APPOINTMENT OF ARBITRATORS IN MULTIPARTY ARBITRATIONS: AN EVALUATION OF FREEDOM OF PARTIES TO APPOINT ARBITRATORS OF THEIR CHOICE

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ABSTRACT

The nomination or appointment of arbitrators undoubtedly falls within the prerogative of parties to arbitration proceedings to choose their arbitrators. The exercise of such choice is legally conceived pursuant to the principles of party autonomy and equality of parties. However, in multiparty arbitrations, the alluded assumption may not be entirely accurate due to the problems that might trail joint nomination/appointment of arbitrators particularly where there are divergent interests among multiple claimants or respondents. The paper evaluates the underlying principles regarding appointment of arbitrators in multiparty arbitration and the extent to which parties must always be accorded the right to nominate arbitrators of their choice. In evaluating the principles, the papers rely on doctrinal legal method by examining relevant international Conventions and Treaties, Arbitral Institutional rules, Cases and Arbitral awards, and opinions of major publicists in the area. The paper finds that much as arbitration in general, and multiparty arbitration in particular revolves around the principle of party autonomy, and equality, there are compelling limitations to the freedom of parties to appoint arbitrators of their choice. Such limitations can be discerned from a purposive understanding of the same principles that supports the parties' freedom to nominate and appoint arbitrators of their choice.

Keywords: Multiparty Arbitration, Party Autonomy, Equality Principle, Arbitral Institutions.

INTRODUCTION

Multiparty arbitration refers to a proceeding involving more than two parties who are mostly commercial enterprises that have some economic relationships with each other (Schlosser, 1990; Mair, 2010). These relationships include those of a consortium member of the same project, parties with the same economic interests, and parties who have obligations towards the same party to the contract in question (Laufer et al., 2021). Such multiparty arbitrations commonly arise out of joint ventures, partnerships and consortia agreements. The proceedings are complex by nature, and may require innovative procedural approach to address them (Schlosser, 1990).

From a theoretical perspective, the principles of arbitration applicable to multiparty arbitration are derived from the doctrinal basis that require two key conditions to take place before any multiparty arbitration proceeding can commence (Schlosser, 1990). Firstly, parties must agree to the principle of multiparty arbitration. In this regard, parties are expected to have

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agreed to participate in any arbitral proceeding should a dispute arise from their economic relationships. Secondly, all parties should participate equally in setting up the arbitral tribunal. Here, each party is expected to freely, and without restraint participate fully in the appointment of arbitrators of their choice. This right to appoint the arbitrators of their choice is safeguarded by the principle of party autonomy.

Although it falls within the prerogative of parties to arbitration proceedings to choose their arbitrators pursuant to the principle of party autonomy, in multiparty arbitrations that may not be entirely accurate due to the problems that might trail joint nomination/appointment particularly where there are divergent interests among multiple respondents or claimants.

Scenarios of multiparty arbitrations are generally diverse and complex (Hanotiau, 2020). They range from single Claimant or Respondent on one hand, against multiple Respondents or Claimants on the other hand bounded by a single contract, to typologies of non-signatories, consolidations and joinders (Born, 2020). The issue of multiparty nomination of arbitrators raises considerable agitation regarding due process concerns in the arbitration community and the consequent danger of duplicity of arbitrations *"Adgas v Eastern Bechtel Corporation"* (Cases, 1982). In Siemens *v* Dutco (Cases, 1992) the French Cour de cassation quashed the decision of the Court and appeal and annulled the interim award issued by the arbitration tribunal on the ground those parties to a multiparty arbitration must be accorded equal treatment in the appointment of arbitrators. In other words, since the two respondents in the arbitration could not agree to a joint nomination due to divergent interests, except under protest, their right to equality of appointment of arbitrators should have been safeguarded as it forms part of French public policy. This case generated a lot of discussions in the arbitration community and helped steer nomination of arbitrators in a multiparty arbitration in a coherent direction. Notable from the discussions is the welcoming of the court's recognition of equal treatment of parties (Mair, 2010).

Against the background of Dutco case, most institutional rules have now made provisions for parties to jointly nominate their respective arbitrators (Laufer et al., 2021). Absent such joint nominations, the institutions will appoint the arbitrators; Article 12 (6) (ICC Arbitration Rules, 2021); Article 8 (LCIA Arbitration Rules, 2020); Article 17 (5) (SCC Arbitration Rules, 2017); Article 8 (2) (Hong Kong International Arbitration Centre, 2018); Article 12 (SIAC Rules, 2016); Article 29 (CIETAC Arbitration Rules, 2015). It influenced changes to the institutional Rules, such as those of The International Centre for Dispute Resolution of the American Arbitration Association (AAA), the International Chamber of Commerce (ICC), the Arbitration Institute of the Stockholm Chamber of Commerce, the London Court of International Arbitration (LCIA), the Belgian Centre for Mediation and Arbitration (CEPANI), and the Swiss Rules of International Arbitration (Swiss Arbitration Centre, 2021), among others (Georgios, 2000). High degree of similarity between some arbitration rules and institutional rules has also been observed. The decision also influenced parties' consideration of possible inequalities in arbitration and how to take steps to prevent that from stalling arbitration, and encourage parties to explore other options where consolidation is impossible. Indeed, exploring these options prevents the stalling of arbitration due to disagreements or non -participation of a party.

Having set this background, the paper will contextualise the diverse and complex scenarios of multiparty arbitration in section II. Section III will address the argument for freedom

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of parties to choose their arbitrators. Section IV will identify limitations of the argument for parties to choose their arbitrators, while Section V will conclude the paper.

Diverse Scenarios of Multiparty Arbitration

Consortium members of the same project: Project finance: In project finance, this refers to where project designers, contractors and maintenance providers in a large contract come together to form a group/consortium (Higham et al., 2017). Such consortium could also be responsible for defects during the lifecycle of the project. Project contractual arrangements that involve consortia include off take contracts wherein the Build Operate Transfer (BOT), Build Own Operate Transfer (BOOT), Build Own Operate (BOO) projects can be found in process plant projects, and concession agreements (Yescombe, 2014), including Public Private Partnerships (PPPs) for construction (Higuchi, 2019). In a power project for example, a process plant project could involve several contractual relationships among several parties. They include Take or Pay, Take and Pay, Long Term Sales, Contract for Differences, Hedging Contract, Throughput, and Input Processing contracts. Therefore, when it comes to project financing, several contractual agreements are entered into in respect of the relationships between the project and the host state, project and other businesses, and project and its lenders.

In addition to the contracts mentioned above, in natural resource projects, there is typically a contractual agreement, i.e., a concession or an off take agreement which gives title or ownership to a party. In an oil exploration and production project for instance, a Joint Venture (JV) agreement is used to create a project company which is a Special Purpose Vehicle (SPV) to explore and produce crude oil under an oil mining license or concession. Other contractual agreements involved include an Operation and Management (O&M) agreement, EPC agreement relating to design and construction, Sponsor's Subordinated Loan agreement, Project Management Service agreement, On the financing side of such projects, financing agreements include Senior Loan agreement, Sponsor Support agreement, Security agreement, Direct agreement, and Consulting agreement.

Construction: Construction is a contract where an employer, main contractor, and sub – contractors exist. In this arrangement, the contractor enters into an agreement with the employer, and also enters into another agreement with its sub-contractors (Schramke, 2018). These parties work together to ensure that construction is completed. This is as a result of a more integrated solution to create value for construction projects throughout its lifecycle, covering design, maintenance, operation, and/ or financing (Puil & Weele, 2014).

Maritime: This is also an industry which involves multiple complex contractual agreements. The complexity can, like in the instances described above, result in multiparty international arbitrations. This could for instance involve a Charter Party and Sub Charter Party agreements (London Maritime Arbitrators Association, 2021; Lau, 2011).

Parties with the same economic interests: Dispute involving parties with the same economic interest generally involve dispute involving a subsidiary of a parent company being held jointly and severally liable for a breach under the same contract, or disputes involving shareholders (Laufer et al., 2021).

Parties who have obligations towards the same party to the contract: For instance, where several parties are under obligations to perform certain duties towards the Project

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Company/Vehicle. It also envisages scenarios where subcontractor and other service providers have obligations towards a contractor (Schlosser, 1990).

Multiparty disputes usually involve dispute between several parties with diver's relationships, goals, and interests. Managing these numerous relationships require complex contractual agreements (Balcha, 2020). This results in complex arrangements hence, when a dispute arises, it usually involves multiple parties who are either answerable to the same party, who share the same economic interests, or parties who are members of a consortium.

Freedom of Parties to Choose their Arbitrators

The freedom or right of parties to arbitration proceedings to choose their is premised upon the following the principles:

Party Autonomy: Party autonomy refers to the principle of law that allows parties to a contract to define the rules that will govern their arbitral process in the event of a dispute (Dickson, 2018). It entails the freedom of parties to arbitration to, among other choices; appoint their own arbitrators subject to constraints of mandatory rules. Party's autonomy to appoint arbitrators of their choice is guaranteed under the New York Convention Article V (I) (d) (Sanders, 2009), National Arbitration Legislations Article 11; UAE Federal Law No. 6 (Law, 2018), and Institutional Arbitration Rules Articles 7-9 (Uncitral, 2021); Articles 12-14 (ICC Arbitration Rules, 2021) respectively. The Freedom is considered as a golden thread that runs through the entire arbitration system. In multiparty arbitration scenario, it is not unusual for parties to insist on nominating their own arbitrators in accordance with their agreement particularly where the interest of each party diverges. In BP Exploration Libya Ltd. *v* ExxonMobil Libya Ltd., (Cases, 1999) The US Court of Appeal held that the district court exceeded its authority when it ordered for appointment of five arbitrators as opposed to three as agreed by the parties in their arbitration agreement. Such deviation could render an award unenforceable under the New York Convention. Indeed, the Court was referring to Article V (I) (d) which provides that an award may be refused recognition and enforcement if the composition of the tribunal was not in accordance with the agreement of the parties.

Principle of equality of parties in nominating arbitrators: The principle of equality of parties in nominating/appointing arbitrators is one of the fundamental bases for setting aside the interim award in Dutco case by the French Cour de cassation (Cases, 1992). In Coop Vigili Fuoco Borgotaro *v* Mariani (Cases, 1999) the Italian Court of Cassation reached similar position regarding the fundamental nature of ensuring equality of parties in nomination of arbitrators. The nagging question however is; is the principle about equality of parties to nominate/appoint their arbitrators or equality of parties in nomination/appointment of arbitrators? This perhaps could do with the fact that equality of parties to nominate arbitrators does not necessarily translate to the right of a party to nominate its own arbitrator, or that failure to nominate does not amount to a violation of right to equality of parties in arbitration. As the inability to appointing arbitrator could potentially result in resort to default rules (Mair, 2010). Resulting to default rules in this case is not without its drawback, which is, that parties who are unable to appoint jointly can be deprived of their right to do so through disagreements. Appointment of arbitrators in a multiparty arbitration is as complex as multiparty arbitration is. Of concern in this regard is as it applies to the consolidation of multiparty arbitration. Many special procedures on multiparty arbitration contemplate situations where parties are unable to appoint arbitrators. Review of the provisions

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of these arbitration rules on appointment of arbitrators do not indicate that they appear to limit, diminish or deprive any party of its rights to appoint an arbitrator.

Limitation of Freedom of Parties to Appoint Arbitrators

Some of the circumstances that could limit autonomy include where parties request for the application of state law, where an arbitral tribunal, on its own, elects to apply state law, or where the party who lost an arbitration refuses to comply with the arbitral award which could lead to courts of law overriding party autonomy, conflict of award with public policy, applicable national/governing law, and recourse to a legal framework for interpretation, it violates the principle of natural justice, where an arbitration clause causes uncertainty and recourse is made to court is made for clarification, among others (Moss, 2015).

The Fallacy of Party Autonomy Argument

Although it may appear to be premised upon the principle of party autonomy, however, party autonomy does not extend to a situation where the choice of parties to resolve their dispute through arbitration would be rendered meaningless or truncated by an avoidable conundrum. In all the multiparty arbitration cases, absent the institutional solution of joint nomination, a party unwilling to participate in the arbitration can easily truncate the process under the guise of divergent interest. In essence, it is an extended application of party autonomy to ensure that choice to arbitration is carried out in an efficient and effective manner. By designating arbitral institutions, it is an express exercise of party autonomy and acceptance of institutional appointment in the event of protracted disagreement between parties (Bantekas, 2020). Furthermore, by subjecting a dispute to some institutional rules, parties have also empowered the institution to revoke earlier appointed arbitrator and replace them with new ones (Laufer et al., 2021). In respect of joinder of parties for instance, Article 17 (1) of the Australian Centre for International Commercial Arbitration (Gaillard & Savage, 1999; ACICA Rules, 2021) empowers the centre to allow a third party to be heard by joining such a party to arbitration before it upon request. The Rules also empowers the centre to revoke the confirmation of appointment of any arbitrator and appoint members where the request for joinder is made before a tribunal is constituted where there is no agreement on the identity of arbitrators nominated for confirmation within 14 days of being notified of the joinder. Furthermore, institutional rules empower tribunal to direct the consolidation of matters raising similar issues. Vesting powers in institutional rules demonstrate circumstances where the right to nominate arbitrators is more or less taken away from parties and vested in tribunals. This, in a way, ensures some form of checks and balances on the equality of parties to nominate arbitrators, and minimises the risk of abuse of power by the party with more leverage.

The Equality Principle

This principle is at the core of arbitration and its main objective is to ensure that all parties are treated equally, and availed equal opportunity to establish arbitration tribunal (Patocchi, 2013). Undergirding this principle is the theory of delocalisation which ensures that dispute resolution is insulated from the influence of national legal systems of seats of arbitration

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(Moss, 2015). Although Dutco and Borgataro have all alluded to the relevance of the principle of equality of parties in nominating arbitrators. However, good readings of Dutco seem to suggest that the court did not say that each party must appoint its arbitrator. On the contrary, the institutional solution of joint nominations clearly ensures the equality particularly where the institutions would appoint each member of a tribunal of three where joint nomination proves impossible by either of the two separate sides of claimants or respondents respectively. In PT Ventures *vs* Vitade (Cases, 2020) the BVI Courts confirmed the correct reading of Dutco by upholding the ICC position of treating three Respondents as one party and appointing all the five arbitrators in the arbitration pursuant to the ICC rule.

CONCLUSION

The need for parties to jointly nominate arbitrators and the consequent institutional nomination stems from the necessity of ensuring efficient conduct of arbitration proceedings and avoidance of inconsistent legal outcomes. As alluded to, the advantage of a single multiparty arbitration outweighs the disadvantages as it results in comprehensive proceedings and leads to cost-effective proceedings. As commercial relations become more complex, multiparty arbitration will be utilised more. This evaluation indicates how institutional rules evolve to address the complexities of multiparty arbitrations. Given that till now, any of the rules still adopt bipolar approach to multiparty arbitration, we anticipate that international arbitration rules will soon evolve and adopt a multipolar approach to multiparty arbitration. Doing so could possibly militate against any potential future Dutco scenario on appointment of arbitrators.

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