

Ensuring Party Equality in the Process of Designating Arbitrators in Multiparty Arbitration: An Update on the Governing Provisions

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The arbitration world has long struggled with how best to ensure fairness in the appointment of arbitrators in disputes among three or more parties. The French Cour de cassation's 1992 Dutco decision is widely credited with calling attention to the question and with spurring leading arbitration institutes to revise their rules to address the appointment process in multiparty cases. Although the solutions adopted differ in some particulars, most major sets of rules now either permit, or else require, the institute to designate the entire tribunal in certain multiparty instances. A number of national arbitration laws also address the question in various ways, with one common thread existing in a sizeable subset of these laws: their protective provisions apply whenever one party enjoys a privileged role in the designation process. This article also examines the relatively modest body of arbitral and judicial precedents existing on the question, and this examination reveals two emerging trends: treating multiple parties named on the same "side" of a dispute as a single entity, and finding that those multiple parties have similar interests. Either of these "solutions" allows multiparty arbitrations to be handled as if they were classic bipartite arbitrations, and for difficulties in the constitution of tribunals to be avoided. The authors conclude that the simplest solution is for parties more routinely to use their arbitration agreements to empower respected arbitration institutes to appoint the entire tribunal, either in all cases or upon the appearance of a disagreement as to a designation among multiple parties on either side.

I. INTRODUCTION

Given the consensual and historically bipartite nature of arbitration, complex procedural questions to which there are no satisfactory or settled solutions can often arise when a dispute involving three or more parties is to be resolved through arbitration. Depending on the circumstances, the parties and the tribunal may have to confront difficult questions such as: the possibility of implementing in a single arbitration several separate but similarly-worded arbitration clauses; the consolidation of parallel proceedings; requests for the joinder or intervention of additional related parties (including possibly non-signatories to the arbitration clause(s)); the orderly presentation of claims and defenses; and the division and payment of arbitration fees among the parties, to name a few.¹ One such difficult procedural question that arises with some frequency is how to ensure the orderly and fair designation of an arbitral tribunal in multiparty arbitration. The critical importance of this issue arises from the fact that a failure to respect the parties'

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¹ See generally FRANÇOIS-XAVIER TRAIN, *LES CONTRATS LIÉS DEVANT L'ARBITRE DU COMMERCE INTERNATIONAL* 1–2 (2003); Bernard Hanotiau, *Les groupes de sociétés dans l'arbitrage commercial international*, in *LA CONVENTION D'ARBITRAGE, GROUPES DE SOCIÉTÉS ET GROUPES DE CONTRATS* 113, 115–16 (2007); JOACHIM G. FRICK, *ARBITRATION AND COMPLEX INTERNATIONAL CONTRACTS* 229–41 (2001).

rights in the designation process can have severe consequences on the validity and enforceability of the award.

Consider, for example, the scenario in which an arbitration agreement calls for the constitution of a three-member arbitral tribunal, and multiple parties on either side of the dispute cannot agree on a co-arbitrator or simply insist that each one of them should have the right to appoint a co-arbitrator. The issue in such circumstances is how to constitute the tribunal in a manner that respects the intentions of the parties, as manifested by the provisions of their arbitration agreement, while simultaneously respecting the principle that each party should be treated fairly, if not equally, in the process of designating the arbitral tribunal.

This issue, and the ways in which it has been addressed under various arbitral rules, national laws, and court decisions, is the topic of this article. Ensuring the proper designation of the arbitral panel is not only a matter of practical import from a case management perspective, but is also one of significance to the ultimate outcome of the arbitration, because, again, an arbitral award issued by an improperly constituted tribunal is one that is at risk of being annulled at the place of arbitration or declared unenforceable at the place of enforcement.

After reviewing the different arbitration rules, national laws, and jurisprudential precedents, we conclude this article by summarizing the key points and offering at least one form of arbitration clause designed to avoid complications in the constitution of tribunals in multiparty arbitrations.

II. OVERVIEW OF THE *DUTCO* CASE AND ITS IMPACT ON THE ICC ARBITRATION RULES

A. THE *DUTCO* CASE

In January 1992, the French Cour de cassation, in the case of *Sociétés BKMI et Siemens v. Société Dutco*, issued what is, without a doubt, one of the most influential and commented-upon contributions to date on the subject of constituting arbitral tribunals in multiparty arbitration.

As *Dutco* has been extensively commented upon elsewhere, a brief overview of its factual context will be adequate for the purposes of this article. The case began as an International Chamber of Commerce (ICC) arbitration commenced by Dutco against BKMI and Siemens. All three of the parties were members of a consortium formed to construct a cement plant in Oman. The arbitration clause in the parties' consortium agreement stated only that all disputes arising under the agreement would be settled by arbitration in Paris in accordance with the ICC Arbitration Rules "by three arbitrators appointed in accordance with those rules."

Dutco's request for arbitration included a nomination of arbitrator. Respondents BKMI and Siemens challenged the request for arbitration and declined to nominate an arbitrator jointly, arguing that Dutco should have commenced a separate arbitration against each of them. Dutco's arbitral claims against the two respondents were factually dissimilar, and the

two respondents' interests were not aligned.² The ICC rejected the challenge and, applying its usual practice at the time, instructed the respondents to make a joint nomination, which they eventually did under protest. After the tribunal was fully constituted, it rendered a partial award finding that it had been properly constituted and that the claims against both respondents could proceed in a single arbitration.

The respondents then applied to the Cour d'appel de Paris to have the award annulled on the grounds that the tribunal was irregularly constituted and that recognition and enforcement of the award would be contrary to public policy. The appellate court rejected those arguments by finding that, under the circumstances, the parties must have contemplated the possibility that a multiparty dispute would be resolved in a single arbitral proceeding wherein each side would have to select an arbitrator. The Cour d'appel found, therefore, that the tribunal had been formed in line with the arbitration agreement of the parties and the applicable ICC Rules of Arbitration.³

On further review, the Cour de cassation reversed the Court of Appeal in rather terse terms. To do so, the Cour de cassation announced that "the principle of the equality of the parties in the designation of arbitrators is a matter of public policy," that a party can waive it "only after the dispute has arisen," and that the result reached by the Cour d'appel violated these principles.⁴ In other words, the Cour de cassation ruled that any procedure for designating an arbitral tribunal set out in a pre-dispute arbitration agreement that does not ensure the strict equality of all parties in constituting that tribunal may not be implemented against a party unless, after the dispute has arisen, all parties confirm their earlier-agreed designation method.⁵

The Cour de cassation's decision has been the object of rather vivid criticism by some. Certain authors have pointed out, for instance, that the decision could lead to the misinterpretation that every arbitral party has a right under French law to designate "its own" arbitrator or that French law requires that all arbitrators be designated in the same manner.⁶

Others have been more measured, saying, for instance, that:

[T]he French Cour de Cassation simply requires that all the parties should have the same rights with regard to the appointment of the arbitrators, not that they should all have a right to appoint "their" arbitrator ... [T]he *Dutco* case quite clearly revealed that the parties' discretion as to their choice of arbitration is not without its limits, and that the French courts are determined to

² Eric A. Schwartz, *Multi-Party Arbitration and the ICC in the Wake of Dutco*, 10 J. INT'L ARB. 5, 14 (No. 3, 1993):

It is important to bear in mind in this regard that the two defendants in the *Dutco* case were independent and had potentially conflicting interests in the arbitration. In fact, the claimant had separate and distinct causes of action against each of them, which, in principle, could have been brought in separate proceedings.

³ Court of Appeal, Judgment of May 5, 1989, 1989 REV. ARB. 723, and English translation, 15 Y.B. COM. ARB. 124 (1990).

⁴ Cour de cassation, Judgment of January 7, 1992, 1992 REV. ARB. 470 and English translation, 18 Y.B. COM. ARB. 140 (1993).

⁵ JEAN-BAPTISTE RACINE, *L'ARBITRAGE COMMERCIAL INTERNATIONAL ET L'ORDRE PUBLIC* 18 (1999).

⁶ Georges Bolard, *Les Principes Directeurs du Procès Arbitral*, 2004 REV. ARB. 511, 535–36. *But see* Schwartz, *supra* note 2, at 14 ("[I]t is to be emphasized that the French Supreme Court's ruling does not confer upon each party to an arbitration the right to designate an arbitrator, as long as the parties are treated with equality").

ensure that the agreement of the parties complies with the fundamental principles of fairness and equality.⁷

Similarly, some have suggested that the Cour de cassation's decision addressed a special circumstance where the respondents clearly had diverging interests, which is not always the case.⁸ And, while many authors have criticized the decision, some of them do recognize that questions of fairness will arise whenever one party is afforded complete liberty in choosing a co-arbitrator, while the remaining parties must either reach a compromise on a joint designation or else have that designation taken from their hands and made by a disinterested third party.⁹

An arbitrator's declared independence or ability to be fair does not always fully assuage such concerns. Although arbitrators are naturally under a duty to be fair and neutral, these are not typically the sole qualities that interest the designating party. The act of nominating an arbitrator constitutes an expression of confidence by the nominating party not only in that arbitrator's fairness and neutrality but, in addition, in the arbitrator's intelligence; educational, professional, and/or personal background or profile; knowledge or expertise on a particular legal or technical point; reputation, including particularly the view that the other co-arbitrators are likely to have of him or her and the degree to which that arbitrator's views can be expected to be accorded weight by other members of the tribunal; or simply the arbitrator's availability to devote adequate time to the matter in light of the arbitrator's other ongoing professional commitments.¹⁰ This last consideration

⁷ FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 469–70 (Emmanuel Gaillard & John Savage eds., 1999).

⁸ Schwartz, *supra* note 2, at 14.

⁹ Similar concerns can, of course, arise also in arbitrations involving just two parties. One example of a case involving a dispute between two parties that is illustrative of the Cour de cassation's concern with equality in the process of constituting arbitral tribunals is a June 8, 1999 ruling of the Cour de cassation's First Civil Chamber. At issue was the appointment of an arbitrator made by a trial level court (the Commercial Court) at the request of the arbitral claimant, in the place of the arbitral respondent, who had initiated a challenge to the validity of the arbitration agreement. Although the respondent had, subsidiarily and without prejudice to its challenge to the validity of the arbitration agreement, also proposed the name of an arbitrator, the Commercial Court did not take that proposal into account and instead named a different individual as arbitrator in the respondent's place. The arbitration rules of the administering organization agreed to by the parties indeed provided that the co-arbitrator normally to be designated by the party who was resisting arbitration would, in the event of difficulty constituting the tribunal, be appointed by the Commercial Court. After the Rouen Court of Appeal refused to rescind the Commercial Court's designation, the Cour de cassation overruled the Court of Appeal, stating that the application of the arbitration institution's rule and the concomitant failure to take the respondent's chosen arbitrator into account violated the principle of equality in the designation of arbitrators. Cass. 1e civ., June 8, 1999, 2000 REV. ARB. 119.

¹⁰ Pierre Bellet made this point at length in an article published shortly after the appearance of *Dutto*:

Independence is certainly necessary, but it is not sufficient. Arbitrators must also be competent. And merely being included on a list of arbitrators is not sufficient to make one competent. Moreover, the attributes needed vary from case to case. Finally, there are many illustrious arbitrators whom it would be unwise to designate because they are already too occupied by a stream of cases. A choice must be made, and it is a tricky and important one. Who can make that choice better than the very party whose interests are at stake in the case? In principle, the choice is too important to be left to the discretion of a third party, of an institution or even of a judge, because it is not possible for them to be as familiar with the file as the party itself.

Thus the party that remains unfettered in making its choice has an advantage as compared to the party who must leave that choice up to someone else and also as compared to the party whose freedom is restricted in this regard. It is this inequality which explains the severity shown by the Cour de cassation judges in *Dutto*. Pierre Bellet, Note, 1992 REV. ARB. 473, 477 (authors' translation); see also Dominique T. Hascher, *Consolidation of Arbitration by American Courts: Fostering or Hampering International Commercial Arbitration?*, 1 J. INT'L ARB. 127, 134–35 (No. 2, 1984); ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 185 (4th ed. 2004).

is a compelling one that, in the authors' experience, is receiving increasing attention by clients and counsel alike, with both questioning in some instances the extent to which they can be assured that the arbitrator they designate will dedicate sufficient time to the matter and will not unduly delegate substantive tasks to assistants and junior counsel.

B. RESULTING MODIFICATION OF THE ICC RULES OF ARBITRATION

The Cour de cassation's ruling in *Dutco* led the ICC Court to re-evaluate its then standard practice of requiring multiple parties from one side of a dispute to nominate an arbitrator jointly. In its next round of revisions to its Arbitration Rules (which took effect in 1998), the ICC added a provision in Article 10 authorizing the ICC Court of Arbitration to appoint *all* of the arbitrators in cases where three arbitrators are to be named and when either multiple claimants or multiple respondents have failed to agree on a joint designation (or on a method of designation).

It is worth observing that disagreements as to designations will most typically arise, as a practical matter, among multiple respondents rather than among multiple claimants, as claimants more often have interests that are in harmony, as reflected by the fact that they have elected to proceed as co-claimants rather than to commence separate arbitrations.¹¹

Following the additions, Article 10 of the ICC Rules of Arbitration reads as follows:

Article 10. Multiple Parties.

- (1) Where there are multiple parties, whether as Claimant or as Respondent, and where the dispute is to be referred to three arbitrators, the multiple Claimants, jointly, and the multiple Respondents, jointly, shall nominate an arbitrator for confirmation pursuant to Article 9.¹²
- (2) In the absence of such a joint nomination and 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 chairman. In such case, the Court shall be at liberty to choose any person it regards as suitable to act as arbitrator, applying Article 9 when it considers this appropriate.¹³

This revised language nevertheless gives rise to one potential uncertainty, namely, how properly to interpret the interplay between Article 10 and the flexibility afforded to the parties under Article 7(6) to opt out of Article 10 altogether. Article 7(6) states that “[i]nsofar as the parties have not provided otherwise, the Arbitral Tribunal shall be constituted in accordance with the provisions of Articles 8, 9 and 10.” Therefore, the ICC has granted discretion to the parties—even those who are party to a multiparty arbitral agreement—to opt out of the ICC's rules for the constitution of an arbitral tribunal. If not used wisely, such discretion could result in an agreement that treats the parties

¹¹ Orkun Akseli, *Appointment of Arbitrators as Specified in the Agreement to Arbitrate*, 20 J. INT'L ARB. 247, 252 (2003).

¹² Though art. 10(1) does not state so explicitly, it seems that the chair is then normally appointed by the ICC Court, unless the parties have agreed on another procedure for that appointment. ICC Arbitration Rules, art. 8(4) (default rule for appointment of the chair).

¹³ Art. 9 sets out, in particular, the process by which the ICC International Court of Arbitration may call upon one or more of its “National Committees” for a recommendation.

unequally in the designation of the arbitral tribunal. In other words, parties who adopt the ICC Rules of Arbitration but opt out of its default mechanisms for constituting the arbitral tribunal may find themselves in a situation akin to that found in *Dutco*, where an impasse is reached and the agreed appointment procedure requires respondents with diverging interests, for example, to nominate a co-arbitrator jointly.¹⁴ In short, the ICC has, in so many words, placed the principle of party autonomy in drafting an arbitration agreement above what would appear to be the unlikely risk that the parties would both opt out of Article 10 and find themselves in a *Dutco*-type predicament.

Perhaps the fact that a close reading of the Rules can give rise to the sorts of interpretational uncertainties mentioned above serves to confirm that the ICC encountered difficulty in modifying Article 10 in such a way as to accommodate simultaneously *Dutco*'s strict interpretation of the principle of equality, on the one hand, and the consensual nature of arbitration (particularly, the right of parties to freely agree upon a method for choosing arbitrators), on the other.

Whatever the proper interpretation on the above point, the fact is that in the years since the amendment of the ICC Rules, the ICC Court has not systematically resorted to the possibility that Article 10(2) provides of appointing all the members of a tribunal. Before deciding that it will appoint all arbitrators sitting on a tribunal, the ICC Court typically takes into account factors such as the arbitration law of the place of arbitration, as well as the law of the likely places where the award might be enforced.¹⁵ As a result, there have been instances in which the ICC Court of Arbitration confirmed the co-arbitrator nominated by a claimant and also proceeded to nominate the second co-arbitrator in the place of the multiple respondents who failed to agree on a nomination.¹⁶

This practice is consistent with the drafting of Article 10(2), in which the word "may" is employed ("the Court may appoint each member of the Arbitral Tribunal"). Interestingly, when the ICC Rules of Arbitration were being revised, Professor Fouchard accurately predicted that the ICC would make sparing use of the possibility offered by Article 10(2).¹⁷

¹⁴ Derains and Schwartz note that there are limits to the types of variations from the ICC's Arbitration Rules to which the parties may agree, and they provide as an example of such an impermissible deviation an agreed derogation from art. 7(1)'s requirement for the arbitrators to be independent of the parties. On the other hand, art. 10, they suggest, is not a mandatory rule and art. 7(6) allows parties to derogate from it. YVES DERAIS & ERIC A. SCHWARTZ, *A GUIDE TO THE ICC RULES OF ARBITRATION* 143–44, 177 n.148 (2d ed. 2005).

¹⁵ Anne Marie Whitesell & Eduardo Silva-Romero, *L'arbitrage à pluralité de parties ou de contrats: l'expérience récente de la Chambre de Commerce Internationale*, Supplément Spécial BULL. C.C.I. 7, 13 (2003); see also Schwartz, *supra* note 2, at 17.

¹⁶ Whitesell & Silva-Romero, *supra* note 15, at 13; see also ERIK SCHÄFER, HERMAN VERBIST, & CHRISTOPHE IMHOOS, *ICC ARBITRATION IN PRACTICE* 61 (2005).

¹⁷ *Evocations de Philippe Fouchard: Témoignages de Quelques Amis, Collègues et Disciples, Témoignage d'Emmanuel Jolivet*, 2005 REV. ARB. 277, 279–80.

Article 10(2) of the 1998 Rules seemed to him to be well tailored to account for the *Dutco* decision and, according to him, would not provide co-respondents with a means of depriving the claimant or claimants of the ability to nominate a co-arbitrator. He already foresaw [at the time of preparation of the 1998 version of the ICC Rules] a parsimonious application of this article by the ICC International Court of Arbitration, the situations in which the article would need to be applied appearing to be rather few in practice. (Authors' translation).

One reason for the ICC Court's flexible, non-systematic approach to Article 10(2) is that it recognizes that the ability of parties to play a role in the constitution of the arbitral tribunal is one important factor that can contribute to their confidence in the overall arbitration process.¹⁸ In any event, an announcement by the Secretariat that the ICC Court is going to proceed to name the arbitrators under Article 10(2) sometimes serves as a sufficient impetus to the parties who were having difficulty agreeing on an arbitrator to come to such an agreement.¹⁹

Finally, although the *Dutco* case elicited widespread reaction, both immediately and directly, in the legal literature, and over a longer timeframe and less directly, in the form of modifications to several arbitration laws and rules, it should be emphasized that the factual context at issue in the case was by no means an everyday one. This perhaps is a further explanation for the non-systematic application of Article 10(2) by the ICC Court under distinguishable fact patterns. As summarized by Yves Derains and Eric A. Schwartz, the "multiple Respondents were unaffiliated companies with different interests, and distinct claims were being made against each of them."²⁰ In the more usual arbitration scenario involving multiple parties, by contrast, "the parties, whether on the Claimant or the Respondent side, are affiliated and their positions and interests are identical,"²¹ and this generally permits multiple parties on a single side to reach agreement on the identity of a co-arbitrator with relatively little difficulty.

III. APPROACHES ADOPTED IN OTHER LEADING SETS OF ARBITRATION RULES TO ARBITRATOR DESIGNATION IN MULTIPARTY ARBITRATION

The present-day versions of virtually all major sets of arbitration rules afford parties the liberty of agreeing on a method for a tribunal's appointment. They also provide a default method of appointment when the parties have not so agreed, or when one or more of the parties fail to participate in the tribunal's constitution. This general statement must, however, be nuanced in some respects in relation to multiparty arbitration.

It is globally accurate to say that the arbitral institutions, aware of the problems that can arise at the enforcement stage, today show a tendency toward exercising great care in the designation of arbitrators in *Dutco*-type situations.²² More to the point, in the aftermath

¹⁸ Whitesell & Silva-Romero, *supra* note 15, at 13.

¹⁹ *Id.*

²⁰ DERAINS & SCHWARTZ, *supra* note 14, at 182; see also Jonathan L. Greenblatt & Peter Griffin, *Towards the Harmonization of International Arbitration Rules: Comparative Analysis of the Rules of the ICC, AAA, LCIA and CIETAC*, 17 *ARB. INT'L* 101, 103 (2001):

In spite of all that has been written about the *Dutco* decision, and the effect it has had on many institutional rules, the problems arose from an unusual conjunction of circumstances that will not always arise in practice: (i) the contract did not indicate how the arbitrators were to be appointed; (ii) the two respondents were unrelated corporations with different interests in the outcome of the arbitration; and (iii) the respondents failed to agree on the appointment of an arbitrator.

²¹ DERAINS & SCHWARTZ, *supra* note 14, at 182.

²² BERNARD HANOTIAU, *COMPLEX ARBITRATIONS: MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS* 201 (2005).

of the Cour de cassation's *Dutco* decision, most leading arbitration institutions incorporated explicit provisions in their arbitration rules to deal with the appointment of arbitrators in multiparty proceedings, and in certain circumstances such special provisions can trump the center's normal appointment rules (i.e., those generally applicable in bipartite arbitrations).²³

In addition to the ICC, the arbitration rules of the following arbitration institutions today include special provisions addressing the designation of arbitrators in multiparty matters: the London Court of International Arbitration (LCIA), the International Centre for Dispute Resolution of the American Arbitration Association (AAA), the Arbitration Institute of the Stockholm Chamber of Commerce, the International Arbitral Centre of the Austrian Federal Economic Chamber, the Belgian Centre for Mediation and Arbitration (CEPANI), and the World Intellectual Property Organization (WIPO) Arbitration Center. In addition, the Swiss Rules of International Arbitration adopted by several Swiss chambers of commerce and industry likewise contain specific provisions on multiparty arbitration.

For the time being, the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules remain the most prominent set of rules in which such a provision is absent. However, a draft revision of the UNCITRAL Arbitration Rules currently under consideration should soon address this situation.

In some instances, the solution adopted by arbitration institutions to ensure that the principle of party equality be respected consists of affording multiple claimants and/or multiple respondents the opportunity of agreeing upon an arbitrator for their "side" and, in the event that the multiple claimants and/or respondents are not successful in agreeing on an arbitrator, providing the arbitration institution *the possibility* of naming all of the arbitrators in the place of the parties. Broadly speaking, this is the approach implemented by the ICC, CEPANI, the Swiss Rules of International Arbitration, and the draft revised UNCITRAL Arbitration Rules.

Other sets of rules *require* that the arbitration institution appoint all of the arbitrators in multiparty arbitrations under certain circumstances, which vary from institution to institution. This is, broadly speaking, the method found in the rules of the Arbitration Institute of the Stockholm Chamber of Commerce, the AAA International Center for Dispute Resolution (ICDR), the LCIA, and the WIPO Arbitration and Mediation Center.

One arbitration institute, the International Centre of the Austrian Federal Economic Chamber, has elected to adhere to neither of these trends.

Finally, as will become apparent below in the discussion of the different sets of rules, while the revised rules do make significant strides in incorporating *Dutco*'s principle of party equality, there is one aspect of *Dutco* that the various arbitration institutions' revised rules do not tend to incorporate, at least in their literal drafting, if not in their application;

²³ Akseli, *supra* note 11, at 253 ("The *Dutco* case is of great importance ... as following this case, significant amendments were made to the arbitration rules of the [LCIA and ICC] ... Until this decision there were no specific provisions regarding multi-party cases in most institutional arbitration rules.").

namely, the portion of the *Dutco* decision holding that the right to strict party equality may not be waived *before* a dispute arises. More specifically, certain institutions may continue to give effect to pre-dispute arbitration agreements calling for imbalanced appointment methods.²⁴

Each of the different sets of rules is examined in turn below.

A. RULES ALLOWING THE ARBITRATION CENTER TO NAME ALL OF THE ARBITRATORS IN CERTAIN MULTIPARTY INSTANCES

1. *International Court of Arbitration of the ICC*

For the sake of completeness, we begin by listing again the ICC Arbitration Rules, which, as seen above, were revised following *Dutco* to grant the ICC Court the discretion to name all of the arbitrators in certain multiparty situations.²⁵

2. *Belgian Centre for Mediation and Arbitration (CEPANI)*

The revised rules for the Belgian Centre that took effect on January 1, 2005 contain provisions governing the appointment of arbitrators in cases of multiple parties that are quite similar to those found in the ICC Rules. Located at the third and fourth paragraphs of Article 9(3), they read as follows:

Where there are multiple parties, whether as Claimant or as Respondent, and where the dispute is referred to three arbitrators, the multiple Claimants, jointly, and the multiple Respondents, jointly, shall nominate one arbitrator for approval pursuant to the stipulations of the present article.²⁶

In the absence of such a joint nomination and where all parties are unable to agree on a method for the constitution of the Arbitral Tribunal, the Appointments Committee or the Chairman may appoint each member of the Arbitral Tribunal and shall designate one of them to act as chairman.²⁷

In a journal article that appeared following the 2005 entry into force of the above rules, CEPANI's chairman observed that the above-cited provision "is directly inspired by the Arbitration Rules of the ICC and respects on one hand the equality of the parties with regard to the appointment of the arbitrators [and] the rule of impartiality on the other, both of which principles are stipulated by the Belgian Judicial Code."²⁸

²⁴ Richard Bamforth & Katerina Maidment, "All Join In" or Not? How Well Does International Arbitration Cater for Disputes Involving Multiple Parties or Related Claims?, 27 ASA BULL. 3, 10–11 (No. 1, 2009).

²⁵ See *supra*.

²⁶ As with the ICC Arbitration Rules, it appears that under the CEPANI Rules the center then designates the chair of the tribunal, absent agreement otherwise by the parties. See CEPANI Arbitration Rules, art. 9(3).

²⁷ *Id.* art. 9(3), paras. 3 and 4.

²⁸ Guy Keutgen, *CEPANI Reviews its Rules*, 22 J. INT'L ARB. 255, 257 (2005).

3. *Swiss Rules of International Arbitration*

The Swiss Rules of International Arbitration (which took effect on January 1, 2004)²⁹ set out a procedure for the appointment of the three arbitrators in multiparty arbitration that, too, is similar to the ICC approach. The relevant terms are found at Articles 8(3)–(5) of the Rules:

- (3) In multiparty proceedings, the arbitral tribunal shall be constituted in accordance with the parties' agreement.
- (4) If the parties have not agreed upon a procedure for the constitution of the arbitral tribunal in multiparty proceedings, the Chambers shall set an initial thirty-day time-limit for the Claimant or group of Claimants to designate an arbitrator and set a subsequent thirty-day time-limit for the Respondent or group of Respondents to designate an arbitrator. If the group or groups of parties have each designated an arbitrator, Article 8, paragraph 2 shall apply by analogy to the designation of the presiding arbitrator [i.e., selection by the two co-arbitrators of the chair of the tribunal within thirty days].
- (5) Where a party or group of parties fail(s) to designate an arbitrator in multiparty proceedings, the Chambers may appoint all three arbitrators and shall specify the presiding arbitrator.

4. *UNCITRAL Arbitration Rules*

The UNCITRAL Arbitration Rules currently in force consist of the original, unchanged text dating from 1976, which does not specifically address multiparty arbitration. However, the UNCITRAL Working Group II (Arbitration) has been working on a significant overhaul of the Rules. The different draft revisions that have been under review include a new provision that deals specifically with the appointment of the tribunal in multiparty arbitration.

The latest draft of that provision, provisionally identified as Article 7*bis*, addresses the question as follows:

1. For purposes of Article 7, paragraph 1, where three arbitrators are to be appointed and there are multiple parties as claimant or as respondent, unless the parties have agreed to another method of appointment of arbitrators, the multiple parties jointly, whether as claimant or respondent, shall appoint an arbitrator.³⁰

²⁹ For a brief overview of the Swiss Rules of International Arbitration, see Laurence Burger, *The New Swiss Rules of International Arbitration: A Comparative Analysis*, 19 MEALEY'S INT'L ARB. REP. 13 (No. 6, 2004).

³⁰ The revised UNCITRAL Arbitration Rules, like the Swiss Rules, foresee that in cases where multiple claimants or respondents do proceed to make a joint designation, the two co-arbitrators designated by the claimant(s) and respondent(s) will nominate the arbitral chair, as set out in art. 7, para. 1: "If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal." UNCITRAL Working Group II (Arbitration), Forty-ninth Session, Vienna, September 15–19, 2008, Note by the Secretariat, Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules, available at <<http://daccessdds.un.org/doc/UNDOC/LTD/V08/558/46/PDF/V0855846.pdf?OpenElement>>, at 10.

2. [Involving situations where the parties have agreed that the tribunal is to be composed of a number of arbitrators other than one or three.]
3. In the event of any failure to constitute the arbitral tribunal under paragraphs 1 and 2, the appointing authority shall, at the request of any party, constitute the arbitral tribunal, and in doing so, may revoke any appointment already made, and appoint or reappoint each of the arbitrators and designate one of them as the presiding arbitrator.³¹

If implemented, these proposed revisions would put the UNCITRAL Arbitration Rules generally in line with the ICC Arbitration Rules, the CEPANI Rules, and the Swiss Rules, in that they all call for multiple claimants or multiple respondents to designate a co-arbitrator jointly and, further, permit institutional designation of all arbitrators in cases where multiple claimants or respondents fail to agree on a joint designation. Keeping closely to the precise language of the current draft, it would be accurate to say that, technically speaking, the proposed UNCITRAL Arbitration Rules, Article 7*bis* provides that the appointing authority “shall ... constitute the tribunal” at the request of any party in the event of difficulty; however, the appointing authority enjoys great liberty to retain (i.e., reappoint) a choice of arbitrator made by the non-defaulting party.³² In fact, the revised UNCITRAL Arbitration Rules, if adopted, would be the most explicit of any major set of arbitration rules regarding the possibility for the appointing authority to confirm an arbitrator that had already been designated by a party or multiple parties when the designation process ran aground.

B. RULES REQUIRING THE ARBITRATION CENTER TO NAME ALL OF THE ARBITRATORS IN CERTAIN MULTIPARTY INSTANCES

1. *Arbitration Institute of the Stockholm Chamber of Commerce*

The most recent version of the Stockholm Arbitration Rules, which took effect in January 2007, likewise takes account of the *Dutco* case, in its Article 13 (entitled “Appointment of arbitrators”).

Article 13(1) explicitly affirms the principle of party autonomy.³³ It states that:

The parties are free to agree on a different procedure for appointment of the Arbitral Tribunal than as provided under this Article. In such cases, if the Arbitral Tribunal has not been appointed within the time period agreed by the parties or, where the parties have not agreed on a time

³¹ *Id.* at 10–11.

³² For a discussion of an earlier, similar draft of the proposed amendment, see Jan Paulsson & Georgios Petrochilos, *Revision of the UNCITRAL Arbitration Rules*, 7, 47–48, <www.uncitral.org/pdf/english/news/arbrules_report.pdf>. Further commentary regarding the intent of the proposed revisions can be found in the Report of the Working Group on Arbitration and Conciliation on the Work of its Forty-Sixth Session, New York, February 5–9, 2007, 19–20, available at <<http://daccessdds.un.org/doc/UNDOC/GEN/V07/818/18/PDF/V0781818.pdf?OpenElement>>; see also Judith Levine, *Current Trends in International Arbitral Practice as Reflected in the Revision of the UNCITRAL Arbitration Rules*, 31 U. NEW SOUTH WALES L.J. 266, 275–76 (No. 1, 2008), reprinted in 6 TRANS’L DISPUTE MANAGEMENT (No. 1, 2009).

³³ José Rosell, *Le nouveau règlement de la Chambre de Commerce de Stockholm de 2007: vers un certain alignement sur le règlement de la CCI*, 128 GAZETTE DU PALAIS 706 (2008).

period, within the time period set by the Board, the appointment shall be made pursuant to [the remainder of Article 13].³⁴

The relevant multiparty arbitration provision is found at Article 13(4) of the Rules. Read in combination with Article 13(1), it provides that designation of the entire tribunal by the institute is *mandatory* whenever there are multiple claimants or respondents, the tribunal is to consist of more than one arbitrator, multiple parties on either side of the dispute fail to agree on a joint designation of co-arbitrator, and, finally, the parties have not agreed on a procedure different from that in the Rules for the constitution of the tribunal. The precise language of Article 13(4) reads as follows:

Where there are multiple Claimants or Respondents and the Arbitral Tribunal is to consist of more than one arbitrator, the multiple Claimants, jointly, and the multiple Respondents, jointly, shall appoint an equal number of arbitrators. If either side fails to make such joint appointment, the Board shall appoint the entire Arbitral Tribunal.

Before the entry into force of the 2007 version of the Stockholm Rules, the immediately preceding version of the Rules gave the Institute the choice in multiparty arbitration of either naming the arbitrator(s) for only the parties that defaulted in making a joint designation, or of naming the entire tribunal if the circumstances warranted that approach.³⁵

The Institute no longer has such discretion following the revision. Although the Stockholm Chamber of Commerce believed that this result conformed to the rule in *Dutco* and was similar to the practice of other leading arbitration centers (especially the ICC and LCIA), some practitioners reportedly resisted this modification when it was under discussion.³⁶ Nevertheless, considerations associated with the international enforceability of awards ultimately prevailed, leading to the revised rule quoted above.³⁷

2. *American Arbitration Association (International Center for Dispute Resolution)*

The International Arbitration Rules of the AAA's (ICDR) also contain a *Dutco*-inspired rule applicable to multiparty situations. Located at Article 6(5), it states:

³⁴ In addition to dealing with multiparty arbitration in subsection (4), art. 13 of the Stockholm Arbitration Rules deals with the appointment of sole arbitrators, the appointment of multi-member tribunals in bilateral arbitration, the nationality of a chairperson or sole arbitrator, and the factors that the SCC Board must take into account in appointing arbitrators.

³⁵ Art. 16(3) of the previous version of the SCC Arbitration Rules (1999) provided:

Where there are multiple parties on either side and the dispute is to be decided by more than one arbitrator, the multiple Claimants, jointly, and the multiple Respondents, jointly, shall appoint an equal number of arbitrators. If either side fails to make such joint appointment, the SCC Institute shall make the appointment for that side. If the circumstances so warrant the SCC Institute may appoint the entire Arbitral Tribunal, unless otherwise agreed by the parties.

³⁶ Kaj Hobér & William McKechnie, *New Rules of the Arbitration Institute of the Stockholm Chamber of Commerce*, 23 *ARB. INT'L* 261, 263–64 (2007).

³⁷ *Nouvelles de l'arbitrage en Suisse et à l'étranger*, *Arbitration Institute of the Stockholm Chamber of Commerce Adopts New Arbitration Rules*, 25 *ASA BULL.* 74, 78 (2007):

Pursuant to the new SCC Rules, the Board shall always appoint the entire Arbitral Tribunal should one side fail to jointly make the appointment. The reason for this procedure is to avoid the risk of national courts considering that the parties have been treated unequally and therefore decid[ing] to quash the award.

Unless the parties have agreed otherwise no later than 45 days after the commencement of the arbitration, if the notice of arbitration names two or more claimants or two or more respondents, the administrator shall appoint all of the arbitrators.

The drafting of this provision is perhaps a bit too terse, as it leaves the rule potentially open to a doubt as to whether the agreement that is needed to avoid the administrator's carrying out of the appointments is an agreement of the parties as to the choice of the arbitrators comprising the tribunal, on the one hand, or an agreement as to the procedure for appointing the arbitrators, on the other.

This ambiguity appearing in Article 6(5) is highlighted by a comparison with Article 6(3), which appears to be applicable in bipartite arbitration. Article 6(3) provides, *inter alia*, that when, within forty-five days of the commencement of the arbitration, "all of the parties have not mutually agreed on a procedure for appointing the arbitrator(s) or have not mutually agreed on the designation of the arbitrator(s)," then the arbitrator(s) shall, at the written request of any party, be designated by the ICDR. In other words, Article 6(3) explicitly refers to the two very types of agreements (as to the procedure and as to the designations themselves) about which Article 6(5) is ambiguous. Another rule, Article 6(1), also provides little assistance in resolving the ambiguity in Article 6(5). That provision, which is not specifically applicable to multiparty arbitration, refers to an agreement on a designation procedure, by stating the general principle that "[t]he parties may mutually agree upon *any procedure* for appointing arbitrators."³⁸

Setting aside this confusion, and assuming for the sake of discussion that it is an agreement as to *the choice of the arbitrators* that is being referenced in Article 6(5), then the rule's terms would have to be interpreted as requiring all of the parties to agree on all of the arbitrators to avoid appointment of the entire tribunal by the administrator. Nothing in the drafting of Article 6(5) would permit one to conclude that an agreement among claimants as to one co-arbitrator coupled with an agreement among respondents as to another co-arbitrator would suffice to avoid the ICDR's appointment of "all the arbitrators." If this is indeed the correct interpretation, then this would truly distinguish the ICDR Rules from the multiparty practice of most other institutions.

3. *London Court of International Arbitration*

Though we have seen above that a number of different arbitration rules grant the relevant arbitration institution the discretion to appoint all members of the tribunal under certain circumstances, such discretionary powers are, in practice, most likely to be exercised when the *interests* of multiple claimants or those of multiple respondents are not aligned. The LCIA Arbitration Rules are distinguishable from other sets of rules in that they

³⁸ Emphasis added. The interpreter of art. 6(5) might presume that there would be no need to restate, at the beginning of art. 6(5), art. 6(1)'s premise regarding agreement on a *procedure* and could consequently conclude that the agreement referred to in art. 6(5) must be one regarding the *names* of the arbitrators. But such an interpretation is not without doubt, as one could just as reasonably understand the language "[u]nless the parties have agreed otherwise," as merely constituting a shorthand cross-reference back to art. 6(1)'s statement of principle regarding the possibility for parties to agree on a procedure.

explicitly consecrate the notion of alignment of the parties' interests as a determinative factor in the decision whether the institution will assume the role of appointing the tribunal.

The LCIA Arbitration Rules take an especially cautious approach by, in effect, including a presumption that multiple parties' interests are not aligned. That presumption can be overcome only by an express statement by the parties to the contrary. More concretely, the Rules provide at Article 8.1 that all of the arbitrators "shall" be appointed by the LCIA Court when:

[T]he Arbitration Agreement entitles each party howsoever to nominate an arbitrator, the parties to the dispute number more than two *and such parties have not all agreed in writing that the disputant parties represent two separate sides for the formation of the Arbitral Tribunal as Claimant and Respondent respectively* (emphasis added).

Appointment by the LCIA is made "without regard to any party's nomination."

Article 8(2) clarifies that in the circumstances described in Article 8(1), the party's decision to select the LCIA's Arbitration Rules "shall be treated for all purposes as a written agreement by the parties for the appointment of the Arbitral Tribunal by the LCIA Court." The reasoning behind Article 8(2) is to answer the possible criticism that institutional arbitration rules (which can in some cases remove the appointment process from the hands of the parties and place it entirely in the hands of the institution) may conflict with parties' arbitration agreements calling for party appointment of the arbitrators. In fact, the view of several commentators is that there is no such clash. Among these authors, Lew, Mistelis, and Kröll, for example, write:

These concerns are not justified. The perceived conflict does not exist. By agreeing to arbitrate under the rules of an institution providing for a special appointment procedure in a multiparty situation this procedure becomes part of the parties' agreement.³⁹

4. *World Intellectual Property Organization's Arbitration Center*

The Arbitration Rules of the WIPO Arbitration Center⁴⁰ are somewhat similar to the Stockholm, AAA (ICDR), and LCIA Arbitration Rules, as all four sets of rules *require* the arbitration institution to appoint arbitrators under certain circumstances. Yet, the WIPO Rules incorporate a number of distinguishing features.

Perhaps most strikingly, unlike the rules of the other institutions discussed above, the WIPO Arbitration Rules make a clear distinction between cases involving multiple claimants and those with multiple respondents. Thus, the WIPO Arbitration Rules

³⁹ JULIAN D.M. LEW, LOUKAS A. MISTELIS, & STEFAN KROLL, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 382 (2003). *But see* REDFERN & HUNTER, *supra* note 10, at 170 ("However, there may be difficulties when it comes to obtaining recognition and enforcement of an award made by a tribunal that has been established for the parties, rather than by the parties" (emphasis in original)).

⁴⁰ English text, 20 Y.B. COM. ARB. 340 (1995) and French text available at <www.wipo.int/amc/fr/arbitration/rules/index.html>.

generally require that when three arbitrators are to be appointed, the parties have not agreed on an appointment procedure, and the request for arbitration names more than one claimant, the claimants must make a joint nomination in the request for arbitration.⁴¹ If the multiple claimants fail to agree on a joint designation, the center will appoint a single arbitrator in their place.⁴² The respondent is then permitted to appoint an arbitrator, and the two co-arbitrators will appoint the presiding arbitrator.⁴³

Under the other sets of rules seen above, by contrast, multiple claimants that fail to agree on a joint nomination are generally permitted to ask the institution to proceed to name *all* of the arbitrators (though with some slight differences among the different rules).

More conventional is the result that obtains when a single claimant confronts multiple respondents. Under the WIPO Rules, when three arbitrators are to be appointed, the parties have not agreed on an appointment procedure, and the request for arbitration names more than one respondent, the respondents shall jointly appoint an arbitrator. If, for any reason, the respondents do not make a joint appointment within thirty days of receipt of the request for arbitration, any appointment of an arbitrator made by the claimant or claimants will be considered void and the two co-arbitrators will be appointed by the center. Upon their appointment, the two arbitrators shall then within thirty days appoint the presiding arbitrator (the center will appoint the presiding arbitrator only in the case of default by the two co-arbitrators).⁴⁴

A final distinguishing feature of the WIPO Rules is that they place strict limits on the effectiveness of parties' contractual arrangements as to the appointment process, and such limits are applicable even to those agreements that might be reached after the appearance of the dispute. Thus, when three arbitrators are to be appointed, and the parties have agreed on an appointment procedure, and the request for arbitration names more than one claimant or more than one respondent, then notwithstanding the general rule appearing in Article 15(a) to the effect that an agreement by the parties as to the procedure for appointing the tribunal shall be followed, and irrespective of any contractual provisions in the arbitration agreement concerning the appointment procedure, the appointment procedures described in Articles 18(a) and (b) are to apply (unless the parties' contractual appointment provisions expressly exclude application of WIPO Arbitration Rules, Article 18).⁴⁵

⁴¹ WIPO Arbitration Rules, art. 18(a). Lew, Mistelis, and Kröll have written approvingly of this result:

The distinction in approach between several claimants and several respondents is sensible. Each claimant can always decide whether it wants to bring its claim alone or in conjunction with other claimants; no such choice exists for the respondents. Since the decision to join forces with other claimants is taken after the dispute has arisen the obligation to agree with the other claimants on a joint arbitrator is not a violation of the *Dutco* rule. The distinction furthermore makes it impossible for the claimant to deprive a single respondent of its right to appoint its own arbitrator by just adding an additional claimant.

LEW, MISTELIS, & KRÖLL, *supra* note 39, at 384.

⁴² WIPO Arbitration Rules, art. 19(a).

⁴³ *Id.* art. 17.

⁴⁴ *Id.* art. 18(b)–(c).

⁴⁵ *Id.* art. 18(c).

C. A SPECIAL CASE: VIENNA INTERNATIONAL ARBITRAL CENTRE OF THE AUSTRIAN FEDERAL ECONOMIC CHAMBER

The Rules of the Vienna International Arbitral Centre (VIAC) are a bit of an exception, because they do not contain any of the different types of *Dutco*-esque retooling that were implemented by the other arbitration institutions surveyed above.

Under Article 15 of the VIAC Rules, when claims are brought against several respondents, the respondents are asked by the VIAC whether they wish to have the dispute decided by a sole arbitrator or by three arbitrators (presumably, it appears, without regard to whether the parties' arbitration clause specified the number of arbitrators). If the respondents opt for three arbitrators, they must jointly nominate an arbitrator. If the respondents fail to decide on the number of arbitrators, the VIAC will make that decision for them, and if the VIAC's decision is for three arbitrators, the VIAC will invite the respondents to make a single nomination, without affecting the claimant's or Claimants' nomination. If the respondents fail to make such nomination, the VIAC will make it for them.⁴⁶ The drafting of the relevant VIAC Rules provisions is absolute in nature, and the provisions do not depend in any respect on a similarity of interests among the different respondents.

This above-described procedure under Article 15 of the VIAC Rules has been summarized as follows:

[I]f the respondents cannot agree on jointly nominating an arbitrator, the VIAC will make the appointment for them. Unlike other rules, the VIAC will therefore appoint the respondents' co-arbitrator (and not the entire tribunal); this will not affect the claimant's nomination. This is argued to preserve equality between the parties; if multiple claimants fail to jointly nominate a co-arbitrator, the case will not go forward in the first place.⁴⁷

It would seem that the authors of the Vienna Rules had already made a conscious and considered decision at the time of an earlier revision of the rules not to implement the same types of adjustments as other institutions had done regarding *Dutco*:

After careful consideration of the *Dutco* decision and of the provisions of Art. 6 of the European Convention on Human Rights, the Vienna Rules have not adopted the same solution that some arbitral centers have adopted as a reaction to *Dutco* and the ensuing debate which leads to the equally unsatisfactory result of depriving all parties of the right to appoint an arbitrator.⁴⁸

The appointment process foreseen in the VIAC Rules leads to an unevenness of treatment in cases where a single claimant is adverse to multiple respondents and three arbitrators are appointed. The claimant may have a greater influence in the constitution of the tribunal than does each of the respondents, as the claimant was entitled to appoint a co-arbitrator freely, while the respondents each enjoyed only partial input in the joint designation of the other co-arbitrator, and even then only on condition that

⁴⁶ *Id.* art. 15(3)–(7).

⁴⁷ Franz T. Schwarz & Christian W. Konrad, *The New Vienna Rules*, 23 *ARB. INT'L* 601, 617 (2007).

⁴⁸ Dr. Werner Melis, *New Vienna Rules 2001*, 26 *Y.B. COM. ARB.* 447 (2001).

the co-respondents reached agreement among themselves (along with all the attendant compromises as to such arbitrator's profile that may have been necessary to reach agreement).

On the other hand, the VIAC Rules do eradicate what is widely recognized as the most unfortunate and unintended negative side effect of *Dutco*; that is, the ability for multiple respondents to sabotage the claimant's or Claimants' co-arbitrator appointment by feigning an inability to agree on the identity of the second co-arbitrator whenever they deem it in their interest to displace the first co-arbitrator.

If, instead, the respondents opt for a single arbitrator, then no party will be in a privileged position, provided that the preference for a sole arbitrator is confirmed in one of two manners: either the claimant agrees to proceed with a sole arbitrator pursuant to Article 14(1), or the VIAC Board decides that the case will be submitted to a sole arbitrator pursuant to Article 14(2) or Article 15(5). If all parties do not agree on the name of the sole arbitrator, the VIAC Board will make the appointment on behalf of all of them.⁴⁹

IV. SELECTED EXAMPLES OF PROVISIONS FROM NATIONAL ARBITRATION LAWS AFFECTING ARBITRATOR DESIGNATION IN MULTIPARTY ARBITRATION

As will become apparent from the discussion that follows, significantly less uniformity exists in the relevant national arbitration law provisions governing arbitrator designations in multiparty arbitration than exists among the institutional arbitration rules highlighted above.

Some national laws identify the relevant criterion for objecting to the composition of a tribunal as the "predominant" or otherwise disproportionate role played by one side or one party in the designation process (and some laws even foresee court intervention in the designation process in such circumstances). Other laws share a similar goal of ensuring party equality, although they do not implement the same criterion of predominance.

A great number of countries, however, have no specific provisions of law addressing the mechanics of arbitrator appointment in multiparty scenarios. In fact, the national arbitration laws that do address the question are relatively few in number and are significantly outnumbered by those that do not. To illustrate this fact by taking just one geographic region as an example, one might point out that the national arbitration laws

⁴⁹ VIAC Rules, art. 14(3). The rule appears in the portion of the article dealing with cases in which the Board decided the dispute would be submitted to a sole arbitrator, but it is nevertheless likely also applicable in cases where all parties agree to proceed before a sole arbitrator without agreeing on the identity of the arbitrator.

One practical point should be kept in mind by VIAC claimants. If the respondents do not opt for a sole arbitrator and if the question of the number of arbitrators is left open by the parties' arbitration agreement, then it might be preferable, in order to avoid potential later complications over the enforcement of an award, for the claimant to request that the VIAC decide that the case be submitted to a sole arbitrator and that the VIAC appoint that arbitrator. Alternatively, again to ensure later enforceability, the claimant could decide to withdraw its designation of arbitrator and ask the VIAC to appoint all three arbitrators. A claimant's ultimate assessment as to the advisability of proceeding in one or the other of these fashions will depend in large part on whether it expects enforcement activities to occur in a jurisdiction where arbitration law has endorsed or at least shown some signs of favorable inclination toward the result in *Dutco*.

in most leading Latin American arbitration venues do not include provisions specifically addressing arbitrator appointment in multiparty arbitration. This is true, for instance, of the arbitration legislation of Mexico,⁵⁰ Brazil,⁵¹ Chile,⁵² Peru,⁵³ Argentina,⁵⁴ Paraguay,⁵⁵ Venezuela,⁵⁶ and Costa Rica.⁵⁷

A. LEGAL PROVISIONS BASED ON THE “PRIVILEGED POSITION,” “PREPONDERANT RIGHTS,” OR OTHER INEQUALITY BENEFITING ONE PARTY IN THE CONSTITUTION OF A TRIBUNAL

As announced above, we begin by examining those laws that point explicitly or implicitly to the “predominant” or otherwise disproportionate role played by one party in the appointment of the arbitral tribunal as the relevant triggering criterion for a party to object.

1. *The Netherlands*

The Netherlands Arbitration Act,⁵⁸ which is codified in Book Four (“Arbitration”) of the Dutch Code of Civil Procedure, includes an Article 1028 entitled “Privileged position of a party in appointing arbitrators” that aims to ensure equality in the making of appointments in multiparty arbitrations by providing as follows:

⁵⁰ Decree of July 22, 1993, Spanish text available at <www.kluwerarbitration.com/arbitration/DocumentFrameSet.aspx?ipn=24037>, English translation, in *ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION* (J. Paulsson ed., Supp. 19, 1995), and French translation, 1994 REV. ARB. 405. See José Luis Siqueiros & Alexander C. Hoagland, *Mexico*, in *ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION* (J. Paulsson ed., Supp. 39, at 6ii, 2003).

⁵¹ Law No. 9307 of September 23, 1996, Portuguese text available at <www.etjab.com.br/EGREGIO_LEI_9307_96.htm>, English translation, in *ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION* (J. Paulsson ed., Supp. 25, 1998), and French translation, 1997 REV. ARB. 297. See Carlos Nehring Netto, *Brazil*, in *ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION* (J. Paulsson ed., Supp. 35, at 10, 2002).

⁵² Law No. 19.971 on International Commercial Arbitration of September 30, 2004, Spanish text available at <www.bcn.cl/leyes/pdf/actualizado/230697.pdf>, and English translation available at <www.kluwerarbitration.com/arbitration/DocumentFrameSet.aspx?ipn=80458>.

⁵³ The General Arbitration Law contained in Law No. 26572 of January 3, 1996, Spanish text available at <www.sice.oas.org/DISPUTE/COMARB/Peru/lgenarb1.asp>, English translation, in *ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION* (J. Paulsson ed., Supp. 27, 1998), and French translation, 2005 REV. ARB. 861. See Prof. Ulises Montoya Alberti, *Peru*, in *ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION* (J. Paulsson ed., Supp. 27, at 7, 1998).

⁵⁴ National Code of Civil and Commercial Procedure, arts. 736–73, available at <www.sice.oas.org/DISPUTE/COMARB/argentina/libro6.asp>, and English translation, in *ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION* (J. Paulsson ed., Supp. 3, 1985). See Horacio A. Grigera Naón, *Argentina*, in *ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION* (J. Paulsson ed., Supp. 28, at 10, 1999).

⁵⁵ Law No. 1879/02 for Arbitration and Mediation of April 11, 2002, Spanish text available at <www.kluwerarbitration.com/arbitration/DocumentFrameSet.aspx?ipn=80946>, and English translation available at <www.kluwerarbitration.com/arbitration/DocumentFrameSet.aspx?ipn=80946>.

⁵⁶ Commercial Arbitration Act of March 25, 1998, Spanish text available at <www.kluwerarbitration.com/arbitration/DocumentFrameSet.aspx?ipn=24043>, English translation available at <www.zur2.com/fcjp/articulos/arbitraje.htm>, and French translation, 2005 REV. ARB. 847.

⁵⁷ Law No. 7727 on Alternative Resolution of Disputes and Promotion of Freedom from Social Unrest of December 9, 1997, Spanish text available at <www.asamblea.go.cr/ley/leyes/7000/7727.doc>, and English translation, in *ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION* (J. Paulsson ed., Suppl. 30, 2000).

⁵⁸ Available in Dutch and in English, French, and German translation in P. SANDERS & A.J. VAN DEN BERG, *THE NETHERLANDS ARBITRATION ACT 1986: TEXT AND NOTES, ENGLISH, FRANÇAIS, DEUTSCH* 163–90 (1987), also English translation, in *ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION* (J. Paulsson ed., Supp. 43, 2005), and French translation, 1988 REV. ARB. 349.

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.

When a situation of imbalance exists within the meaning of Article 1028, it does not lead to the nullification of the agreement to arbitrate. Rather, it opens up the right to petition the court for it to intervene to make the appointment or appointments, thereby replacing the method of designation called for in the arbitration clause.

Legal commentators have suggested that this provision was designed to address, and would be applicable to, situations such as those in which one party alone has the unique right to appoint the arbitrator or arbitrators, or when the arbitration clause provides that the arbitrators must be selected from a list of candidates drawn up by one of the parties (as opposed to a list drawn up by a neutral third party).⁵⁹

The first reported occurrence in which Article 1028's provisions were applied was described by Jan C. Schultz in the *Revue de l'Arbitrage*. The dispute in that case arose in the context of a three-member partnership comprised of a father, his son, and a third individual. The dispute was, more specifically, one between the father and son, on one side, and the third person, on the other. Although the partners' arbitration agreement allowed for each of the three partners to name an arbitrator, the third partner challenged this arrangement under Article 1028 after the dispute arose. Finding that the father and son constituted in fact one indissoluble party for purposes of the dispute, the trial court of The Hague proceeded to name all three arbitrators.⁶⁰

The legal commentaries setting out hypothetical examples for the application of the Dutch law and the one jurisprudential application just mentioned all appeared before the *Dutco* decision. No specific guidance exists as to whether a situation like that in *Dutco* would be considered as giving rise to a right to apply Article 1028 in the Netherlands, though one might suspect that this would be the case.⁶¹

⁵⁹ Dr. Albert Jan van den Berg, *Netherlands*, in ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (J. Paulsson ed., Supp. 7, at 13, 1987).

⁶⁰ Jan C. Schultz, *Les Nouvelles Dispositions de la Législation Néerlandaise en Matière d'Arbitrage*, 1988 REV. ARB. 209, 211 n.4.

⁶¹ This said, there exists some doubt as to whether the law would be applicable when the parties' arbitration agreement provides that the arbitration will be administered by an entity whose arbitration rules already have built-in protections to address the *Dutco* situation. For instance, in discussing the similar German law (*see infra*), Prof. Schlosser suggested that a generic reference in the arbitration agreement to a set of arbitration rules (such as the ICC Rules of Arbitration) that contains a provision allowing the institution to become involved to correct situations of inequity renders it impossible to characterize the arbitration agreement as one that creates preponderant rights and an associated disadvantage. Prof. Schlosser concludes that the German law permitting court intervention in the constitution of the tribunal would therefore be inapplicable. Peter Schlosser, *La nouvelle législation Allemande sur l'arbitrage*, 1998 REV. ARB. 291, 302.

2. *Germany*

The German arbitration law (Act on the Reform of the Law Relating to Arbitral Proceedings of December 22, 1997),⁶² which came into force on January 1, 1998, is similar to the Dutch law, as section 1034(2) of the Act deals with the composition of arbitral tribunals in the following terms:

If the arbitration agreement grants preponderant rights to one party with regard to the composition of the arbitral tribunal which place the other party at a disadvantage, that other party may request the court to appoint the arbitrator or arbitrators in deviation from the nomination made, or from the agreed nomination procedure.⁶³

In cases of a preponderant right and corresponding disadvantage, the agreement to arbitrate is not vitiated, but the method of designating arbitrators set out therein is replaced, upon request, by a designation by the judge.⁶⁴

In multiparty situations, this German legislative provision (just like the similar Dutch provision) could be used, for example, to call for court designation of all party-appointed arbitrators when multiple respondents do not reach agreement on a joint nomination of arbitrator. Moreover, application of the provision would not appear to be limited to cases in which an actual deadlock exists among the respondents. Indeed, the provision may be applicable based on the simple fact that a given arbitration clause allows a sole claimant to appoint one arbitrator while requiring multiple respondents to agree on a single arbitrator, because, in such a case, it could be argued that the process itself gives rise to a “preponderant rights” situation that justifies court-appointment of all arbitrators.⁶⁵

3. *Switzerland (Domestic Arbitration)*

Yet another analogous provision can be found at Article 19 of the 1969 Swiss Inter-Cantonal Arbitration Convention (“Concordat”) applicable to Swiss *domestic* arbitration. The first paragraph of the Concordat’s Article 19 reads: “Objection may be raised in respect of the arbitral tribunal as such, if one of the parties has exercised an overriding influence in respect of the designation of the members.”⁶⁶

⁶² German text available at <www.sadaba.de/GSBT_ZPO_1025_1041.html>, English translation, in ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (J. Paulsson ed., Supp. 34, 2001), and French translation, 1998 REV. ARB. 441.

⁶³ Section 1034(2).

⁶⁴ Schlosser, *supra* note 61, at 301.

⁶⁵ Dr. Stefan Kröll, *Germany*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (J. Paulsson ed., Supp. 48, at 16, 2007); Schlosser, *supra* note 61, at 301. One reported application of s. 1034(2) outside the multiparty arbitration arena is found in a May 24, 2004 decision of the German Federal Court of Justice. That case illustrates another scenario in which s. 1034(2) could come into play to protect against one party enjoying preponderant rights: namely, when the rules of clubs or associations provide that disputes between the club and a member are to be resolved by an internal “arbitration” committee of the club. Bundesgerichtshof, May 24, 2004, available at <www.kluwerarbitration.com/arbitration/DocumentFrameSet.aspx?ipn=80406>. The case is discussed at Kröll, *supra* note 65, at 557–58.

⁶⁶ French text available at <www.ccig.ch/images/pdf/Concordat.pdf>, and English translation, in ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION annex 1 (J. Paulsson ed., 1984).

This provision does not permit a finding that the arbitration clause is invalid. Rather, it authorizes a party to seek the recusal of the entire tribunal or else to later seek to set the arbitral award aside on the basis that the tribunal was irregularly constituted (provided that the ground was not waived by proceeding without reservation and that there was no undue delay in raising the objection upon learning the grounds therefor).⁶⁷ Article 19 also provides that when a challenge to the tribunal is successful, a new tribunal may be established according to the normal rules set out in Concordat, Article 11 and, further, that in recomposing the tribunal, parties may once again designate individuals who had been members of the challenged tribunal.⁶⁸

Chapter 12 (“International arbitration”) of the Swiss Federal Statute of Private International Law (PIL) applicable to *international* arbitration does not contain a directly analogous provision. Although Article 179(2) of that law says that “in the absence of such agreement [i.e., an agreement of the parties on appointment, removal, or replacement of arbitrators], the judge where the tribunal has its seat may be seized with the question; he shall apply, by analogy, the provisions of cantonal law on appointment, removal or replacement of arbitrators,” this cross-reference has been viewed as nevertheless not incorporating Article 19 of the Concordat into the PIL for purposes of international arbitration.⁶⁹

4. *Belgium*

Somewhat analogous to the German, Dutch, and Swiss laws is Article 1678(1) of the Belgian Judicial Code, which provides that “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.”⁷⁰ As the language makes apparent, however, the provision differs from the German, Dutch, and Swiss laws in that it calls for a declaration of invalidity of the arbitration agreement itself, rather than simply providing for an alternate method of appointing the tribunal.⁷¹

In an early commentary on the Belgian law, Professor Pieter Sanders opined that this section would be applicable, for instance, to “the situation with regard to contracts of adhesion, where the association to which only one party belongs appoints the arbitrators.”⁷²

⁶⁷ PIERRE LALIVE, JEAN-FRANÇOIS POUDET, & CLAUDE REYMOND, *LE DROIT DE L'ARBITRAGE INTERNE ET INTERNATIONAL EN SUISSE* 111, 115–17, 207–8 (1989); ERIC LOQUIN, *A la recherche du principe de l'égalité des parties dans le droit de l'arbitrage*, 128 *GAZETTE DU PALAIS* 2031, 2035 (2008).

⁶⁸ DR. ROBERT BRINER, *Switzerland*, 14 *Y.B. COM. ARB.* 1, 15–16 (1989).

⁶⁹ JEAN-FRANÇOIS POUDET & SÉBASTIEN BESSON, *DROIT COMPARÉ DE L'ARBITRAGE INTERNATIONAL* 360 n.84 (2002).

⁷⁰ French text, 1999 *REV. ARB.* 693, and English translation, 15 *ARB. INT'L* 101 (1999).

⁷¹ GUY HORSMANS, *Actualité et évolution du droit Belge de l'arbitrage* (2), 1992 *REV. ARB.* 3, 13. The Quebec Civil Code contains a similar provision in art. 2641: “A stipulation which places one party in a privileged position with respect to the designation of the arbitrators is null.”

⁷² Prof. Pieter Sanders, *The New Arbitration Statute in Belgium*, 1 *Y.B. COM. ARB.* 173 (1976).

One reported application of Article 1678(1) arose in a Belgian commercial court law-suit commenced by a Belgian manufacturer of doors against a Dutch industrial purchaser, in which the former sought the payment of several outstanding invoices. The purchaser contested the jurisdiction of the Belgian Commercial Court, by pointing to an arbitration clause in the purchase order that called for disputes to be settled by arbitration in the Netherlands. The court, however, found the arbitration clause invalid under Article 1678(1), because it gave one of the parties an advantage in that only one of them was a member of the trade organization from among whose membership the arbitrator was to be chosen. This decision was later reversed by the Brussels Court of Appeal on other grounds (specifically, a finding that the arbitration agreement was governed by Dutch law rather than Belgian law, thus making Article 1678 inapplicable).⁷³

Article 1678(1) may also be available as a basis to seek the annulment of a tribunal's award on the ground that an arbitration agreement was invalid when one party was privileged with regard to appointment of the tribunal.⁷⁴

5. Spain

Article 15(2) of the Spanish Arbitration Law allows parties to agree freely on the procedure for the appointment of arbitrators, "provided that there is no violation of the principle of equal treatment."⁷⁵ This same article then lays out a series of rules governing situations in which there is no agreement between the parties. Among these default rules is the following rule relating to multiparty arbitration that ensures that no party or side in a dispute carries undue weight in the composition of the tribunal:

Where there are multiple claimants or respondents, the former shall nominate one arbitrator and the latter another. If the claimants or the respondents do not agree on their nomination of the arbitrator, all of the arbitrators shall be appointed by the competent court upon request of any of the parties.⁷⁶

Interestingly, the Spanish law is explicitly addressed to arbitrator designations in *multiparty* arbitration, rather than being a rule of universal application in the designation process generally (as is the case for the other laws discussed above). Moreover, one might note that the Spanish rule can be considered as the legislative parallel of Article 13(4) of the Stockholm Arbitration Rules.

⁷³ Theuma Deurenindustrie v. Haegens Bouw, Commercial Court of Leuven (September 19, 1989), *reversed on other grounds*, Brussels Court of Appeal (October 15, 1992), 18 Y.B. COM. ARB. 612 (1993); *see also* Horsmans, *supra* note 71, at 11–13.

⁷⁴ G. Keutgen & G.A. Dal, *Belgium*, in ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (J. Paulsson ed., Supp. 49, at 19, 40, 2007).

⁷⁵ Law 60/2003 of December 23, 2003 on Arbitration, art. 15(2), Spanish text *available at* <www.kluwerarbitration.com/arbitration/DocumentFrameSet.aspx?ipn=80314>, English translation, in ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (J. Paulsson ed., Supp. 41, 2004), and French translation, 2004 REV. ARB. 459.

⁷⁶ *Id.* art. 15(2)(b). *See generally* David J.A. Cairns, *The Spanish Application of the UNCITRAL Model Law on International Commercial Arbitration*, 22 ARB. INT'L 573, 582 (2006); Fernando Mantilla-Serrano, *The New Spanish Arbitration Act*, 21 J. INT'L ARB. 367, 374 (2004).

B. ILLUSTRATIONS OF OTHER LEGISLATIVE APPROACHES APPLICABLE TO THE CONSTITUTION OF A TRIBUNAL IN MULTIPARTY ARBITRATION

Other national arbitration laws referring explicitly to multiparty arbitration adopt widely divergent methods for ensuring the appointment of the arbitral tribunal. A number of these methods are quite protective of party equality. Some examples of specific protective techniques that may apply, depending on the circumstances, include requirements for the agreement of all of the parties regarding the identities of all the arbitrators; the designation of arbitrators by a neutral third party or by the courts; and the division of a dispute into a separate arbitration proceeding for each of the multiple parties sought to be named as respondent, among other methods.

At the other extreme of the spectrum falls the recent Austrian Arbitration Act, which, though it appears to envisage court intervention to designate an arbitrator in the place of multiple defendants in the event of an impasse, also allows to stand the designation of an arbitrator already made by a sole claimant or by multiple claimants in such circumstances. A sampling of these different approaches follows.

1. *Italy*

The new Italian Arbitration Law is found in Book Four, Title VIII of the Code of Civil Procedure, which was amended by a February 2, 2006 legislative decree. Among the amendments was the inclusion of a new provision entitled “Multiple parties,” which is codified at Article 816*quater*.⁷⁷ This new article contains rather original terms designed to ensure the equality of the parties in the arbitrator-designation process.

The first paragraph of the new provision states that when more than two parties are bound by an arbitration agreement, any one of them may request that all or some of the others resolve a dispute in arbitration only if: (1) the agreement bestows the task of designating the arbitrators upon a third party, (2) the arbitrators are named by agreement of all parties, or (3) following the appointment of an arbitrator or arbitrators by a first party, the remaining parties appoint an equal number of arbitrators by agreement or agree to entrust such appointment(s) to a third party.⁷⁸

After identifying, in its first paragraph, these three exceptional circumstances under which multiparty arbitration will be permitted, Article 816*quater* lays out, in its second

⁷⁷ Italian text available at <www.kluwerarbitration.com/arbitration/DocumentFrameSet.aspx?ipn=80669>, English translation, in ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (J. Paulsson ed., Supp. 49, 2007), and French translation, 2008 REV. ARB. 169.

⁷⁸ It has been suggested that the first of these possibilities, namely, the circumstance when the arbitration clause empowers a third party to appoint the arbitrators, does not encompass the situation when an agreed set of arbitration rules referred to in the arbitration clause contains a provision permitting the arbitration center to designate all of the arbitrators under certain circumstances. Prof. Piero Bernardini, *Italy*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (J. Paulsson ed., Supp. 49, at 13, 2007):

It would have been more constructive to provide for the respect of the parties' equality in the appointment of arbitrators in case of multiple parties, thus allowing for the intervention of a third party in the appointment process in the absence of the parties' agreement (similarly to what is provided by Art. 10 of the ICC Rules of Arbitration).

paragraph, the default rule applicable in all other cases. It consists of a requirement that a number of separate arbitrations equal to the number of respondents be initiated: “Except in the cases foreseen in the previous paragraph, the proceedings initiated by a party against other parties shall be divided into as many proceedings as there are the latter parties.”

Even before the 2006 modification of the law, Italian case law had been protective of party equality in the designation of arbitrators in multiparty disputes. Italy’s Supreme Court had held on more than one occasion that when there are more than two parties to a dispute and the relevant arbitration clause calls for a tribunal of three arbitrators, arbitration would be permitted to proceed only if the multiple parties could be categorized into two distinct groups with opposing interests.⁷⁹

While the new law is highly protective of the parties’ equality in multiparty situations, the earlier approach in the Italian jurisprudence of identifying a commonality of interests among different parties is not one of its features. Instead, under the new law, multiple parties on one side of an arbitration are allowed to agree on an arbitrator without the necessity of sharing identical positions on, or interests in, the merits.⁸⁰

2. *Japan*

Japan’s arbitration law (Law No. 138 of 2003)⁸¹ includes several provisions that are designed to prevent stand-offs in commencing multiparty arbitration. One provides that when an arbitration involves three or more parties and the parties have not agreed on the number of arbitrators, any party may move the appropriate Japanese district court to determine the number of arbitrators.⁸² Another article states that when the parties have not agreed on a procedure for appointing the arbitrators and there are three or more parties, “the court shall appoint arbitrators upon the request of a party.”⁸³ Commentators that have reviewed this latter provision of the Law have suggested that it authorizes the court to proceed to designate all of the arbitrators.⁸⁴

Of course, the difficulty in many multiparty situations lies not in the absence of an agreement for the appointment of arbitrators, but rather from the parties’ inability to apply it under a given set of facts. Thus, another provision of the Law, found at Article 17(5), deals with scenarios involving difficulties in implementing an arbitration clause’s provisions. It provides that where, “under an appointment procedure for arbitrators

⁷⁹ *Id.* at 12 (citing 1983 and 1988 decisions of the Italian Corte Suprema di Cassazione); see also Bertoldo v. Unointrasport, Italian Corte Suprema di Cassazione, June 26, 2007, 5 *IL MASSIMARIO DEL FORO ITALIANO* 1131 (2007).

⁸⁰ Chiara Giovannucci-Orlandi, *La nouvelle réglementation Italienne de l’arbitrage après la Loi du 2 Février 2006*, 2008 *REV. ARB.* 19, 25.

⁸¹ English translation, in *ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION* (J. Paulsson ed., Supp. 43, 2005).

⁸² Law No. 138 of 2003, art. 16(3).

⁸³ *Id.* art. 17(4).

⁸⁴ Kazuhiko Yamamoto, *La nouvelle Loi Japonaise sur l’arbitrage*, 2004 *REV. ARB.* 829, 837; Dominic Roughton, *A Brief Review of the Japanese Arbitration Law*, 1 *ASIAN INT’L ARB. J.* 127, 132–33 (No. 2, 2005).

agreed upon by the parties ... arbitrators cannot be appointed due to a failure to act as requested under such procedure or for any other reason, a party may request of the court the appointment of arbitrators.”

Notwithstanding the use of the plural “arbitrators” in Article 17(5), its drafting remains somewhat ambiguous: it is unclear whether it authorizes courts to appoint the entire tribunal, or only to fill those arbitrator positions in which the difficulty was encountered.⁸⁵ Additional precision in the drafting would perhaps have been advisable to avoid such confusion. It is unclear, for instance, whether a difficulty in a multiparty arbitration in applying an agreed method for choosing a co-arbitrator encountered at the stage of the multiple respondents’ designation could constitute a valid basis for the district court to ignore the claimant’s or Claimants’ earlier designation and to name the *entire* tribunal. On the other hand, a difficulty encountered by the two co-arbitrators in naming a chairperson would not normally appear to be an adequate basis for withdrawing the co-arbitrators’ appointments and seeking the judicial appointment of an entirely new tribunal—yet just such a request might be deemed to be literally permissible under the Law as currently drafted.

3. *Panama*

As discussed below, Panama’s Arbitration Law⁸⁶ provides a special mechanism for the arbitrator’s or arbitrators’ appointment in multiparty arbitration. While Article 12 of the Law provides generally that arbitral tribunals are composed of one or three arbitrators, with three being the default number absent agreement of the parties for a single arbitrator, the article also goes on to specify that in multiparty arbitration, the tribunal may, by agreement of the parties, be composed of a different number of arbitrators.

As to the constitution of the tribunal, Article 14 states that arbitrators are designated in one of three manners: (1) by agreement of the parties; (2) pursuant to a set of arbitration rules that they have selected; or, finally, (3) according to the procedure established by the appointing authority, when an appointing authority is involved as foreseen in Article 15.

If the parties do not agree on the arbitrators to be designated and if the selected arbitration rules do not contain specific rules on designation, then Article 15(2) governs the appointment of arbitrators in multiparty arbitrations. It aims to ensure equality of participation of all parties in the process as follows.

First, Article 15(2) provides generally that the parties are permitted in multiparty arbitrations to make joint designations of arbitrators whenever there is no conflict of interest among them. Although not stated explicitly in the text, the reference to joint

⁸⁵ Cf. Roughton, *supra* note 84, at 131 (describing art. 17 as authorizing a district court to “appoint a sole arbitrator, co-arbitrator, or third arbitrator in the event of default,” and perhaps thereby implicitly suggesting that the provision allows the district court to fill only the arbitrator position for which difficulty has arisen).

⁸⁶ Decree-Law No. 5 of July 8, 1999, Spanish text available at <www.legalinfo-panama.com/legislacion/comercial/dl051999.pdf>, and French translation, 2005 REV. ARB. 823.

action by parties would presumably permit multiple claimants not having conflicting interests and/or multiple respondents not having conflicting interests to make (a) joint nomination(s).

Article 15(2) further provides that in multiparty cases where the parties have conflicting interests, each party must designate an arbitrator, and the arbitrators designated by the parties will name the chair of the tribunal, thus leading to a tribunal composed of more than three members.⁸⁷

Finally, Article 15(2) provides that whenever a disagreement exists among parties in multiparty arbitration (presumably over the appointment of a co-arbitrator, when there is no conflict of interest) or among the arbitrators (presumably over the appointment of the chair), the appointing authority (as defined in Article 10) will proceed with the nomination in question.

4. Colombia

Although Colombia's Arbitration Law⁸⁸ does not specifically refer to multiparty arbitration, it does contain a number of interesting and generally applicable provisions that ensure the equality of all parties in constituting the tribunal.

Most notably, Colombia's arbitration law has a unique provision that specifies that parties shall appoint arbitrators either directly by mutual agreement or by delegating appointment wholly or partially to a third party.⁸⁹ When the parties fail to agree on one or more of the arbitrators or when the third party beneficiary of the delegation of power fails to make the appointment, any party may ask the Civil Circuit Judge to summon the party that has failed to agree or the third party, as the case may be, to a court hearing for the purpose of, respectively, reaching an agreement between the parties as to the arbitrator(s) or having the third party proceed with the appointment.⁹⁰

If a party or the third party does not appear for the court hearing, or if no agreement is reached at the hearing between the parties or no appointment is made by the third party, then the judge shall proceed at the same hearing to make the appointment (from a list of arbitrators maintained by the local chamber of commerce).⁹¹

⁸⁷ Fernando Mantilla-Serrano, *Le traitement législatif de l'arbitrage en Amérique Latine*, 2005 REV. ARB. 561, 579.

⁸⁸ Decree No. 2279 of October 7, 1989, amended by Law No. 23 of March 21, 1991, Spanish text available at <www.sic.gov.co/Normatividad/Decretos/Decreto%202279-89.php>, English translation, in ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (J. Paulsson ed., Supp. 18, 1994), and French translation, 1992 REV. ARB. 161.

⁸⁹ "Partial" delegation to a third party might include, for example, delegation for the designation of a chair or delegation for the designation of the remaining arbitrator positions that the parties have been unable to fill by agreement.

⁹⁰ Arbitration Law, art. 9.

⁹¹ *Id.*

Interestingly, the result of these provisions is that traditional party-appointed arbitrators (i.e., those appointed individually by a party or group of parties, rather than by mutual agreement of all the parties) do not exist under Colombian practice.⁹²

5. *England*

England's Arbitration Act 1996⁹³ provides at section 16(1) that "parties are free to agree on the procedures for appointing the arbitrator or arbitrators, including the procedure for appointing any chairman or umpire." On its face, this provision would seem to countenance agreements among multiple parties that have the effect of calling for the joint nomination of a single arbitrator by several parties while permitting a single opponent to designate its own arbitrator.

Yet in cases where the parties have reached an agreement on an appointment procedure but its implementation has failed, or where they have not agreed on an appointment procedure, the parties may seek court intervention to challenge the appointment of a tribunal in an asymmetrical manner.

We examine, first, the multiparty arbitration situation where there has been a *failure* of an appointment procedure. Section 18 begins by laying out two basic rules: first, that the "parties are free to agree what is to happen in the event of a failure of the procedure for the appointment of the arbitral tribunal"⁹⁴; and, secondly, that "[i]f or to the extent that there is no such agreement any party to the arbitration agreement may ... apply to the court to exercise its powers under this section [18]."⁹⁵

Under section 18(3) of the Arbitration Act, a court enjoys wide discretionary powers and great leeway to support the formation of arbitral tribunals.⁹⁶ In responding to a party's request under the Arbitration Act for assistance in the appointment process, a court is allowed, for instance, to appoint a co-arbitrator on behalf of defaulting parties while at the same time leaving another party's designation unaffected or, conversely, the court can elect to appoint all of the arbitrators.⁹⁷ The precise language of section 18 reads as follows:

18. Failure of appointment procedure

- (1) The parties are free to agree what is to happen in the event of a failure of the procedure for the appointment of the arbitral tribunal ...
- (2) If or to the extent that there is no such agreement any party to the arbitration agreement may (upon notice to the other parties) apply to the court to exercise its powers under this section.

⁹² Fernando Mantilla-Serrano, *La nouvelle législation Colombienne sur l'arbitrage*, 1992 REV. ARB. 41, 48; Mantilla-Serrano, *supra* note 87, at 580 n.56; Marco Gerardo Monroy Cabra, *Colombia*, in ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (J. Paulsson ed., Supp. 18, at 6, 1994).

⁹³ English text, in ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (J. Paulsson ed., Supp. 23, 1997), and French translation, 1997 REV. ARB. 93.

⁹⁴ Arbitration Act 1996, s. 18(1).

⁹⁵ *Id.* s. 18(2).

⁹⁶ V.V. Veeder, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (J. Paulsson ed., Supp. 23, at 29, 1997).

⁹⁷ Peter Aeberli, *Jurisdictional Disputes Under the Arbitration Act 1996: A Procedural Route Map*, 21 ARB. INT'L 253, 258 (2005).

- (3) Those powers are—
 - (a) to give directions as to the making of any necessary appointments;
 - (b) to direct that the tribunal shall be constituted by such appointments (or any one or more of them) as have been made;
 - (c) to revoke any appointments already made;
 - (d) to make any necessary appointments itself.
- (4) An appointment made by the court under this section has effect as if made with the agreement of the parties.
- (5) The leave of the court is required for any appeal from a decision of the court under this section.

When the parties' agreed appointment procedure has failed, the court is thus perfectly entitled to enforce that agreement by appointing the arbitrator in the place of one or multiple defaulting parties. However, in presence of a multiparty dispute, the court is equally free to judge that considerations of fair and equal treatment compel it to revoke an appointment or appointments already made and to itself appoint the whole arbitral tribunal. We note in this connection that the February 1996 report of the Departmental Advisory Committee overseeing the Arbitration Act refers expressly to the *Dutco* case and indicates that the court's power to revoke any appointments already made was included in the Bill to allow courts to address concerns about fair treatment in multiparty situations.⁹⁸

Turning to the situation in which the parties have not agreed on a procedure for appointment of arbitrators, section 16(2) of the Arbitration Act provides that in such cases the procedure is to be determined according to the remainder of section 16. However, with the exception of the procedure for appointment of a sole arbitrator outlined in section 16(3),⁹⁹ and of the terms of section 16(7), the appointment procedures of section 16 would appear to be applicable only in cases of *bipartite* arbitration. Section 16(7) addresses *multiparty* arbitration by specifying that "[i]n any other case (in particular, if there are more than two parties) section 18 applies as in the case of a failure of the agreed appointment procedure." The court's discretion would thus be the same as discussed above.

6. Austria

Austria's revised arbitration law, effective as of July 1, 2006, is codified in the Austrian Code of Civil Procedure, Part Six, Chapter Four.¹⁰⁰ The law does not contain a provision

⁹⁸ Departmental Advisory Committee on Arbitration Law, 1996 Report on the Arbitration Bill, February 1996 (Chairman Lord Justice Saville), 13 *ARB. INT'L* 275, 290 (1997):

It will be noted that we have given the Court power to revoke any appointments already made. This is to cover the case where unless the Court took this step it might be suggested thereafter that the parties had not been fairly treated, since one had his own choice [of] arbitrator while the other had an arbitrator imposed on him by the Court in circumstances that were no fault of his own. This situation in fact arose in France in the *Dutco* case, where an award was invalidated for this reason.

⁹⁹ "If the tribunal is to consist of a sole arbitrator, the parties shall jointly appoint the arbitrator not later than 28 days after service of a request in writing by either party to do so." Arbitration Act 1996, s. 16(3). This procedure applies irrespective of whether the parties have agreed on a sole arbitrator (*id.* s. 15(1)) or whether there is to be only one arbitrator by application of the default rule in cases where there is no agreement on the number of arbitrators (*id.* s. 15(3)).

¹⁰⁰ German text available at <http://portal.wko.at/wk/format_detail.wk?angid=1&stid=321109&dstid=347&opennavid=0>, English translation, in *ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION* (J. Paulsson ed., Supp. 50, 2007), and French translation, 2006 *REV. ARB.* 518.

indicating explicitly how arbitrators are to be appointed in situations where the parties have failed to agree on a procedure for their appointment and the parties on each “side” of the dispute are different in number.

Nevertheless, one observer of Austrian arbitration law, Andreas Reiner, believes that a provision of the new law found at Article 587(5) of the Austrian Code of Civil Procedure is open to being read in such a way as to support the conclusion that “[f]or multiparty situations, the new Act ... obliges several claimants or several respondents to agree on one co-arbitrator, failing which this co-arbitrator will be appointed by the court.”¹⁰¹ The text of Article 587(5) specifies that when several of the parties are obligated to appoint jointly one or more arbitrators, and they fail to do so, such arbitrator or arbitrators will be appointed by a court:

When several parties that are to jointly appoint one or more arbitrators have not agreed upon such appointment within four weeks of receipt of a respective written notification from [*sic*] these parties, the arbitrator or arbitrators shall be appointed by the court upon application by one of these parties, unless the agreement on the appointment procedure provides other means for securing the appointment.

What Article 587(5) does not specify are the circumstances under which several parties are required to designate jointly one or more arbitrators. It is possible that the obligation referred to was intended to mean simply an obligation that results from the terms of the appointment procedure to which all of the parties agreed. Andreas Reiner suggests, however, that the obligation for multiple parties on one or both sides to make a joint appointment might be found in the Austrian arbitration law itself. He proposes one possible line of reasoning as follows:

The obvious difficulty arises from the passage “that are to jointly appoint one or more arbitrators.” Based on one permissible first interpretation, subsection (5) is a cross reference to the second point of article 587(2), which provides that “each party shall appoint one arbitrator” in arbitrations with three arbitrators, with the expression “each party” capable of being understood in the sense of “each side,” i.e., one or more claimants or one or more respondents. According to this interpretation, multiple claimants and multiple respondents would always have to jointly appoint a co-arbitrator, barring which the judge responsible for arbitration assistance matters will proceed to make the appointment in the place of the defaulting parties pursuant to article 587(5).¹⁰²

In a similar vein, another commentator, Dr. Stefan Kröll, while noting that “[e]qual treatment of the parties in the appointment of the arbitral tribunal and the independence of the arbitrators are crucial elements for the success of arbitration,” expresses the hope and expectation that an approach characterized by “absolute equality” in the designation of arbitrators will not prevail in Austria.¹⁰³ According to Dr. Kröll, Austrian arbitration law has “never explicitly regulated the situations in which one party had a greater influence

¹⁰¹ Andreas Reiner, *The New Austrian Arbitration Act*, 24 J. Int'l Arb. 529, 534 (2007).

¹⁰² Andreas Reiner, *La réforme de droit Autrichien de l'arbitrage par la Loi du 13 Janvier 2006*, 2006 REV. ARB. 401, 412 (authors' translation). The relevant provisions do not represent an exercise in drafting clarity, and other authors have proposed another interpretation of this provision. *Id.* at 413.

¹⁰³ Dr. Stefan Kröll, “First Experiences” with the New Austrian Arbitration Law, *A German Perspective*, 23 ARB. INT'L 553, 558–59 (2007).

on the composition of the arbitral tribunal,” and this position is reflected in the Arbitration Rules of the International Arbitral Centre of the Austrian Federal Economic Chamber, Article 15(7) of which provides for an appointment by the centre of an arbitrator in the place of multiple defaulting respondents, without affecting a designation of arbitrator made by a single claimant.¹⁰⁴

7. *Other Pertinent Laws*

While many countries have not enacted legislation that specifically ensures the principle of equality in the designation of arbitrators in multiparty arbitrations, this should not be taken to mean that inequality in the designation process is of diminished concern. A party claiming to have been treated unequally in this process may, for example, seek to set aside the award at the place of the arbitration upon the grounds that either: (1) the tribunal was constituted in a manner inconsistent with the parties’ agreement; or (2) the award conflicts with the public policy of the place of arbitration. Depending on the particular facts, these two provisions may be broad enough to encompass claims that a party was treated unequally in the designation process. These provisions are commonly found in most national laws, and this is certainly true of all those countries that have adopted the pertinent provisions of the UNCITRAL Model Law, for example.¹⁰⁵

Similarly, at the recognition and enforcement stage, a party resisting enforcement may attempt to invoke Article V(1)(d) or (2)(b) of the New York Convention, which is in force in over 140 countries.¹⁰⁶

V. ANALYSES CONTAINED IN DIFFERENT ARBITRAL AND JUDICIAL DECISIONS

The preceding sections have served to confirm that most leading arbitration institutes and, to a lesser extent, a number of national legislatures have turned their attention to the question of arbitrator appointments in multiparty situations. By contrast, the number of publicly available arbitration awards and court decisions examining the question remains relatively low. It nevertheless proves to be instructive to examine how courts and tribunals faced with multiparty disputes resolve the difficulties of balancing: (1) adherence to the arbitration agreement, versus (2) maintaining party equality in the process of designating an arbitral tribunal.

¹⁰⁴ *Id.* at 559.

¹⁰⁵ See UNCITRAL Model Law (as amended in 2006), art. 34(2)(a)(iv) and (b)(ii).

¹⁰⁶ Art. V of the New York Convention provides in pertinent part:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: ... (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; ... 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: ... (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

It would appear that at least two approaches have been adopted as a means to avoid any difficulties in this regard. Under the first approach, courts and arbitral institutions consider two or more parties (e.g., typically those that form part of the same corporate family) to constitute a *single party* for the limited purpose of requiring them to jointly nominate one arbitrator.¹⁰⁷

Under the second approach, the stated justification for requiring multiple entities to make a joint nomination of an arbitrator is a finding that their interests in the dispute are sufficiently aligned. Thus, to quote a number of examples laid out by Jean-Louis Dévolvé in an important 1995 article on multiparty arbitration, when (1) “two joint creditors ... together assert their rights against a common debtor”; or (2) “a creditor ... assert[s] his [rights] against two joint and/or several debtors”; or (3) “a company to which a controlling shareholding in another company is assigned ... undertake[s] an action relating to the guarantee of liabilities against the former shareholders, who may comprise a large number of persons”; or (4) “such former shareholders ... bring proceedings against the new owner for payment of a supplementary price,” it is “doubtful whether an arbitration of this kind is necessarily a multiparty arbitration, for in reality it involves a dispute between two separate ‘camps’—one claimant and one defendant.”¹⁰⁸ The second approach relies, therefore, less on an amorphous definition of the term “party” and more on an inquiry into whether the *interests* of multiple parties are so closely aligned that it would be inequitable to allow each of them individually to enjoy the same weight in composing the tribunal as the remaining party or parties having unaligned interests.

In any event, both approaches are closely related and often indistinguishable in their application, because if parties can be treated as constituting a “single party” for purposes of designating an arbitral tribunal, this necessarily presupposes that they have wholly or partially overlapping interests.¹⁰⁹ Perhaps what can be said is that the common interests test has a broader application, applying to cases even in which the parties are not part of the same corporate family. These two approaches have been applied in a variety of factual contexts, as catalogued and discussed below.

¹⁰⁷ Didier Matray & Gautier Matray, *La rédaction de la Convention d'Arbitrage*, in FILIP DE LY ET AL., *LA CONVENTION D'ARBITRAGE, GROUPES DE SOCIÉTÉS ET GROUPES DE CONTRATS* 20, 73 (2007).

¹⁰⁸ Jean-Louis Dévolvé, *Final Report on Multi-Party Arbitrations Approved by the ICC's Commission on International Arbitration*, 6 ICC BULL. 26, 29–30 (No. 1, 1995); see also Olivier Caprasse, *The Setting Up of the Arbitral Tribunal in Multi-Party Arbitration*, 2006 REVUE DE DROIT DES AFFAIRES INTERNATIONALES 197, 206; Jean-Louis Dévolvé, *Multipartism: The Dutco Decision of the French Cour de Cassation*, 9 ARB. INT'L 197, 200–01 (1993). Dévolvé continues: “The situation will be different, however, if, for example, the parties within one camp fail to agree on the strategy or tactics to be adopted, the claims to be argued, the grounds of their claim, or even whether an arbitration is appropriate, or, as is often the case, the identity of the arbitrator that they are to nominate, whether as claimants or defendants.” *Id.* at 30. As for the final example contained in this list (“the parties within one camp fail to agree on ... the identity of the arbitrator that they are to nominate”), this admittedly begs the question as to a key issue addressed in this article.

¹⁰⁹ See also Dévolvé, *supra* note 108, at 201:

Consorts, to some extent, are regarded as members of one procedural camp. To what extent should such a camp be deemed to constitute one party? The question deserves deeper study, but enunciating it in this term could pave the way to eliminating one of the difficulties of multipartism. Reducing a number of litigants to the unity of one camp would be capable of transforming multipartism into bipartism, so that nobody in the same camp should contend that he is personally entitled to contribute to the constitution of the arbitral tribunal.

A. PARTIES TO A CONSORTIUM AGREEMENT

An example of the application of the above approaches in the context of a consortium agreement can be seen in an unpublished March 3, 1999 ad hoc award reported by Matthieu de Boissésou in a 2003 special issue of the *ICC Bulletin* on complex arbitration.¹¹⁰ At issue was a claimant's request for the intervention of three additional respondents in an already ongoing (though not very advanced) bipartite arbitration.¹¹¹ The claimant and existing respondent were signatories to the arbitration agreement, but the three additional entities the claimant sought to join were not. The tribunal first found that the governing procedural law of arbitration neither imposed a requirement on claimants to name all respondents in the request for arbitration, nor precluded the naming of additional respondents later in the proceedings (subject to fair treatment).

Among the reasons raised by the three entities for resisting joinder was that they had not had an opportunity to participate in the constitution of the arbitration panel. The arbitral tribunal discounted this objection by finding that the one respondent that was a signatory to the arbitration clause and the three entities that were sought to be joined as respondents were all in fact members of a consortium within the meaning of Swiss law and that, as such, the four respondents formed a single party that had consented to the constitution of the tribunal. In this way, the tribunal was able to avoid issues relating to the equality of the parties.

B. PARTIES TO A JOINT VENTURE AGREEMENT

This same approach is found in an unpublished May 26, 1997 decision of the Argentinean National Commercial Court of Appeals discussed by Horacio A. Grigera Naón in his chapter on Argentinean arbitration in the *ICCA International Handbook on Commercial Arbitration*. The court in that case was able to avoid the difficulties caused by the presence of multiple respondents (all members of a joint venture) by considering that all of the respondents should be treated as a single party for purposes of constituting the tribunal. The Argentinean case differed from the 1999 ad hoc case discussed above in that all of the respondents in the Argentinean case were signatories to the arbitration agreement, whereas none of the additional entities sought to be joined as respondents in the 1999 ad hoc case were.

As noted, the Argentinean dispute arose in the context of a joint venture agreement, with a sole claimant seeking damages against three joint venture partners. The arbitration clause called for ad hoc arbitration and provided that each party was entitled to appoint

¹¹⁰ Matthieu de Boissésou, *La jonction de parties à l'instance arbitrale: deux décisions opposées*, Supplément Spécial BULL. C.C.I. 21, 24–25 (2003).

¹¹¹ For a discussion of the joinder aspects associated with this award, see Thomas Bevilacqua, *Voluntary Intervention and Other Participation of Third Parties in Ongoing International Arbitrations: A Survey of the Current State of Play*, 1 WORLD ARB & MED. REV. 507, 516–18 (2007).

one arbitrator. Each of the three respondents sought to exercise its right to do so. The Court of Appeals, however, disallowed this, ruling that the three co-respondents must be treated as a single party, for which only one co-arbitrator would be appointed.¹¹²

C. PARTIES TO A SHAREHOLDERS' AGREEMENT

Another case involving a comparable approach was that decided by the Court of First Instance of The Hague and discussed above in connection with Article 1028 of the Dutch Code of Civil Procedure. As noted, the Court of First Instance of The Hague declined to apply literally the terms of an arbitration clause between the three shareholders of a firm (a father, his son, and a third party) that granted each of them the right to name an arbitrator. The court found that the father and son constituted a single party. Yet, while the conclusion regarding the identity of parties in the Dutch case was similar to that in the Argentinean matter, the overall result was not. In the Argentinean matter, multiple parties were allowed only one designation and the sole claimant's designation was allowed to stand, but in the Dutch case, by contrast, due to Article 1028's strong expression of principle regarding party equality, the trial court did not allow any party designations and proceeded to appoint *all* the members of the tribunal.

A somewhat opposite result on the question of whether multiple respondent parties can be treated as a single party for purposes of constituting a tribunal is found in the February 2, 2006 decision of the Quebec Superior Court in *Audrey Jack v. James Jack, Gordon Jack, and Ferme de Reproduction James & Gordon Jack Inc.*¹¹³ As permitted by the Quebec Code of Civil Procedure, arbitral claimant Audrey Jack had sought the trial court's assistance following a stalemate in the constitution of an arbitral tribunal. She argued that the relevant arbitration clause, found in a shareholders agreement entered into among the three shareholders of the Ferme de Reproduction James & Jack Gordon Inc. (namely, herself, James Jack, and Gordon Jack), entitled her as claimant to designate a co-arbitrator and entitled James Jack and Gordon Jack, the respondents, to name jointly the other co-arbitrator. According to Ms. Jack, the two arbitrators so chosen would name the third arbitrator.

The claimant asserted that this approach was compulsory due to the fact that (1) the two respondents had common interests,¹¹⁴ and (2) Article 2641 of the Civil Code of Quebec provided that "a stipulation which places one party in a privileged position with respect to the designation of the arbitrators is null."¹¹⁵

¹¹² Naón, *supra* note 54, at 10–11.

¹¹³ The decision is available at <www.canlii.org/eliisa/highlight.do?language=en&searchTitle=Search+all+CanLII+Databases&path=/fr/qc/qccs/doc/2006/2006qccs837/2006qccs837.html>.

¹¹⁴ Each of the two respondents owned 40% of the said company's stock, while the claimant owned 20%. Following a deterioration in the parties' relationship, claimant commenced the arbitration to obtain a valuation of all of the shares of the company, but the two respondents argued that the only question suitable for submission to arbitration was valuation of the claimant's 20% shareholding.

¹¹⁵ Note the similarity to art. 1678(1) of the Belgian Judicial Code.

The two respondents answered by arguing that, as separate parties, each of them was entitled to name an arbitrator and that, following their respective designations, the tribunal would be complete with three members. They relied on the language of the arbitration clause in the shareholders agreement, which stated in relevant part, “The parties herein agree that any dispute ... will definitively be passed upon, at the exclusion of any court or tribunal, by an arbitration committee constituted of three (3) arbitrators ... Each party shall appoint one arbitrator.”

The court found that the parties’ intention seemed to be that each of the three shareholders would be entitled to name an arbitrator in the event of a dispute. The court also found, however, that the arbitration clause did not explicitly envisage the situation in which two parties to the shareholders agreement could have common interests adverse to the interests of the third shareholder. The claimant argued that under such circumstances, the arbitration clause would be invalid, that the process of nominating the arbitrators must respect the equality of the parties and lead to an independent and neutral tribunal, and that an arbitrator designated by one of the respondents would have to be dismissed.

The court did not grant the claimant’s requested remedy. It considered that the claimant was merely assuming, first, that the respondents had identical interests and, secondly, that the party-named arbitrators would be biased. The court remarked that the arbitrators were experts in accounting and tax matters and that their good faith had to be presumed. Further, those arbitrators were subject to the ethical codes governing their professions and to the provisions of Quebec’s arbitration law on arbitrator recusal. The court therefore allowed the tribunal to stand as appointed.¹¹⁶

D. PARTIES TO A PARTNERSHIP AGREEMENT

As far as partnership agreements are concerned, one application of the common interest approach can be found in a multiparty dispute that was addressed by a Zurich-based cantonal court (Zurich Superior Court) in a decision dated September 11, 2001.¹¹⁷ In that case, A, B, and C were all parties to an ordinary partnership agreement whose arbitration clause allowed each partner to name an arbitrator in the event of a dispute. A

¹¹⁶ For a further demonstration of the overlapping nature of the questions, and also of the rather novel (and sometimes debatable) solutions to which these types of cases can give rise, see the award rendered on May 7, 2007 by the Cairo Regional Center for International Commercial Arbitration (mentioned at 10 J. ARAB ARB. 347 (2007) and abstracted by the Institute for Transnational Arbitration, available at <www.kluwerarbitration.com/arbitration/print.aspx?ipn=80976>). The tribunal in that case held that in a situation where there were a single claimant and two respondents with conflicting interests, not only was each of the two respondents entitled to choose an arbitrator, but the claimant must be permitted to name a second arbitrator, such that the tribunal as finally constituted would contain five members. According to the award, this result was necessary in order to respect the fundamental principle of equality and the requirement for an odd number of arbitrators, and in spite of the fact that the parties’ arbitration clause called for a three-member panel. The award also noted that where, by contrast, the two respondents shared an identity of interest, they should be compelled to jointly designate a single co-arbitrator.

¹¹⁷ The decision is available in German text, 20 ASA BULL. 694 (2002), and is discussed at length in HANOTIAU, *supra* note 22, at 205–06.

commenced an arbitration to wind up the partnership, naming B and C as respondents. A named a co-arbitrator and invited B and C to jointly nominate the other co-arbitrator. When B and C failed to do so, A asked the Zurich court to appoint a single arbitrator in their place. C then accepted the idea of a joint nomination without saying more. B, however, refused to accept a joint nomination with C, arguing that A and C were in collusion and, moreover, insisting on the fact that the partnership agreement allowed each party to name an arbitrator. B also argued that because C's interests were more aligned with those of A than with those of B, if there were to be any joint nomination it should be made by A and C. In addition to its objections, B made its own proposal for co-arbitrator. C did not object to B's proposed arbitrator.

The court could find no evidence that A's and C's interests were aligned. Moreover, it deemed that if the arbitration clause were applied literally, it would have allowed for two respondent-appointed arbitrators on the panel, as compared to one claimant-appointed arbitrator. Further, the respondents' arbitrators would have had a greater say in relation to the selection of the tribunal's chair. As such, the clause did not respect the principle of equality.

The court deemed the arbitration clause was partially invalid, because it gave the respondents a predominant role in the tribunal's appointment, and hence did not respect the principle of equality. Bernard Hanotiau describes the Zurich court's resolution of this conundrum as follows:

Given the partial invalidation of the arbitration clause, the Court had to fill the gap. It established a mechanism which the parties in good faith would have agreed upon had they been aware of the invalidity of the mechanism they had initially provided. This mechanism was for the defendants to appoint an arbitrator jointly ... Indeed, the Swiss Federal tribunal has confirmed that parties' real interests rather than their position in the proceedings are decisive with respect to the right to appoint an arbitrator.¹¹⁸

This resolution is remarkable insofar as the Zurich court required a joint nomination to be made by respondents who, by all appearances, did not seem to have common interests. This anomaly is perhaps immaterial given that C did not object to B's proposed arbitrator. In his case note on this decision, Laurent Hirsch observes that the facts with which the Zurich Superior Court was confronted were so specific that they perhaps did not provide the court with an opportunity to rule on a number of issues.¹¹⁹ Nevertheless, the author surmises that even though the court did not refer to *Dutco*, the doctrine for which *Dutco* stands "seems unlikely to convince Swiss courts, which apparently consider that it is not contrary to the principle of equality of the parties that two defendants with possibl[y]

¹¹⁸ HANOTIAU, *supra* note 22, at 205–06.

¹¹⁹ The Zurich Superior Court was faced with the problem in quite specific circumstances, since defendant C did not insist on his right to appoint an arbitrator and did not object to the arbitrator proposed by B. The practical outcome appeared therefore not detrimental to any party: A could appoint his arbitrator, B could have his arbitrator appointed as well, and C appeared satisfied to have the arbitrator proposed by B. This specific feature of the case may explain the decision. One may consider that the case is limited to its own facts.

Laurent Hirsch, *Note (Obergerich Zürich, Sept. 11, 2001)*, 20 ASA BULL. 702 (2002).

different interests should jointly appoint an arbitrator.”¹²⁰ Incidentally, this statement implicitly raises an important question with respect to the *Dutco* decision, that is, the extent to which the fact that the respondents in *Dutco* had diverging interests entered into the Cour de cassation’s decision as a practical matter (this factor does not appear as a consideration from the text of the decision).

Whatever reservations some observers might have about the limits of the holding in the Zurich case, it also should be noted that at the time of that ruling, another lower Swiss court (this one in Neuchâtel) had already endorsed the idea that, as one element of preserving party equality, it was permissible to assess the potential unity of the parties’ interests in determining their respective roles in the arbitrator appointment process. The case in question was a June 17, 1994 decision of the Neuchâtel Cantonal Tribunal (Arbitral Chamber),¹²¹ followed by the Swiss Tribunal fédéral’s January 4, 1995 rejection of a challenge thereto.¹²²

Like a number of the multiparty arbitration cases that interest us, the dispute presented to the Neuchâtel court arose in the context of a professional partnership consisting of Founding Partners 1, 2, and 3 (FP1, FP2, FP3) and several other partners who joined the partnership later (the new partners, or NPs) by means of an “association contract”

¹²⁰ *Id.* at 706. In any event, it is indeed true that in the Swiss Tribunal Fédéral’s May 16, 1983 decision in Arab Republic of Egypt v. Westland Helicopters Ltd., which is often considered, next to *Dutco*, as “the other” leading case on the appointment of arbitrators in multiparty arbitration and which no doubt underlies Laurent Hirsch’s above-quoted assertion in part, did not find fault with the ICC’s then-existing arbitrator designation rules (including apparently the practice that multiple respondents be required to jointly name a single co-arbitrator). See Schwartz, *supra* note 2, at 10; Bernard Hanotiau, *Problems Raised by Complex Arbitrations Involving Multiple Contracts-Parties-Issues: An Analysis*, 18 J. INT’L ARB. 253, 341 n.270 (2001).

The arbitration involved in that case was an ICC arbitration commenced by Westland Helicopters against six respondents, including four Middle Eastern states. Applying its practice from the period, the ICC appointed a single arbitrator on behalf of the six co-respondents. The Egyptian state then attacked the jurisdiction of the arbitral tribunal before the Geneva Cour de Justice, invoking a preponderant influence of the claimant in constituting the tribunal and a lack of independence of the arbitrators under art. 19 of the Swiss Concordat (the application of which was not limited to domestic arbitration at the time). The Geneva-based court rejected the challenge for a number of reasons. In discussing art. 19, it said: “According to this [Swiss Tribunal Fédéral] case law [on which art. 19 of the Concordat was based], only an arbitration award issued by an arbitral tribunal which can offer guarantees of neutrality in its decision-making is consistent with Swiss public policy. An arbitral tribunal constituted under the preponderant influence of one party cannot be considered as an impartial and independent tribunal . . . In the case at issue, the parties agreed to be bound by the ICC Rules of Arbitration, and these rules were applied concerning, *inter alia*, the method for naming the arbitrators, as we have seen. It is not possible to argue that the application of these rules gave WHL [Westland Helicopter] a preponderant influence. The ICC’s system for appointments offers every guarantee, or in any case more than others, since the parties only propose arbitrators, who are named by the ICC’s Court of Arbitration. The Arab Republic of Egypt is mistaken in believing that it has a right to be represented on the Arbitral Tribunal. Indeed, an arbitrator, even one designated by a party, is not that party’s agent or representative . . . In conclusion, contrary to what was argued, it is in any case certain that the system provided for by the [ICC Rules] is not contrary to Swiss public policy.” (Authors’ translation). Extracts, *in* LA SEMAINE JUDICIAIRE 309 (1984); summary, 2 ASA BULL. 154 (1984).

It should be noted that the challenge raised by Egypt and addressed by the Geneva court and then the Tribunal Fédéral turned largely on an alleged lack of independence said to stem from the designation of arbitrators from three “industrialized European nations” and the absence of a “third World” arbitrator. The question of preponderant influence based solely on the fact that the ICC, pursuant to its rules, designated a single co-arbitrator on behalf of the six respondents seems to have been a background consideration not addressed directly by the courts, although the ICC’s practice in this regard at the time appears to have been approved implicitly. Schwartz, *supra* note 2, at 10 (noting that the Swiss courts upheld the ICC’s practice “indirectly”). Extracts from and commentary regarding the Tribunal Fédéral’s upholding of the Geneva court’s decision, 2 ASA BULL. 203 (1984).

¹²¹ See 13 ASA BULL. 51 (1995).

¹²² See 13 ASA BULL. 210 (1995).

among FP1, FP2, FP3, and the NPs. The dispute arose after FP1 and FP2 informed FP3 and the NPs that they were terminating the association contract and dissolving the partnership. FP3 and the NPs wished to continue the partnership and thus were opposed to dissolution; they wished only that FP1 and FP2 leave the partnership and that it continue to operate.

The association contract's arbitration clause provided that in the event that all of the partners could not agree on a sole arbitrator, there would be three arbitrators, with all of the claimants naming one arbitrator, all of the respondents naming another, and the chair being named by the two co-arbitrators. When the parties failed to reach an amicable settlement, the NPs commenced arbitration against FP1, FP2, and FP3. Because the parties did not agree on a sole arbitrator, the NPs named an arbitrator. When FP3 thereafter named an arbitrator on behalf of the three respondents, FP1 and FP2 contested FP3's right to do so, claiming that FP3 was in fact not really a respondent, as its position was the same as that of the NPs and it had no dispute with the NPs.¹²³ FP1 and FP2 then named an arbitrator for themselves. Shortly thereafter, FP3 and the NPs joined together to seek provisional measures from a Geneva court against FP1 and FP2.

The Neuchâtel court was then called upon to resolve the controversy between FP3's supposed appointment of an arbitrator on behalf of all three FPs (an appointment which was also supported by the NPs) and FP1 and FP2's separate and competing appointment. The court found that the dispute submitted to arbitration was, in reality, one between, on the one hand, the NPs and FP3, who wished to continue the partnership's operations, and, on the other, FP1 and FP2, who wished to dissolve the partnership. The designation of FP3 as a respondent was "artificial," because FP3's interests not only were not in common with those of FP1 and FP2, but they were in fact adverse. The court thus rejected FP3's request to name its chosen arbitrator. The court allowed the arbitrators designated by the NPs and by FP1 and FP2 to be seated, and confirmed that those two arbitrators would select the chair.

The Swiss Tribunal fédéral approved this approach, by rejecting the challenge brought by FP3. In doing so, the Tribunal fédéral stated:

By "assigning roles," by determining who the true parties to the proceeding were, and by grouping together those that, in its estimation, *were in a similar position*, the cantonal court did not in any way breach the arbitration agreement binding the parties. On the contrary, by proceeding in the way it did, the court acted in a manner consistent with the true meaning of the arbitration clause, which was to describe the position of the parties, insofar as it could be done, *based on their true positions and not just on the title formally assigned to them in the arbitration*. Moreover, the principle that the claimant is free to name its respondent or respondents is in no way stripped of its import by the fact that one respondent, unlike a co-respondent, has the same arbitrator appointed for it as the claimant on the basis of relevant grounds set out by the court ... [T]he decision of the cantonal court obviously flowed from a concern over ensuring respect of the principle raised by the appellant [equality of the parties], by assigning to each party and to each *consort* its true role. The decision

¹²³ As a practical matter, the great majority of the NPs' claims were directed only at FP1 and FP2, not at FP3. It might be assumed that a major impetus to the naming of FP3 as a respondent was to prevent FP1 and FP2 from having the right as sole respondents to name a co-arbitrator.

seeks to prevent a situation where one party is permitted to designate its arbitrator while the other cannot and instead has one imposed on it by a *consort* or by the appointing authority, *based solely on the fact that this consort was artificially designated as an adversary by the party that shares a common cause with it and that has already designated its arbitrator ...* [B]ased on the factual findings relating to the parties' real roles in the dispute that has arisen among them and on *the absence of a common interest among the respondent pseudo-consorts*, the cantonal court's determination that the designation of [FP3] as a respondent consort was artificial, is in no way arbitrary.¹²⁴

Thus, the idea that multiple respondents' commonality of interests, or lack thereof, constitutes a relevant factor has been endorsed by Swiss courts.¹²⁵

The foregoing cases notwithstanding, it should be remembered that the *Dutco* decision announced a broad principle of equality that was wholly independent (at least on the face of the Cour de cassation's decision) of any similarity or dissimilarity of interests among the different claimant or respondent parties. In the intervening years since *Dutco*, the lower French courts have not always seized upon the occasions presented to reaffirm this particular aspect (albeit implicit) of its holding. In one Paris Court of Appeal decision dated October 18, 2002, the factor of common interests appeared even to receive an explicit blessing.¹²⁶

Some of the Paris appellate court's reasoning in that case is open to question under *Dutco*. As Eric Loquin points out, even assuming that the parties had agreed in their contract to an arbitration clause that did not guarantee party equality in the constitution of the tribunal, *Dutco* nevertheless makes clear that the rule of party equality rises to the level of public policy and it cannot be waived by a party before a dispute arises.¹²⁷ Moreover, as Professor Loquin puts it, the question in French law is not whether the respondent parties' interests are similar, but rather whether each of them is treated in the same manner as the claimant regarding appointment of the arbitrators.¹²⁸ While recognizing the practical difficulties that *Dutco* can entail (particularly, coordinated, fictitious "disagreements" by multiple respondents as to a joint designation of co-arbitrator), Professor Loquin opines

¹²⁴ Authors' translation from French (emphasis added).

¹²⁵ See also Swiss Tribunal Fédéral, August 4, 2006, 2007 REV. ARB. 870; Loquin, *supra* note 67, at 11 (comparing French and Swiss law and positing that the similarity or dissimilarity of the parties' respective interests is not considered relevant by the French Cour de cassation, whereas for the Swiss Tribunal Fédéral, there is a violation of the rule of equality only when there is a divergence of interests among the parties for whom a single arbitrator has been appointed). The same principle was affirmed, in addition, by the Italian Court of Cassation when, prior to the appearance of the 2006 Italian Arbitration Law, it held in a series of decisions that when more than two parties are involved in a dispute, an arbitration clause calling for the parties to appoint a three-member tribunal can validly be applied only when the parties are capable of being broken down into two homogeneous and opposing groups based on their interests. Bernardini, *supra* note 78, at 12. As seen above, a provision of Italian law dating from 2006 now attempts to protect party equality in a different manner.

¹²⁶ Cour d'appel Paris, 1e ch., October 18, 2002, 2003 REV. ARB. 1277. In affirming the lower court's decision to appoint a single arbitrator for two respondents, the Court of Appeal pointed out, "[M]oreover, the designation of a sole arbitrator for two parties for whom the outcome is linked, who signed the agreement jointly and severally, and who do not have diverging interests does not constitute a breach of the equality between the parties." (Authors' translation).

¹²⁷ Eric Loquin, *De la validité de la clause d'arbitrage imposant la désignation d'un arbitre commun à deux parties en litige contre une troisième, ou un groupe d'arbitres n'ayant qu'une voix au sein du tribunal arbitral*, 57 REVUE TRIMESTRIELLE DE DROIT COMMERCIAL 249 (2004).

¹²⁸ *Id.* at 249; see also Eric Loquin, *Note (Cass. 1st Civil Chamber, May 23, 2006)*, 2008 REV. ARB. 71, 74 (stating that the holding of *Dutco* was that an arbitral institution may not require two entities sharing the same interests in a dispute to name a single arbitrator jointly (or, failing which, do so on their behalf) in situations where the sole opposing party was free to name an arbitrator on its own).

that the Court of Appeal's decision is representative of a resistance to the *Dutco* rule and a step backwards for party equality.¹²⁹

E. PARTIES TO MULTIPLE CONTRACTS

We observe, finally, that in most of the cases discussed in the preceding paragraphs, the issue of the alignment of multiple parties' interests arose in the context of a single contract among multiple entities. Of course, the theory of alignment of interests is sometimes called into play to avoid difficulties in the constitution of a tribunal when a dispute arises on a single project that is governed by *multiple contracts*, particularly when the parties to those different contracts overlap only partially. More specifically, difficulties can easily arise in constituting a tribunal when a single claimant commences an arbitration that names several respondents and those respondents were parties to different agreements in the overall multi-contract scheme governing the project in question.

Similar problems involving constitution of the tribunal can also arise when separate ongoing arbitrations involving the same project are sought to be consolidated, particularly, again, when the respondent parties are not all parties to the same contracts. These situations can give rise to a series of complex issues that are beyond the scope of this article. Without delving more deeply into the subject, it can be noted simply that arbitrators (and reviewing courts) will sometimes resort to the notion of the identity of interests among multiple respondents in order to find harmless a lack of equality or an imbalance between the claimant and the respondents in the constitution of the tribunal.¹³⁰

VI. A PROPOSED SOLUTION

When a contract is entered into between three or more parties, if these parties wish to resort to arbitration before three arbitrators but to avoid the difficulties in constituting an arbitral tribunal that were addressed in the *Dutco* decision and in the numerous arbitral rules, laws, and court decisions discussed above, a straightforward solution is simply to require in the arbitration agreement that all members of the arbitral tribunal be appointed by a trusted arbitral institute. Alternatively, an arbitration clause could set out the parties' express agreement to: (1) first allow for a certain defined period of time following the appearance of a dispute for each "side" (claimant(s) and respondent(s)) to agree on a single arbitrator; and (2) in the event that either side fails to designate an arbitrator within the defined period of time, then all the arbitrators are to be selected by a trusted arbitral institute. These solutions would maintain party equality in the designation process and be workable regardless of the number of parties involved and regardless of the interests each has in the dispute.

¹²⁹ Loquin, *supra* note 127, at 249.

¹³⁰ See, e.g., *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara & P.T. PLN*, Alberta Court of Queen's Bench, Judicial District of Edmonton, No. 0203 03768, December 9, 2004, 30 Y.B. COM. ARB. 488, 490, 494–96 (2004).

While a party potentially cedes its right to nominate an arbitrator under the solutions proposed above, such a sacrifice is worthwhile, and indeed potentially illusory, given the benefits to be gained. In today's sophisticated environment, many of the premier arbitration institutes, when given the role of constituting the entire arbitral tribunal, will ensure that the tribunal is composed of independent, fair, and able arbitrators, while also taking into account a host of other important factors such as the nationality of the parties, the governing law, and the place of arbitration. Moreover, experience shows that these arbitration institutes are sensitive to any particular case-specific concerns raised by a party or the parties concerning the selection of arbitrators (such as concerns relating to a potential appearance of lack of strict neutrality or independence of an arbitrator or, more practically, a wish that the arbitrator possess certain technical or legal expertise). Above all, an award issued by an arbitral tribunal that had been appointed entirely by an arbitral institute pursuant to the parties' express contractual agreement is not subject to challenge or to a claim of unenforceability on the ground that the parties were treated unequally in the tribunal's designation.

VII. CONCLUSION

In the preceding pages, we have attempted to provide a broad survey of the specific provisions found in the major sets of international arbitration rules and in selected national arbitration laws that govern the constitution of multi-member tribunals in multiparty arbitration. We have endeavored to be sufficiently specific as to the workings of each such provision to render our observations of practical use to the arbitration practitioner. In those instances where the drafting of a particular provision leaves it ambiguous or otherwise open to constructive criticism, we have not refrained from attempting to open or continue the discussion in that regard.

Although the different arbitration institutions have not implemented a common solution in their respective sets of rules, most of the major rules can be broken down into one of two categories: those which *permit* the institution to name all arbitrators in certain cases and those which *require* it to do so.

The several national laws surveyed reflect, generally speaking, more diversity on the question than do the institutional rules. Yet a certain number of the laws do contain one common thread: their protective provisions come into play when one party enjoys a privileged or predominant position in the appointment process. The remaining laws surveyed, however, adopt widely varying modes of protecting party equality.

Our review of the limited jurisprudence that has developed over the question reveals that a number of courts and tribunals have applied one of two different inquiries (unity of the parties or of their interests), or else a combination of both, in deciding how to handle arbitrator appointments in multiparty arbitrations.

The variety of the approaches to arbitrator designation encountered throughout this article is perhaps best understood as the inevitable result of the different law-makers' and rule-makers' diverse ordering of their priorities and of their efforts to accommodate simultaneously two fundamental, and sometimes conflicting, principles governing tribunal

appointments: first, the freedom of contract allowing parties to enter into arbitration agreements of their choosing, and, secondly, the same parties' right to participate equally in the constitution of an arbitral tribunal when a dispute erupts.

The final word has, of course, not been written on these subjects. Given the relatively young age of many of the rules and laws, it can be expected that a more abundant jurisprudence will develop in the coming years. In addition, a new crop of laws may also be expected, given the relative scarcity of express legislative provisions throughout the world's leading arbitration venues.

For the time being, however, based on our review of the materials referenced herein, we would offer the following points that may be taken away from this article:

- The agreement of the parties concerning the designation of the tribunal still remains of primary importance, but there are limits to the parties' ability to insist upon strict party consent when it comes to designating arbitrators, as demonstrated by the above-referenced arbitral rules, national legislation, and international conventions.
- *Dutco* reminds us that for the sake of maintaining the integrity of arbitration as a dispute resolution mechanism and *ordre public*, the principle of party equality in the designation of the arbitral tribunal must be respected.
- But the equality established in *Dutco* and its progeny does not mean that each party in a multiparty arbitration will always have the right to name "its own" arbitrator. Rather, all the parties to the proceeding must have an opportunity to enjoy equal rights in the process of designating the tribunal. How this principle is preserved will depend upon the circumstances of each case.
- In the case where there are unaffiliated respondents that confront distinct claims, as was the case in *Dutco*, perhaps the application of this principle of equality requires that all members of a tribunal be appointed under modern rules of arbitration such as Article 10 of the ICC Rules, absent agreement between nominally aligned parties (co-respondents).
- In other cases, where the respondents are closely affiliated or have interests that are essentially inseparable or indistinguishable, we observe that multiple parties are oftentimes (rightly in our view) treated as *one* "party" for the purposes of designating an arbitrator. The concept of "party" in multiparty arbitration is indeed flexible.
- One way to avoid the potential pitfalls discussed herein is to set forth in arbitration agreements involving three or more parties that an arbitral institute must nominate all members of the tribunal. Alternatively, the arbitration agreement could require each respective "side" to name a co-arbitrator within a defined period of time after initiation of the dispute, and failing such designation by either side all arbitrators would be chosen by an arbitral institute. In that manner, each party in a multiparty arbitration will be assured that the arbitral award will not be subject to being set aside or declared unenforceable on the ground that the parties were treated unequally in the constitution of the arbitral tribunal.