Article 12(9) of the new ICC Rules - Is Party Autonomy really being eroded?

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The principle of party autonomy is expressed and enshrined in English law in s. 34(1) of the 1996 Act – the right of the parties ultimately to decide on all procedural and evidential matters. It allows parties to an arbitration agreement the freedom to choose how their arbitration is conducted as well as how their arbitral panel is appointed. In relation to the latter in two party arbitrations which require a three person tribunal each party often agrees that they can choose and appoint their own arbitrator with those arbitrators then appointing the third.

This fundamental principle of party autonomy in arbitration under English law is different from the approach adopted by some civilian law jurisdictions. For example in France the principle of equality of the parties has prevailed over the principle of party autonomy since the famous 1992 *Dutco Decision* (Court of Cassation, January 7, 1992, Nos. 89-18.708, 89-18.726) of the French Cour de Cassation, and is reflected in Articles 1453 and 1506 of the French Code of Civil Procedure. More recently, the Paris Court of Appeal has shown this principle in action in the *PT Ventures Decision* (Paris Court of Appeal (International Chamber of the Court, Chamber 5-16), January 26, 2021, No 19/10666.) where they upheld an award rendered by a 5 member panel directly appointed by the ICC, despite the parties' agreed appointed mechanism in the arbitration agreement.

One of the ways parties exercise their autonomy in arbitration is by agreeing the rules by which an arbitration will be conducted with many choosing to agree a set of institutional rules which will, among other things, determine procedural and evidential matters. The ICC's 2021 Arbitration Rules ("the New ICC Rules") entered into force on 1 January 2021 and define and regulate the management of cases received by the International Court of Arbitration from 1 January 2021 onwards. One of the more controversial provisions of the New ICC Rules relates to the constitution of the Arbitral Tribunal. Article 12(9) which provides:

'Notwithstanding any agreement by the parties on the method of constitution of the arbitral tribunal, in exceptional circumstances the Court may appoint each member of the arbitral tribunal to avoid a significant risk of unequal treatment and unfairness that may affect the validity of the award."

By that provision the principle of equality of the parties may prevail over the principle of party autonomy in the appointment of the arbitral tribunal. It goes beyond previous versions of the ICC Rules which only empowered the Court to appoint each member of the arbitral tribunal specifically in multi-party arbitrations where all the parties were unable to agree on a method for constitution of the arbitral tribunal (now Article 12(8)).

There is no guidance from the ICC as to what constitutes "exceptional circumstances" and this is left to the discretion of the ICC Court. On its face it appears to target circumstances when the method of the constitution of the tribunal chosen by the parties is clearly unbalanced. The most obvious examples are where one of the parties is given much more control over the designation process e.g. an arbitration agreement which gives one party the power to appoint a sole arbitrator or the presiding arbitrator or gives one party exclusive control over a list of potential arbitrators from which the other party must select its appointee.

The ICC's own notes on this new Article provide that it has been introduced as an additional safeguard for parties' equality in the constitution of the arbitral tribunal and that it allows the Court to appoint each member of the tribunal "*where the method of constitution in the arbitration agreement may pose a risk to the validity of the award.*" Those notes seem to suggest that it is concerns about enforcement rather than any imbalance per say in the appointment procedure which Article 12(9) is specifically targeting. Thus it is most likely to arise where the law of the place of the arbitration does not permit the parties' agreed appointment procedure e.g. in India a right to constitute the arbitral tribunal unilaterally is not

permitted.

However, when considering enforcement it is also important to remember Article V.1(c) of the New York Convention (as well as many of the national arbitration legislation in jurisdictions around the world) which provides that recognition and enforcement of an award may be refused, at the request of the party against whom it is invoked, if the composition of the arbitral tribunal was not in accordance with the agreement of the parties. Thus there may be a very fine line to tread when exercising the power under Article 12(9) of the New ICC Rules.

One possible answer to the potential tussle between Article 12(9) of the New ICC Rules and Article V.1(c) of the New York Convention is that by choosing the New ICC Rules the parties have agreed that the appointment procedure includes Article 12(9) and therefore a panel appointed in accordance with Article 12(9) would be in accordance with the agreement of the parties even if it is contrary to any express provision for constitution of the tribunal in the arbitration agreement.

It will take time to see how, and how often, Article 12(9) is applied but from the perspective of an English trained lawyer its potential to erode party autonomy is a potential concern.

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