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INSIGHT

From party equality in constituting the tribunal to party equality before the arbitral tribunal: the Paris Court of Appeal's novel take on *Dutco*

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On 26 January 2021, the Paris Court of Appeal rejected an application to set aside an ICC award in a multiparty shareholder dispute[1]. The claimant in these proceedings argued that the award would have to be set aside under Article 1520(2) of the French Code of Civil Procedure because the tribunal had been improperly constituted. It had put forward two arguments in support of its set-aside application, both of which were rejected by the Court of Appeal. This commentary will briefly discuss the Court of Appeal's ruling on the first of these arguments, i.e. that the tribunal was improperly constituted because the ICC had directly appointed all five arbitrators despite the contractually agreed appointment procedure.

The facts

The dispute that gave rise to the award challenged in the set-aside application arose out of a four-party shareholders' agreement ("Shareholder Agreement") with the following arbitration clause:

"16.1 Any claim, dispute or other matter in question between the Parties with respect to or arising under this Agreement or the breach thereof, shall be decided by arbitration, by a panel of five [5] arbitrators, one to be designated by each Party, and the fifth one to be designated by the other four arbitrators, provided, however, that if no agreement between the arbitrators designated by the Parties is reached, the independent arbitrator shall be designated by the President for the time being of the International Chamber of Commerce.

1. Paris Court of Appeal (International Chamber of the Court, Chamber 5-16), 26 January 2021, No 19/10666. The author of this commentary acted as counsel for one of the respondents in the underlying arbitral proceedings.

Such arbitration shall be in accordance with [the] Rules of the International Chamber of Commerce. Any such arbitration shall be conducted in English in Paris."

In 2015, one of the four shareholders, PT Ventures, SGPS, SA ("PTV") filed a request for arbitration against the three remaining shareholders, claiming that they had been acting in concert to deprive it of its shareholder rights. PTV submitted that applying Article 16(1) of the Shareholder Agreement would result in the tribunal being composed of a majority of arbitrators appointed by parties whose interests were aligned against its own. It submitted that, in these circumstances and for the sake of the principle of party equality under French law – the law of the arbitral seat –, the tribunal should comprise three arbitrators. The respondents, in turn, insisted that Article 16(1) of the Shareholder Agreement should be abided by and proceeded to appoint one arbitrator each.

After unsuccessfully inviting the parties to agree on a method for constituting the arbitral tribunal, the ICC Court went on to appoint all five members of the tribunal pursuant to Article 12(8) of the ICC Rules (2017 version).

The Court of Appeal's decision

The Court first pointed out that, failing an agreement between the parties on the method for constituting the tribunal, the ICC was entitled to step in pursuant to either Article 1453 of the French Code of Civil Procedure, which provides that *"[i]f there are more than two parties to the dispute and they fail to agree on the procedure for constituting the arbitral tribunal, the person responsible for administering the arbitration or, where there is no such person, the judge acting in support of the arbitration, shall appoint the arbitrator(s).*", or Article 12(8) of the ICC Rules of Arbitration, the relevant part of which provides that *"[i]n the absence of a joint nomination pursuant to Articles 12(6) or 12(7) and where all parties are unable to agree to a method for the constitution of the arbitral tribunal, the Court may appoint each member of the arbitral tribunal and shall designate one of them to act as president."*

At paragraph 62 of its decision, the Court of Appeal then underscored that the steps taken by the ICC *"enabled the constitution of the arbitral tribunal and, accordingly, allowed the parties' intention to have their dispute settled by these means to be respected, and*

allowed the obstacle resulting from the parties' opposition to the method for appointing the arbitrators provided for in this clause to be overcome." [2]

The Court went on to state the following:

"63- Therefore, it was for the ICC, as the arbitration institution in charge of organising the arbitration, in view of the parties' opposition, to put in place a method for appointing the arbitrators that was consistent with its Rules and in such a way that this could be done in accordance with the mandatory principle of equality of the parties in constituting the tribunal, which means that each party is entitled to participate on an equal footing in the constitution of the arbitral tribunal. [3]

64- In this respect, if on the day the arbitration clause was concluded it was consistent with said principle to stipulate that each party to the shareholder agreement could actually appoint one arbitrator, then, on the day the dispute arose, this principle of equality has to be applied not only in light of the parties' capacity under the contract, but also in light of the claims and interests of each of the parties to the dispute. As such, if several of them are likely to raise joint interests against another one, steps must be taken to constitute an arbitral tribunal which allows this principle to be respected.[4]

65- Therefore, within the contours of the case at hand, in which the dispute is between one of the shareholders and the remaining three, with the former claiming that the latter acted together in expelling it and breaching the shareholder agreement, the principle of

2. Unofficial translation of: *"[ces dispositions] ont permis la mise en place d'un tribunal arbitral et ainsi de respecter la volonté des parties de voir trancher leur différend selon cette voie et de surmonter l'obstacle résultant de l'opposition des parties quant aux modalités de désignation des arbitres telles que prévues par cette clause."*

3. Unofficial translation of: *"Il incombait donc bien à la CCI, en tant que centre chargé d'organiser l'arbitrage, compte tenu de l'opposition des parties, d'organiser les modalités de désignation des arbitres conformément à son Règlement, et ce dans des conditions telles qu'elles permettaient de satisfaire au principe d'ordre public de l'égalité des parties dans la désignation des arbitres, qui suppose la possibilité pour chaque partie de pouvoir participer de manière égale à la constitution d'un tribunal arbitral."*

4. Unofficial translation of: *"A cet égard, si au jour de la conclusion de la clause compromissoire, il était conforme audit principe de prévoir que chacune des parties au pacte d'actionnaires puisse effectivement être en mesure de désigner un arbitre, au jour où le litige est né, ce principe de l'égalité doit s'apprécier non plus seulement au regard de la qualité des parties au contrat, mais aussi au regard des prétentions et des intérêts de chacune des parties au litige. Ce faisant, si plusieurs d'entre elles sont susceptibles de défendre des intérêts communs et partagés contre une seule autre, il convient de veiller à constituer un tribunal arbitral permettant d'en garantir le respect."*

equality of the parties in the appointment of the arbitrators required, in the absence of a better agreement between the parties, the application of an appointment method that was consistent with respect for said principle, to which the parties, notwithstanding the provisions of the arbitration agreement, are subject."[5]

Accordingly, the Court dismissed the argument that the tribunal had been improperly constituted because the ICC had directly appointed all five arbitrators rather than applying the parties' arbitration clause.

From party equality in constituting the tribunal to party equality before the tribunal

Both Article 1453 of the French Code of Civil Procedure and Article 12(8) of the ICC Rules are the offshoot of the French Court of Cassation's landmark *Dutco* decision in 1992[6]. The *Dutco* case involved three parties to a construction contract with an arbitration clause that provided for ICC arbitration with a three-member panel. Dutco initiated arbitral proceedings against the remaining two parties for payment of separate money claims. In accordance with its applicable rules at the time, the ICC Court confirmed the arbitrator appointed by Dutco and requested that the two respondents jointly appoint an arbitrator, failing which it would appoint an arbitrator on their behalf. Even though the two respondents eventually appointed a joint arbitrator, they did so under protest and later filed an application to set aside the award on the grounds that the tribunal had been improperly constituted. On appeal, the Court of Cassation sided with the respondents in the arbitration, establishing a *"principle of equality of the parties in the appointment of the arbitrators"* of mandatory application.

This principle thus implies that where there are more parties to the dispute than seats on the arbitral tribunal pursuant to the applicable arbitration agreement, and in the absence of a joint nomination by the parties to the dispute, the arbitral institution or

5. Unofficial translation of: *"65- Ainsi, dans la configuration telle que celle de la présente cause, au terme de laquelle le litige oppose l'un des actionnaires aux trois autres, le premier mettant en cause l'action conjointe de ces derniers dans son éviction et le non respect dudit pacte, le respect du principe de l'égalité des parties dans la désignation des arbitres justifiait, en l'absence de meilleur accord des parties, de s'assurer d'une modalité de désignation compatible avec le respect dudit principe, qui s'impose aux parties nonobstant les dispositions de la convention d'arbitrage."*

6. Court of Cassation, First Civil Chamber, Decision of 7 January 1992, Case No. 89-18708/89-18726.

the supporting judge may appoint *all* members of the tribunal rather than just *some of them*.

It is also because of this shortage of seats on the arbitral tribunal that the parties asked to make a joint nomination cannot *legitimately* be required to reach an agreement on that joint nomination, or that the need for all the parties to agree on an alternative method for constituting the arbitral tribunal may *legitimately* arise.

In the case at hand, the premise for applying the *Dutco* principle as enshrined in either Article 1453 of the French Code of Civil Procedure or Article 12(8) of the ICC Rules was lacking. Under the arbitration agreement, there were as many seats on the arbitral tribunal as there were parties to the dispute. No joint nomination by two or more parties was required in order for the tribunal to be constituted pursuant to the arbitration agreement. No *legitimate* need arose for the parties to agree on an alternative method for constituting the arbitral tribunal. In other words, the *"principle of equality of the parties in the appointment of the arbitrators"* as hitherto understood was not at stake.

Nevertheless, at paragraph 62 of its decision, the Court of Appeal underscored the existence of an *"obstacle resulting from the parties' opposition to the method for appointing the arbitrators"*, as if the case before it fell squarely within the scope of Article 1453 of the French Code of Civil Procedure or Article 12(8) of the ICC Rules and the *Dutco* principle. This was, in fact, the view PTV had taken in the arbitration and the set-aside proceedings.

At paragraphs 64 and 65 of its decision, however, the Court changed tack. It explained that if the ICC Court was entitled to appoint all members of the arbitral tribunal, it is because the principle of equality of the parties in constituting the tribunal should be understood as barring the constitution of a tribunal where a majority may hold views adverse to one party.

The merits of this ruling are likely to be extensively discussed by scholars and practitioners in the near future. Yet whether or not one agrees with this ruling, it is undeniable that it radically changes the contours of the *Dutco* principle. In addition to entailing an objective assessment of the parties' entitlement to appoint an arbitrator – based on the number of seats available on the arbitral tribunal and the number of

parties to the dispute – the principle of party equality in constituting the tribunal now also entails a subjective assessment of that entitlement – based on the parties' likely positions in the proceedings. Moreover, because it presupposes that an arbitrator is likely to espouse the views of the party that appointed him or her, this ruling equates party equality in constituting the tribunal with party equality *before* the arbitral tribunal.

To be continued?

This ruling may still be appealed to the Court of Cassation, which would have the final say on whether the principle of party equality before the arbitral tribunal may trump the parties' intention as set out in an otherwise valid arbitration agreement. The Court of Cassation would then have to decide whether to claim the Court of Appeal's novel take on *Dutco* as its own or to reject it.