French Supreme Court Nullifies ICC Practice For Appointment of Arbitrators in Multiparty Cases

Ruling Calls into Question Clauses and Awards Governed by French Law Or Subject to Interpretation or Review by French Courts

by Christopher R. Seppala, Esq.

In a recent landmark ruling, *Siemens AG and BKMI Industrienlagen GmbH* v. *Dutco Consortium Construction Company, Ltd.* (the *Dutco* case), the French Supreme Court (*Cour de Cassation*) nullified a longstanding practice of the International Chamber of Commerce (ICC) for the appointment of arbitrators in multiparty arbitrations.

The Court's ruling has the effect of calling into question many multiparty arbitration clauses governed by French law or that may be subject to interpretation by the French courts. Even multiparty arbitration proceedings already underway in France, or that may be subject to review by the French courts (including awards already rendered), may be affected.

Given the importance of French law to the development of international arbitration, especially as the ICC has its headquarters in Paris, this is a decision that should interest every international business lawyer.

ICC Practice

To understand the ICC practice in question, it is necessary to refer initially to the Rules of Arbitration of the ICC (the ICC Rules). As readers will know, the ICC Rules envisage the settlement of disputes by one or three arbitrators, unless the parties agree otherwise. The parties are free to agree on the number (one or more) and the names of the arbitrators; if they do not do so, these matters will be decided by the International Court of Arbitration of the ICC (the ICC Court) in accordance with the ICC Rules.

In the usual "biparty" arbitration (that is, between a single claimant and a single defendant), where the parties or, if the parties fail to agree, the ICC Court has fixed the number of arbitrators at three, the claimant and the defendant each nominates one arbitrator, subject to confirmation by the ICC Court. The third arbitrator, or Chairman, is appointed by the ICC Court if the parties fail to agree on the Chairman.

However, in a "multiparty" arbitration (that is, one with multiple claimants or defendants, or both), where the number of arbitrators is three, the claimants or defendants, as the case may be, may be unable to agree upon a jointly nominated arbitrator. In practice, the difficulty most often arises when there are two or more defendants. Two or more claimants, having decided to bring an arbitration jointly, usually can agree on a jointly nominated arbitrator, but two or more defendants often cannot, especially if each perceives its interests to be different from those of the other defendant or defendants.

How is this difficulty to be resolved? It is almost never addressed in the relevant arbitration clause. Like most other multiparty arbitration issues, it is not addressed in the current version of the ICC Rules. Consequently, to enable the arbitration to proceed, the ICC Court's practice in such cases has been to require the two or more defendants to agree on a joint nomination, failing which the ICC Court appointed an arbitrator on their behalf.

The *Dutco* Case

This was the practice that the French Supreme Court condemned in *Dutco*. In that case, BKMI Industrienlagen GmbH, a German contractor, had entered into a contract with an employer in the Sultanate of Oman for the construction of a cement plant. Thereafter, BKMI entered into a consortium agreement with two other corporations, Siemens AG and Dutco Consortium Construction Company, Ltd., for the execution of the construction contract. Siemens and Dutco were BKMI's silent partners, BKMI being solely bound to the Omani employer. The consortium agreement among the three companies contained an arbitration clause similar, though not identical, to the standard ICC arbitration clause. The clause provided that "all disputes" relating to the consortium agreement would be finally settled under the ICC Rules by "three arbitrators" appointed in conformity with such Rules.[1]

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Thereafter, Dutco commenced an ICC arbitration

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Landmark Court Ruling

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against BKMI and Siemens, pursuant to the arbitration clause, asserting separate claims against each of them. BKMI and Siemens challenged the validity of this proceeding, asserting that Dutco should have commenced two separate ICC arbitrations, one against each defendant, which would, among other things, have enabled each defendant to nominate its own arbitrator, as the claimant Dutco had been able to do.

The ICC Court rejected this contention and, in accordance with its practice, required BKMI and Siemens to jointly nominate an arbitrator, failing which the ICC Court would appoint one on their behalf. An arbitral tribunal was constituted consisting of an arbitrator nominated by Dutco, an arbitrator jointly nominated—under protest—by the defendants, and a chairman appointed by the ICC Court in accordance with the ICC Rules. The ICC Court's decision to require the two defendants to agree to jointly nominate an arbitrator (although the claimant had enjoyed the right to nominate its own arbitrator) was upheld by the arbitral tribunal and later, when the arbitral tribunal's award was challenged, by the Paris Court of Appeal.

In arriving at its decision, the Court of Appeal said that, inasmuch as the arbitral clause provided for the submission of all disputes among the three parties to arbitration by three arbitrators, it was necessarily implicit from the clause that, in the event of a dispute, whereas two parties would have to agree jointly on the nomination of an arbitrator, one party would nominate an arbitrator alone. Thus the parties' intentions had been respected.

Supreme Court Decision

However, in a judgment of January 7, 1992, the French Supreme Court quashed the decision of the lower court, holding that the decision (and, therefore, by implication the ICC Court's standard practice) violated:

- Article 1502(2) of the French New Code of Civil Procedure, which provides that an arbitral award may be set aside where the arbitral tribunal has been irregularly constituted, and
- Article 6 of the French Civil Code, which provides that contracts may not derogate from laws relating to public policy (*ordre public*) and morality.

Furthermore, in arriving at its decision, the French Supreme Court enunciated the following principle (translation):

> Whereas, the principle of equality of the parties in the naming of arbitrators is a matter of *ordre public* (public policy); it can be derogated from only after the dispute has arisen.
>
> *(Attendu que le principe de l'égalité des parties dans la désignation des arbitres est d'ordre public; qu'on ne peut y renoncer qu'apres la naissance du litige.)*

Other than this statement of principle, the Supreme Court gave no reason explaining its decision. Evidently, the Supreme Court concluded that the two defendants had not been treated equally with the claimant, which had been able to appoint its own arbitrator.

Supreme Court Was Right To Throw Out ICC Practice

There should be nothing surprising, as Mr. Pierre Bellet has noted,[2] in the Supreme Court's requirement in this case that each party should be treated equally in the appointment of arbitrators. As the present writer had noted in relation to the Court of Appeal's decision:

> Neither defendant had the freedom to nominate an arbitrator, a freedom that the claimant enjoyed.
>
> Where defendants cannot agree on a joint nomination, or can only concur in one under protest, reserving their rights, as was the case here, it would be fairer, and certainly more 'equal' for the ICC Court to appoint an arbitrator on behalf of the claimant, as well as one on behalf of the defendants.
>
> Being first to the courthouse should not entitle a claimant to greater rights in the nomination of an arbitrator than each defendant.[3]

The Supreme Court was, therefore, right to condemn the ICC Court's practice of compelling multiple defendants jointly to nominate an arbitrator. The ICC Court was treating parties unequally. Its practice was unjustified in the absence, at least, of a provision authorizing it in the ICC Rules. Such a provision is in fact contained in the Rules of the Arbitration Court of the Chamber of Commerce and Industry of the former U.S.S.R. (see Rule 19(3)) which, surprisingly, seem more modern than the ICC rules in this respect.[4]

Although the ICC Rules require every arbitrator, including a party-nominated arbitrator, to be independent of the parties involved in an arbitration, nonetheless, where there are to be three arbitrators, each party can be expected to want to nominate an arbitrator which it believes will be sympathetic to its own case. Experienced arbitration practitioners know that this is not a negligible right. Where a party is deprived of such right (or enjoys less rights in this respect than its adversary), it could be prejudiced.

In this connection, the principle that the parties should be treated equally in the appointment of arbitrators does not necessarily mean that each party should have the right to nominate an arbitrator. Rather it implies that each party should have equal rights in the process of constituting the arbitral tribunal.

Statement of Principle Goes Too Far

However, the French Supreme Court went too far when declaring that the principle of equal treatment of the parties in the naming of arbitrators *cannot be derogated from until after a dispute has arisen.*[5]

This would imply that one cannot derogate from this principle in the drafting of an arbitration clause which would, of course, ordinarily take place well before any dispute could have arisen. Such a declaration would bar any contractual solution to the appointment of arbitrators in an arbitration clause, other than one whereby any sole

arbitrator is, or all the arbitrators (including the arbitrator who would otherwise have been nominated by the claimant) are, appointed by an arbitral institution or a state court (unless the parties can otherwise agree on arbitrator(s) after the dispute arises).[6]

This statement of principle risks needlessly undermining many multiparty arbitration clauses and multiparty arbitration proceedings already underway, which are potentially subject to interpretation or review by the French courts. Even awards already rendered in multiparty arbitration cases could be at risk.

The importance of the Supreme Court's judgment is emphasized by its formulation as an *arrêt de principe*, that is, a judgment which is intended to establish a legal principle, rather than as an *arrêt d'espèce*, that is, a judgment which is to be confined to its own facts. The categorical statement of a general principle at the beginning of the judgment (*arrêt*), called a *chapeau*, is the mark of an *arrêt de principe*.[7]

This unfortunate declaration could probably have been avoided had the ICC Rules included a provision such as that in the Rules of the Chamber of Commerce and Industry of the former U.S.S.R. referred to above (although even this provision would now be invalid in France under the Supreme Court's statement of principle). Hopefully, this decision will encourage the ICC to address the problem of updating its Rules soon.

In the meantime, the declaration that the principle of equal treatment of the parties can only be derogated from after a dispute has arisen has been widely criticized by French legal commentators.[8] French legal commentators, including Mr. Pierre Bellet, a former *Premier Président* (equivalent to Chief Justice) of the *Cour de Cassation* and an authority on arbitration, take the view that as long as parties have unequivocally waived the right to appoint an arbitrator, they should not be entitled to complain later about unequal treatment.

The difficulty in this case, as Mr. Bellet has rightly further noted, and what justifies the Court's decision to quash, is that there was no unequivocal waiver. The same may be said for other multiparty arbitration cases where the arbitrators' jurisdiction is founded on the ICC standard arbitration clause given that, although more than 20 percent of ICC arbitrations involve three or more parties, the ICC Rules (which the ICC standard arbitration clause incorporates by reference) still do not explicitly address the appointment of arbitrators in a multiparty context.

Potentially Wide Impact

In the writer's view, the Supreme Court's declaration that the principle of equal treatment of the parties in the naming of the arbitrators cannot be derogated from until after a dispute has arisen will probably be recognized by the Supreme Court in the fullness of time to be excessive and it will limit the application of the principle to the particular facts of the *Dutco* case. This is plainly the hope of French legal commentators.[9] To give the Supreme Court's decision greater weight would run counter to more than 20 years of the Supreme Court's case law in favor of international arbitration.

However, until the Supreme Court acts to limit the application of its recent declaration, any party involved in either the drafting of an arbitration clause in a multiparty situation or a multiparty arbitration that could come before the French courts would be imprudent to overlook the potentially wide impact of the Court's *arrêt de principe* in *Dutco*.

Footnotes

[1]Although not cited in the French Supreme Court's decision, the complete arbitration clause is contained in the brief (*conclusions*) of the *Avocat Général* to the Court. The clause provides as follows:

> 21.1 Tous les différends découlant de cet accord, qui ne pourront être règlés à l'amiable entre les Membres, seront tranchés définitivement conformément au Règlement de Conciliation et d'Arbitrage de la Chambre de Commerce Internationale par trois arbitres nommés conformément à ce Règlement. Le Siège du tribunal arbitral sera à Paris.
>
> 21.2 Aucun litige, question ou différend existant avant ou pendant toute procédure arbitrale ne donnera le droit à aucun des Membres de cet accord de refuser d'exécuter ses obligations respectives selon cet accord.

(Translation:

> 21.1 All disputes arising from this agreement and which cannot be resolved amicably by the Members shall be resolved finally in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three arbitrators appointed pursuant to these Rules. The place of arbitration shall be Paris.
>
> 21.2 No disagreement, issue or dispute which arose before or which arises during any arbitration proceeding shall give the right to any of the Members to this agreement to refuse to perform their respective obligations pursuant to this agreement.)

[2]*See* Cass. Civ. 1re, 7 janvier 1992, Rev. arb. 1992 no. 3, note Bellet.

[3]Seppala and Gogek, *Multiparty Arbitration Under ICC Rules*, Middle East Executive Reports, March 1990, p. 23.

[4]Rule 19(3) provides as follows: "Where there are two or more plaintiffs or defendants, the plaintiffs and the defendants shall choose one arbitrator on each side, they also can choose one reserve arbitrator each. Failing agreement among the plaintiffs or the defendants the arbitrator shall be appointed by the President of the Arbitration Court."

In fairness, the ICC Rules are not the only international arbitration rules which fail to deal explicitly with the appointment of arbitrators in a multiparty context. The same criticism may be leveled at most, if not all, other international arbitration rules. But as the ICC is the world's preeminent international arbitral institution, one could expect the ICC to be taking the lead in addressing and resolving this issue.

[5]This harkens back to the 1843 decision of the French Supreme Court in *L'Alliance* v *Prunier* (*see* Seppala, *French Domestic Arbitration Law*, The International Lawyer 1981, Vol. 16, No. 4, 753-4). In that famous case, the Court held an arbitration clause to be unenforceable on the grounds that it did not name the arbitrators or identify the matter in dispute. This implied that parties could not enter into an enforceable agreement to arbitrate until after a dispute had arisen. This remained the law in France in commercial cases for the following 75 to 80 years.

[6]The only alternative would be for the claimant to have to institute separate arbitration proceedings against each defendant which would, however, give rise to additional expense and time as well as, possibly, inconsistent awards.

[7]*See* Barry Nicholas, *The French Law of Contract*, Oxford (2nd Edition 1992), 16-17; and Perdriau, JCP 1990 I. 3468.

[8]*See* the notes to this case of Pierre Bellet, Rev. arb. 1992 no. 3 and of Charles Jarrosson, J.D.I. 1992 no.3; *see also* Stephen R. Bond, *Equality is Required When Naming Arbitrators, Cour de Cassation Rules*, World Arb. and Med. Rep. 1992.70.

[9]Messrs. Bellet and Jarrosson in the notes referred to above.