

*LCIA Reference No. 132498, Decision Rendered 24 December 2014*

<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 arbitrator's impartiality or independence)
<i>Division/Court member:</i>	Former Vice President of the LCIA Court (acting alone)
<i>Summary:</i>	The test for whether there is bias is an objective test. Bias or impartiality includes where an arbitrator has prejudged an issue by expressing a firm and definitive opinion on it. Where the parties have agreed that the Tribunal decide preliminary issues relating to jurisdiction, an arbitrator who expresses his views on the merits of the case without contemplating the possibility that his view might change and by expressing that view prematurely outside the mandate provided for the preliminary issues phase of the arbitration creates an appearance of bias.

## **1 Background**

1.1 The underlying dispute arose out of multiple agreements governing the parties' rights and obligations in respect of the exploration and production of oil and gas. The agreements were governed by English law and contained LCIA arbitration clauses. 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 19 September 2013. The Respondents filed a Response on 24 October 2013.

1.3 On 12 February 2014, the LCIA notified the parties of the appointment of the Tribunal, which comprised three members.

1.4 On 13 March 2014, the First and Second Respondents filed a formal application for joinder of a third party as the third respondent in the arbitration.

1.5 By email dated 14 July 2014, the parties informed the Tribunal of an agreed list of preliminary issues to be determined at a hearing on 29 July 2014, including the question of joinder of the third party as the third respondent, jurisdiction of the Tribunal over certain counterclaims made by the Respondents and certain arguments as to set-off.

1.6 The parties exchanged submissions on the agreed issues and on 29 July 2014 a one day hearing on preliminary issues took place.

1.7 On 21 October 2014, the Tribunal issued a majority award on the preliminary issues. One of the co-arbitrators (the "Co-arbitrator") produced a dissenting opinion.

1.8 On 30 October 2014, the Respondents wrote to the Co-arbitrator that he had prejudged the merits of the counterclaims and invited him to recuse himself and resign as arbitrator pursuant to Article 10.1 of the Rules with immediate effect.

1.9 On 1 November 2014, the Claimant stated that the challenge was wholly unmeritorious.

1.10 On 2 November 2014, the Co-arbitrator replied to the Respondents' letter of 30 October 2014 and stated that he did not think it was necessary or appropriate for him to recuse himself and resign as an arbitrator at that stage.

1.11 On 6 November 2014, the Respondents filed an application under Article 10.3 and 10.4 of the LCIA Rules challenging the Co-arbitrator, seeking his removal as a member of the Tribunal.

1.12 The Claimant made submissions on the challenge on 21 November 2014. The Respondents filed a reply on 26 November 2014 and the Claimant filed final remarks on the challenge on 2 December 2014.

1.13 On 17 December 2014, 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 24 December 2014, the former Vice President rendered his decision on the challenge.

## **2 Decision excerpt**

"[...]

### **VI. THE GROUNDS FOR CHALLENGE UNDER THE LCIA RULES AND ENGLISH LAW**

38. *Section 33(1)(a) of the 1996 Arbitration Act imposes upon arbitrators a general duty 'to act fairly and impartially as between the parties'.*
39. *Article 5.2 of the 1998 LCIA Rules applicable to this case also provide that 'All arbitrators conducting an arbitration under these Rules shall be and remain at all times impartial and independent of the parties...'*
40. *Article 5.3 of the same rules obliges each arbitrator to confirm that 'there are no circumstances known to him likely to give rise to any justified doubts as to his impartiality' and imposes upon the arbitrators a continuing duty to disclose any such circumstances to the LCIA Court, the Tribunal and the parties.*
41. *Article 7.1 also provides that the LCIA Court 'may refuse to appoint any such nominee if it determines that he is not...impartial'.*
42. *Finally, Article 10.3 of the LCIA Rules provides that: 'An arbitrator may also be challenged by any party if circumstances exist that give rise to justifiable doubts as to his impartiality or independence...'*

43. *This provision echoes section 24(1)(a) of the 1996 Act, which 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’.*
44. *The test is an objective test. It was described in Porter v. Magill [2002] 2 AC 357 at paragraph 103: ‘The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.’*
45. *It can hardly be disputed that bias or partiality includes the circumstance where an arbitrator has prejudged an issue by expressing a firm and definitive opinion on it. If it is so, a fair minded and informed observer will necessarily reach the conclusion that it will be hardly possible for the arbitrator to approach the question anew with an entirely free mind.*

## **VII. DECISION**

46. *On the basis of these principles, I consider that the challenge filed by Respondents against [the Co-arbitrator] and seeking his removal as a member of the Tribunal is founded.*
47. *Whatever the submissions of the Parties on the Preliminary Issues may have been, it is clear that the issues before the Tribunal were jurisdictional issues and that the Tribunal did not have at this stage of the proceedings to express a firm and definitive opinion on the merits of the case. As mentioned above, the majority of the Tribunal was extremely clear in this respect. Even if they took into consideration the Deed of Novation in their analysis of the Preliminary Issues, they pointed out in various paragraphs of their Award that they did not make any decision on the merits of the counterclaims.*
48. *By contrast, the [the Co-arbitrator] stated in his Dissenting Opinion, that the language used in the SPA and in the Deed of Novation was entirely inconsistent with the proposition that the Parties contemplated or intended that [the First Respondent] could bring a counterclaim against [the Claimant] for alleged past breaches of the [Product Sharing Contract (“PSC”)], that [the First Respondent]’s position was not logical and [the Claimant]’s argument was correct : the Deed of Novation could hardly have made it more clear that [the Claimant] should be free and clear from, and [the First Respondent] should assume, all liabilities arising (i) under the PSC and (ii) in respect of the Transferred Interest; that liability for any claim on the part of [the First Respondent] for breach by [the Claimant] of its obligations under [...] the PSC was accordingly a liability which has been novated to [the First Respondent] itself by the Deed of Novation. The conclusion of the [Co-arbitrator] is that ‘[the First Respondent]’s counterclaim is therefore impossible to maintain’ [...]. These affirmations were stated in definitive terms before the [Co-arbitrator] turned to address the specific questions raised by the agreed Preliminary Issues [...].*
49. *The Arbitrator further recognised that his reasoning might be characterised as something going to the merits of the alleged counterclaims [...]. He implicitly confirmed the Respondents’ concern in his letter of 2 November 2014 by expressing the consideration that it was not necessary or appropriate for him to recuse himself and resign as an arbitrator ‘at this stage’ and that ‘if and when the merits of the Respondents’ counterclaims do arise for consideration by the Tribunal I shall reconsider the issue of my participation as a member of it’.*

50. *By expressing his view on the merits of the case in definitive terms without contemplating the possibility that his view might change and by expressing that view prematurely outside the mandate provided for the Preliminary Issues phase of the proceedings, the [Co-arbitrator] conveyed the impression to an objective and informed observer that he had prejudged the merits of the counterclaims at the jurisdictional phase, creating thereby an appearance of bias.*
51. *I therefore conclude on the basis of Article 10.3 of the LCIA Rules that Respondents' Application must be granted and that [the Co-arbitrator] must be removed as a member of the Tribunal conducting the present reference. This decision in no way casts any doubt on the arbitrator's personal integrity, professionalism or good standing."*