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Arbitrator Selection in Multiparty Disputes

From the Experts

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This article is Part 2 of a four-part series on international arbitration.

Many people believe that appointing an arbitrator is the most critical decision during an arbitration. In the “typical” two-party arbitration, this objective is easily met either by choosing rules that provide for direct selection by the parties or by crafting an agreement that each party will nominate an arbitrator. The typical two-party arbitration, however, is becoming increasingly atypical. In today’s global marketplace, business is more complex, often with back-to-back transactions involving numerous parties across the globe. As a result, arbitrations themselves have also become more complicated with multiple claims, parties and contracts.

As explored in the first part of in this series, to meet this expanding business interconnectivity, the United Nations Commission on International Trade Law (UNCITRAL) Rules and the Rules of the International Chamber of Commerce (ICC), the International Centre for Dispute Resolution (ICDR) and the London Court of International Arbitration (LCIA) permit the joinder of parties and each of the arbitral institutions permits consolidation. Following joinder or consolidation, however, the paradigm of the claimant on one side and the respondent on the other shifts and, with three or more parties involved in an arbitration,



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each party appointing an arbitrator is no longer a viable option. The ability to make this “single most important decision” must be abrogated.

Part 2 of this series explores the thorny question of arbitrator selection in a multiparty arbitration and how the various rules handle the issue.

Background

The 1992 French case *Siemens A.G. & BKMI Industrienlagen GmbH v. Dutco Constr. Co.* has shaped how arbitrator appointments are made in multiparty arbitrations. In *Dutco*, three parties entered into a consortium agreement for the construction of a factory. The agreement contained an arbitration provision calling for any dispute to

be settled under the ICC rules before a three-person tribunal appointed in accordance with the ICC rules. Dutco filed a request for arbitration asserting a claim against BKMI and a second, dissimilar claim against Siemens. Although the claims were dissimilar, each was based on alleged breaches of the consortium agreement. The claimant nominated its party-appointed arbitrator. Each respondent, however, challenged the request for arbitration and declined to nominate an arbitrator jointly, maintaining that two arbitrations should have been commenced because the claims were factually dissimilar and the interests of the two respondents not aligned.

Ultimately, the respondents made

the joint nomination under protest. The arbitral tribunal issued an interim award on jurisdiction, finding that the tribunal had been properly constituted. The interim award was challenged in the courts of France. The French Cour de Cassation found that “the principle of the equality of the parties in the designation of arbitrators is a matter of public policy” that could be waived only after a dispute had arisen.

Against this backdrop, one might argue that the simplest way to deal with the conundrum of treating multiple parties equally, at least when the number of parties does not exceed three, is to permit each party to name an arbitrator and for the three arbitrators to name two additional arbitrators, for an ultimate tribunal of five. And that solution was exactly what the court ordered in *BP Exploration Libya Ltd. v. ExxonMobil Libya Ltd.* when a dispute arose as to whether the two respondents were required to jointly nominate an arbitrator for a three-person tribunal. This “Solomonic” solution, however, was challenged and reversed on appeal because the parties’ agreement required a three-person panel. The appellate court acknowledged that there was a lapse in naming the arbitrator, giving the trial court the authority under 9 U.S.C. § 5 to select an arbitrator or arbitrators, but the court also held that the district court exceeded its authority by ordering an arbitral tribunal of five members when the arbitration agreement specified that the dispute was to be heard by three.

After providing a suggested procedure for how the arbitrator appointment process should be handled, the court concluded with: “Of course, nothing in this opinion prohibits the parties from reaching an agreement between or among themselves upon which they can agree for the appointment of arbitrators to hear this dispute.”

As will be seen, the *Dutco* decision and the concept of party autonomy each have impacted how the various

rules confront the question of arbitrator appointment in multiparty arbitrations.

Ad Hoc Arbitration

A. UNCITRAL Rules

The UNCITRAL Rules at Article 10 provide that if three arbitrators are to be appointed, the multiple parties, as claimant or as respondent, are to jointly appoint an arbitrator. The rules, however, expressly recognize that the parties may agree on a number other than one or three.

But what happens if the appointment procedure fails? Although UNCITRAL arbitrations are not administered, the Rules contain a failsafe mechanism for appointment in the event one or more parties fail to appoint the arbitrator(s) in accordance with Article 10. That failsafe is the appointing authority. Article 6 provides that in the absence of an appointing authority agreement, a party may at any time propose the name or names, including the secretary general of the Permanent Court of Arbitration at The Hague (PCA), to serve as the appointing authority. If the parties are unable to agree on an appointing authority within 30 days, any party may request the secretary general of the PCA to designate one.

The appointing authority, at the request of any party, is empowered to constitute the arbitral tribunal. And in constituting the arbitral tribunal, the appointing authority may revoke any appointment made by a party and appoint or reappoint each of the arbitrators, and may designate one of the arbitrators as the presiding arbitrator.

It should be remembered that Article 17.5 (permitting joinder) does not set a deadline by which joinder must be requested. Consequently, a party that is joined after the arbitration tribunal is constituted will lose its right to appoint an arbitrator absent an agreement among the parties. But that result may not pass judicial scrutiny of the ultimate award, as demonstrated by the *Dutco* case.

Arbitral Institution Arbitration

B. ICC Rules

The ICC Rules state that “[i]nsofar as the parties have not provided otherwise, the arbitral tribunal shall be constituted in accordance with the provisions of Articles 12 and 13.” Article 12 specifically addresses the arbitrator nomination in multiparty disputes. The rules provide that if there are multiple claimant(s) or multiple respondent(s) and the dispute is to be referred to three arbitrators, the multiple claimants nominate jointly and the multiple respondents nominate jointly.

In the case of joinder of an additional party, if the dispute is to be decided by three arbitrators, the additional party may nominate jointly with either the claimant(s) or with the respondent(s), as applicable. However, pursuant to Article 7(1), no party may be joined after the confirmation or appointment of any arbitrator, unless all parties, including the additional party, agree and the secretariat has the express power to set a time limit for the requesting joinder of an additional party. So presumably, a party would not be joined after an arbitrator has been appointed and thus would not be deprived of its opportunity to participate in the selection process.

Regarding the effect of consolidation on arbitrator selection, the ICC Rules expressly provide that the International Court of Arbitration of the International Chamber of Commerce (ICC Court) may take into account “whether one or more arbitrators have been confirmed or appointed in more than one of the arbitrations and, if so, whether the same or different persons have been confirmed or appointed” as part of the consolidation decision. The rules further provide that if the arbitrations are consolidated, they are consolidated into the first commenced arbitration unless all parties agree otherwise.

If the parties fail to make a joint nomination pursuant to Articles 12(6) or 12(7) and all parties are unable to agree on a methodology for the constitution of the arbitral tribunal, the

ICC Court may appoint each member of the arbitral tribunal and shall designate one of them to act as president. In appointing the tribunal, the ICC Court is empowered to choose any person it regards as suitable to act as arbitrator, applying, if it deems appropriate, the provisions of Article 13 concerning appointment and confirmation of arbitrators. In practice, the secretariat of the ICC Court's notification to the parties that it will proceed to name the arbitrators pursuant to Article 12(8) often acts a catalyst and agreement among the parties is reached.

C. ICDR Rules

Article 12(1) of the ICDR Rules recognizes that "[t]he parties may agree upon any procedure for appointing arbitrators and shall inform the Administrator as to such procedure." Thus, without regard to the number of parties involved in the arbitration, the rules permit the parties to design their own procedure for arbitrator appointment. In the absence of party agreement regarding the method of appointment, "the administrator may use the ICDR list method as provided in Article 12(6)."

The deadline for reaching an agreement is 45 days after the commencement of the arbitration. If all parties have not agreed on the procedure for appointing the arbitrator(s) within this 45-day window or have not agreed on the selection of the arbitrator(s), any party may request that the administrator appoint the arbitrator(s). Moreover, if all appointments have not been made within the agreed procedural time limits, at the written request of any party, the administrator shall perform all the functions in the procedure that have yet to be performed. Additionally, the rules specifically address arbitrator appointment in multiparty arbitration. Using the same 45-day deadline, the rules provide that unless the parties have agreed otherwise "the administrator may appoint all the arbitrators."

In the case of joinder of an additional party, like Article 7(1) of the ICC Rules, Article 7(1) of the ICDR Rules prohibits joinder of an additional party after the appointment of any arbitrator, unless all the parties, including the party to be joined, agree and make joinder specifically subject to the provisions in Article 12 regarding arbitrator appointment. In the case of consolidation, each party is deemed to have waived its right to appoint an arbitrator and the consolidation arbitrator may revoke the appointment of any arbitrators and may select one of the previously appointed tribunals to serve in the consolidated proceeding.

D. LCIA Rules

The LCIA Rules take a more minimalistic, straightforward approach to the issue of arbitrator appointment in multiparty arbitrations. Simply stated, if there are more than two parties to the dispute and the "parties have not all agreed in writing that the disputant parties represent collectively two separate 'sides' for the formation of the Arbitral Tribunal (as Claimants on one side and Respondents on the other side, each side nominating a single arbitrator), the LCIA Court shall appoint the Arbitral Tribunal without regard to any party's entitlement or nomination." To circumvent the issue of overriding party autonomy, the rules further provide that in the case of a lack of agreement that the disputant parties represent collectively separate sides, the arbitration agreement "shall be treated for all purposes as a written agreement by the parties for the nomination and appointment of the Arbitral Tribunal by the LCIA Court alone."

Conclusion

In the multiparty arbitration, the UNCITRAL Rules recognize that there may be instances in which a tribunal of a number other than one or three is appropriate. In contrast, the LCIA Rules, with their express requirement that the parties agree to multiple claimants and/or respondents jointly

nominating, suggest that a three-person tribunal is the maximum number. The ICC Rules and the ICDR Rules do not place this stricture on the parties and acknowledge that the parties may craft their own arbitrator selection agreement. But the one constant across all the rules is power of the institution or in the case of the UNCITRAL Rules, the appointing authority, to intercede and appoint the arbitrators in the event the parties' agreement fails.

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