The ICC Arbitration Rules and Appointment of Arbitrators in Cases Involving Multiple Defendants

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I. Introduction

Dr. Dr. Ottoarndt Glossner has presided over the Commission on International Arbitration of the ICC with great probity and wisdom. Being a diplomat *par excellence*, he has managed to harmonize the different views of the members concerning the ICC Arbitration Rules in such a way that the Rules have been without major changes for a long time.

Recently however, it was not the Commission members who knocked on his door for change. Rather, it was the French Cour de Cassation, which on 7 January 1992 forced the door open by holding that the ICC's requirement that two named defendants jointly nominate one arbitrator violates the principle of equality of the parties in the appointment process. The Cour de Cassation held that a party can renounce this principle only after the dispute has arisen.

This decision raises the question of what the ICC Commission on International Arbitration should do. It is the answer to this question that I wish to explore in this contribution to the *Festschrift* at the occasion of Dr. Dr. Glossner's 70th birthday. Dr. Dr. Glossner can be reassured. I conclude that a major change of the ICC Rules is again not required – merely the addition of one sentence:

> "If the arbitral tribunal consists of more than one arbitrator and two or more claimants or defendants are named in the Request, all arbitrators shall be appointed by the International Court of Arbitration, unless the parties have agreed otherwise after the dispute has arisen."

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II. Method of Appointment under the ICC Rules

It is assumed herein that the parties have agreed to ICC arbitration, including in their contract the arbitration clause recommended by the ICC.[1] By doing so, the ICC Arbitration Rules, including the provisions relating to the appointment of arbitrators, become part of their agreement. In other words, when agreeing to ICC arbitration, the parties agree to the method of appointing arbitrators contained in the ICC Rules. That method, set forth in article 2 of the Rules, may be summarized as follows.

Article 2(1)-(6) of the ICC Rules concerns the constitution of the arbitral tribunal. Article 2 opens in its first paragraph with the principle that, to the extent the parties have not provided otherwise, the International Court of Arbitration appoints, or confirms the appointment of, arbitrators in accordance with the provisions of the article.

The fifth paragraph of article 2 of the ICC Rules provides that where the parties have not agreed on the number of arbitrators, the Court of Arbitration shall appoint a sole arbitrator, unless it appears to the Court that the dispute warrants the appointment of three arbitrators (which it generally does if the sum in dispute is over US$ 1 million).

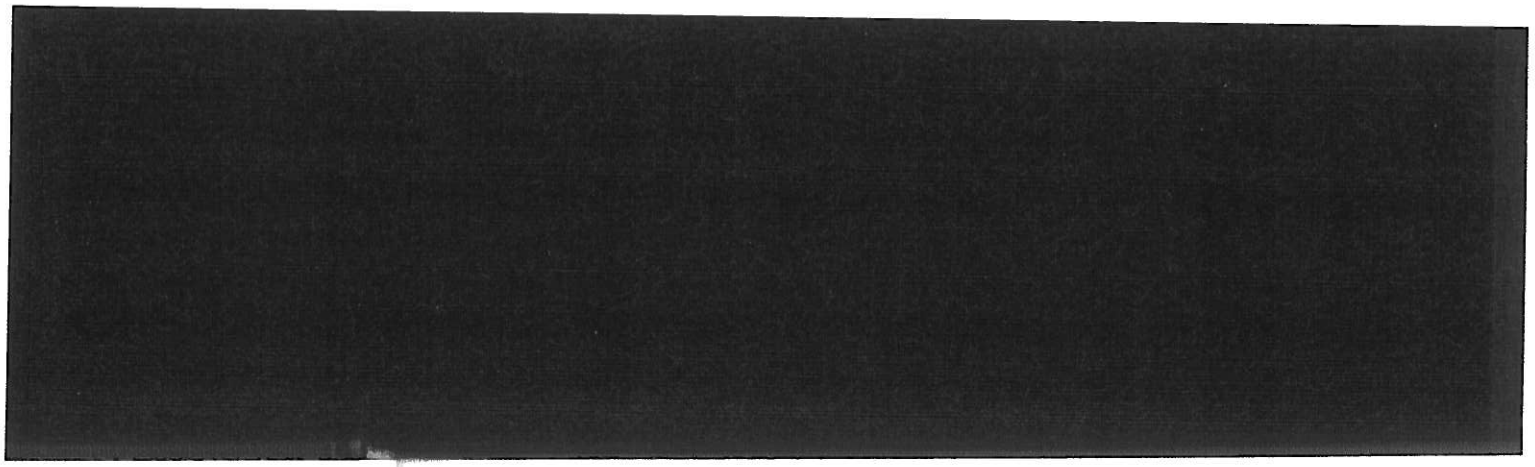
The fourth paragraph of article 2 of the ICC Rules provides that where the dispute is to be referred to three arbitrators, each party shall, either in the Request for Arbitration or the Answer, respectively, nominate one arbitrator for confirmation by the Court of Arbitration. The second sentence of the fifth paragraph specifies that where the Court has determined that three arbitrators are to be appointed, the parties shall each have a period of 30 days within which to nominate an arbitrator.

The fourth paragraph of article 2 further provides that the third arbitrator, who will act as chairman of the arbitral tribunal, shall be appointed by the Court unless the parties have provided that the arbitrators nominated by them shall agree on the chairman.

The sixth paragraph of article 2 then provides that where the Court is to appoint the chairman of the arbitral tribunal, that appointment will be made after requesting a proposal from an appropriate National Committee of the ICC.

If a party fails to nominate an arbitrator, the fourth paragraph of article 2 provides that the appointment shall be made by the Court of Arbitration. The sixth paragraph of article 2 specifies that where the Court is to appoint an arbi-

1 The clause recommended by the ICC reads:
"All disputes arising in connection with the present contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules."



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III. Do the ICC Rules Provide for Joint Nomination of an Arbitrator in Cases Involving Multiple Defendants?

If a Request for Arbitration names two or more defendants and three arbitrators are to be appointed (either because of the parties' agreement or the Court's determination), the ICC has adopted the practice of requiring the named defendants to appoint one arbitrator jointly and, upon their failure to do so, appointing the arbitrator on their behalf. Is there a proper legal basis for this practice? In other words, does this practice form part of the parties' agreement on the method of appointing arbitrators? The various theories that have been advanced in support thereof are examined in this section.

a) Text of the Rules

The text of the ICC rules does not contain any provision for a case involving multiple defendants and the constitution of an arbitral tribunal of three arbitrators. Article 2 of the Rules uses the word "party", "claimant" and "defendant" in the singular.

Moreover, the ICC Rules do not provide that the singular shall be construed as plural in the event of multiple claimants (or defendants) with regard to the constitution of the arbitral tribunal. If the drafters of the Rules had wished such construction, one would assume that it would have been specifically provided for. This observation applies more forcefully because the ICC Rules do specifically provide elsewhere that the plural shall include the singular in the case of an arbitrator.[2]

The only place where the ICC Rules refer to a plurality of claimants and defendants is article 9(2), concerning the advance on costs. That rule provides that: "The advance on costs shall be payable in equal shares by the Claimant or Claimants and the Defendant or Defendants." No one has argued that the ICC Rules should be read as a whole, such that article 9(2) would import the possibility of a plurality of claimants and defendants in the article 2 provisions regarding the constitution of the arbitral tribunal, insofar as a three-member tribunal is concerned.

2 Article 2(2), provides:
"The disputes may be settled by a sole arbitrator or by three arbitrators. In the following Articles the word 'arbitrator' denotes a single arbitrator or three arbitrators as the case may be."

In fact, the provisions regarding the constitution of the arbitral tribunal consisting of three arbitrators do not leave any room for a plurality of claimants or defendants. Specifically, article 2(4) provides:

> "Where the dispute is to be referred to three arbitrators, *each party* shall nominate in the Request for Arbitration and the Answer thereto respectively one arbitrator ... " (emphasis added).

And article 2(5), second sentence, provides:

> "In such a case the parties shall *each* have a period of 30 days within which to nominate an arbitrator" (emphasis added).

The words "each party" in article 2(4) and the word "each" in article 2(5) cannot possibly be interpreted in the plural sense, particularly as in the subsequent articles the Rules do refer to the "Claimant" and the "Defendant" (see, e.g., articles 4 and 5 of the Rules).

Moreover, the article 2(4) requirement to nominate the arbitrator "in ... the Answer" indicates that one defendant is meant. If there were two defendants, it is likely that there would be two (different) Answers. When only three arbitrators are to be appointed, one of whom is to be the Chairman pursuant to the second part of article 2(4), it is inconceivable where there is more than one defendant that each Answer could contain a nomination by a party of its own arbitrator.[3]

b) Nomination and Confirmation of Appointment

The Cour de Justice of Geneva (a court of first instance) has held that defendants in an ICC arbitration do not each have the right to appoint an arbitrator because

> "[T]he ICC system offers every guarantee, in any event more than anything else, because the parties only propose arbitrators who are appointed by the Court of Arbitration of the ICC. The Arab Republic of Egypt is wrong when it thinks that it has the right to be represented on the Arbitral Tribunal. In fact, the arbitrator himself designated by a party is neither its mandatory nor its representative."[4]

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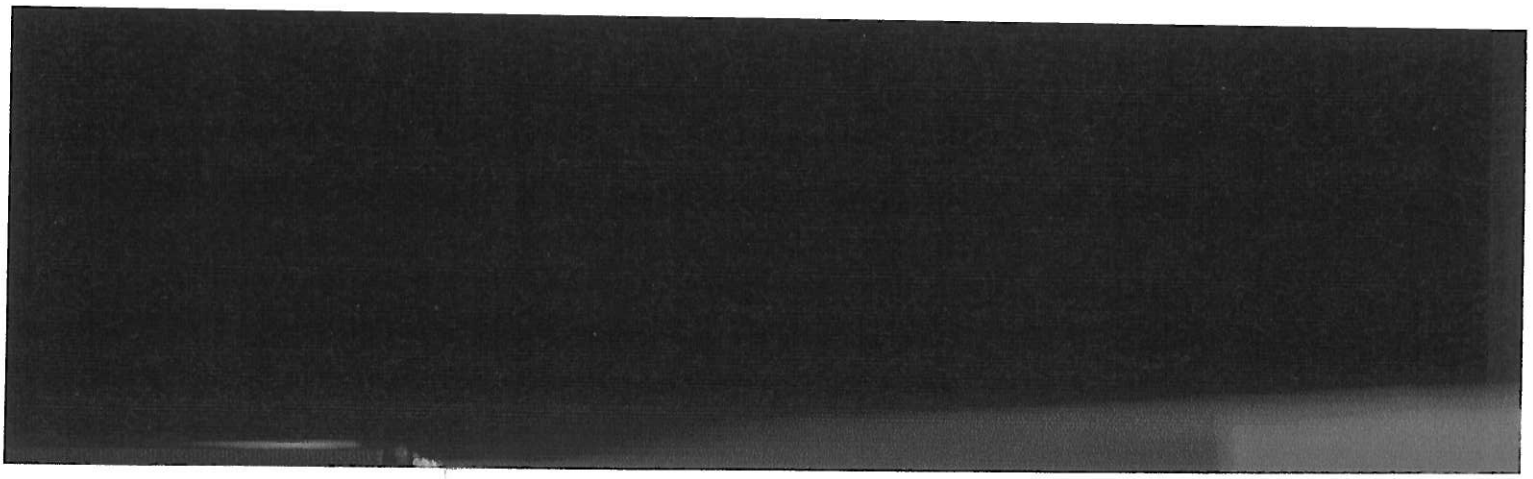
3 This does not mean that where there is a plurality of claimants they are not allowed to jointly nominate an arbitrator. A joint nomination is possible provided that the claimants can agree on the arbitrator. In this connection, it is to be noted that the question of a plurality of claimants or defendants is to be distinguished from so-called "parallel arbitrations" between the *same* (two) parties. In that respect, the ICC Rules do contain the possibility of joinder of claims in arbitration proceedings (ICC Rules, Appendix II, article 13).

4 Decision of 26 November 1982, La Semaine Judiciaire 1984, page 509, confirmed on other grounds (i.e., waiver of objection) by the Tribunal Fédéral on 16 May 1983. P. Bellet reports in his case comment on the *Dutco* decision in Revue de l'arbitrage, 1992 no. 3, page 473 at page 476, that the Kammergericht in Berlin (a court of first instance), Treuhand und Schiedsgerichtswesen 1966, page 10, decided in the same sense by imposing on eight defendants the obligation



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It is correct that an arbitrator is neither a mandatory nor a representative of a party. But that is not the issue. The question is whether the ICC Rules contain a method for appointment of arbitrators where there exists a plurality of defendants. The Cour de Justice apparently believed that the ICC Rules permit a joint nomination of an arbitrator on the grounds that a distinction could be made between the proposal ("nomination") by a party of an arbitrator and the confirmation by the ICC Court of the nomination. This distinction is erroneous.

The provision for the confirmation by the ICC Court was inserted in the Rules in order to afford the Court the ability to refuse an arbitrator whom the Court does not believe possesses the required impartiality and independence. Technically, the appointment of a party-nominated arbitrator is an appointment by a party, which is then perfected by the ICC Court. The text of article 2(1) of the ICC Rules is clear in this respect: "The Court of Arbitration ... *appoints, or confirms the appointments* of, arbitrators in accordance with the provisions of this Article" (emphasis added).[5] The appointment by the Court referred to in article 2(1) is concerned with the appointment by the Court of a chairman of the tribunal [article 2(4)] or a default appointment [article 2(6)], whereas the confirmation of appointment referred to in article 2(1) contemplates a party-nominated arbitrator. In the first case, there is a true appointment by the Court, whereas in the second case there is an appointment by a party that is ratified by the Court.[6] Consequently, a party has the right to appoint an arbitrator under the ICC Rules, subject to ratification by the ICC Court.

c) Default Appointment

It is sometimes argued that the failure to nominate an arbitrator jointly should be considered a failure to appoint an arbitrator within the meaning of article 2(4) *in fine* and article 2(6) of the ICC Rules.

Apart from the fact that both provisions contemplate the singular "party", this theory confuses cause and effect. The question is whether the ICC Court

to appoint one arbitrator. On the other hand, the American courts have decided in an opposite direction which consider the right of a party to appoint an arbitrator to be fundamental. *Compañía Española de Petroleos, S.A. vs. Nereus Shipping, S.A. et al.*, 527 F.2 d 966 (2nd Cir. 1975); *Antco Shipping Company, Ltd. vs. Sidermar S.p.A.*, 417 F. Supp. 207 (SDNY 1976).

5 See also article 2(7) of the ICC Rules: "Every arbitrator *appointed or confirmed* by the Court ... " (emphasis added).

6 The distinction is also clearly made in article 2(4)(2) of the ICC Rules, providing: "The third arbitrator, who will act as chairman of the arbitral tribunal shall be *appointed* by the Court, unless the parties have provided that the arbitrators nominated by them shall agree on the third arbitrator within a fixed time-limit. In such a case the Court shall *confirm* the appointment of such third arbitrator." (emphasis added)

of Arbitration can require two or more defendants to make a joint nomination. There is no indication in the Rules that it can. The provision in the Rules for the Court to make default appointments can only cover those failures in making appointments provided for in the Rules.

d) "All the Necessary Powers" of the ICC Court (Article 3 Statutes) and "Act in the Spirit of these Rules" (Article 26 Rules)

The position of the ICC Court of Arbitration regarding the question under discussion is summarized by Mr. *S.R. Bond* as follows:

> "Of course, multiple defendants are first offered the opportunity to propose jointly an arbitrator. Where none of the defendants proposes an arbitrator, the Court will select and appoint one. The ICC Rules do not explicitly set out the procedure for such an appointment. This has been taken by some as an indication that the Rules are not made or intended for multi-party arbitration in the absence of an agreement of the parties or an arbitral clause which has anticipated a multi-party arbitration.
>
> The ICC International Court of Arbitration has not been of this opinion. Where it must act for defaulting multiple defendants, it does so in light of Article 3 of its Statute, already cited above, which gives the Court 'all the necessary powers' to ensure the application of its Rules and also Article 26 of the ICC Rules which states, *inter alia*, that 'In all matters not expressly provided for in these Rules, the International Court of Arbitration ... shall act in the spirit of these Rules'."[7]

Article 3 of Appendix I, entitled "Statutes of the International Court of Arbitration", provides in relevant part:

> "The function of the International Court of Arbitration is to ensure the application of the Rules of Conciliation and Arbitration of the International Chamber of Commerce, and the Court has all the necessary powers for that purpose."

Article 26 of the ICC Rules provides:

> "In all matters not expressly provided for in these Rules, the Court of Arbitration and the arbitrator shall act in the spirit of these Rules and shall make every effort to make sure that the award is enforceable at law."

It is submitted that neither article 3 of the Statutes nor article 26 of the Rules offers a legal basis for requiring multiple defendants to nominate an arbitrator jointly for a three-member arbitral tribunal.

Article 3 of the Statutes[8] does not provide a legal basis for the requirement of a joint nomination by multiple defendants. As is correctly pointed out by

7 S.R. Bond, *The Experience of the ICC International Court of Arbitration*, in Multi-party Arbitration, Dossier of the Institute of International Business Law and Practice (Paris 1991) page 37 at page 44.

8 From a formal legal point of view, the question can be asked whether the Statutes form part of the ICC Rules of Conciliation and Arbitration. The ICC Rules do not contain any provision that refers to, or incorporates, Appendix I which contains the Statutes (nor for that matter, any of the other Appendices).

Mr. *Bond*, the ICC Rules do not provide the method for such an appointment. Pursuant to article 3, the function of the Court is to ensure "the *application* of the Rules". When the Rules do not provide for a method of appointment in a certain case, there is nothing to be applied: *ex nihilo nil fit*. Consequently, "all the necessary powers *for that purpose*" fall with it.

Mr. *Bond* seems to argue that a distinction should be made between an explicit and an implicit method of appointment. However, as is explained above, the ICC Rules do not even imply an appointment method requiring a joint nomination by multiple defendants for a three-member tribunal. Thus, to say that the method is implied because the ICC Court has the necessary powers to ensure the application of the Rules is reverse logic.

As regards article 26 of the ICC Rules, the ICC Court relies heavily on the words "in all matters not expressly provided for in these Rules". It seems to share the opinion that the ICC Rules do not expressly provide for the appointment of arbitrators in cases involving multiple defendants. But it then assumes the power to fill gaps regarding the method of appointment on the basis of the above quoted words in article 26. However, this language does not provide the ICC Court with carte blanche to act in whatever manner it deems fit. The power of the Court to fill gaps in the Rules is circumscribed by the words also appearing in article 26: "in the spirit of these Rules".

To be clear, the present question does not concern the *interpretation* of the Rules. Rules can always be interpreted where they are unclear. In this respect, one should not be overly formalistic. However, the question concerns the *filling of gaps* in the Rules, and that is quite a different matter. A third party mandated by the parties to fill in gaps, as is the case for the ICC Court under article 26, should have a clear mandate from the parties as to the cases in which it may do so.

In the case of the ICC Rules, the parties have mandated the Court to fill gaps in the Rules "in the spirit of these Rules". That raises the intriguing question of what is meant by the "spirit", and who has the power to determine the "spirit". Of course, the spirit of the Rules should not be confused with the spirit of the Court. The spirit should be established in some objective way. Admittedly, this is difficult. As regards the appointment of arbitrators, is it the spirit of the Rules that all arbitrators should ultimately be appointed by the Court of Arbitration? The answer is obviously no, as the Rules themselves provide for party appointments of arbitrators. But is the spirit then that in all cases where a party does not appoint an arbitrator, the Court has the residual power to appoint the arbitrator(s)? Here again, the answer must be no. The spirit of article 2 is an enumeration of specific cases in which the Court may appoint arbitrators. There is no hint in article 2 of a residual power of the Court in this respect. The inescapable conclusion therefore is that there is no

spirit that can be established regarding the appointment of arbitrators. Failing such a spirit, the ICC Court of Arbitration cannot avail itself of the power to *fill gaps* as provided in article 26 of its Rules in connection with the appointment of arbitrators.

Rather, article 26 of the ICC Rules militates against the imposition of a joint nomination by defendants of an arbitrator in its final proviso that the Court "shall make every effort to make sure that the award is enforceable at law". As the imposition may violate the applicable arbitration law, it may jeopardize the validity of the arbitral award under that law and, hence, its international enforceability.[9]

e) Custom

The ICC also suggests that it is customary in ICC arbitrations involving multiple defendants that the defendants propose an arbitrator jointly. It may be that it has become ICC's practice to require a joint nomination in such cases, and that not many defendants have offered opposition. However, this practice is legally insufficient to have become a custom that is legally binding on the parties and/or has become a term of an arbitration clause in a contract referring to ICC arbitration. It is also very unlikely, in view of the confidential nature of ICC arbitration, that the custom would be known to parties adopting an ICC arbitration clause. *M. P. Bellet,* former First President of the French Cour de Cassation, observes:

> "This 'practice', used more and more by the ICC (and which is the origin of the difficulties encountered in the famous *Westland* affair), is not yet sufficiently known so that it constitutes a true custom, having a binding force on all who address themselves to the ICC."[10]

f) Implied Acceptance

Another theory invoked in support of the requirement of a joint nomination by defendants is the implied acceptance of this method of appointment. This theory is advanced by Me. *de Boisséson,* who writes that the defendants have not been deprived of the right to appoint an arbitrator because:

> "[When] they have concluded arbitration agreements, they are deemed to have accepted all modalities thereof, including the mechanism for the constitution of the Arbitral Tribunal."[11]

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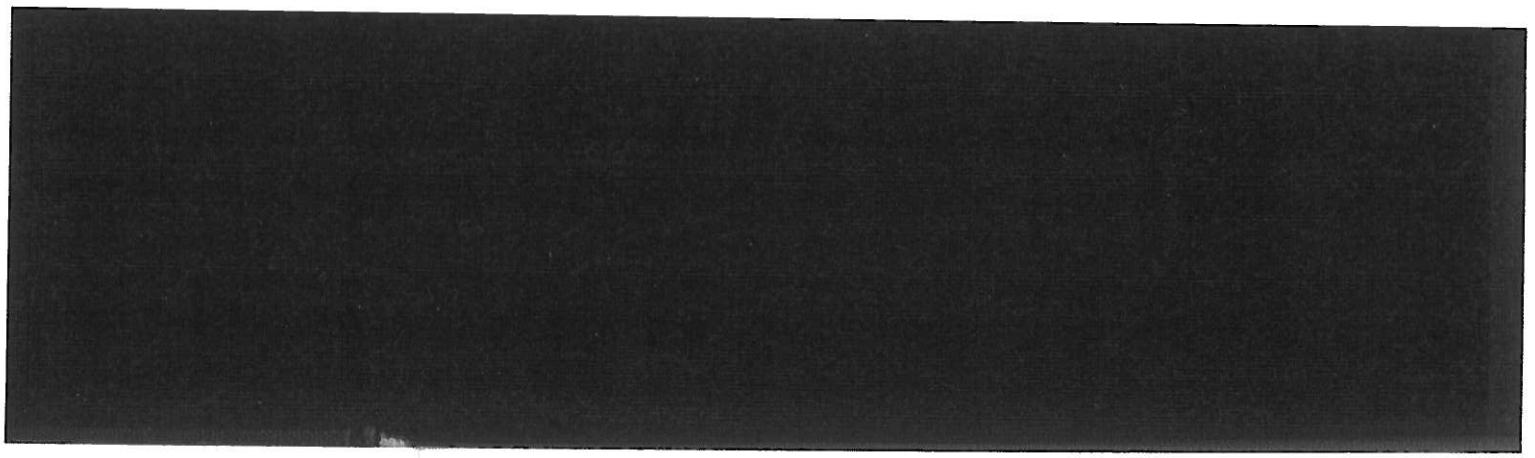
9 See Section V below. A setting aside of the arbitral award in a New York Convention country will have an effect *erga omnes*, preventing enforcement on a world-wide basis by virtue of article V(1)(*e*) of the Convention.

10 Revue de l'arbitrage, 1989 no. 2, page 99 at page 103.

11 M. de Boisséson, *Droit français de l'arbitrage*, 2nd edition (Paris, 1990), page 537.



At first sight, one is inclined to reason that it is incongruous for parties to agree to arbitration under the rules of an arbitral institution in the first instance and, subsequently, for one of the parties to argue that the arbitral tribunal cannot be constituted under the rules in a given case.

However, such an extensive interpretation is difficult to accept in the constitution of an arbitral tribunal pursuant to an arbitration clause recommended by the ICC as it relates to the very foundation of the arbitral process. In that respect, the parties must make clear additional contractual arrangements in their arbitration agreement.

g) "Equivalent Sacrifice"

Yet another theory in support of the requirement of a joint nomination by defendants is that of "equivalent sacrifice". This theory is advanced by Me. *J. L. Delvolvé*. He argues that when making an appointment each party makes an equivalent sacrifice. In exchange for the freedom in the choice of the arbitrator, the claimant has the obligation to propose an independent arbitrator and, conversely, the defendants have the obligation to accept such an arbitrator. From this it is reasoned that there is "nothing shocking in that the choice of one arbitrator is imposed on the parties in the same camp."[12]

The theory of Me. *Delvolvé* does not answer the question of what the contractual or other basis is for the obligation to jointly nominate an arbitrator. Moreover, it is difficult to see where the sacrifice of the claimant lies. The claimant is in any event obliged to appoint an independent arbitrator.[13] There being no sacrifice on the part of the claimant, there can be no "equivalent sacrifice" on the part of the defendants.

h) Conclusion

Having regard to the various theories discussed above, one must conclude that there is no proper contractual basis for requiring two named defendants to nominate an arbitrator jointly for a three member arbitral tribunal. Nor is there a contractual basis in the absence of such a nomination empowering the ICC Court of Arbitration to appoint an arbitrator on behalf of the two defendants.[14]

12 J.L. Delvolvé, *Des solutions contractuelles: La clause d'arbitrage multipartite*, Revue de l'arbitrage, 1988 no. 3, page 501 at page 505.

13 See article 2(4) of the ICC Rules, providing in relevant part: "Such person shall be independent of the party nominating him."

14 *Accord*, Chr. Seppala, *Multi-party Arbitration at Risk in France*, International Financial Law Review (March 1993) p. 33 *et seq.*

The situation involving multiple defendants pertains to multi-party arbitration, as it involves more than two parties. The fact that the ICC Rules do not provide for multi-party arbitration is recognized by the ICC itself. In its "*Guide on Multi-party Arbitration under the Rules of the ICC Court of Arbitration*"[15] it states at paragraph 4:

> "The ICC Court of Arbitration can provide for a multi-party arbitration proceeding *only where all the parties have agreed to it* either at the time the dispute or disputes arise or at the time the parties enter into their various contractual arrangements. That a multi-party arbitration proceeding needs a contractual basis is beyond doubt" (emphasis added).

It is also worth quoting the observations made by Mr. *H. Herrling* on this subject:

> "It is true that in a meeting with the ICC Commission on International Arbitration a majority voted for [the solution that in the case of multi-party arbitration the arbitrators should all be appointed by the ICC Court] but so far the current ICC Rules do not indicate that, nor does the ICC Guide: Thus, multi-party arbitration is possible under the Rules but there seems nothing making it possible for the ICC International Court to deprive a party of its opportunity to nominate an arbitrator. If this is true and if, for various reasons, it is considered necessary to let the ICC Court of Arbitration appoint all arbitrators in a multi-party arbitration, it seems that it would be necessary for the ICC – and for any other institution having, in this regard, similar rules – to change its rules."[16]

Similarly, the authors of the leading textbook on ICC arbitration also appear to be of the opinion that multi-party arbitration can be solved by appropriate contractual arrangements only in the context of ICC arbitration.[17] In particular, the authors admonish:

> "However, the freedom of action of arbitral institutions is restricted by the necessarily consensual character of arbitration. If an arbitral institution takes too much initiative in purporting to oblige recalcitrant parties to participate in arbitral proceedings, the validity of the resulting award will be doubtful."[18]

The above conclusion may be unsatisfactory in view of the realities in present international commercial life. However, due to its consensual nature, international commercial arbitration can function only on the basis of a proper contractual arrangement. The ICC Rules are regrettably deficient in this respect.

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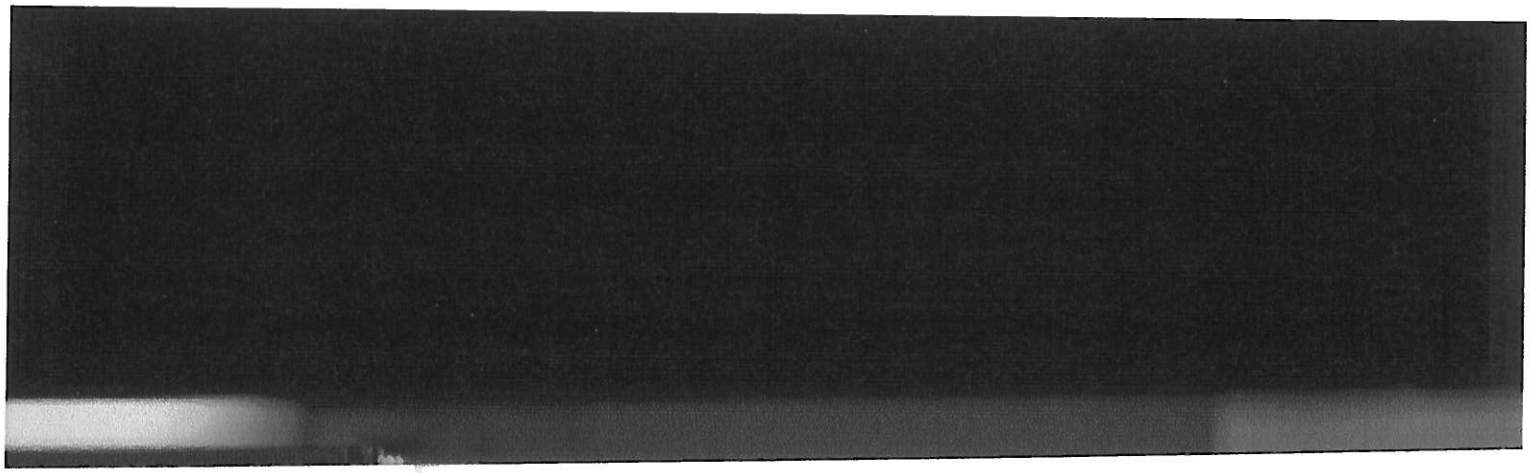
15 ICC Publication no. 404 of 1982.

16 H. Herrlin, *Issues to be Discussed*, in Multi-party Arbitration, Dossier of the Institute of International Business Law and Practice (Paris 1991) page 131 at pages 134–135.

17 W.L. Craig, W.W. Park, and J. Paulsson, *International Chamber of Commerce Arbitration*, 2nd edition (New York, 1990) pages 155–156. See also, M. de Boisséson, *Le droit français de l'arbitrage* (Paris, 1990) pages 541–542.

18 W.L. Craig, W.W. Park, and J. Paulsson, *International Chamber of Commerce Arbitration*, 2nd edition (New York, 1990) page 156.



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IV. Equality of the Parties in the Appointment Process

1. Introduction

The question of the appointment of arbitrators and multiple defendants is not limited to the ICC Arbitration Rules alone. Irrespective of what the ICC Rules may provide in this respect, the more fundamental issue is that of the equality of the parties in the appointment process. This question will be examined in the present section.

In the recent decision by the French Cour de Cassation (First Civil Chamber), 7 January 1992, *BKMI and Siemens vs. Dutco*,[19] the question of whether a joint nomination can be imposed on two named defendants arose. The highest French court reached the conclusion that such an imposition violates the principle of equality of the parties in the appointment of the arbitrators. This being a principle of international public policy, a party can renounce it only after the dispute has arisen.

2. Meaning of the Right to Appoint

Before discussing the *Dutco* case, a preliminary observation should be made regarding the equality of parties in appointing arbitrators. One might be inclined to think that as every arbitrator must be impartial and independent, how the arbitrator is appointed is of little importance. This view overlooks the fact that underlying the desire of a party to appoint an arbitrator is not the intent to hold that arbitrator in that party's control, but rather the wish to be assured of his expertise and experience.[20] When parties to an arbitration agreement have stipulated for the appointment of their "own" arbitrator, equality of the parties in the appointment means that each party has the aforementioned right, not just one of them.

3. Cour de Cassation re Dutco

Dutco involved a consortium agreement between two German companies, BKMI and Siemens, and a company from the United Arab Emirates, Dutco, with respect to the construction of a plant in Oman. The arbitration clause in the agreement provided for arbitration of all differences in accordance with the ICC Rules by three arbitrators appointed pursuant to those Rules.

19 Reported in Revue de l'arbitrage, 1992 no. 3, pages 470–472, with comment by P. Bellet, *id.*, pages 473–482.

20 P. Bellet in his case comment on the *REDEC* case in Revue de l'arbitrage, 1989 no. 2, page 99 at page 104.

A dispute having arisen among the parties, Dutco commenced ICC arbitration by means of a single Request for Arbitration against both BKMI and Siemens. Dutco having appointed an arbitrator, the ICC required BKMI and Siemens to nominate an arbitrator jointly. When BKMI and Siemens refused to comply with this request, the Court of Arbitration threatened to appoint an arbitrator on their behalf. Upon this threat, BKMI and Siemens appointed an arbitrator, but reserved their right to challenge the regularity of such appointment.

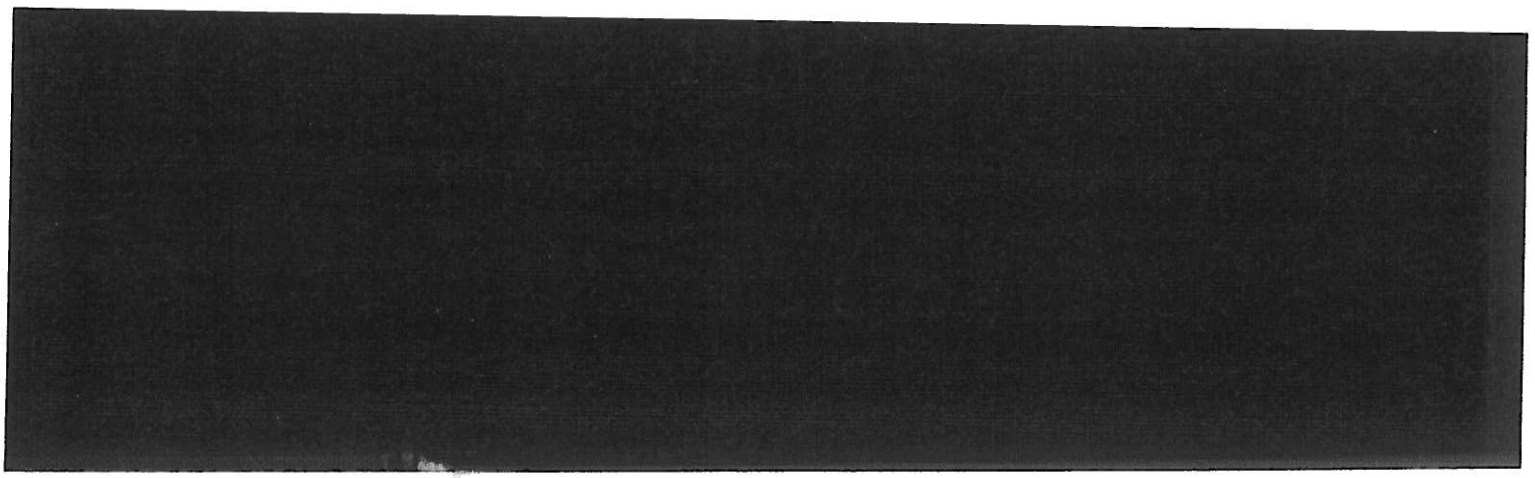
The arbitral tribunal decided in an interim award that the appointment procedure was valid. BKMI and Siemens took recourse against this award before the Court of Appeal in Paris. They invoked the irregularity in the constitution of the arbitral tribunal and a violation of public policy on the grounds that they had been deprived of the fundamental right to each designate an arbitrator.

By a decision dated 5 May 1989, the Court of Appeal rejected the recourse.[21] The Court of Appeal held that the arbitration clause in the consortium agreement expressed the will of the parties to the same contract to submit to an arbitral tribunal of three arbitrators, from which it necessarily resulted that the parties had contemplated the possibility of one arbitral tribunal consisting of three arbitrators who would decide on a dispute involving the three parties. According to the Court of Appeal, that included the modalities that such situation imposed on the choice of the arbitrators.

The Cour de Cassation overturned the decision of the Court of Appeal. It reasoned that the principle of equality of the parties in the appointment of the arbitrators pertains to public policy and that a party can renounce to it only after the dispute has arisen.

At this juncture, it must be noted that the public policy principle of equality in the appointment process referred to by the Cour de Cassation must be deemed one of international public policy. The *Dutco* case was governed by the French International Arbitration Law, which is contained in articles 1492–1507 of the French New Code of Civil Procedure. Article 1504 provides that the grounds for setting aside an arbitral award made in France in an international arbitration are those set forth in article 1502. The Cour de Cassation relied on the second ground listed in article 1502 ("If the arbitral tribunal was irregularly composed or the sole arbitrator irregularly appointed"). The fifth ground of article 1505 refers to a violation of "international public policy". When under these circumstances the Cour de Cassation mentions "public policy" in connection with the constitution of the arbitral tribunal, it can only mean international public policy as it is inconceivable that two different no-

21 Reported in Revue de l'arbitrage, 1989 no. 4, pages 723–727, with comment by P. Bellet, *id.*, pages 727–733.



) commenced ICC arbitration
inst both BKMI and Siemens.
required BKMI and Siemens
nd Siemens refused to comply
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-727, with comment by P. Bellet, *id.*,

tions of public policy would be used in arbitrations governed by the French International Arbitration Law.

4. Equality of Appointment under Some Other Arbitration Laws

The principle that there should be equality of the parties in the appointment process is accepted in many countries. In most countries, this principle is developed in case law. Some countries even have specific statutory provisions. For example, the Netherlands Arbitration Act 1986 provides in article 1028:

> "If the arbitration agreement gives one of the parties a privileged position with regard to the appointment of the arbitrator or arbitrators, the other party may, despite the method of appointment laid down in that agreement, request the President of the District Court within one month after the commencement of the arbitration to appoint the arbitrator or arbitrators. The other party shall be given an opportunity to be heard. The provisions of article 1027(4) shall apply accordingly."

A similar provision can be found in article 1025(2) of the German Code of Civil Procedure,[22] and article 1678(1) of the Belgian Judicial Code.[23] The difference between the Dutch provisions and the German and Belgian provisions is that under Dutch law only the agreed upon method of appointment becomes invalid. In Germany and Belgium the entire arbitration agreement becomes invalid.

A privileged position within the meaning of article 1028 of the Netherlands Arbitration Act exists if one of the parties may appoint all arbitrators or more arbitrators than the other party.[24] A privileged position also exists if arbitrators can be chosen only from a list drawn up by one of the parties.[25]

However, the principle is viewed as being so fundamental that, even if a party does not avail itself of article 1028, an arbitral award rendered by a tribunal constituted in violation of article 1028 can still be set aside on the basis of

22 Article 1025(2) of the German Code of Civil Procedure provides:
"The arbitration agreement is not valid if one of the parties has used any superiority it possesses by virtue of economic or social position in order to constrain the other party to make this agreement or to accept conditions therein, resulting in the one party having an advantage over the other in the procedure, and more especially in regard to the nomination or the non-acceptance of the arbitrator."

23 Article 1678(1) of the Belgian Judicial Code provides:
"An arbitration agreement shall not be valid if it gives one of the parties thereto a privileged position with regard to the appointment of the arbitrator or arbitrators."

24 *Memorie van Toelichting* [Explanatory Memorandum], submitted by the Minister of Justice to the Dutch Parliament on 11 July 1984, Doc. no. 18464, reprinted in *Tijdschrift voor Arbitrage*, 1984 no. 4/A, page 19 at page 25 (at that stage of the draft Act being article 1022).

25 *Memorie van Antwoord* [Memorandum of Reply], submitted by the Minister of Justice to the Dutch Parliament on 16 February 1986, Doc. no. 18464 no. 6, reprinted in *Tijdschrift voor Arbitrage*, 1986 no. 2, page 54 at page 61.

article 1065(1)(*b*) of the Act ("the arbitral tribunal was constituted in violation of the rules applicable thereto").[26]

5. *Common and Differing Interests*

Certain authors argue with respect to a joint appointment by two or more defendants that a distinction must be made between cases where the interests of the defendants are different and cases where the interests are the same.[27] These authors opine that in the latter case, a joint nomination can be imposed.

It is submitted that this theory, called "*consorité*", is of no assistance. First, it does not provide an answer to the question of whether the parties have agreed that multiple defendants must nominate an arbitrator jointly. Aside from the foregoing consensual aspect, the application of the theory raises difficult questions. The proponents of the theory appear to advance two criteria for determining whether there is a community of interest: (1) the claims advanced against the defendants are the same; (2) the defendants belong to the same group of companies. However, it is unclear whether the proponents of the theory deem the fulfillment of one of these criteria sufficient or require that both be cumulatively fulfilled.

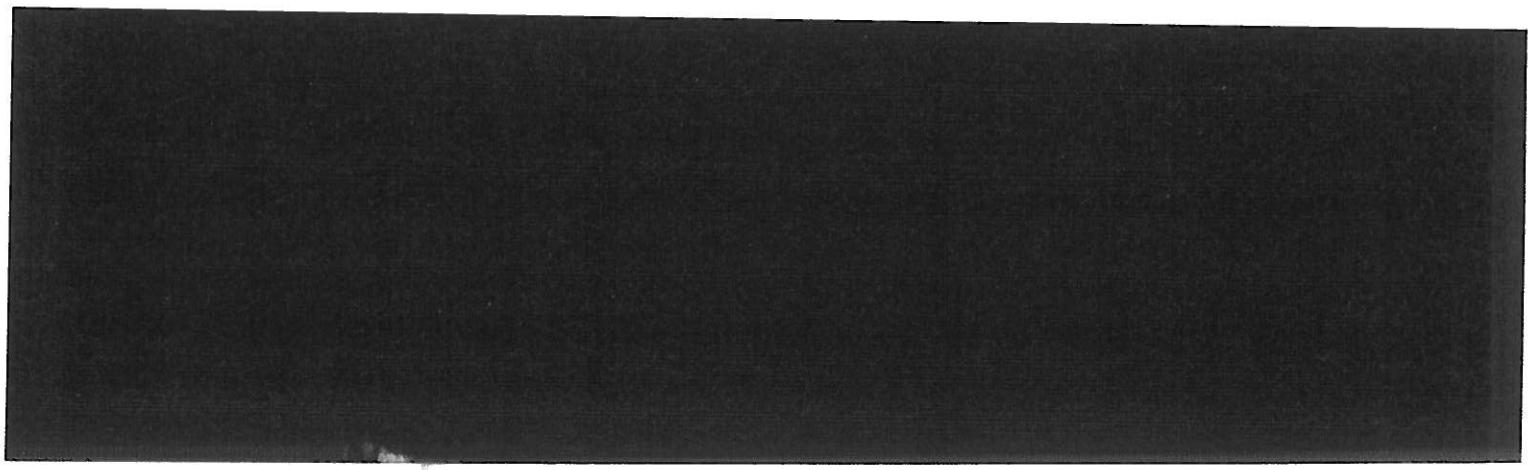
As regards the first criterion, a claimant can take advantage of the theory by filing identical claims against the defendants and thus force defendants to nominate an arbitrator jointly. But what will happen if after the constitution of the arbitral tribunal, but before the establishment of the Terms of Reference, the claimant amends its claims to make them different with respect to each defendant?[28] May each defendant in such a case appoint its own arbitrator in lieu of the arbitrator already nominated jointly? And what would happen if, before the establishment of the Terms of Reference, one of the defendants introduces a counterclaim that might create a diversity of interest?

As regards the second criterion, it is a basic principle of many laws that obligations entered into by a legal person bind that person only. Its shareholders or affiliated companies are not liable therefor. Piercing the corporate veil is, in general, limited to highly exceptional circumstances only (in particular in the area of abuse of legal entities for the purpose of obtaining advantage to the detriment of creditors). It should also be noted that companies in the same group not only have a separate legal existence, but also may operate quite inde-

26 H.J. Snijders, *Burgerlijke Rechtsvordering* (loose-leaf, supplement 206, November 1991), Vol. IV, pages 163–164.

27 For references, see P. Bellet in his case comment on the *Dutco* decision in Revue de l'arbitrage, 1992 no. 3, page 473 at pages 479–480.

28 Article 16 of the ICC Rules would require the consent of the defendants for new claims after the establishment of the Terms of Reference.



pendently in practice. That being the case, what then is the common interest of two or more companies belonging to the same group justifying the denial of their right to appoint their own arbitrator(s) on the same footing as the claimant?

Both criteria, and hence, the theory of "*consorité*", must fail for two reasons. The first is that the nature of the claims and the corporate affiliation of the defendants are confused with the right to appoint an arbitrator. Whereas claims may be identical or defendants may belong to the same group, the defendants' views and the requirements regarding the expertise and experience of the desired arbitrator may differ.[29] The second is of a more practical nature. Who determines whether there is common interest? Is it the claimant? Or is it the ICC International Court of Arbitration? Obviously, it cannot be the claimant alone, who would be allowed to state unilaterally that there is common interest. The matter would then revert to the ICC International Court of Arbitration. Here again, the ICC Arbitration Rules do not contain any provision empowering the Court to make a determination that there is common interest among defendants. The procedure concerning the determination is also likely to cause delays in setting the arbitration into motion.

In conclusion, the theory of "*consorité*" does not provide a workable solution and, if it provides a solution, it is a partial one only. In fact, the theory of "*consorité*" admits that each defendant may appoint its own arbitrator in the event of differing interests. The theory does not give an answer as to how that situation should be solved in ICC arbitration.

V. Role of the Applicable Arbitration Law

When considering the question of whether the ICC International Court of Arbitration may impose the joint nomination of one arbitrator by multiple defendants, the applicable arbitration law should also be taken into account. That law not only may enshrine the principle of equality of the parties in the appointment process, but may also provide solutions for the present question. Furthermore, the appropriate arbitration law may contain provisions that the ICC Court of Arbitration and the parties may not ignore.

An example is the Netherlands Arbitration Act 1986, which applies to any arbitration taking place in the Netherlands, whether domestic or international. The Act's provisions are mandatory unless they specifically allow the

29 For this reason, the present question has nothing to do with the question as to whether two or more companies in the same group are bound by the same arbitration clause. See *Dow Chemical France i. a. vs. Isover Saint Gobain*, IX Yearbook Commercial Arbitration (1984) page 131 *et seq.*

parties to agree otherwise. In that respect, the Act is quite liberal. It frequently allows the parties to deviate from a provision in the Act. Conversely, mandatory provisions in the Act prevail over any provisions in an arbitration agreement or arbitration rules referred to therein that are in violation thereof. Consequently, the ICC Rules are subject to the mandatory provisions contained in the Netherlands Arbitration Act.

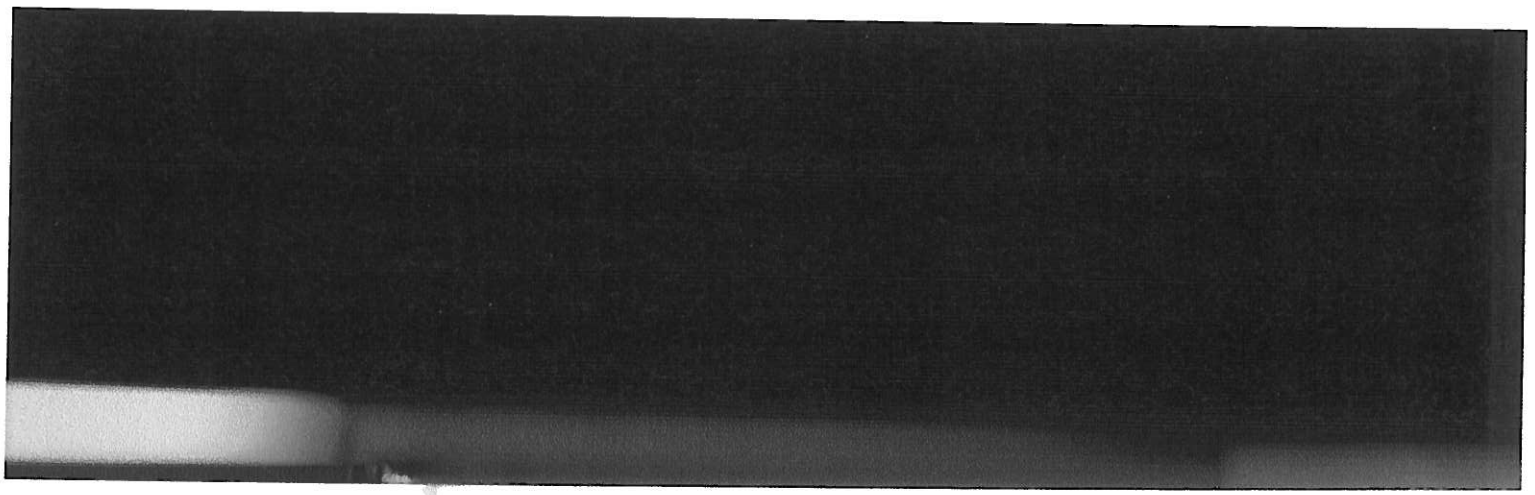
A specific aspect of the new Netherlands Arbitration Act is that its provisions are rather detailed. This is to provide adequately for those cases where the parties have failed to make arrangements with respect to the appointment process or the arbitral proceedings or where their arrangements fail to work properly (the so-called system of "fall-back" provisions). It is believed that this method assists parties and arbitrators in practice.[30] For example, if the parties have not, or inadequately, agreed on the method of appointing arbitrators, or if the agreed to method fails to work properly, the Act provides solutions to solve these problems.[31] In the event that the fall-back provisions have not been observed in these cases and no waiver has occurred with respect to the non-observance, the award can be set aside. For example, if the parties have not agreed on the method of constituting the arbitral tribunal and the statutorily provided method has not been followed, the award can be set aside on the ground mentioned in article 1065(1)(*b*) ("the arbitral tribunal was constituted in violation of the rules applicable thereto").

The provisions relating to the appointment of the arbitrators are set out in article 1027 of the Act:

> "(1) The arbitrator or arbitrators shall be appointed by any method agreed by the parties. The parties may entrust to a third person the appointment of the arbitrator or arbitrators or any of them. If no method of appointment is agreed upon, the arbitrator or arbitrators shall be appointed by consensus between the parties.
>
> "(2) The appointment shall be made within two months after the commencement of the arbitration, unless the arbitrator or arbitrators have already been appointed. In the event, however, that any of the cases mentioned in article 1026(2) occurs, the period of two months shall start to run on the day on which the number of arbitrators is determined. The period for appointment shall be extended to three months if at least one of the parties is domiciled or has his actual residence outside the Netherlands. These periods may be shortened or extended by agreement between the parties.
>
> "(3) If the appointment of the arbitrator or arbitrators is not made within the period prescribed in the preceding paragraph, the arbitrator shall, at the request of either party, be appointed by the President of the District Court. The other party shall be given an opportunity to be heard.

30 A.J. van den Berg, *National Report: The Netherlands*, in: The International Handbook on Commercial Arbitration (ICCA, Deventer, Supplement 7, April 1987) page 1 at page 2.

31 Article 1027 of the Act. See below.



"(4) The President or third person shall appoint the arbitrator or arbitrators without regard to the question whether or not there is a valid arbitration agreement. By participating in the appointment of the arbitrator or arbitrators, the parties do not forfeit the right to challenge the jurisdiction of the arbitral tribunal on the grounds of absence of a valid arbitration agreement."

As is clear from the text quoted above, the Act attaches primary importance to the agreement of the parties on the method of appointment. The Act also expressly allows the parties to entrust the appointment of the arbitrator or arbitrators to a third person (e.g., the ICC Court of Arbitration).

If the parties have not agreed on a method of appointment, the Act provides that they must agree on the sole arbitrator or *all* arbitrators, as the case may be (first paragraph of article 1027).[32]

With the purpose of expediting the arbitration, the Act stipulates that the appointment must take place within two months after the commencement of the arbitration (second paragraph of article 1027).[33] If one or both parties have their domicile or actual residence outside the Netherlands, the period is extended to three months. These periods of time may be shortened or extended by agreement of the parties.[34]

If the arbitrator appointment has not taken place within the prescribed period of time, the arbitrator or arbitrators shall, at the request of either party, be appointed by the President of the District Court (the third paragraph of article 1027). This rule also applies to the failure of a third person to make the appointment within the prescribed period of time.[35]

32 The idea underlying this rule is the following. Traditionally, Dutch legal doctrine and practice disfavours so-called "party-arbitration". Party-arbitration means that each party nominates an arbitrator and the two so chosen appoint the third arbitrator. It is believed in the Netherlands that this method of appointment may jeopardize the independence of the party-appointed arbitrator (in literature sometimes referred to as "combat-arbitrator"). When drafting the new legislation on arbitration, it was therefore thought advisable not to introduce in the Act the system of "party-arbitration" as a statutory method of appointing arbitrators where the parties have not agreed on a method of appointing arbitrators. Consequently, the Dutch legislature provided that, in the absence of an agreed method of appointing arbitrators, consensus on all arbitrators must be reached. *Memorie van Toelichting* [Explanatory Memorandum], submitted by the Minister of Justice to the Dutch Parliament on 11 July 1984, Doc. no. 18464, reprinted in *Tijdschrift voor Arbitrage*, 1984 no. 4A, page 19 at page 20. It may be added that party-arbitration is legally not forbidden in the Netherlands.

33 In the case of an arbitration clause, the arbitration is deemed to have commenced on the day of receipt by the respondent of the notice of arbitration (article 1025(1)). The parties may agree on another method of commencement (article 1025(3)).

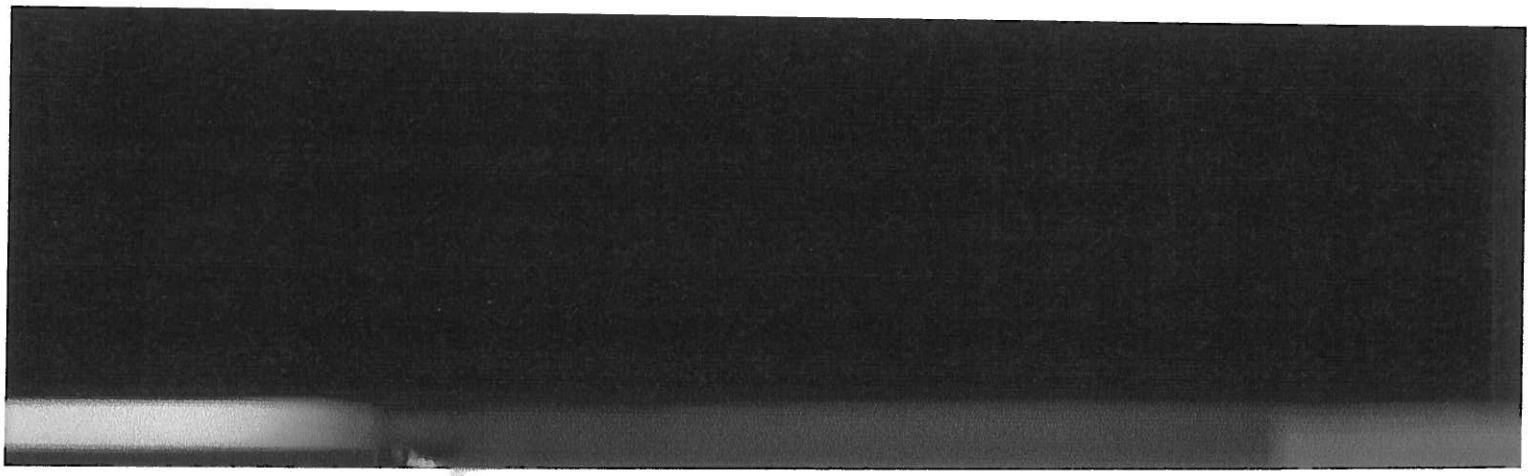
34 In the event that after the commencement of the arbitration the number of arbitrators is to be determined as yet, the period of time starts to run on the day on which the number of arbitrators is determined (article 1027(2)).

35 P. Sanders, *Het Nieuwe Arbitragerecht*, 2nd edition (Deventer, 1991) page 79.

It is important to note that where an appointment is to be made by the President of the District Court, the President appoints *all* arbitrators, even if one or more of the arbitrators were already appointed. In making the appointment, the President will normally follow the preference expressed by a party.[36]

Thus, interplay between the Dutch statutory provisions on appointment of arbitrators and those contained in the ICC Rules is as follows. The provisions regarding the appointment of arbitrators contained in article 2 of the ICC Rules are the "method agreed by the parties", referred to in the first sentence of paragraph 1 of article 1027 of the Act. Those cases specified in article 2 of the ICC Rules where the ICC International Court of Arbitration may appoint the arbitrators come within the scope of the second sentence of paragraph 1 of article 1027 of the Act ("The parties may entrust to a third person the appointment of the arbitrator or arbitrators or any of them."). It is important to emphasize that the ICC Rules authorize the International Court to appoint an arbitrator only in specific cases. The Rules do not contain a specific rule to the effect that the ICC may in all cases appoint an arbitrator or arbitrators. Nor is this the meaning of the second sentence of paragraph 1 of article 1027 of the Act. That sentence merely allows the parties to authorize a third person to appoint an arbitrator or arbitrators in those cases circumscribed by them. Finally, the third sentence of paragraph 1 of article 1027 of the Act applies in those cases where the parties have not agreed upon a method of appointment. That includes the situation where the method of appointment does not cover the actual case. This occurs under the ICC Rules with respect to the appointment of an arbitrator in the case of multiple defendants. In that case, the third sentence of the first paragraph of article 1027 of the Act requires that all parties agree on all arbitrators. If the parties are unable to reach such an agreement within the period of time referred to in the second paragraph of article 1027 of the Act, or if for whatever other reason the appointment of all arbitrators has not taken place within that period of time, any party to the dispute may apply to the President of the District Court to appoint all arbitrators. Following the provisions of the Netherlands Arbitration Act in ICC arbitrations taking place in the Netherlands, an arbitral tribunal can ultimately always be constituted.

36 *Memorie van Toelichting* [Explanatory Memorandum], submitted by the Minister of Justice to the Dutch Parliament on 11 July 1984, Doc. no. 18464, reprinted in *Tijdschrift voor Arbitrage*, 1984 no. 4A, page 19 at page 28.



VI. Possible Solutions

In this contribution it is concluded that the ICC Arbitration Rules used in conjunction with the arbitration clause recommended by the ICC are regrettably deficient with respect to the appointment of arbitrators in the case of multiple defendants (and, for that matter, multiple claimants). There are various solutions to this problem.

Obviously, a first solution is to draft an appropriate arbitration clause by elaborating on the clause recommended by the ICC. However, in France such a solution may not work because the Cour de Cassation has held in *Dutco* that a party can renounce the right of equality in the appointment process only after the dispute has arisen.

A second solution is to appoint a sole arbitrator, in which case no question regarding equality can arise. The parties may so agree pursuant to the first sentence of article 2(3) of the Rules.[37] The ICC may also determine that only a sole arbitrator is necessary pursuant to article 2(5) of the Rules. If the parties then fail to agree on the sole arbitrator, the sole arbitrator would have to be appointed by the ICC Court by virtue of the second sentence of article 2(3) of the ICC Rules. This solution may not be entirely satisfactory in cases where the amount at stake is in excess of US$ 1 million, as it is the policy of the ICC in such cases to determine the number of arbitrators at three. Moreover, the parties may prefer to have three arbitrators.

A third solution is that all parties, possibly at the suggestion of the ICC, agree that all three arbitrators would be appointed by the ICC Court. However, this solution may not always be consented to by all parties after a dispute has arisen.[38]

A fourth solution is a variation of the previous solution. This may be adopted where there are two defendants. All three parties, again, possibly at the suggestion of the ICC, would agree to have an arbitral tribunal of five arbitrators, each of the parties appointing an arbitrator and the remaining two (one of whom would act as chairman) being appointed by the ICC Court. A tribunal of five arbitrators, however, is rather cumbersome. Again, it may not always prove possible that all parties agree on such a method after the dispute has arisen.

37 The first sentence of article 2(3) of the ICC Rules provides:
"Where the parties have agreed that the dispute shall be settled by a sole arbitrator, they may, by agreement, nominate him for confirmation by the Court."

38 The parties may also agree that the ICC draws up a list of possible arbitrators from whom the parties can choose the three arbitrators. See the list procedure provided in the AAA and NAI Rules.

A fifth solution is to rely on the provisions of the applicable arbitration law, such as article 1027 of the Netherlands Arbitration Act. However, not all arbitration acts fit seamlessly into the ICC Rules. Moreover, the interference of national courts in the international arbitral process should take place only in those instances where it is really necessary.

The above solutions are not entirely satisfactory. The conclusion, therefore, seems inevitable that the ICC Rules should be amended to provide specifically for cases involving multiple defendants. This can be achieved by adding a rather simple provision to article 2 of the ICC Rules, reading:

> "If the arbitral tribunal consists of more than one arbitrator and two or more claimants or defendants are named in the Request, all arbitrators shall be appointed by the International Court of Arbitration, unless the parties have agreed otherwise after the dispute has arisen."

The advantage of such a provision is that its application is purely administrative. The ICC Court need only consult the Request for Arbitration in order to find out whether two or more claimants or two or more defendants have been named. It then needs to inquire with the claimants and defendants whether they have agreed or intend to agree otherwise. The appointment process will not be blocked because of uncooperative defendants and no interference of the local courts in the appointment process is required. Perhaps such an amendment could be the ICC Commission on International Arbitration's "present" for Dr. Dr. Glossner's 70th birthday.