

LCIA Reference No. 0252, Decision Rendered 1 July 2002

Subject:	Challenge to arbitrators' appointment pursuant to article 10.4 of the LCIA Rules, based on article 10.2 (failure to act fairly and impartially) and article 10.3 (doubts as to impartiality or independence)
Division:	Prof. Emmanuel Gaillard, David W. Rivkin and John Beechey
Summary:	Where a party seeks to enquire as to progress with the issue of an Award, not only is it prohibited to direct such enquiry to an individual arbitrator without copy to the other members of the tribunal and the other parties, it is also unacceptable for the arbitrator who has been approached to provide an answer to that enquiry, thereby giving one side the benefit of an intimation of the outcome of the arbitration.

1. Background

1.1 The underlying arbitration related to a dispute arising out of a consultancy agreement and a contract for the supply of olive oil (the 'Agreements'). The Agreements each contained an LCIA arbitration clause which, in the English translation obtained by the LCIA, provided in identical terms for arbitration in London before a panel of three arbitrators, with each party nominating an arbitrator and the third arbitrator to be appointed by agreement of the first two.

1.2 In a Request for Arbitration, dated 16 September 2000, the Claimants nominated an arbitrator, and, in their Response of 12 October 2000 the Respondents nominated the second arbitrator.

1.3 By fax dated 30 October 2000, the two nominated arbitrators advised the LCIA of their nomination of the third and presiding arbitrator.

1.4 Pursuant to articles 5.4 and 5.5 of the LCIA Rules, the LCIA Court appointed the three arbitrators as the tribunal to hear the claim, and the parties were notified of the appointment on 15 November 2000.

1.5 The proceedings followed the course set out by the LCIA Rules and the directions of the Tribunal, culminating in a substantive hearing in March 2002.

1.6 On 17 April 2002, the Chairman of the Tribunal forwarded his draft of the dispositive section of the final Award to his co-arbitrators.

1.7 On 30 April 2002, following consultations with his co-arbitrators, the Chairman of the Tribunal forwarded to them a draft of the full Award.

1.8 On 1 May 2002, the Second Respondent brought proceedings against the Claimants in a US District Court (the 'US Court proceedings'). The Claimants sought an extension of time for their response in the US Court proceedings, pending a decision in the LCIA arbitration, which the Claimants asserted they had just won; informing the US District Court that '[t]he Arbitrators have now ruled on these issues in favour of [Claimants]' and that the LCIA Tribunal had 'reached

a decision for [Claimants] on April 15, 2002. The decision will be set forth in a written opinion within the next month or so’.

1.9 On 2 May 2002, Claimants’ nominated arbitrator confirmed his approval of the draft award, whilst Respondents’ nominee informed the Chairman of his intention to file a dissenting opinion, the text of which was received by the Chairman on 15 May 2002.

1.10 On 16 May 2002, the Respondents filed a challenge against the whole Tribunal, on the basis that its decision had been communicated to the Claimants before the Award had been issued, and introduced into the US Court proceedings.

1.11 By letter to the LCIA dated 17 May 2002, the Chairman of the Tribunal denied that either he or the Tribunal’s Administrative Secretary had communicated the outcome to the parties or to their Counsel.

1.12 On 20 May 2002, Respondents’ nominated arbitrator wrote to the LCIA stating that ‘if there has been any leakage of confidential information about a decision made by the Tribunal, this is certainly not due to my action or even a lack of care on my part’.

1.13 By letter dated 27 May 2002, Claimants’ Counsel confirmed to the LCIA that, about a month after the conclusion of the March hearing, he had telephoned Claimants’ nominated arbitrator ‘to find out whether a final award had been taken and eventually the content of the decision’.

1.14 Claimants’ nominated arbitrator had, he said, then told him that ‘the Arbitral Tribunal had rendered the award... the award was final, and... its content was ‘partially favourable’ to [Claimants]’.

1.15 Further, Claimants’ Counsel stated that Claimants’ nominated arbitrator had warned him that ‘[he] would have to wait for the reasoned opinion and the subsequent publication of the award from the LCIA for the details of the decision’.

1.16 By letter dated 28 May 2002 to the LCIA, Claimants’ nominated arbitrator confirmed the substance of the telephone call with Claimants’ Counsel, stating that he had taken the view that the ‘proceedings were no longer pending and that the information given was merely bureaucratic’.

1.17 By letter dated 10 June 2002, the LCIA informed the parties that the LCIA Court had appointed a Division of the Court comprising Prof. Emmanuel Gaillard, David W. Rivkin and John Beechey to determine the challenge (the ‘Division’).

1.18 On 20 June 2002, the Division consulted by telephone conference, and determined that it should proceed to rule on the challenge on the basis of the copy materials that had been provided by the LCIA Secretariat, and that further submissions were unnecessary.

2. Grounds of the challenge

2.1 The Respondents invoked the provisions of article 10.2 and 10.3 of the LCIA Rules on the basis that the Claimants’ filing in the US court proceedings

revealed the Tribunal's failure to act fairly and impartially and raised doubts as to their impartiality or independence.

2.2 Articles 10.2 and 10.3 of the LCIA Rules provide:

‘10.2 If any arbitrator acts in deliberate violation of the Arbitration Agreement (including these Rules) or does not act fairly and impartially as between the parties or does not conduct or participate in the arbitration proceedings with reasonable diligence, avoiding unnecessary delay or expense, that arbitrator may be considered unfit in the opinion of the LCIA Court.’

‘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.’

3. *Criteria to be applied*

3.1 Since the seat of the arbitration was London, the Division examined both the Arbitration Act 1996 and the LCIA Rules, and determined that the test to be applied was that set out in article 10.3 of the LCIA Rules, namely, whether ‘circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence’.

4. *Reasoning*

4.1 In considering the challenge, the Division stated that it was not for it to enquire into the circumstances in which Claimants’ US Counsel had been made aware of these matters or into the accuracy of their representations made to the US District Court. Nor was it necessary for the Division to do so for the purposes of its conclusions and recommendations in respect of this challenge.

4.2 In light of the admission made by Claimants’ nominated arbitrator, the Division was in no doubt that he had divulged certain material information concerning the award and the outcome of the arbitration a short time before the date of the Claimants’ filing in the US court proceedings.

4.3 It noted that there had been nothing to suggest that the Chairman or the Respondent’s nominee, or the Administrative Secretary of the Tribunal had been aware of the approach made to Claimants’ nominated arbitrator by Claimants’ Counsel.

4.4 The Division said that it would have been acceptable for Claimants’ Counsel to have written to the Chairman of the Tribunal (with copy to his co-arbitrator and Respondents’ Counsel) following the March hearing, to enquire as to progress towards the publication of the award, any such enquiry being transparent to all concerned. However, Claimants’ Counsel chose to make his enquiry of Claimants’ nominated arbitrator alone.

4.5 The Division stated that Claimants’ nominated arbitrator should have declined to answer the question posed by Claimants’ Counsel, and should, instead, have advised him to address any such questions in writing to the Chairman of the Tribunal; and that he should have informed the Chairman, his co-arbitrator and

the Respondents immediately of the approach made to him. The Chairman of the Tribunal would then have been in a position to remind the parties that *ex parte* communications of this kind were unacceptable and inappropriate in the context of any international arbitration, not least one conducted under the LCIA Rules.

4.6 With respect to the assertion by Claimants' nominated arbitrator that, when he spoke to Claimants' Counsel, the proceedings were no longer pending, the Division noted that the draft text of the full award had not, at the time of the telephone conversation between arbitrator and Counsel, been circulated for review among members of the Tribunal, and that Claimants' nominated arbitrator had not himself notified his approval of the text until 2 May 2002, the day after the Claimants' filing in the US Court proceedings. Further, the text of the dissenting opinion of Respondents' nominated arbitrator had not been made available until 15 May 2002.

4.7 Accordingly, and on any view, the Claimants had had the benefit of an intimation of the outcome of the arbitration (as then understood by Claimants' nominated arbitrator) weeks before the award would have been published to the parties by the LCIA in the ordinary way, had it been perfected.

5. *Decision*

5.1 In light of the above, the Division unanimously concluded that Respondents' challenge should be upheld as against Claimants' nominated arbitrator and that he should be removed.

5.2 However, the Division saw no basis for removing the Chairman of the Tribunal or Respondents' nominated arbitrator, as their conduct, so far as the Division could ascertain, had been beyond reproach. The Respondents' challenge to the Chairman of the Tribunal and Respondents' nominated arbitrator was, therefore, rejected.

5.3 The Division recommended that the appointment of the replacement arbitrator be a direct appointment made by the LCIA Court, exercising its discretion under article 11.1 of the LCIA Rules.