Multi-party arbitration under ICC rules

Following a recent decision by a French court, Christopher R Seppala and Daniel Gogek of White & Case, Paris put the case for greater care when drafting arbitration clauses in multi-party contracts

Traditionally, standard arbitration clauses and rules of arbitration have been drafted upon the assumption that any arbitration of a dispute would be between a single claimant and a single defendant. Thus the Rules of Arbitration of the International Chamber of Commerce (ICC Rules) generally presuppose a dispute between a 'claimant' and a 'defendant' and, where the dispute is substantial (over US$1m), the ICC International Court of Arbitration (ICC Court) will ordinarily, unless the parties otherwise agree, fix the number of arbitrators at three: the claimant will nominate one arbitrator, the defendant another, and, unless the parties otherwise agree, the Chairman will be designated by the ICC Court. To our knowledge, the ICC Court has rarely, if ever, constituted a tribunal with more than three arbitrators.

However, the reality of modern business life is that many types of contracts are 'multi-party' in nature (that is, between more than two parties). For instance, joint ventures or consortia of contractors for international construction projects are often among three or more parties, eg the consortia of UK and French contractors for the construction of the Channel Tunnel. Moreover, a substantial number of multi-party contracts in turn provide for the settlement of disputes by arbitration as may be indicated, roughly, by the number of multi-party disputes submitted to arbitration. According to the ICC, approximately 21 per cent of the Requests for Arbitration submitted to the ICC Court between 1984 and 1988 involved three or more parties.

Not standard

Nevertheless, when entering into a multi-party contract, parties tend to continue to use an arbitration clause in the traditional form (eg the standard ICC arbitration clause), that is, one which does not address expressly how disputes are to be resolved in such a context. For example, in the case of a contract among three parties, if one party wishes to initiate arbitration against the other two, must it commence a single arbitration proceeding against both or a separate proceeding against each one? If it must commence a single proceeding against both, does each of the defendants have the right to nominate its own arbitrator or must the two of them make a joint nomination? If they must make a joint nomination and cannot agree on one, is the arbitral institution, or the appointing authority concerned, authorised to appoint one on their behalf? Does it make any difference whether the two defendants have conflicting interests (eg claims against each other)? These issues, which are just some of those that may arise in the case of a multi-party dispute, are not addressed expressly either in the standard ICC arbitration clause (which provides 'All disputes arising in connection with the present contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules') or in the ICC Rules to which it refers.

A recent decision of the Court of Appeal of Paris is of interest as it indicates how, in the case of a dispute among three parties to the same contract, the French courts will interpret an arbitration clause, similar to the standard ICC arbitration clause, which does not expressly provide for multi-party arbitration. The decision is also significant in view of the influential role of the Paris Court of Appeal, to whose review a large number of ICC awards are subject (the ICC headquarters are in Paris), in the development of international arbitration law, both in France and abroad.

Three party dispute

In *BKMI Industrieanlagen GmbH et al v Dutco Construction*, First Chamber, May 5, 1989 (unreported), BKMI Industrieanlagen GmbH, a West German contractor, had entered into a contract in 1981 with Raysut Cement Corporation (Sultanate of Oman) pursuant to which BKMI agreed to construct a cement plant for Raysut in the Sultanate of Oman on a turnkey basis. 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. Under the consortium agreement, Siemens and Dutco were BKMI's silent partners. BKMI was the leader of the consortium and was, alone, bound directly to Raysut. The consortium agreement contained a clause providing for the settlement of 'all' disputes by ICC arbitration. The clause was apparently similar, though not identical, to the standard ICC arbitration clause.

In 1986, Dutco commenced an ICC arbitration against both BKMI and Siemens, under the arbitration clause in the consortium agreement, alleging that they had breached their contractual obligations thereunder and asserting a separate financial claim against each of them. BMKI and Siemens challenged the validity of this proceeding, asserting that Dutco should have commenced two separate ICC arbitrations. A separate proceeding against each company would, among other things, have enabled each to nominate its own arbitrator.

The ICC Court rejected *prima facie* the defendants' jurisdictional challenge and requested them to nominate jointly an arbitrator, failing which the ICC Court

would normally appoint one on their behalf. Thereafter, an arbitral tribunal was constituted consisting of an arbitrator nominated by the claimant, Dutco, an arbitrator nominated — under protest and without prejudice — by BKMI and Siemens jointly, and a Chairman appointed by the ICC Court in accordance with the ICC Rules.

On May 19, 1988, the arbitral tribunal rendered a partial award upholding the tribunal's jurisdiction and finding that (1) the arbitration proceeding had been properly commenced and should continue in the form of a multi-party arbitration proceeding against the two defendants, and (2) the arbitral tribunal had been properly constituted.

With respect to point (1), the arbitral tribunal stated that the central question was as follows (translation):

> 'whether the three parties to the 'horizontal' consortium agreement (BKMI, DUTCO, SIEMENS) had, in agreeing to the [ICC] arbitral clause, the common intention of submitting any dispute among themselves to a multi-party arbitration in which the three corporations would be opposed within the framework of a single arbitration proceeding'.

For the purposes of interpreting the arbitration clause, the tribunal found that it was not bound to refer to any particular national law. It also observed that the ICC Rules do not contain any rule excluding multi-party arbitration. On this basis, the arbitral tribunal found that the parties had accepted the possibility of a single multi-party arbitration proceeding (against the two defendants) and had the common intention to submit disputes, if any, thereto.

The arbitral tribunal then examined point (2), namely, whether it had been properly constituted, deciding that it had been, because:

> (i) under Article 2(4) of the ICC Rules, which provides, 'Where the dispute is to be referred to three arbitrators, each party shall nominate in the Request for Arbitration and the Answer thereto respectively one arbitrator for confirmation by the Court', 'each party' must be interpreted in these circumstances as referring to one or more claimants, or one or more defendants since the right of each party to choose 'its arbitrator' is not an absolute one, but admits certain exceptions such as an implicit waiver by the parties;
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> (ii) the constitution of the arbitral tribunal in this case had not given rise to any manifest unfairness;
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> (iii) the principle of equal treatment of the parties had not been violated; and
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> (iv) there had been no violation of French internal or international public policy.

Different views

The arbitral tribunal's partial award was by no means a foregone conclusion. In a parallel case involving some of the same parties, the same arbitration clause and the same construction project, a different ICC arbitral tribunal apparently found that no implied consent to multi-party arbitration had existed.

BKMI and Siemens requested the Paris Court of Appeal to annul the arbitral tribunal's partial award on jurisdiction on the basis of two grounds for the annulment of awards rendered in international arbitration provided for by the French New Code of Civil Procedure, namely, where French international public policy has been violated (Article 1502(5)), and where the arbitral tribunal has been improperly constituted (Article 1502(2)). For this purpose, they alleged, among other things, that by the institution of a multi-party arbitration the contractual basis for arbitration had been disregarded as Dutco's claims against BKMI and Siemens were distinct and unrelated and the parties' agreement, of which the ICC Rules were a part, evinced no intention to submit to a multi-party arbitration. They also argued that the principles of equal treatment of the parties and respect for their rights of defence had been violated, because each defendant had been deprived of the right to nominate its own arbitrator and to organise freely its own defence in light of its own interests, which interests, the defendants alleged, differed from the other's.

The court's decision

The Court of Appeal upheld the award in favour of Dutco, rejecting both grounds for annulment. It began by noting that (translation): 'the submission of a multilateral dispute to a single arbitration tribunal can result only from the common intention of the parties, whether express or tacit but unequivocal on this issue, and must assure respect for the principles of equal treatment of the parties and the free exercise of their rights of defence'.

The Court then noted that the arbitration clause concerned provided for the resolution of disputes by three arbitrators (not by 'one or more arbitrators' as provided for in the standard ICC arbitration clause). Then, with regard to the issue of the interpretation of the arbitration clause, the Court, proceeding more by way of assertion (in our view) than reasoned argument concluded that the parties had agreed implicitly to a multi-party arbitration. In reaching this conclusion the Court relied on three arguments: the arbitral clause provided expressly for three arbitrators, thereby necessarily implying under the ICC Rules that, in a dispute among all three parties, two of them would have jointly to nominate an arbitrator or have one appointed on their behalf; the multi-party character of the contract itself, with the foreseeable possibility of disputes thereunder among all three parties; and the specific requirement in the arbitration clause that 'all disputes' be submitted to arbitration.

The Court interpreted Article 2(4) of the ICC Rules (quoted above) as meaning that the three parties accepted that, in an appropriate case, the two arbitrators to be nominated under the ICC Rules by each of the parties — 'the claimant' and 'the defendant' — be nominated one by the claimant or claimants and the other by the defendant or defendants.

The Court added that on the facts in this case, involving three parties to the same contract, its interpretation was the only one which could give full effect to the arbitral clause.

The Court went on to state that the constitution of the arbitral tribunal did not violate any principle of French international public policy as concerned either the equal treatment of the parties, or their rights of defence.

As to the principle of the equal treatment of the parties the Court stated that the arbitration clause authorised the institution of a single proceeding against the two defendants and could oblige them to choose a single arbitrator. However they could have resolved any disagreement about the choice by recourse to the ICC, whose rules deal with the appointment of arbitrators.

As to whether there had been a violation of the defendants' rights of defence, the Court noted correctly that the impact of the loss of the right to choose an arbitrator on a party's defence rights is limited since, under ICC and French practice, a party-nominated arbitrator is expected (once confirmed) to remain independent of the party who nominated him.

Appeal

The Court of Appeal's decision, if left standing, will promote multi-party arbitrations under the ICC Rules. By the decision, an arbitral clause providing for ICC arbitration was interpreted to allow for multi-party arbitration although it contained no express provision for it. Similarly, the ICC's current practice of requiring multiple defendants to agree jointly on a single arbitrator, failing which the ICC Court will appoint one on their behalf, received a measure of sanction from the Court. On the other hand, the particular wording of the arbitral clause at issue (the requirement of three arbitrators and the reference to 'all disputes') was clearly a factor in the Court's decision.

However, the Court of Appeal's decision has been appealed to the *Cour de Cassation*, France's highest court for such matters, and is vulnerable to attack on one ground. The claimant, Dutco, had been entirely free to nominate its own arbitrator whereas the defendants, as we have seen, had either to make a joint nomination or have one appointed on their behalf by the ICC Court. Neither defendant had the freedom to nominate an arbitrator that the claimant had enjoyed. Where defendants cannot agree on a joint nomination, or could 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.

Possibly, the defendants' case might have been stronger still had they refused to make a joint nomination at all. But when making a joint nomination the defendants did so under protest reserving their position, and it should make no difference, in principle, whether parties refuse to make a joint nomination or make a joint nomination under protest reserving their position. In either case, they have recorded their objection for appellate review. Accordingly, the *Cour de Cassation* could take a different position from the Court of Appeal, especially as it is more cautious in favouring international arbitration than the Paris Court of Appeal.

Irrespective of how this case is ultimately decided, until there are standard arbitration clauses or rules of arbitration that address explicitly the issues raised by multi-party disputes, there will remain no substitute for the careful drafting, on a case-by-case basis, of arbitral clauses in multi-party contracts. Unless the parties express clearly their intentions as to how disputes thereunder are to be resolved, they will be inviting subsequent litigation of this matter. □