

LCIA Reference No. 101642, Decision Rendered 31 January 2011

<i>Subject:</i>	Challenge to arbitrator's appointment pursuant to Article 10.4 of the LCIA Rules 1998, based on Article 10.3 (justifiable doubts as to the arbitrator's impartiality or independence)
<i>Division/Court member:</i>	Former Vice President of the LCIA Court (acting alone)
<i>Summary:</i>	Where an arbitrator has, in the last three years, acted as an arbitrator in an arbitration on a related issue involving an affiliate of one of the parties, but did not receive any arguments from the parties in the other case and the issues are tangential to the present case, the arbitrator's involvement in the previous case does not give rise to justifiable doubts as to the arbitrator's independence or impartiality in the present case.

1 Background

1.1 The underlying dispute arose out of a contract for the supply of power by the Claimants to the Respondent. The contract was governed by Spanish law and provided for LCIA arbitration seated in London. The language of the arbitration was Spanish.

1.2 The Claimants filed a Request for Arbitration with the LCIA on 9 July 2010, in which it nominated an arbitrator.

1.3 The Respondent filed a Response to the Request on 6 August 2010, and nominated an arbitrator.

1.4 In accordance with the parties' arbitration agreement, the LCIA Court was required to select the chairperson. The LCIA contacted seven potential candidates who, one after the other, were ultimately rejected as a result of their having perceived conflicts of interest. In relation to one of the candidates, the Claimants objected to the appointment following a disclosure made by him and asserted that the chairperson should have no relationship whatsoever with the parties.

1.5 On 5 November 2010, the LCIA notified the parties that it had appointed the tribunal. The chairperson appointed (the "Chair") had accepted appointment without any disclosures.

1.6 On 10 November 2010, the Respondent challenged the appointment of the Chair, stating that in early February 2008, the Chair had been the party-appointed arbitrator of an affiliate of the Claimants in another ad hoc arbitration.

1.7 On 18 November 2010, the Claimants advised that they did not agree with the challenge.

1.8 On the same day, the Chair advised that he did not wish to stand down. In particular, the Chair stated that the parties in the ad hoc arbitration and the LCIA arbitration were different, the Respondent's nominated arbitrator had also been a party-appointed arbitrator in the ad hoc

arbitration, the claimant had withdrawn its claim in the ad hoc arbitration soon after the “*Terms of Reference*” had been signed, he had received no memorials from the parties to the ad hoc arbitration, there had been no hearings or deliberations in the ad hoc arbitration and he considered himself totally impartial and independent in this matter.

1.9 On 25 January 2011, 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 decide the challenge.

1.10 The former Vice President rendered his Decision on the challenge on 31 January 2011.

2 Decision excerpt

“[...]

II. Analysis

12. Section 10.3 of the Rules states:

‘An arbitrator...may be challenged by any party if circumstances exist that give rise to justifiable doubts as to his impartiality or independence.’

13. *It is against this standard that the present challenge must be judged.*

14. *There appears to be no ground for challenging [the Chair]’s impartiality. This criterion is essentially subjective. [The Chair] expressly avers that he was impartial in this matter and there is no intrinsic evidence indicating to the contrary. The challenge was rather based on his alleged appearance of lack of independence from [the Claimants] by reason of his having served as its party appointed arbitrator in the previous, ad hoc arbitration.*

15. *[The Respondent and the Chair] make reference to the IBA Guidelines on Conflicts of Interest in International Arbitration (the ‘Guidelines’) in support of their respective positions. (I am not aware that any International Arbitration Institution considers itself bound to follow the Guidelines. Nevertheless, the Guidelines express a consensus of a group of distinguished arbitration practitioners, reference to which is useful in analysing challenges such as this one.)*

16. *The Guidelines set forth examples of situations which may lead to challenges, and groups them into three categories: the Red List; the Orange List; and the Green List.*

17. *Example 3.1.5 of the Orange List is:*

‘The arbitrator currently serves, or has served, within the last three years, as an arbitrator in an arbitration on a related issue involving one of the parties or an affiliate of one of the parties.’

18. *It is not clear how close the issues in the ad hoc arbitration were related to the present arbitration. The ad hoc arbitration involved interpretation of a previous arbitration award deciding on the revision of pricing under another long-term contract for the provision of [energy]. However, the ad hoc arbitration to which [the Chair] was appointed apparently was*

not faced directly with the question of price revision. Nevertheless, for the purposes of this analysis only, and without deciding the question, I will assume that the issues in the ad hoc arbitration and the instant arbitration are 'related'.

19. *The Terms of Reference in the ad hoc arbitration were signed on 3 October 2008. The present arbitration was commenced on 9 July 2010. Thus [the Chair] was involved in arbitration with a party related to [the Claimants] commenced approximately 21 months thereafter. He was appointed in the present arbitration on 5 November 2010, approximately 25 months thereafter.*
20. *It appears therefore that [the Chair]'s relationship to [the Claimants] is one that is described in Guideline 3.1.5 as being on the Orange List.*
21. *What then is the Orange List?*
22. *Paragraph 3 of Part II of the Guidelines explains in part:*

'The Orange List is a[n]... enumeration of specific situations which (depending on the facts of a given case) which may give rise to justifiable doubts as to the arbitrator's impartiality or independence. [It reflects situations in which] the arbitrator has a duty to disclose...' (emphasis added.)
23. *The questions thus posed are:*
 - *Do the facts of the present case give rise to justifiable doubts as to [the Chair]'s independence?*
 - *Does the fact that he failed to disclose his prior relationship to the ad hoc arbitration impact the ultimate decision on the challenge?*
 - *Does the higher standard proposed by [the Claimants in their] prior objection to the appointment of an arbitrator ---no prior relationship whatever with any party---impact the ultimate decision on the challenge?*
24. *[The Chair]'s involvement with the previous ad hoc arbitration was slight and fleeting. The case settled soon after the Terms of Reference were signed. [The Chair] never received any memorials in the ad hoc arbitration, the issues in which were at best tangential to those in the present case. He was thus not 'tainted' by the arguments of either of the parties. He avers that he has, and has had, no professional ties with [the Claimants].*
25. *I take also into consideration the fact that the LCIA has had a very difficult time in identifying appropriate Spanish speaking arbitrators to serve as chairman. Thus, [the Claimants have] had to wait for four months for the constitution of the Tribunal. [The Respondent], and presumably [the Claimants], are both important participants in the economy of Spain. It is thus not unlikely that any potential successor candidates will also have some ties to one or the other of the parties. It is important that the LCIA now pragmatically appoint a chairman whose relationship to the parties and the issues in the previous ad hoc arbitration are, at best, slight. Indeed if this search were to continue, it would not be long before [the Chair's involvement] in the ad hoc arbitration would not qualify as an example described in Guideline 3.1.5.*

26. *On balance therefore, I am inclined to conclude that [the Chair]’s involvement in the ad hoc arbitration does not ‘give rise to justifiable doubts as to his impartiality independence.’*
27. *Does the fact that [the Chair] did not disclose his involvement in the prior, ad hoc arbitration alter this conclusion?*
28. *I believe that under the Guidelines and under better arbitration practice, he should have disclosed such involvement, when attesting to his impartiality and independence. Others, however (including [the Chair]) could reasonably differ. Nevertheless, under the circumstances, such failure should not deprive the parties of a prompt determination of their dispute by a Tribunal chaired by a qualified arbitrator whose impartiality and independence I do not question.*
29. *Finally, should [the Claimants’] objection to a previous candidate for chairman set the standard against which I must judge this challenge? The answer is No. The standard proposed by [the Claimants] of no contact whatsoever with any of the parties or their affiliates is well beyond the standard set forth in the Guidelines and impractical in the present situation. The fact that the LCIA deferred to [the Claimants’] previous objection and sought, once again unsuccessfully, to find a mutually acceptable candidate, should not govern my decision on whether the standard proposed by [the Claimants] should be imposed. I therefore rejected its unduly stringent standard.*

III. Decision

30. *For the reasons set forth above, I deny [the Respondent’s] challenge to the LCIA’s appointment of [the Chair] as Chairman of the Tribunal in the referenced arbitration.”*