### Subject:
Challenge to the co-arbitrators’ appointment pursuant to Article 10.4 of the LCIA Rules 1998, based on Articles 10.2 (failure to act fairly and impartially as between the parties and deliberate violation of the Arbitration Agreement) and 14.1(ii) (breach of general duty as arbitrators) of the LCIA Rules 1998 and section 33 of the Arbitration Act 1996

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

### Summary:
Where the co-arbitrators proceed in a manner which they honestly believed to be a process directed by the LCIA Court for the selection of the Chair, the fact that the co-arbitrators do not agree with what one party believes was the process agreed by the parties, or should be followed, is not sufficient for a finding that the co-arbitrators had acted unfairly or were partial to one of the parties.

The decision of whether or not to maintain a hearing date when a member of the Tribunal’s appointment is being revoked is one for the re-constituted Tribunal. By trying to keep open the option of maintaining the hearing date when selecting the replacement chairperson, the co-arbitrators are fulfilling their obligation under section 33 of the Arbitration Act 1996 and Article 14.1(ii) of the LCIA Rules rather than breaching these provisions.

There can be different views as to the rights and wrongs of a particular situation, without those views necessarily being considered partisan. The mere fact of an arbitrator taking an honestly held view does not render the holder of that view biased or aligned with the interests of another.

Where the parties have agreed that the proceedings be confidential, in order to decide whether or not information disclosed by co-arbitrators to a prospective Tribunal member is confidential it is important to consider the circumstances of a particular case and what is appropriate for a prospective chair to know. Where the information disclosed is to assist the prospective chair to fully understand what is required of him/her if he/she should accept the nomination and appointment, and does not go so far as setting out the specific facts or circumstances giving rise to the dispute or set out the position or augments of the party, the disclosure does not breach confidentiality. Even if the disclosure did breach confidentiality the breach must have been deliberate in order to be a violation of Article 10.2 of the LCIA Rules.
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 Respondent brought a challenge against the whole Tribunal on 5 May 2016 (the “First Challenge”). A Division was appointed to determine the challenge. On 4 August 2016, the Division issued its Decision upholding one of the five grounds of the challenge in relation to Chair’s appointment (the “First Challenge Decision”), requiring the removal of the Chair (the “First Chair”).

1.3 The Respondent made a second challenge in this arbitration (the “Second Challenge”) and the same Division members who decided the First Challenge were appointed by the LCIA Court to decide the Second Challenge.

1.4 The procedural history of the arbitration relevant to the First Challenge is set out in the First Challenge Decision and are not repeated here.

1.5 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.

1.6 The arbitration agreement in the framework agreement and the shareholders’ agreement provided for each party to nominate an arbitrator and for the third and presiding arbitrator to be “nominated by agreement by the two Party-nominated arbitrators within 14 days of the confirmation of the appointment of the second arbitrator, or in default of such agreement, appointed by the LCIA Court” (the “Arbitration Agreement”).

1.7 Both parties nominated an arbitrator and consented to their respective nominees consulting their nominating party in regard to the selection of the third and presiding arbitrator. By letter and email dated 25 June 2014, the LCIA notified the parties of the appointment of the parties' nominated arbitrators.

1.8 By email of 25 June 2014, the co-arbitrators advised the parties of a list procedure by which the nominees would select the Chair. This procedure involved each co-arbitrator, in consultation with his nominating party, providing to the parties three names, then allowing the parties to suggest names to replace any candidate who had a conflict falling into the Red or Orange Lists of the IBA Guidelines for Conflicts of Interest, and finally asking the parties to rank the list of candidates by order of preference. The co-arbitrators would then select a candidate with reference to the rankings and if that candidate refused they would move on to the next.

1.9 The co-arbitrators provided the list of candidates to the parties by email of 3 July 2014 and a revised list was sent to the parties on 15 July 2014, following the removal of a conflicted candidate and addition of a replacement candidate. In the 15 July email, the co-arbitrators clarified that whilst they would pay due regard to the parties’ preferences, they did not consider that they were bound by the rankings as there may be other relevant factors to consider.

1.10 By emails of 15 and 16 July 2014, the parties confirmed that they agreed to extend the time for the parties’ nominees to select the Chair to 26 July 2014 and ranked the candidates.
1.11 By email of 17 July 2014, the co-arbitrators advised the parties of two candidates both ranking the highest score (“Candidate 1” and “Candidate 2”) and that they had decided to choose Candidate 1 as he was in the top half of the rankings, the co-arbitrators had both worked with him, and due to his experience. They also advised they would approach Candidate 2 if Candidate 1 declined the appointment.

1.12 Candidate 1 accepted the appointment and was appointed on 31 July 2014, such that the Tribunal was fully constituted.

1.13 The First Challenge Decision was issued on 4 August 2016 and required that the appointment of the First Chair be revoked.

1.14 By email of 5 August 2016, and in light of Article 11.1 of the Rules, the Claimant requested that the LCIA Court decide to follow the original nominating process in the selection of the replacement Chair and cited the Arbitration Agreement.

1.15 By email of the same date, the Respondent stated that its position was that the original process should be followed, and noted that the Claimant too indicated its wish for the original process to be followed.

1.16 By email of 8 August 2016, the co-arbitrators, among other things, commented that, subject to the LCIA Court’s confirmation that the original nominating process should be followed, they proposed to go back to the original list of candidates as ranked by the parties and to approach Candidate 2, who ranked top jointly with Candidate 1, proposed to approach him on a provisional basis to assess his availability and for conflicts and requested the parties’ comments. The co-arbitrators also wrote to the LCIA on the same day requesting the urgent confirmation of the LCIA Court that the original nominating process be followed, in light of the proximity of the hearing, which was in three weeks’ time.

1.17 By email of the same date, the Claimant agreed to the approach of the co-arbitrators and that given the urgency agreed that the co-arbitrators approach Candidate 2 on a provisional basis to check conflicts and availability. The LCIA also wrote to the parties informing them and the co-arbitrators that the LCIA Court was content with the parties’ request to follow the original nominating process.

1.18 By email of the same date, the Respondent stated that the receipt of the LCIA’s email confirming that the original nominating process should be followed “marks the start of the process for appointment a new chairman”. It also referred to the fact that during the selection of the First Chair the timeframe for selection was extended to 37 days of the appointment of the Respondent’s nominated arbitrator, submitted that the inclusion of the parties in the selection process of the new Chair was equally, if not more important, in view of the removal of the First Chair, and rejected the co-arbitrator’s proposal.

1.19 The Respondent further submitted that new conflicts may have arisen, the reconstituted Tribunal would have to deal with issues that were not in play at the time the original Tribunal was constituted and as a result Candidate 2 may no longer receive the combined highest score, and therefore requested that the co-arbitrators each provide three names, in consultation with their nominating party.
1.20 The Claimant responded on the same day that it was within the co-arbitrator’s discretion to decide how they elected to nominate a chairperson and that neither party had the right to reject or demand a particular process.

1.21 By email of 9 August 2016, the co-arbitrators advised, among other things, that they considered that the original nominating process was as set out in their email of 8 August 2016 since the parties had accepted that procedure and the co-arbitrators had expressly clarified in their email of 15 July 2014 that whilst they would pay due regard to the parties’ references, they did not consider themselves to be bound by the rankings. They further advised that they had already been in contact with Candidate 2, who has indicated his willingness and availability to accept appointment as Chairman to preside over the hearing scheduled, and formally nominated Candidate 2 as the Chairman.

1.22 On the same day, the Respondent requested that the LCIA Court order the co-arbitrators to withdraw their nomination of Candidate 2, arguing that the Arbitration Agreement had been supplemented by the procedure proposed by the co-arbitrators and restating its position that the ranking exercise should be carried out de novo.

1.23 By letters of 10 and 11 August 2016, the Claimant submitted that the “original nominating process” was set out in the Arbitration Agreement, that the co-arbitrators were free to decide the process for nominating the new Chair, that the decision to consult the parties did not, and could not, change the Arbitration Agreement and requested the LCIA Court to appoint Candidate 2 as the replacement Chair.

1.24 By letter of 10 August 2016, the Respondent referred to sections 27(3) and 16(1) of the Arbitration Act 1996, the judgment of Rix J. (as he was then) in Federal Insurance Company and Others v Transamerica Occidental Life Insurance Company [1999] 2 Lloyd’s Rep 286, an extract from International Commercial Arbitration (2nd Edition) G. Born and the Departmental Advisory Committee on Arbitration (“DAC”) report on the Arbitration Bill to support its submission that co-arbitrators did not have free reign to decide the process for appointing the new Chair, and that the original process, which included consultation with the parties and ranking of candidates, should be followed.

1.25 In a further letter dated 11 August 2016, the Respondent stated that the decision to take the direction that the co-arbitrators have taken was driven by their wish to punish the Respondent for its unsuccessful challenge to the entire Tribunal, noting the co-arbitrators’ support for the First Chair who had been removed.

1.26 By email of 11 August 2011, the co-arbitrators repeated their view as previously expressed, stated that they were clear in their minds that Candidate 2 was the best choice and stated that there was no basis for the proposition made by the Respondent in its 11 August letter.

1.27 On the same day, the LCIA advised that the Court had decided to give the parties until 15 August 2016 to reach agreement as to what consisted the original nomination process and that should the parties not reach agreement the matter would be referred back to the LCIA Court.

1.28 The parties wrote to the LCIA on 15 August 2016, advising that they could not reach agreement and restating what they each considered was the original nomination process.
1.29 In addition, the Respondent, among other things, indicated that it had lost confidence in the co-arbitrators’ ability to conduct the proceedings, that they had breached their general duties as arbitrators by prioritising keeping the hearing dates over ensuring a fair resolution of the dispute, that they were unable to act fairly and impartially between the parties and asked the co-arbitrators to resign and for their appointments to be revoked.

1.30 By email of 17 August 2016, the co-arbitrators advised that they did not wish to resign and stated, among other things, that the decision of whether a full hearing can go ahead as scheduled could only be taken once the Tribunal has been reconstituted.

1.31 The Respondent replied to this email on the same day asking for full particulars of any communications with Candidate 2 and a number of questions as to whether the details of the case were discussed with, or whether any material has been supplied to, Candidate 2, the nature of the communications with Candidate 2, and details about any steps that had been taken to ensure Candidate 2 did not have any conflicts.

1.32 By email of 17 August 2016, the LCIA wrote to the parties and stated that the Court had decided to select, itself, the presiding arbitrator and advised the parties of the candidate selected (the “Second Chair”).

1.33 On 23 August 2016, the Respondent submitted its challenge against the co-arbitrators pursuant to Article 10.4 of the Rules.

1.34 On 28 August 2016, the co-arbitrators confirmed that they would not withdraw from the Tribunal.

1.35 On 7 September 2016, the Claimant requested the LCIA Court to reject the challenge.

1.36 On 12 September 2016, the LCIA notified the parties and the Tribunal that, pursuant to Article 10.4 of the LCIA Rules, and Article D.3(c) of the Constitution of the LCIA Court, the Court had appointed a three-member Division of the Court to determine the challenge.

1.37 On 27 September 2016, the Division held a procedural teleconference, following which it issued directions on 28 September 2016 for the conduct of the challenge. The parties and the co-arbitrators provided their comments and submissions in accordance with the direction of the Division.

1.38 The Respondent in its submissions requested the Division to order the co-arbitrators to produce certain documents, which request the Division denied by Procedural Order No 1 in this challenge, dated 1 November 2016.

1.39 The Respondent requested a hearing but the Division decided not to hold a hearing stating that it was fully familiar with the background of the case, having held a hearing in the first challenge, the submissions already made were clear enough that further elucidation at a hearing is not required, and it considered that it had all the necessary information and argument before it to reach a decision.

1.40 The Division made its Decision on the Respondent’s Second Challenge on 16 December 2016.
III. The Division’s Analysis

A. Timeliness

162. There were some arguments raised by [the Claimant] that some of the grounds of challenge raised by [the Respondent] were out of time by virtue of Article 10.4 of the LCIA Rules which requires a challenge to be brought within 15 days of the challenging party becoming aware of the circumstances in question.

163. The Division has not set out the arguments of the parties on this issue as it is satisfied that the challenge, as set out by [the Respondent], was clearly brought within the time limit.

B. Ground 1: the co-arbitrators failed to act fairly and impartially in nominating the Chair

164. There seems to be no dispute between the parties, and the co-arbitrators, that what is required by sections 16(1) and 27(3) of the Arbitration Act 1996 and by authority such as Federal Insurance Company and Others v Transamerica Occidental Life Insurance Company is that, when replacing an arbitrator, the parties should go back to any previous agreement that had been reached on the appointment of such arbitrator.

165. There is also no dispute that Article 11.1 of the LCIA Rules gives the LCIA Court complete discretion to decide whether or not to follow ‘the original nominating process’.

166. There has been much discussion between the parties and, to an extent, by the co-arbitrators, as to the meaning of ‘the original nominating process’. That discussion can be summarised as being about whether the original nominating process means the process that was originally agreed between the parties for the appointment of the Chair – namely the Arbitration Agreement, or the process that was originally used by the co-arbitrators with the parties’ consent for the appointment of the Chair – namely the list procedure.

167. For the purposes of this Decision it does not matter who is right, as [the Respondent] has made clear that its complaint is not about the interpretation which the co-arbitrators adopted, but their conduct in handling the appointment of the replacement Chair, which [the Respondent] characterises, in its Challenge of 23 August 2016, as failing to act fairly and impartially between the parties, and acting in the arbitration as advocates for [the Claimant].

168. In the First Challenge, on the question of doubts as to the impartiality and independence of the Chair, [the Respondent] submitted, based on authorities, that the test and approach the Division should take was as follows:

(i) the test ‘is 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’ (Magill v Porter [2001] UKHL, 67, para 103);
(ii) ‘the informed and fair-minded observer is to be treated as knowing all the relevant circumstances and it is for the court to make an assessment of these’ (Janan George Harb v HRH Prince Abdul Aziz Bin Fahd Bin Abdul Aziz [2016] EWCA Civ 556, para 72);

(iii) the burden of showing a real possibility of bias is a lesser one than showing that such actual bias exists (Locabail v Bayfield Properties [2000] QB 451, 471;

(iv) in considering whether there is a real possibility of bias, one must look not at the mind of the arbitrator himself, but look at the impression that would be given to the fair-minded and informed observer (Metropolitan Properties Co. (F.G.C.) Ltd v Lannon [1969] 1 QB 577, 598).

169. No new or additional submissions were made in this challenge as to the test to apply, and, although [the Respondent] has not, explicitly, in this ground, based its challenge on Article 10.3 of the LCIA Rules, it did list that Article as one of the Articles upon which it relied generally in its Challenge of 23 August 2016.

170. In all the circumstances, therefore, the test the Division considers appropriate to this ground of challenge, and which we have applied, is the test we also applied in the First Challenge, namely that of the informed and fair-minded observer.

171. In order to examine the co-arbitrators’ conduct, it is necessary to look at the exchanges between the parties, the co-arbitrators and the LCIA in the period following the removal of the previous Chair by virtue of the First Challenge Decision of 4 August 2016, and the appointment by the LCIA of the replacement Chair,

172. First off the mark, after the LCIA had circulated the First Challenge Decision, was [the Claimant] who wrote to the LCIA, [the Respondent] and the co-arbitrators on 5 August 2016 and asked for a new Chair to be appointed ‘in accordance with the original nominating process set forth in each of Section 16.10(b) of the Joint Venture Framework Agreement [...] and Section 17.10(b) of the Shareholders’ Agreement [...], both of which in relevant part provide as follows:

the third arbitrator, who shall act as chairman, shall be nominated by agreement by the two Party-nominated arbitrators within 14 days of the confirmation of the appointment of the second arbitrator, or in default of such agreement, appointed by the LCIA Court

[the Claimant] therefore also respectfully requests that the LCIA Court invite the Co-Arbitrators to nominate the new Chairperson by 18 August 2016, i.e., within 14 days of the Decision’

173. That is a clear reference by [the Claimant] to the Arbitration Agreement. There is no reference to the list system that was used in appointing the [First Chair], and the informed and fair-minded reader of that correspondence could not, in the judgment of the Division, come to any other conclusion as to what [the Claimant] meant.

174. [The Respondent] then responded and said

‘In accordance with Article 11.1 of the LCIA Rules (1998), the Chairman of the Tribunal must be replaced and the LCIA Court will have to decide whether or not the original nominating process
will be followed. In accordance with the LCIA’s standard practice, it is [the Respondent]’s position that the original process should be followed but, again, it will be for the LCIA Court to decide this issue. [Counsel for Claimant] too have indicated on behalf of its client that it wishes for the original process to be followed.’

175. The Division has no doubt that the informed and fair-minded reader of that correspondence would conclude that [the Respondent] was in complete agreement with [the Claimant] that, absent a decision to the contrary by the LCIA Court, the manner by which the replacement Chair would be chosen would be that originally agreed by the parties, namely the Arbitration Agreement. No mention of a list procedure is made, and none would be read into that letter by the informed and fair-minded reader.

176. At this point, therefore, no-one would have any reason to believe that the parties were not in complete agreement as to the process to be adopted for appointing the replacement Chair.

177. A further letter from [the Claimant] was sent on 8 August 2016 saying ‘it appears that both parties wish, with the approval of course of the LCIA court, to have the new Chair chosen under the original nominating process under which it would be your responsibility, as the two party-appointed arbitrators to select a new Chair within 14 days.’ On the same day, the co-arbitrators responded ‘Subject to the LCIA confirming under Art 11.1 that the original procedure is to be followed, we stand ready to appoint the new Chair within the prescribed time limit’.

178. In that letter the co-arbitrators made it clear that, assuming the LCIA agreed with the procedure proposed by the parties (which at this stage, in the judgment of the Division, can still only be a reference to the Arbitration Agreement), they proposed to approach [Candidate 2] to clear conflicts. The reason stated for approaching [Candidate 2] is that he, and the previous Chair, came equal top in the rankings when the list procedure had been used previously.

179. Accordingly, on 8 August 2016, the co-arbitrators wrote to the LCIA ‘requesting that the LCIA Court decide that the new Chairperson be appointed in accordance with the original nominating process set out in the Joint Venture Framework Agreement. [The co-arbitrator nominated by the Respondent] and myself understand that this is the preference of both parties.’

180. Although explicit reference is only made by the co-arbitrators to [the Claimant]’s letter of 5 August 2016, and not to [the Respondent]’s letter of that date, the reference by the co-arbitrators to ‘the preference of both parties’ clearly indicates they had considered [the Respondent]’s position. In addition, all the correspondence had been copied to the LCIA, and the co-arbitrators would be aware, therefore, that the LCIA had seen [the Respondent]’s correspondence as well. As it was [the Claimant]’s letter which made express reference to the Arbitration Agreement, that letter was the obvious piece of correspondence to which the LCIA should be directed in order to be clear what had been agreed by the parties. As previously stated, there was nothing to indicate that [the Respondent] had a different process in mind, and the Division, having looked at the correspondence referred to so far, has no doubt that the co-arbitrators honestly believed that the parties were in complete agreement.

181. [The Claimant] again wrote on 8 August 2016, agreeing with the approach envisaged by the co-arbitrators and agreeing that the co-arbitrators should approach [Candidate 2].
182. It is at this stage that the Counsel for the case at the LCIA e-mailed the co-arbitrators and the parties and said: ‘Having consulted the LCIA Court, I confirm that the LCIA Court is content with the parties’ request to follow the original nominating process’.

183. Pausing here, it is worth asking what conclusions the informed and fair-minded reader would have reached as to the state of affairs surrounding the appointment of a replacement Chair. It should be noted that, in order to be informed, the reader of this correspondence would have been aware, as were the parties and the co-arbitrators, not only of the process originally agreed by the parties for the selection of the Chair – the Arbitration Agreement -, but also of the fact that the list process had been the process that had been originally used.

184. The Division has no doubt that the only conclusion the informed and fair-minded reader of this correspondence could possibly have reached is that the parties, and the co-arbitrators, had all agreed that the Arbitration Agreement was to be used as the basis for appointing the replacement Chair, and that in accordance with Article 11.1 the LCIA Court had decided that was to be the process to be adopted, and not any other.

185. The Arbitration Agreement makes it clear that the Chair shall be nominated by agreement of the two party-nominated arbitrators and, by this stage, the Division considers that the co-arbitrators had already made it clear, to all concerned, that they were proposing to nominate [Candidate 2] if he was clear of conflicts. Looked at from the point of view of the co-arbitrators, it is clear to the Division that they believed the parties had agreed to use the Arbitration Agreement to appoint the new Chair, that agreement had been endorsed by the LCIA and it was now their job to get on and implement that agreement within the 14 day time frame.

186. In the judgment of the Division, the correspondence makes it clear that the co-arbitrators honestly held that belief and, in the judgment of the Division, it was reasonable for them so to do.

187. The Division does not consider that the informed and fair-minded reader of the correspondence would have concluded that the reference to the previous rankings by the co-arbitrators meant that they believed they should run a list process again. No mention of a list process had been made by anyone up to this point in time. The reasonable interpretation of the co-arbitrators’ reference to the rankings from the previous process, is that they were seeking to reassure the parties that they would be nominating someone who had previously been highly ranked. The co-arbitrators have submitted that they ‘simply aimed to pick a candidate who was agreeable to both parties’, and the Division accepts that submission.

188. It is only going forward from this point that the correspondence reflects a difference of view between the parties as to what constituted the original nominating process. [The Respondent] wrote to the co-arbitrators, also on 8 August 2016, to say that the LCIA Court has confirmed that the original nominating process must be followed, but goes on to say ‘to avoid any misunderstanding, it is important to set out the process that was used to appoint the original Chairman...’. [The Respondent] then described the list procedure and concluded ‘In short and so as to comply with the original nominating process, the selection and ranking process has to be started de novo. Each party-arbitrator will have to consult with its nominating party and decide
on the names of three candidates. The combined names must then be submitted to each party for their ranking’.

189. [The Claimant]’s response to this – the final piece of correspondence on 8 August 2016 - reiterated that the Arbitration Agreement was to be used to appoint the replacement Chair, that is what had been approved by the LCIA Court, and that it was within the co-arbitrators’ discretion how to elect to nominate the replacement Chair.

190. The response of the co-arbitrators on 9 August 2016 was, understandably in the view of the Division, to e-mail the LCIA and seek clarification as to what the LCIA Court was directing them to do. The co-arbitrators said that, when the LCIA Court had said ‘follow the original nominating process’, they took that to be a reference to the Arbitration Agreement. As the Division has already found, that was not only the co-arbitrators’ honestly held belief, but also a reasonable belief for them to hold.

191. The co-arbitrators then stated that, on that basis, namely that they should follow the Arbitration Agreement, they did not agree with [the Respondent]’s contentions that there should be a new list procedure. They then formally nominated [Candidate 2].

192. [The Respondent] criticises the co-arbitrators for saying, in their e-mail of 9 August 2016 to the LCIA, ‘We have not addressed the arguments in [the Respondent]’s letter of 8 August asking for the whole election process to be repeated as we believe that the matter is effectively closed by the LCIA’s email on 8 August (referred to above), which decision cannot be challenged.’ However, the LCIA had been copied on [the Respondent]’s correspondence which set out its arguments, and it is clear from the content of the co-arbitrators’ e-mail of 9 August 2016 that they had read and considered those arguments – albeit rejecting them. In the judgment of the Division, the co-arbitrators had made plain in this e-mail what their view was of the direction given by the LCIA Court and that, in consequence, it was not necessary to go into detailed discussion of [the Respondent]’s arguments.

193. The co-arbitrators have also confirmed, in their comments provided to the Division, that they did consider [the Respondent]’s arguments and, in light of our reading of the co-arbitrators’ e-mail of 9 August 2016, the Division has no hesitation in accepting that confirmation.

194. [The Respondent] wrote further to the LCIA, on 9 August 2016, requesting the nomination of [Candidate 2] be rejected. [The Respondent] put forward to the LCIA its arguments as to the nominating process it believed should be followed, and stated that the parties should have a de novo ranking exercise. It also stated that the co-arbitrators appeared to have taken into consideration, in their nomination of [Candidate 2], that he would be available for the hearing due to begin on 29 August 2016, and confirmed that the objection to [Candidate 2] was not personal, but based on what [the Respondent] considered to be a breach of the original nominating process.

195. There followed an exchange of correspondence from [the Claimant] and [the Respondent] on 10 and 11 August 2016, each setting out its respective view of the correct interpretation of ‘the original nominating process’. This was followed, on 11 August 2016, by a further e-mail from the co-arbitrators to the LCIA stating that they disagreed with [the Respondent]’s last letter, that they didn’t want to engage in dispute with the parties, but would leave them to present their
respective arguments to the LCIA Court. However, the co-arbitrators did go on to list six ‘salient facts to assist [the LCIA Court] in arriving at its eventual decision.

(1) The Arbitration Agreement specifically provides that the choice of the Chair shall be exclusively a matter for the co-arbitrators.

(2) The co-arbitrators thought it would be useful to have a transparent process of consultation with the parties at the time of choosing the Chair, which would otherwise have been done by ex parte communications between the respective arbitrators and their appointing parties. Accordingly, the co-arbitrators adopted the list procedure which has been previously described.

(3) All 6 names that were in the final list were acceptable to both parties and to the co-arbitrators, subject to a conflict search after the Chairman Designate had been chosen by the co-arbitrators, as no enquiries for conflicts were made at the rankings stage.

(4) The co-arbitrators were careful not to yield the choice of arbitrator in any way to either or both of the parties since we expressly stated that while ‘we [would] pay due regard to the Parties’ preferences, we will not consider ourselves bound by the rankings, as there may be other factors which are relevant for us to consider in addition to the preferences of the Parties’.

(5) In short, the list procedure was only an exercise to assist in our choice, as we would have had to consider which of the 6 names to choose after seeing the responses of the parties, which choice would be made based on a number of factors, of which the parties’ preferences would be but one.

(6) In the circumstances which now exist, the co-arbitrators have decided that [Candidate 2] is the best choice for Chair (and one previously approved by both parties), subject only to the LCIA Court being satisfied that he is free from conflicts of interest […]. The co-arbitrators do not believe that at this stage they would be assisted by further soundings to be taken from the parties as we are clear in our minds as to who is the best choice’

196. There is no doubt that these ‘salient facts are ‘facts’ from the point of view of the co-arbitrators, and, certainly, the parties may have different views as to the absolute correctness of some of them.

197. It is clear to the Division, however, both from the context in which this e-mail was written, and from consideration of the correspondence at the time of the appointment of the original Chair […], that the co-arbitrators honestly believed these to be facts appropriate for the LCIA Court to consider. In the judgment of the Division, the informed and fair-minded observer, having read all the correspondence at the time and, also, the correspondence at the time of the appointment of the previous Chair, would not consider the list above to be a misstatement of the facts as seen by the co-arbitrators, and would certainly not see it as being favourable to one side or the other.

198. Put differently, the informed and fair-minded observer would consider it perfectly understandable for the co-arbitrators to express these six ‘salient facts’ in the way they did.
199. This e-mail of 11 August 2016 is the last piece of correspondence from the co-arbitrators on the subject of ‘the original nominating process’ until after the LCIA announced the appointment of [the second Chair] on 17 August 2016.

200. There was a further e-mail from the co-arbitrators to [the Respondent] on 17 August 2016, written in response to a request for the co-arbitrators to resign. That e-mail dealt with whether the scheduled hearing would proceed on 29 August 2016, [Candidate 2]’s availability for the hearing and the fact that the co-arbitrators had worked towards the appointment of a Chair ‘available to hear the case in the period currently fixed for the hearing, an option that would, at least, allow for the possibility of the full evidentiary hearing taking place as originally scheduled’.

201. The issue of maintaining the hearing date, and the co-arbitrators’ approach to that, is something raised in Ground 2, and so considered by the Division under that head.

202. The Division has found that, as at the time (8 August 2016) the LCIA Court directed the co-arbitrators to follow the original nominating process, the co-arbitrators honestly held the belief that this meant the Arbitration Agreement, and that it was reasonable for them so to do.

203. In the judgment of the Division there is nothing in the subsequent correspondence, namely the e-mails of 9, 11 and 17 August 2016, from the co-arbitrators that would indicate to the informed and fair-minded observer that the co-arbitrators were acting in any way unfairly between the parties or, indeed, as an advocate for [the Claimant]. It is clear that the co-arbitrators were simply putting forward their honestly held beliefs as to the process they believed they had been directed by the LCIA to follow in nominating the replacement Chair. That process was not the process that [the Respondent] considered had been agreed, or should be followed, but the fact that the co-arbitrators disagreed with [the Respondent] is not sufficient for a finding they acted unfairly or as an advocate for [the Claimant].

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

C. **Ground 2: the co-arbitrators prioritised maintaining the hearing dates over a fair resolution of the dispute**

205. [The Respondent]’s case is that the co-arbitrators prioritised keeping the hearing date over ensuring a fair resolution of the dispute and prejudged the reconsideration of past decisions and that, in so doing, they acted in breach of their general duty as arbitrators, as set out in section 33 of the Arbitration Act 1996, Article 14.1(ii) of the LCIA Rules and similar provisions in the LCIA Notes for Arbitrators.

206. Section 33 of the Arbitration Act 1996 provides as follows:

> ‘33 General duty of the tribunal.

> (1) The tribunal shall—

> (a) 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, and
(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

(2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.

207. Article 14.1(ii) of the LCIA Rules contains very similar wording, but includes the requirement of efficiency as well.

208. Again, in order to consider this ground, it is necessary for the Division to look at the correspondence between the parties and the co-arbitrators in the same period as in Ground 1.

209. [The Respondent] refers to various extracts from that correspondence in their submissions, namely:

(i) ‘The urgency of the matter is further compounded by the fact that the hearing in this case is due to commence on 29 August. We will need to arrange for a new Chairperson as soon as possible in view of the current schedule.’ […]

(ii) ‘the Tribunal has been in informal contact with [Candidate 2], who has already indicated that he is able and willing to preside as Chairman over the hearing that is scheduled for 2 to 3 weeks beginning on August 29….’ […]

(iii) ‘We should emphasise that this process of appointing the new Chairman is of some urgency as there has been much difficulty in finding common dates for the hearing that are suitable for all concerned. If the case does not go along as scheduled, then it is likely to take a long time to find a new stretch of two to three weeks for the postponed hearing.’ […]

210. [The Respondent] submits that both parties took from those statements that [Candidate 2] would be willing to conduct the three week merits hearing, due to begin on 29 August 2016, and that was what drove the co-arbitrators to push for his nomination.

211. It does seem from [the Claimant]’s correspondence at that time that [the Claimant] believed [Candidate 2] would be willing to conduct the hearing as scheduled as there are references by [the Claimant] to ‘[Candidate 2]’s announced availability and willingness to conduct the merits hearing as planned’ […] and ‘permits the hearing to proceed as scheduled on 29 August 2016, as the co-arbitrators and their proposed Chairman are prepared to do’ […].

212. However, it must be borne in mind that [the Claimant]’s correspondence at the time was written clearly in the context that it did not want there to be a delay to the scheduled hearing date, that it was concerned that the removal of the previous Chair could cause that to happen, and that the Chair the co-arbitrators were proposing to nominate had availability over the period the hearing was due to take place. In other words, it was, clearly, self-serving correspondence aimed at seeking to persuade the co-arbitrators, and the LCIA, that the hearing should proceed as scheduled.
213. Accordingly, although [the Respondent] has used [the Claimant]’s correspondence to seek to demonstrate what was in the minds of the co-arbitrators at the time, the Division does not find it of assistance in seeking to determine whether the co-arbitrators really were prioritising maintaining the hearing dates over a fair resolution of the dispute. The co-arbitrators’ correspondence at the time, and not [the Claimant]’s, is what the Division considers it should rely upon in reaching its decision.

214. Of particular relevance in considering the mind-set of the co-arbitrators is their initial e-mail of 8 August 2016 when they stated ‘we propose to approach [Candidate 2]’. It is clear that, at that stage, they had decided to approach [Candidate 2], but had not yet done so. [The Respondent] has not sought to argue otherwise and it is obvious, therefore, that the decision of the co-arbitrators to nominate [Candidate 2] was not driven by a desire to maintain the hearing dates at all costs, as they had no idea, at that stage, of [Candidate 2]’s availability.

215. Having reached that, obvious, conclusion, the question the Division now has to ask is whether, having discovered [Candidate 2]’s availability, the co-arbitrators prioritised maintaining the hearing dates over a fair resolution of the dispute.

216. There is no doubt, reading the correspondence, that the co-arbitrators were not willing, at that stage, to abandon the three week period that had been set aside for the hearing, but, in the Division’s judgment, that is hardly surprising. The co-arbitrators were in receipt of strident correspondence from [the Claimant] that there should be no further delays, and vacating the hearing dates at that stage was not a decision the co-arbitrators were empowered to take. Such a decision could only be taken by the reconstituted tribunal.

217. The co-arbitrators subsequently said, in their e-mail of 17 August 2016:

‘No decision has yet been taken as to whether the full hearing will go on from 29 August to 16 September. That decision can only be taken when the Tribunal is reconstituted, and, as soon as the Tribunal is reconstituted, either party may make any application it wishes with regard to the date of the hearing. The fact that [Candidate 2] has indicated his availability for the full hearing period of three weeks does not necessarily lead to the conclusion that the Tribunal will proceed with the full hearing as originally scheduled. Neither the co-arbitrators nor [Candidate 2] are necessarily wedded to a full three week hearing and we have considered various alternative possibilities to trying to complete the evidentiary hearing within the period, such as utilising part of that period for applications and/or limited aspects of the main hearing.’

218. As noted in paragraph 96 above, the co-arbitrators have said that they were presented at the time with two competing positions and they were anxious to keep their options open. They say that it was for the new Chair to conclude whether or not he could appropriately prepare in time for some or all of the hearing to take place when scheduled.

219. [The Respondent] characterises the co-arbitrators’ e-mail of 17 August 2016 as self-serving and contrary to previous correspondence, but the informed, fair-minded reader of all the correspondence would not, in the judgment of the Division, come to such a conclusion.

220. Had the co-arbitrators made the decision that they would only consider a new Chair who had availability for the scheduled hearing dates, then the correspondence might be viewed in a
different light; but that is clearly not the case. The co-arbitrators had decided to approach [Candidate 2] before they had any idea as to his availability. They decided to do so, because they considered he was the right person to approach as a result of the ranking exercise that had taken place when the previous Chair had been appointed.

221. In the event, [Candidate 2] did have availability over the period scheduled for the hearing and that, of itself, created the option of maintaining the hearing dates.

222. The obligation under s 33 of the Arbitration Act 1996 and Article 14.1(ii) of the LCIA Rules is to adopt procedures suitable to the circumstances of the arbitration, and both make clear that a balance has to be achieved between avoiding unnecessary delay and expense and providing a fair and efficient means for the final resolution of the dispute.

223. Immediately following the removal of the previous Chair, the co-arbitrators were tasked with adopting procedures which sought to maintain this balance. Clearly a new Chair had to be appointed and, once appointed, the reconstituted tribunal would need to decide what procedures would need to be adopted in order to maintain that balance going forward. In the meantime, in the judgment of the Division, the duty on the co-arbitrators was clearly not to do anything which would remove any of the options that would be available to the new tribunal. Agreeing to vacate the scheduled hearing dates would, undoubtedly, have removed one of those options.

224. The option of maintaining the hearing dates may well have been a remote, or even impossible, option, as [the Respondent] has contended, but it was an option, and it would have been a breach of the co-arbitrators’ duty to remove it before a decision could properly be taken by the reconstituted tribunal. In the judgment of the Division, the co-arbitrators fulfilled their obligations under s 33 and Article 14.1(ii) by keeping all the options open during the time the new Chair was being appointed.

225. In concluding consideration of this ground, the Division should, briefly, mention a further point raised by [the Respondent], namely the obligation ‘to determine whether and if so to what extent the previous proceedings should stand’ which [the Respondent] submits the reconstituted tribunal would have to undertake under s. 27(4) of the Arbitration Act 1996.

226. [The Respondent] argues that the co-arbitrators’ approach failed to recognise the duty imposed by this provision and, effectively, prejudged the view that the reconstituted tribunal would take of previous decisions in the arbitration.

227. There is no evidence of this, however, other than what [the Respondent] has sought to argue was a ‘rush to appoint [Candidate 2]’ which ‘assumes the Tribunal’s previous decisions all stand in full and in their current terms’. As the Division has found, the duty the co-arbitrators had was to keep all options open, and this they achieved. It was not for the co-arbitrators to make any assumptions about previous decisions. That was for the reconstituted tribunal. However, there is nothing before the Division to show that the co-arbitrators had made any such assumptions. The ‘rush’, as [the Respondent] terms it, was no more than the co-arbitrators following the process they reasonably believed they had been directed by the LCIA Court to follow.
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’ interests are aligned with [the Claimant]’s.**

In its submissions [the Respondent] has given three examples to support this ground which are set out in paragraph 76 above, and also submits that the co-arbitrators have been ‘overturned’ in three recent matters which are set out in paragraph 119 above.

Finally, [the Respondent] submits that the co-arbitrators have aligned themselves with [the Claimant] in scenarios where the co-arbitrators were intent on protecting their own positions, have misrepresented to the Division that the decisions which were the subject of the First Challenge were procedural in nature, and repeats a previously quoted example to the effect that the co-arbitrators supported the position taken by the previous Chair in the First Challenge which resulted in him being removed.

When distilled, [the Respondent]’s complaints centre around three issues:

(i) the approach of the co-arbitrators in seeking to nominate [Candidate 2];

(ii) the co-arbitrators’ view of the decisions which were the subject of the First Challenge; and

(iii) the co-arbitrators’ support for the position taken by the previous Chair in the First Challenge

The first of these can be disposed of quickly. The Division in considering Grounds 1 and 2 above has found that the co-arbitrators’ actions in the period leading up to the appointment of the new Chair were not unfair or in breach of their duties. In consequence, the argument that the co-arbitrators misrepresented to the LCIA that the only agreement between the parties as to the appointment of a new Chair was that set out in the Arbitration Agreement, and that this shows alignment of interest with [the Claimant], must fail.

As to the second, the Division made clear in the First Challenge Decision, it is not for us to reach any conclusion as to whether the decisions which were the subject of the First Challenge were procedural or not. What is clear to us is that there is a debate between the parties as to whether or not they are. Equally, it is clear from the correspondence and submissions we have reviewed, that the co-arbitrators have an honestly held, independent view of the nature of those decisions.

Holding such a view, which may or may not coincide with the position taken by one of the parties, is not a valid basis for saying that an arbitrator has aligned his or her interests with those of that party. [The Respondent] says that the position taken by the co-arbitrators is ‘plainly wrong’ and ‘undermined by statements made by both the Tribunal and [the Claimant] at the time of making those decisions’. However, having considered all the evidence available to it on this subject, the Division cannot conclude that the co-arbitrators are plainly wrong. They may or may not be wrong. This is not for the Division to decide. However, they are not so plainly wrong as to be considered to have aligned their interests with those of [the Claimant].

As to the third, [the Respondent] has maintained that the co-arbitrator’s statement made during the First Challenge that they ‘fully endorse the appropriateness of the conduct of the Chairman,
who, in our view, has acted with the utmost professionalism, diligence and integrity throughout this arbitration’ was made in the context of the ground of challenge against the previous Chair that was, ultimately, successful.

236. The co-arbitrators have stated that they did not support the Chair’s assertions as to that ground in the First Challenge and provided no specific statements of support in relation to the ground that was, ultimately, successful.

237. The Division has re-read the statements made by the co-arbitrators in the First Challenge and it is clear that the statement quoted above was made in the context of one of the grounds that was unsuccessful. However, in the context of the ground that was successful, the co-arbitrators said this:

‘We support the Chairman and are in agreement with his observations’

238. [The Respondent] argues that, in saying what they said, the co-arbitrators were unable to recognise how an informed fair-minded observer would perceive the position, and that this has led [the Respondent] to question whether the co-arbitrators can properly judge what is or is not fair. [The Respondent] has also relied upon the letter written to the Division by the former Chair, dated 11 July 2016, which defends the former Chair’s position on the question of bias and is stated to be written on behalf of all three members of the tribunal. [The Respondent] says this shows the co-arbitrators endorsed the former Chair’s defence on this ground of challenge.

239. Of course, the test as to whether the co-arbitrators are aligned with [the Claimant]’s interests is not that of [the Respondent]’s perception, but that of the informed and fair-minded observer. In the judgment of the Division, the informed and fair-minded observer could well come to the conclusion that the statement made by the co-arbitrators was simply a general statement of support for the Chair in the context of his conduct of the arbitration as a whole rather than a specific endorsement of the actions of the Chair which led to his removal following the First Challenge decision.

240. However, even if the informed fair-minded observer did consider the co-arbitrators’ statement to be a more specific endorsement, the fact that the Division concluded in the First Challenge that the previous Chair might be perceived not to be impartial does not mean that, by taking a different view, the co-arbitrators should automatically be viewed as in alignment with [the Claimant]’s interests.

241. One of the characteristics of the informed fair-minded observer is that he or she is fair-minded. The fair-minded observer looks at things from both sides and accepts that there can be different views as to the rights or wrongs of a particular situation without those views necessarily being considered to be partisan.

242. The Division fully accepts that it is possible for others to take a different view to that taken by the Division as to the conduct of the previous Chair, and for that view to be honestly held. The mere fact of taking such an honestly held view does not render the holder of that view biased or to be aligned with the interests of another. It is simply another view formed on the basis of the facts before him.
The Division considers that is the conclusion the informed fair-minded observer would reach as to the statements made by the co-arbitrators in the First Challenge. The Division does not consider that, in making such statements, the co-arbitrators were aligning themselves with [the Claimant]’s interests.

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

E. Ground 4: the co-arbitrators’ breach of confidentiality of the proceedings.

This ground is based upon the information which [the Respondent] alleges was disclosed by the co-arbitrators to [Candidate 2] during the period prior to the appointment of the new Chair.

The confidential information said to have been disclosed is set out in paragraph 123 above, and [the Respondent] submits that, in disclosing this information, the co-arbitrators exceeded the limits laid down in the CIArb Guidelines and the IBA Guidelines.

The Division is, of course, aware that the CIArb and IBA Guidelines are guidelines as to what may, and what may not, be disclosed by parties, or party representatives, to prospective arbitrators, rather than what may, or may not be disclosed by co-arbitrators to a prospective Chair. Having said that, the Division takes the view that if a piece of information is considered by the Guidelines to be appropriate for a party to disclose to a prospective arbitrator, then a fortiori, it must be appropriate for co-arbitrators to disclose to a prospective Chair.

In the First Challenge it was accepted by [the Respondent], in relation to the challenge it was making on the ground of breach of confidentiality, that it needed to establish, pursuant to Article 10.2 of the LCIA Rules, an act of deliberate violation of the arbitration agreement and, in the absence of alternative submissions in this challenge, that is the test the Division has applied. Accordingly, to succeed, [the Respondent] must establish both that the information imparted to [Candidate 2] was confidential and that, in imparting that information to him, the co-arbitrators were committing an act of deliberate violation.

The co-arbitrators have not confirmed or denied that the information referred to above, which was contained in a number of letters, was supplied to [Candidate 2]. [The Respondent] has submitted that, as the co-arbitrators have not denied supplying these letters to [Candidate 2], it ‘must therefore conclude that they were’. The Division has no evidence before it as to whether the information contained in those letters, was provided to [Candidate 2] by the co-arbitrators. However, in the interests of dealing fully, in this Decision, with this ground of challenge, the Division is proceeding upon the assumption that it was.

It is accepted by [the Respondent] that certain information must, of necessity, be imparted to a prospective arbitrator to enable conflict checks to be carried out and availability to be ascertained. [The Respondent], however, submits that the co-arbitrators overstepped the mark in their information exchange with [Candidate 2].

An analysis of the information of which complaint is made, however, does not, in the judgment of the Division lead to a conclusion that it is, in fact, confidential. Of importance in such
consideration are the circumstances of the particular case and what it is appropriate for a prospective Chair to know given those circumstances.

252. Taking each item in turn:

(i) That the dispute concerned [certain] allegations [...] and that the value of the dispute exceeds $1.5 billion

The nature of the dispute is something which has to be discussed with every prospective arbitrator. An outline of the allegations made is commonly provided to prospective arbitrators, not just by co-arbitrators when seeking to decide upon a Chair, but by institutions such as the LCIA and ICC when providing case information to prospective arbitrators. This is nothing more.

It does not go as far as setting out the specific facts or circumstances giving rise to the dispute, or setting out the position or arguments of the parties. Accordingly, in the judgment of the Division, what was disclosed does not stray into the areas that the CIArb or IBA Guidelines say should not be disclosed.

(ii) [The Respondent] previously ranked [another candidate] highest out of the potential candidates in 2014. As [the Respondent] made clear, [the other candidate] is now chairing [a] tribunal for which [the Respondent]'s counsel is acting as the Chairman, and the disclosure of [the Respondent]'s previous rankings may raise conflict concerns within that [other] arbitration;

The information disclosed to [Candidate 2] was disclosed, as the co-arbitrators have confirmed, and as an experienced arbitrator such as [Candidate 2] would, in any event have understood, on the basis that he was to keep it confidential. The ranking of [the other arbitrator] in the course of appointing the previous Chair is not confidential per se. It does not relate to the substance or procedure of the arbitration at all. The risk that conflict concerns may be raised in the [other] arbitration is a function of the information going beyond [Candidate 2], not of its disclosure to [Candidate 2] in the first place.

(iii) That [the First Chair] was removed as Chairman on the basis of the conclusion of the Division that there was an appearance that he lacked impartiality;

The removal of the previous Chair would, obviously, have to be explained to [Candidate 2] given he was being approached to replace him. It would be natural for [Candidate 2] to want, and need, to know why the Chair had been removed in case it was for reasons which might apply to him. In the judgment of the Division, this was not disclosure of information which went beyond the bounds of what would be necessary to be disclosed in the process of appointing the new Chair in the circumstances of this case.

(iv) The allegation that [the Respondent] was attempting to avoid a hearing at all costs and is acting in bad faith;

This, again, is an allegation that had been made in the course of the challenges. It is an allegation made in the context of the appointment of the new Chair and not in the underlying arbitration. It is something that would be appropriate for a prospective Chair
to know, especially where he is being appointed after the removal of the previous Chair, and where it is clear that procedural issues and the question of whether or not a hearing will take place in a few weeks’ time will be questions with which the new Chair will have to deal immediately upon appointment. Again, in the judgment of the Division, this was not a disclosure of information which went beyond the bounds of what would be necessary to be disclosed in the process of appointing the new Chair in the circumstances of this case.

(v) That [the Respondent] ranked [Candidate 2] fourth in 2014, and [the Claimant] ranked him first;

That [Candidate 2] had been previously involved in a ranking exercise was something that was inevitable that the co-arbitrators would discuss with him, given the removal of the previous Chair. It may be that it was not necessary for [Candidate 2] to know how he had been ranked by the respective parties. However, the Division does not consider this fact, of itself, to be confidential.

(vi) A summary of all correspondence passing between [the Respondent] and [the arbitrator nominated by the Respondent] and the Co-Arbitrators and the Parties during the Chairman nomination process in 2014;

The Division does query whether this was something that was necessary for the appointment of the new Chair. It may have been provided out of an abundance of caution by the co-arbitrators. In any event, no allegation is made as to any particular confidential information contained in such summary of correspondence and the Division has no reason, therefore, to make a finding of breach of confidentiality.

(vii) Key aspects of the Second Decision on Document Production, including that [the Claimant] had sought an order that [the Respondent] be ordered to produce documents controlled by its corporate family.

The Division does not consider this information to go beyond what it was reasonable to supply to the prospective new Chair given that this was one of the decisions that would, in all likelihood, be referred to the reconstituted tribunal for reconsideration. Again, in the judgment of the Division, this was not disclosure of information which went beyond the bounds of what would be necessary to be disclosed in the process of appointing the new Chair in the circumstances of this case.

253. [The Respondent] has also submitted that the co-arbitrators discussed with [Candidate 2] important procedural and substantive matters including what applications had been made in the arbitration. [The Respondent] submits that, given that some of these applications go to the heart of the dispute, this was a breach of the co-arbitrators’ duty of confidentiality and they were treating [Candidate 2] as a de facto Chair in circumstances when he was not even a member of the tribunal.

254. There is no evidence as to whether such discussions took place, but in the judgment of the Division, even if they did, they were necessary discussions in order for [Candidate 2] to understand fully what would be required of him should he accept the nomination and appointment. In the judgment of the Division, this was not disclosure of information which went
beyond the bounds of what would be necessary to be disclosed in the process of appointing the new Chair in the circumstances of this case.

255. Accordingly, having carefully considered all the correspondence and submissions in question, the conclusion of the Division is that the information complained of does not constitute confidential information in the context and circumstances of this arbitration which ought not to have been supplied to a prospective arbitrator.

256. In reaching this conclusion, we are comforted by the fact that, even if we are wrong as to one or more of the pieces of information in question, to be in breach of Article 10.2 of the LCIA Rules there must be a deliberate act of violation.

257. As we stated in the First Challenge Decision, for that act to be deliberate, there must be the requisite subjective intention to commit the violation in question.

258. It is clear to the Division and, in our judgment, would be clear to the informed fair-minded observer, that even if the co-arbitrators did disclose confidential information which they ought not to have done, they did not do so with the subjective intent to commit an act of violation of confidentiality.

259. Rather, most likely, the disclosure was inadvertent in the context of wanting to ensure that [Candidate 2] was fully briefed on what he might be taking on. In the judgment of the Division, what the co-arbitrators did falls well short of a deliberate act of violation of confidentiality.

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

F. Cumulative Effect of the Grounds of Challenge

261. [The Respondent] has also submitted that, considering the grounds of challenge cumulatively, the appointment of the co-arbitrators should be revoked.

262. As set out above, the Division has found that each ground of challenge, individually, has failed and, having considered them cumulatively, does not consider that the cumulative impact of the allegations, given our findings in respect of each of them, is sufficient justification to revoke the appointment of the co-arbitrators.

263. Accordingly, for all the reasons set out in this Decision, we find that [the Respondent]’s cumulative challenge also fails.

IV. Decision

264. For all the reasons set out above we have found that the challenge by the Respondent has failed on all four individual grounds upon which it was based and also cumulatively. Accordingly, the challenge is hereby dismissed.

265. No submissions have been made as to costs and so, as with the First Challenge Decision, the Division has concluded 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.”