1 Background

1.1 The underlying dispute arose out of two marketing agreements, which were governed by English law. The agreements contained LCIA arbitration clauses, which provided that the language of the arbitration was English, but did not specify the number of arbitrators or a seat. The parties subsequently agreed that the seat of the arbitration be London.

1.2 The Claimant filed a Request for Arbitration with the LCIA on 16 February 2017, in which it proposed that a three-member Tribunal be appointed and nominated an arbitrator as a wing arbitrator (the “Co-arbitrator”). The Respondents filed a Response on 23 March 2017.

1.3 In a correspondence of 24 April 2017, the Respondents, in response to the Claimant’s nomination in the Request, stated that they would not object to the Claimant’s nominee and proposed an arbitrator as their own nominee.

1.4 By email of 24 April 2017, the LCIA informed the parties that it had understood that the parties had reached an agreement on a three-member Tribunal and took note of the parties’ nominees.

1.5 On 27 April 2017, the LCIA shared the following disclosure (the “First Disclosure”) made by the Co-arbitrator, inviting the parties to let the LCIA know of any objection and its reasons therefor by no later than 3 May 2017:

“Whilst at the Bar, before [...] 2000, I acted as counsel for [the Claimant], although I cannot remember how often and in what circumstances. I expect that I must also have acted against them. Whilst at the Bar I was instructed by [the Claimant’s counsel], but again I cannot recall how often and in what circumstances. I have known [an individual] who I believe is employed by [the Claimant] in a legal capacity, for over 40 years. He is an acquaintance rather than a close friend. We were at college together.”

No objection was made by the Respondents by 3 May 2017.
1.6 On 4 May 2017, the LCIA notified the parties that it had appointed the Tribunal, comprising the parties’ nominees and a third and presiding arbitrator selected by the LCIA Court.

1.7 On 7 May 2017, the Respondents requested information detailing the facts and circumstances of the Co-arbitrator’s prior representation of the Claimant and circumstances of his prior instruction(s) by the Claimant’s counsel, asserting that the First Disclosure was “too vague”.

1.8 On 18 May 2017, the Co-arbitrator provided the following information to the parties and the LCIA (the “Second Disclosure”):

“I practised at the Bar between 1975 and 2000. My practice ceased [...] on my appointment to [Court A]. Whilst not wishing to engage in semantics, this I would respectfully suggest is a little more than “several” years ago. During that time I was instructed by most, if not perhaps all, of the firms solicitors then practising in London in the [relevant] field. During my [...] years sitting in [Court A] and [...] years sitting in [Court B] I also of course dealt judicially with many cases involving those same solicitors and their clients. I am advised by my clerk [...] that such records as survive in chambers of my practice are of fee notes rendered. [My clerk] has searched the system. A search for [the Claimant’s name] reveals no cases. Of course a fee note rendered to a solicitor citing [a different means of referring to the matter than the Claimant’s name] may have related to [the Claimant]. The name of [an individual] at [the Claimant company] is on the chambers’ system, but there is no record of my having been instructed by him or having worked with him. That accords with my own, imperfect, recollection. I still think it likely that I must have acted for (and against) [the Claimant] but I have no further recollection. The records show one case for [the Claimant’s counsel]. Apparently I gave advice in June 1994 [...]. I do not know whether this was the only time I acted for [the Claimant’s counsel]. I mean them no disrespect when I record, as is I have no doubt the case, that I may have difficulty now in distinguishing them in my recollection from one or two other small niche [...] firms [in the relevant area] which were started up at much the same time by solicitors whom I knew from longer established firms.

I am sorry that I cannot be more helpful.”

1.9 On 23 May 2017 the Respondents expressed concern over the Second Disclosure and again sought clarification of the Co-arbitrator’s relationship with the Claimant and its counsel.

1.10 On the same day, the Claimant submitted that the only connection of the Co-arbitrator to the Claimant of which they were aware is that he rendered a judgment against the Claimant in a 2014 Court decision. In relation to the Claimant’s counsel, the Claimant stated, inter alia, that they had never instructed the Co-arbitrator and that it was the first time that the firm had nominated him as an arbitrator. Further, the Claimant stated that its lead counsel had never met with the Co-arbitrator and another partner with whom the Co-arbitrator recalled working had left the firm in 1998.

1.11 On the same day, the Co-arbitrator referred to the Respondents’ correspondence of earlier that day and made the following further comments (the “Third Disclosure”):

“Pursuant to the formula in Statement B of the LCIA Statement of Independence, I have done my best to disclose from recollection alone circumstances for the consideration of
the LCIA court prior to my appointment, whether or not any such circumstance is likely to
give rise in the mind of any party to any justifiable doubts as to my impartiality or
independence. Pursuant to the request of the LCIA, I have sought to clarify that
information by reference to such records as exist, subject to the limitations therein which
I have described. For the avoidance of doubt I do not have any relationship with either the
Claimant or the Claimant’s legal representatives. I am independent of all the parties in
this arbitration and of all their legal advisers. I am impartial and shall remain so.

There is nothing further which I can add.”

1.12 On 24 May 2017, the Respondents expressed “apprehension” in response to the disclosures.

1.13 On 27 May 2017, the LCIA stated that it understood that the Respondents’ email did not
constitute a challenge brought under Article 10 of the LCIA Rules unless the Respondents state the
contrary by or before 31 May 2017.

1.14 On 6 June 2017, the Respondents submitted an application challenging the Co-arbitrator
on the basis of his disclosures, under Article 10.1 and 10.3 of the LCIA Rules, alleging that there were
circumstances giving rise to justifiable doubts as to the Co-arbitrator’s independence or impartiality.

1.15 On 30 June 2017, 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.

1.16 On 21 July 2017, the former Vice President rendered her decision on the challenge.

2 Decision excerpt

“[…]

III Admissibility

18. A party challenging an arbitrator after the formation of the tribunal under Article 10.1 of the
LCIA Rules shall, within 14 days of becoming aware of any grounds described in Article 10.1,
deliver a written statement of the reasons for its challenge to the LCIA Court, the Arbitral
Tribunal and all other parties.

19. [The Co-arbitrator]’s First Disclosure, Second Disclosure and Third Disclosure were received by
the parties on 27 April 2017, 18 May 2017 and 23 May 2017, respectively. [The Co-arbitrator] was appointed as an arbitrator on 4 May 2017. The challenge was filed on 6 June 2017.

20. The Respondents based the challenge on the vagueness and inconsistencies among the three
Disclosures and allege that the Third Disclosure in conjunction with the First Disclosure and
Second Disclosure lead to a reasonable perception of conflict of interest and potential bias. As
such for the purpose of calculating the 14-day period, such period should begin to run on the day
following the day on which the Third Disclosure was received by the parties, which was 23 May
2017. Accordingly, the challenge dated 6 June 2017 was made within the 14-day period in
accordance with Article 10.3 of the LCIA Rules and therefore is admissible.
IV  Grounds of the Challenge

21. In their email of 6 June 2017 to the LCIA, the Respondents submitted that there are circumstances giving rise to justifiable doubts as to [the Co-arbitrator]’s impartiality or independence in this arbitration because (i) the facts and circumstances as to the relationship between [the Co-arbitrator] and the Claimant and its counsel in [the Co-arbitrator]’s three Disclosures are vague and inconsistent and (ii) the three Disclosures lead to a logical and reasonable perception that [the Co-arbitrator] is conflicted and thereby potentially biased.

V  Criteria to be applied

22. Since London is the seat of the arbitration, I examined the Arbitration Act 1996. Article 24(1)(a) of the Arbitration Act provides that a party may apply to the court to remove an arbitrator if ‘circumstances exist that give rise to justifiable doubts as to his impartiality.’

23. I have also considered the IBA Guidelines on Conflicts of Interest in International Arbitration 2014 (the IBA Guidelines), although non-binding, to which the LCIA Court had referred in previous decisions on challenges and to which the Respondents referred in their letter dated 7 May 2017, seeking clarification of the First Disclosure.

VI  Reasoning

24. The issue here is whether circumstances exist that give rise to justifiable doubts as to [the Co-arbitrator]’s impartiality and independence because the three Disclosures made by [the Co-arbitrator] were vague and inconsistent and reasonably lead to a perception that he has previously represented the Claimant and is conflicted and therefore is potentially biased as alleged by the Respondents.

25. I am not convinced by any of the Respondents’ claims for the reasons below.

26. Firstly, I did not find any inconsistencies among the three Disclosures. The Respondents cite as an example of inconsistency ‘[the Co-arbitrator]’s First Disclosure in which he stated that he had acted as counsel for [the Claimant]; in the Third Disclosure, this client relationship has been, at least in the present tense, disavowed’. [The Co-arbitrator]’s past representation of the Claimant disclosed in the First Disclosure is in no way inconsistent with the Third Disclosure in which [the Co-arbitrator] denied a present relationship with either the Claimant or the Claimant’s legal representatives.

27. Secondly, I am not convinced by the Respondents’ contention that the three Disclosures are ‘vague and appear to obfuscate the nature of the past relationship between [the Co-arbitrator] and the Claimant and/or Claimant legal representatives’.

28. In the First Disclosure, [the Co-arbitrator] disclosed his representation of the Claimant and that he was instructed by [the Claimant’s counsel] while he was at the Bar, before […] 2000. [The Co-arbitrator] was also forthcoming in disclosing his acquaintance with [an individual], who he believed was employed by the Claimant in a legal capacity, a fact that does not fall within the so-called Orange List of the IBA Guidelines, which lists representative circumstances that warrant disclosure.
29. In the Second Disclosure, [the Co-arbitrator] went on to have his clerk search fee notes of his chambers, which, contrary to his recollection, did not in fact reveal that [the Co-arbitrator] represented the Claimant. However, this might be because fee notes of his chambers tended to cite [a different means of referring to the matter] rather than [the client’s name] as explained by [the Co-arbitrator], or because his representation, if any, was in any event more than 15 years ago and records might not have survived. On the other hand, the search confirmed [the Co-arbitrator]’s prior disclosure in relation to [the Claimant’s counsel], and that he had advised [a partner] of [the Claimant’s counsel] in June 1994, which was more than 20 years ago.

30. In the Third Disclosure [the Co-arbitrator] did not really make any new disclosure but instead simply explained his prior two Disclosures. To wit, he made the First Disclosure based on his recollection, and in the Second Disclosure, which was made pursuant to the request from the LCIA, he disclosed the results of the search of such records as existed with a clarification on the limitations of such search due to the manner in which the records were kept in his chambers.

31. In essence, in spite of the fact that [the Co-arbitrator]’s representations of the Claimant and working relationship with [the Claimant’s counsel], if any, were all prior to [...] 2000, [the Co-arbitrator] duly investigated and disclosed the relevant circumstances for the consideration of the parties and the LCIA Court regardless of whether or not such circumstances were likely to give rise to justifiable doubts as to his impartiality and independence. The lack of particulars in each case in which he represented the Claimant is primarily because they were all prior to [...] 2000, and such lack of particulars does not evince [the Co-arbitrator]’s ‘reluctance to issue a clear statement regarding the nature of his relationship with the Claimant and the Claimant’s legal representatives’ as alleged by the Respondents. Indeed, the fact that [the Co-arbitrator]’s representation of the Claimant and instruction by the Claimant precede [...] 2000 alone suggests the unlikelihood that the related circumstances amount to anything that would give rise to justifiable doubts as to his impartiality or independence.

32. Thirdly, I do not see how the three Disclosures could reasonably and logically lead to a perception that [the Co-arbitrator] is conflicted and thereby potentially biased. The Respondents claim that [the Co-arbitrator] must have actively represented the Claimant in the past and is conflicted and potentially biased, due to alleged inconsistencies between the First Disclosure, which reveals [the Co-arbitrator]’s past representation of the Claimant, and the Third Disclosure, which states that there is no present relationship with the Claimant and its legal representatives. The Respondents also cite [the Co-arbitrator]’s alleged reluctance to issue a clear statement regarding the nature of his relationship with the Claimant and the Claimant’s legal representatives as evidence therefor. There is no inconsistency between the First Disclosure and the Third Disclosure, and [the Co-arbitrator] was not reluctant to make full disclosure. Further, while [the Co-arbitrator] recalled that he represented the Claimant before [...] 2000 (in spite of the lack of records in his chambers), nothing suggests that [the Co-arbitrator] ‘actively’ represented the Claimant in the past nor is there anything to suggest that he is conflicted and potentially biased. Indeed, a logical and reasonable reading of the three Disclosures leads to the conclusion that [the Co-arbitrator] has no conflict in serving as an arbitrator in this arbitration and nothing suggests the possibility of bias on his part in this case.

33. Accordingly, none of the Respondents’ allegations can be sustained.
VII  Decision

34.  I found no circumstances giving rise to justifiable doubts as to [the Co-arbitrator]’s impartiality or independence.

35.  For the above reason, I conclude that the challenge to [the Co-arbitrator] should be dismissed and declare that all (i) legal costs for the challenge are to be fixed by the Arbitral Tribunal, (ii) all arbitration costs for the challenge are to be determined by the LCIA Court, both sets of costs to be borne entirely by the Respondents.”