When *Égalité* Trumps *Liberté*: Paris Court Upholds Award Rendered by Five-Member Tribunal Directly Appointed by ICC, Despite Parties' Agreed Appointment Mechanism

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On 26 January 2021, the International Chamber of the Paris Court of Appeal rejected an application to set aside an ICC award in a multiparty shareholders' dispute on the grounds that, among other things, the tribunal was improperly constituted because the ICC had directly appointed all five members rather than following the parties' contractually-agreed appointment procedure.[1]

The *PT Ventures* decision is a timely reminder of the specific issues that can arise in multiparty disputes, especially when the arbitration is seated in France. For almost 30 years, French courts have held that the principle of equality of the parties may prevail over the principle of party autonomy in the appointment of the arbitral tribunal. In practice, this principle means that, in some multiparty disputes, all the members of a tribunal can be appointed by the appointing authority rather than following the parties' contractually-agreed appointment mechanism. First established in the landmark 1992 *Dutco* decision of the *Cour de cassation*, this principle is now reflected in articles 1453 and 1506 of the French Code of Civil Procedure for arbitrations seated in France.

Most recently, the same principle has been enshrined in a new Article 12(9) of the 2021 ICC Arbitration Rules, which came into force on 1 January 2021 and which applies regardless of the seat of the arbitration. Parties to complex contractual arrangements—such as shareholder disputes, joint ventures, fund formation agreements and partnerships—where the parties' interests may not necessarily fall into two clearly aligned sides will need to carefully consider the appointment mechanism in light of the applicable arbitral rules and the law of the seat.

The *PT Ventures* Decision. PT Ventures SGPS, S.A. ("PT Ventures"), Vidatel Ltd. ("Vidatel"), Mercury Serviços de Telecomunicações S.A., and Geni S.A. each owned 25% of the shareholding in Unitel, the principal mobile telephone operator in Angola. In October 2015, PT Ventures commenced arbitration against its three partners, claiming that they had excluded it from the management of Unitel in violation of the shareholders' agreement.

[1] Paris Court of Appeal (International Chamber of the Court, Chamber 5-16), January 26, 2021, No 19/10666.

Article 16.1 of the shareholders' agreement provided for ICC arbitration seated in Paris, before "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."

PT Ventures requested that the arbitral tribunal be composed of three members and not five, and designated one arbitrator. The three respondents rejected this request, and each designated one arbitrator. The ICC Secretariat invited the parties to agree on a different method for constituting the arbitral tribunal and informed them that, if no agreement were reached, the ICC Court would directly appoint all five arbitrators, pursuant to Article 12(8) of the 2012 ICC Arbitration Rules. The parties having failed to reach agreement on an alternative method of appointment, the ICC Court appointed all five arbitrators in April 2016.

After an award was rendered in favor of PT Ventures ordering the respondents to pay over US$660 million, Vidatel sought to set aside the award on the grounds that the tribunal had not been properly constituted and that two of the arbitrators lacked independence.

Public Policy Requires Equality in Arbitrator Appointment. On 26 January 2021, the Paris Court of Appeal rejected the application for set-aside.

With respect to the appointment of the tribunal by the administering institution, the Court invoked Article 1453 of the French Code of Civil Procedure, which applies to international arbitration pursuant to Article 1506 of the same code, and which provides that: "If 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)." The Court noted that the ICC had invited the parties to agree on a different method to constitute the arbitral tribunal, and that there had been no agreement. Thus, the Court reasoned, "it was for the ICC, as the arbitration institution in charge of organizing the arbitration, to settle this difficulty, by making sure that the arbitration rendered under its auspices was in conformity with its Rules."[2]

[2] Paris Court of Appeal, January 26, 2021, No 19/10666, ¶ 55 ("il appartenait bien à la CCI, en tant que centre d'arbitrage institutionnel chargé d'organiser l'arbitrage, de régler cette difficulté, en veillant à ce que l'arbitrage rendu sous son égide le soit conformément à son Règlement").

The Court also rejected Vidatel's argument that Article 12(8) of the ICC Arbitration Rules did not allow the ICC to directly appoint a five-member tribunal, noting that Article 41 of the 2012 Rules authorized the Court to "act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law." According to the Court, the ICC had to ensure compliance with the "public policy principle of the equality of the parties in the designation of the arbitrators, which presupposes the possibility for each party to be able to participate in an equal manner in the constitution of an arbitral tribunal."[3]

The Court reasoned that equality needed to be assessed not only at the time of contracting, but also at the time the dispute arose, when the parties' interests were differently aligned: "on the day when the dispute arose, this principle of equality has to be applied not only in light of the parties' status under the contract, but also in light of the demands and interests of each of the parties to the dispute."[4] Accordingly, the principle of equality required taking into account the fact that one of the shareholders challenged the joint actions of the three other shareholders, "notwithstanding the provisions of the arbitration agreement."[5]

***Dutco's* Continuing Legacy**. The *PT Ventures* decision is the latest manifestation of a long-standing principle of French arbitration law that may expand its influence to arbitrations seated outside France.

The public policy principle of equality of the parties in tribunal constitution was first recognized in the *Cour de cassation's Dutco* case in 1992[6] and expressly incorporated in the Code of Civil Procedure in 2011.[7] In response to *Dutco*, the ICC and other arbitral institutions adopted specific rules for the appointment of the tribunal in multiparty disputes, such as nomination of one arbitrator by each side where the parties are clearly aligned.[8]

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3 Paris Court of Appeal, January 26, 2021, No 19/10666, ¶ 63 ("… 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 Paris Court of Appeal, January 26, 2021, No 19/10666, ¶ 64 ("… 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").

5 Paris Court of Appeal, January 26, 2021, No 19/10666, ¶ 65 ("… le respect dudit principe, qui s'impose aux parties nonobstant les dispositions de la convention d'arbitrage").

6 Court of Cassation, January 7, 1992, Nos. 89-18.708, 89-18.726 ("attendu que le principe d'égalité des parties dans la désignation des arbitres est d'ordre public; qu'on ne peut y renoncer qu'après la naissance du litige").

7 French Code of Civil Procedure, Articles 1453, 1506.

8 *See, e.g.*, ICC Arbitration Rules 2017, Article 12(8); LCIA Arbitration Rules 2020, Article 8(1); SIAC Arbitration Rules 2016, Rule 12.2; SCC Arbitration Rules 2017, Article 17(5).

Earlier this year, the ICC's arbitration rules were amended to include a new Article 12(9), which now expressly adopts the principle of equality as justification for derogating from the parties' arbitration agreement. Article 12(9) of the 2021 ICC Rules provides as follows: "Notwithstanding any agreement by the parties on the method of constitution of the arbitral tribunal, in exceptional circumstances the Court may appoint each member of the arbitral tribunal to avoid a significant risk of unequal treatment and unfairness that may affect the validity of the award."

The practical implications of this provision for arbitrations seated outside France may be limited in the near term by the reference to exceptional circumstances and the validity of the award. Over time, however, it remains to be seen how far *Dutco*'s legacy will go. Meanwhile, regardless of the seat or the law governing the arbitration agreement, parties to complex contractual arrangements should consider crafting a mechanism for appointing the tribunal that is flexible enough to anticipate the possible alignment of interests between multiple parties and to guarantee equality even after a dispute arises.

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