

LCIA Reference No. 1303, Decision Rendered 22 November 2001

Subject:	Challenge to arbitrator's appointment pursuant to article 10.4 of the LCIA Rules, based on article 5.3 (a declaration of any circumstances likely to give rise to any justified doubts as to an arbitrator's impartiality or independence) and article 10.3 (doubts as to impartiality or independence)
Division:	Prof. William W. Park, Dr Éva Horváth and Jean-Claude Najar
Summary:	While the grounds adduced to challenge an arbitrator may not constitute circumstances that may give rise to justifiable doubts as to his impartiality or independence, his response to that challenge may of themselves do so.

1. Background

1.1 The underlying arbitration related to a dispute arising out of an agreement for the production and distribution of batteries (the 'Agreement'). The Agreement contained an LCIA arbitration clause.

1.2 The Claimant submitted a Request for Arbitration dated 2 June 2001 to the LCIA, in which it made certain procedural proposals, including the nomination of a sole arbitrator.

1.3 Respondent's Counsel served a Response to the Request, by letter of 18 July 2001, in which it advised its agreement to the Claimant's procedural proposals, except the appointment of the arbitrator proposed by the Claimant; suggesting an alternative candidate.

1.4 On 25 July 2001, Claimant's Counsel advised that the Claimant did not agree to the appointment of the arbitrator proposed by the Respondent; that it waived the nationality requirement of article 6.1 of the LCIA Rules, so broadening the LCIA's choice of candidates.

1.5 By fax of 26 July 2001 from the LCIA Secretariat, the parties were informed that the LCIA Court would be requested to constitute the tribunal and that it would be prepared to receive the parties' submissions with regard to its constitution.

1.6 Having made no further submissions on the question of the identity of the tribunal, the parties were informed of the appointment of a sole arbitrator by the LCIA on 23 August 2001.

1.7 By letter dated 6 September 2001, the Claimant challenged the arbitrator pursuant to article 10.4 of the LCIA Rules, on the grounds of an alleged failure to disclose information.

1.8 By fax dated 17 September 2001, the arbitrator declined to withdraw, and commented on the detail of the Claimant's challenge.

1.9 The Respondent advised that it did not agree to the challenge.

1.10 On 20 September 2001, Claimant's Counsel responded to the arbitrator's fax of 17 September 2001.

1.11 The parties were advised, by fax of 25 October 2001, that the LCIA Court had appointed a Division comprising Prof. William W. Park, Dr Éva Horváth and Jean-Claude Najar to determine the challenge (the 'Division').

2. *Grounds of the challenge*

2.1 In its letter of 6 September 2001, the Claimant invoked the provisions of articles 5.3 and 10.3 of the LCIA Rules which provide:

'5.3 Before appointment by the LCIA Court, each arbitrator shall furnish to the Registrar a written résumé of his past and present professional positions; he shall agree in writing upon fee rates conforming to the Schedule of Costs; and he shall sign a declaration to the effect that there are no circumstances known to him likely to give rise to any justified doubts as to his impartiality or independence, other than any circumstances disclosed by him in the declaration. Each arbitrator shall thereby also assume a continuing duty forthwith to disclose any such circumstances to the LCIA Court, to any other members 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.'

'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 becomes aware after the appointment has been made.'

2.2 The Claimant based its challenge on the grounds of an alleged failure by the arbitrator to disclose:

- (a) the fact that he was the President of his country's trade court of arbitration (the 'Trade Court');
- (b) that the Respondent was a member of a chamber of commerce which was said to be closely linked to the Trade Court; and
- (c) that there were alleged shortcomings in the fairness of the Trade Court.

3. *Criteria to be applied*

3.1 The Division examined the LCIA Rules and applied the test set out in article 10.3 of the LCIA Rules, namely, whether 'circumstances exist that give rise to justifiable doubts' as to the arbitrators' 'impartiality or independence'.

4. *Reasoning*

4.1 The Division concluded that the fact that the arbitrator had not elected to submit a qualified statement of independence meant that he did not consider his Presidency of the Trade Court to be a circumstance likely to give rise to doubts as to his impartiality or independence.

4.2 The Division noted that both the notice of appointment of the arbitrator and the form of appointment itself (as sent to the parties by the LCIA Secretariat),

gave the Trade Court as the arbitrator's address. In light of this, the Division concluded that there had been no failure by the arbitrator to disclose his association with the Trade Court.

4.3 The Division found no reason to believe that the Respondent's membership of the chamber of commerce, or anecdotal observations about the Trade Court's fairness, called into question the impartiality of the arbitrator.

4.4 It observed that the arbitrator's fax of 17 September 2001 addressed each of the grounds adduced by the Claimant in its challenge. It took note of the language used in his response; in particular the use of the expression 'fictitious, false and malevolent' in his characterisation of the Claimant's submissions that the Trade Court was 'not famous for being always protective and fair to the justified interest for foreign companies', and his use of the expression 'viciously attributed by [Claimant's Counsel]', referring to the concluding paragraphs of the letter of 6 September 2001 from Claimant's Counsel.

4.5 The Division took into consideration the concerns expressed by Claimant's Counsel (in its response of 20 September 2001) regarding the language used by the arbitrator.

4.6 Though neither accepting that the grounds originally adduced by the Claimant for the removal of the arbitrator, nor in any way calling into question his reputation or qualifications, the Division considered that the self-evident tension and ill-feeling that had arisen as a result of the challenge had created circumstances that may, of themselves, give rise to justifiable doubts as to the arbitrator's impartiality in this particular case.

5. *Decision*

5.1 For the above reasons, the Division upheld the challenge and declared that the administrative costs and expenses should be determined by the replacement arbitrator in due course.