

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)**

CLAIM NO. BVIHC (COM) 2015/0117

CLAIM NO. BVIHC (COM) 2019/0067

BETWEEN:

PT VENTURES SGPS SA

Claimant

and

VIDATEL LTD

Defendant

Appearances:

Mr. Roger Masefield QC, with him Ms. Akesha Adonis and Ms. Andrea Walters of
Maples and Calder for the claimant

Mr. Jonathan Adkin QC, with him Ms. Tamara Cameron of Walkers for the
defendant

2020 July 27, 28, 29, 31
August 13

JUDGMENT

- [1] **JACK, J [Ag.]**: In this claim the claimant (“PTV”) seek to register an arbitration award for US\$646,445,968 (plus interest and costs) against the defendant (“Vidatel”). The award was made by an arbitral tribunal sitting under auspices of the ICC Court of International Arbitration in Paris. The final award is dated 20th February 2019, but after discovery of an arithmetical mistake an addendum correcting the error was made on 30th April 2019.

- [2] Vidatel has challenged the award before the Cour d'Appel de Paris (an application to the appropriate French Court of Appeal being the appropriate procedure in France) and seek annulment of the award. The Cour d'Appel is likely to give its judgment in the early part of next year. An appeal (which is available as of right on a point of law) to the Cour de Cassation is likely to be decided in 2022.
- [3] The current claim was commenced on 16th May 2019. PTV seeks registration of the award pursuant to sections 81 and 84 of the **Arbitration Act 2013**,¹ which gives force of law to the **New York Convention**.² In February 2020 I heard an application for summary judgment issued by PTV. By a judgment delivered on 16th March 2020, I rejected certain defences raised by Vidatel under BVI law ("the BVI defences"). However, I declined to give summary judgment on two defences ("the Paris defences"), which were the defences relied on in the annulment application to the Cour d'Appel. It is the Paris defences which I tried in the week of 27th July 2020 and in respect of which I now give judgment.
- [4] The first Paris defence is that the arbitral tribunal was not properly constituted in accordance with the underlying agreement to arbitrate, contained in a shareholders' agreement of 15th December 2000. Instead of the ICC Court accepting the four arbitrators nominated by the four parties to the shareholders' agreement (with the fifth to be selected by the four nominated arbitrators), the ICC Court appointed all five arbitrators itself. The second Paris defence is that two of the arbitrators, Klaus Sachs ("Prof. Dr. Sachs") and Marcelo Roberto Ferro ("Mr. Ferro"), were not independent and impartial. Both these defences are properly available to Vidatel under section 86(2)(e) of the 2013 Act (composition of the tribunal and independence of the arbitrators).³ Vidatel participated fully in the hearings in the arbitration, but it is common ground that neither of these defences

¹ Act No 13 of 2013, Laws of the Virgin Islands.

² The Convention on the Recognition and Enforcement of Foreign Arbitral Awards done at New York on 10th June 1958.

³ The full text of section 86 is reproduced in para [28] of my March judgment.

have been waived by Vidatel nor that Vidatel are estopped from taking either of the Paris defences in the current proceedings.

The background facts

[5] I can take the undisputed background facts from my judgment of 16th March 2020:

“[13] The shares in Unitel are and were held, one quarter each, by PTV, a Portuguese company; Vidatel, a BVI company; Geni SARL (“Geni”), an Angolan company, owned by a retired Angolan general; and Mercury Serviços de Telecomunicações SARL (“Mercury”), another Angolan company. Mercury is a wholly-owned subsidiary of Sonangol, Angola’s state-owned oil and gas company. Sonangol has recently acquired majority ownership of PTV from a Brazilian company, Oi SA (“Oi”). Vidatel is owned by Ms. Isabel dos Santos. She is the daughter of a former president of Angola and is reputed to be the richest woman in Africa. More recently she appears to have fallen out with the Angolan state. On 23rd December 2019, an Angolan court granted an order of *saisie conservatoire* against her, including purportedly her beneficial ownership of Vidatel’s shares in Unitel.

[14] The four shareholders held their shares pursuant to a shareholders’ agreement with an effective date of 15th December 2000. (PTV was then called Portugal Telecom International SGPS SA.) The agreement is in English and largely follows an English common-law style of drafting. The substantive rights given by the agreement I shall discuss in relation to the arbitration award. Of importance for the current application is the arbitration clause, clause 16. This follows clause 14, which is an ‘entire agreement’ provision, and clause 15, which provides for the shareholders’ agreement to be governed by Angolan law...

[15] Unitel commenced operations in April 2001 and grew to be the biggest mobile telephone company in Angola. Unitel declared a dividend every year (although the 2010 declaration was by way of a special dividend). These were paid to Mercury and Geni in Kwanza, the local Angolan currency, which is not freely convertible. However, PTV and Vidatel were entitled to payment in hard currency. There were delays in paying the hard currency dividends from the time of the 2010 special dividend. Between November 2012 and the date of the final award, PTV did not receive any dividend payment at all. (It refused to accept payment in Kwanza.) Although there were difficulties between the parties in 2006, matters started to become more tense in 2010. In 2014 relations between the parties broke down completely, when the other shareholders refused to vote on to Unitel’s board the director nominated by PTV. PTV complains that the other shareholders, in breach of the shareholders’

agreement, (mis)used their control of the board to prevent Unitel paying dividends to PTV.

[16] On 13th October 2015, PTV filed a request for arbitration with the International Chamber of Commerce (“the ICC”). In the request PTV submitted that, if the arbitration tribunal was composed as required by clause 16, namely with PTV, Vidatel, Mercury and Geni each nominating one arbitrator, this would breach the requirement of “*égalité*”, a mandatory rule of French arbitration law, because it would effectively mean one arbitrator against three, with the president unable to use a casting vote. It invited the ICC to appoint all the arbitrators. If the ICC was against it on the question of *égalité*, then PTV nominated Mr. Laurent Lévy as its arbitrator.

[17] In its response to the ICC, Vidatel objected to any departure from the clause 16 procedure for appointing arbitrators. Vidatel nominated Dr. Matthieu de Boissésou as its arbitrator. Mercury and Geni supported Vidatel’s position on the constitution of the tribunal and nominated Dr. Maria Cristina Galhardo Vilão and Dr. Adelaide de Jesus Mata de Moura as their arbitrators respectively.

[18] PTV produced to the ICC an opinion from Prof. Charles Jarrosson, who is an eminent French lawyer-academic in the field of arbitration law. His opinion was that the constitution of the arbitration panel in accordance with clause 16 would be contrary to mandatory French law, because it would result in one PTV-nominated arbitrator against three respondent-nominated arbitrators. Whether he is right or not is the [main] issue under the first Paris defence. [Some additional arguments are also run under the first Paris defence.]

[19] The ICC accepted Prof. Jarrosson’s view. Instead of accepting the four arbitrators nominated by the parties, it made its own selection of five arbitrators for the panel: Prof. Bernard Hanotiau, Prof. Dr. David Arias, Mr. Ferro, Prof. Luca Radicati di Brozolo, all as co-arbitrators, and Prof. Dr. Sachs, as president. This arbitration panel then proceeded to determine the arbitration.”

The first Paris defence

[6] Clause 16 of the shareholders’ agreement, so far as material, reads:

“16.1 Any claim, dispute or other matter in question between the Parties with respect to or arising under this Agreement or the breach thereof, shall be decided by arbitration, by a panel of five [5] arbitrators, one to be designated by each Party, and the fifth one to be designated by the other

four arbitrators, provided, however, that if no agreement between the arbitrators designated by the Parties is reached, the independent arbitrator shall be designated by the President for the time being of the International Chamber of Commerce. Such arbitration shall be in accordance with Rules of the International Chamber of Commerce. Any such arbitration shall be conducted in English in Paris.

16.2 The independent arbitrator shall have a casting vote.”

- [7] Vidatel complain that the ICC Court appointed the five arbitrators itself, instead of following the provisions of the arbitration clause in the shareholders’ agreement.

The Dutco principle

- [8] It was common ground between the parties and their experts that there is in French arbitration law a mandatory principle of French public policy that an arbitration clause must respect the principle of *égalité* (equality). If a clause breaches the principle then the agreement to arbitrate is not itself rendered unenforceable. Rather, that part of the agreement which breaches the principle of *égalité* is unenforceable. Thus in the current case, PTV says that there would be a breach of the principle if it were only able to appoint one arbitrator, whilst the three respondents were able to appoint one each. By contrast Vidatel says that giving each party the right to nominate an arbitrator was respecting the *égalité* of each of the parties.

- [9] It is also common ground that the principle was first expressed in the decision of the Cour de Cassation in **Dutco**⁴. In that case there were three parties: BKMI, Siemens and Dutco. The arbitration clause was in a standard form reference to arbitration, with the claimant nominating one arbitrator and the respondents one arbitrator. In turn the two arbitrators were to nominate a president. Dutco raised claims against both BKMI and Siemens, which Dutco referred to arbitration. An issue arose as to whether BKMI and Siemens were obliged jointly to appoint an

⁴ BKMI Industrienlagen GmbH et Siemens AG v Dutco Construction *Bull. Civ.* 1 No 2, decision of the Chambre Civile 1 of the Cour de Cassation of 7th January 1992.

arbitrator. The claims were at least in part in the alternative, so that BKMI and Siemens did not share the same interest in the defence of Dutco's claims.

- [10] The Cour d'Appel de Paris held that BKMI and Siemens were obliged to agree on a single arbitrator between themselves. The Cour de Cassation disagreed. It held:

“le principe de l'égalité des parties dans la désignation des arbitres est d'ordre public; qu'on ne peut y renoncer qu'après la naissance du litige...”

["the principle of equality of the parties in the appointment of arbitrators is a matter of public policy, that can only be waived after the dispute has arisen..."]

It was against public policy, the court held, to force BKMI and Siemens to “share” one arbitrator.

- [11] It must be remembered that the Cour de Cassation only deals with errors of law. In the light of its conclusion that there had been an error of law, it sent the matter back to a different Court of Appeal, the Cour d'Appel de Versailles, to determine what should happen with the arbitration. Much to the regret of legal science the parties settled their dispute before this Cour d'Appel could decide how the arbitration should proceed.

The new Rules

- [12] The **Dutco** decision had immediate international repercussions. As a result, most of the main centres of arbitration changed their rules, including the ICC. I shall set out the relevant part of the current iteration of the ICC Rules of Arbitration from 2012. In these Rules, “the Court” is the ICC Court of International Arbitration, which supervises arbitrations under the Rules. The Rules so far as material provide as follows:

“Article 11: General Provisions

11.1 Every arbitrator must be and remain impartial and independent of the parties involved in the arbitration.

11.2 Before appointment or confirmation, a prospective arbitrator shall sign a statement of acceptance, availability, impartiality and independence. The prospective arbitrator shall disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality. The Secretariat shall provide such information to the parties in writing and fix a time limit for any comments from them.

11.3 An arbitrator shall immediately disclose in writing to the Secretariat and to the parties any facts or circumstances of a similar nature to those referred to in Article 11(2) concerning the arbitrator's impartiality or independence which may arise during the arbitration.

11.4 The decisions of the Court as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final, and the reasons for such decisions shall not be communicated.

11.5 By accepting to serve, arbitrators undertake to carry out their responsibilities in accordance with the Rules.

11.6 Insofar as the parties have not provided otherwise, the arbitral tribunal shall be constituted in accordance with the provisions of Articles 12 and 13.

Article 12: Number of Arbitrators

12.1 The disputes shall be decided by a sole arbitrator or by three arbitrators.

12.2 Where the parties have not agreed upon the number of arbitrators, the Court shall appoint a sole arbitrator, save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators. In such case, the claimant shall nominate an arbitrator within a period of 15 days from the receipt of the notification of the decision of the Court, and the respondent shall nominate an arbitrator within a period of 15 days from the receipt of the notification of the nomination made by the claimant. If a party fails to nominate an arbitrator, the appointment shall be made by the Court.

Sole Arbitrator

12.3 Where the parties have agreed that the dispute shall be resolved by a sole arbitrator, they may, by agreement, nominate the sole arbitrator for confirmation. If the parties fail to nominate a sole arbitrator within 30 days from the date when the claimant's Request for Arbitration has been received by the other party, or within such additional time as may be

allowed by the Secretariat, the sole arbitrator shall be appointed by the Court.

Three Arbitrators

12.4 Where the parties have agreed that the dispute shall be resolved by three arbitrators, each party shall nominate in the Request and the Answer, respectively, one arbitrator for confirmation. If a party fails to nominate an arbitrator, the appointment shall be made by the Court.

12.5 Where the dispute is to be referred to three arbitrators, the third arbitrator, who will act as president of the arbitral tribunal, shall be appointed by the Court, unless the parties have agreed upon another procedure for such appointment, in which case the nomination will be subject to confirmation pursuant to Article 13. Should such procedure not result in a nomination within 30 days from the confirmation or appointment of the coarbitrators or any other time limit agreed by the parties or fixed by the Court, the third arbitrator shall be appointed by the Court.

12.6 Where there are multiple claimants or multiple respondents, and where the dispute is to be referred to three arbitrators, the multiple claimants, jointly, and the multiple respondents, jointly, shall nominate an arbitrator for confirmation pursuant to Article 13.

12.7 Where an additional party has been joined, and where the dispute is to be referred to three arbitrators, the additional party may, jointly with the claimant(s) or with the respondent(s), nominate an arbitrator for confirmation pursuant to Article 13.

12.8 In the absence of a joint nomination pursuant to Articles 12(6) or 12(7) 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 president. In such case, the Court shall be at liberty to choose any person it regards as suitable to act as arbitrator, applying Article 13 when it considers this appropriate.”

[13] I do not need to reproduce Article 13, which deals with the formal steps for the appointment or confirmation of an appointment by the ICC Court of International Arbitration. Article 41 provides:

“Article 41: General Rule

In all matters not expressly provided for in the Rules, the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law.”

[14] As can be seen Article 12 deals expressly with only arbitral panels of one or three persons. I was not referred to any statistics, but it is common ground that one and three person panels determine the overwhelming number of cases referred to arbitration. Five-person panels are rare or very rare. As a result, the implications of the **Dutco** ruling for five-person tribunals have not been explored in the case law and the *doctrine* (learned academic commentary). As such the issue I am determining is without precedents in French law.

[15] For completeness, I should also reproduce Article 1453 of the French Code of Civil Procedure,⁵ which was introduced to give force of law to the **Dutco** principle. It provides:

“If there are more than two parties to the dispute and they fail to agree on the procedure for constituting the arbitral tribunal, the person responsible for administering the arbitration or, where there is no such person, the judge acting in support of the arbitration, shall appoint the arbitrator(s).”

It is common ground that this Article is applied to international arbitration by Article 1506 of the same Code.

[16] The pendency of annulment proceedings in France puts me in a potentially embarrassing position, because, whichever way I decide the case, it is quite possible that in the fairly near future, the French courts will say I have got it wrong. However, as I discussed in paras [76] of my March judgment, I am obliged to determine the application for recognition without regard to the currency of the proceedings in France. At the trial before me, counsel agreed that, if I decided against Vidatel, any issues about staying execution or permitting the current

⁵ Translated in Prof. Racine’s first report para 13 Bundle B1/1/6.

directors to continue to represent Vidatel in the French proceedings in the event of a winding-up order being made⁶ were for a later date.

The experts

- [17] Each side called eminent experts in French arbitration law and practice. Prof. Jean-Baptiste Racine, who was called by PTV, has both an ordinary doctorate and an *Agrégation* (the doctoral equivalent of the German *Habilitation*). He has recently been appointed as a professor of law at the Paris II University, also known as Panthéon-Assas, having previously been a professor at the University of Nice Sophia Antipolis. He is the scientific co-director of the *Journal du droit international*. He has been a member of various arbitration organisations. He has sat as an arbitrator and as president of arbitral panels. He has experience in both French and international arbitrations. Some of these have been under the auspices of various arbitral bodies; others have been *ad hoc* tribunals. He has written two books on arbitration and numerous articles in learned journals.
- [18] Prof. Thomas Clay, who was called by Vidatel, is equally well-qualified. He has been a professor of law at the Paris I University, perhaps better known as the Sorbonne. He is about to take up the very distinguished position of President of the Sorbonne. He is a contributing editor to the arbitration law column in the *Recueil Dalloz*, an eminent legal journal in France. He has written or contributed to over 200 books and articles. He has participated in over 100 arbitrations. He has his own law firm, Clay Arbitration, from which he practises as an *avocat* specialising in arbitration work.
- [19] In terms of knowledge and experience, there is in my judgment nothing to choose between the two men.
- [20] In my March judgment, I cited from the experts' original reports. Prof. Racine's view at para [14] was:⁷

⁶ See the orders made in *Re Svoboda Corp BVIHC (COM) 2019/0200*, *Re Koshigi Ltd BVIHC (COM) 2019/0201*.

“The principle of equality of the parties in the constitution of the arbitral tribunal, created by the **Dutco** decision, is *a fortiori* applicable to the present case, which is emblematic of a breach of equality between the parties. Thus, in the [current] case... the implementation of the arbitration clause would have led to the designation by the claimant of one arbitrator and the designation by the three co-respondents of three arbitrators. Accordingly, the implementation of the clause would have been incompatible with the principle of equality of the parties in the constitution of the arbitral tribunal. For this reason, the ICC Court adopted an approach that was most in line with the principle of equality... Indeed, if the ICC Court had implemented the arbitration clause as drafted it would have infringed the principle of equality of the parties in the constitution of the arbitral tribunal. In order to uphold the principle of public policy the clause could not be applied as it stood. To reiterate: a principle of public policy takes precedence over the will of the parties.” (Prof. Racine’s emphasis and mode of emphasis.)

[21] Prof. Clay’s views I cited as follows:⁸

“[30] ...The process for appointing arbitrators may be different depending on the agreements of the parties, but each party must have had the right to express itself in an equal way on the process agreed upon. Moreover, if the parties do agree on the way in which the arbitrator’s contract must be formed in accordance with this principle of equality, then neither the arbitration institution nor the judge acting in support of the arbitration can override it.

...

[36] In appointing the five arbitrators itself, the International Court of Arbitration of the ICC violated the fundamental principle of the appointment of arbitrators by the parties, which its own Rules require it to apply.

...

[39] To admit, as my colleagues Jean-Baptiste Racine and Charles Jarrosson have done, that a potential consortium of co-defendants would have had the effect of violating the principle of equality of the parties, with the appointment of a larger number of arbitrators on the side of the defendant, amounts to a pure and simple denial of the **Dutco** case law. Equality would not be undermined by each defendant being able to appoint one arbitrator, just as the plaintiff could. On the contrary, the principle of equality would have been complied with because each party

⁷ Bundle B1/1/6-7.

⁸ Bundle B1/3/60-63.

would have appointed one arbitrator, meaning that each party would have participated in the constitution of the arbitral tribunal on an equal footing.” (Prof. Clay’s emphasis and mode of emphasis.)

Prof. Clay noted at para [42] that arbitrators, once appointed, are expected to be independent and that it is wrong to presume them biased in favour of the party appointing them.

[22] Subsequently, Prof. Racine prepared a second report dated 14th November 2019. Since then, the two experts have met and prepared a detailed joint memorandum signed on 19th May 2020 outlining their agreements and disagreements. Subsequently, Prof. Racine prepared a third report dated 9th June 2020 and Prof. Clay a second report dated 16th June 2020.

[23] Both experts gave oral evidence to me and were cross-examined on their reports. Due to Covid restrictions all the advocates and witnesses were heard virtually. Prof. Racine gave his evidence on day 2 and at the beginning of day 3 of the trial from Paris. Due to time differences, his evidence commenced at 8.30am BVI time (2.30pm French time) concluding on day 2 shortly after 2.30pm BVI time (8.30pm French time) and then ran into the beginning of day 3, commencing at 8.30am BVI time.

[24] Prof. Clay gave his evidence on day 3 of the trial from Spain. Again, his evidence began shortly after Prof. Racine’s. Unfortunately the Court day was disrupted by Tropical Storm Isaias. Although the storm passed mercifully south of Tortola, as a precautionary measure the Department of Disaster Management required the Court close early with my having to adjourn to my home. This would of itself not have been a problem, save that there was then a power cut which delayed the resumption of the hearing. In the event, Prof. Clay agreed to continue to give his evidence much later than had been anticipated. He eventually finished at nearly 10.45pm Spanish time. It is also right to record that the internet reception on day 3 was worse than on the other days of the trial. Notwithstanding these difficulties, and the enormous strain which sitting late in these circumstances puts on a

witness giving evidence in a case of this seriousness, Prof. Clay was able to give his evidence in a manner which did not in my judgment materially disadvantage him vis-à-vis Prof. Racine.

- [25] Both experts were in my judgment doing their best to assist the Court. I do not find that this is a case where the demeanour of the witnesses assisted me to choose between them. Rather, in my judgment I need to consider the arguments presented by the experts in order to decide the evidence of which I prefer on balance of probabilities.

The meaning of *égalité*

- [26] Oddly, neither expert seems to have been shown a copy of my March judgment. This is slightly regrettable, because in para [65] of that judgment, I recorded what I understood to have been Mr. Adkin QC's submission to me that *égalité* had three potential meanings:

"First, it could mean each party *to the arbitration agreement* having the right to appoint one arbitrator each. Second, it could mean each party *to a dispute* under the arbitration agreement having such a right. Third, it could mean each *side to a dispute* having such a right. In the first two cases, this would mean the original four arbitrators were the appropriate panel in accordance with *égalité*. Only in the last case would there be an argument for the approach taken by the ICC in appointing its own panel."

- [27] Mr. Masefield QC in his submissions to me at trial was happy to adopt this analysis of the meanings of *égalité*. I and leading counsel for both sides thought that this adequately conceptualised the potential meanings of the expression and sufficiently defined the *champ de bataille*, if I can use the expression. Unfortunately, in cross-examination both Prof. Racine and Prof. Clay thought that this schema lacked nuance. However, the experts' "nuances" can, I think, fairly be described as part of the arguments which each were making in support of their respective positions. The statements in the joint memorandum can sensibly be analysed in terms of this three-fold distinction.

- [28] In the joint memorandum, the experts were asked⁹ whether the **Dutco** principle meant:

"that, when the arbitral tribunal is constituted: (i) each of the parties to the arbitration clause must be treated equally; or (ii) each of the parties to the dispute must be treated equally; or (iii) claimants, on the one hand and respondents, on the other, must be treated equally; or (iv) other?"

⁹ B1/7/214-216, box 7.

[29] The experts agreed that the principle of *égalité* meant:

“that all parties should be treated equally. In the constitution of the arbitral tribunal, the parties to the dispute must be treated equally. Most of the time, the parties to the dispute are the parties to the arbitration clause, but not necessarily all the parties to that clause.”

[30] Prof. Racine held, however, that the principle was:

“intended to apply to multi-party arbitration. It therefore implies that claimants (if more than one) on the one hand and respondents (if more than one) on the other hand must be treated equally. In this case, attention must be paid to the procedural position of the parties depending on whether they are co-claimants or co-respondents. The claimant group must be treated in the same manner as the respondent group and neither should have an advantage over the other in the constitution of the arbitral tribunal. A pragmatic and concrete view on the principle of equality must be adopted and not a dogmatic and abstract view. It is not enough that each party has had the opportunity to appoint an arbitrator. Attention should be paid to the procedural positions and the existence of converging interests among the claimants and/or respondents”.

[31] By contrast, Prof. Clay’s view was:

“The principle laid down by the **Dutco** case applies from the execution of the arbitration agreement, since the Cour de Cassation specifies that it is possible to ‘waive it only after the dispute has begun’. Consequently, the principle refers to the situation where the parties are not yet in dispute and where they will agree in the arbitration agreement on the procedure for constituting the arbitral tribunal, which will have to comply with the principle of equality at this stage.

Therefore, the principle means that the parties must be treated on equal footing. The parties referred to in the arbitration agreement are the parties to the future dispute, but they will most often be the parties to the arbitration agreement. However, there will never be the claimants on one side and the defendants on the other, otherwise we find ourselves in the situation sanctioned by the **Dutco** decision. In this [*sic*: ‘that’ is intended] case, two respondents had been forced to agree on a common arbitrator, and it was sanctioned.

It is not at all the same thing as the situation where all the parties agreed in advance on the individual choice of an arbitrator per party. It is even the symmetrically opposite situation. The arbitration clause which guarantees that each party can appoint an arbitrator rigorously applies the principle of equality of the parties in the constitution of the arbitral tribunal, and therefore complies with the **Dutco** case law. Circumventing this solution is tantamount to breaching the principle of equality of the parties and therefore the **Dutco** case law.”

Four subsidiary points

- [32] Before I consider the evidence supporting each expert’s view on the main issue, I shall deal with four subsidiary points: (a) the Article 12 three-person tribunal point, (b) Mr. Masefield QC’s “safety first” point, (c) the “casting vote” point and (d) the *Kompetenz-Kompetenz* point.
- [33] So far as (a) is concerned, Article 12.1 provides that “disputes shall be decided by a sole arbitrator or by three arbitrators.” Articles 12.4 to 12.8 then sets out special rules for three-person panels. This raises a construction point as to whether these latter provisions also apply to a five-person panel *mutatis mutandis*. In my judgment, they do.
- [34] Article 41 has two elements. The first is a requirement that the Court of Arbitration act “in the spirit of the Rules”; the second is that “every effort [be made] to ensure that the award is enforceable at law.” So far as the “spirit of the Rules” is concerned, it is easy to construe Articles 12.4 to 12.8 so as to apply to a five (or for that matter seven or nine) person tribunal. There is no need to adopt any special common law rules on implied terms, in order to see that Article 41 readily allows Articles 12.4ff to be adapted to larger tribunal constitutions. Further it is best in accordance with Article 11.6, which gives primacy to the parties’ agreement on the tribunal’s constitution. Second, the whole purpose of Article 12.8 is to ensure compatibility of the Rules with the **Dutco** decision. (Both the experts are agreed on this, although they disagree on how compatibility was to be ensured.) If Article 12.8 did not apply to a five-person panel, then there would be a potential breach of **Dutco**. Accordingly, Article 12.8 does apply.

[35] So far as (b) is concerned, it will be seen that the ICC Court has to decide at a very early stage in a reference how the arbitral panel should be comprised. The extent to which parties stand to be seen as joint claimants or joint respondents, or seen to have divergent interests in the dispute, may not be clear at the outset of a reference. Against that background, Mr. Masfield QC submitted that:¹⁰

“faced with an uncertain situation (where the parties did not agree on the extent to which their interests were aligned and in conflict), the ICC Court quite properly and in accordance with the spirit of its rules (and in particular Article 12(8)) and Article 1453 of the French Civil Code of Procedure,... took the safest course of appointing each member of the Tribunal itself: thereby ensuring that there would be equality as between the parties with regard to the constitution of the Tribunal.”

[36] It seemed to me that there might be a reasonable argument that the ICC Court had some discretion in applying Article 12.8, when it was assessing the position when a reference was first made to it. If that was right, then Mr. Masfield’s submission was quite attractive. In particular it restricted the danger (as Vidatel alleges has happened here) that years down the track it could be shown that the ICC Court’s initial assessment was wrong, with the consequence that all the time and effort spent on the arbitration were set at naught.

[37] However, that is not the evidence adduced before me. I asked Prof. Racine when he was giving his evidence whether the ICC Court had a discretion or a margin of appreciation when applying the Rules and in particular in making its assessment of a dispute under Articles 12.6 and 12.8. He said:¹¹

“It’s not a discretionary power that is given the Court of the ICC in a strict sense, all the more so that the decision, the ultimate award might be submitted to a judge, in case of setting aside the proceedings. But *prima facie* [by which I think the witness meant ‘in the first instance’] it’s up to the court — the ICC court — to assess the situation and to ascertain whether

¹⁰ Opening submissions para 51(6).

¹¹ Official transcript, day 2, p 71.

or not there is a convergence or a divergence of interests. Again, even at — if there is a possibility later on that there might be a setting aside of the award, in which case, of course, this assessment might be [rebutted].”

[38] Accordingly, in my judgment I have to determine myself whether the ICC Court got it right or not. This is a very different test to deciding whether the ICC Court acted reasonably, or within a margin of appreciation, in reaching its decision to appoint all five arbitrators itself.

[39] As to (c), “casting vote” is an ordinary English expression. It has no special legal meaning. The French translation has no special legal meaning either. Prof. Clay in his first report¹² suggested that one way of dealing with the opposing views of what constitutes *égalité*, would be to give the president of the tribunal three votes, instead of just one. That would mean that the inequality in the appointment of arbitrators (one to PTV; three to the others) would be overcome, whilst still giving all the parties a right to appoint “their” arbitrator.

[40] Prof. Racine’s answer to the point was:¹³

“Well, it [interpreting the clause to give the president three votes] would have re-established equality or could have re-established equality, but it would have been so ambiguous that this could have led to considerable risk if we had applied the clause as such [i.e. in such a way]. And if we had let the Tribunal decide on the issue then the three arbitrators appointed by the co-respondents should have agreed to getting a third of a vote and not the one vote. And I would add, by way of speculation admittedly, but that I doubt any rational arbitrator would agree to only getting a third of a vote and not a full one vote.”

[41] Prof. Racine commented that the need for the shareholders’ agreement to provide for the president to have a casting vote was “somewhat puzzling”, since the arbitrators could decide matters three:two without the need for anyone to have a

¹² Bundle B1/3/64-65 at paras 44-46.

¹³ Official transcript, day 3, p 14.

casting vote.¹⁴ However, he provided an ingenious explanation.¹⁵ If two arbitrators found for the claimant and two arbitrators for the respondents with the fifth arbitrator somewhere in the middle, then it would be sensible to give the president an extra vote to extricate the panel from stalemate. (See also the problem discussed below if a dispute arose only between three shareholders.)

[42] In my judgment, the suggestion that “casting vote” should be construed so as to give the president three votes simply does too much violence to the ordinary meaning of the words to be an acceptable construction of the phrase. Giving the respondents’ three arbitrators only a third of a vote each is even less plausible as an interpretation of the shareholders’ agreement. I accept Prof. Racine’s evidence on this. Accordingly, I reject the construction of “casting vote” urged under (c).

[43] As to point (d), it was faintly suggested on Vidatel’s behalf that the original tribunal (that with the four party-appointed arbitrators) should have determined whether **Dutco** applied to clause 16.1 of the shareholders’ agreement. As I pointed out in my March judgment at para [77], this *Kompetenz-Kompetenz* point is wholly academic, because that tribunal never sat and indeed never got to appoint a president. In any event, the point has no merit. An arbitral tribunal can rule on its own jurisdiction, but that is not the same as ruling on its own composition. If a tribunal could rule that it was properly composed and if the supervising court had no power to overrule that determination, then the tribunal would have a bootstrapping power to determine its very existence. That in my judgment must be wrong.

The main issue under the first Paris defence

[44] I turn then to the main issue under the first Paris defence. Prof. Racine’s view has been consistently that the third of the three interpretations of *égalité* is correct — each *side* to a dispute has a right of appointment. Mr. Masfield QC says that

¹⁴ *Ibid* p 9.

¹⁵ Second report at para 13, Bundle B1/5/153-154.

Prof. Racine had been “clear and consistent”, whereas Prof. Clay, he submits, has alternated between the first meaning (each party having a right of appointment) and the second meaning (each party to a dispute having that right).¹⁶ This was a free-standing ground, he submitted, for preferring Prof. Racine’s evidence to that of Prof. Clay.

[45] The difference between the first and the second meanings is, on the facts of the current case, irrelevant, because all four shareholders are involved in the dispute. However, the difference was explored by Mr. Masfield QC in cross-examination with Prof. Clay, as follows:¹⁷

“Q. Well, suppose this, Professor Clay: suppose there is a dispute between three of the shareholders but not the fourth. Suppose there is a dispute between PTV, Vidatel and Mercury, but not Geni. It is no part of the **Dutco** principle that Geni would be able to nominate an arbitrator when it is not a party to the dispute.

A. No.

Q. So I think we can therefore agree, can we not, Professor Clay, that the **Dutco** meaning does not have the first meaning identified by Mr. Adkin. It not a principle that requires each party to the original agreement to be entitled to appoint an arbitrator.

A. What we’re talking about is the right by the signatories involved in the dispute to appoint an arbitrator. If they’re not involved in the dispute then there is no arbitrator. Equality, once again, is about the constitution of the Tribunal should there be a dispute. If there isn’t, then there’s no reason for them — for the signatories to appoint an arbitrator. I mean, imagine, there would be 20, 30, 40 signatories to the shareholders’ agreement and a dispute between two, of course the others wouldn’t be entitled to appoint an arbitrator.”

[46] Mr. Masfield QC submitted that this was a change of stance on the part of Prof. Clay. In my judgment, this is a little unfair to Prof. Clay. He was not asked to advise on a hypothetical dispute between three shareholders only, so it is not surprising that he failed to do so. An arbitration where PTV, Vidatel and Mercury

¹⁶ Official transcript, day 4, pp 8-10.

¹⁷ Official transcript, day 3, pp 52-53.

were the sole shareholders in dispute would be workable with three arbitrators appointed by the disputants and a fourth appointed as president with a casting vote. (In French law, international, unlike domestic, arbitrations can proceed with an even number of panellists.)

[47] In my judgment, in the circumstances of this case, Prof. Clay's clarification of his position does not undermine his evidence overall. However, it does narrow the dispute to one between the second meaning and the third meaning.

[48] In deciding between these two meanings, it is important to remember that the academic discussion of **Dutco** and the case law on the subject are focussed on the problem of a three-person tribunal. The issue of *égalité* does not arise with a one-person tribunal. Five-person tribunals have generated no precedents in the case law and are not the subject of discussion in the *doctrine*.

A “party” for Dutco purposes

[49] The issue of what constitutes a “party” has generated a large amount of academic commentary and some case law. There are many arbitrations where there are more than one claimant or more than one respondent. That, however, does not automatically mean that an arbitration is “multi-party”. Under some circumstances French arbitration law will consider that two or more claimants are properly to be considered as one party or that two or more respondents should be considered as one party.

[50] As **Schwartz and Derains** comment:¹⁸

“[T]here are many cases with multiple parties that are not necessarily true multi-party arbitrations, e.g., where multiple Respondents are under common control or otherwise have identical interests in the outcome of the arbitration. In such a case, the multiple entities concerned might more properly be seen as forming, in reality, a single Respondent party and there would not seem to be any legitimate reason why they should not normally be expected to agree upon an arbitrator.... It is questionable

¹⁸ Eric Schwartz and Yves Derains, *Guide to the ICC Rules of Arbitration* (2nd Ed, 2005), Chapter 4 at p 184.

whether it would be appropriate to deprive the Claimant of an opportunity to nominate an arbitrator in such a situation.”

[51] **Fouchard Gaillard Goldman** are to the same effect:¹⁹

“The principle remains that if the arbitration clause provides for three arbitrators, the multiple claimants jointly, and/or the multiple defendants jointly, nominate one arbitrator. If the parties fail to make a joint nomination and all parties are unable to agree on a method for the constitution of the arbitral tribunal, the [ICC] Court may appoint every member of the tribunal and shall designate one of them to act as chairman. The Court has full discretion to appoint any person it regards as suitable to act as arbitrator.

The new system is legally watertight and is welcome in practice. Contrary to the opinion of certain commentators, the **Dutco** decision did not state that the principle of the equality of the parties gave each party the right to appoint ‘its’ arbitrator. Each party will receive equal treatment where all the arbitrators are appointed by third parties. In fact it is probable that the Court will seldom need to appoint all three arbitrators, as the mere fact that it may do so will... encourage the parties to agree on the method of appointment... Furthermore, the appointment of all the arbitrators by the Court is only an option: the Court could consider that, because all multiple claims or multiple defendants have the same interests (as in the case of a parent company and its subsidiary), those parties are required to make a joint nomination of one arbitrator.”

[52] As to this last possibility, **Fadlallah and Hascher** observe:²⁰

“[O]ne must be aware that, if there are no serious differences between the co-defendants, their failure to agree is the result of their own choice. It is not impossible co-defendants, not satisfied with the choice made by the plaintiff, may simulate an opposition to get rid of the arbitrator appointed by the plaintiff... [I]t would be more radical and probably more in keeping with the fundamentals of arbitration to substitute only the defaulting party.”

¹⁹ Emmanuel Gaillard and John Savage (Eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (1999) (based on and with revisions to *Fouchard Gaillard Goldman, Traité de l'arbitrage commercial international* (1996)), Part 3, Chapter 1 at pp 547-548, para 988.

²⁰ Ibrahim Fadlallah et Dominique Hascher, *Les grandes décisions du droit de l'arbitrage commercial* (2019), Chapter 1, Section 1 at p 134 para 19 (parties' agreed translation).

- [53] **Seraglini and Ortscheidt**²¹ comment that “the appointment of a single arbitrator for parties sharing a community of interests does not disregard the equality of the parties in the appointment of arbitrators.”
- [54] French *doctrine* draws a distinction between “vertical” multi-parties and “horizontal” multi-parties: see **Bernheim-Van de Castele**²² and **Le Bars**.²³ Vertical relations will exist between parent companies and their subsidiaries. Horizontal multi-parties are independent of each other. The former are likely to be treated as one party. The appropriate treatment of the latter is a key dispute between Prof. Racine and Prof. Clay.
- [55] Prof. Racine’s view is that one needs to look closely at the degree of convergence and divergence between the interests of co-claimants or co-respondents. If there is a high degree of convergence, then the co-claimants or, as the case may, the co-respondents should be treated as one party. Prof. Clay, by contrast, adopts the view of Dr. Bernheim-Van de Castele²⁴ that in **Dutco**:

“[t]he equality of the parties was broken at the time of the constitution of the arbitral tribunal: while one of the parties to the arbitration was free to appoint the arbitrator of its choice, the other two parties were not or, at the very least, their freedom was restricted on this point. Convergence and divergence of the interests of the co-defendants [are] irrelevant to the merit of the dispute, since the arbitrators are not the representatives of the parties that have designated them in the procedure. The *principle of equality* provides that each party has identical prerogatives with respect to the constitution of the arbitral tribunal.”

²¹Christophe Seraglini et Jérôme Ortscheidt, *Droit de l'arbitrage interne et international* (2nd Ed, 2019) at para 771 (parties’ agreed translation).

²² Laure Bernheim-Van de Castele, *Les principes fondamentaux de l'arbitrage* (2012), with preface by Prof. Clay, at p 492, para 611 (parties’ agreed translation).

²³ Benoit Le Bars, *International Commercial Arbitration* (2019), p 423.

²⁴ Bernheim-Van de Castele *op cit* at p 494, para 614 (parties’ agreed translation).

[56] In re-examination by Mr. Adkin QC, Prof. Clay explained his view on convergence and divergence in this way:²⁵

“Q. ...There is an arbitration. The claimant appoints an arbitrator. There are two respondents. The respondents are parent and subsidiary. If they were required to appoint a joint arbitrator, would that infringe the **Dutco** principle?

A. No.

Q. I want you to assume a similar situation. There is an arbitration. The claimant appoints an arbitrator. There are two respondents. They are completely separate commercial entities. If they were required to appoint a joint arbitrator, would that be a breach of the **Dutco** principle?

A. Yes.

Q. I want you to consider a third situation, which [*sic*]. There is an arbitration. The claimant appoints an arbitrator. There are two respondents. And the respondents have agreed, in their contract with the claimant, that they will be treated as being indivisible. If the two respondents were required to appoint a joint arbitrator, would that be a breach of the **Dutco** principle?

A. No.”

[57] There are two cases, both decided by the Cour d'Appel de Paris, which the parties identified as relevant. The first is **Culioli v Gastrolouvre and Sibella** from 2003.²⁶ In this, a Mr. Culioli and a Mr. Sibella agreed to sell all the shares in a company, Art-Chi-Med SARL, to Gastrolouvre SA. The memorandum of sale described Culioli and Sibella as acting “indivisibly and with a solidarity stipulation towards [Gastrolouvre]”. Shortly afterwards and before completion, Sibella informed the others that his wife objected to the share sale. Sibella and his wife held their matrimonial property under the French community of property regime, so this was a potential problem to passing title in the shares. Gastrolouvre initiated arbitration proceedings and nominated a Mr. L as its arbitrator. Culioli nominated a Mr. C as his arbitrator. Sibella nominated a Mr. B. The dispute as to the nomination of the arbitrators was referred to the relevant judge. He let the

²⁵ Official transcript, day 3, pp 103-104.

²⁶ Cour d'Appel de Paris (1re Chambre Civile), 18 octobre 2003, Rev. Arb. 2003, Issue 4, pp. 1277-1282 (parties' agreed translation).

appointment of Mr. L stand, but appointed a Mr. A in place of Messrs. C and B. Culioli appealed on the basis all three parties had a right of nomination and that the judge should not have let the appointment of Mr. L stand. The Cour d'Appel dismissed the appeal holding that:

“the appointment of a single arbitrator for two parties whose fate is tied, having signed the agreement indivisibly and jointly and severally and having no divergent interests, does not constitute a breach of equality between the parties.”

- [58] The second case is **The State Grain Organisation of the Islamic Republic of Iran v Redle Grains Silos Ltd.**²⁷ Here Redle requested arbitration under the ICC Rules against (1) the State Grain Organisation and (2) the four liquidators of the State Grain Organisation. Redle nominated a Mr. Z as arbitrator. The respondents did not agree a joint nomination and the ICC Court appointed a Mr. A as Mr. Z's co-arbitrator. The arbitration award went against the State Grain Organisation, who sought annulment of the award on the basis that the ICC Court's mode of appointing Mr. A as an arbitrator breached the principle of *égalité*. The Cour d'Appel dismissed the application for annulment. It held:

“if [what is now Article 12.8] of the ICC Rules allows the [ICC] Court, as it does in this case, in the event of... multiple respondents and failure to appoint an arbitrator jointly, to appoint each of the members of the arbitral tribunal, it does not oblige it to do so; furthermore, the divergence of interests of the respondents consisting, on the one hand, of a company and on the other, the members of the liquidation committee, regarding the outcome of the arbitration, is not established, it being of little importance in this regard that the [four liquidators] are not bound by the arbitration agreement or that separate claims have been brought by [Redle] against them.”

- [59] I remind myself, as was common ground, that French law has no doctrine of *stare decisis*. Thus, these two decisions are not precedents in the English sense.

²⁷ Cour d'Appel de Paris 3 décembre 2013, No. 12/07062 (parties' agreed translation).

Further, unlike England, a great many cases come before the Courts of Appeal. Prof. Clay said²⁸ that the **Gastrolouvre** case was not well-known, so that its weight in the development of French law was correspondingly small. Because there is no binding case law, it is therefore possible for there to be, for possibly long periods, two views of what the law is. As I said in my March judgment, both Prof. Racine's and Prof. Clay's views are arguable. That remains my view. In my judgment my task is to determine which of Prof. Racine's or Prof. Clay's views is the majority (or more generally accepted) view and which the minority (or less generally accepted) view.

- [60] As to this, a key question in my judgment is whether Prof. Clay was right, when he said in re-examination that where there are two respondents, which are "completely separate commercial entities",²⁹ any requirement that they appoint a joint arbitrator would be a breach of the **Dutco** principle. This view has the advantage of drawing a bright line, without any need to reach a value judgment on the degree of convergence or divergence of interests between "horizontal" respondents necessary to them to constitute one party for arbitral purposes.
- [61] It is also right to say that the experts are agreed that arbitrators must be independent and impartial.³⁰ Thus, justice might still be done, even if three of the arbitrators were appointed by the respondents. I consider this point further below.
- [62] In my judgment, however, the weight of the commentaries is against Prof. Clay's view. The opinion of **Schwartz and Derains** is of particular importance, because they are the leading commentators on the ICC Rules. They say that the ICC Court will examine whether multiple respondents form "*in reality*, a single respondent party" (my emphasis). That involves a value judgment. **Fadlallah and Hascher** are also supportive of the appointing body taking a realistic (as opposed to a formalistic) view of the convergence of interests. **Fouchard Gaillard Goldman**

²⁸ Official transcript, day 3, p 102.

²⁹ Official transcript, day 3, p.103.

³⁰ Joint memorandum Box 19, Bundle B1/7/227.

mention the parent/subsidiary as an obvious case of shared interest, but this is by way of example. On a fair reading they also support the appointing body looking at the facts to see the degree of congruence of interest. **Bernheim-Van de Castele** is the only commentator who unequivocally supports Prof. Clay's view.

[63] The **Iranian State Grain** case also supports the view that an evaluative approach has to be taken. On one level, of course, liquidators and the company they are liquidating are on a vertical plane. However, in that case the liquidators were potentially in a quite different position to the company. As the Cour d'Appel noted, (a) the liquidators were not bound by the arbitration agreement and (b) they faced separate claims at the suit of Redle. (Indeed, although in general a parent company and its subsidiary will have a shared interest, this is not always the case. A parent may not mind its subsidiary being forced into insolvency on losing an arbitration, so long as the parent is not liable on the award.) The Cour d'Appel carried out an evaluation before reaching its view.

[64] Accordingly, I find that Prof. Clay's view that separate commercial entities are always to be treated as separate parties, except where they have by contract agreed to be bound indivisibly, is the minority view. I prefer Prof. Racine's view that it is necessary to make a value judgment in deciding whether multiple claimants or respondents should be treated as one party or separate parties. In my judgment on balance of probabilities, Prof. Racine's view represents the relevant French law.

Were Vidatel, Mercury and Geni "one party"?

[65] The consequence of this finding for the determination of the current case is in my judgment this. If Prof. Clay were right, then (subject to the counterclaim issue) the resolution of the case could be fairly straightforward. PTV commenced an arbitration against Vidatel, Mercury and Geni. These are separate commercial entities with different owners. At the time they had not made any joint counterclaim. Therefore, *ipso facto* they are to be treated as separate parties, each of which is entitled to appoint an arbitrator. On this argument the ICC Court

was therefore wrong not to allow the arbitration to proceed with the four arbitrators nominated by the four shareholders. What the consequences of the counterclaim might be on Prof. Clay's view, I shall consider separately below.

[66] Since, however, I have preferred Prof. Racine's view, it is necessary to look more closely at the joint status of Vidatel, Mercury and Geni. I must evaluate the extent to which their interests converged and diverged. Although not the logical order, it is convenient to start at the end with what we now know from the final award about the respondents and their respective interests. We can then look at the beginning and at what the ICC Court knew when it made its decision to appoint the five arbitrators itself.

[67] What we now know is this. Firstly, Vidatel, Mercury and Geni all had separate legal representation. Secondly, on 16th October 2016 PTV served its statement of claim, claiming relief jointly and severally against the three respondents. This remained PTV's position to the end: see final award para [1503]. The operative part of the award was made jointly and severally against the three respondents: see determinations V and VI of para [1767]. Thirdly, on 28th February 2017, each respondent served its own individual statement of defence, but at the same time all three respondents jointly served a counterclaim against PTV. The counterclaim was dismissed by the tribunal: see determination IX of para [1767].

[68] So far as the separate defences are concerned, the tribunal summarised the position as follows at para [1509] of its final award:

“[Mercury] submits that the Parties' obligations under the Shareholders' Agreement are not plural and solidary and therefore do not give rise to joint and several liability but 'each party responds only for its acts.'”

At para [1514] the tribunal recorded the same submission by Geni.

[69] At paras [1512] and [1513] the tribunal summarised Mercury's case that PTV had “failed to attribute specific and individual acts to [it] and... that the arguments... as

to why Respondents controlled Unitel do not apply to Mercury... Mercury... is in the same position as Claimant as regards the alleged breaches of the Shareholders' Agreement..."

[70] As to the nature of the counterclaim, the tribunal summarised matters in paras [14] and [15] as follows:

"In 2014, Portugal Telecom and the Brazilian telecom company, Oi SA, implemented a transaction by which Portugal Telecom sold its 75% stake in Claimant's parent company, Africatel Holdings BV, to Oi, while Portugal Telecom acquired a stake of 37.3% in Oi. Respondents claim that the Shareholders' Agreement provides for a pre-emption right in case of indirect transfers of controlling shares in Unitel to a non-affiliated company and that, as a result of the transfer to Oi, Claimant would have been obliged to offer its shares in Unitel *pro rata* for sale to Respondents, because these shares were no longer held by an affiliate of the Portugal Telecom group.

As Claimant failed to do so, Respondents submit that Claimant committed a material breach of contract and a breach of Angolan law, which entitles Respondents to terminate the Shareholders' Agreement *vis-à-vis* Claimant and to acquire Claimant's shares at their net asset value."

[71] When I stand back and look at matters in the round as they appear after the making of the final award, in my judgment Vidatel, Mercury and Geni should be considered as "one party" for the purposes of French arbitral law. The claims against them were made jointly and severally. They each lodged separate defences and denied that they were liable for any liability which might be established against the other respondents. However, the degree of divergence of interest was fairly small. This was not a case where any of the respondents were advancing cut-throat defences. They were merely denying liability for their co-respondents' defaults. The existence of a joint counterclaim is of very substantial evidential weight in showing that they shared the same interest. It is true that the three companies were not (as had been the case in **Gastrolouvre**) contractually bound to present a united front. However, the reality is that their fates were tied. This reality is borne out by the actual result of the arbitration.

[72] I should briefly consider the implications of the joint counterclaim by the respondents for the views expressed by Prof. Clay. It will be recalled in the passage I have cited — in what was literally the last question to him in re-examination — he said that parties who stand to be “treated as being indivisible”³¹ would not be entitled to separate appointments of an arbitrator each. If that is right, then the existence of the joint counterclaim would mean each of the three respondents lost their right to appoint a separate arbitrator. This would be an independent ground for upholding the ICC Court’s decision, even if I were wrong in my preference for Prof. Racine’s view. Because the point arose in re-examination, indeed at the very end of re-examination, the implications were not explored further in the course of Prof. Clay’s evidence. Although it is difficult to reach a firm conclusion on the point in these circumstances, were it necessary, Prof. Clay’s approach to “indivisibility” would as a separate consideration reinforce my preference for Prof. Racine’s view.

[73] I turn then to the position at the time when the ICC Court made its decision to appoint all five arbitrators under Article 12.8. PTV’s request for arbitration is dated 13th October 2015. It is a 27-page document. PTV’s lawyers, White & Case LLP, say at para 4 that the:

“arbitration arises from the Respondents’ sustained efforts to wrongfully deprive PTV of its rights as a shareholder of Unitel..., a major Angolan mobile telephone operator. In addition to blatant breaches of the Shareholders’ Agreement that have damaged PTV, the Respondents are also engaged in a scheme to loot Unitel of its assets and then to divert the proceeds to other business ventures that enrich the Respondents’ insiders, in particular for the benefit of Isabel dos Santos, the daughter of Angola’s President.”

Relief was sought against the three respondents jointly and severally.

³¹ Official transcript, day 3, page 104.

- [74] Vidatel gave a formal answer to PTV's request for arbitration on 8th January 2016, prepared by its lawyers, Quinn Emanuel Urquhart & Sullivan LLP. It is a 33-page document. Very little is said about any divergence of interests between Vidatel on the one hand and Mercury and Geni on the other. The answer at para 3(a) says that "the suggestion... that Geni and Mercury — which... are entities distinct from Vidatel and Vidatel's owner, Isabel Dos Santos — have engaged in wrongful transactions at the expense of Unitel... merely to benefit Mrs Dos Santos personally is entirely nonsensical." However, this is an attack on the merits of PTV's claim, not any submission that there is a divergence of interests between Vidatel and the other two.
- [75] In the meantime, before Vidatel presented its answer, both Geni and Mercury wrote letters dated 24th November 2015 and 16th December 2015 setting out their position. The letters are in nearly word for word identical terms. They are written to PTV rather than the ICC Court and appoint arbitrators to act for each of the two companies. The letters are supportive of Vidatel's position. There is no suggestion in them that there is a divergence of interests between any of the three. The letters were passed to the ICC Court. These are the only formal communications from Geni and Mercury before the ICC Court made the Article 12.8 appointments.
- [76] One of PTV's complaints was that Unitel had ceased to pay dividends in hard currency. Vidatel in its answer at para 49 says that it too has ceased to receive hard currency dividends. Vidatel accepted that Mercury and Geni had been receiving dividends in Kwanza, the local non-convertible currency, not hard currency. However, even here Vidatel do not make any complaint about Mercury and Geni.
- [77] Vidatel raised a counterclaim against PTV. At para 86(d) it sought declarations that:

“(i) PTV is in breach of a material obligation under the Shareholders' Agreement by reason of the Oi acquisition;

(ii) upon a notice of termination being served upon PTV by all three Respondents terminating the Shareholders' Agreement PTV shall be obliged to negotiate in good faith with a view to selling its shares at net asset value..."

[78] Now this was a counterclaim by just one respondent, but the matters whereof complaint is made could equally be raised by Mercury and Geni. Indeed declaration (ii) is necessarily one which touches on the interests of all three respondents. The existence of the counterclaim in this form does not show any divergence of interests between the three respondents, rather the contrary.

[79] The ICC Court made its decision to appoint a five-person tribunal itself under Article 12.8 on 10th February 2016. It confirmed its decision on 10th March 2016. That is probably the time at which the ICC Court's decision stands to be assessed. However, there is a good argument that 14th April 2016 is the relevant date, because that was the date on which the ICC Court appointed the five-person tribunal. There may also be an argument that 26th May 2016 is the relevant date. This is when the ICC Court rejected a challenge made on 2nd May 2016 by Vidatel to the panel's composition.

[80] By these later dates, there had been an important procedural change. On 14th March 2016, Vidatel withdrew its individual counterclaim and the three respondents made a request for arbitration of a counterclaim made jointly by all three. This counterclaim was eventually consolidated with the existing arbitration commenced by PTV's request.

[81] I do not need to consider this development when looking at the situation from the ICC Court's point of view on 10th February and 10th March 2016. Looking at matters at those dates, on the assumption that I am right in treating Prof. Racine's view as representing the relevant French law, in my judgment the ICC Court's decision to apply Article 12.8 was correct. The letters of Geni and Mercury showed that they were in Vidatel's camp. There were divergencies in the positions

of Geni and Mercury as against Vidatel, for example in relation to the payment of dividends in soft currency, but these were minor. PTV was seeking relief against all three respondents jointly and severally. Geni and Mercury had not yet raised any counterclaim, but insofar as they were going to, it would have been reasonable to infer that it would mirror that already presented by Vidatel.

[82] If the later dates are relevant, then the facts for treating the three respondents as one party become even stronger, because they were making a counterclaim jointly.

[83] I should add that, even if I were wrong in my conclusion that the ICC Court in 2016 (whether the relevant date is 10th February, 10th March, 14th April or 26th May) properly assessed the parties' positions as falling within two camps only, the ICC Court's decisions at the outset of the arbitration would be vindicated by the position as shown in the final award. The ICC Court was, in my view, in any event proved right in the end. It would be strange to annul an award for a decision by the ICC Court at the beginning of the arbitration which proved to be both prescient and right.

Conclusion in respect of the first Paris defence

[84] Accordingly I conclude that Vidatel, Mercury and Geni should be considered as one party for the purposes of the **Dutco** principle. It follows that, if the ICC Court had permitted each of the four parties to appoint an arbitrator each, there would have been a breach of the **Dutco** principle, because PTV would have appointed one arbitrator whilst the "other side" appointed three. Accordingly the ICC Court was in my judgment right to appoint all five members of the arbitral panel. The first Paris defence fails.

The second Paris defence

[85] The second Paris defence is that neither Prof. Dr. Sachs nor Mr. Ferro were impartial and independent. It is common ground that Article 11.1 of the ICC Rules requires an arbitrator to "be and remain impartial and independent of the parties

involved in the arbitration.” Further prospective arbitrators have a duty of disclosure of “any facts or circumstances which might be of such a nature as to call into question the arbitrator’s independence in the eyes of the parties”: Article 11.2. This is an ongoing duty during the arbitration: Article 11.3.

[86] It is common ground between the experts that a breach of the duty to be impartial and independent on the part of an arbitrator will give rise to a well-founded claim for annulment of the arbitration award under Article 1520(2) of the French Code of Civil Procedure.³²

[87] Useful guidance on what matters might impair an arbitrator’s impartiality and independence and what matters stand to be disclosed is given by the ICC’s **Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration**. It provides:

“23. Each prospective arbitrator or arbitrator must assess what circumstances, if any, are such as to call into question his or her independence in the eyes of the parties or give rise to reasonable doubts as to his or her impartiality. In making such assessment, a prospective arbitrator or arbitrator should consider all potentially relevant circumstances, including **but not limited** to the following:

- The prospective arbitrator or arbitrator or his or her law firm represents or advises, or has represented or advised, one of the parties or one of its affiliates.
- The prospective arbitrator or arbitrator or his or her law firm acts or has acted against one of the parties or one of its affiliates.
- The prospective arbitrator or arbitrator or his or her law firm has a business relationship with one of the parties or one of its affiliates, or a personal interest of any nature in the outcome of the dispute.
- The prospective arbitrator or arbitrator or his or her law firm acts or has acted on behalf of one of the parties or one of its affiliates as director, board member, officer, or otherwise.
- The prospective arbitrator or arbitrator or his or her law firm is or has been involved in the dispute, or has expressed a view on the dispute in a manner that might affect his or her impartiality.

³² Joint memorandum, Box 2, Bundle B1/7/211.

- The prospective arbitrator or arbitrator has a professional or close personal relationship with counsel to one of the parties or the counsel's law firm.
- The prospective arbitrator or arbitrator acts or has acted as arbitrator in a case involving one of the parties or one of its affiliates.
- The prospective arbitrator or arbitrator acts or has acted as arbitrator in a related case.
- The prospective arbitrator or arbitrator has in the past been appointed as arbitrator by one of the parties or one of its affiliates, or by counsel to one of the parties or the counsel's law firm." (Emphasis in original.)

[88] The obligations are also considered in great detail in the **IBA Guidelines on Conflicts of Interest in International Arbitration 2014**. These **Guidelines** are of particular significance, because they show the distilled wisdom of eminent practitioners in the international arbitration community. It has to be remembered that whether an arbitrator is impartial and independent is a binary question: he or she either is or is not. The number of appropriately qualified arbitrators in any particular field may be small or very small, so disqualification of a particular arbitrator may be very significant.

[89] The **IBA Guidelines** adopt a traffic-light system, which is described in these terms:

"2. The Red List consists of two parts: 'a Non-Waivable Red List'... and 'a Waivable Red List'... These lists are non-exhaustive and detail specific situations that, depending on the facts of a given case, give rise to justifiable doubts as to the arbitrator's impartiality and independence. That is, in these circumstances, an objective conflict of interest exists from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances... The Non-Waivable Red List includes situations deriving from the overriding principle that no person can be his or her own judge. Therefore, acceptance of such a situation cannot cure the conflict. The Waivable Red List covers situations that are serious but not as severe. Because of their seriousness, unlike circumstances described in the Orange List, these situations should be considered waivable, but only if and when the parties, being aware of the conflict of interest situation, expressly state their willingness to have such a person act as arbitrator...

3. The Orange List is a non-exhaustive list of specific situations that, depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence... with the consequence that the arbitrator has a duty to disclose such situations. In all these situations, the parties are deemed to have accepted the arbitrator if, after disclosure, no timely objection is made...

...

7. The Green List is a non-exhaustive list of specific situations where no appearance and no actual conflict of interest exists from an objective point of view. Thus, the arbitrator has no duty to disclose situations falling within the Green List."

Prof. Dr. Sachs

[90] Mr. Adkin QC's criticism of Prof. Dr. Sachs is based on the involvement of a Mr. Groenewegen with a subsidiary of Oi called Portugal Telecom International Finance BV ("PTIF"), a Dutch company. In his opening he puts Vidatel's case in this way:

"114. ...Dr. Sachs undertook pursuant to Article 11(5) to carry out his responsibilities in accordance with the ICC Rules, one of which was Article 11(3) which required him immediately to disclose in writing to the Secretariat and the parties any facts or circumstances which might have been of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could have given rise to reasonable doubts as to the arbitrator's impartiality, and which arose during the course of the arbitration. Dr. Sachs failed to comply with that obligation on a number of occasions:

114.1. In September 2016, Dr. Sachs should have disclosed that one of his partners, Mr. JLM Groenewegen of CMS Netherlands, had been approached to be appointed as PTIF's administrator.

114.2. In April 2017, Dr. Sachs should [have] disclosed that this same partner had been appointed as judicial administrator (bankruptcy trustee) of PTIF.

115. Dr. Sachs did not do so, breaching his disclosure obligation."

[91] Now in fact Prof. Dr. Sachs was not a partner of Mr. Groenewegen. CMS is an international group of law firms using a Swiss Verein model. Prof. Dr. Sachs was a partner in CMS Hasche Sigle in Munich; Mr. Groenewegen worked in a

Netherlands joint stock company, CMS Derks Star Busmann NV, a Dutch law firm. These are different entities. There is and was no fee sharing between the two firms.

[92] The fact that there is no fee sharing is in my judgment fatal to any attack based on the connection between Prof. Dr. Sachs and Mr. Groenewegen. The **IBA Guidelines**³³ put on the green list (and therefore exclude) the need to disclose that current services are provided for one of the parties by a “firm, in association or in alliance with the arbitrator’s law firm, but that does not share significant fees or other revenues with the arbitrator’s law firm, renders services to one of the parties, or an affiliate of one of the parties, in an unrelated matter.”

[93] I am told that this was also the conclusion of the Swiss Federal Tribunal in dismissing an annulment application in a wholly unrelated case decided on 7th September 2016. The sole arbitrator in that case was a partner in CMS Switzerland, whilst CMS Hasche Sigle had advised an affiliate of one of the parties to the arbitration. The absence of fee-sharing meant that the Swiss partner was not obliged to recuse himself.

[94] Further, Mr. Groenewegen’s appointment as judicial administrator was for the benefit of PTIF’s creditors, not for Oi. He was at arm’s length to Oi. He was in no respect advising or acting for Oi. This too in my judgment is fatal to the attack on Prof. Dr. Sachs’ impartiality and independence, arising from his association with Mr. Groenewegen.

Mr. Ferro

[95] The attack on Mr. Ferro’s impartiality and independence is more complicated. Vidatel starts by saying in its opening:

“93. In June 2016, Oi was the subject of a quasi-bankruptcy (restructuring) procedure in Brazil. According to media reports, it constituted, at the time,

³³ Para 4.2.1.

the largest restructuring in the history of the Brazilian economy with nearly US\$20 billion in debt to be restructured. Mr. Ferro was aware that Oi was the true party to the dispute and that PT Ventures was merely an investment vehicle.

94. It is no doubt for this reason that, on 23 June 2016, Mr. Ferro informed the parties that the firm in which he was 'partner' was likely to be asked to advise and represent the judicial administrator who was to be appointed by the Brazilian courts in the restructuring of Oi and its subsidiary [PTIF], and that he thus consulted the parties in this regard:

'On June 20th, Oi SA and its wholly-owned direct and indirect subsidiaries, among which [PTIF], have requested for judicial reorganization before Brazilian Court, as published on its 'material fact' on the company's website... Although Oi SA and [PTIF] are not parties to this arbitration procedure, they are related to the Claimant. At this point, according to Brazilian Law, the Court is about to appoint a judicial administrator in order to help it during the course of the procedure. There is a possibility that members of Ferro, Castro Neves, Daltro & Gomide Advogados ('FCDG'), of which I am a partner, be elected to provide legal services for the judicial administrator in Oi Reorganization...'

[96] Vidatel did object to Mr. Ferro's firm acting in this way, so his firm did not accept the proposed mandate. Vidatel thanked Mr. Ferro for declining the mandate. Vidatel do not (and could not) rely on this directly to challenge Mr. Ferro. Rather it says:

"98... Mr Ferro was therefore fully informed that any direct or indirect relationship that may exist between any of the members of the tribunal and Oi, PTV's majority shareholder, or any of its companies, was a sensitive matter and likely to create a conflict that would be considered unacceptable."

[97] Vidatel's detailed case (from their opening, omitting citations) is:

"100. Mr. Ferro and his law firm were, as it appears, the regular counsel of Mr. Nelson Tanure, the most influential shareholder of Oi at the time of the arbitration, and of his companies. The connections between Mr. Tanure and Oi... may be summarised as follows:

100.1. Mr. Tanure is a well-known businessman in Brazil. He notably invests in distressed companies which he then attempts to turn around. He invested in Oi just before it was restructured, in June 2016. Oi's reorganization began in June 2016 and was still ongoing at the time of the arbitration.

100.2. According to the press, Mr. Tanure intended to resell his investment at a significant profit. He therefore attempted to influence the management of Oi from the time he invested in the company.

100.3. Mr. Tanure is a director and shareholder of Pharol. Pharol is a member of the Board of Directors of Oi. Pharol also owns around 25% of the capital of Oi.

100.4. Mr. Tanure is also the economic beneficiary of Société Mondiale Fundo de Investimento, which owned between 3% and 5% of Oi's shares during the 2016-2018 period.

100.5. Mr. Tanure was himself an alternate member of the Oi Board of Directors as from 2016.

100.6. Mr. Tanure was described by a number of sources as a shareholder who controlled Oi despite holding a minority share:

'In Oi's case, it had two minority, but effectively controlling, shareholders that were actively involved throughout the restructuring process — the investment vehicles of Pharol, SGPS SA, the legacy owner of Portugal Telecom, and Nelson Tanure, a well-known activist shareholder in Brazilian restructurings who acquired his interests in Oi on the eve of its judicial restructuring. Pharol and Tanure exerted pressure on Oi's board throughout the process and ensured that each restructuring plan proposed by Oi's board, over the course of nearly 18 months under judicial restructuring, would have effectively resulted in existing shareholders retaining 100% of Oi's shares immediately post restructuring, while forcing creditors to either take massive principal haircuts or significant maturity extensions and interest rate cuts.'

100.7. The press also commented on his taking control of the Board of Directors, which occurred at the same time as the arbitration:

'By the time the company collapsed under its massive debt load and filed for bankruptcy in June 2016, a global who's who of distressed debt investors had bought in and frictions between shareholders and bondholders were coming into sharp relief... Among the former was Tanure's Société Mondiale, which had scooped up a chunk of the company's shares and struck alliances giving him majority control of Oi's board.'

101. Against this background, the existence of a very substantial arbitration involving a subsidiary that was majority-owned by Oi, i.e. PTV, was a key component of Oi's financial situation, in which Mr. Tanure had a direct interest. Further, Mr. Tanure himself had a direct interest in the matter since, according to a Material Fact released by Oi on 8 January 2019, it undertook, if it were to sell its stake in Unitel, to pay a portion of the amounts received from the sale to Pharol, a company in which Mr. Tanure owns shares and for which he acts as director, and the proceeds from the potential sale of PTV's share in Unitel were said by Oi to be directly contingent on its success in the arbitration.

102. Mr Ferro or his law firm have regularly represented Mr. Tanure's companies, having acted for the following companies:

102.1. JVCO, a company wholly owned by Mr. Tanure, which was involved in a major arbitration against Telecom Italia between 2012 and June 2016.

102.2. Sequip Participações, a company wholly owned by Mr. Tanure, which was involved in an arbitration between an entrepreneur, Paulo Roberto Franco Marinho, and Sequip Participações in 2011 and 2012.

102.3. Docas Investimentos, a company wholly owned by Mr. Tanure, from 2012 to June 2016 in a major arbitration against Telecom Italia, and according to the registries of the Brazilian courts (Diário da Justiça Eletrônico), from 2008 to 2016 in *Norske Skog Pisa v. Docas Investimentos* and *Editora JB SA* and from 2012 to 2013 in *Docas Investimentos v. Amura Publicidade Marketing e Eventos Ltda.* In its litigation against Telecom Italia, Docas was represented by Mr. Ferro himself, and Mr. Tanure was directly involved."

[98] There are two issues raised by Vidatel: firstly, Mr. Tanure's involvement with Oi and thence with PTV, and secondly, Mr. Ferro's involvement with Mr. Tanure. So far as the first issue is concerned, Mr. Tanure was the beneficial owner of Société Mondiale. However, Société Mondiale only ever owned between 3 and 5 per cent of the shares in Oi. There were purchases shortly before Oi started restructuring proceedings in June 2016. There were all sold by May 2018. Mr. Tanure wholly owned a company called Bankhill Holding Ltd, which owned 1.92 per cent of Pharol. Pharol in turn had a wholly-owned subsidiary, Bratel BV. Bratel BV in turn was the 100 per cent shareholder of Bratel SARL, which owned (at its height) 7.06

per cent of Oi's shares (it now owns 5.4 per cent). It can be seen that Mr. Tanure only ever held a beneficial interest in a small minority of shares in Oi and that these began to be acquired shortly before June 2016, in other words after the arbitration panel had been formed. Mr. Tanure was briefly from 28th April 2017 to 21st February 2018 an alternate member of Oi's board of directors. Mr. Rogerson, who gave affidavit evidence on behalf of PTV but was not cross-examined on it, said that Oi's board of directors was not involved in the conduct of the arbitration.

[99] As regards the second issue, Mr. Ferro's firm acted on behalf of three companies owned directly or indirectly by Mr. Tanure, Docas Investimentos SA ("Docas"), JVCO Participações ("JVCO") and Sequip Participações ("Sequip"), in two arbitrations and two sets of Brazilian court proceedings. These had finished or were in the course of finishing when the current arbitration began. Mr. Ferro had personal involvement in only one of these, so he cannot in my judgment be described as "regularly representing" Mr. Tanure's companies. Oi had no interest in any of these three companies.

[100] In any event, representing Mr. Tanure's companies is not relevant under the detailed guidance given by the **IBA Guidelines**. These say that "the term 'affiliate' encompasses all companies in a group of companies, including the parent company."³⁴ Neither Docas nor JVCO nor Sequip are affiliates of PTV. This is the crucial question under para 2.3.7 of the **Guidelines** (waivable red list) and paras 3.1.1 and 3.1.4 (orange list). Mr. Ferro and his firm never acted for Mr. Tanure personally. Since none of the three companies were affiliates, there was in my judgment no duty of disclosure under the **Guidelines**. The ICC's **Note to Parties** does not define "affiliate", but there is in my judgment no reasonable basis for saying that Docas, JVCO and Sequip were affiliates of PTV or Oi. A company wholly owned by a minority shareholder in a second company is not an affiliate of the second company. The fact that the minority shareholder is a prominent "activist" shareholder who may have exercised an influence over the board in my

³⁴ Footnote 4, p 21.

judgment makes no difference. There was no breach by Mr. Ferro of para 23 of the **Note to Parties**.

[101] The position is the same in relation to FCDG advising and acting for BNY Mellon, a large New York bank. Once Oi was restructured, in September 2018 BNY Mellon were appointed as lenders' trustee, registrar and payment agent for the conversion of US\$20 billion of Oi's debts. There was no connection between BNY Mellon and PTV. They were not affiliates. BNY Mellon's duties were to Oi's creditors, not Oi itself, still less PTV.

[102] The **IBA Guidelines** and the ICC's **Note to Parties** are not necessarily the last word on the matter. They are not statutes. I have to exercise my own judgment, although I am entitled to have regard to the **Guidelines** and the **Note**. Looking at the matter through my own eyes, the position is that Mr. Tanure acquired a small interest, never much more than 5 per cent, in Oi and thence in PTV in June 2016 or just before, but after the arbitral panel had been formed with Mr. Ferro as a member. The involvement of Mr. Ferro and his firm was solely with companies owned by Mr. Tanure but otherwise having no connection with PTV or Oi. The involvement was limited — two arbitrations and two court cases, all of which had either finished or were just finishing when Mr. Tanure acquired his interest in Oi. The connection through BNY Mellon was even more tenuous.

[103] Exercising my own judgment, I find that these matters do not impugn Mr. Ferro's impartiality or independence. The relationship from PTV at one end of the chain of links to Docas, JVCO and Sequip at the other end is too distant. Likewise, Mr. Tanure's small minority interest in Oi does not create sufficient a link between PTV on the one hand and Mr. Ferro and his firm on the other, so as to give any justifiable fear that Mr. Ferro's impartiality and independence were at risk. The same goes for BNY Mellon. There was in my judgment no failure of disclosure by him either: there was nothing to disclose.

Conclusion on the second Paris defence

[104] Accordingly, in my judgment the second Paris defence fails as well. In the light of my conclusions on the merits of this defence, I do not need to consider whether Vidatel could or should have discovered the matters of which they now complain sooner than they in fact did.

Final conclusion

[105] It follows that none of the grounds on which I may refuse to enforce an award are made out. Under section 86(1) of the 2013 Act, I therefore direct that the award be enforceable against Vidatel at the suit of PTV.

[106] I shall hear counsel on what consequential orders I should make.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar