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Whose Side Are You On? Modification of the Dutco Principle by the French Supreme Court

Mangesh Krishna · Thursday, February 9th, 2023

Recently, in the landmark *Vidatel* case (previously discussed here), the French Court of Cassation ("**Court of Cassation**") rejected an appeal for setting aside an arbitral award on the ground, among others, that the tribunal was improperly constituted. This appeal had arisen from a Paris Court of Appeal ("**Court of Appeal**") judgment refusing to set aside the arbitral award in a multi-party shareholder's dispute. This ruling has introduced a new perspective in the application of the principle of equality in the constitution of an arbitral tribunal as had been laid down by the Court of Cassation in the case of Dutco in 1992.

Principle Of Equality

In Dutco, briefly discussed here, the Court of Cassation had held 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*". This has since been known as the principle of equality or the Dutco principle.

The principle of equality basically means that each party in the dispute has an equal right in the process of appointing the arbitrators. The manner this principle has been applied is that in multi-party disputes where, as per the arbitration agreement, the number of arbitrators to be appointed is less than the number of parties, then the parties will jointly nominate the arbitrators. If they fail to do so, then the appointed arbitral institution/authority or the court can appoint all the arbitrators, and the party-agreed appointment procedure is overridden to maintain equality between parties. This principle is now reflected in Articles 1453 and 1506 (2) of the French Code of Civil Procedure ("CCP") which is applicable to arbitration proceedings seated in France.

Factual Background

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 2015, PT Ventures initiated arbitration proceedings against the other three shareholders claiming that it had been excluded from the management and was not paid dividends in violation of the shareholder's agreement.

Article 16.1 of the shareholder's agreement provided for arbitration seated in Paris and administered by the International Chambers of Commerce ("**ICC**"). According to the arbitration agreement, the dispute was to be decided 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 proposed that the arbitral tribunal should be composed of three arbitrators instead of five because of the convergence of interests between the other three shareholders. It reasoned that appointing five arbitrators would result in the tribunal being constituted by a majority of arbitrators appointed by parties whose interests would be aligned against PT Ventures, which would be against the principle of equality. Therefore, PT Ventures appointed one arbitrator and requested the other three respondents to propose one arbitrator jointly. However, the other three respondents rejected this proposal and each appointed one arbitrator as per the arbitration agreement.

Considering the disagreement between the parties, the ICC invited the parties to agree on a different method of constituting the arbitral tribunal but was unsuccessful. Therefore, the ICC Court dismissed the parties' nominations and appointed all five tribunal members under Article 12(8) of the ICC Arbitration Rules. Subsequently, the ICC Court dismissed a disqualification application against the five arbitrators it had appointed.

On 20 February 2019, the tribunal issued an award in favour of PT Ventures, ordering the respondents to pay over USD 660 million in damages which Vidatel sought to set aside before the Court of Appeal and then the Court of Cassation, both unsuccessfully. Vidatel raised a ground, among others, that by not complying with the appointment procedure under the arbitration agreement, the tribunal was improperly constituted, which is a ground for setting aside an award under Article 1520 of the CCP.

Court Rulings

The Court of Appeal dismissed this objection stating that the principle of equality between the parties is not only to be assessed at the time of the conclusion of the arbitration clause that each party could appoint one arbitrator but also on the day the dispute had arisen taking into account "*the claims and interests of each of the parties*". It further stated that if there are several parties which are likely to defend common and shared interests against another single party, then the arbitral tribunal should be constituted by taking steps which ensure compliance with the principle of equality. Thus, the Court of Appeal concluded that since the other three shareholders had acted jointly against PT Ventures, the adopted method of constituting the arbitral tribunal was proper and consistent with the principle of equality.

Subsequently, the Court of Cassation dismissed the appeal against the order of the Court of Appeal. The Court of Cassation ruled (para 9) that since there was a convergence of interests between the respondents and there was disagreement on the constitution of a three-member tribunal, the ICC was justified in appointing all the arbitrators under Article 1453 of the CCP and Article 12(8) of the ICC Arbitration Rules. The Court of Cassation, in respect of the principle of equality, also held that since all the disputing parties "*were deprived of the right to choose their*

arbitrator, the equality between them was preserved".

Conclusion

In the present case, the disputing parties had already addressed the principle of equality by giving each party the right to appoint its arbitrator under the arbitration agreement. A joint nomination for constituting the arbitral tribunal, as is usually required in multi-party disputes due to the lesser number of arbitrators than the parties, was not required in the present case. Therefore, there was no need for the ICC and the French Courts to deviate from the appointment procedure under the arbitration agreement. Nevertheless, the ICC and the French Courts considered the parties' interests and position in the dispute in appointing the tribunal members to uphold the principle of equality.

The concern with the application of the principle of equality in this manner is that it presumes that an arbitrator espouses the stance of the party which appointed him or her during the arbitration proceedings. Further, when applied in the future, this may lead to a complicated situation in multi-party disputes where the parties' positions and interests may not easily be categorized into two sides.

By disregarding the arbitration agreement and considering the claims and interests of the parties in constituting the tribunal, the ICC and the French Courts applied the principle of equality differently from how it has been applied to date. Until now, the principle of equality was applied objectively, i.e. based on the number of arbitrators to be appointed and parties (as explained above). With this ruling, the French Courts have introduced a subjective assessment of the parties' right to appoint the arbitrator. From now on, in multi-party disputes, the parties' position and their interests and claims in the dispute would also be of consideration in the constitution of the arbitral tribunal.

Pertinently, the amended ICC Arbitration Rules, which came into force from July 2021, included a new provision, i.e. Article 12(9), expressly adopting this principle of equality. Under Article 12(9) of the ICC Arbitration Rules 2021, the ICC Court, notwithstanding any agreement between the parties on the method of the constitution of the arbitral tribunal, in exceptional circumstances, can appoint each member of the tribunal to avoid a significant risk of unequal treatment and unfairness that may affect the validity of the award.

The practical effect of this new provision is that the principle of equality, as applied in French seated arbitrations by French courts, can also be made applicable in arbitrations seated outside of France when the parties have agreed to arbitrate under the ICC Arbitration Rules.

It is yet to be seen what would qualify as exceptional circumstances for the ICC to apply this provision, its effect on the validity of the award considering that there might be implications on overriding the agreed appointment procedure under the *lex arbitri* and if the ICC would consider the subjective criterion as applied in the present case.

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