Multi-party arbitrations at risk in France

The French Supreme Court has struck down ICC practice in the appointment of arbitrators in multi-party cases. Christopher R Seppala of White & Case, Paris, examines the ramifications

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 long-standing practice of the International Chamber of Commerce (ICC) for the appointment of arbitrators in multi-party arbitrations. The Court's ruling has the effect of calling into question many multi-party arbitration clauses contained in contracts governed by French law or which may otherwise be subject to interpretation by the French courts. Even multi-party arbitration proceedings already under way in France, or which 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 which should interest every international business lawyer.

Too many cooks?

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 (usually 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 case of the usual 'bi-party' arbitration (that is, one between a single claimant and a single defendant), where the parties or, failing their agreement, the ICC Court has fixed the number of arbitrators at three, the claimant and the defendant will each nominate one arbitrator, subject to confirmation by the ICC Court, and the third arbitrator, or Chairman, will be appointed by the ICC Court (failing agreement on the Chairman by the parties).

However, in the case of a 'multi-party' 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, can usually agree on a jointly nominated arbitrator but often two or more defendants cannot so agree, 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 will almost never have been addressed in the relevant arbitration clause. Like most other multi-party 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 would appoint an arbitrator on their behalf.

This was the practice which the French Supreme Court condemned in *Dutco*. In that case BKMI Industrienlagen GmbH, a German contractor (BKMI), 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 (Siemens) and Dutco Consortium Construction Company Ltd (Dutco), for the performance of the construction contract. Siemens and Dutco were BKMI's silent partners, BKMI alone being contractually bound to the Omani employer. The consortium agreement between the three contractors 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.

Thereafter, Dutco commenced an ICC arbitration 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 the ICC Court's practice, required BKMI and Siemens to nominate jointly an arbitrator, failing which the ICC Court would appoint one on their behalf. Thereafter, an arbitral tribunal was constituted, consisting of an arbitrator nominated by Dutco, an arbitrator nominated – under protest – by the defendants, jointly, 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 nominate, jointly, 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 had said that, inasmuch as the arbitral clause provided for the submission of all disputes among the three contractors 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.

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

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.

There should be nothing surprising, as Pierre Bellet has noted (see Cass Civ 1re, 7 janvier 1992, Rev arb 1992 no 3, note Bellet), in the Supreme Court's requirement in this case that each party should be treated equally in the appointment of arbitrators. As this writer had noted in relation to the Court of Appeal's decision:

> '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.' *Multi-party arbitration under ICC Rules* Seppala and Gogek, IFLRev November 1989, p32.

Gap in the rules

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 USSR (see Rule 19(3)) which, surprisingly, seem more modern than the ICC Rules in this respect. In fairness, the ICC Rules are not the only international arbitration rules which fail to deal explicitly with the appointment of arbitrators in a multi-party context. The same criticism may be levelled at most, if not all, other international arbitration rules. But as the ICC is the world's pre-eminent international arbitral institution, one could expect the ICC to be taking the lead in addressing and resolving this issue.

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.

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

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

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 USSR 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 (see the comments of Pierre Bellet, Rev arb 1992 no 3 and of Charles Jarrosson, JDI 1992 no 3; see also that of Stephen R Bond, World Arb and Med Rep 1992.70). French legal commentators, including Bellet, a former *Premier President* (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, and one which justifies the Supreme Court's decision to quash, is that there was no unequivocal waiver. The same situation may reoccur in other multi-party arbitration cases where the

arbitrators' jurisdiction is founded merely on the ICC standard arbitration clause given that, although more than 20 per cent 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 multi-party context.

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 wish or expectation of French legal commentators (Bellet and Jarrosson, as above). To give the Supreme Court's decision any greater weight would run counter to more than 20 years of the Supreme Court's case law in favour 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 multi-party situation or a multi-party 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*. ❑