Subject: Challenge to sole arbitrator’s appointment pursuant to Article 10.4 of the LCIA Rules 1998, based on Articles 10.2 (failure by arbitrator to act fairly and impartially) and 10.3 (justifiable doubts as to arbitrator’s independence and impartiality)

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

Summary: The nature of arbitration is such that there might develop a procedural situation which is not to one party’s liking and which may end in the possibility of a ruling in favour of the other side, however this is in no sense a ground upon which the arbitrator’s conduct can be criticised.

1 Background

1.1 The underlying dispute arose out of a contract for the sale of organic fruit juice. The agreement was governed by English law, and contained a clause which referred disputes arising out of the agreement to be submitted to the “London Chamber of Commerce” by an arbitrator appointed in accordance with its Rules. In its referral to the LCIA, the Claimant relied on the provisions of Articles 6.01 and 6.02 of the bye-laws of the London Chamber of Commerce. 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 8 September 2014. In the Request, the Claimant alleged breach of the agreement by the Respondent providing juice that was fermented due to defective packaging and which the Respondent had deliberately diluted with water. The Respondent did not file a Response to the Request.

1.3 On 21 October 2014, the LCIA notified the parties that it had appointed the Sole Arbitrator.

1.4 Detailed pleadings were served by the parties, after which on 2 November 2016 the Sole Arbitrator ordered that issues of breach and quality of the juice would be left over and a hearing would be arranged to deal with the preliminary issues, inter alia, on the loss recoverable on the assumption (without admission) that liability would be established.

1.5 The parties agreed a list of issues and assumed facts. Subsequently, disputes arose between the parties as to whether deliberate dilution would be assumed at the hearing and also as to the admissibility of certain evidence. The Claimant expressed concern that the preliminary issues hearing would increase rather than reduce costs, and requested the Sole Arbitrator to revoke her decision to order a preliminary issue hearing. The Sole Arbitrator declined to revoke her order for the hearing.

1.6 By email of 15 February 2017, the Sole Arbitrator stated, inter alia, that the assumed facts did not include an assumption of deliberate dilution by the Respondent and that if the Claimant argues
that the position in relation to “mitigation and consequential loss” is different, depending on whether
the dilution was deliberate or not, then short submissions could be made to that effect at the hearing.

1.7 The Claimant subsequently sought to challenge the admissibility of parts of a witness
statement submitted by the Respondent. The Sole Arbitrator declined to give specific rulings on the
evidence, as a result of which the Claimant advised that it would submit a supplementary expert report
in response.

1.8 Following further exchanges with the parties, on 1 March 2017 the Sole Arbitrator ruled that
there was no provision for supplementary expert reports until after the experts had met and that the
scope of the supplementary expert reports had been defined in the directions.

1.9 On 2 March 2017, the Claimant filed a challenge pursuant to Article 10.2 and 10.3 of the LCIA
Rules, contending that the Sole Arbitrator had failed repeatedly to act fairly and impartially as between
the parties on the basis of her decisions.

1.10 On 6 March 2017, the Respondent advised that it did not agree to the challenge.

1.11 On 13 March 2017, the Sole Arbitrator advised that she did not wish to withdraw as arbitrator
and responded to the challenge.

1.12 On 15 March 2017, the Claimant submitted its reply submission.

1.13 On 23 March 2017, the LCIA notified the parties that, pursuant to Article 10.4 of the LCIA
Rules, and paragraph D.3(b) of the Constitution of the LCIA Court, the LCIA Court had appointed
a former Vice President of the LCIA Court to determine the challenge.

1.14 On 3 March 2017, the former Vice President rendered his decision on the challenge.

2 Decision excerpt

“[...]

Applicable Rules

14. The relevant provisions of the LCIA Rules are as follows:

10.2 If any arbitrator acts in deliberate violation of the Arbitration Agreement
including these Rules) or does not act fairly and impartially as between the parties or
does not conduct or participate in the arbitration proceedings with reasonable diligence,
avoiding unnecessary delay or expense, that arbitrator may be considered unfit in the
opinion of the LCIA Court.

10.3 An arbitrator may also be challenged by any party if circumstances exist that
give rise to justifiable doubts as to his impartiality or independence. A party may
challenge an arbitrator it has nominated, or in whose appointment it has participated,
only for reasons of which it became aware after the appointment has been made

15. Article 10.4 of the Rules requires that a challenge should be submitted within 15 days of
becoming aware of the circumstances giving rise to the challenge. The challenge is based on the

arbitrator’s decisions of 15 February and 1 March 2017. The challenge was submitted on 2 March 2017 so that no issue arises as to the timing of the challenge.

[...

Consideration of Grounds of Challenge

29. The unusual feature of this case is that, while the purchase price under the Contract was only USD 47,520 and the Claimant’s loss of profit on the Re-sale Contract was USD 36,960, the claim includes loss of profit on further Contracts in 2011 and beyond 2011 amounting in total to over USD 880,000, giving rise to a claim overall of USD1.17 m. The breakdown of the Respondent’s costs provided with an application for security came to over £500,000 so that it is unsurprising that the Arbitrator should express concerns as to the level of costs, which appeared likely, overall, to exceed the amount in issue. This is clearly material to what might otherwise be seen as the arbitrator’s somewhat unconventional approach to the case.

30. The decision to adhere to the directions for a Preliminary Issues Hearing is clearly at the heart of the Claimant’s application and the Claimant emphasises the difficulties that the direction gives rise to. The Claimant’s principal concern is as to how the hearing will deal with the issue of alleged deliberate dilution which the Claimant regards as a vital part of its case. However, it is clear that this aspect of the intended procedure has been fully addressed by both parties, also bearing in mind that the Respondent contends the point to be irrelevant. There is nothing to suggest that the arbitrator has not, as is stated in her email of 15 February 2017, carefully considered the parties’ submissions and has come to the conclusion that there is no justification for revising the decision previously made. That was clearly a matter for the arbitrator. The decision as it appears on paper cannot be challenged as irrational. It goes without saying that a decision by a Tribunal which goes against one party, however strongly it may have been argued by that party, cannot of itself found a claim of partiality or lack of independence. Indeed it is clear that the arbitrator had been made fully aware of the complexities and difficulties that might arise in relation to the proposed Preliminary Issues. The decision whether or not to adhere to the Directions already given is a matter of judgment and is not open to review in this forum.

31. The Claimant then challenges the arbitrator’s ruling that the issue and effect of deliberate dilution should be addressed only by ‘short submissions’ at the hearing, the Claimant not being permitted to prove the issue one way or the other. This ruling is challenged both on the grounds of unfairness and that it would be ‘meaningless’. Against this, it is pointed out that the arbitrator had stressed that the parties would be given a ‘full opportunity’ to present their cases. It is appropriate to observe here that however much an arbitrator may require or encourage a party to produce ‘short submissions’, parties are rarely in fact inhibited by such an order and it is indeed difficult to understand what the effect of requiring short submissions would be in practice. Having reviewed a selection of the correspondence exchanged over more than two years of preparation of the case, it seems most unlikely the Claimant would in fact be restrained by such a ruling from the arbitrator.

32. More important, there has been no Order restricting the time available for oral submissions and no restriction on written submissions; so it cannot be supposed that the Claimant will in fact be restricted to any material degree in presenting its case. If the Claimant makes further application
to produce either written or oral submissions on the issue, there is nothing to indicate that such application would not be carefully considered and allowed by the arbitrator if properly merited.

33. The Claimant then seeks to suggest that there has been a material change of circumstances in that the breach alleged by the Claimant was initially to be assumed for the purpose of the preliminary issue, but was later revised with breach no longer to be assumed. Again, these are detailed matters which have emerged during the course of the parties’ exchanges in seeking to clarify exactly what is the issue to be determined at the Preliminary Hearing. There is nothing unusual about this and nothing to suggest that the arbitrator has not properly considered the matters raised which are, it must be borne in mind, all opposed or said to be irrelevant by the Respondent. There is nothing unusual in finding that a Preliminary Issue needs to be refined and if necessary re-addressed in order to produce a just and appropriate decision. Nor is there any indication that the arbitrator, in refining the details of the issues to be addressed, has acted unfairly.

34. The Claimant contends that the Preliminary Issue Hearing has become inappropriate because the circumstances and the intended objective have changed, particularly in that the earlier anticipation of dealing with the matter through little or no evidence has proved to be unfounded. However, again, these are matters which have been extensively argued by the parties and there is nothing to indicate that the arbitrator, when ruling that the Preliminary Hearing should go ahead, was not fully aware of these difficulties and had not taken them fully into account. They provide no grounds suggestive of unfairness or lack of impartiality.

35. The Claimant, arising from events immediately preceding filing of the challenge, addresses the arbitrator’s Decision in relation to the proffered Reply Supplementary Report. The arbitrator is said to have ruled the Reply report inadmissible without hearing the Claimant and having just refused to rule the evidence to which it was addressed inadmissible. The Respondent points out that this is not the effect of the arbitrator’s ruling which was in fact to require the parties to comply with the previous order that experts should meet and produce a joint report, only after which further responsive expert reports might be served. On analysis these events are nothing more than routine procedural differences in which the arbitrator’s decision that the existing directions must prevail cannot be questioned. The fact that the arbitrator may have given the impression of favouring one party over the other by allowing the Respondent’s statement to stand while not accepting the Claimant’s Supplementary Report is hardly an unusual situation and is not one that gives rise to any serious question of bias or lack of independence.

36. Looking at the matter overall, it is clear that the procedural situation which has developed is not to the Claimant’s liking and the Claimant has no doubt correctly anticipated the possibility that a ruling in favour of the Respondent on the Preliminary Issues might well render the Claimant’s case either unsustainable or not worth pursuing. That is, however, the nature of arbitration and in no sense a ground upon which any party’s conduct can be criticised. The Respondent points out that the arbitrator has in fact given many decisions favourable to the Claimant. That does not assist in judging the effect of particular decisions alleged to be biased in favour of the Respondent. However, taking all the complaints put forward by the Claimant together, I can see no ground upon which those complaints, either individually or in the aggregate, can seriously be said to support an accusation that the arbitrator has not acted fairly or impartially or that those
events should give rise to justifiable doubts as to the impartiality or independence of the arbitrator.

37. In my view, an informed bystander reading all the exchanges between the parties and the arbitrator would conclude that the arbitrator has experienced difficulty in dealing with the increasingly irreconcilable differences between the parties as to the appropriate way of resolving the dispute. But that observer would also conclude that the arbitrator has acted with firmness as well as flexibility in seeking to guide the parties to a position in which the principal difference between them should be capable of being resolved short of a full hearing.

Decision

38. I have therefore come to the clear conclusion that the case advanced by the Claimant has no merit and the challenge should therefore be dismissed. While the Respondent requests that the challenge be dismissed with costs, I consider all issues of costs should be reserved to the arbitrator.”