THREE HEADS ARE BETTER THAN ONE? A DISCOURSE ON THE NUMBER OF ARBITRATORS AND THE NOTION OF SOLE ARBITRATOR VERSUS THREE-MEMBER TRIBUNAL

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Abstract

*Although frequently used for international conduct, arbitration can be considered the "parallel world" of commercial dispute resolution, existing alongside litigation in national courts. In essence, arbitration is frequently chosen by parties because it offers extra benefits not found in court litigation, like the ability of the parties to agree on the number of arbitrators and choose the best arbitrators to hear their disputes. Parties do not, however, always get to choose their arbitrators because in cases where the parties are unable to agree on the number of arbitrators, a single arbitrator is appointed by default. The various facets of the debate between a single arbitrator and a three-person tribunal will be covered in this article, including the historical background, the United Nations Commission on International Trade Law Model Law's ["**Model Law**"] legislative deliberations, current practises, and future recommendations.*

I. Introduction

American mathematician Tobias Dantzig once said that "*mathematics is the supreme judge; from its decisions there is no appeal.*"[1] As a prologue, jurisprudence as science[2] would not be incompatible with or detached from the formal sciences of numbers. Arithmetic does, after all, play a crucial part in the law and in how legal proceedings are conducted, such as when determining the amount of money to be awarded, how to calculate interests and, from a jurisprudential perspective, the number of judges, jurors, and arbitrators. British jurist Lord Denning, formerly a Master of the Rolls, first studied mathematics before reading the law. He was renowned for his unique prose style of judgment and does not appear to have completely abandoned his numeral fascination where he had underlined numbers[3] in some of his decisions with quite a fascinating impression. This article deals with arbitration and the question of the number of arbitrators in arbitral proceedings. To a novice or arbitral theorist, this may appear to be an insignificant matter of the choice of number, but in fact, it is a material issue in international arbitral practice for practitioners.

Central to the concept of arbitration and its *raison d'être*, is the arbitrator. There is a well-known saying in French that "*Tant vaut l'arbitre, tant vaut l'arbitrage*" which translates to "*an arbitration is only*

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1 *Back Matter*, 118(8) AM. MATHEMATICAL MONTHLY (2011).

2 *See* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED xix (John Murray eds., 1832). Jurisprudence is said to be a science.

3 For interesting reading, Lord Denning wrote at the beginning of each of the judgements that "*This is the case of the three smugglers*" *in* Allgemeine Gold-und-Silberscheideanstalt v. Customs and Excise Commissioners, [1980] QB 390 and '*Many years ago Sir Edward Coke had a case about six carpenters. Now we have a case about six car-hire drivers*' *in* Cinnamond v. British Airports Authority, [1980] 1 WLR 582.

as good as the arbitrator".[4] Amidst the numerous discourse and publications on the purpose or concept of the appointment of arbitrators, at its core, the impulse of disputants is to prevail in the arbitration and to not be bested by the other. It would be rather jejune to think that friends can be made or existing relationships preserved when entering into the arbitration arena. This is in contrast though to other forms of Alternate Dispute Resolution ["**ADR**"] such as mediation, which invariably involves the will of the disputants themselves to come to a resolution *inter se* and not by an arbiter or adjudicator. The outcome of arbitration while heavily dependent on the good fight of each party, will ultimately be decided by the arbitral tribunal. Therefore, the cornerstone consideration while the parties prepare for arbitration is the appointment of the arbitrator also underpinned by the chief aims of winning and spending prudently for the arbitration to avoid a Pyrrhic victory.

In reality, disputants, while relying on the good counsel of their representatives, would want to appoint the "*right*" arbitrators for their dispute for the stake is high and there would be no appeal on the decision of the tribunals, whose decision is normally final. Here, the idea of choosing the "*right*" arbitrator can become elusive and at times, controversial. Parties are thought to be not inclined to appoint a random arbitrator but to at least consider someone with a known track record or based on recommendations from peers. On the other hand, well-known arbitrators might be overcommitted in terms of their time; given that not all disputes, parties and counsels are the same, there is no certainty that all arbitrators conduct all proceedings similarly, no matter how glowing the reports are from previous cases. In essence, then, the idea of party autonomy and choice of parties in the selection of arbitrators is a key reason for parties choosing arbitration. They can decide not only on the procedural aspects of the proceedings but also the arbitrator to whom they can entrust their disputes.

Arbitrators perform quasi-judicial roles not exactly effortlessly because, in contemporary times, they have been regularly called upon to adjudicate large and complex disputes, many of which have a significant impact on individuals, entities or even states. In substance, the roles and duties of arbitrators can be equated to those of judges in national courts though they operate in a different order, often enjoying more benefits such as a near "*free market*" approach to practice and acting as free agents. Unlike court judges with fixed remunerations, arbitrators tend to be better rewarded financially, typically on an *ad valorem* basis. However, these perks do not detract arbitrators from the heavy and often stressful responsibilities that they have to shoulder– often, their specialised expertise is the *raison d'être* for their appointment and their best judicial acumen is expected. It is no wonder that in choosing arbitrators, the parties need to consider all relevant aspects very carefully. After all, arbitration can be a zero-sum game.

This article will not deal with the fundamental questions of the independence and impartiality of arbitrators but with the concept of and issues surrounding the number of arbitrators. It also emphasises the dichotomy of long-held beliefs or practices and the reality, juxtaposed, based on the culmination of inquiries, research and experience of an academic practitioner. This work also aims to invite further discussion on potential reforms for new or improved mechanisms in the

[4] *See, e.g.*, Stephen R Bond, *The International Arbitrator: From the Perspective of the ICC International Court of Arbitration*, 12 NW. J. INT'L L. & BUS. 1 (1991).

procedural framework of contemporary international arbitration, which tends to be disregarded or relegated to the league of a non-issue.

II. Number of arbitrators

A. Purpose and brief historical context

International arbitration has been criticised in recent times for its high costs and complexity,[5] although this can be attributed to the parties themselves for their own choice of big-name arbitrators, counsels[6] or their own counsel's conduct in the arbitral proceedings, such as applications, discovery, and extension of time, which could all impact the timeframe for the end of the proceedings.[7] In international commercial arbitration proceedings, the arbitral tribunal comprises of either a sole arbitrator or three arbitrators. In the case of a tribunal other than a sole arbitrator, the number is not even, as a matter of practicality, to avoid potential deadlock. Admittedly, it is trite law that arbitration is contractual and consensual between the parties, but there is also an economic consideration in the choice of the number of arbitrators; a sole arbitrator reduces costs, whereas three arbitrators increase the costs three-fold.

Given that the question of the number of arbitrators is conceived at the contract drafting stage of the arbitration or dispute resolution clause, it is also worthwhile considering what goes through the minds of the drafters. Contracts prepared by professionals often embody professional opinions or recommendations for the parties. This is to say that generally and empirically; parties may not enquire or inquire about the arbitration clause as their focus will be on the commercial terms they are about to enter into. There are, of course, exceptions, whereby the parties might be aware of the contentious nature of their contracts or have experience with disputes. When the parties choose or agree to arbitration, their choice of the number of arbitrators would be influenced by a variety of factors. They may only want the most economical set of the tribunal, which is the option of a sole arbitrator. This can be risky because proficient contract drafters would likely advise paying particular attention to the nature of the contract, value and profile of the parties so that informed choices can be made regarding the arbitration clause.

Nevertheless, legal contract drafters almost invariably are corporate law advisers and not dispute specialists and thus they may not have the insights into what there is to come when disputes arise. This is exacerbated by the fact that the parties may engage dispute lawyers from another set of firms different from the ones engaged to prepare the contracts. There is also the complication of self-drafted contracts and arbitration clauses by laypeople or legal professionals who do not fully comprehend arbitration. The prevalence of defective arbitration clauses in contracts these days is

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5 *See*, Queen Mary University of London, International arbitration: Corporate attitudes and practices 2006, at 19, *available at* https://arbitration.qmul.ac.uk/media/arbitration/docs/IAstudy_2006.pdf; Queen Mary University of London, International Arbitration: Corporate attitudes and practices 2008, at 5 *available at* https://arbitration.qmul.ac.uk/media/arbitration/docs/IAstudy_2008.pdf; Queen Mary University of London, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, at 24 *available at* https://arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf.

6 Sundaresh Menon, Opening Plenary Session, International Arbitration: The Coming of a New Age for Asia (and Elsewhere), ICCA Congress, ¶¶ 30, 35 (2012), *available at* https://cdn.arbitration-icca.org/s3fs-public/document/media_document/ags_opening_speech_icca_congress_2012.pdf.

7 Queen Mary University of London, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, at 31, *available at* https://arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf.

rife,[8] making the lack of awareness regarding the importance of considering the number of arbitrators inconsequential in comparison.

Briefly exploring the origin of the number of arbiters, there appears to be some historical context, which makes for an interesting academic observation. According to the ancient Jewish law or Talmud, in its key religious text of Mishnah Sanhedrin, composed in Talmudic Israel (circa 190 to 230 CE), it is said that:[9]

> *"Cases concerning property [are decided] by three [judges]. This [litigant] chooses one and this [litigant] chooses one and then the two of them choose another, according to Rabbi Meir. But the Sages say: "The two judges choose the other judge.""*

To this day, the Jewish Rabbinical court, or Beth Din, still maintains a "*bench*" of three adjudicators. The tradition as espoused above is compatible with the notion of natural justice, where each litigant chooses their own judge; no one can claim that he has been discriminated against, and also a collective decision-making process. Such a constitution will certainly avoid deadlock since, logically speaking, a majority of dissent becomes the majority decision.

It would be interesting to also observe other historical accounts, though they are ancient and may no longer make sense presently, which may or may not have influenced contemporary context. Arbitration history scholars Roebuck and De Loynes de Fumichon, among others, published a work on the arbitration practice of ancient Rome and its empire based on the earliest evidence to 640AD.[10] Disputants were free to agree with any number of arbiters they liked, although the most usual way was to appoint a single arbiter but there have been more and the number was even, with usually two arbiters.[11] However, everything depended on the "*compromissum*,"[12] a sort of arbitration agreement between the parties. If two arbiters were named, the parties could ask either one of them to be the sole arbiter but if both named arbiters accepted the appointment, the award would have to be rendered by both or none.[13] The ancient Roman system also deals with the question of an even number of arbiters, which is thought of as "*likely to cause problem*" due to "*human nature's propensity to disagree*" and when the arbiters were equal in number and could not agree, the Roman praetor would compel the parties to add another arbiter to make it uneven.[14] Incidentally, if the parties in their compromise provided for two arbiters with the power to add but failed to name the third arbiter, it would be void.[15]

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8 Laurence Shore, Vittoria De Benedetti & Mario de Nitto Personè, *A Pathology (Yet) to Be Cured?*, 39(3) J. INT'L ARB., 365 (2022).

9 Joshua Kulp, *English Explanation of Mishnah Sanhedrin, Chapter 3:1*, SEFARIA, *available at* https://www.sefaria.org/English_Explanation_of_Mishnah_Sanhedrin.3.1.1?lang=bi. It also went to discuss about challenging the judge on grounds of lack of impartiality "*This [litigant] can invalidate this one's judge, and this [litigant] can invalidate this one's judge, according to Rabbi Meir. But the Sages say: "When is this so? When they bring proof against them that they are relatives or otherwise invalid; but if they are valid and experts, he cannot invalidate them.*"

10 DEREK ROEBUCK AND BRUNO DE LYONES DE FUMICHON, ROMAN ARBITRATION 38 (2004).

11 *Id.* at 118.

12 *Id.* at 19. Refers to a mutual promise undertaking between the parties to go to arbitration and to submit to the arbitrator's award.

13 *Id.* at 118.

14 *Id.*

15 *Id.* at 119.

Meanwhile, the English Parliament passed the first arbitration act in 1697.[16] The ancient law stated that "…*Parties shall submit [disputes] to finally be concluded by the Arbitration or Umpirage which shall be made concerning them by the Arbitrators or Umpire pursuant to such Submission*…" There is nothing mentioned about the number of arbitrators, and neither is it conclusive, though "*arbitrators*" in the plural is stated. The subsequent English Arbitration Act of 1889 did not appear to specifically address the "*default*" number of arbitrators, whereas modern English legislations all eventually adopt the sole arbitrator position. For example, the Arbitration Act, 1950 states that unless a contrary intention is expressed by the parties, the reference shall be made to a single arbitrator.[17] Arguably, the default single arbitrator is instinctive since, in the beginning, arbitration can be traced back to the time of the English merchants when it was created to serve the needs of merchants and traders who needed their commercial disputes resolved expeditiously[18] and also likely to be uncomplicated. Incidentally, the single arbitrator system could be English by origin, as the development of arbitration laws and practice in its non-primitive form as well as in the last three centuries was primarily taking place in England, where its influence on the world during the time of the British Empire had, unsurprisingly, influenced the policies and laws of many countries today.

In a final historical review, the Institute of International Law at its 1875 session held at The Hague came up with draft regulations for the international arbitral procedure, intended to promote the use of arbitration.[19] The draft regulation provides for the parties to agree on designating the number of arbitrators (and names) according to the compromise, thus, in the absence of any provisions laid down in it, "*each of the contracting parties chooses on its own part an arbitrator, and the two arbitrators thus named choose a third arbitrator or designate a third person who shall select him*."[20]

B. Comparison and rationale

Turning to the modern history of arbitration legislation formation, it is imperative to examine the legislative history of the Model Law.[21] Modern arbitration enshrines the concept of party autonomy, which essentially grants the parties the right to decide on how the arbitration is to be conducted, including the number of arbitrators. In the first instance, the parties can and are usually expected to agree on the number of arbitrators at their contract formation stage. Often, parties have omitted or ignored this, resulting in the need to regulate how this is to be resolved when there is a deadlock. Where the parties cannot come to a consensus, there would be a default number that will apply; in the case of the Model Law, three arbitrators shall be appointed.[22] This is also consistent with the UNCITRAL Rules of Arbitration ["**Rules of Arbitration**"] which

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16 *William III, 1697-8: An Act for determining Differences by Arbitration. [Chapter XV. Rot.Parl. 9 Gul. III.p.3. n.5], in* STATUTES OF THE REALM 1695-1701 369-370 (Vol. 7, John Raithby eds., 1820), *available at* http://www.british-history.ac.uk/statutes-realm/vol7/pp369-370.

17 Arbitration Act 1950, 14 Geo. 6 c. 27 § 6 (Eng.).

18 KYRIAKI NOUSSIA, CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION, A COMPARATIVE ANALYSIS OF THE POSITION UNDER ENGLISH, US, GERMAN AND FRENCH LAW 11 (2010).

19 Sessions of the Hague, Draft Regulations for International Arbitral Procedure (1875), *available at* https://www.idi-iil.org/app/uploads/2016/01/1875-Session-of-The-Hague-Arbitral-Procedure-translated-Scott.pdf.

20 *Id.* at art. 2.

21 United Nations Comm'n on Int'l Trade Law, Model Law on International Commercial Arbitration, G.A. Res. 40/72, U.N. Doc. A/RES/40/72 (Dec. 11, 1985), as amended by G.A Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006) [*hereinafter* "Model Law"].

22 Model Law, art. 10(2).

prescribes three arbitrators if the parties fail to agree on a sole arbitrator[23] wherein the number three "*appears to be the most common number in international arbitration.*"[24]

The Model Law's provision on the number of arbitrators, though only framed in two short sentences,[25] belies the careful deliberations made by the Model Law's Working Group ["**Working Group**"]. The Working Group considered various possibilities, which included:

(a) The number of arbitrators equal to the number of the parties but increased by one if the number is even. This was not thought to be practical since the claimant might be bringing a claim against multiple respondents and hence will result in an unsymmetrical tribunal.[26]

(b) The Working Group also considered the possibility of a sole arbitrator by default, and unless the circumstances of the case require a tribunal of three arbitrators,[27] a sole arbitrator would be appointed. However, there was widespread support for the choice of three arbitrators and the Working Group unanimously agreed without dissent.[28]

Indeed, the Working Group expectedly had to deal with the debate that a sole arbitrator would cost less in time and money.[29] However, it was eventually agreed that a panel of three arbitrators was more likely to "*guarantee equal understanding of the positions of the parties*" and "*three-person arbitral tribunals were the most common configuration in international commercial arbitration*.".[30]

The Model Law also did not require the number of arbitrators to be uneven,[31] for it is considered to be an "*overprotective legislative measure*" which should be fully left to the parties' discretion and

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23 Article 5, UNCITRAL Rules of Arbitration, adopted in 1976 by the UN General Assembly Resolution 31/98 and UNCITRAL Rules of Arbitration Article 7, revised in 2010, UN General Assembly Resolution 65/22. Perusing the legislative history or *travaux preparatoire* (See UNCITRAL Committee reports, A/CN.9/9/C.2/SR.3 (15 April 1976) and A/CN.9/9/C.2/SR.15 (23 April 1976)) of the Rules of Arbitration, some of the delegates had preferred a sole arbitrator over three arbitrator cited reasons of effectiveness and less expensive there were arguments for three arbitrators due to the preference for a 'college of arbitrators' and opportunity for the parties to each appoint an arbitrator (see A/CN.9/9/C.2/SR.3 (Apr. 15, 1976), ¶¶ 1, 5). Following the deliberation, it was held that the majority of countries advocated the appointment of three arbitrators thus this would be adopted (see A/CN.9/9/C.2/SR.3), ¶¶ 6 -7.

24 *See*, G.A. XVIII, U.N. Doc. A/CN.9/264, art. 10, at ¶ 3.

25 Model Law, art. 17.

26 U.N. GA, Report of the Working Group on International Contract Practices on the Work of its Fourth Session, A/CN.9/232 (October, 1982), which illustrated that 'if a party were to commence arbitration proceedings against ten respondents in a single case, there would be one party-appointed arbitrator by the claimant and ten party-appointed arbitrators by the respondents.'

27 HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, LEGISLATIVE HISTORY AND COMMENTARY, 349 (1989).

28 *Id.* at 349.

29 *Id.*

30 *Id.*

31 This is even when in some legal jurisdictions this is required and the existence of treaty, i.e. the "Strasbourg Uniform Law" or European Convention providing a Uniform Law on Arbitration, European Treaty No. 56, 1966. For instance, the French Decree No. 2011-48 of 13 January 2011 at Article 1451 requires the number of arbitrator to be uneven. Article 5 (1) and (2) states that "The arbitral tribunal shall be composed of an uneven number of arbitrators" and "If the arbitration agreement provides for an even number of arbitrators an additional arbitrator shall be appointed". Further, Article 5(3) provides that "If the parties have not settled the number of arbitrators in the arbitration agreement and do not agree on the number, the arbitral tribunal shall be composed of three arbitrators." It would appear that the Strasbourg Uniform Law have not gained significant traction considering the number of countries that have adopted it. *See*, Council of Europe, European Convention providing a Uniform Law on Arbiration, ETS No. 056, *available at* https://rm.coe.int/168006ff61.

agreement.[32] Whilst an even number of arbitrators could lead to a deadlock, there are also sound reasons for this which cannot be dismissed completely. For example, the parties may want a two-arbitrator tribunal with the option to appoint an "*umpire*" should there be a deadlock between the two. There is no known evidence that a two-member tribunal will always fail and the umpire will only be called upon to act when necessary; also, the parties may want to appoint any number of arbitrators they prefer.[33] The system of two arbitrators with the option of an umpire was available in the past, largely based on English practice.[34]

Despite the Model Law providing for the default three-member tribunal, many countries that have adopted the Model Law and otherwise[35] have opted for a single arbitrator position. Apart from the possible influence of the English system, it is also quite natural to instinctively consider arbitration to be what it was first created – an alternative to court litigation, a less time as well as cost-consuming method.[36] For instance, Singapore, which adopted the Model Law,[37] prescribed a default single arbitrator whereas the Hong Kong Special Administrative Region's ["**Hong Kong SAR**"] previous arbitration law[38] was formulated based on the English Arbitration Act, 1950 for its domestic regime. Without the need to embark on an intricate historical inquiry, it would suffice to say that the rationale for choosing a sole arbitrator is largely about cost savings.

In an important exercise in the 1980s, the English and Wales Departmental Advisory Committee on Arbitration Law ["**DAC**"] was formed to conduct a review of the English arbitration law and also to consider the adoption of the Model Law. On the point of the number of arbitrators, the DAC reported the following rationale:[39]

> *"[T]he absence of agreement the default number shall be one. The employment of three arbitrators is likely to be three times the cost of employing one, and it seems right that this extra burden should be available if the parties so choose, but not imposed on them. The provision for a sole arbitrator also accords but with common practice in this country, and the balance of responses the DAC received." (emphasis added)*

The common observation that can be made from the above is that the provision for a sole arbitrator as default is wholly due to the issue of cost savings. The notion is that if the parties want a tribunal of three arbitrators, they can and are expected to do so, otherwise, a sole arbitrator would be appointed. Such an expectation is not irrational, given that there can be a presumption that contracts are drafted by trained professionals. However, given the number of "*pathological arbitration clauses*" out there, for the time being, it would appear to remain an aspiration that all contract and legal drafters are fully aware of arbitration today. Interestingly, this is contrasted with the Model

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32 Possible features of a model law on international commercial arbitration, Report by the Secretary-General, UN Doc. A/CN.9/207 (1981), ¶ 67.

33 HOLTZMANN, *supra* note 27 at 348.

34 *See, e.g.,* Arbitration Act 1950, 14 Geo. 6 c. 27, § 8 (Eng.).

35 *See, e.g.,* Arbitration Act 1996, c. 23, § 15(3) (Eng.); Federal Arbitration Act § 5, 9 U.S.C. § 5 (1947) (U.S.); Singapore International Arbitration Act 1994, § 9; The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996, § 10(1) (India).

36 At least that was how arbitration was expected to be as one interesting historical record found in the British House of Commons Hansard attributed to Sir John Rigby, a member of the house who has also held offices as Solicitor-General (1892-1894) and Attorney-General (1894) that "*(H)his experience of arbitration was that it was more expensive and a more dilatory tribunal for simple cases than decision by a Court of Justice*." *See* 20 Parl Deb HC (1894) co. 900 (UK).

37 Singapore maintains a dual-regime arbitration law, for domestic and international arbitration.

38 Arbitration Ordinance, No. 22, Cap. 341, (1963) O.H.K (H.K.).

39 Departmental Advisory Committee on Arbitration Law Report on the Arbitration Bill, Feb. 1996, at 609-610.

Law of which the Working Group held the view that if the parties desired the time and cost savings sometimes associated with a sole arbitrator, they would normally agree on this at the outset.[40]

The English Arbitration Act, 1996[41] even went on to include a mechanism for the statutory "*conversion*" of three arbitrators to a sole arbitrator (though not the other way around). Sections 17(1) and (2) provide that in the case of a three-member tribunal,[42] each of the parties shall appoint one arbitrator, but if a party fails to do so, the other party having appointed its arbitrator may treat its arbitrator as the sole arbitrator. This effectively means that despite the prior agreement of the parties for three arbitrators, the tribunal can be converted into a sole arbitrator configuration.[43]

For comparison purposes of other arbitral jurisdictions and notable provisions: France does not stipulate the default number of arbitrators. However, in the event, the parties could not agree on the procedures for appointing the arbitrator, the French Code of Civil Procedure provides the procedure that will be followed. The German arbitration law[44] provides for the freedom of the parties to determine the number of arbitrators failing which the default number would be three arbitrators,[45] similar to the Swedish Arbitration Act.[46] Elsewhere, in Malaysia,[47] the default number of arbitrators would be a tribunal of three arbitrators for international arbitration[48] or a sole arbitrator in the case of domestic arbitration.[49] Hong Kong SAR being a key international arbitral jurisdiction has an interesting proposition to the number of arbitrators. Its Arbitration Ordinance[50] is novel, in that following the Model Law, it allows the parties to determine the number of arbitrators and the right to authorise a third party or institution to make that determination for them.[51] If the parties are unable to decide on the number of arbitrators (either one or three), the Hong Kong International Arbitration Centre ["**HKIAC**"] will decide for the parties.[52] Incidentally, Section 23(3) of the Arbitration Ordinance also fixes and caps the number of arbitrators that would be determined by HKIAC to three.[53]

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40 *See* HOLTZMANN, *supra* note 27, at 349; *See also* Analytical commentary on draft text of a model law on international commercial arbitration, Report of the Secretary-General, UN Doc. A/CN.9/264, art. 10, ¶ 3.

41 Arbitration Act 1996, c. 23 (Eng.).

42 Arbitration Act 1996, c. 23, § 16(5) (Eng.).

43 Inevitably, there is concern of whether an arbitral award rendered under such 'reconfigured' tribunal may be refused enforcement under the United Nations Convention on the Enforcement and Recognition of Foreign Arbitral Awards, made in New York in 1958 [*hereinafter* "New York Convention"] abroad due to, among others, grounds that the composition of the tribunal is not in accordance with the agreement of the parties under art V(1)(d). The English case of Minermet SpA Milan v Luckyfield Shipping Corporation SA, [2004] 2 Lloyd's Rep 348, whilst *inter alia* dealt with the issue of notice requirement under section 17 of the English Arbitration Act, Cooke J also observed that ("…*no evidence has actually been adduced to show that there would be any additional difficulty in enforcing such an award against Luckyfield, a Panamian registered company… I cannot see therefore that there is any "substantial injustice" which will be done*…").

44 Under the Tenth Book of the Code of Civil Procedure Arbitration Procedure, the German arbitration law adopts the Model Law; ZIVILPROZESSORDNUNG [Code of Civil Procedure] §§1025-1066 (Ger.).

45 *Id.* at § 1034(1).

46 Swedish Arbitration Act (1999, 116), §§ 12-13. The Swedish arbitration law does not adopt but is influenced by the Model Law.

47 Malaysian Arbitration Act, 2005.

48 *Id.* at § 12(2)(a).

49 *Id.* at § 12(2)(b).

50 Arbitration Ordinance, (2011) Cap. 609.

51 *Id.* at § 23(2).

52 Provided also that the parties have opted out of section 1 of Schedule 2 of the Arbitration Ordinance.

53 Similarly, the ICC rules also fixed the number of arbitrator(s) as single or three only. *See* Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules 2018, art. 12(1).

Considering all the above, it can be concluded that the core reason for a single arbitration position, including the departure from the Model Law, is cost savings. In adopting this position, it is mostly a matter of policy, though there may also be influenced by time-honoured practices. As a general observation, the DAC report was made in 1996 and the policies were formulated more than two decades ago when the international commercial arbitration scene was much more different than it is today. Arbitration then was largely perceived as an ["**ADR**"] method alongside mediation and thus should be expeditious and economical, but today, arbitration is taking on an important position as a common and preferred method of dispute resolution alternative to courts.

Nevertheless, most arbitrations these days are institutional. As earlier argued that the question of the number of arbitrators is a matter of policy, then the question of whether national arbitration laws must undergo overhaul or review on a possible mechanism to "*upsize*" the constitution of the tribunal from single to three-member arbitrators remains a matter of policy choices that would be followed by each of the jurisdictions. At present, there is a remedy to this in the form of arbitral institution rules. Arbitration institutions are far more flexible than national arbitration laws or *leges arbitri* in that they promulgate procedural rules, and then participate in case administration as well as management; they also have far greater flexibility in introducing innovations as well as the ability to revise their rules within a much shorter period of time, unlike legislative process. Most commonly, arbitral institutions incorporate discretionary provisions allowing the appointment of three arbitrators if the circumstances of the dispute warrant the appointment of three arbitrators,[54] notwithstanding the default number of a single arbitrator. Nevertheless, this article is not a critique of any *leges arbitri* whereas the advantages and disadvantages of the number of arbitrators will be discussed.

C. Sole arbitrator

Shakespeare's famous line, "*and one man in his time plays many roles*," spoken by the character Jacques in "*As You Like It*," [55] is a fitting description of the sole arbitrator. The lone arbiter will be left to fend for herself or himself, all alone in the arbitral proceedings which can be a highly unpleasant "*battlefield*." Procedurally, he would need to deal with the parties, and if fortunate enough, the arbitrator would encounter cordial parties who are not exacting. However, if one is less than fortunate, in dispensing the duties, the arbitrator might come under pressure from one or both parties. Parties are not always cooperative and whilst respondents are thought to be likely to attempt in delaying the proceedings, claimants can similarly do so for various reasons[56] and hence the arbitrator would need to endure and handle it all. The sole arbitrator neither has nobody to fall back on, to deliberate and discuss, nor there can be any delegation of duties or tasks. As it is, the job of an arbitrator is already a pressuring one these days. If it is an ad hoc arbitration, the sole

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54 *See e.g.*, International Chambers of Commerce Rules of Arbitration 2021, art. 12(2); London Court of International Arbitration (LCIA) Arbitration Rules 2020, art. 5.8; Beihai Asia International Arbitration Centre (BAIAC) Arbitration Rules 2019, art. 8.1; Singapore International Arbitration Centre (SIAC) Arbitration Rules 2016, r. 9.1; Arbitration Act 1996, c. 23, § 15(3) (Eng.); International Arbitration Act 1994, § 9 (Sing.).

55 WILLIAM SHAKESPEARE, AS YOU LIKE IT Act II, Scene VII (1623).

56 It has been observed from the writer's own experience from the industry claimants may have commenced arbitration only to draw the respondent to negotiation, but this may not always be effective resulting in the tribunal being kept in abeyance indefinitely. Other examples can include the possibility of the claimant's counsel encountering issues over terms of engagement midway through the proceedings (such as non-payment of fees) resulting in the need to slow down the proceedings in order to resolve their internal impasse. *See*, Bremer Schiffbau und Maschinenfabrik v. South Indian Shipping Corp Ltd, [1981] AC 999.

arbitrator has no one to turn to in enquiring about potential procedural issues, unlike in the case of institutional arbitration. Unlike judges, the commercialisation of arbitration also means that arbitrators would be concerned with what the parties, i.e., the "*customers*" think.[57] All eyes will be on the sole arbitrator, and he would have to need to deal with all the parties' objections and requests. The same respect that is shown to national court judges from the parties cannot be expected to be shown to an arbitrator. Parties will not be at the threat of contempt[58] for their treatment of the arbitrators, whereas, they may perceive that the arbitral tribunals are paid to do their job. In the Singapore High Court case of *Koh Bros* v. *Scotts Development*[59] involving the removal of the arbitrator, Prakash J. observed that when the arbitrator refused to discharge himself, the applicant should have taken out an application rather than haranguing him or sought to influence his decision by brandishing a Queen's Counsel's opinion in his face as this left a strong impression of bullying.[60] This subsequent part will discuss the common issues affecting both the parties and the sole arbitrator by looking at the advantages as well as disadvantages of the lone arbitrator.

i. The "Good"

The immediate advantage of a sole arbitrator as already enumerated above is costs, whereby the parties only need to pay for one arbitrator; put simply, it is one-third of the cost of the arbitral tribunal. Not only the arbitrator's fees but also lower expenses to pay; a tribunal of three arbitrators means three times more in terms of reimbursable personal and travelling expenses; the latter if they are all located in different geographical locations other than the place of the physical hearing.

Since there is no need for all members of the tribunal to speak with each other and just one person's schedule is taken into consideration when scheduling the hearings, it would seem natural that sole arbitral processes may, in theory, move along more quickly.[61] At the helm of a decisive and deft sole arbitrator, in theory, the parties can expect swifter conduct of the proceedings since the decision would be made by a single person. Quality of the conduct is less likely to be a concern since an arbitral tribunal can appoint experts to assist it and in the case of a sole arbitrator, he can enlist the services of a subject expert to assist if the dispute and its proceedings prove to be challenging. Whilst there will be costs involved, fees may likely be lesser than that of another arbitrator, let alone two.

The tribunal secretary also comes in handy to assist the sole arbitrator in the administrative aspect of the proceedings. In the preparation of the arbitral award, as long as the arbitrator does not delegate intrinsic decision-making duties or roles expected of him by the parties as an arbitrator to

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57 Arbitral institutions have feedback forms that require parties to give their views about their satisfaction of the arbitral proceedings and rating the arbitrator. Institutions are keen to project a good image in order to remain the institution of the parties' choice. Whether or not this is a fair appraisal is subject to debate whereas the losing party is thought less likely not to be very pleased with the arbitrator.

58 In addition to being simply a guideline, the IBA produced Guidelines on Party Representation in International Arbitration, although in practice it will be difficult to enforce, such as by disciplining counsels or witnesses for their actions. *See* International Bar Association (IBA) Guidelines on Party Representation in International Arbitration, 2013.

59 Koh Bros Building and Civil Engineering Contractor Pte. Ltd. v. Scotts Development (Saraca) Pte. Ltd., [2002] SGHC 223.

60 *Id.* at 49.

61 In practice, it is possible for the presiding arbitrator to be entrusted with the task of communicating with the parties on behalf of the tribunal for expeditiousness, or to make certain procedural rulings alone without the need to consult all the members of the tribunal; *See* SIAC Arbitration Rules 2016, r. 19.5.

discharge to avoid potential controversies,[62] the tribunal secretary can assist in a role akin to judicial clerks in assisting with legal research, proofreading or cite checking in the course of preparing the arbitral awards. This is also thought of to be beneficial in helping groom arbitral talents with tribunal secretaries, as the lack of opportunity to intern for arbitrators or to gain practical experience in actual arbitral proceedings is a constant debate.

From the practical standpoint, the appointment of a sole arbitrator is less likely to be mutually agreed upon by the parties and thus, is done by an arbitral institution or appointing authority, in the case of ad hoc arbitration. In this respect, the sole arbitrator can be completely "*unemotional*" towards the parties for he is likely to look to or feel accountable only to the arbitral institution or appointing authority as appointer.

Acting alone, the sole arbitrator does not need to confer or deliberate with anyone else. There is no need for internal tribunal deliberation, plagued with the burden of scheduling calls according to the availabilities of all the arbitrators and possibly also accounting for different time zones. Finally, with most arbitrators remunerated according to fees fixed according to published schedules, there will be no incentive for the arbitrators to procrastinate. However, with non-single arbitrator tribunals, availability and other professional commitments can get in the way, whereas this is less of an impediment for sole arbitrators who work alone.

ii. The Bad

As a flipside to the advantageous point raised above that sole arbitrators are likely to be an appointee of arbitral institutions or appointing authorities, the parties will end up not being able to exercise their rights under "*party autonomy*," said to be the predominant advantages and feature of arbitration, to nominate their arbitrators. Not that it is outright impossible for the parties to be able to agree on the choice of a sole arbitrator, but this process is almost certain to be plagued with scepticism and strategic non-comity. The choice of arbitrator candidate proposed by one party is likely to be received with doubts that the candidate might understand the position of the proposer, thus likely to be rejected by the other party. Counsels representing the parties will also not be prepared to accept any risk because if the sole arbitrator proposed by one party is accepted by the other and the latter eventually loses in the arbitration, it is expected that there would be a blame game. Further, it is commonplace that a party will reject proposals by the other because of the notion that "*if I can't have it my way, so can't you*." Put simply, it is elusive for two parties already in a dispute to come to a consensus over their arbiter. Contrasted with a multi-arbitrator tribunal, it is by convention that each party shall nominate their preferred arbitrator for appointment and typically the choice will not be opposed unless there are concerns of independence or impartiality. When the sole arbitrator is referred to the administering arbitral institution for his appointment, this can result in a delay in commencing the proceedings.

Then there is the question of the choice of the sole arbitrator appointed as the institution in the case of administered arbitration. It is difficult to please all as occasionally, a party or the parties may be sceptical of the choice of the appointee by the institution. A party may object to the choice

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62 *See*, Omar Puertas & Borja Alvarez, *The Yukos Appeal Decision on the Role of Arbitral Tribunal's Secretaries*, INTERNATIONAL BAR ASSOCIATION, *available at* https://www.ibanet.org/article/B55CB7F1-01C6-4BDF-9383-90F567C17147.

of the sole arbitrator by the institution (even in the case of an institution—nominated co-arbitrator) but unless there are reasonable grounds, the institution will confirm the appointment. Apart from dilatory tactics employed by a party or both parties, there might be a reasonable objection to the institution's choice of arbitrator since they are not infallible. Institutional repeat appointments of arbitrators, particularly popular ones, or arbitrators whose backgrounds, in the opinion of the parties, do not appear relevant to the case are some common industry complaints.[63]

In the early stage of the constitution of the arbitral tribunal, objections to the choice of a party's arbitrator is also common. If an objection is mounted against a party — nominated arbitrator, the party will normally be allowed to respond to it as well as the objected arbitrator responding to it. Depending on the applicable arbitration rules, the arbitral institution is unlikely to ignore the protests of a party or the parties regarding its choice of the single arbitrator. When this happens, the arbitrator may be given the option to respond to the unsuitability allegations or the institution might just withdraw the appointment. The arbitrator — candidate will not have the benefits of a counsel coming to their defence in that circumstance.

When an arbitrator is challenged midway through the proceeding, the arbitral tribunal shall first decide on the challenge[64] according to the Model Law[65] before escalating to the court or competent authority for its determination.[66] In the case of a tribunal of three arbitrators, when challenged, the entire tribunal will also be allowed to respond to and decide on the challenge. The remaining unchallenged arbitrators will confer between them and the challenged arbitrator will likely be able to make an informed choice as regards the challenge thus potentially avoiding delay.

If a challenged sole arbitrator is removed, the entire arbitral proceedings will have to start all over again with the appointment of a new arbitrator. Different from a tribunal with three arbitrators, there is no need to reset the proceedings when the substitute arbitrator is appointed. The parties and the tribunal can jointly agree to what extent the previous proceedings would be followed. Hypothetically, this will be much more efficient compared to the appointment of a new sole arbitrator who will conduct the proceedings *de novo*.

iii. The Ugly

Suppose the sole arbitrator dies, is incapacitated, whether temporarily or permanently, vanishes, or perhaps is even kidnapped,[67] the parties would be in a quandary with much more difficulties if the proceedings are already at an advanced stage. Of course, most arbitration procedures provide

63 Arbitral institutions are not always in an envious position since in promoting international arbitration, it takes into account diversity also in terms of geographical representation. At times, institutions may want to align their development objectives with the appointment of arbitrators from their targeted jurisdictions. However, this does not mean that the arbitrators are not qualified except that parties who are paying for the arbitration services expect nothing less than the best for their case for their plan is to win, thus they do not desire to be made part of the institutions' corporate plan. Common examples of such grievances include the appointment arbitrators from purely civil law jurisdiction to hear disputes and parties from common law jurisdiction or arbitrators who may be perceived to be disconnected from the parties and the disputes in terms of expertise, including sometimes language as well as custom.

64 In the case of administered arbitration, the challenge will be informed to the institution and depending of the rules and institutional procedure, the arbitral tribunal will also be informed and be given the opportunity to respond to it.

65 Model Law, art. 13(2).

66 Model Law, art. 13(3).

67 Marc J. Goldstein, *International Commercial Arbitration*, 34(2) INT'L L. 519, 528 (2000).

for a substitute arbitrator in instances of the failure or impossibility of the arbitrator to act,[68] but the question is the practical consideration of doing so.[69] In such an unfortunate circumstance, the only practical approach is for the entire arbitral proceeding to restart *de novo*. However, unlike a tribunal of three arbitrators, there would be greater latitude for the parties, the substitute arbitrator and the remaining arbitrators to discuss at what stage the proceedings should proceed from (i.e., if there is any need for rehearing of certain parts of the case). The substitute arbitrator would confer with his arbitrator colleagues on the proceedings thus far and if need be, seek clarifications from the parties or hold a short oral hearing to fill in any missing links in the case of conclusion of oral hearings. Arguably, having three arbitrators could hedge against calamities and "*not putting all the eggs in one basket*."

Next, what if the sole arbitrator is incompetent or inefficacious? Perhaps some arbitrators took on more cases than they could and ended up having to prioritise other large value disputes or own professional commitments since many arbitrators still retain their full-time occupations. Accounts of arbitrators who failed to respond to the parties timely after the conclusion of the oral hearing,[70] or took years before rendering the final awards are not unheard of. Worst, as time lapses, the arbitrator may have difficulties trying to recall what happened one or two years ago as memory fades. In a reported Singaporean case, an arbitrator took more than ten years after the conclusion of the hearing to render the arbitration award.[71] Putting aside the more extreme examples, a tardy arbitrator can be subject to a request for removal[72] for "*failing to act without undue delay*" as justice delayed is justice denied.[73] It is thought to be highly unlikely that in the case of a three-member tribunal, all the arbitrators would become unresponsive.

Already discussed earlier, some arbitral institutions' rules whilst prescribing default single arbitrators may also appoint a tribunal of three arbitrators if the dispute warrants it. Indeed, disputes which are likely to be demanding and complex will ideally be handled by a "*full bench*" of three arbitrators who can provide better support to each other. In the back of the mind of the parties, they are not free from the anxiousness of pleading before a sole arbitrator because it is essentially one person's view; if they form certain views or make up their mind, no one else can change their views and decision.

The sole arbitrator acts alone without the benefits of other arbitrators scrutinising each other. For instance, in a tribunal of three arbitrators, the presiding arbitrator is usually designated as the main

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68 Model Law, art. 14.

69 In the case of a deceased sole arbitrator and in the instance of an advanced stage proceedings, it is possible that the substitute arbitrator would rely on the transcript of the oral hearings, if any, but would likely seek further clarifications from the parties including hold a brief oral hearing. It is argued to be possible for the remaining members of a tribunal to render an award on the basis of the majority of the tribunal albeit remaining two of three-member tribunal, especially with the agreement of the parties which may take into consideration time factor and the unique circumstances. *See*, *supra* note 67.

70 E.g. PT Central Investindo *v.* Franciscus Wongso and others and another matter [2014] SGHC 190.

71 Hong Huat Development Co (Pte) Ltd v Hiap Hong & Co Pte. Ltd., [2000] SGCA 14.

72 UNCITRAL Model Law, art. 14(1).

73 However, this must be substantiated as a matter of as a matter of objective and subjective standard. It is objective if an arbitrator cannot respond to the parties' emails or correspondences despite repeated reminders but it is subjective if a party expects the arbitrator to reply its communication within twenty-four hours, or rendering the final award within weeks of the conclusion of the arbitral hearing. Arguably, delay cannot be a "*mere passage of time but passage of time that was more than was necessary and desirable.*" *See* Regina v. R & Anor., [2016] EWCA Crim 1938.

contact person for the tribunal but even so, the co-arbitrators will always be required to approve draft communications and edit or prepare draft correspondences before being transmitted. The lack of peer-checking with a sole arbitrator does give rise to the concern of their personal conduct in addition to professional conduct,[74] after all, arbitrators perform a quasi-judicial function. There are many instances of controversial conduct of arbitrators that do not help in assuaging apprehensions. In *Catalina (Owners)* v. *Norma (Owners),* the sole arbitrator, an eminent lawyer, uttered a racist remark leading to his disqualification. One might wonder, what if he was never caught saying what he said, what was his mindset that would have influenced his decision making?

If the parties are faced with a strong-willed arbitrator, it can prove to be disconcerting. The Singapore High Court's case of *Turner (East Asia) Pte. Ltd.* v. *Builders Federal (Hong Kong) Ltd. and Another*,[75] concerns the removal of the arbitrator for not conducting himself impartially, but what might be interesting to note was the injudicious conduct of the sole arbitrator and rather controversially, the hostile treatment to one of the parties and offensive letters. Some of the arbitrator's remarks were also abrasive and the arbitrator defended himself by stating that those were merely "*jocular comments*."[76] In *Cofely Ltd.* v. *Bingham & Anor*,[77] a sole arbitrator was subject to an application for removal due to repeat appointments. When requested by a party's counsel to recuse himself, the arbitrator called for a hearing during which he aggressively questioned the party's counsel[78] and made known his displeasure, giving the impression of "*entering the arena.*"

Indeed, the above examples and discussions are not passing any judgement on the single arbitrator system. However, might any of the situations in the cases above have been different if it was not arbitrated by a single arbitrator whereby there were other arbitrators involved? Whilst there is no guarantee that a three-member tribunal will always please the parties and produce a flawless outcome, the critiques of the sole arbitrator system as seen above have shown that in the realm of arbitration where arbitral awards cannot be "*appealed*" and the stake can be immensely high, it would be reasonable for the single person system be put under the microscope.

D. Three-member tribunal

i. Issue of costs

Considering all of the above discussion thus far, there appears to be no hostility towards an arbitral tribunal constitution of more than one arbitrator. The issue of cost stands out as the core issue, or perhaps, even the sole issue. As already enumerated above, arbitration is a "*one bullet, one shot*" attempt and thus, evidently, the risk is very high. Would the economic saving of two-thirds of the

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74 This is well established in medical law as regards a medical practitioner's in the distinguishment of personal conduct, professional conduct and professional competence. Skidmore v. Dartford & Gravesham NHS Trust, *per* Lord Steyn, [2003] UKHL 27, ¶¶ 18-19:
"…It seems right to treat the definitions of professional conduct ("behaviour of practitioners arising from the exercise of medical or dental skills") and professional competence ("adequacy of performance of practitioners related to the exercise of their medical or dental skills and professional judgment") as the primary categories. Personal conduct is the residual category consisting of "behaviour . . . due to factors other than those associated with the exercise of medical or dental skills" (Emphasis added).
For present purposes it is unnecessary to examine the distinction between professional conduct and professional competence...The line drawn between professional conduct and personal conduct is conduct "arising from the exercise of medical or dental skills" and "other" conduct."

75 Turner (East Asia) Pte. Ltd. v. Builders Federal (Hong Kong) Ltd. and Another, [1988] SGHC 47.

76 *Id.* at 103.

77 Cofely Ltd. v. Bingham & Anor, [2016] EWHC 240 (Comm).

78 *Id.* at 63, 64, 66.

fees and expenses of the tribunal be worth it? If it is all about cost, a crucial question that must be asked would be how burdensome are the fees and expenses of the arbitral tribunal vis-à-vis the whole cost of resolving a dispute through arbitration?

Among others, high cost, lengthy process and unnecessary complexity are the common grievances of arbitration users and these were also flagged as some of the major disadvantages of arbitration by the authoritative Queen Mary University of London's ["**QMUL**"] annual arbitration survey in 2006 and 2008[79] as well as the QMUL 2015 survey which still identified high costs as arbitration's worst feature.[80] According to a 2011 commentary, twenty-one arbitral institutions were polled on arbitration costs, and the results were similar to an earlier International Chamber of Commerce ["**ICC**"] survey, which found that 82 per cent was for counsel's fees and expenses, 16 per cent for the arbitrators' fees and 2 per cent for the institutions' fees.[81] Furthermore, according to the 2012 ICC Commission Report, "*costs incurred by the parties constitute the largest part of the total cost of international arbitration proceedings*."[82] The fees of arbitrators are *ad valorem*; it is transparent and can be accounted for. In a nutshell, arbitrators do not contribute to the high costs of arbitration nor constitute the substantial cost element in an arbitration.

It is also necessary to consider the preference of arbitration users and contract drafters as to the preferred number of arbitrators as decided at the outset of the contracts. A useful reference point is the data published by the ICC, arguably the world's leading international commercial arbitration service provider. According to its ICC 2020 statistics,[83] a vast majority of parties (87 per cent) have agreed on the number of arbitrators out of which, 62 per cent opted for a three-member tribunal and 38 per cent for a sole arbitrator.[84] When the parties have not agreed on the number of arbitrators, according to the ICC rules, the ICC Court would therefore determine for the parties and as a result, the overall statistics showed that 56 per cent of cases have been submitted to a three-member tribunal and 44 per cent to a sole arbitrator.[85]

ii. Does quantity equal quality?

As mentioned above that the Working Group observed that "*a panel of three arbitrators was more likely to guarantee equal understanding of the positions of the parties,*"[86] it is posited that there are also other

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79 *See*, Queen Mary University of London, International arbitration: Corporate attitudes and practices 2006, *available at* https://arbitration.qmul.ac.uk/media/arbitration/docs/IAstudy_2006.pdf; Queen Mary University of London, International Arbitration: Corporate attitudes and practices 2008, *available at* https://arbitration.qmul.ac.uk/media/arbitration/docs/IAstudy_2008.pdf.

80 Queen Mary University of London, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, *available at* https://arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf.

81 Matthias Scherer, *Arbitral Institutions under Scrutiny*, KLUWER ARBITRATION BLOG (Oct. 05, 2011), *available at* http://kluwerarbitrationblog.com/2011/10/05/arbitral-institutions-under-scrutiny/.

82 ICC Commission, Report on Controlling Time and Costs in Arbitration: Second Edition, at 6 (2012).

83 *ICC Dispute Resolution Statistics: 2020*, INTERNATIONAL CHAMBER OF COMMERCE (Aug. 03, 2021), *available at* https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/icc-dispute-resolution-statistics-2020/. At the time of writing this article, the 2021 statistics are not available yet.

84 *Id.* at 13.

85 *Id.* at 13. In theory, a high value cases may warrant the appointment of three-member tribunal, however a highly experienced sole arbitrator with strong track record could also be appointed. On the other hand, complex cases may not necessarily equate to high value dispute thus may warrant three arbitrators but also a sole arbitrator depending on the case. As a whole, statistically this shows that there is a higher percentage of three-member tribunals being determined by the ICC Court than those of the sole arbitrator.

86 HOLTZMANN, *supra* note 27, at 349.

dimensions to this. Hypothetically, based on logic and syllogistic arguments, the decision-making by three persons would be of a greater weight compared to one, granted that all of them are of equal intellect. It was also argued by a commentator in the case of the multi-judge decision-making process that "*reasonable assurance of sound decision and public confidence in that soundness support the multi-judge system.*"[87] In a note published by the *de Rechtspraak* of the Netherlands on best practices and recommendations for the Dutch civil divisions of the Court of Appeal, it is said that:[88]

> *"["I]t follows from research that in many cases a decision made by three judges is less likely to be at risk of errors than a decision made by a single judge. In addition, the involvement of three judges deepens the debate and sheds light on the case from various perspectives. A three-judge ruling is a synthesis of three opinions. For this reason, three-judge decisions have advantages from a qualitative point of view, or rather: they potentially have advantages."*

Having more than one arbitrator also essentially allows the constitution of a variety of experts, including a balance of expertise such as legal and non-legal experts. This is of particular relevance, especially when the dispute involves technical issues and is multi-jurisdictional where a multi-member tribunal can be constituted to reflect the circumstances of the disputes. For example, the Indus Water Treaty, 1960[89] provides for disputes[90] arising to be referred to arbitration by a Court of Arbitration established in accordance with Annexure G of the Treaty:[91]

> *"4. Unless otherwise agreed between the Parties, a Court of Arbitration shall consist of seven arbitrators appointed as follows:*
>
> *(a) Two arbitrators to be appointed by each Party in accordance with Paragraph 6; and*
>
> *(b) Three arbitrators (hereinafter sometimes called the umpires) to be appointed in accordance with Paragraph 7, one from each of the following categories:*
>
> *(i) Persons qualified by status and reputation to be Chairman of the Court of Arbitration who may, but need not, be engineers or lawyers.*
>
> *(ii) Highly qualified engineers,*
>
> *(iii) Persons well versed in international law.*
>
> *The Chairman of the Court shall be a person from category (b) (i) above." (emphasis added)*

Although some commentators have described how an arbitrator can be multi-talented in various fields and proficient across different legal jurisdictions from all over the world, it is thought that a realistic, as well as prudent approach, should be taken in order to not over exaggerate the vocation

87 Robert A. Leflar, *The Multi-Judge Decisional Process,* 42 MD. L. REV. 722, 723 (1983).

88 The Judiciary, Professional standard: The three-judge decision-making process: Best practices and recommendations for the civil divisions of the courts of appeal., at 3, *available at* https://www.rechtspraak.nl/SiteCollectionDocuments/professional-standards.pdf.

89 The Indus Water Treaty, India-Pakistan, Sept. 19, 1960, 5 U.N.T.S. 603.

90 A dispute arose and held at the Permanent Court of Arbitration, also referred to as the Indus Waters Kishengaga Arbitration, 2013. *See* Indus Waters Kishengaga Arbitration (Pakistan v. India), Case No. 2011-01, Final Award (Perm. Ct. Arb. 2013).

91 *Id.* at ¶ 4.

of the arbitrator.[92] Thus, it is only likely through a three-member tribunal that a balanced and well-represented set of expertise can be constituted. For example, an engineering related dispute involving two different legal jurisdictions could be heard by a three-member tribunal comprised of legal and engineering experts. As opposed to the case of a sole arbitrator, such a collective body of knowledge, expertise and experience including quasi-judicial acumen embodied by one person can be a unicorn.

iii. Three is a crowd?

If a tribunal of three members is thought to embody a collective view of three able arbitrators and they collectively contribute to and produce a final arbitral award, what might the "*behavioural science*" behind this be? After all, the tribunal consists of three highly able and intellectually charged individuals coming together, many, at times, as strangers. According to the ICC 2020 statistics, of the 289 decided awards (both partial and final) rendered by three-member tribunals, only 16 per cent were rendered by the majority of the tribunal,[93] meaning 84 per cent of the awards were rendered by a unanimous three-member tribunal. This is a high statistical indicative that tribunals can work together and often in accord. Whilst it can be argued that the ICC situation does not represent the entire global perspective, empirically, from among global practitioners, it is also known that credible arbitrators can work alongside each other with a high level of professionalism. As professional arbitrators, they know their responsibilities towards the parties and are unlikely to jeopardise their reputation, provided that, *ceteris paribus*, the parties have put together a set of experienced and able arbitrators.

iv. Checks and balances

An arbitral tribunal of three arbitrators which involves the nomination of an arbitrator by each party wherein the two arbitrators would appoint the chair or presiding arbitrator has occasionally been criticised as a flawed system potentially bogged by the party-appointed arbitrators feeling "*obliged*" towards their nominators including subconsciously becoming an advocate of the party's case. This article will not be able to address the above points in detail and it is suggested that further research be conducted, perhaps also involving aspects of human psychology.

Notwithstanding that granted that we are in accord an arbitrator is "*in the category of an independent provider of services who is not in a relationship of subordination with the parties who receive his services*"[94] and all arbitrators appointed would have passed the tests of impartiality and independence, the subsequent discussion deals generally with the conduct and behaviour of the arbitrators. This is of relevance especially when users of arbitrations have doubts whether arbitration as a private dispute settlement method outside of national courts can be free from influence or interference. This discussion does not seek to posture arbitration as a state of utopia, but despite imperfections, arbitration, for many, and globally, is still the only choice of dispute resolution. Therefore, more is the need for checks and balances whenever and wherever possible. Each arbitrator is expected to

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92 *See* RICHARD A. POSNER, HOW JUDGES THINK 7 (2008). The writer said about American judges, mutatis mutandis, is true also of the arbitrator: "*My analysis and the studies on which it builds find that judges are not moral or intellectual giants (alas), prophets, oracles, mouthpieces, or calculating machines. They are all-too-human workers, responding as other workers do to the conditions of the labor market in which they work.*"

93 *Supra* note 83, at 19.

94 *See* Jivraj v. Hashwani, [2011] UKSC 40, ¶ 40.

be one's own person and not an advocate for a party. A three-member tribunal can ascertain the process to be followed when deliberating on the decision making, this way there would be transparency. The tribunal could also scrutinise each other's thoughts and views and therefore not only work towards a well-covered outcome or decision but also one which is accountable.

Finally, if there is a rogue arbitrator, it is more likely to be a sole arbitrator since no other peer is watching or present in the tribunal. Three arbitrators would need to consult each other and consider each of their arguments as well as opinions to render a majority award. No one person would be making the sole decision.

III. Evaluation and postulations

A. Reconciling policies and practices

To recapitulate, the discussion can be narrowed down into two main points– the *first* is the question of policy and procedural framework, and the *second* is the practical aspect including understanding the needs of users.

For the first point, in terms of the standpoint of legislative drafters and arbitral rule drafts, a sole arbitrator as the default option stemmed from cost savings and efficiency factors. The policy of a single arbitrator system appears to have inherited the historical tradition of arbitration as an alternative dispute resolution system to the courts but over the decades, arbitration has metamorphosed. No doubt, there are still means for the admission of the three-member tribunal despite the default sole arbitrator system but this is mostly only available in institutional arbitration. The question is, should the current *leges arbitri* be overhauled to reconsider adopting the Model Law's original default number of three arbitrators? Whilst it is reasonable to consider arbitral institutions to be best positioned to administer procedural matters and make determinations on the number of arbitrators, there are still ad hoc arbitrations being opted by parties.

As for the second point, there exists some practical challenges in that most arbitrations are by way of an arbitration agreement in the contracts to submit future disputes to arbitration (unlike a "*compromise*"). The number of arbitrators would be decided there and then, whether consciously by the parties, or uninformed due to referring the disputes to arbitral institutions or their rules. Very often, only when a dispute has arisen would the parties be aware of the choice they have made or not made. In part, the situation is exacerbated by contract drafters replicating arbitration clauses from another source without fully grasping their applicability. There is also a possible disconnect between the contract drafters and the parties (also the eventual users of arbitration) as the choice and content of an arbitration clause are usually decided by the professional drafters who are mostly corporate lawyers.

Recent developments in arbitration may potentially render some previously held policies and practices obsolete. For example, third-party funding for arbitration whereby costs of doing arbitration will no longer be a hindering factor. With the focus on the best conduct of arbitral proceedings possible to obtain the most advantageous outcome where all financial burdens are being taken care of, the issue of costs of two additional arbitrators compared to a single arbitrator diminished. Also, in many jurisdictions, conditional and contingency fees agreements are now

increasingly permitted,[95] bearing in mind that the fees and expenses of arbitrators do not contribute to the bulk of the entire costs of doing arbitration, in fact, the fees of the counsel are. Incidentally, all along, claimants are seldom required to pay for all of the tribunal and arbitral institutional fees at the commencement of the proceedings as it would be equally shared with the respondents as a matter of the contract, but in the event of the respondents' default, the claimants would usually be required to pay in instalments throughout the proceedings.

Finally, with the increase in competition in the arbitration industry, there are now more options for disputants to consider which include lower-cost solutions such as new arbitral institutions, online dispute resolution mechanisms, self-representation with the assistance of alternative professionals, widening legal talent pool and the broader use of mediation. These transform the way arbitrations are conducted.

B. Recommendations

The following recommendations and guidelines are proposed to ameliorate the present system of the default number of arbitrators:

(a) Arbitration clause drafting checklist – It is trite law that an arbitration clause is considered standalone and entirely separate from the underlying contract. Given the gravity of this, it is rife today with arbitration clauses being drafted without being given serious consideration. With pathological arbitration clauses commonly seen, it would not come as a surprise if no due regard is given to the determination of the number of arbitrators. The International Bar Association ["**IBA**"] already made a key contribution to global educational efforts by publishing guidelines for the drafting of arbitral clauses.[96] However, the industry stakeholders can do more to promote the use of the guidelines including academic institutions, chambers of commerce, professional bodies and local bar associations.

Awareness should be created that the drafting of arbitration clauses is not only a matter for corporate lawyers but also for in-house counsels and business owners. As a suggestion, a much more detailed checklist can be created to supplement the IBA's drafting guidelines such as one containing some guidelines on determining the rules and number of arbitrators according to the contract's value, risk profile, complexity, jurisdictions, etc. This can better help contract drafters make an informed choice and understand not only the importance of the number of arbitrators but also many other equally important aspects of an arbitration agreement such as the juridical seat of arbitration or specifying the substantive law. In addition, the parties should also be aware of the features of institutional arbitration, such as an expedited procedure that can impact the number of arbitrators.

For instance, in a noteworthy case involving the number of arbitrators according to expedited procedures in *Noble Resources International Pte Ltd* v. *Shanghai Good Credit International Trade Co.,*

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95 For instance, Singapore's recent regulatory changes allowing conditional fee agreements. *See*, *Framework for Conditional Fee Agreements in Singapore to Commence on 4 May 2022*, MINISTRY OF LAW SINGAPORE (Apr. 29, 2022), *available at* https://www.mlaw.gov.sg/news/press-releases/2022-04-29-framework-cfas-in-singapore-commence-4-may-2022/.

96 IBA Guidelines for Drafting International Arbitration Clauses International Bar Association (2010), *available at* https://www.ibanet.org/MediaHandler?id=D94438EB-2ED5-4CEA-9722-7A0C9281F2F2.

Ltd.[97] the Shanghai court refused enforcement of a Singapore International Arbitration Centre ["**SIAC**"] award because it was arbitrated by a sole arbitrator under the expedited rules[98] when the arbitration clause provided for a three-member tribunal. The respondent objected to the choice of sole arbitrator but the SIAC confirmed the appointment of a sole arbitrator. At the enforcement stage, the award was refused enforcement on the grounds that the arbitral procedure was not as per the agreement of the parties and thus in breach of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**"].[99]

(b) Conversion of single to three-member tribunal – Already discussed above, the English Arbitration Act enables parties with a prior agreement to three arbitrators to convert to a sole arbitrator. This is a noble approach of promoting expeditiousness and cost-effectiveness but consideration must also be given to the complexity and circumstances of the disputes. Other than reinstating the original Model Law provision, national arbitration reviewers could consider the approach in the Hong Kong Arbitration Ordinance, or a "*reverse conversion*" as per the English Arbitration Act which enables parties that have agreed to a single arbitrator to convert to a three-member tribunal subject to fulfilling certain conditions and according to its set procedure. It would also appear that institutional arbitrations have broader latitude and greater flexibility in initiating innovative approaches through their arbitral rules, however, appointing authorities designated under the Model Law or Rules of Arbitration can similarly be called upon to perform the required role.

(c) Objective standards in determining the number of arbitrators – Generally, in the case of administered arbitration and expedited procedure, the arbitral institution would have the discretion to determine whether the complexity of the case would necessitate a three-member tribunal or not. It is believed that the introduction of an objective approach will help to avoid the use of subjective standards, and thus uncertainty. Arbitral institutions can avoid being exposed to a myriad of challenges including potential legal action involving the parties over procedural decisions, it is thought that providing a general practice note can seek to assure parties that there is transparency or also seek to provide basic guidelines to the parties as to the parameters allowing an application or appeal to increase the number of arbitrators. Finally, the party requesting a three-member tribunal may also elect to advance the additional cost of the two arbitrators. As usual, the arbitral tribunal will then make its decision on costs in the final arbitral award.

IV. Conclusion

International commercial arbitration has come a long way to be where it is today. The ghosts of the past are likely to be confounded by the current state of the conduct of arbitration today. It was considered to be an alternative dispute resolution method in the past and arbitration, according to the standard textbook definition decades ago, is often described as a quick and economical method

97 Noble Resources International Pte Ltd v. Shanghai Good Credit International Trade Co., Ltd., (2016) Hu 01 Xie Wai Ren No. 1, (Shanghai No. 1 Intermediate People's Court).

98 *See*, SIAC Arbitration Rules 2016, r. 5. The expedited rules apply when the dispute does not exceed the equivalent amount of S$ 6 million.

99 New York Convention, art. V(1)(d).

of dispute resolution. One commentator observed that the role of the arbitrator is not necessarily a specifically juridical one, whereas credibility, personal integrity and an understanding of commercial and technical issues are more important than legal competence.[100] Eventually, there is a shift since about 1970 where the penetration of the United States of America ["**USA**"] practitioners into international arbitration resulted in its "*judicialization*" and the introduction of USA-style procedures, and the tendency toward a more adversarial process.[101] The expectation of arbitrators then evolved and, among others, it is no longer just a process parties choose if they want to avoid national courts for an economical and faster option. Inevitably, the massive growth of international trade also resulted in the use of arbitration due to the New York Convention.

Today, the role of arbitrators has exponentially increased. The stakes are high and parties go to arbitration to win. The arbitrators are central in this process of "*private judiciary*."[102] The arbitrators are needed by the parties, and yet they are not always put on the pedestal; parties expect a lot from them and may not hesitate to make known their demands. The parties' options, de facto, are a tribunal of a single arbitrator or three arbitrators. Arbitration involves arbitrators who are natural persons and is not a mechanical process. The decision on the number of arbitrators can also be said to be a matter of case strategy when it is very much in the hands of the drafters, not the arbitral institutions or the arbitrators. We must not lose sight of the fact that the parties ultimately have the autonomy to choose the dispute resolution method they deem most appropriate.

The growth of international arbitration is still significantly influenced by arbitral institutions. Empirically, institutional arbitrations are now the norm; as a result of being at the forefront, arbitral institutions can continuously improve their procedures and processes, as well as contribute to the advancement of jurisprudence. In an academic debate, [103] the late Professor Emmanuel Gaillard expressed his opinions in favour of party-appointed arbitrators, which can be summed up as being great due to transparency and options. He continued by saying that in arbitration, parties can choose the institution, location, applicable law, and even the tribunal members. The chair is chosen with the participation of the parties, and arbitration requires all of these decisions. If institutions have the authority to appoint arbitrators in some circumstances, it is merely a power that the parties have delegated to them.

There have been discussions and debates about the necessity of party-appointed arbitrators in recent years, with some arguing that the idea of party autonomy in arbitration is outdated, thus arbitrators should be chosen on behalf of the parties, most likely by a third-party body like arbitral institutions. However, the parties' rights to select their arbitrators are not merely symbolic. In essence, it is not just a matter of the number of arbitrators because choosing three arbitrators rather than a single arbitrator can create a "*level playing field*" where the parties can decide how the

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100 Ralf Michaels, *Roles and Role Perceptions of International Arbitrators, in* INTERNATIONAL COMMERCIAL ARBITRATION AND GLOBAL GOVERNANCE: CONTENDING THEORIES AND EVIDENCE 59 (Thomas Dietz & Walter Mattli eds., 2014).

101 *Id.* at 60.

102 *Per* Lord Donaldson in Bremer Schiffbau und Maschinenfabrik v. South Indian Shipping Corp Ltd., [1981] AC 999.

103 SIAC, *SIAC-CIArb Debate 8 June 2017*, YOUTUBE (June 20, 2017), *available at* https://www.youtube.com/watch?v=h19vcrp-RpY.

arbitration would proceed since they were each given the chance to choose an arbitrator. Perhaps it is also time to re-establish the logic of arbitration.