribunal Secretary. The Young ICCA Guide had been launched by the time [the Tribunal Secretary] was appointed and, as was pointed out to the Division the third paragraph of the Foreword states:

‘Unsurprisingly, the major area of disagreement lies in the nature of the tasks properly assigned to arbitral secretaries’.

251. The arbitral tribunal made it clear in the letter of 8 April 2016 that [the Tribunal Secretary] had been operating as circumscribed by the LCIA Notes and the Young ICCA Guide and, given that the LCIA notes did not come into existence until 29 June 2015, it certainly makes sense, so far as the Division is concerned, that, at least up until 29 June 2015, insofar as it was circumscribed by any guidelines, [the Tribunal Secretary]’s role should have been as contemplated by the Young ICCA Guide.

252. In the judgment of the Division, especially given the expertise and experience of [the Respondent]’s counsel in international arbitration, they might have been expected to assume that [the Tribunal Secretary]’s role was as contemplated by the Young ICCA Guide, especially in the absence of specific guidance from the LCIA. However, no evidence as to the actual expectations of [the Respondent] and its counsel at the time was presented to the Division other than the submission that, in the absence of the LCIA Notes [the Respondent] ‘thought it was contracting to a tribunal that would make its own decisions and not have a tribunal secretary that would do the bulk of the heavy lifting.’

253. The question that arises, therefore, is when the LCIA Notes were issued, should the arbitral tribunal have notified the parties that [the Tribunal Secretary]’s role was not as contemplated by the Notes, or, equally, should the parties have made enquiry as to whether, now there were specific LCIA guidelines, [the Tribunal Secretary]’s role was in accordance with those guidelines? In fact, none of that happened, and it is perhaps not surprising if, indeed, as appears to be the case, the parties and the arbitral tribunal had differing views as to the role from the start.

254. [The Respondent] submits that the LCIA Notes limit the role of Tribunal Secretary to tasks of an administrative nature and that what [the Tribunal Secretary] did went beyond administrative matters. However, ‘administrative’ is not a word used by the LCIA Notes. The Notes refer to ‘internal management of the case’, make it clear that the duties of the Tribunal Secretary should not ‘constitute any delegation of the Arbitral tribunal’s authority’ and provides a list of activities to which the duties of a Tribunal Secretary should be ‘confined’.
255. Having said that, the list of activities is qualified by the words ‘such matters as’, making it clear it is not a complete list, and the LCIA Notes are preceded by a statement in the Introduction that they are ‘by no means intended to provide an exhaustive list of ‘best practices’ in the conduct of arbitration’ and that the Notes highlight ‘the broad principles by which Arbitral Tribunals should be guided in the conduct of LCIA arbitrations’.

256. Although references were made by [the Respondent] to a prohibition on drafting awards, no awards have been made in this case, and [the Tribunal Secretary] has not been involved in drafting any awards. He has, however, been involved in the drafting of the Decisions which form the basis of this challenge. The extent of his involvement in this task has been highlighted by [the Respondent] by reference to the number of hours recorded by [the Tribunal Secretary].

257. The arbitral tribunal has asserted that this drafting is under the supervision of the Chair, that it either follows a draft prepared by the Chair or is subsequently commented on, edited and adopted as his own by the Chair, and that oral instructions have been given to [the Tribunal Secretary] by the Chair in respect of the Decisions in which [the Tribunal Secretary] has been involved in drafting.

258. The Young ICCA Guide says, at Article 3(1): ‘With appropriate direction and supervision by the arbitral tribunal, an arbitral secretary’s role may legitimately go beyond the purely administrative’. And in the commentary on this Article it says that ‘Ultimately, it should be left to the discretion of the tribunal to determine what duties and responsibilities can appropriately be entrusted to the arbitral secretary, taking into account the circumstances of the case and the arbitral secretary’s level of experience and expertise’

259. One of the tasks the Young ICCA Guide contemplates being undertaken by the Tribunal Secretary is in Article 3(g), namely ‘Drafting procedural orders and similar documents’.

260. The contents of the Young ICCA Guide might be considered irrelevant to the analysis of the Division if it contradicted the LCIA Notes and if, indeed, the LCIA Notes had been in existence at the time [the Tribunal Secretary] was appointed. However, in the judgment of the Division, given both the timing of the issue of the LCIA Notes, the fact that they are expressed to be broad principles, and the manner in which the duties of a Tribunal Secretary are described, it would be wrong to confine consideration of the tasks undertaken by [the Tribunal Secretary] solely to the LCIA Notes.

261. It is clear to the Division that the LCIA Notes are not intended to be all encompassing in providing guidance as to the role of a Tribunal Secretary and can, where not in contradiction, be supplemented by other guidance, including the Young ICCA Guide.

262. In the judgment of the Division, the tasks undertaken by [the Tribunal Secretary], as explained by the arbitral tribunal, including all those tasks listed by [the Respondent] [...], are the sorts of tasks contemplated by the Young ICCA Guide, and do not infringe the expectations and guidance provided by the LCIA Notes. Accordingly, we find that the arbitral tribunal has not improperly delegated its role to the Tribunal Secretary by systematically entrusting the Tribunal Secretary with tasks beyond what is permissible under the LCIA Rules and the LCIA policy on the use of arbitral secretaries.
263. In coming to that decision, the Division has taken into account all the material submitted by [the Respondent] in support of its challenge on this Ground and has, especially, considered the hours worked by the Tribunal Secretary, including those recorded in relation to two of the Decisions, where no subsequent time was recorded by the arbitral tribunal. Although it was submitted to us those time records inferred a lack of supervision on the part of the arbitral tribunal, the Division considers it can, equally, infer conclusion of a drafting exercise, after receiving comments from the arbitral tribunal, by a Tribunal Secretary experienced enough not to need his final draft checked again by the entire arbitral tribunal. That conclusion is reinforced by the affirmation by the arbitral tribunal, which we accept, that proper supervision was provided, especially by the Chair.

264. In that regard we should also confirm that we specifically considered the description of work in [the Tribunal Secretary]’s fee notes, which comprised [the Respondent]’s exhibit C-7, to which we were referred at the hearing. The description “Work on the Decision”, in the overall context, indicates drafting work. However, there is nothing to suggest [the Tribunal Secretary] was deciding the matters under consideration in the Decision himself, and, indeed, the arbitral tribunal has affirmed he did not. Equally, there is nothing to suggest he was drafting without supervision from the Chair.

265. In conclusion, we would comment that the problem of the conflicting views of the parties and the arbitral tribunal expressed in this challenge as to precisely what tasks were to be entrusted to the Tribunal Secretary has its genesis in the failure on the part of all concerned to discuss, and agree, at the time of appointment, the manner in which the Tribunal Secretary was intended to operate. We would suggest that it would be best practice for this to be clarified by arbitral tribunals, and by parties, whenever a Tribunal Secretary is appointed, even if only by reference to a particular set of guidelines.

266. Accordingly, for the reasons we have set out above, we find that [the Respondent]’s challenge fails on Ground 1.

C. Ground 2: The Chair’s breach of his duty not to delegate by seeking the views of a third party

[...]

270. The misdirected e-mail of 23 March 2016 from the Chair asks the Tribunal Secretary ‘Your reaction to this latest from [the Respondent]?’ was not copied to the co-arbitrators and was, clearly, intended to provoke a discussion of some sort between the Chair and the Tribunal Secretary. Whether it was a discussion as to the status of [the Respondent]’s compliance with the Second Decision on Document Production, or a discussion as to what the Tribunal Secretary considered should be done in response to [the Respondent]’s letter of 22 March 2016, or whether it was seeking the views of the Tribunal Secretary on some wider issue, is not obvious from the face of the e-mail.

271. However, for the purposes of this analysis, the Division do not consider it necessary to seek to establish precisely what the e-mail was intended to elicit from the Tribunal Secretary. What the misdirected e-mail does not do, on its own, is substantiate the allegation made by [the Respondent] that the Tribunal Secretary was acting as fourth arbitrator and involved in, and contributing to, decisions made by the arbitral tribunal.
272. We are urged by [the Respondent] not to view it as a ‘one off’, but as part of a pattern, and we have been urged to look at the time recorded by the Tribunal Secretary as support for the proposition that he has been acting as a fourth arbitrator.

273. Whether it is a ‘one off’ we do not know. We have no evidence either way. As for the time records, as previously stated, we have considered them, and the accompanying descriptions of work done by the Tribunal Secretary, in great detail. The number of hours spent by the Chair and the other members of the arbitral tribunal, and the description of the Tribunal Secretary’s work, do not lead us to the conclusion that [the Tribunal Secretary] fulfilled the Tribunal’s decision making function. [...] 

274. In the misdirected e-mail, the Chair was clearly asking for a reaction from the Tribunal Secretary, but as [Counsel for Respondent] accepted at the hearing, if there are no issues of breach of confidentiality, discussions as to matters relating to the arbitration with a third party may be acceptable. Obviously, in this situation, there can be no question of breach of confidentiality, and it seems to the Division that an arbitrator seeking the reaction of a Tribunal Secretary does not, of itself, constitute delegating any of the non-delegable duties of an arbitrator.

275. Clearly, care must be taken when members of an arbitral tribunal seek to elicit views from a Tribunal Secretary, as to aspects of an arbitration, that they are not seeking a contribution from that third party to the decision making process, but there is no evidence before us that demonstrates this is what the misdirected e-mail was doing, that the Chair or the arbitral tribunal had done this in the past or that the time records demonstrate this to be the case.

276. Accordingly, for the reasons we have set out above, we find that [the Respondent]’s challenge fails on Ground 2.

D. Ground 3: The co-arbitrators’ breach of their duty not to delegate

[...] 

278. [Counsel for Respondent] relied upon Article 10.2 of the LCIA Rules which provides, amongst other things, that if an arbitrator does not ‘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’

279. [Counsel for Respondent] submitted that the three Decisions which form the basis of the challenge were not purely procedural decisions, but evidentiary decisions. In support of that submission he made a number of points:

(i) the consequences of the Decisions, as was known at the time, went far beyond the procedure in the arbitration;

(ii) the gravity and the substance of the matters under consideration was apparent from the volume of the submissions made by the parties; and

(iii) none of the arbitrators considered they were purely procedural decisions as they weren’t delegated to the Chair to deal with under Article 14.3.

[...]
281. [Counsel for Respondent] referred the Division to the hours recorded by the co-arbitrators in respect of each of the three Decisions, as set out in [the Respondent]’s challenge of 5 May 2016, and submitted this showed the disproportionate activity of the Tribunal Secretary when compared to the co-arbitrators. [...]  

282. [Counsel for Respondent] showed the Division the bundles of documentation that had comprised the submissions for each of the three Decisions, and made the point that the Second Decision on Document Production was a 65 page decision that had been based on 469 pages of submissions. [...]  

283. [Counsel for Respondent] drew attention to the inconsistency in the comments made by the Chair as to how the co-arbitrators had contributed to the decision making process (‘often suggested amendments, modifications or revisions resulting in a further draft’) and the comments from the co-arbitrators themselves (‘generally and more broadly, the chairman’s draft accorded with our views, resulting in our often having little, if anything, to criticise or amend significantly’).  

284. [Counsel for Respondent] referred to what was termed the five stage decision making process as described in [the Respondent]’s submissions of 30 June 2016 and submitted that, in order to make a proper decision, it is necessary to be engaged in the decision making process and that it undermines an individual’s decision if it becomes an adoption of what somebody else has done [...]. [...]  

285. The Division has carefully considered the time records of the co-arbitrators, the time records of the Tribunal Secretary and the Chair and the nature of the three Decisions made. The co-arbitrators have explained in detail in their comments of 20 June 2016 how they went about dealing with each of the Decisions in question and how much time they spent. They have confirmed, in relation to each Decision, that they read the party correspondence and considered the issues which arose. In relation to the Record Sharing Decision and the Second Stay Decision they confirmed they agreed with the draft received from the Chair. In relation to the Second Decision on Document Production they confirmed they were sent and reviewed three drafts of the Decision before it was issued.  

286. The conclusion reached by the Division is that the time spent by the co-arbitrators on each of these Decisions, whether categorised as procedural or evidentiary, was appropriate and proportionate given the obligation placed on them by Article 10.2 of the LCIA Rules to use reasonable diligence but to avoid unnecessary delay and expense.  

287. Where the co-arbitrators agreed with the draft Decision provided to them, they dealt with it promptly, where they had comments and drafting suggestions to make, they spent more time and considered additional drafts. This is entirely in keeping with the way in which arbitral tribunals function, and, in our judgment, the number of hours spent corresponds with the specific nature of the Decisions. As can be seen from the attachments to the LCIA’s letter of 7 April 2016 providing the parties with an interim fee update, in earlier phases of the arbitration the allocation of hours among the members of the arbitral tribunal and the Tribunal Secretary was different. There is no indication that the co-arbitrators simply rubber-stamped decisions of the
Chair, as alleged by [the Respondent], and the Division repeats that it accepts what the Chair said in his comments of 11 July 2016 at paragraph 6.11 quoted above.

288. Accordingly, for the reasons we have set out above, we find that [the Respondent]'s challenge fails on Ground 3.

E. **Ground 4: Justifiable doubts as to the Chair's independence and impartiality**

289. Article 10.3 of the LCIA Rules provides that an arbitrator may be challenged ‘if circumstances exist that give rise to justifiable doubts as to his impartiality or independence’. As has been already stated, there is no challenge to the Chair’s independence.

290. At the hearing [Counsel for Respondent] confirmed that the test was not concerned with actual bias, and that the test had been correctly formulated by the Chair at paragraph 6.2 on page 11 of the Chair’s comments of 20 June 2016. The test, as set out there is as follows:

‘Divisions of the LCIA Court have held that the English Courts have determined that the test for arbitral bias is ‘whether the fair-minded and informed observer, having considered the facts, would conclude that there [i]s a real possibility that’ an arbitrator is … partial to a party’.

291. [Counsel for Respondent] [informed] the Division […] of [the remarks made by the Chair] […] and concluded that, applying this test, the fair-minded observer would conclude there were justifiable doubts as to the Chair’s impartiality. He referred us to the challenge decision of the Secretary-General of the Permanent Court of Arbitration in the case of Perenco Ecuador Limited v Republic of Ecuador and the approach taken there.

292. [Counsel for Claimant], in his submissions said that what the Chair had [referred to in his remarks] were allegations […]. […]

293. There is no dispute between the parties or the arbitral tribunal as to the conclusion the Division would need to reach to uphold this challenge, nor to the test we should apply to the facts in order to establish whether such a conclusion can be reached. We would need to conclude that justifiable doubts as to the Chair’s impartiality exist and we should do this by applying the test set out in Magill v Porter [2001] UKHL 67, para 103 ‘whether the fair-minded and informed observer, having considered the facts, would conclude that there is a real possibility that an arbitrator is partial to a party’.

294. The fair-minded observer has a number of characteristics which are set out in Helow v Secretary of State for the Home Department and another (Scotland) [2008] UKHL 62. These characteristics were neatly summarised in [the Claimant]’s submissions of 11 July 2016 as follows:

‘In English law, the informed, fair-minded observer is “neither complacent nor unduly sensitive or suspicious,” “always reserves judgment on every point until she has seen and fully understood both sides of the argument,” and “takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context.”’

295. That is the approach the Division has taken in considering what was said by the Chair […]. […] We understand that not only have we to be fair-minded, but also informed. […]
296. We should say, at the beginning of this part of the analysis, that we fully accept what the Chair said in his comments of 20 June 2016, in respect of each of the issues identified by [the Respondent] in this Ground, namely:

‘I did not then and have not ever to date made any judgment on the issue mentioned by the Respondent or on any issues presented in this arbitration. Furthermore, I will not reach a conclusion on any issue in this arbitration until the proceedings have been entirely completed.’

[...]

313. What is the informed, fair-minded observer to take from the Chair’s remarks, taken in the overall context [in which the remarks were made]?

314. It is unarguable, in the judgment of the Division, and we find accordingly, that the Chair identified himself as a member of the arbitral tribunal in the LCIA arbitration. [...]

315. The existence of the LCIA arbitration was public knowledge, its existence had been confirmed to the press by [the Respondent]’s own counsel, but the composition of the arbitral tribunal, and the fact that the Chair was a member of that arbitral tribunal, was not.

316. Armed with that knowledge, what else would the fair-minded observer take from the remarks of the Chair? The Chair referred to publicity surrounding the case. In his comments to the Division he has stated that he was careful to say only what he knew had been publicly reported [...]. The informed, fair-minded observer would be aware of those reports and what they had said.

317. However, because the Chair was simply repeating what had been said in the press, without any qualification such as ‘it has been reported that’ or ‘as is public knowledge, allegations have been made that’, the informed fair-minded observer would have noted that the Chair was not seeking to qualify what had been reported in any way, but simply repeating it verbatim. Knowing that the Chair was a member of the LCIA arbitral tribunal, in the judgment of the Division, the fair-minded observer would conclude that what the Chair had repeated were facts pertaining to the case which either were not in dispute, or which the Chair viewed not to be in dispute.

318. Amongst those ‘facts’ were [issues] [...] [which [t]he Division understands [...] are [...] in dispute in this arbitration. [...]

319. As set out above, at the hearing [Counsel for Claimant] submitted that the use of the word ‘allegedly’ was not needed, because the Chair was talking about allegations, but at no stage was that made clear by the Chair himself. [...]

[...]

321. In the judgment of the Division, there is a great difference between discussing decided cases [...] and discussing ongoing cases. If a case has been decided, what was decided can be discussed without the need for qualification. If the judgment or award has been published, it can be discussed with full reference to the parties involved and to the findings of fact and law in the case. If, however, the case is an ongoing one, it is clear that, generally, much more care has to be used, and this is all the more so if it is an arbitration which is not being conducted in public and, especially, if the person commenting on the case [...] is one of the arbitrators.
322. As stated in paragraph 296 above, the Division fully accepts what the Chair said in his comments of 20 June 2016, and believes that to be the case. However, the test we have to apply is that of the informed fair-minded observer, and that is the test we have applied.

323. In doing so, as stated above, we have found that the informed fair-minded observer would conclude that the Chair was associating himself with what had been reported and that what the Chair had repeated were facts pertaining to the case which either were not in dispute, or which the Chair viewed not to be in dispute. In our judgment, the result of the remarks made by the Chair in relation to this arbitration, where it was clear that he was one of the arbitrators, would be to lead the informed, fair-minded observer to conclude that the Chair accepted, as established fact, what was still in contention in the arbitration and that, in consequence, justifiable doubts as to the Chair’s impartiality existed.

324. Accordingly, for the reasons we have set out above, we find that [the Respondent]’s challenge succeeds on Ground 4.

F. Ground 5: The Chair’s breach of the confidentiality of the proceedings

325. To succeed on this Ground, as [the Respondent] accepts, it needs to establish, pursuant to Article 10.2 of the LCIA Rules, that the Chair acted in deliberate violation of the arbitration agreement. In consequence, it must be established that confidentiality, including disclosure by an arbitrator that he is a member of the arbitral tribunal, is part of the arbitration agreement, and that there has been deliberate violation of that confidentiality.

326. We have already found that, in his remarks [...], the Chair identified himself as a member of the arbitral tribunal in this LCIA arbitration. Accordingly, we must now consider whether this amounted to a breach of confidentiality of these arbitral proceedings, and whether that breach was deliberate.

[...]

328. There was some discussion, both in the written submissions and at the hearing, as to the extent to which arbitrators in LCIA arbitrations are subject to a duty of confidentiality.

329. Article 30 of the LCIA rules refers to the parties having an obligation of confidentiality in respect of the award and materials and documents in the arbitration, but not as to the existence of the arbitration itself, and to the arbitrators having an obligation to keep their deliberations confidential.


331. [The Claimant] does not seek to argue that English law does not apply but submits that Russell on Arbitration does not cite any specific English law precedent for this principle and, in any event, it says that any confidentiality obligation would not extend beyond that which is expressly incorporated by reference into the arbitration agreement. [The Claimant] submits that is done
by the provisions of the Framework Agreement and the Shareholder’s Agreement and is limited to incorporating Article 30.2 of the LCIA rules which only applies confidentiality to arbitrators’ deliberations.

[...] 333. The approach to confidentiality of arbitration proceedings varies from jurisdiction to jurisdiction and, given the international spread of LCIA arbitrations, both as to governing law of the dispute and the seat of the arbitration, the absence of a reference in the LCIA Rules to the overall confidentiality of proceedings is not surprising. Equally, however, nothing should be read into the lack of reference as countermanding the requirements of local law as to confidentiality.

334. The Division accepts the general proposition, on the basis of the texts relied upon by [the Respondent], that, in England, arbitration proceedings are considered, as a matter of English law, to be confidential, and that an obligation of confidentiality in respect of the proceedings applies not only to the parties, but to the arbitral tribunal as well.

335. In this case, however, whether an obligation of confidentiality existed by operation of law or not, it had been agreed, in procedural Order No 2, that the [...] arbitration proceedings would be confidential. [...].

336. [...] we consider that the [confidentiality obligations apply] to the arbitrators [...].

337. Accordingly, for the Chair to reveal publicly that he was a member of this arbitral tribunal amounts, in our judgment to a breach of confidentiality and, consequently, to a violation of the arbitration agreement.

338. Was the breach deliberate? Clearly, as we have found, there was an act which violated the confidentiality of the arbitration but, for that act to be deliberate, there must be the requisite subjective intention to commit the violation in question.

339. The Chair used the background to this dispute, a current dispute, as an example [...]. In doing so, he revealed he was a member of this arbitral tribunal. He was not sufficiently prudent in doing so, possibly careless, but, at no stage, did he say, outright, that he was a member of the arbitral tribunal, even though, as we have found, this fact would have been clear to [those to whom the remarks were addressed]. Whilst he didn’t say he was a member of the arbitral tribunal, did he intend [those to whom the remarks were addressed] to understand that he was? If so, that would be sufficient to constitute a deliberate act.

340. It seems that, in making his remarks, the Chair did not intend [those to whom the remarks were addressed] to understand he was a member of the arbitral tribunal. [...] is clear to the Division that the Chair did disclose his involvement, the Division accepts that the Chair does not believe he did and did not intend to do so. Accordingly, he did not have the requisite subjective intention to commit the violation required under Article 10.2 of the LCIA Rules.

341. The conclusion the Division has reached, therefore, is that the Chair’s actions fell short of being a deliberate breach of confidentiality and, in consequence, for the reasons we have set out above, we find that [the Respondent]’s challenge fails on Ground 5.
IV. Decision

342. For all the reasons set out above we have found that the challenge by the Respondent has failed on four of the five Grounds upon which it was based. However, we have found that the challenge, on Ground 4, that circumstances exist that give rise to justifiable doubts as to the Chair’s independence or impartiality, succeeds and was brought within the time limit required by the LCIA Rules. Accordingly, the appointment of the Chair of the arbitral tribunal in this arbitration should be revoked.

343. Although the parties confirmed that the Division has the power to make a costs award as part of this Decision, the Division has concluded, in the light of the Decision it has reached, that the issue of the costs and expenses generated by this challenge should be treated as costs in the arbitration, and determined as part of the arbitral award.”