IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

19 June 2025

CASE No: AIFC-C/CFI/2025/0009

R JSC

Claimant

v

B and C Pvt. Ltd

Defendants

JUDGMENT

Justice of the Court:

Justice Sir Jack Beatson FBA

ORDER

UPON consideration of the Applicant's application for the removal of B as the Sole Arbitrator in IAC Case 153 of 2024 and for the appointment of a new sole arbitrator, and

UPON the Court having dismissed the application for the reasons set out in the judgment, and

UPON consideration of the issue of costs,

IT IS ORDERED THAT:

1. The application by R for the removal of the Sole Arbitrator in a pending IAC Case 153 of 2024 and the appointment of a new arbitrator is *dismissed*.

2. The parties are to seek to agree the costs of the application within 14 days of the date of this order. In default of agreement, the parties shall file written submissions on costs, including a summary of time spent and hourly rates.

3. Upon receipt of such submissions, the Court will make an immediate assessment of costs pursuant to Rule 26.5 of the AIFC Court Rules.

JUDGMENT

This judgment is in five parts, namely:

PART 1. INTRODUCTION

1. This is an application to the Astana International Financial Centre Court (hereafter the "AIFC Court") under Regulation 22(3) of the AIFC Arbitration Regulations 2017 for the removal of the Sole Arbitrator in a pending arbitration (IAC Case 153 of 2024) in the International Arbitration Centre (hereafter the "IAC") of the AIFC and the appointment of a new arbitrator. It is made by the Respondent in the arbitration and names the Sole Arbitrator and the Claimant in the arbitration as the defendants. The application was filed on 26 March 2025 and registered by the AIFC Court on 31 March 2025.

2. In circumstances described in §§12-15 below, the IAC decided that the arbitration should proceed by the expedited procedure in Article 31 of the IAC Rules. In such cases, Article 31.3 provides that, unless the Chairman of the IAC determines otherwise, the case is to be referred to a sole arbitrator.

3. To preserve the confidentiality of the arbitration, I refer to the Sole Arbitrator as B, to the Claimant in the pending arbitration as C, and to the Respondent in the arbitration as R. I refer to C's legal representatives as XYZ LLP and to its senior partner as X. I refer to R's legal representatives as LMN LLP, and to the partner acting for R in this matter, who was formerly a partner in XYZ LLP, as L.

PART 2. THE APPLICATION UNDER REGULATION 22(3) OF THE AIFC ARBITRATION REGULATIONS 2017

4. R maintains that, as a result of the circumstances surrounding B's appointment on 26 February 2025 and procedural decisions he has made since then, it has justifiable doubts as to the impartiality and independence B is required to have by Article 9 of the IAC Rules. On 31 March 2025 the AIFC Court's Registry required B and C to file acknowledgments of service within 14 days and written defences by 28 April 2025.

5. Article 9.1 of the IAC Rules requires that "*every arbitrator must be and remain independent and impartial".* R relied on the well-established reasonable third-party test as to whether there is an apprehension of bias that is applied in common law jurisdictions as well as arbitral institutions around the world including the AIFC Arbitration Regulations and IAC Rules. R's submissions referred, *inter alia* to the decisions of the UK House of Lords and Supreme Court in *Porter v Magill* [2002] 1 All ER 465 and *Halliburton v Chubb* [2020] UKSC 48 and that of Hamblen J in the English Commercial Court in *Cofely Ltd v Anthony Bingham* [2016] EWHC 240 (Comm). The test accords importance not only to actual impartiality, but to the perception of impartiality. It asks whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. The assessment is an objective assessment. In *Cofely Ltd v Anthony Bingham* Hamblen J stated:

> "*Such a fair minded and informed observer, although not a lawyer, is assumed to be in possession of all the facts which bear on the question and expected to be aware of the way the legal profession operates in practice*" and "*reserves judgment until he/she has seen and fully understood both sides of the argument: his/her approach must not be confused with that of the person who has brought the complaint, the assumptions made by the complainer are not to be attributed to the observer unless they can be justified objectively*".

The nature of the test means that an application such as this requires a detailed consideration of the factual circumstances of the case and the conduct of the arbitrator.

6. On 16 April 2025, R applied to amend its application to reflect developments since the original application and which were the subject of a challenge to the Arbitrator made on 4 April. On 17 April C responded objecting to this, and on 18 April applied for an immediate judgment in its favour dismissing R's application for B's removal or in the alternative the partial strike out of the application. Other applications made to the Sole Arbitrator and to this court, including a motion by R that the ordinary procedure rather than the expedited procedure apply to this arbitration and regarding the number of arbitrators, are dependent on the outcome of the application to remove B as the Sole Arbitrator.

7. On 28 April 2025, B informed the Court and the parties that he does not intend to participate actively in these proceedings. In his brief email he stated that he has always been independent and impartial and then gave the reasons for conducting the proceedings in the way that he had to date. He attended the hearing on 9 June 2025 in order to be able to answer any questions by me. After the parties had concluded their submissions, I put two questions to him which R's counsel had raised during the hearing. His answer to one was that he was a Russian national resident in Uzbekistan. His answer to the other

was that, prior to this case he had never been nominated as an arbitrator by XYZ LLP or by a member of the firm, but that he has since been nominated by the firm as a sole arbitrator in another IAC arbitration. After answering those questions, B asked whether he could make a statement about himself and said that he was not dependent on arbitral appointments because he was a professor at several universities and that he also acted as an expert witness and as counsel.

8. The applicant R was represented by Mr Valikhan Shaikenov and Mr Mukhit Yeleuov of ADL Disputes, Astana. The respondent C was represented by Mr Bakhyt Tukulov and Ms Marya Petrenko of TKS Disputes, Almaty. I am grateful for the assistance provided in their written and oral submissions. I note that R's submissions and supporting documents totalled 783 pages and C's totalled 191 pages.

PART 3. THE CONTRACTUAL, FACTUAL & PROCEDURAL BACKGROUND

9. In a contract entered into on 16 June 2022 C, the Claimant in the underlying arbitration, contracted to sell industrial equipment to R for a total contract price of US$ 5,868,100. The equipment was subsequently delivered. C claims that R did not pay over US$ 3 million of the sum due under the contract. R claims that the equipment delivered did not meet the contractual standards and the requirements of the applicable legislation. It gave notice of a counterclaim seeking restitution in respect of defective equipment supplied and compensation for its losses.

10. Article 9 of the contract provides that if the parties fail to settle a dispute by mutual negotiation, the "*parties may address the respective dispute to AIFC Court … arbitration under Kazakh law*" (i.e. in the IAC) and that "*the decision of the Arbitration Court shall be considered final and binding on both parties*". The applicable substantive law is thus the law of the Republic of Kazakhstan. It is agreed by the parties that the arbitration "*shall be seated in the AIFC*" and that "*the applicable procedural law is the AIFC Arbitration Regulations 2017*".

11. On 12 July 2024 C sent R and the IAC a Request for Arbitration which the IAC registered and issued on 21 August 2024. C requested the expedited procedure under Article 31 of the IAC Rules because the amount in dispute was less than US$ 5 million. That procedure involves a sole arbitrator unless the IAC Chairman determines otherwise. Section 5 of the Request for Arbitration form asks claimants to indicate the name and contact details "of any arbitrators appointed or proposed". C listed B and three others as potential sole arbitrators and invited the Respondent to agree on the candidate. The request for arbitration named XYZ LLP as the Claimant's legal representative and was signed on behalf of the Claimant by X, a senior partner of XYZ described by R as the firm's founding partner and de facto managing partner.

12. The IAC's Registry acknowledged receipt of the request and supporting documentation on 21 August 2024 and required R to file its answer in accordance with Article 5 of the IAC Rules by 18 September. It stated that, as the amount in dispute did not exceed US$ 5 million, the arbitration qualified for the expedited procedure as requested by C and that, in accordance with Article 31.3(1) of the IAC Rules, proceedings under the expedited procedure "*shall be referred to a sole arbitrator unless the IAC Chairman determines otherwise*". The email also stated that C had asked the IAC to appoint an arbitrator from the list in its Request for Arbitration, and that the Registry recommended the appointment of B, a member of the IAC's Arbitrators' Panel. It attached B's CV and stated that if it did not receive a reply from the parties by 2 September 2024, the IAC Chairman would proceed to appoint B as the sole arbitrator.

The Expedited Procedure

13. In its Answer to the Request for Arbitration dated 2 September 2024, R maintained that due to the complexity of the case, the need for expert evidence, and the likelihood of multiple potential counterclaims, the expedited procedure and a sole arbitrator were unsuitable. It requested the IAC Chairman to permit the constitution of a three-member tribunal and it nominated a person not on C's list as "*the arbitrator from the Respondent's side*", i.e. as its party nominated arbitrator. A supplementary response dated 18 September 2024 was mainly about potential counterclaims which, although it was not possible to estimate their value, stated they would be likely significantly to exceed US$ 5 million. The supplementary response also stated that R would be represented in the arbitration by LMN LLP. In emails dated 21 and 30 September 2024, C objected to the supplementary response and maintained its position that the expedited procedure be used and stated that there was a significant risk of conflict of interests and serious ethical concerns as L, who was representing R, was a former partner of LMN LLP and was assisted by a paralegal who had worked on C's case and left the firm to join L. The parties made submissions on these questions until early October.

14. On 27 January 2025, an email signed by the Registrar of the IAC informed the parties that he had considered the parties' submissions but "was not persuaded by the arguments submitted by the Respondent that the expedited procedure should not apply".

15. The Registrar stated that "*no evidence has been submitted to the Registry to indicate that the amount in dispute exceeds the aggregate equivalent of USD 5 million, other than an assertion by the Respondent that the 'amount of counterclaims is likely to significantly exceed USD 5 million'…*". He also stated that he was not persuaded that the case is too complex for it to be appropriate for the tribunal to be constituted with one arbitrator. In his view, "*a tribunal with one arbitrator who is appropriately qualified and experienced, should be able to satisfactorily consider this case, ably supported by relevant expert evidence if the tribunal deems this to be necessary, without unnecessary delay or expense, in accord with the Overriding Objective*". The email also noted that under the Expedited Procedure a case was to be referred to a tribunal with one arbitrator unless the IAC Chairman determined otherwise pursuant to Article 31.3 of the IAC Rules. His determination was that the case should be conducted by the Expedited Procedure with a sole arbitrator.

The Selection of the Sole Arbitrator

16. The Registrar's email dated 27 January 2025 also stated that the Registry had "*selected [B] from the IAC Arbitrator Panel to be appointed as the sole arbitrator in this case, and it is proposed that the IAC Chairman will appoint this arbitrator … if no objection to the appointment … is received at the registry … by 17:00 Astana time on Thursday 6 February 2025*".

17. The Registrar had previously made inquiries of B, who provided a statement of "acceptance, independence, impartiality and availability" dated 16 January 2025. B stated that there were "*no facts or circumstances, past or present that I should disclose because they might be of such a nature as to call into question my independence in the eyes of any of the parties and no circumstances that could give rise to reasonable doubts as to my impartiality*" and that he could devote the time necessary to conduct the arbitration "*as diligently, efficiently and expeditiously as possible*". Article 9.3 of the IAC Rules requires copies of that statement to be sent to the parties and any other arbitrator but unfortunately that was only done on the morning of the hearing before me on 9 June 2025 following a request by R on Saturday 7 June. R argued (see e.g. §71 of R's Response to C's Defence to the present application dated 5 May

2025) that the failure to provide the parties with the statement undermined transparency and cast doubt on the integrity of the appointment process but did not pursue the point at the hearing.

18. On 5 and 6 February 2025 R's legal counsel objected to B's appointment, stating that while it did "*not question the qualifications or professionalism of [B]*", it wished to bring it to the Registrar's attention that B was proposed by the Claimant whereas R had nominated another person. R and its counsel stated that to ensure full compliance with the requirement in Article 28 of the AIFC Arbitration Regulations that "*the parties shall be treated with equality*" the Registrar should appoint an arbitrator who is not on either parties' list.

19. On 26 February 2025 the Registry wrote stating that B was appointed as sole arbitrator. The email noted R's counsel's objections but stated that Rule 8.4(1) of the IAC Rules provided that where the parties did not agree on an arbitrator appointment, the tribunal (in this case, the sole arbitrator) shall be appointed by the IAC Chairman. It stated that the appointment of B "*was deemed appropriate by the IAC Chairman having regard to his qualifications and the overriding objective*". B "*is a member of the IAC arbitrator panel and has complied, for this case, with all independence and impartiality requirements under the IAC Rules 2022. Counsel has not provided any 'justifiable doubts' as to [B's] independence, impartiality or qualifications*".

20. On 27 February B sent the parties a draft Procedural Order No. 1 and asked them to comment on it by 7 March. R's counsel, L of LMN LLP, responded stating they would review the document and revert by the deadline. On 6 March L wrote to B asking for his bank details in order to proceed with the payment of B's fees and on 7 March he sent a confirmation of payment to B. L did not comment on B's appointment in any of these communications.

21. R did not comment on the draft PO No. 1 by 7 March but on that day, filed a motion requesting the sole arbitrator to disqualify XYZ LLP from acting on behalf of C in the arbitration. On 11 March, L asked that R be given the opportunity to comment on the draft PO No.1 after the motion to disqualify XYZ LLP was decided.

The motion to disqualify C's legal representatives

22. The motion R filed on 7 March 2025 requested B to disqualify X, all members of XYZ LLP and XYZ LLP as a firm, from representing C in the arbitration. R claimed the firm and its members and employees have a conflict of interest arising from a prior professional legal services agreement dated 29 July 2022 with R under which it was to provide legal services concerning the "*appeal of the act of special investigation of a group accident with a fatal outcome related to work activity of a higher state body and representation of interests in the SIEC [special intradistrict economic court]*" and "*in the court of appeal in that case*". Paragraph 5 of the motion stated that a potential cause of the accident was the use of the industrial equipment sold by C to R. R submitted that the XYZ LLP had therefore previously represented it in a substantially related matter gaining access to confidential information directly relevant to this arbitration.

23. Clause 7 of the legal services agreement provided that:

> "*any information or documents exchanged and received by the parties under this agreement, and all correspondence or communication between the client and the firm in any form ('Confidential Information'), shall be strictly confidential and may not be disclosed to third parties without the written consent of the party to this agreement*".

Clause 8, headed "Conflict of Interest", was a confidentiality clause requiring XYZ LLP to obtain the client's "*consent in cases where any representation of the interests of third parties by us may cause damage to the client*", and containing an undertaking by the parties "*to inform each other of any conflicts of interest that may arise during the provision of services*".

24. R relied on:

    (i) the fact that XYZ LLP's legal services agreement with R had not been terminated, named X as its primary contact with R, and stated that X would oversee and bear responsibility for the services the firm rendered to R,
    (ii) logins and actions accessing R's confidential cloud storage system which showed that between December 2022 and December 2023, i.e. after the dispute with C had arisen, members of XYZ LLP accessed files related to this arbitration including C's claim and R's counterclaim and the quality of the industrial equipment sold by C to R, and
    (iii) the content of C's Request for Arbitration which also showed C's access to documents relevant to the arbitration from R's cloud system.

    Paragraph 1 of R's motion stated that the conflict of interest raised by these matters "*undermines the integrity of these proceedings and the fundamental principles of fairness and impartiality*".

25. B invited C's counsel to respond to the motion and C did so on 12 March 2025. C denied that there was a conflict or a risk of conflict or that XYZ LLP had used R's confidential information. It stated that after about 8 December 2023, over six months before C made its request for arbitration, XYZ LLP did not render any legal services to R. Moreover, XYZ's previous work for R was limited to specific administrative litigation and did not involve work on a group accident with a fatal outcome or issues concerning the industrial equipment sold by C to R. Moreover, no evidence had been furnished as to what confidential information belonging to R XYZ LLP had access to.

26. On 12 March 2025, B acknowledged receipt of C's response and stated that he would make his decision by Friday 14 March 2025. He also stated that should he require further submissions, he would "*direct such party or parties … accordingly*". R claimed the right to reply to C's response, relying on the requirement in Regulation 28 of the AIFC Arbitration Regulations that "*the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case*". It stated that C's response contained new arguments, factual statements and allegations. The sole arbitrator's response was that in view of the overriding objective to avoid unnecessary delay and considering the 6-month lapse of time since the commencement of the arbitral proceedings he sought no further statements.

27. On 13 March R submitted its response reiterating its justification for doing so and stating that it trusted that the arguments in it would be considered. B acknowledged receipt but stated that an unsolicited statement or submission "is not part of the record of the proceedings unless he decided otherwise" and reserved the right not to consider it.

    R's First Challenge to the Sole Arbitrator

28. On 13 March R stated that it had justifiable doubts as to the Sole Arbitrator's impartiality and independence as a result of the initial procedural actions taken by him in dealing with R's motion to disqualify XYZ LLP, its members and its employees from acting as C's legal representatives. It relied in particular on B's requests that the parties "*refrain from making unsolicited statements and submissions*

going forward", B's statement that should he require these he would so direct, and B's reservation of the right not to consider R's later reply to C's response to the motion. R also stated:

> "*importantly, the questionable conduct of the Sole Arbitrator manifested itself only after the respondents raised the issue of a conflict of interest of the Claimant's Counsel. This is particularly concerning given that the Sole Arbitrator was appointed from a list provided solely by the Claimant.*"

In the light of this, R requested B to recuse himself from the arbitration to preserve the integrity of the process.

29. On 14 March 2025, B reserved his decision on R's motion to disqualify C's legal representatives pending the resolution of the challenge and invited C to make written representations on the challenge requesting that he recuse himself. C did so on 18 March, and R sought the opportunity to respond in view of new arguments, evidence and legal authorities submitted by C, including a decision of the LCIA Court dated 3 January 2018.

30. B replied stating that he would decide the challenge as it was presented by R. In the same email he stated that he had reviewed the challenge and rejected it. He stated that at the time of his appointment he was independent from and impartial towards the parties and their counsel and remained so. He invited R to inform him whether it intended to apply to the AIFC Court under Article 10.7 of the IAC Rules and Regulation 22(3) of the AIFC Arbitration Regulations to decide on the challenge.

The Sole Arbitrator's Decision on R's motion to disqualify C's legal representatives

31. In an email to the parties dated 21 March 2025, B stated that he had reviewed the parties' submissions including what he described as R's unsolicited reply dated 13 March 2025, and he rejected the motion to disqualify XYZ LLP. He stated that his email stood as Procedural Order No. 1 and would be finalised on 31 March 2025.

32. B's decision stated that he recognised that the right to counsel of a parties' choice and the right to fair proceedings are two fundamental principles of any adjudicatory process and are enshrined in the AIFC Arbitration Regulations. On the basis of the AIFC Arbitration Regulations and the IAC Rules, he concluded that XYZ LLP might be disqualified if there was a real risk that members of the firm representing C had received confidential information from R which might be of significance in and might prejudice the fair conduct of the present proceedings. He stated that he was not convinced that this standard was met, giving the following reasons:

    (1) Although R demonstrated that some members of XYZ LLP had at least some access to R's confidential information, those individuals had left the firm and were not part of C's legal team in the arbitration.
    (2) The motion was based on an assumption that X, the founding partner and de facto managing partner of XYZ LLP, had access to R's confidential information, but a "mere assumption" no matter how reasonable it might be was not sufficient to disqualify X.
    (3) There was no evidence suggesting that Y, an associate at XYZ LLP, had or ought to have had access to R's confidential information.
    (4) Although B believed that the information referred to in the motion to disqualify and the unsolicited statement in reply was *prima facie* significant to C's claim and R's counterclaim, he concluded that R had failed to demonstrate how that information was prejudicial to its case

33. In order to address R's concerns, the Sole Arbitrator stated that his decision was conditional on:
    (1) Each member of C's legal team at XYZ LLP making a statement confirming that s/he did not have access to R's confidential information relevant to the proceedings and were not relying on such information, and
    (2) Having a "Chinese Wall" between members of C's legal team and former employees who had previously acted for R rather than disqualifying the firm of XYZ LLP from acting for C.

    Those affidavits and statements were made and a Chinese Wall arrangement was put in place. The decision also invited R and its Counsel to inform B at the earliest convenience if any of C's statements and submissions were based on R's confidential information C could not have obtained other than through its past representation of R. B reserved the right to strike out such statements and submissions from the record.

34. In its application registered on 31 March 2025, R applied to this Court to determine its challenge to B's appointment as Sole Arbitrator, requesting his removal and replacement.

    R's Second Challenge to the Sole Arbitrator

35. On 4 April 2025, R raised a second challenge also based on B's handling of R's motion to disqualify XYZ LLP, its members and its employees from acting as C's legal representatives. R claimed that this demonstrated a disregard of compelling evidence of a conflict of interest by XYZ LLP and for R's procedural rights and showed additional grounds for R having justifiable doubts as to B's impartiality. This challenge has three limbs. The first is that B failed to address R's request to disqualify the entire firm of XYZ LLP as opposed to named individuals within it. The second is that he proposed an unsolicited *ex post facto* Chinese Wall solution six months after the commencement of the arbitration, thus implicitly acknowledging there was a conflict of interest and confirming rather than resolving any procedural impropriety. The third is that B dismissed direct evidence of the conflict as speculative. R's amended claim form states at §101 that the second challenge is based on the ground that B's "handling of the motion to disqualify … alone demonstrates a disregard for procedural fairness and therefore constituted further compelling evidence of [B's] lack of impartiality and independence".

36. C responded to the challenge on 5 April 2025. On 9 April B rejected it stating that he found that there were no justifiable reasons for recusing himself.

PART 4. SUMMARY OF THE PARTIES' PRINCIPAL SUBMISSIONS

37. R's submissions are contained in its claim form registered on 31 March 2025, its application to amend its claim form filed on 16 April 2025, and its Response to C's Defence, filed on 5 May 2025. C's submissions are contained in its application for immediate judgment and partial strike-out dated 15 April 2025, its response to R's application to amend its claim form filed on 17 April 2025, and in its Defence, filed on 28 April 2025. I have considered all the submissions but here summarise only those central to the core case on the challenge to the Sole Arbitrator's impartiality and independence.

    R's submissions

38. I summarised the test relied on by R in §5 above. R submitted that, assessed cumulatively and assessed holistically, the circumstances of B's appointment as sole arbitrator and his procedural decisions

thereafter satisfied that test and gave rise to justifiable doubts within Regulation 21 of the AIFC Arbitration Regulations and Article 9.3 of the IAC Rules as to his impartiality and independence and justified his removal and the appointment of a new arbitrator. The procedural decisions made by the Sole Arbitrator after his appointment are relevant to the challenge for apparent bias because they deprived R of a meaningful opportunity to present its case and respond to new arguments and new factual assertions made by C.

39. For its submission that the views of both parties are duly considered when appointing a sole arbitrator who must be seen as neutral from the outset, R relied on the decision of Aikens J in *XL Insurance Ltd v Toyota Motor Sales USA Inc,* 14 July 1999 about the appointment of a presiding arbitrator, the decision of the US District Court for South Carolina in *Hooters of America, Inc v Phillips* 39 F. Supp. 2d 582 (1998), and the commentary in Gary Born, *International Commercial Arbitration,* 2nd ed. 2014, ch 12 p 52.

40. There was, R maintained, procedural irregularity in B's appointment because C, which had nominated him, had greater influence in his appointment than R. R submitted that a higher standard of impartiality applies to the appointment of sole arbitrators and presiding arbitrators who must be seen to be neutral from the outset. Accordingly, the appointment of a sole arbitrator from a list put forward by one party in the absence of the consent of the other party when that other party explicitly requested that a person not on either party's list be appointed raised concerns about the Sole Arbitrator's impartiality and independence: R's claim, §§ 31-52, and R's response to the C's Defence dated 5 May 2025, §§ 42-43 and 54. See also R's submission dated 6 February 2025 objecting to the IAC's proposal to appoint B summarised at § 18 above. In his oral submissions, R's counsel referred to another case in which B had been proposed as a sole arbitrator by XYZ LLP but the other party had not consented as showing that the circumstances of B's appointment in the present case was not an isolated incident.

41. R also submitted that the procedural decisions subsequently made by B are relevant to the challenge for apparent bias because they repeatedly deprived R of a meaningful opportunity to present its case and respond to new arguments and new factual assertions made by C. Taking them chronologically, they are the decisions not to seek further statements after receiving C's response to R's motion to disqualify XYZ LLP, reserving the right not to consider the statement R subsequently sent, and, because they are integral to an understanding of the full factual context, the three elements of R's second challenge summarised at §35 above concerning B's rejection of R's motion to disqualify XYZ LLP, its members and its employees.

42. As to the motion to disqualify XYZ LLP, R submitted that there was clear evidence that the firm was conflicted as a result of the professional legal services agreement it entered into with R in July 2022 containing the confidentiality clause set out at §23 above. It is not disputed that XYZ was granted access to confidential information in R's cloud storage. A timesheet dated 11 April 2023 showed the work done by X for R in March 2023. The work was described as "*assistance to [R] in connection with the tasks not associated with the special appeal against the Lenina Commission Report*", and each entry gave a brief description of the topic, e.g. "*strategy in the criminal case*", "*daily update*" "*co-ordination of processing information requests*". Moreover, R stated that there was clear evidence before the arbitrator and this court that documents directly relevant to the industrial equipment C sold to R were requested by two of XYZ LLP's junior employees on 28 August and 18 September 2023 and by a paralegal on 5 April 2023. In oral submissions it was claimed that the reason B did not disqualify XYZ LLP was because the firm had identified him as one of the four individuals it identified for appointment as a sole arbitrator.

43. B's decision was also criticised because, although it referred to R's request for the disqualification of XYZ LLP as a firm, R submitted that his reasoning focussed on whether named individuals within it had access to confidential information and ignored the institutional nature of the conflict. Taking account of the fact

that certain members of the firm who had access to R's confidential information had since left the firm, R argued, overlooked the fact that it is the firm which owes the duty of confidence. R submitted that B had made no attempt to investigate the extent of XYZ LLP's access to R's confidential information or whether the nine individuals named as authorised to act on behalf of C had prior involvement in R's matters or accessed confidential information. Nor had he investigated how the information was stored within the firm, assessed what steps had been taken to prevent the use or dissemination of such information, or whether X or other members of the firm had knowledge of information which could still materially prejudice the integrity of the proceedings despite the subsequent erection of Chinese Walls. He had also not investigated the implications of X excluding himself from the XYZ legal team engaged in the arbitration on behalf of C, in part because that was only done in X's affidavit dated 31 March 2025, after B's decision on 21 March rejecting the motion to disqualify XYZ LLP and its members.

44. As to procedure, R submitted that although its objection to B was made on 5 February 2025, nearly 6-months after it learned that B was one of those nominated by C, it was timely because the 14-day period under Article 10.3 of the IAC Rules for challenging an arbitrator cannot start until the tribunal has been constituted; here on 26 February 2025. Until then, R's communications were to the IAC Registry and the IAC Chairman. Moreover, the application was timely even under Article 10.3 because 26 March 2025 was the first available business day following the Nauryz holidays.

45. R also submitted that it filed its application challenging the Sole Arbitrator to the AIFC Court of First Instance within the thirty-day period after his decision on 18 March 2025 specified under Regulation 22(3) of the AIFC Arbitration Regulations and Rule 27.28 of the AIFC Court Rules.

C's submissions

46. C submitted that there was no procedural impropriety in B's appointment. R was clearly not excluded from the appointment process. It did not propose a different sole arbitrator but raised its concerns about appointing a person on C's list and its desire for a three-person arbitral panel which the IAC found insufficient. The sole arbitrator was appointed by the IAC without party intervention after considering the views of both parties. The IAC Chairman was entitled to appoint an arbitrator from the IAC panel whether or not that person was proposed by one of the parties, provided that person had appropriate qualifications and met the requirements of impartiality and independence.

47. There was no procedural unfairness or bias in B's handling of R's motion to disqualify XYZ LLP and the challenges to him. Regulation 29(2) of the Arbitration Regulations and Article 12.2 of the IAC Rules gave the tribunal broad discretion to conduct the arbitration in such manner as it considers appropriate guided by the overriding objective to resolve disputes fairly without unnecessary delay or expense. C made the following submissions about the specific complaints:

    a. In view of the fact that between 27 February and 12 March R had sent 9 emails to B and C, B's request that the parties refrain from making unsolicited statements and submissions was proportionate. B was entitled to conclude that he had enough information to determine the matter fairly. In any event B did consider R's reply to C's response to the motion to disqualify.

    b. B did not overlook R's request to disqualify XYZ LLP as a firm or show partiality by focussing on two individuals, X and Y: see §§ 97of C's Defence to R's application. The decision states that the firm "*may be disqualified if there is a real risk that members [of it] representing [C] have received confidential information from [R] which may be of significance in and may prejudice the fair conduct of the … proceedings*". C submitted that R did not (i) articulate the applicable legal test for

disqualification or explain how the facts it relied on satisfied that test or (ii) identify any specific confidential document relating to the arbitration that was accessed by XYZ LLP or its members: §§109-110 and 106 of C's Defence to R's application.

c. C also noted: (i) B concluded that the record did not establish that either X or Y had access to confidential information relevant to the arbitration, (ii) a key document relied on by R was unspecific and did not mention C or name the industrial equipment sold by C to R, and (iii) the requests referred to in the motion to disqualify were by three junior members of the firm who had left it before the arbitration began: see respectively §§ 106, 113, 98, 59 and 61 of C's Defence to R's application. C also noted that R had not replied to an offer by it to disclose prior engagement documents which it maintained showed that its past work was irrelevant to current claims and the arbitration: §60 of C's Defence to R's application.

d. B's proposal that a Chinese Wall be established was not an acknowledgment that a disqualifying conflict had been established. It was an appropriate procedural measure in order to address R's concerns in circumstances where R had failed to provide any evidence that XYZ LLP's current legal team had accessed confidential information relevant to the arbitration: see §§100, 102, 104 of C's Defence to R's application. R did not respond to B's invitation (see § 33 above) to R to identify any specific statements or submissions based on R's confidential information relied on by C which C could not have obtained other than through its past representation of R.

48. C also submitted that the application was time-barred for a number of reasons. As to challenging B's appointment, R waived its right to do so because Article 10.3 of the IAC Rules requires objections within 14 days of learning of the relevant circumstances. B's nomination was proposed in the request for arbitration on 24 August 2024, but R did not object until 5 February 2025, over five months later. C submitted that because it could take a long time for a tribunal to be appointed, a party which has identified a problem, for instance in relation to a proposed arbitrator, should identify it promptly.

49. As to R's application to this Court, the 30-day period under Regulation 22(3) of the AIFC Arbitration Regulations is a default provision and does not apply where the parties have agreed on another deadline. They did so in this case because, by the adoption of the IAC Rules in their contract, they agreed on the 7-day period in Article 10.7 of the IAC Rules. Regulation 10(b) of the Arbitration Regulations provides that "*parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest*", and the 7-day period does not contravene due process or public policy.

50. Secondly, the 7-day period was not extended as a result of the Nauryz holiday pursuant to IAC Rules, Article 3.3. That provision applies to arbitral proceedings and not to proceedings in this court and Rule 2.9 of the AIFC Court Rules explicitly includes holidays in calculating periods of 6 days or more.

51. Thirdly, R is not assisted by Rule 2.10 of the AIFC Court Rules because that applies only to activities "at the Registry" and not to electronic filings, and there is no evidence that R attempted to file electronically but did not succeed.

52. C also submitted that R's late filing prejudiced it because it has incurred significant costs and even a one-day delay has disrupted the expedited procedure and undermined the arbitration's efficiency. C's statement of claim was to be filed on 8 May 2025 and it has invested considerable time in case management, initial procedural exchanges, and the preparation of substantive submissions and pleadings: see §§ 120-123 of C's Defence to R's application.

PART 5. DISCUSSION AND CONCLUSIONS

53. Mustill & Boyd, *Commercial and Investor State Arbitration* (3rd ed., 2024) state at §8.85 that:

> *"Many complaints about lack of impartiality by arbitrators focus on rulings on procedural decisions. A tribunal will often have to make rulings on issues of procedure as the arbitration progresses. Parties who have procedural rulings made against them may sometimes suspect, or choose to believe, that the arbitrator or tribunal is not approaching the matter impartially, and rely upon the record of procedural rulings to buttress a removal application. Such reliance is generally misplaced. The correctness of a procedural ruling does not, without more, have any bearing on the impartiality of those making such rulings. Courts accord a wide margin of appreciation in case management decisions (although that it not to say that the manner in which procedural decisions are taken can never be evidence of lack of impartiality)."*

Similar points are made in Clifford & Wade, *A Commentary on the LCIA Arbitration Rules,* 2nd ed., 2022 at §§ 10-020-021 and 14-009. The rules governing IAC arbitrations also confer broad discretion on tribunals: see Regulation 29(2) of the AIFC Regulations and Article 12.2 of the IAC Rules.

54. The question before me is whether, assessed cumulatively and holistically, the circumstances of B's appointment as sole arbitrator and his procedural decisions thereafter gave rise to justifiable doubts within Regulation 21 of the AIFC Arbitration Regulations and Article 9.3 of the IAC Rules as to his impartiality and independence. Underlying R's application is its dissatisfaction with the IAC's decision to proceed by Article 31's expedited procedure and for the case to be referred to a sole arbitrator: see §§ 13-16 and 18-19 of its Answer to the Request for Arbitration, summarised at §13 above).

55. I first consider the submissions based on the way B was appointed. I then consider those based on B's subsequent procedural directions when handling R's motion for the disqualification of XYZ LLP and its members from representing C in the arbitration, and then whether, as C submitted, R's application is time barred.

56. The IAC Registry's initial email to the parties on 21 August 2024, acknowledging receipt of C's Request for Arbitration, stated that it recommended the appointment of B and that the IAC Chairman would proceed to appoint him if the Registry did not receive a reply from the parties by 2 September 2024. This was before it had heard what R's views were as to whether to use the expedited procedure and a sole arbitrator. It would have been better if the email had explicitly invited R's views on these questions before making a recommendation about a sole arbitrator. But it is clear from the reference to Article 5.2 of the IAC Rules in the email that R's Answer was required to contain comments on procedural matters including the number of arbitrators and whether the arbitration should proceed by the expedited procedure. Moreover, since B is a member of the IAC Arbitrators' Panel and would have to clear conflicts and make a statement of independence, impartiality and availability before being appointed, I do not consider that the indication given on 21 August 2024 was procedurally improper.

57. Thereafter, the concerns expressed by R in its Answer to the Request for Arbitration on 2 September and in its subsequent submissions were considered by the IAC's Registrar. On 27 January 2025 the Registrar gave a reasoned decision (summarised at §§ 14-15 above) for his conclusion that the case

should be conducted by the expedited procedure and gave the parties the opportunity to object to the appointment of B by 6 February 2025. Before then the Registrar had (see §17 above) obtained the required statement of independence, impartiality and availability from B.

58. R's objection to the appointment on 5 and 6 February did not question B's qualifications or professionalism. It was based solely on the fact that it was C which in the Request for Arbitration form had suggested B as one of 4 names. R's submission referred to its nomination of another person, but not to the fact that it was proposing a party-nominated arbitrator to be a member of a three-person tribunal rather than a sole arbitrator. R did not then in fact engage with the selection of a sole arbitrator except by asking that a person not on either party's list should be appointed.

59. While it may be that greater care is warranted where what is being considered is the appointment of a sole arbitrator, I reject the submission that where a sole arbitrator is being appointed an arbitral institution cannot appoint a person over the objection of one of the parties. What is important is the ground of the objection. Here there was no objection to B's independence or impartiality and R did not suggest that B was not appropriately qualified. R's only objection was that C had included B's name in the list of possible sole arbitrators.

60. I also reject R's submission that a higher standard of impartiality is required in the appointment of sole arbitrators. There is no indication that this is the case in the summary of the law in *Halliburton v Chubb* [2020] UKSC 48. Lord Hodge stated at [151] that "[*t]he obligation of impartiality is a core principle of arbitration law and in English law the duty of impartiality applies equally to party-appointed arbitrators and arbitrators appointed by the agreement of party-appointed arbitrators, by an arbitral institution, or by the court*". (emphasis added)

61. R was not excluded from the appointment process in the way the employees were in *Hooters of America Inc. v Phillips* 39 F. Supp. 2d 582 (1998). The concerns expressed by R in its Answer to the Request for Arbitration on 2 September and in its subsequent submissions were considered by the IAC's Registrar. In those circumstances, the mere fact that B, a member of the IAC's Arbitrators' Panel, had been proposed to the IAC by C, the other party to the dispute, is not a violation of the requirement in Regulation 28 of the Arbitration Regulations and Article 12.2 of the IAC Rules that the parties be treated with equality. It was open to R to suggest individuals for appointment as sole arbitrator by the IAC, but it only suggested a person as its party nominated arbitrator on a three-person panel. The situation here thus differs from that in *XL Insurance Ltd v Toyota Motor Sales USA Inc,* 14 July 1999 where there were two contenders for appointment as presiding arbitrator and Aikens J chose the one about whom there was no objection.

62. Moreover, the mere fact that B had been suggested by C did not, in my judgment, create a justifiable doubt as to his independence or impartiality so as to preclude the IAC from appointing him. Neither did it provide a legitimate basis for an allegation that he lacked independence and impartiality and that there was a real possibility that the arbitral tribunal was or appeared to be biased under the reasonable third-party test stated in *Porter v Magill* [2002] 1 All ER 465 and *Halliburton v Chubb* [2020] UKSC 48.

63. For these reasons, I accept C's submission that in the circumstances of this case the IAC Chairman was entitled to appoint an arbitrator from the IAC Arbitrators' Panel whether or not that person was proposed by one of the parties but objected to by the other. What is required is that the individual is appropriately qualified and meets the requirements of impartiality and independence.

64. I turn to the submissions based on B's subsequent procedural directions when considering R's motion to disqualify XYZ LLP and its members from representing C in the arbitration. I can deal with the first in time, the subject of the first challenge (summarised at §28 above) briefly. This was the challenge to B's decisions not to seek further statements after receiving C's response to R's motion to disqualify and to reserve the right not to consider any unsolicited responses. I have concluded that those decisions fell well within the broad discretion B was given by Regulation 29(2) of the Arbitration Regulations and Article 12.2 of the IAC Rules in respect of the conduct of the arbitration. He was entitled to conclude that he had enough information to determine the matter fairly without a further statement from R. Since, notwithstanding his reservation, he did consider R's reply to C's response, in any event no injustice was caused to R.

65. The substantive challenges to B's handling of R's motion to disqualify XYZ LLP and members of the firm from acting on C's behalf depend on showing a disqualifying conflict of interest as a result of the firm's previous work for R under a professional legal services agreement. They raise a very serious and difficult issue which has troubled me. Legal systems generally and correctly take a strict approach to protecting disclosure by lawyers of their clients' confidential information. For example, in England § 6.5 of the Solicitors' Regulatory Authority ("SRA") Code of Conduct provides that a lawyer may not act for a client ("J") who has an interest adverse to the interest of "K", another client or former client of the lawyer, and the lawyer has confidential information belonging to "K" which is material to the matter concerning "J" unless effective measures have been taken which result in there being no real risk of disclosure or use the confidential information or "K" has consented to the lawyer acting for "J". See also the decisions of the New Zealand Court of Appeal in *Russell McVeagh Mckenzie Bartlett v. Tower Corporation* [1998] 3 NZLR 64 and the UK House of Lords in *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222 at 226-7 and 234-5.

66. In *Prince Jefri Bolkiah v KPMG* Lord Millett stated at 235 that it is incumbent on a person who seeks to restrain his former lawyer from acting in a matter for another client to establish "*(i) that the [lawyer] is in possession of information which is confidential to him and to the disclosure of which he has not consented and (ii) that the information is or may be relevant to the new matter in which the interest of the other client is or may be adverse to his own*". Where it has been established that the lawyer was in possession of confidential information belonging to a former client which is relevant to a disputed matter concerning their new client, the burden is on the new client and the lawyer to show that there is no risk of it being disclosed to or used in relation to the new client's matter. It is, however, important that the person alleging a disqualifying conflict of interest puts such information before the decision-maker, whether that be a court, a regulator, or an arbitral tribunal. Although the burden of proof is on the person alleging a disqualifying conflict, Lord Millett stated at 237 that it is not a heavy one and it is not necessary to introduce any presumptions in relation to the two matters that person must establish.

67. In the present case, R's motion that XYZ LLP be disqualified referred (see §42 above) to three requests by junior members of the firm who left the firm before the arbitration began and had no role in it. In his oral submissions on behalf of R, Mr Yeleuov stated that there were many more requests of relevance to the industrial equipment C sold to R and therefore of significance to this arbitration before B but they were not before me because they are in Russian. I note, however, that Part 2.3 of the AIFC Court Rules provides that "*all documents for use in the Court shall be in the English language or be provided with translations into the English language*".

68. R has known that XYZ LLP was representing C from the time it received the Request for Arbitration in July 2024. It had over six months to put together evidence that XYZ LLP's legal team had accessed confidential information relevant to the arbitration from R's cloud storage. But all I have before me are the quotations in the motion for disqualification of extracts from the three access requests referred to above by

individuals who left the firm before the request for arbitration was made. Apart from those, there are no copies of access requests for documents in R's cloud storage relating to C's claim for the industrial equipment it supplied to R and a possible counterclaim by R, let alone evidence showing that such documents had been accessed.

69. R's submission is in effect that it was incumbent on B proactively to investigate which members of XYZ LLP had requested access to relevant confidential information in R's cloud storage, which requests had been granted, and how and by whom accessed information was stored at XYZ LLP. While, as I have stated, the allegation that XYZ LLP had a conflict of interest disqualifying the firm from acting for C in the arbitration is a serious one, it was up to R, the person making the allegation to put the relevant information establishing it before the decision-maker, here initially the sole arbitrator and, then this court.

70. It was not suggested that R did not have records of all access requests to material stored on its cloud or of requests for material relevant to this arbitration that were granted. However, save for the extracts from the three access requests I have referred to, no such requests were put before this Court. In those circumstances, I have concluded that B was entitled to conclude that, although the information referred to was *prima facie* significant to C's claim and R's counterclaim, R had failed to demonstrate access which was prejudicial to its case.

71. Moreover, since the decision, X and Y have taken up B's invitation to swear affidavits stating that they have had no access to R's confidential information relevant to the arbitration and to establish a Chinese Wall within the firm. By contrast, R has not responded to B's invitation (see §33 above) R to identify any specific statements or submissions based on R's confidential information relied on by C which C could not have obtained other than through its past representation of R. B had reserved the right to strike such statements and submissions from the record.

72. Those invitations were appropriate responses to a situation in which the sole arbitrator considered that what R was alleging was a significant conflict of interest but that R had not established to the required standard that there was a real risk that XYZ LLP and, through XYZ LLP, C had received R's confidential information which may prejudice the conduct of the arbitration.

73. Had R established that there was a real risk that confidential information relevant to the arbitration had been received, R would have been correct to maintain that the erection of an *ex post facto* Chinese Wall would not have resolved the problem. But given my conclusion that B did not err in finding that R had not established this, I accept C's submission that the proposal of a Chinese Wall was not an acknowledgment that a disqualifying conflict had been established. It was a procedural measure in order to address R's concerns in circumstances where R had failed to provide any evidence that XYZ LLP's current legal team had accessed confidential information relevant to the arbitration.

74. For these reasons, I have concluded that R has not satisfied the substantive component of the reasonable third-party test because it has not demonstrated that XYZ LLP in fact had access to information which was confidential to R and of relevance to the arbitration.

75. In view of that conclusion, it is not necessary to decide whether R's application was out of time for one or more of the reasons advanced by C at §§ 45-48 of its Defence. I see force in C's submission that R should have informed C and the IAC of its view that XYZ LLP had a disqualifying interest within a reasonable time of learning in July 2024 that the firm was representing C in the arbitration. In *Claimant v Defendants A, B, C, and D ÂIFC-C/CFI/2023/0033*, 23 November 2023, Justice Sir Rupert Jackson stated

at §4.3 that it would be good practice to give all parties prompt notice of the challenge which would be coming once the tribunal has been constituted.

76. Justice Sir Rupert Jackson, however, also made it clear that a valid challenge could not be launched until the tribunal had been constituted. In the present case, it therefore appears that time began to run for the periods specified in Article 10.3 of the IAC Rules, Regulation 22(3) of the AIFC Arbitration Regulations and Rule 27.28 of the AIFC Court Rules only when the tribunal was constituted on 26 February 2025. Accordingly, R did comply with the time limits in the Regulations and IAC Rules.

77. Consideration of whether R's application must also be dismissed on the ground of his failure to give pre-emptive notice of his future challenge, would require determining whether C was correct in submitting that R had in fact engaged in a pattern of delaying tactics to obstruct progress and delay the arbitration that merited sanction, notwithstanding its compliance with the time limits in the Regulations and Rules. In view of my conclusion that the substantive grounds underlying the application were not demonstrated it is not necessary to undertake what would involve a factual inquiry into R's intentions and the reasons for its actions. It would indeed be disproportionate to do so.

78. For the reasons in this Part of my decision, R's application that B be removed as the Sole Arbitrator in IAC Case 153 of 2024 and a new sole arbitrator be appointed is dismissed.

79. There remains the question of the costs of the application. Rule 26.5 of the AIFC Court Rules provides that the general rule is that the unsuccessful party pay the costs of the successful party, here C, but that the Court may make a different order. C has applied for US$ 15,000 as its costs of this application. I invite the parties to attempt to reach an agreement on the costs to be awarded, or to provide submissions on costs, including a summary statement of the time taken on this application and the hourly rates involved within 14 days of receipt of this decision. On receipt of such submissions, I am minded to make an immediate assessment of costs.

By Order of the Court,

Justice Sir Jack Beatson FBA,
Justice, AIFC Court

Representation:

The Claimant was represented by Mr Bakhyt Tukulov, Partner, and Ms Marya Petrenko, Associate, TKS Disputes, Almaty.

The Defendant was represented by Mr Valikhan Shaikenov, Partner, and Mr Mukhit Yeleuov, Partner, ADL Disputes, Astana.