

DE BERTI ■ JACCHIA

De Berti Jacchia Franchini Forlani  
studio legale

# *Appointment of the arbitrators in multiparty arbitrations*

*Michelangelo Cicogna*

De Berti Jacchia Franchini Forlani

# 1. INTRODUCTION

## MULTIPARTY ARBITRATIONS

# Nature of the multiparty arbitrations (1)

- Not every transaction or contract involves just two parties
- The increasingly complex and diverse nature of contracts makes it likely that international commercial disputes will be multi-party in nature (e.g. in the insurance, maritime, energy business) (30/35% at ICC)
- In the following slides we will list some multiparty situations which may occur in arbitral proceedings

## One contract and more than two parties (2)

- The situation envisaged is one typical of joint ventures, partnerships and consortia
- In all these situations a number of entities come together in a business relationship governed by one contract

## More than one contract and more than two parties (3)

- Situation in which there are a number of contracts involving different parties
- This is the situation where several entities have entered into various interrelated contracts (particularly common situation in large construction projects where the employer usually enters into a construction contract with the main contractor, which in turn enters into several other contracts with suppliers and sub contractors)

# Joinder (4)

- A third party is joined in the arbitration process by one of the original parties of the arbitration process, through a procedural request (e.g. a respondent may seek to join an additional party, raising a claim in connection with the Claimant's claim)
- In principle, there are no limitations to number of additional parties that may be joined

# Intervention (5)

DE BERTI ■ JACCHIA

De Berti Jacchia Franchini Fortani  
studio legale

- A third party requests to join an arbitration already in progress (e.g. a third-party guarantor, which is not directly party to the main agreement but has a contract with one party to the agreement, requests to intervene in the arbitral proceedings)
- The intervention is on a voluntary basis

# Consolidation (6)

- Consolidation is a procedural mechanism allowing for two or more claims to be united into one single procedure concerning all related parties and disputes
- Multiparty arbitral proceedings *scenarios* include parallel disputes, arising out of different contracts entered into by different parties, which would be convenient to treat together



## **2. ISSUES ARISING OUT THE APPOINTMENT OF THE ARBITRAL TRIBUNAL IN MULTIPARTY ARBITRATIONS**

## Multiparty arbitrations are a valuable tool

Multi party arbitrations are possibly more complex but always consider that parallel and multiple litigations are worst.

- In fact, in multi-party/multi-contract situations, **there is a risk:**
  - that it is not possible to litigate in a single forum
  - that parallel proceedings take place
  - that different tribunals may be appointed
  - that DR clauses are completely different one from the other
  - that different arbitral tribunals may reach different conclusions on common questions of fact or law

In multi-party/multi-contract situations, **there is the certainty:**

- That the above issue will cause long lasting litigations, huge costs, inefficiencies, disruption etc.

**Still there are some delicate issues and the appointment of the arbitrators is one of them**

# The peculiarities vis-à-vis the appointment process

- Usually (in case of transactions which involve only two parties) the arbitration agreement (so called bipolar) provides for the following mechanism:
  - Each party appoints one member of the arbitral tribunal
  - The two party nominated arbitrators (or the institution) design the third arbitrator
- This mechanism may not work in multi-party situations as it is not always possible for each party to appoint its own arbitrator
- Panels with more than 3 arbitrators are rare
- Arbitration agreements are often poorly drafted and do not take into consideration the possibility that the arbitration may result in a multi party dispute

## When the problem arose: The leading case “Dutco” (Cour de Cassation, 7 January 1992)

- Until 1992, the situation was quite under control
- Suddenly a decision of the French Supreme Court changed the scenario
- The arbitration world had to make some “adjustments” in order to avoid new Dutco cases

# When the problem arose: (cont'd)

## The leading case “Dutco” (Cour de Cassation, 7 January 1992)

### The case in brief

- There was a consortium concluded between Siemens, BKMI and Dutco. The contract provided for a standard ICC-clause with appointment of three arbitrators
- Dutco appointed its arbitrator. BKMI and Siemens claimed to be entitled to nominate one arbitrator as they had conflicting interests
- The ICC (under its 1988 rules) invited the parties to agree on a joint arbitrator
- The parties did so under protest and challenged subsequently the proper composition of the tribunal

# When the problem arose: (cont'd)

## The leading case “Dutco” (Cour de Cassation, 7 January 1992)

- The Paris Court of Appeal confirmed the appointment procedure 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*”
- Actually the issue existed already under the New York Convention (art. V 1. d)) [the composition of the arbitral authority was not in accordance with the agreement of the parties, or, failing such agreement, (...) with the law of the country where the arbitration took place]

# When the problem arose: (cont'd)

## The leading case “Dutco” (Cour de Cassation, 7 January 1992)

In a nutshell, the Dutco decision indirectly emphasised the importance of the right to appoint ones own arbitrators **elevating the completely equal treatment of the parties** in this regard **to the level of public policy**

Is this correct? Difficult to say, but certainly many arbitral institutions changed their approach

# AFTER THE *DUTCO*

DE BERTI ■ JACCHIA

De Berti Jacchia Franchini Fortani  
studio legale

## **3. *FOCUS* ON THE APPOINTMENT OF ARBITRATORS IN SITUATIONS THAT ARE MULTIPARTY SINCE THE BEGINNING AFTER THE *DUTCO* CASE**



# Situation of bipolar interests

DE BERTI ■ JACCHIA

De Berti Jacchia Franchini Fortani  
studio legale

- There are cases in which even though there are more than two parties involved, the dispute has a bipolar structure (e.g. two joint ventures' partner which have the same claim against an other partner)
- In this *scenarios* there are only two interests at stake and it is possible for the parties to side Claimant or Respondent's position
- As a matter of fact, it is possible both for Claimant and for Respondent to choose their own arbitrators forming two sides

## Situation of bipolar interests (2)

- Solutions adopted by the arbitral institutions to deal with situations of bipolar interests:
  - *“...Where there are multiple claimants or multiple respondents, and where the dispute is to be referred to three arbitrators, the multiple claimants, jointly, and the multiple respondents, jointly, shall nominate an arbitrator...”* (12(6) ICC Rules)
  - *“...Where the request for arbitration is filed by or against several parties, if the parties form two sides when filing the request for arbitration and the statement of defence and the arbitration agreement provides for a panel of arbitrators, each group shall appoint an arbitrator and the Arbitral Council shall appoint the president...”* (15(1) CAM Rules)

# Situation of multipolar interests (3)

- There are cases in which there are more than two parties in the proceedings and each party has claims against any other party (e.g. owner has a claim against the contractor which, in turn, has a claim against the subcontractor which, in turn, has a cross-claim against the contractor)
- In these *scenarios* there are more than two interests at stake
- It is not possible for each party to nominate its own arbitrator and the decision shall be deferred to someone else

# Situation of multipolar interests (4)

- Solutions adopted by the arbitral institutions to deal with the situations of multipolar interests
  - “...Where all parties are unable to agree to a method for the constitution of the arbitral tribunal, **the Court may appoint each member of the arbitral tribunal** and shall designate one of them to act as president...” (12(8) ICC Rules)
  - “...Regardless of the arbitration agreement, if the parties do not form two sides when filing the request for arbitration and the statement of defence, the Arbitral Council, without considering any appointment made by any of the parties, shall appoint the Arbitral Tribunal...” (15(2) CAM Rules)

# AFTER THE *DUTCO*

DE BERTI ■ JACCHIA

De Berti Jacchia Franchini Fortani  
studio legale

## 4. ***FOCUS ON THE APPOINTMENT OF ARBITRATORS IN SITUATIONS THAT BECOME MULTIPARTY AT A LATER STAGE AFTER THE DUTCO CASE***

# Object of the discussion (1)

DE BERTI ■ JACCHIA

De Berti Jacchia Franchini Fortani  
studio legale

- The difference lies on whether the need to additional parties becomes apparent
  - before the confirmation of the arbitrators; or
  - after the confirmation of the arbitrators

## Need to additional parties becomes apparent before the confirmation of the arbitrators (2)

- If the joinder/intervention/consolidation comes before the confirmation of the arbitrators the situation is simplified
- Indeed, the adding party can participate to the constitution of the arbitral tribunal

## Need to additional parties becomes apparent before the confirmation of the arbitrators (2)

- Solutions adopted by the arbitral institution to deal with joinder before the confirmation of the arbitrators
  - The additional party may jointly with the Claimant or with the Respondent nominate an arbitrator (Art. 3.2, 18.2 VIAC Rules, Art. 12.7 ICC Rules)
  - If there is no agreement between the parties, the appointment of the arbitrators is made by the Institution (Art. 12.8 ICC Rules)



## Need to additional parties becomes apparent after the confirmation of the arbitrators (3)

- If the joinder/intervention/consolidation comes after the appointment of the arbitrators there are more issues to be taken into consideration
- The adding party was not in a position to take part in the constitution of the arbitral tribunal
- Arbitral institution rules provide different provisions with regard to the situation of joinder, intervention or consolidation

# Joinder after the confirmation of the arbitrators (4)

- **Solutions adopted by the arbitral institution rules**
  - No possibility to be joined after the appointment of the arbitrators (Art. 7.1 ICC Rules) unless all parties, including the additional party, otherwise agree (accepting thus the existing composition of the arbitral tribunal)
  - Express consent of the third party to be joined in the proceedings is considered waiver to the right to appoint an arbitrator (Art. 22.1 viii LCIA Rules, Art. 24.1 b SIAC Rules)
  - Discretion of the arbitral tribunal which may revoke any appointment already made and appoint or reappoint each of the arbitrators (Art. 10.3 Uncitral Rules)

# Joinder after the confirmation of the arbitrators (5)

An interesting approach

## SWISS RULES

Article 4.2

***“where one or more third persons request to participate in arbitral proceedings already pending under these Rules or where a party to pending arbitral proceedings under these Rules requests that one or more third persons participate in the arbitration, the arbitral tribunal shall decide on such request, after consulting with all of the parties, including the person or persons to be joined, taking into account all relevant circumstances”.***

# Joinder after the confirmation of the arbitrators (6)

An interesting approach (cont'd):

- the Rules allows both the **joinder** and the **intervention**
- the authority to decide on the joinder and on the intervention is on the Arbitral Tribunal
- **no consensus** of the party to be joined
- in theory, SR could permit a tribunal to order a joinder of a third party at request of the third party **even if it is not signatory** and **with the objection of the two existing parties**
- consensus should be found in the choice of the SR... but what for the third party that could be requested to join without its consensus

# Consolidation after the appointment of the arbitrators (6)

## Solutions adopted by the arbitral institution rules

### SWISS RULES (Article 4.1)

*“where a Notice of Arbitration is submitted between parties already involved in other arbitral proceedings pending under these Rules, the **Court may decide**, after consulting with the parties and any confirmed arbitrator in all proceedings, that the new case shall be consolidated with the pending arbitral proceedings. The Court may proceed in the same way where a Notice of Arbitration is submitted between parties that are not identical to the parties in the pending arbitral proceedings. When rendering its decision, the Court shall take into account all relevant circumstances, including the links between the cases and the progress already made in the pending arbitral proceedings. Where the Court decides to consolidate the new case with the pending arbitral proceedings, **the parties to all proceedings shall be deemed to have waived their right to designate an arbitrator, and the Court may revoke the appointment and confirmation of arbitrators and apply the provisions of Section II (Composition of the Arbitral Tribunal)**”.*

# Consolidation after the appointment of the arbitrators (7)

## The Swiss Rules (cont'd)

- Parties in the two arbitrations can be different
- the **consent** of the parties **is not required** with regard to the consolidation
- the authority to decide on the consolidation is on the Institution
- Swiss Chambers could decide for consolidation **in their own motion**
- at any stage of the proceedings

## Case law after the DUTCO?

Very few in more than 20 years

Some Institutional Rules did not change their provisions and did not adapt themselves to the changing world

Few decisions proved to have a slightly different approach

- Germany: Higher Regional Court in Frankfurt (16 Sept. 2010)
- Switzerland: Swiss Federal Supreme Court (DFT4P. 105/2006)

Still, it seems that lawyers did not take the above into consideration since they keep on drafting poor arbitration clauses, therefore...

# Problems can obviously arise but...

## ...GET YOUR ARBITRATION AGREEMENT RIGHT!

Maybe not a Panacea but certainly a great  
help

(and tell your M&A colleagues...)



# MICHELANGELO CICOGNA

m.cicogna@dejalex.com

[www.dejalex.com](http://www.dejalex.com)



20121 **MILANO**  
Via San Paolo, 7  
tel. + 39 02 72554.1  
fax +39 02 72554.500

[milan@dejalex.com](mailto:milan@dejalex.com)

00197 **ROMA**  
Via A. Bertoloni, 14  
tel. + 39 06 809154.1  
fax +39 06 809154.44

[rome@dejalex.com](mailto:rome@dejalex.com)

1050 **BRUXELLES**  
Avenue Louise, 221  
tel. + 32 2 645 5670  
fax +39 2 742 0138

[bruxelles@dejalex.com](mailto:bruxelles@dejalex.com)

115114 **MOSCOW**  
Ulitsa Letnikovskaya, 10  
tel. + 7 495 792 54 92  
fax +7 495 792 54 93

[moscow@dejalex.com](mailto:moscow@dejalex.com)