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Siemens – Dutco Revisited? Balancing Party Autonomy and Equality of the Parties in the Appointment Process in Multiparty Cases

Stefan Kröll (Dr Stefan Kröll, LL.M., Rechtsanwalt) · Friday, October 15th, 2010 · Institute for Transnational Arbitration (ITA), Academic Council

In a recent contribution to this list serve Alexis Mourre vigorously defended the parties' right to appoint their own arbitrator. The appointment of an arbitrator is probably one of the single most important decisions during an arbitration. In so far it is not surprising that the right to appoint ones own arbitrator is regularly mentioned as one of the greatest advantages of arbitration.

One of the areas where this right has played a major role is multiparty arbitration. The Siemens-Dutco decision of the French Cour de Cassation (7 January 1992 – XV Yearbook Com. Arb. (1992) 124 et seq.) indirectly emphasized its importance elevating the completely equal treatment of the parties in this regard to the level of public policy. At the same time the decision evidenced the possible conflicts between the right to appoint ones arbitrator, the right to an equal treatment of the parties in the appointment process and party autonomy. In its decision the court set aside an ICC interim-award in which the tribunal had rejected the objections of the defendants against the proper composition of the tribunal. On the basis of a largely standard ICC-clause in a contract of consortium concluded between the parties involved, i.e. Siemens, BKMI and Dutco the two defendants had been requested to agree on a joint arbitrator. They did so under protest and challenged subsequently the proper composition of the tribunal. The Paris Court of Appeal saw no problems with the appointment procedure which had been standard practice at the time and rejected the challenge. The Cour de Cassation by contrast considered the appointment process to be contrary to public policy stating that the "equality of the parties in the appointment of arbitrators is a matter of public policy which can be waived only after the disputes has arisen".

As a consequence of that decision the arbitration rules of numerous institutions, such as the ICC (Art. 10(2)) or the German Institution for Arbitration (DIS) (Section 13 (2)) provide for appointment of all arbitrators by the institution in case the various parties on respondent's side cannot agree on a joint arbitrator. Irrespective of that there are also institutions which have not followed that approach. They still provide for appointments as in the Siemens-Dutco case, leaving the plaintiff's right to appoint its own arbitrator untouched even if the multiple respondents cannot agree on a joint

arbitrator.

At least in Germany, however, it was common ground that a strict equality of the parties in the appointment of the arbitral tribunal was part of public policy. Where neither the underlying arbitration clause nor the applicable arbitration rules contained special rules ensuring the strict equality of the parties in the appointment process section 1034(2) Code of Civil Procedure (ZPO) was used to have the entire tribunal appointed by the courts. It provides in its pertinent parts

> "(2) If the arbitration agreement grants preponderant rights to one party with regard to the composition of the arbitral tribunal which place the other party at a disadvantage, that other party may request the court to appoint the arbitrator or arbitrators in deviation from the nomination made, or from the agreed nomination procedure. The request must be submitted at the latest within two weeks of the party becoming aware of the constitution of the arbitral tribunal. …"

In a recent decision of 16 September 2010 (docket no. 26 SchH 5/10) the Higher Regional Court in Frankfurt has deviated from that approach. In arbitral proceedings initiated by the insolvency administrator of a project company against two of its shareholders, the Court appointed a joint arbitrator for the two defendants as requested by the claimant. At the same time it rejected the auxiliary counterclaim by one of the two defendants that the arbitrator appointed by the claimant should be replaced by an arbitrator appointed by the court. In justifying its approach the court invoked the arbitration agreement concluded in conjunction with the shareholder agreement. Unlike many other arbitration agreements it explicitly stated that in multiparty situation several parties on one side had to appoint a joint arbitrator.

In the case, the peculiar facts allowed the court to avoid a detailed discussion of the auxiliary claim that it should appoint all arbitrators under § 1034(2) ZPO. One of the respondents had not participated in the proceedings at all while the second respondent had replied and had appointed its own arbitrator. In doing so the latter, however, had made clear that in his view the claims against both respondents should not be heard together. Consequently he made the appointment of the arbitrator only for the separate arbitration proceedings which should in his view been initiated against him.

The court considered that view not to be tenable. It held the appointment made to be void, as it was not in line with the agreed upon procedure which provided for joint appointment. In making the appointment for both respondents, the Higher Regional Court in Frankfurt, however, appointed the same person which had been nominated by the second respondent before. On the basis of this the court argued that there had been no inequality in the appointment process. The second respondent had de facto received the arbitrator it wanted while the first respondent did not care about appointment and was therefore also not negatively affected.

While the result reached may be equitable, the efforts to promote party autonomy may

be laudable the reasoning of the judgment is at least doubtful. It allowed the court to avoid the more general question raised by the case: to what extent are the parties entitled to deviate from important features of arbitration. Or to put it differently: what are the limits of party autonomy in arbitration.

This question has recently gained some prominence in connection with the parties' efforts of regulating the finality of awards and their possible review by the courts. There it has received different answers by the US-Supreme Court in its Hall Street v. Mattel decision and by the German Supreme Court in a decision rendered shortly before. While the US Supreme Court considered any extension of the grounds for vacating awards to be beyond the reach of party autonomy its German equivalent saw no problems in a regulation by which the parties made the binding force of an award dependant on the condition that neither party started court proceedings in the same matter within a certain time.

At least under German law, the answer to the question in connecting with the appointment of arbitrators appears to be given by § 1034(2) ZPO which clearly limits the autonomy of the parties in giving preponderant influence on the appointment process to one party. Irrespective of this the Higher Regional Court in Frankfurt tried to look for ways to ensure as much party autonomy in the appointment process as possible. Instead of a very imaginative interpretation of the existing provision the question must be allowed whether it may not be time to revisit Siemens vs. Dutco at least for those cases where the parties have expressly provided for appointment in multiparty situations. It appears doubtful that parties negotiating at arms length require protection by public policy when they decide to waive their right to strict equality in the appointment process before the dispute has arisen. In these cases there are good arguments to protect the claimant's right to appoint its own arbitrator.

This entry was posted on Friday, October 15th, 2010 at 10:18 pm and is filed under Appointment of arbitrators, Arbitrators, Europe
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