

*LCIA Reference No. 91305, Decision Rendered 4 March 2011*

<i>Subject:</i>	Challenge to sole arbitrator's appointment pursuant to Article 10.4 of the LCIA Rules 1998, based on Articles 5.3 (requirement to declare any circumstances likely to give rise to any justifiable doubts as to an arbitrator's impartiality or independence) and 10.3 (justifiable doubts as to the arbitrator's independence or impartiality)
<i>Division/Court member:</i>	Former Vice President of the LCIA Court (acting alone)
<i>Summary:</i>	A barrister owes his duty to the lay client and not the instructing solicitors. If a barrister is instructed by a solicitor's firm for an unconnected client in an unconnected court proceedings, while simultaneously acting as sole arbitrator in a dispute in which the same solicitors firm acts as counsel for a party, where the lawyers of the firm acting in the arbitration are different to the lawyers in the court proceedings, this does not constitute circumstances that give rise to justifiable doubts as to the arbitrator's independence or impartiality.

## **1 Background**

1.1 The underlying arbitration arose out of a share purchase agreement. The agreement was governed by English law. The arbitration clause contained in the agreement provided that disputes should be resolved by arbitration under the LCIA Rules, and provided for a London seat.

1.2 The Claimant filed a Request for Arbitration on 31 March 2009. The Respondents filed their Response on 5 May 2009.

1.3 On 12 May 2009, the LCIA notified the parties of the appointment of the arbitrator who had been jointly nominated by the parties (the "Sole Arbitrator").

1.4 An 11-day substantive hearing took place in early September 2010. On 6 December 2010, before completing and issuing an award, the Sole Arbitrator made a disclosure to the parties as follows:

- (a) he was acting in a Commercial Court case (the "Court Case"), unconnected to this arbitration, as counsel for a non-party to this arbitration where the Claimant's legal representatives (the "Claimant's Counsel") are his instructing solicitors;
- (b) the Court Case started in 2004, settled before trial in 2008, revived at the end of 2009, and had the opening and evidence heard during the previous week;
- (c) the Claimant's lead counsel in charge of this arbitration was not involved in the Court Case;

- (d) he had been previously instructed by the Respondents' former legal representatives, but not the Respondents' current legal representatives (the lead counsel for the Respondent had moved to a new firm and the case was transferred from his old firm to his new firm); and
- (e) the fact that the Respondents' former counsel and the Claimant's Counsel are or have been instructing solicitors in unconnected matters does not strictly require disclosure, as it has no bearing on his independence or impartiality.

1.5 The Sole Arbitrator issued a partial award in the arbitration on 17 December 2010 finding in favour of the Claimant. The award was transmitted by the LCIA to the parties on 20 December 2010.

1.6 On 21 December 2010, the Respondents made a challenge for the revocation of the Sole Arbitrator's appointment.

1.7 By letter dated 31 December 2010, the Sole Arbitrator advised that he would not withdraw from the arbitration. The Claimant advised on the same date that it did not agree to the challenge and made further comments on the challenge on 27 January 2011.

1.8 By fax of 3 February 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 determine the challenge brought by the Respondents.

1.9 Following the appointment of the Former Vice President, the parties and the Sole Arbitrator made supplementary submissions on the challenge.

1.10 On 4 March 2011, the former Vice President issued his decision on the challenge.

## **2 Decision excerpt**

"[...]"

### **The Discussion**

#### **A. Timing of the Challenge**

14. *I begin by addressing Claimant's questioning of the timing of the Challenge. Respondents did not make the Challenge until the 'latest possible date' after seeing the unfavourable result of the Award. Claimant, therefore, invites the LCIA Court to conclude that the Challenge is nothing more than an attempt to impede Claimant's efforts to enforce the Award.*

15. *Article 10.4 of the Rules provide that: 'A party who intends to challenge an arbitrator shall, within 15 days of the formation of the Arbitral Tribunal or (if later) after becoming aware of any circumstances referred to in Article 10.1, 10.2 or 10.3, send a written statement of the reasons for its challenge to the LCIA Court, the Arbitral Tribunal and all other parties' (emphasis added).*

16. *Respondents submitted their Challenge to the LCIA Court on the fifteenth day after receiving [the Sole Arbitrator]'s 6 December letter, albeit on the day after receiving the Award. Under the Rules, however, Respondents were entitled to make a challenge at any stage within the 15-day*

*time limit prescribed by the Rules. That the LCIA Court would publish the Award in the Claimant's favour on 20 December 2010, the day prior to the expiration of the 15-day period, was not a matter within Respondents' control.*

17. *Accordingly, the timing of the Challenge is irrelevant to the merits of the Challenge. Either there are circumstances giving rise to justifiable doubts about the Sole Arbitrator's Impartiality or Independence, or there are not.*

B. Article 10.3

(i) *IBA Guidelines*

18. *Respondents seek the revocation of [the Sole Arbitrator]'s authority in accordance with Article 10.3 of the Rules on the basis that 'circumstances exist that give rise to justifiable doubts as to his impartiality or independence.'*

19. *The question is this: Whether 'justifiable doubts' arise because [the Sole Arbitrator] acted as barrister and was instructed by [the Claimant's Counsel] as solicitor for an unconnected client in an unconnected court proceeding, while simultaneously acting as sole arbitrator in a dispute in which [the Claimant's Counsel] acted as counsel for a party.*

20. *Respondents contend that the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration ('IBA Guidelines') 'provide precisely for the circumstances revealed by the Arbitrator's 6 December letter.' [...] Paragraph 2.3.2 of the IBA waivable Red list states:*

*'Arbitrator's relationship with the parties or counsel*

*[...] 2.3.2. The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.*

*The waivable Red list 'encompasses situations that... should be considered waivable only if and when the parties, being aware of the conflict of interest situation, nevertheless expressly state their willingness to have such a person act as arbitrator...' (IBA Guidelines, Part II, para. 2).*

21. *It is not disputed that the IBA Guidelines can be considered in applying Rule 10.3. Claimant, however, disputes Respondents' contention that [the Sole Arbitrator], acting in the Court Case as a barrister to address the court orally at trial, 'represent[ed]' [the Claimant's Counsel] by taking instructions from [the Claimant's Counsel], acting as solicitors conducting the litigation in the Court Case. The relationship between a barrister and his instructing solicitor, Claimant states, is not a lawyer-client relationship. Rather, both the barrister and the solicitor owe their duty to the "lay client" whom they both represent.*

22. *I agree that a barrister does not 'represent' the solicitors who instruct him in the context of the barrister-solicitor relationship in the courts of England. A barrister's duty is to his lay client, as clearly set forth in the Code of Conduct of the Bar for England and Wales (8<sup>th</sup> edition) at paragraph 303:*

*'A barrister:*

*(a) must promote and protect fearlessly and by all proper and lawful means the lay client's best interests and do so without regard to his own interests or to any consequences to himself or to any other person (including any colleague, professional client or other intermediary or another barrister, the barrister's employer or any Recognised Body of which the barrister may be an owner or a manager);*

*(b) owes his primary duty as between the lay client and any other person to the lay client and must not permit any other person to limit his discretion as to how the interests of the lay client can best be served...*' (emphasis added).

23. First, Respondents argue that the purpose of paragraph 2.3 is aimed at the 'Arbitrator's relationship with the parties or counsel' (emphasis added), and that a barrister instructed by a solicitor in England has both a professional and financial relationship with the solicitor. Respondents' broad characterization of the barrister-solicitor relationship does not, however, answer the question as to whether paragraph 2.3.2. by its terms 'precisely' encompasses such relationship as a Red List 'relationship with... counsel', as Respondents contend.

24. Second, Respondents assert that Claimant's interpretation of paragraph 2.3.2 relies on a 'narrow' and 'peculiarly' English reading of the word 'represents'. From the perspective of a fair and informed observer, Respondents argue, [the Sole Arbitrator] represented [the Claimant's Counsel] in the Court Case by taking instructions from [the Claimant's Counsel] and being paid by [the Claimant's Counsel] on behalf of the lay client for acting as barrister. But, it is not 'peculiar' to construe 'represents' to signify, in general, a lawyer-client relationship or to ascertain, in the specific context of England, that a barrister's representative relationship is with the lay client, and not the solicitor.

25. Third Respondents argue that if, as paragraph 2.3.3 of the IBA Guidelines provides, a conflict exists when 'the arbitrator is a lawyer in the same law firm as the counsel to one of the parties', then a barrister instructed by a law firm is also conflicted under paragraph 2.3.2 from acting as arbitrator in a dispute in which the same law firm acts for one of the parties. Respondents further point to the LCIA Guide's highlighting of the Swedish Supreme Court Lind Case, where it was held that an arbitrator who worked as a consultant for a law firm was to be treated as any other lawyer at the firm (LCIA Guide para. 4.24). Analogously, a barrister can be considered a part of the legal team acting for the lay client and, therefore, 'represents' the law firm within the meaning of paragraph 2.3.2.

26. I do not accept either the paragraph 2.3.3 or the Lind Case analogy posited by Respondents. The arbitrator in paragraph 2.3.3 shares in the profits of the law firm and owes duties to all the clients of that firm. [The Sole Arbitrator], on the other hand, has no financial interest in [the Claimant's Counsel], and no duty to any clients of [the Claimant's Counsel] (unless instructed by one of those clients to represent it).

27. As for the Lind Case, the arbitrator-consultant there was held out as an employee of the law firm, had an office at the firm, received 20 percent of his income from the firm, used its facilities in connection with his practice as an arbitrator, and wrote legal opinions for companies in the same group as the respondent in the arbitration. None of these circumstances applies in the slightest to the relationship between [the Sole Arbitrator] and [the Claimant's Counsel]. The Lind Case, therefore, affords no basis to bring that relationship within the confines of paragraph 2.3.2.

28. Fourth, Respondents note the International Chamber of Commerce's Arbitrator Statement of Acceptance, Availability & Independence ("ICC Statement"), which requires a potential ICC arbitrator to:

*'take into account... whether there exists any past or present relationship direct or indirect, between you and any of the parties, their related entities or their lawyers or other representatives, whether financial, processional or of any other kind. Any doubt must be resolved in favour of disclosure.'* (emphasis added).

According to Respondents, it would be 'very surprising' if the ICC regarded this so serious as to merit including in the ICC Statement, whilst the IBA Guidelines were silent on this point.

29. Respondents ought not be surprised. The ICC Statement generally addresses all the circumstances that it wants a potential arbitrator to disclose; paragraph 2.3.2 concerns one instance of a waivable conflict of interest. Not every circumstance that requires disclosure by an arbitrator thereby merits revocation of the arbitrator's authority as a conflict of interest. Furthermore. As Respondents acknowledge, the IBA Guidelines state that its list is a 'non-exhaustive' enumeration. [...]

30. In summary, I conclude that paragraph 2.3.2 of the IBA Guidelines does not apply in the circumstances of [the Sole Arbitrator]'s disclosure. Indeed the parties have not cited any judicial or other authority directly on point. The question of whether [the Sole Arbitrator]'s barrister-solicitor relationship with [the Claimant's Counsel] warrants revocation of his authority as arbitrator thus appears to be one of first impression.

(ii) Justifiable Doubts

31. That no precedent exists for this challenge still leaves open the question as to whether the instant circumstances give rise to 'justifiable doubts' as to [the Sole Arbitrator]'s impartiality or independence under the LCIA Rules. It is common ground among the parties that, in deciding what such circumstances are under Article 10.3 of the Rules, the LCIA Court may have regard to both the position under English law (which is the *lex arbitri*) and to relevant international standards.

32. In addition, the authorities cited by the parties indicate that the test to be applied under either English law or international standards is essentially the same. The English test asks 'whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased' (Porter v Magill, [2002] 2 A.C. 357 at [110] (per Lord Hope)). The international standard is that doubts are 'justifiable if a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision'. (IBA Guidelines, General Standard 2(c)).

33. I find that the following facts lead to a conclusion by a fair-minded and informed observer that justifiable doubts do not exist with respect to this Challenge:

- a. The arbitration and the Court Case are unconnected matters.
- b. The parties to the arbitration and to the Court Case are unconnected.

- c. [The Sole Arbitrator] as a barrister in the Court Case owed his primary duty to the lay client.
- d. [The Claimant's Counsel's] core team of lawyers in the arbitration led by the partner in charge of the arbitration is not involved in the Court Case, and [the Sole Arbitrator] had no contact in the arbitration with any other [lawyers from the Claimant's Counsel] except the core team.

*In short, this Challenge involves different cases, different parties and different lawyers.*

34. Respondents propose that [the Sole Arbitrator]'s relationship would raise justifiable doubts from the standpoint of an observer who 'is a foreign party who has chosen to arbitrate his dispute in England under English law (and who does not necessarily share English ideas of conflicts of interests)'. [...] Respondents justify this gloss on the 'fair-minded and informed observer' standard because this case is an international arbitration with non-English parties.

35. I decline to accept the gloss proposed by the Respondents. The informed observer standard is not a subjective one, tailored to the needs of a particular case. Whatever the nationality, the observer is 'informed' of the relevant facts. The observer, for example, might not immediately understand the manner in which the English legal profession is organized between barrister and solicitors but, before concluding that there are justifiable doubts, the observer will inform itself of the relevant facts. See *ASM Shipping Ltd of India v TTMI Ltd of England*, [2005] EWHC 2238 (Comm), at para. 39(2) ('objective observer is there to ensure an even-handed approach to apparent bias, whatever the nationalities of the parties') (per Morison J).

36. Respondents' 'foreign' observer standard also ignores the role of observer's counsel in making the observer an informed one. Respondents, for example, are sophisticated international companies; they are represented by highly competent London counsel, well able to inform them of the relevant background. [...] The Respondents from Russia and elsewhere in this proceeding were, thus, in an excellent position to have their counsel explain the English legal practice to them.

37. Respondents rely on *Laker Airways Inc v. FLS Aerospace & Another*, [2000] 1 WLR 113 [1992] 2 Lloyd's Rep. 45, for their gloss that the existence of justifiable doubts may be affected by the participation of foreign parties. In the *Laker* case, Rix J noted the Paris Court of Appeal's and the LCIA Court's finding that no conflicts arose from the appointment of an arbitrator from the same chambers as counsel instructed to appear to advocate for a party in the same case. It was not that these tribunals or, by analogy, 'foreign parties', had an instinctive understanding of the 'legal scene' in England. They were, however, quite capable of informing themselves. Neither English law nor international practice requires one to assume that sophisticated users of international arbitration, advised by counsel intimately familiar with the English legal profession, will not take the trouble to understand how it works. That is the case whether the issue involves [the Sole Arbitrator] and Respondents' barrister coming from the same chambers, or [the Sole Arbitrator] taking instruction from [both the Respondent's former counsel and the Claimant's Counsel] in unconnected matters – both the subjects of disclosures by [the Sole Arbitrator].

38. Indeed, Respondents have demonstrated an informed and sophisticated understanding of the English legal scene throughout the arbitration. It is not disputed that it was Respondents' counsel who first suggested [the Sole Arbitrator]'s name as sole arbitrator, although [the Sole Arbitrator] not

*only came from the same chambers as Respondents' barrister, but also had taken instructions from [the Respondents' former counsel] – then [the Respondents' current counsel] – in a previous case. Neither situation posed any problem to informed Respondents.*

39. *Other factors that Respondents contend give rise to justifiable doubts include that:*

*a. [The Sole Arbitrator] had a 'significant commercial relationship' with [the Claimant's Counsel] that it was in his interest to 'perpetuate and develop' because [the Claimant's Counsel] was paying (and was liable for) [the Sole Arbitrator]'s fees in the Court Case. [The Sole Arbitrator], like most well-established QCs, has a very busy legal practice involving contact with many transnational law firms such as [the Claimant's Counsel]. [The Sole Arbitrator] taking instructions from [the Claimant's Counsel] in one court case with a four-day trial was hardly a 'significant' commercial connection.*

*b. It was 'natural' that considerable personal and professional friendship would arise between [the Sole Arbitrator] and [the Claimant's Counsel] legal team during the run-up to the trial in the Court Case which coincided with the drafting of the Award. However naturally friendly or not, [the Sole Arbitrator]'s professional connection with [the Claimant's Counsel] in the Court Case did not involve any of [the Claimant's Counsel]'s lawyers with whom he had contacts in the arbitration.*

*c. It would be regarded as most surprising that [the Sole Arbitrator] could be sitting in judgment of [the Claimant's Counsel]'s costs in the arbitration whilst simultaneously defending [the Claimant's Counsel]'s costs or conduct in the Court Case. Respondents' supposition is sheer speculation; there is no evidence that [the Sole Arbitrator] undertook any such defense in the Court Case.*

*d. There was some crossover between [the Claimant's Counsel's] legal personnel in the arbitration and the Court Case. Nevertheless, the only [the Claimant's Counsel] lawyers with whom [the Sole Arbitrator] had contact in the arbitration were not involved in the Court Case. [...]*

40. *After reviewing all of the circumstances of this Challenge, I conclude that they are insufficient under Article 10.3 of the LCIA Rules to give rise to justifiable doubts as to [the Sole Arbitrator]'s impartiality or independence.*

C. Article 5.3

41. *Respondents further contend that [the Sole Arbitrator]'s failure to make proper disclosure for over a year is, in itself, a serious breach of Article 5.3 of the LCIA Rules which justifies revocation of his authority. Article 5.3 imposes a duty of initial disclosure of any 'justified doubts as to his impartiality or independence' and 'continuing duty forthwith to disclose any such circumstances to the LCIA Court, to any other member of the Arbitral Tribunal and to all the parties if such circumstances should arise after the date of such declaration and before the arbitration is concluded.'*

42. *[The Sole Arbitrator]'s account of the facts states that, after his appointment as sole arbitrator in May 2009, he became involved again in the Court Case in late November 2009. Between then and mid-November 2010, [the Sole Arbitrator] advised the client three times, attended one procedural hearing, liaised once with opposing counsel, and had one discussion with junior counsel. He only started work on trial preparation in mid-November 2010 for a four-day trial between 29 November and 8 December 2010.*

43. *Given this chronology, I fully credit [the Sole Arbitrator]’s representation that it was the trial that made him conscious of [the Claimant’s Counsel] acting in both the arbitration and the Court Case. While the disclosure could have been made earlier, I do not find that a ‘serious breach’ of Article 5.3 warranting revocation of [the Sole Arbitrator]’s authority occurred. The fact remains that the disclosure was made and the Respondents have had the opportunity to challenge [the Sole Arbitrator] based on his disclosure.*

44. *The Respondents contend that such a late disclosure, eleven days prior to the Award’s issuance, has caused the Respondents ‘substantial injustice’. Had a challenge been made to the LCIA Court at an earlier stage, Respondents argue, such challenge would have been more likely to succeed than one made after the rendering of an award. But that is not the situation here. My decision is based solely on my view of the merits of the Challenge, and has not been influenced in any way by the timing of either the Challenge or the Award. Respondents also argue that they would have been in a better position to persuade [the Sole Arbitrator] to withdraw if the disclosure had come earlier. Such a tactical consideration does not constitute ‘substantial’ injury.*

45. *Accordingly, I find that the timing of [the Sole Arbitrator]’s disclosure does not provide sufficient ground under Article 5.3 of the LCIA Rules to revoke his authority in the arbitration.*

**IV. The Decision**

46. *I conclude that the circumstances of this Challenge do not give rise to justifiable doubts as to [the Sole Arbitrator]’s impartiality or independence.*

47. *The challenge to [the Sole Arbitrator] as sole arbitrator is, therefore, DENIED.”*