**Subject:** Challenge to sole arbitrator’s appointment pursuant to Article 10.3 of the LCIA Rules 2014, based on Articles 10.1 (justifiable doubts as to arbitrator’s independence and impartiality) and 10.2 (failure by arbitrator to act fairly and impartially as between the parties)

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

**Summary:**

The Sole Arbitrator expressed no comments on the challenge. By doing so, the arbitrator cannot be reproached for not ‘engaging’ with the challenge. The arbitrator should be cautious when addressing arguments put forward involving the merits of the challenge.

An Arbitral Tribunal has a wide discretion in respect of the conduct of proceedings. A challenge cannot serve to attack procedural decisions of an Arbitral Tribunal in the absence of circumstances that would lead a fair-minded and informed observer, having considered the facts, to conclude that there is a real possibility that the Tribunal was biased.

### Background

1.1 The underlying dispute arose out of a shareholders’ agreement and a settlement agreement, which were both governed by Israeli law. The shareholders’ agreement contained an LCIA arbitration clause, which was incorporated into the settlement agreement. 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 18 March 2016. The First and Second Respondents filed a Response on 21 April 2016. The Third Respondent did not take an active role in the arbitration.

1.3 On 26 April 2016, the LCIA notified the parties that it had appointed the Sole Arbitrator.

1.4 The Sole Arbitrator sent to the parties a draft Procedural Order No. 1 and provisional timetable providing for three simultaneous exchanges of written submissions, and invited the parties’ comments, including, on the realistic time required by the parties for written submissions and whether a hearing was required. The Sole Arbitrator indicated that it might be prudent to block out dates for the hearing if a hearing was required and proposed blocking five days in October 2016, and advised that she would be available from 16 to 31 October 2016.

1.5 The Claimant expressed agreement with the Sole Arbitrator’s proposed sequence for written submissions and suggested dates for the exchange of these submissions. In relation to the hearing, the Claimant’s view was that it was too early to schedule hearing dates, however, after the insistence
of the Sole Arbitrator, the Claimant indicated that the days of 16 to 24 October 2016 should be avoided due to Jewish holidays and suggested that the hearing commence on 31 October 2016.

1.6 The First and Second Respondents stated that the time frames proposed by the Claimant were ‘absolutely unrealistic’ and that they required at least 45 day timeframes for written submissions. They added that their counsel had planned to be on vacation in the first half of September and between 6 and 23 October 2016, and recalled that Jewish holidays, which ran from 3 to 24 October 2016, also needed to be considered. They agreed that 5 days should be set aside but stated that it was unrealistic to set aside hearing days before March/April 2017. They also noted that counsel for the First and Second Respondents did not work during the Jewish holidays.

1.7 By letter dated 22 May 2016, the Sole Arbitrator submitted to the parties a revised draft Procedural Order No.1 and a revised provisional timetable, advising that she had taken into account the parties’ comments. She noted the parties’ comments regarding written submissions and stated that she had lengthened the schedule and otherwise ensured that it did not conflict with the First and Second Respondent’s counsel’s vacation dates or the Jewish holidays. The hearing days were scheduled for 31 October 2016 through to 4 November 2016. The Sole Arbitrator invited the parties’ comments by 26 May 2016, and advised that she would finalise the Procedural Order and provisional timetable and notify them to the parties after this date.

1.8 On 29 May 2016, the Sole Arbitrator issued Procedural Order No. 1 and the provisional timetable reflecting the draft sent to the parties on 22 May 2016.

1.9 On 23 June 2016 the Claimant filed its Statement of Claim and the First and Second Respondents filed a Statement of Counterclaim.

1.10 On 28 July 2016, the First and Second Respondents notified the Sole Arbitrator, the LCIA, the Third Respondent and the Claimant that, in accordance with Article 18.3 of the LCIA Rules, that henceforth they would be represented by new counsel and requested the Sole Arbitrator’s approval of the change. The notice did not mention that this change in counsel might affect the First and Second Respondent’s ability to adhere to the provisional timetable.

1.11 On 31 July 2016, the Sole Arbitrator approved the change in counsel.

1.12 On 2 August 2016, the First and Second Respondents applied for an extension of time to file the subsequent two submissions “by a minimum of 30 days each” and sought a postponement of the hearing dates to a date after 15 December 2016 (the “Application”). The Application mentioned, inter alia, that the Claimant had agreed to a “collegial extension of 10 days” of the dates for the next two written submissions, but had objected to the postponement of the hearing.

1.13 On 2 August 2016, the Claimant strongly objected to the Application and requested until 5 August 2016 to reply to the Application.

1.14 On the same day, the Sole Arbitrator wrote to the parties inviting them to “confer with a view to agreeing a way forward”, and stated that “[a]bsent agreement, I look forward to receiving Claimant’s comments no later than 5 August 2016.” The Sole Arbitrator also reminded the parties of the existing deadline of 11 August 2016 for the Statements of Defence, adding that “[u]nless and until
an extension of time is agreed between the parties, or granted by me, the parties should prepare to file their statements of defence by that date.”

1.15 Within the hour, the First and Second Respondents advised that they would not be in a position to file their Statements of Defence on 11 August or on 21 August 2016, the latter date being the extension to which the Claimant previously indicated it would agree.

1.16 On 3 August 2016, the First and Second Respondents requested that they be allowed until 8 August 2016 to reply to the Claimant’s response to the Application, noting that this would provide them two working days after receipt of the Claimant’s response, since Shabbat is not a working day.

1.17 On 4 August 2016, at 12:48 am Israel time, the Sole Arbitrator acknowledged the First and Second Respondents’ emails of 2 and 3 August 2016, reiterating her invitation to the parties to confer with a view to agreeing the way forward and directed that the First and Second Respondents reply, should they so need, to the Claimant’s response to the Application, by Sunday 7 August 2016.

1.18 On the same day at 5:23 pm, the First and Second Respondents advised that they had not been able to reach agreement with the Claimant as to the extension and counsel stressed that, since they did not work on Shabbat or on Jewish High Holidays, the Sole Arbitrator’s decision would leave them with only one working day to respond to the Claimant’s response to the Application. They requested the Sole Arbitrator to modify her decision and grant them until 8 August 2016, 5 pm UK time, to reply to Claimant’s response.

1.19 Approximately 20 minutes later, the Claimant advised that it would be submitting its response to the Application later that day, and reasoned that this would give the First and Second Respondents two working days to file their reply by Sunday 7 August 2016.

1.20 At 6:22 pm on the same day, the First and Second Respondents wrote to state that further to the Claimant’s most recent email they would file their reply to the Claimant’s comments to the Application by “end of day Sunday 7 August 2016”.

1.21 The Claimant submitted its response to the Application on 4 August 2016 and the First and Second Respondents submitted their reply on 7 August 2016. The Sole Arbitrator never pronounced her decision on the First and Second Respondents’ request that she modify her decision of 4 August 2016 to give the First and Second Respondents until 8 August 2016 to reply to the Claimant’s response.

1.22 On 7 August 2016, the Sole Arbitrator advised that she had decided to grant in part the Application, allowing the parties two additional weeks for the filing of the parties’ two subsequent rounds of submissions, but refused to postpone the hearing. She noted her duty to act fairly and impartially and to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties’ dispute.

1.23 The Sole Arbitrator noted that when seeking new counsel, the First and Second Respondents should have verified their new counsel would be able to work within the deadlines set out in the Provisional Timetable, and stated that the existing schedule had been “set after taking into account the holiday period in October and vacation plans of all concerned.” She further stated that given the
number of lawyers and witnesses involved in the arbitration, any attempt to reschedule the hearing would almost certainly result in a material delay in the proceedings.

1.24 The Sole Arbitrator noted that the First and Second Respondents would have four weeks to prepare their Statement of Defence from the time their current counsel appeared in the proceedings, and stated that this would be “more than ample” time to respond to the Claimant’s sixteen-page Statement of Claim, which was supported by five witness statements and fewer than fifty exhibits. The parties would also have four weeks from their Statements of Defence to file their Statements of Reply.

1.25 Finally, the Sole Arbitrator noted that the First and Second Respondents sought the costs of their Application and stated that she foresaw deciding all issues of costs in an award following the hearing, in accordance with Article 28 of the LCIA Rules. She reminded the parties that, in doing so, she would take into account, among other things, the parties’ conduct in the arbitration, including any cooperation in facilitating the proceedings as to time and cost and any non-cooperation resulting in undue delay and unnecessary expense.

1.26 On 10 August 2016, the First and Second Respondents filed a challenge against the Sole Arbitrator.

1.27 On 11 August 2016, the Claimant objected to the challenge and, on 24 August 2016, it provided submissions on the challenge.

1.28 On 12 August 2016, the Sole Arbitrator advised that she had no comments on the challenge.

1.29 On 1 September 2016, the LCIA notified the parties that, pursuant to Article 10.6 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.

1.30 The parties made further submissions on the challenge and, on 23 September 2016, the former Vice President advised that he did not consider that any additional information was required from the parties or the sole arbitrator for him to determine the challenge. Further, he advised that unless he was notified that any party or the Sole Arbitrator wished to add anything, he would consider the challenge proceedings to be closed and proceed to consider and decide the challenge. No further communication was received from the parties or the Sole Arbitrator.

1.31 On 3 October 2016, the former Vice President rendered his decision on the challenge.

2 Decision excerpt

“[...]

IV – ANALYSIS

A. Applicable Law and Criteria to be Applied

103. The Shareholders’ Agreement and the Settlement Agreement identify the procedural law governing this arbitration as English law. In view of the Parties’ explicit election for LCIA arbitration seated in London, the First and Second Respondents are correct in identifying English
law, including the Arbitration Act 1996 (the Act), together with the LCIA Rules, as governing the determination of this Challenge.

104. Under s. 24 of the Act, a party may seek the removal of an arbitrator if ‘circumstances exist that give rise to justifiable doubts as to his impartiality’. Lord Hope of Craighead concurring in Porter v Magill, laid out the test for reasonable apprehension of bias under English law as being ‘whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.’ This test was applied to decide challenge applications under the LCIA Rules in other arbitral proceedings seated in London.¹

105. In a recent decision, the English commercial court summarized as follows the main authorities relating to s.24 of the Act, including as regards the notion of the ‘fair-minded and informed observer’:²

(1) The common law test for apparent bias is reflected in section 24 – see, for example, Laker Airways v FLS Aerospace [1992] 2 Lloyds Rep 45, per Rix at [48]; A v B [2011] 2 Lloyds Rep 591 per Flaux J at [21]-[29]; Sierra Fishing Co & Others v Farran & Others [2015] EWHC 140 (Comm), [2015] Lloyds Law Reports per Popplewell J at [51];

(2) The common law test under section 24 is whether the ‘fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased’ – see Porter v Magill [2002] AC 357 per Lord Hope at [103]; Hellow v Secretary of State for the Home Department [2008] UKHL 62, [2008] WLR 2461, per Lord Hope at [1]-[3];

(3) Such a fair-minded and informed observer, although not a lawyer, is assumed to be in possession of all the facts which bear on the question and expected to be aware of the way in which the legal profession operates in practice – see Rustal v Gill & Dufus [2001] 1 Lloyd’s Law Reports 14; Taylor v Lawrence [2002] EWCA Civ 90, [2003] QB 528; A v B [2001] 2 Lloyds Rep 591 per Flaux at [21]-[29];

(4) A ‘fair-minded’ observer reserves judgment until he/she has seen and fully understood both sides of the argument: his/her approach must not be confused with that of the person who has brought the complaint, the assumptions made by the complainer are not to be attributed to the observer unless they can be justified objectively: A v B at [26] and Helow at [1]-[3];

(5) An ‘informed’ observer takes a balanced approach [sic] and appreciates that context forms an important part of the material to be considered: A v B at [26] and Helow per Lord Hope at [3].

106. The undersigned has applied the foregoing principles deciding the Challenge.

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¹ LCIA Reference Nos. 81209 and 81210, paras. 3.1 and 3.2 (16 November 2016) 27 Arbitration International 455. See also LCIA Reference No. 81160, para 3.4 (28 August 2009) 27 Arbitration International 442; LCIA Reference No. 81224, para 3.5 (15 March 2010) 27 Arbitration International 461
B. Admissibility

107. The Challenge is based on Articles 10.1 and 10.2 of the LCIA Rules. Under Article 10.3 of the LCIA Rules, a party intending to challenge an arbitrator must deliver a written statement of the reasons for its challenge ‘within 14 days of becoming aware of any grounds described in Article 10.1 or 10.2.’

108. The First and Second Respondents assert that the sole arbitrator breached her duty to act fairly and impartially in her decisions of 4 August 2016 and 7 August 2016. The Challenge Application having been delivered to the LCIA Court on 11 August 2016, and copied simultaneously to the other Parties and the challenged arbitrator, there can be no question that the Challenge was made timeously, and is therefore prima facie admissible.

C. Merits

109. Since the Challenge rests on the contention that the sole arbitrator breached her duty to act fairly and impartially by her decisions of 4 and 7 August 2016, each of these decisions must be considered in turn. However, the First and Second Respondents having advanced, in their Reply, the overarching argument that an adverse inference should be drawn from the sole arbitrator’s failure to comment on the Challenge or to ‘engage with any of the Respondents’ serious claims against her actions’, it is convenient to begin by addressing this argument.

i. The sole arbitrator’s decision not to comment on the Challenge

110. As noted above (see para 3.), after receiving the Challenge Application, the sole arbitrator, no doubt aware of her ability to comment on the Challenge under Article 10.4 of the LCIA Rules, informed the LCIA Court that she had no comments on the Challenge. The conclusion to be drawn from this course of conduct is that the sole arbitrator had decided not to resign her position (as this possibility is expressly mentioned in Article 10.6 of the LCIA Rules). By necessary implication, this also meant that the sole arbitrator still considered herself to be independent and impartial and, subject to the LCIA Court’s determination of the Challenge, willing and able to continue to serve in the arbitration.

111. Should the sole arbitrator be reproached for failing to ‘engage’ with the challenging party? This former Vice-President thinks not. In the undersigned’s opinion, an arbitrator who faces a challenge based on an alleged breach of his or her duty to act fairly and impartially should be very cautious indeed before engaging with the challenging party and addressing the arguments put forward in an effort to obtain his or her removal. Precisely because his or her duty is to remain independent and impartial, the challenged arbitrator should resist any temptation, and decline any invitation by a party to the dispute, to descend into the fray and argue the merits of the challenge. Yet this is what an arbitrator would in effect be doing were he or she, as suggested by the First and Second Respondents, to ‘engage’ with the challenging party and address the arguments raised in support of the Challenge.

112. This view is consistent with the CIArb’s Guidelines, cited by the Claimant in its Rejoinder. The CIArb Guidelines state in the introduction that upon notice of an application being made to the Court in an arbitration in which he or she has acted as arbitrator, the arbitrator ‘may wish to ensure that relevant material is placed before the Court’. The Guidelines go on to observe that
‘a wise arbitrator will exercise some caution before deciding to respond to criticisms of his conduct of the arbitration made by a party’ (para. 5.1.). The CIArb Guidelines also say (para. 5.2):

The cardinal rule is to respond only where this is absolutely necessary, to do so objectively and confine any response to statements which can be verified from the contemporary documents.

113. The undersigned subscribes to the advice contained in the three quoted extracts from the CIArb Guidelines.

114. In the present case, it is the opinion of the undersigned that the sole arbitrator’s course of conduct in connection with the Challenge Application is irreproachable. Accordingly, the First and Second Respondents’ invitation to draw an adverse inference from the sole arbitrator’s failure to comment on the Challenge or otherwise engage with the challenging parties is inapposite, and is therefore refused.

ii. **The 4 August 2016 decision**

115. The 4 August 2016 decision of the sole arbitrator is criticized by the First and Second Respondents on two grounds.

116. The first is that the sole arbitrator allegedly disregarded the fact that their counsel do not work on Shabbat. There is no basis for this contention. The sequence of events is as follows:

- On 3 August 2016, the First and Second Respondents request the opportunity to reply by Monday, 8 August 2016, to the Claimant’s forthcoming response to their Extension and Postponement Application, due Friday, 5 August 2016.
- On 4 August 2016, the sole arbitrator decides that if First and Second Respondents wish to reply to the Claimant’s response, they need to do so by Sunday, 7 August 2016.

117. Pausing here, it is apparent that the only basis on which it could be said that the arbitrator disregarded the fact that counsel do not work on Shabbat would be either to infer that the sole arbitrator in fact considered that two days were required for the First and Second Respondents to reply, or that she in fact meant to give them 2 days and disregarded the fact that one of those days was a day on which counsel did not work. However, in the absence of any reference in the decision to the number of days that the sole arbitrator considered were required to reply to the response, or to the number of days she meant to give the First and Second Respondents for the preparation of the reply, neither of these inferences may reasonable be made.

118. The Claimant having been given three days to respond to the Extension and Postponement Application, it is likely that, in keeping with prevailing practice in international arbitration, the sole arbitrator considered that in order to reply to a response which a party had been given three days to prepare, a shorter delay of one working day would be sufficient and appropriate.

119. A compelling reason for refusing to draw the inference contended for by First and Second Respondents is the fact that the sole arbitrator was fully conscious of the fact that their counsel did not work on Shabbat, since their email of 3 August 2016 expressly pointed that out […].
Moreover, it had been clarified early in the proceedings that both Parties were represented by Jewish counsel who did not work on Shabbat or during the Jewish High Holidays [...]. Counsel’s email of 3 August 2016 confirmed that the practice in this regard of First and Second Respondents’ new counsel was the same as their initial counsel in the arbitration.

120. The second complaint concerning the 4 August 2016 decision is that the sole arbitrator granted the First and Second Respondents two days to respond to the reply, rather than three days, one of which was a non-working day. Continuing with the sequence of events on 4 August 2016:

- Shortly after being informed of the sole arbitrator’s decision of 4 August 2015, the First and Second Respondents asked her permission to reconsider her decision, arguing that counsel would be left with only one working day to reply, a delay which they considered insufficient. However, and as already seen (see para. 50 above), the sole arbitrator never pronounced on this request for reconsideration and, because of the early filing of the Claimant’s Response, the First and Second Respondents did, in the end, have two working days to reply (excluding the non-working day of Shabbat).

121. This, apart from the unsupported contention that the sole arbitrator disregarded the fact that Shabbat was a non-working day, the First and Second Respondents complain about a decision that was not ultimately effective, and which the sole arbitrator may or may not have agreed to reconsider if the First and Second Respondents had not declared themselves satisfied with the two working days afforded to them by the Claimant’s early filing of its Response.

122. The additional peripheral criticisms directed at the sole arbitrator’s decision of 4 August 2016 are equally without merit. The use of the expression ‘I look forward to’ in respect of the Claimant’s Response, but not the First and Second Respondents’ Reply, does not come remotely close to evincing a semblance of bias. The expression is no more than a polite figure of speech, the use or non-use of which in the context of the correspondence reviewed earlier in these reasons is of no moment.

123. The contention that the sole arbitrator ‘decided not to respond’ to the First and Second Respondents’ email of 4 August 2016 sent at 5:23 pm is wholly unjustified. The fact of the matter is that the request contained in that email had become moot upon the First and Second Respondents’ subsequent email confirmation, within the hour – specifically at 6:22 pm –, that they were content to file their Reply on Sunday, 7 August 2017, two working days after the early filing of the Claimant’s Response.

124. In light of these circumstances, the First and Second Respondents’ complaint in respect of the decision of 4 August 2016 boils down to a complaint that the sole arbitrator ought to have decided that they should have two working days, rather than one, to reply to the Claimant’s Response. The First and Second Respondents do not deny that the sole arbitrator’s decision of 4 August 2016 is procedural in nature and that it falls within the arbitrator’s widest discretion to discharge her duties under Article 14.4 and 14.5 of the LCIA Rules. In the opinion of the undersigned, the First and Second Respondents have failed to show how this decision can be said to give rise to justifiable doubts as to the sole arbitrator’s impartiality, independence, or fairness, and the undersigned’s finding and conclusion are that it does not.
iii. **The 7 August 2016 decision**

125. It is common ground that the sole arbitrator’s decision of 7 August 2016, which determined a request for an extension of time for the filing of written submissions and for a postponement of the hearing, is also procedural in nature and falls within the sole arbitrator’s wide discretion in respect of the conduct of the proceedings.

126. It should be recalled that a challenge cannot serve to attack procedural decisions of an Arbitral Tribunal in the absence of circumstances that would lead a fair minded and informed observer, having considered the facts, to conclude that there is a real possibility that the Tribunal was biased. To quote from the decision of the High Court of Justice in Enterprise Ins Co. v U-Drive Solutions, cited by the Claimant (at para. 93):

> The fact that a different arbitrator may have taking [sic] a different view on the facts does not mean that the fair-minded and informed observer would conclude that there was a real possibility that the tribunal was biased.

127. The First and Second Respondents recognized in their Extension and Postponement Application that the sole arbitrator had discretion to grant the relief they were seeking. This implies that the Tribunal also had discretion to grant such relief in part, or indeed to deny it entirely. After citing Articles 14.4 and 14.5 of the LCIA Rules, which provide the Tribunal with discretionary power to order an extension of time and postpone the hearing date, Article 34(3) of the Act, which confers upon the Tribunal the authority to ‘fix the time within which any directions given by it are complied with, and may if he thinks fit extend the time so fixed (whether or not it has expired)’, the First and Second Respondents cited the following provision in Article 14.2 of Procedural Order No. 1:

> The sole arbitrator, in her discretion, may grant extensions of time upon a reasoned request of the party or in her own initiative, but will generally only do so in exceptional circumstances.

128. The First and Second Respondents go on to summarize the position as follows:

22. These Articles of the LCIA Rules, the Arbitration Act and PO1, therefore provide that:

(i) The Tribunal has broad management powers, which include the power to extend time limits and to postpone hearing dates previously set; and

(ii) the power to extend time is discretionary, but the Tribunal must exercise its discretion so as to provide fair and efficient means for the resolution of the parties’ dispute, in accordance with article 14 of the LCIA Rules; and

(iii) the tribunal may grant extensions of time upon a reasoned request of a party;

(iv) relevant factors to the Tribunal’s exercise of discretion include: (i) achieving a fair result as between the parties; (2) [sic] enabling each party to put its case before the Tribunal by being properly represented by legal counsel.
129. The First and Second Respondents having accepted this as being the legal position, the grounds raised in support of their attempt to impugn the sole arbitrator’s decision of 7 August 2016 may be disposed of summarily in light of the criteria applicable to this challenge.

130. The first complaint against the 7 August 2016 decision is that the sole arbitrator pre-judged the case by deciding on the scope of the dispute based on the Claimant’s submission only. In reality, the sole arbitrator did no such thing. Presented with a request for an extension of time to file a Statement of Defence, it was, to quote a submission of the Claimant which the undersigned accepts (Response, para. 27):

    both reasonable and sensible [for the sole arbitrator] to assess the time needed for the preparation of a Statement of Defence by examining the Statement of Case to which the Statement of Defence is responding (...) Such assessment does not result in any pre-judging of the merits of the case and does not raise any issue with regard to [her] impartiality.

131. Another reason why there can be no reasonable apprehension that the sole arbitrator, because of the words used in her decision, had pre-judged the scope of the dispute is that as early as 19 May 2016, she had been presented with both a description of the First and Second Respondents’ counterclaim and a statement of the grounds for their objection denying the sole arbitrators’ jurisdiction to consider the Claimants’ claim regarding the forced retirement of the First Respondent as Managing Director of the Third Respondent.

132. Nor is there any merit to the First and Second Respondents’ contention that the sole arbitrator, by her reference to the length of the Claimant’s Statement of Claimant and the number of witness statements and exhibits, was in any way suggesting that the Statement of Defence has been limited to the arguments of the Claimant. In the opinion of the undersigned, no fair-minded and informed observer reading those words in the broader context of the correspondence exchanged between the parties and the sole arbitrator would make such an assumption.

133. The second argument concerning the 7 August 2016 decision is the alleged denial of the First and Second Respondents’ right to be properly represented in the arbitration. In this regard, the First and Second Respondents’ position amounts to arguing that the sole arbitrator’s decision to approve the change of counsel ipso facto gave them an entitlement to a one-month extension of time for subsequent filings of written submissions, and to a postponement of the hearing.

134. In considering this argument it is relevant to recall the following facts:

    • The First and Second Respondents did not inform the sole arbitrator when they requested an approval of the change of counsel that their new counsel would take the position that they were not able to respect the procedural timetable.

    • The First and Second Respondents had asked, earlier in the proceedings, that the hearing not be before March/April 2017. The Claimant had opposed that request and the sole arbitrator decided, on 29 May 2016, to fix the hearing commencing on 31 October 2016.
In both her decisions of 29 May and 7 August 2016, the sole arbitrator stated that she took account of the October holidays, during which she knew the Parties’ counsel did not work.

Quite independently of her duty, under the LCIA Rules, to ‘avoid unnecessary delay’ and provide a process that is ‘efficient and expeditious’, the sole arbitrator had been presented with a submission by the Claimant that it had a strong interest in early hearing given that the dispute included competing positions about, among others, the obligation of the First Respondent to step down from his position on 20 March 2016 or on 25 December 2016.

In such circumstances, there is force in the sole arbitrator’s observation that when seeking new counsel, the First and Second Respondents ought to have verified that any new counsel they might engage would be able to work within the deadlines set out in the Provisional Timetable.

Be that as it may, it cannot seriously be argued that by her decision to grant an extension of 14 days, rather than the 30 days requested by the First and Second Respondents, the sole arbitrator denied their right to be properly represented in the arbitration, and thus breached her duty to act fairly or impartially. The same must be said about her refusal to postpone the hearing, which was scheduled to take place beginning on 31 October 2016, three months after the First and Second Respondents notified their change of counsel.

The third ground for the alleged breach of the duty to act fairly and impartially is the contention that the sole arbitrator disregarded the fact that counsel do not work on Shabbat and Jewish High Holidays. This contention is demonstrably incorrect. The sole arbitrator states expressly in her decision that the deadlines which the First and Second Respondents were seeking to modify ‘were set after taking into account the holiday period in October and the vacation plans of all concerned’. There can be no question that the ‘holiday period in October’ was a reference to the Jewish High Holidays. In their Extension and Postponement Application, the First and Second Respondents had stated: ‘As the Tribunal is well aware of, the Jewish High Holidays will take place between 2 and 26 October 2016. During this period Respondents’ counsel will be on Jewish High Holiday vacation and will not be able to prepare for the hearing’ [...].

As their last argument, the First and Second Respondents say that the sole arbitrator inferred that by filing the Extension and Postponement Application, the Respondents did not act in good faith and did not cooperate in facilitating the proceedings as to time and cost. This too is an incorrect characterization of the sole arbitrator’s decision. After recording that the First and Second Respondents were seeking the costs of their application, the sole arbitrator explained how she would approach ‘all issues of costs’. She then reminded ‘the parties’ that in doing so, she would take account of their conduct in the arbitration, using words that echoed the provisions of Article 28.4 of the LCIA Rules. In the opinion of the undersigned, it simply cannot be said that this reminder, addressed to ‘the parties’, amounts to a breach of the sole arbitrator’s duty to act fairly and impartially.
iv. **Conclusion**

139. The undersigned has no hesitation in concluding that the Challenge lacks any merit and that it should be dismissed. None of the circumstances cited in support of the Challenge give rise to justifiable doubts as to the sole arbitrator’s impartiality. In the undersigned’s opinion, a fair-minded and informed observer, having considered the facts cited in the Challenge, would not conclude that there is a real possibility that the sole arbitrator was biased.

V - **COSTS**

140. The Claimant requests that the First and Second Respondents be ordered to pay the ‘Claimant’s costs, and they refer specifically to Article 10.7 of the LCIA Rules […]. The undersigned understands this request to encompass the costs of the Challenge in accordance with Article 10.7 of the LCIA Rules, including the Claimant’s Legal Costs (as defined in Article 28.3 of the LCIA Rules) incurred in relation to the Challenge.

141. Article 10.7 of the LCIA Rules reads as follows:

10.7 The LCIA Court shall determine the amount of fees and expenses (if any) to be paid for the former arbitrator’s services, as it may consider appropriate in the circumstances. The LCIA Court may also determine whether, in what amount and to whom any party should pay forthwith the costs of the challenge; and the LCIA Court may also refer to all or any part of such costs to the later decision of the Arbitral Tribunal and/or the LCIA Court under Article 28.

142. In accordance with the principle that costs should reflect the parties’ relative success and failure in the determination of the matter in dispute (see Article 28.4 of the LCIA Rules), the undersigned is of the opinion, and hereby decides, that the First and Second Respondents shall bear the costs of the Challenge, in an amount to be determined by the sole arbitrator as part of her decisions on Arbitration Costs. As regards the Claimant’s claim for its Legal Costs (as defined in Article 28.3 of the LCIA Rules) incurred in relation to the Challenge, the undersigned decides that it should be dealt with as part of the sole arbitrator’s decisions on the Legal Costs.

VI - **DECISION**

143. For the foregoing reasons, in my capacity as former Vice-President of the LCIA Court, I decide as follows:

(a) The First and Second Respondents’ Application dated 10 August 2016, challenging the sole arbitrator pursuant to Article 10.3 of the LCIA Rules, is hereby dismissed;

(b) The First and Second Respondents shall bear the costs of the Challenge, in an amount to be determined by the sole arbitrator as part of her decisions on Arbitration Costs;

(c) The Claimant’s Claim for Legal Costs (as defined in Article 28.4 of the LCIA Rules) incurred in relation to the Challenge, shall be dealt with as part of the sole arbitrator’s decisions on the Legal Costs.”