

International Arbitration Alert

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Party Nomination of Arbitrators: Égalité of Parties and the 'Dutco Principle'

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Party Nomination of Arbitrators

Parties benefit from a broad freedom in nominating arbitrators. In the context of an arbitration seated in France, the French law principle of *égalité* (equality) between the parties in appointing arbitrators “limits” this freedom. Such principle leads to tangible and competing interpretations in the context of a multi-party arbitration. Recently, in *PT Ventures v. Vidatel*,¹, the British Virgin Islands (BVI) High Court ruled that the International Chamber of Commerce (ICC) was correct in appointing all five arbitrators because the arbitration clause breached the French law principle of *égalité* and the ‘Dutco principle’. The BVI Court held that the three respondents should be considered as one “party” given the convergence of interests, such that if the arbitration clause had been applied literally, there would have been a breach of the principle because the “claimant” would have appointed one arbitrator whilst the “respondent” appointed three. *PT Ventures v. Vidatel* applied the “Dutco Principle,” namely that equality of the parties in the appointment of arbitrators is a matter of public policy and can only be waived after the dispute has arisen. The case is also noteworthy since the arbitration was the first ICC arbitration conducted with a panel of five arbitrators and it is the first judicial authority dealing with the principle of *égalité* in the context of a five-person tribunal.

The Facts in PT Ventures

Four companies held the shares in Unitel, each holding one quarter: (i) PT Ventures (PTV), a Portuguese company; (ii) Vidatel, a BVI company; (iii) Geni SARL (“Geni”), an Angolan company; and (iv) Mercury Serviços de Telecomunicações SARL (“Mercury”), another Angolan company. The four shareholders held their shares pursuant to a shareholder’s agreement (the “Shareholder Agreement”) effective as of December 15, 2000. Clause 16 of the Shareholder Agreement read:

Clause 16

“16.1 Any claim, dispute or other matter in question between the Parties with respect to or arising under this Agreement or the breach thereof, shall be

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decided by arbitration, by 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. Such arbitration shall be in accordance with Rules of the International Chamber of Commerce. Any such arbitration shall be conducted in English in Paris.

16.2 The independent arbitrator shall have a casting vote.”

Unitel declared a dividend every year; however due to delays in paying the hard currency dividends, from 2012 to 2019 PTV did not receive any dividend payment (it refused to accept payment in the local Angolan currency). In 2014, relations between the shareholders were sour: three shareholders refused to vote on to Unitel’s board the director nominated by PTV, and PTV complained that the other shareholders, in breach of the Agreement, misused their control of the board to prevent Unitel from paying dividends to PTV.

In October 2015, PTV filed a request for arbitration with the ICC; the arbitration was seated in Paris. PTV submitted that, if the arbitral tribunal was composed pursuant to Clause 16 of the Shareholder Agreement, with PTV, Vidatel, Mercury and Geni each nominating one arbitrator, this would breach the requirement of “*égalité*” because it would mean one arbitrator “against” three, and thus PTV invited the ICC to appoint all the arbitrators. Agreeing with Prof. Jarrosson (PTV’s expert witness), the ICC made its own selection of all five arbitrators. In February 2019, the arbitral tribunal awarded PTV around US\$650 million in respect of a diminution in value of PTV’s shares in Unitel and unpaid dividends owed to PTV. In May 2019, PTV sought leave to enforce the award against Vidatel before the BVI Commercial Court, pursuant to Sections 81 and 84 of the Arbitration Act 2013,² which gives force of law to the New York Convention. In June 2019, Vidatel filed an annulment application before the French Court of Appeal in Paris³ (scheduled to be heard in December 2020). Vidatel is seeking annulment on the grounds that (referred to in the BVI Court Judgment as the “Paris Defenses”):

1. The arbitral tribunal was not properly constituted so that the Award is a nullity; and
2. Two of the five arbitrators were not independent.

In August 2019, PTV sought summary judgment in respect of the enforcement of the final award. By a judgment delivered on March, 16 2020, the BVI Court refused to grant summary judgment, thereby requiring a full trial.⁴ The Paris Defenses were tried in late July 2020.

The “Paris Defenses”

Vidatel raised the two Paris Defenses under Section 86 of the BVI Arbitration Act, which sets a comprehensive list as to the circumstances in which enforcement of a New York Convention award may be refused. Section 86 is in virtually identical terms to Section 103 of the UK Arbitration Act 1996. In particular, Section 86(2)(e) provides that the enforcement of a Convention award may be refused if the person against whom it is invoked proves that “the composition of the arbitral authority [...] was not in accordance with the agreement of the parties, or if there was no agreement, the law of the country where the arbitration took place”. Under French law, pursuant to Article

1520 of the French Code of Civil Procedure (CCP), one party can apply for an annulment if “the arbitral tribunal has been irregularly constituted” or if “the recognition or enforcement of the award is contrary to international public policy.”⁵

Vidatel argued that the arbitral tribunal was not properly constituted in accordance with the Shareholder Agreement: the ICC Court was wrong to appoint all five arbitrators itself instead of accepting the four arbitrators nominated by the four parties to the shareholders’ agreement (with the fifth to be selected by the other arbitrators), in line with the principle “*égalité*” of each of the parties. PTV argued that there would have been a breach of the principle if it had only been able to appoint one arbitrator while the three respondents appoint one each. On the allegation of a lack of independence and impartiality, Vidatel argued that two arbitrators, Professor Dr Sachs and Mr Ferro were not impartial or independent on account of their alleged failure to disclose purported connections with PTV.

The *Dutco* Principle

The mandatory public policy exception is an obstacle to the recognition of an award by the French legal system. Amongst such public policy principles, French arbitration law has established that an arbitration clause must respect the principle of “*égalité*” (equality).

The principle was first expressed in the decision of the French Cour de Cassation of 1992 known as “*Dutco*,” which involved three parties: Bangladesh Knowledge Management Initiative (BKMI), Siemens and Dutco Construction.⁶ The facts are simple: three companies entered into a consortium agreement for the construction of a factory on behalf of their common employer in the Middle East. The consortium agreement contained an ICC arbitration clause expressly providing for the settlement of disputes by an arbitral tribunal composed of three arbitrators, where the claimant appointed one arbitrator, the respondents appointed one arbitrator, and in turn, the two arbitrators appointed a president. Dutco filed a request for arbitration in which it had one particular claim against BKMI and a second against Siemens, although both claims were based on alleged breaches of the consortium agreement. The question arose as to whether BKMI and Siemens were obliged to jointly appoint an arbitrator, as the claims were at least in part in the alternative, so that BKMI and Siemens did not share the same interest in the defense of Dutco’s claims (they were in reality two separate disputes). The ICC Court refused the respondents’ contentions and warned them of its intention to apply former Article 2.4 of the ICC Rules (“If a party fails to nominate an arbitrator, the appointment shall be made by the Court”). Eventually, Siemens accepted the same arbitrator as BKMI but expressed its strong reservation as to the validity of such constitution. Siemens challenged the jurisdiction of the arbitration tribunal that was rejected by the arbitral award. Siemens ultimately filed a recourse for annulment before the Cour d’appel de Paris that was also rejected.⁷

The Cour d’appel de Paris considered that, in the framework of a multiparty agreement, there was no obstacle in providing for an arbitral tribunal to be composed of three arbitrators with the unavoidable consequence that the first two arbitrators should have to be appointed respectively by the one or two claimants and one or two defendants. For the appellate judges, such a practice under the ICC rules was not contrary to the principle of equality of parties in the constitution of an arbitral tribunal, taking into consideration that the choice of a single arbitrator for the two respondents

(i) was the result of the consortium agreement reflecting their contractual partnership and (ii) would not restrict their autonomy in the preparation of their defense. Moreover, the Cour d'appel emphasized that the appointed arbitrator would be fully vested the power to judge, thus escaping the contractual sphere to accede to the status of "judge," exclusive by nature of any dependency on the parties, and whose independence constitutes the guarantee of the stride equality of the parties in the course of the process.⁸ However, the Cour de Cassation considered that such decision by the Cour d'appel violated the following principle:

“ le principe de l'égalité des parties dans la désignation des arbitres est d'ordre public; qu'on ne peut y renoncer qu'après la naissance du litige...”

[“the principle of equality of the parties in the appointment of arbitrators is a matter of public policy, that can only be waived after the dispute has arisen...”]

Jean-Louis Devolvé commented that through this decision, the Cour de cassation affirmed the principle: “*that any and all parties to an arbitral agreement should be kept on the same footing in their right to contribute to the constitution of their arbitral tribunal. Hence a party who, in contrast to other parties, has been deprived of such a right as an effect of either the arbitration agreement or the circumstances of the case, could claim annulment of an award rendered in that arbitration*”.⁹ The Cour de cassation added that such principle was such that none of the parties could waive its right in advance (for instance, in the arbitration agreement); the renunciation would be only valid if expressed after a dispute had arisen.¹⁰ The Cour d'Appel de Paris later on specified that the designation by the supporting judge, bound to respect the equality of the parties, of a single arbitrator for two parties “whose fate is tied, having signed the agreement indivisibly and jointly and having no divergent interests, does not constitute a breach of equality between the parties.”¹¹

French law commentators suggest that the solution put forward by the Cour de Cassation was not jurisprudentially sound.¹² Nevertheless, the *Dutco* decision has had an international impact and influenced the major arbitration institutions rules. Most arbitration rules contain provisions aimed at resolving these constitutional differences while respecting the principle of equality of the parties in the appointment of arbitrators.¹³

Despite the principle being apparently clear-cut, the parties in *PT Ventures* set out different interpretations relying on the views of experts in French arbitration law and practice: Prof. Jean-Baptiste Racine, called by PTV, and Prof. Thomas Clay, called by Vidatel. In short, Prof. Racine explained that “the implementation of the arbitration clause would have led to the designation by the claimant of one arbitrator and the designation by the three co-respondents of three arbitrators. Accordingly, the implementation of the clause would have been incompatible with the principle of equality of the parties in the constitution of the arbitral tribunal.”¹⁴ In response, Prof. Clay explained that “the principle of equality of the parties, with the appointment of a larger number of arbitrators on the side of the defendant, amounts to a pure and simple denial of the *Dutco* case law. (...) the principle of equality would have been complied with because each party would have appointed one arbitrator, meaning that each party would have participated in the constitution of the arbitral tribunal on an equal footing.”¹⁵

One should also bear in mind that since the reform resulting from of January 2011,¹⁶ French arbitration law specifically provides for multiparty arbitration under Article 1453 of the French CCP.¹⁷ The solution adopted by Article 1453 is to entrust the institution or the supervisory judge with the task of appointing the entire arbitral tribunal should the parties disagree in the appointment of the arbitrators.

The BVI High Court Decision

In its August 2020 decision, Justice Adrian Jack (Ag) held that the award was enforceable in the BVI against Vidatel. In respect of the composition of the arbitral tribunal, the court heard expert evidence on French law from both sides as to the meaning of the principle of *égalité*. It was agreed that such principle had three potential meanings:

First, it could mean each party to the arbitration agreement having the right to appoint one arbitrator each.

Second, it could mean each party to a dispute under the arbitration agreement having such a right.

Third, it could mean each side to a dispute having such a right.

In the first two cases, this would mean the original four arbitrators were the appropriate panel in accordance with *égalité*. Only in the last case would there be an argument for the approach taken by the ICC in appointing its own panel.¹⁸

Justice Adrian Jack ruled that “on a balance of probabilities,” PTV’s and Prof. Racine’s interpretation of the principle was more generally accepted, supported by other French legal experts and concluded that it “represent[ed] the relevant French law.”¹⁹ The court ruled that Vidatel, Mercury and Geni (as co-respondents) were properly considered as one “party” given the convergence of their interests,²⁰ such that if the ICC Court had permitted each of the four parties to appoint an arbitrator each, there would have been a breach of the “Dutco principle” because PTV would have appointed one arbitrator while the “other side” appointed three. The BVI Court, therefore, considered that the ICC was right to have appointed all five members of the arbitral tribunal. The BVI Court also ruled against Vidatel in respect of the second Paris Defense.²¹

The Risk of Inconsistency

The French annulment proceedings are still pending: the Cour d’Appel de Paris will hear oral arguments in December 2020 and a judgment can be expected in Q1 2021. However, there is a further right of appeal on a point of law to the “Cour de Cassation” and the BVI Court considered that such an appeal is “almost inevitable [...], a final decision is only likely to be obtained in France in 2022.”²² On that basis, and despite that: “it is quite possible that in the fairly near future, the French courts will say I have got it wrong”²³, in March 2020, the BVI Commercial Court had declined to adjourn the enforcement proceedings, given the delay this would have occasioned and on the basis of its finding the neither party would be irredeemably prejudiced if the French court later ruled inconsistently with the BVI court’s decision.²⁴ It therefore remains to be seen whether the French Court of Appeal will take the same view on the Paris Defenses, in particular, in the context of the interpretation of the French law principle of *égalité*. This potential inconsistency further illustrates what the authors of this Alert

had concluded with regards to the Kabab-Ji saga: “the sequence in which the enforcement judge and the annulment judge render their decisions proves to be more important than one might have thought.”²⁵

¹ *PT Ventures SGPS SA v Vidatel Ltd* (BVIHC (COM) 2015/0017 and 2019/0067, 13 August 2020)

² Act No. 13 of 2013, Laws of the Virgin Islands.

³ Under French law, applications seeking the annulment of arbitral awards handed down by an arbitral tribunal sitting in Paris are within the exclusive jurisdiction of the Cour d'Appel de Paris (Article 1519 French Code of Civil Procedure).

⁴ *PT Ventures SGPS SA v Vidatel Ltd* (BVIHC(COM) 2015/0017 and 2019/0067), 16 March 2020, BVI Commercial Court.

⁵ Articles 1520(2) and 1520(5) of the French Code of Civil Procedure. In fact, both Articles 1520(2) and 1520(5) could be legal basis to annul the award in relation to the first Paris Defense while the second can be raised pursuant to Article 1520(2).

⁶ *BKMI Industrienlagen GmbH et Siemens AG v Dutco Construction Bull. Civ. 1 No 2*, decision of the Chambre Civile 1 of the Cour de Cassation of January 7, 1992 (no. 89-18.708, 89-18.726).

⁷ Cour d'appel de Paris, 1989-05-05, du 5 mai 1989.

⁸ Cour d'appel de Paris, 1989-05-05, du 5 mai 1989; as explained in Jean-Louis Dévolvé, « Multipartism: the *Dutco* Decision of the French Cour de cassation », *Arbitration International*, Volume 9, Issue 2, June 1, 1993, Pages 197–202; published November 7, 2014.

⁹ Jean-Louis Dévolvé, « Multipartism: the *Dutco* Decision of the French Cour de cassation », *Arbitration International*, Volume 9, Issue 2, June 1, 1993, Pages 197–202; published November 7, 2014.

¹⁰ The Cour de Cassation only deals with errors of law. In the light of its conclusion that there had been an error of law, it sent the matter back to a different Court of Appeal, the Cour d'Appel de Versailles, to determine what should happen with the arbitration. However, the parties settled their dispute before this Cour d'Appel could decide how the arbitration should proceed.

¹¹ Cour d'Appel de Paris (1re Chambre Civile), 18 octobre 2003, *Rev. Arb.* 2003, Issue 4, pp. 1277-1282. See also Cour d'appel de Paris, 3 Décembre 2013, No. 12/07062.

¹² Christophe Seraglini, Jérôme Ortscheidt, *Droit de l'arbitrage interne et international*, LGDJ, 2e édition, at para. 770.

¹³ See for example, art. 12 of the ICC Rules, article 17 of the SCC Rules and Rule 9 of the SIAC Rules.

¹⁴ *PT Ventures SGPS SA v. Vidatel Ltd* (BVIHC (COM) 2015/0017 and 2019/0067, August 13, 2020, at para 20.

¹⁵ *PT Ventures SGPS SA v. Vidatel Ltd* (BVIHC (COM) 2015/0017 and 2019/0067, August 13, 2020, at para 21.

¹⁶ Decree No. 2011-48.

¹⁷ This Article applies to national arbitration but Article 1506 2°(International Arbitration) provides that this principle applies to international arbitration as well.

¹⁸ *PT Ventures SGPS SA v. Vidatel Ltd* (BVIHC (COM) 2015/0017 and 2019/0067, August 13, 2020, at para. 26.

¹⁹ *PT Ventures SGPS SA v. Vidatel Ltd* (BVIHC (COM) 2015/0017 and 2019/0067, August 13, 2020, at para. 64.

²⁰ *PT Ventures SGPS SA v. Vidatel Ltd* (BVIHC (COM) 2015/0017 and 2019/0067, August 13, 2020, at para. 65 et seq.

²¹ With respect to Professor Dr Sachs, the claim was based on the fact that he was a partner of an individual allegedly affiliated with PTV. However, the court ruled that there was no such partnership given that Professor Dr Sachs was partner in a law firm separate from the firm of the alleged affiliate, in the absence of fee sharing between the two firms (circumstance listed as part of the IBA Guidelines Green list at para. 4.2.1). In respect of Mr. Ferro, it was alleged that his firm was regular counsel to one of the shareholders of a company which was

itself a majority shareholder of PTV. The court ruled that those matters did not create a sufficient link between PTV and Mr. Ferro so as to give rise to any justifiable fear that Mr. Ferro's impartiality and independence were at risk. The court therefore concluded that neither Professor Dr. Sachs nor Mr. Ferro failed to disclose a relevant conflict of interest.

²² *PT Ventures SGPS SA v. Vidatel Ltd* (BVIHC (COM) 2015/0017 and 2019/0067, 16 March 2020, at para 9.

²³ *PT Ventures SGPS SA v. Vidatel Ltd* (BVIHC (COM) 2015/0017 and 2019/0067, 13 August 2020, at para 16.

²⁴ *PT Ventures SGPS SA v. Vidatel Ltd* (BVIHC (COM) 2015/0017 and 2019/0067, 16 March 2020, at paras. 100-101.

²⁵ Akin Gump International Arbitration Alert, June, 29, 2020 - "The Law of an Arbitration Agreement: Is it the Law of the Seat or the Law of the Underlying Contract? – Paris Contradicts London".

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