บทความวิชาการ

จำนวนอนุญาโตตุลาการและผลต่อการทำคำชี้ขาดของอนุญาโตตุลาการ

Number of arbitrators and the effect on the Arbitration Award

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บทคัดย่อ

บทความนี้มีวัตถุประสงค์ เพื่อศึกษาว่า ปัญหาจำนวนอนุญาโตตุลาการที่ระบุเป็นเลขคู่หรือเลขคี่ ไม่ว่าจะเป็นจำนวนอนุญาโตตุลาการหนึ่งคน สองคน สามคน หรือมากกว่าสามคนขึ้นไปมีผลต่อการอนุญาโตตุลาการหรือไม่ และจำนวนดังกล่าวมีข้อดีข้อเสียอย่างไรต่ออนุญาโตตุลาการ โดยมีการยกตัวอย่างประกอบทั้งกฎหมายอนุญาโตตุลาการระหว่างประเทศ และกฎหมายอนุญาโตตุลาการของประเทศต่าง ๆ

ทั้งนี้จากการศึกษาพบว่า ปัจจัยที่มีผลต่อการแต่งตั้งอนุญาโตตุลาการที่เป็นเลขคู่หรือเลขคี่นั้น คือ ความสมบูรณ์ของสัญญาหรือข้อสัญญาอนุญาโตตุลาการ จำนวนอนุญาโตตุลาการ บทบาทหน้าที่และจริยธรรมของอนุญาโตตุลาการ ปัจจัยทางด้านค่าใช้จ่ายและระยะเวลา รวมทั้งปัจจัยอื่น ๆ เช่น ด้านกฎหมายและด้านจิตวิทยา เป็นต้น ล้วนเป็นปัจจัยที่มีผลต่อการแต่งตั้งอนุญาโตตุลาการ ซึ่งปัจจัยต่าง ๆ เหล่านี้ และจำนวนอนุญาโตตุลาการทำให้ผลของอนุญาโตตุลาการมีความแตกต่างกันออกไป

ข้อเสนอแนะในเรื่องของจำนวนอนุญาโตตุลาการ กล่าวคือ ถ้าข้อสัญญาอนุญาโตตุลาการมีมูลค่าของข้อพิพาทตามสัญญาสูง การแต่งตั้งอนุญาโตตุลาการควรแต่งตั้งจำนวนสามคนหรือเลขคี่ เพื่อที่ว่าจะได้ช่วยกันตรวจสอบและระวังข้อผิดพลาดต่าง ๆ ที่อาจเกิดขึ้นได้ แต่ก็อาจมีข้อเสียอยู่บ้างในส่วนของความล่าช้าและค่าใช้จ่ายที่เพิ่มมากขึ้นกว่าการแต่งตั้งอนุญาโตตุลาการเพียงคนเดียวที่ทั้งประหยัดเวลาและเสียค่าใช้จ่ายน้อยกว่า แต่การตั้งอนุญาโตตุลาการเพียงคนเดียวก็อาจมีอุปสรรคในเรื่องของการมองเห็นปัญหาในข้อพิพาทและเกิดข้อผิดพลาดได้ง่ายกว่าเช่นเดียวกัน

คำสำคัญ: อนุญาโตตุลาการ, จำนวนอนุญาโตตุลาการ, การแต่งตั้ง, ผลต่อการทำคำชี้ขาด

Abstract

Arbitration has become a popular means by which to resolve conflicts that arise from contractual agreements in a range of different commercial settings.[3] The appointment of the arbitrators is an important task for the parties, which needs to be provided in an arbitration clause. The decision on the number of arbitrators can benefit from taking account of multiple factors, including the conduct of the arbitrators; therefore, the purpose of this paper is to examine some of the factors the parties to an arbitration may consider when specifying the number of arbitrators in an arbitration clause based on a discussion of a practical case when the parties chose the number of arbitrators to settle their dispute.

This paper is expected to contribute to the general understanding of why a group of arbitrators is better than a single one when making this decision. Importantly, it seeks to identify the key factors that affect the appointment of arbitrators, including the role of arbitrators, ethics, and the way the arbitration should respond to claims of diversity in order to answer the question, "do the number of arbitrators affect the arbitration outcome?" in order to understand of the effects of arbitrator and case-specific differences on the outcomes of an arbitration.

Many domestic and International arbitration laws and rules grant to the parties their right to challenge on the number of arbitrators. The

[3] Pattawee Sookhakich, "Opportunity for Thailand to apply the "Med-Arb Process" as an Alternative Dispute Settlement Mechanism," *Assumption University Law Journal* 9, No. 1 (2018): 241.

UNCITRAL Model Law, French arbitration law and Thai arbitration law will be added as the examples. Details of the meaning of the arbitration process may help to understand the concept of "arbitration", and these are provided below.

Keyword: arbitration, sole arbitrator, number of arbitrators, an Arbitral Award

Introduction

There are two forms of arbitration under Thai law, namely, out-of-court and in-court. The provisions of the Arbitration Act 2002 are applied to an out-of-court arbitration, while an in-court arbitration is regulated by the Civil Procedure Code (CPC). It is notable that the Thai Arbitration Act 2002 has adopted most of the provisions related to the arbitral procedure and the enforcement of awards from the UNCITRAL Model Law on International Commercial Arbitration. According to the results of a 2018 survey, the three most valuable characteristics of international arbitration are the enforceability of the award, the ability to avoid specific legal systems and national courts, and the flexibility of the process.[4] Arbitration proceedings benefit from being faster than a judicial settlement by the court. They are less formal than litigation in the court and, since the parties are able to select the arbitrators themselves, they can be confident of the privacy of the process. Furthermore, the arbitration award is final and rarely challenged. The parties can be sure that their dispute will be kept away from the eyes of the media and the

[4] ICC Dispute Resolution Bulletin, *ICC Dispute Resolution Statistics* 2018, (Paris, Internaitonal Chamber of Commerce 2017), 7.

public because both parties to the arbitration, as well as arbitrator, are obliged to maintain the confidentiality of the whole arbitral proceedings and the arbitration award.[5] The parties select the number of arbitrators in the arbitration agreement based on their previous award and their reputation.[6] Therefore, the flexibility of the process and the ability of the parties to select the arbitrators continue to be perceived as the most attractive characteristics of arbitration. On the other hand, the settlement of international disputes by arbitration has some drawbacks; for example, the cost, lack of effective sanctions during the arbitral process, as well as the lack of power in relation to third parties.

The parties agree to settle all or some specific disputes that may arise between them and they expressly state the number of arbitrators in an arbitration agreement, which may be in the form of an arbitration clause in a contract or in the form of a separate arbitration agreement, as stated in Section 11 of the Thai arbitration Act.[7] If the parties disagree about the number of arbitrators, it may create further legal difficulties. The arbitrators are appointed by the parties; hence, there will be a specific number in each case. Some national arbitration laws have sole arbitrators, while others give

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[5] Pattawee Sookhakich, "Opportunity for Thailand to apply the "Med-Arb Process" as an Alternative Dispute Settlement Mechanism," 247.

[6] Naomi, G., "Singles vs. Panels: Do more Arbitrators induce less bias?," http://naomigershoni.weebly.com/uploads/5/3/2/0/53205125/singlesvspanels_nov15.pdf, (accessed Lanuary 20, 2020).

[7] Thai Arbitration Act, 2002, Sec. 11.

the parties a choice of either a sole arbitrator or a Panel consisting of two or three arbitrators.

It is stated in Article 10(1) of the UNCITRAL Model Law that "*The parties are free to determine the number of arbitrators, provided that such number shall not be an even number*". In contrast, it is provided in the Thai Arbitration Act 2002 that, where there is "an even number of arbitrators', the arbitrators are required to appoint a third person to be the Chairperson of the arbitral tribunal. The single arbitrator will be required to be a referee if the other two arbitrators disagree or when the parties are unable to agree on the number of arbitrators.[8] "An even number of arbitrators'" is required so that each party can appoint one or two of them. Therefore, arbitration agreements include the provision of a panel of three or more arbitrators that are not an "even number".

It is important to note that the use of out-of-court arbitration, which is currently the most popular form, will be the focus of this paper. One of the main questions to be answered is "Does the number of arbitrators affect the making of an Arbitral Award?" as well as the sub-questions of "how many arbitrators can the parties appoint?" and "what is a suitable number of arbitrators if the parties do not reach an agreement?" Furthermore, the standards of reaching a procedural decision by multi-numbers of arbitrators will be analyzed. There is some discussion of the possible effects of applying a number of arbitrators, but the parties must always choose an odd number. The arbitrators' neutrality and lack of bias is important to the arbitration. A

[8] Thai Arbitration Act, 2002, Sec. 17.

neutral arbitrator is a person who hears the arguments presented by the parties and listens to evidence from witnesses called by the parties, but he cannot address issues that are not raised by the parties.[9] The qualifications and challenges of an arbitrator are mentioned in Section 19 of the Thai Arbitration Act 2002, in which it is stated that *"an arbitrator may be challenged in circumstances that give rise to justifiable doubts as to his or her impartiality or independence"*. It was confirmed by the Thai Supreme Court Decision No. 2231/2553 that persons are disqualified from becoming an arbitrator if they are not impartial or independent. The liability of arbitrators in cases where their intention or gross negligence damages any party is subject to a civil action under Section 23 of the Arbitration Act 2002. Out-of-court arbitration disputes can be administered by selected arbitrators under the rules of the Thai Arbitration Institute (TAI), the THAC Arbitration Center (THAC), the Office of Insurance Commission (OIC), the Stock Exchange of Thailand (SET), and the International Chamber of Commerce (ICC Rules) or under the statutes of the United Nations Commission on International Trade Law (UNCITRAL). Related trends and statistics are provided below.

[9] Pattawee Sookhakich, *"Achievements and Difficulties of Med-Arb as practiced within the framework of International Arbitration Law,"* (Master of Law Thesis, in School of law Toulouse University 1 Capitole, 2012), 5.

The rise of Arbitration

The number of disputes successfully resolved through arbitration in Thailand continues to increase. According to the available public records, the report of the Department of Civil Dispute Settlement and Arbitration of the Office of the Attorney General shows that 62 arbitration claims were resolved by TAI in 2013 and 66 in 2014.[10] A large number of administrative cases are now being referred to arbitration in lieu of the courts of justice; for instance, disagreements over hiring contracts between the public and private sector and disputes between the Securities and Exchange Commission and listed public companies. Since this type of arbitration ensures the validity of the arbitration clause in a contract between a government agency and a private party, it will continue to play an important role as an acceptable and effective alternative means of resolving disputes in Thailand.

Number of Arbitrators

Since there appears to be no general rule of whether a sole arbitrator or a multi-arbitrator tribunal should be appointed, the establishment of the number of arbitrators in a particular case involves the consideration of many factors. Alan and Martin suggest that an arbitral tribunal may consist of one or more arbitrators based on the agreement between the parties.[11] In a commercial relationship between parties from the most developed and

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[10] Department of Civil Dispute Settlement and Arbitration, "Statistics of cases," www.dispute. ago.go.th/index.php/sn (accessed 25 April 2015).

[11] Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, (London: Sweet & Maxwell, 2004), 183.

developing countries, one arbitrator should be appointed by each party and the chairman should be jointly appointed by the two party appointees.[12] In practice, the choice is between one and three.[13] Either the parties' autonomy or innovation with the rules will prevail as long as it helps to make the outcome of the procedure fair and efficient. This is what distinguishes arbitration from litigation and a number of local laws essentially cover the agreement of an even number of arbitrators by providing for the appointment of an additional arbitrator.[14] The national legalization of the number of arbitrators is provided in Sections 17 and 18 of the Thai Arbitration Act in which it is stated in Chapter II that "The arbitral tribunal shall compose of arbitrators in an **odd number.** In any case where the arbitral panel cannot result in an even number, the arbitrators shall jointly appoint an additional arbitrator as chairman of the arbitral tribunal.[15] If the parties are unable to agree on the number of arbitrators, there shall be a sole arbitrator. If they are unable to agree on the arbitrators, they shall be appointed by the competent Court upon the parties' request". It is also stated in the Netherlands Code of Civil Procedure Article 1026(3), "If the parties have

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[12] Petar Sarcevic, *Essays on international commercial arbitration,* (Kluwer Academic Publishers, 1989), 42.

[13] Alan Redfern and Martin Hunter, Law and Practice of International Commercial Arbitration, 183.

[14] Department of Civil Dispute Settlement and Arbitration, "Statistics of cases."

[15] Institute for the promotion of arbitration and mediation in the Mediterranean, "Report on the criteria for selection of arbitrators," https://www.ispramed.com/wp-content/uploads/2012/09/Report-on-Selection-of-Arbitrators.pdf (accessed January 12, 2020).

agreed on an even number of arbitrators, the arbitrators shall appoint an additional arbitrator who shall act as the Chairman of the arbitral tribunal". This similarly applies to the French New Code of Civil Procedure, Belgian Judicial Code, and European Uniform Law on Arbitration.[16] With three arbitrators composed of two party-appointed arbitrators and a chairman, the parties will have equal rights in deciding the dispute.[17]

This system has some positive aspects, as well as a few drawbacks. Although sole arbitrators are popular in less complex cases and they seem to settle more cases, it is difficult for a single arbitrator to address errors and mistakes. Interestingly, more cases brought to the court involve a sole arbitrator rather than a three-member arbitral tribunal.[18] Three arbitrators are neutral and can balance the award, reducing the risk of poor decisions. A tripartite panel usually makes the parties feel better represented. For example, the Iran- United States Tribunal consists of nine arbitrators. Each of the two governments appointed one-third of them and the remaining third were selected based on the mutual agreement of the party-appointed arbitrators.[19] Hence, the tribunal consists of an Iranian arbitrator, an American arbitrator, and a chairman from a third country. An uneven number of

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[16] See more details in Gary B. Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2014), 1352.

[17] Crenguta Leaua and Flavius A. Baias, eds., *Arbitration in Romania: A Practitioner's Guide*, 1st ed. (Kluwer Law Internaitonal) 2017.)

[18] ICC Dispute Resolution Bulletin, *ICC Dispute Resolution Statistics* 2018, 4.

[19] Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* (Hague: Kluwer Law International, 1995), 15.

arbitrators is usually perceived to be essential to prevent deadlocks and ensure the making of a majority decision.

A further question is "Can there be an even number of arbitrators?". There is no mechanism in the given framework of Thai Arbitration Law that enables the courts to make a determination in the event of a procedural impasse. As a result, it is compulsory under Thai law for the number of arbitrators to be an odd number, regardless of the general rule that the parties may choose the number of arbitrators to decide their dispute. However, the domestic arbitration rules of France, the Netherlands, Belgium, Italy, Portugal, Egypt and Tunisia all prohibit an even number of arbitrators from presiding over a dispute.[20] Therefore, it is worth noting that it is mandatory in Thai law for the number of arbitrators to be odd, presumably in order to ensure a majority decision. Nevertheless, in some trades, it is a matter of custom for the parties to entrust their dispute to two arbitrators,[21] even though an even number may not be capable of finally resolving a dispute. In such cases, the decision would be considered to be inappropriate, having been based on pure compromise.[22] An even number of arbitrators are used in the United States and England where two-arbitrator tribunals are permitted, and they seem to have functioned satisfactorily and produced

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[20] Ibid, 15.

[21] Lars Heuman and Sigvard Jarvin, "The Swedish arbitration Act of 1999, five years on: a critical review of strengths and weaknesses" Papers presented, and the ensuing discussions, at an international arbitration symposium, (Stockholm, October, 7-8, 2004).

[22] Gary B. Born, *International Commercial Arbitration*, 1352.

effective results in a number of cases. For example, the arbitration between IBM and Fujitsu in 1990 was conducted by two arbitrators,[23] who resolved a multi-billion-dollar intellectual property dispute.[24] The case began with three arbitrators, but one of them was dismissed, and it proceeded with the two remaining arbitrators. Secret hearings were held in which these two arbitrators determined that IBM must grant Fujitsu access to information about the software that operates IBM's mainframe computers.[25]

Factors that affect the choice of the number of arbitrators

The decision to appoint a sole arbitrator or three arbitrators is important when attempting to resolve commercial disputes. A single arbitrator or a tri-panel depends on the type of case and why these numbers matter. Therefore, it is essential to consider the complexity of the case, timing, cost and profiles of the arbitrators to be selected, since these aspects will most certainly affect the results. Moreover, the complexity of the administration involved and the need for a peer review of the decision should also be considered in deciding whether a sole arbitrator or a tribunal

[23] The arbitrators were Robert H. Mnookin, a Stanford University law professor, and John L. Jones, a computer expert who was the retired executive vice president of the Norfolk Southern Corp.

[24] Los Angeles Times, "Fujitsu to Pay Big Premium for IBM Data: Arbitrators Resolve '82 Suit; Cost Put in Hundreds of Millions," *Los Angeles Times,* 29 Nov 1988, 1-2.

[25] Peter Coy., "Arbitrators to Announce Findings In IBM-Fujitsu Dispute," https://apnews.com/4da41d94ef69d229e3685d1383a9628c (accessed February 1, 2020).

of three arbitrators should be appointed.[26] According to Professor Jan Paulsson, "no matter the size of the tribunal, arbitrators should be chosen jointly or selected by a neutral body."[27] The determination of whether to appoint a single arbitrator or a tri-panel will influence the outcome of the case and several factors should be considered, including the Arbitration Agreement, the efficiency of the process, and the minimization of the costs. Moreover, the characteristics of the parties involved, the complexity of the legal issue, and the financial impact of the dispute are other factors that need to be weighed in deciding the number of arbitrators.

a) Arbitration clause

The relationship between the parties and the arbitrator can be seen in the arbitration contract, in which the parties agree to settle all or certain disputes that arise between them. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate arbitration agreement. The arbitration agreement must contain certain details; for instance, the parties should identify a professional arbitrator or the qualifications of the arbitrator in case they fail to respect the time limit to appoint one, the procedural issues to be managed by the arbitrator, and

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[26] Crenguta Leaua and Flavius A. Baias, "Arbitration in Romania: A Practitioner's Guide,"

[27] Yenew B. Taddele., "Why party-appointed arbitrators: a reflection," http:// www.abyssinialaw.com (accessed January 1, 2020).; see more, Jan Paulsson, "Moral Hazard in International Dispute Resolution," ICSID Review – Foreign investment law journal 25, 2 (2010): 339, 352.

the value of the claim, etc.[28] The number of arbitrators is determined by the arbitration agreement. As mentioned earlier, the parties must expressly state the number of arbitrators in the arbitration agreement. Section 17 of the Thai Arbitration Act provides that an arbitration should consist of an odd number of arbitrators, but in cases where an even number of arbitrators are appointed, they should jointly appoint an additional arbitrator to chair the arbitral tribunal. This indicates that the parties may agree on a number of arbitrators, not only three.

Moreover, there are some differences between an *ad hoc* and an institutional arbitration. If the parties stipulate a preference for an institutional arbitration, the number of arbitrators selected will depend on the concrete rules of the arbitration body involved.[29] If the parties have agreed on an *ad hoc* arbitration, but have failed to stipulate the number of arbitrators in the arbitration agreement or have agreed on a different uneven number, particularly a single arbitrator, the question that arises is whether the parties can agree on another number of arbitrators to form the arbitral tribunal. The Thai law provides that the arbitrators shall jointly appoint an additional arbitrator as the chairman of the tribunal unless the parties previously agreed to designate an uneven number of arbitrators.[30] Some scholars argue that Article 17 of the Thai Arbitration Act is a mandatory provision, since the number of arbitrators can only be one or three;

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[28] Insitiue for the promotion of arbitration and mediation in the Mediterranean, "Report on the criteria for selection of arbitrators,"

[29] Petar Sarcevic, "Essays on international commercial arbitration,"

[30] Thai Arbitration Act, 2002, Sec. 17.

otherwise, the parties' agreement would be invalid because it would violate Article 17, while others contend that Article 17 is a discretionary stipulation, and the parties' agreement overrides it. It is suggested that Section 17 is discretionary, and should not restrict the parties' autonomy for two reasons: (1) Section 17 does not involve the jurisdiction of the arbitration, or the validity of the arbitration agreement, which may leave the power for these at the legislature's discretion. It is something that may be agreed by the parties; (2) in practice, parties may agree to compose an arbitral tribunal in various forms; for example, they may agree that the presiding arbitrator must be jointly selected by the arbitrators the two parties nominate, or a lucky draw, etc.[31]

The ambiguity in the arbitration clause related to the number of arbitrators will lead to the failure to specify the number of arbitrators. The arbitration clause in the case of the *Itochu Corporation V Johann M.K. Blumenthal GMBH & Company KG & Another [2012] EWCA Civ 996*[32] contained the following terms;

"Any dispute ... shall be submitted to arbitration held in London in accordance with English law, and the award given by the arbitrators [sic] shall be final and binding on both parties."

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[31] Ma Xiaoxiao, "How many arbitrators do you need in mainland China?," https://www.vantageasia.com/many-arbitrators-need-mainland-china/ (accessed January 20, 2020).

[32] Ito Corporation v Johann M K Blumenthal GmbH & Co KG and anor [2012] ***EWCACiv*** 996 http://www.bailii.org/ew/cases/EWCA/Civ/2012/996.html, (accessed January 20, 2020).

Multiple arbitrators can be implied from the above since the number of arbitrators is not clearly mentioned, but what gives rise to the ambiguity of how many arbitrators should be appointed is not specified. It can be assumed that three arbitrators should be appointed as a result of the arbitration clause referring to "arbitrators" in the plural; therefore, it would be inappropriate if a sole arbitrator was appointed or another party contested the appointment of only one. This absence of clear standards for the selection of party-appointed arbitrators may undermine the confidence in arbitration.[33] This raises the question of whether implied consent accurately represents the parties' intention and also the question of interpreting the arbitral agreement. It must be determined if the reconciliation of the parties' agreement on the number of arbitrators and the institutional rules expressly agree on the number of arbitrators.[34] This decision reinforces the English court's view that the number of arbitrators should be established in an arbitration clause; however, the Act provides that the court shall appoint a single arbitrator in cases where there is no agreement as to the number. It can be learned from this case that parties' failure to specify the number of arbitrators will result in the appointment of

[33] Yenew B. Taddele., "Why party-appointed arbitrators: a reflection,"

[34] Fabian Bonke, "Overriding an Explicit Agreement on the number of arbitrators – one step too far under the new ICC expedited Procedure rules?" Kluwer Arbitration Blog,http://arbitrationblog.kluwerarbitration.com/2017/05/22/overriding-an-explicit-agreement-on-the-number-of-arbitrators-one-step-too-far-under-the-new-icc-expedited-procedure-rules/ (accessed January 1, 2020).

a sole arbitrator,[35] despite the fact that the parties considered appointing a tribunal of more than one arbitrator.

b) Choice of arbitrators

Arbitrators from different professions or backgrounds will help to promote the fairness of a justifiable award based on deliberation, co-operation and their prospective contribution. Hence, it could be said that an arbitration is only as good as the arbitrators.[36] There is a case for encouraging diversity in selecting arbitrators because those from different professions or backgrounds are likely to contribute more to the arbitral proceedings. Hence, there is a need to raise awareness of the advantages of diversity, as well as the standard of legal education and professional training in less developed jurisdictions.[37]

The choice of arbitrators depends on specific governmental institutions, for instance, the Office of Insurance Commission, the Department of Intellectual Property and Securities and the Exchange Commission. In Thailand, when a dispute arises from administrative contracts that include an arbitration clause, government agencies often appoint a public prosecutor as an arbitrator. Therefore, it is critical that a fair and impartial

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[35] Christopher Roberts, "International arbitration newsletter," https://www.dlapiper.com/en/us/insights/publications/2012/12/parties-failure-to-specify-number-of-arbitrators/ (accessed January 15, 2020).

[36] Yenew B. Taddele., "Why party-appointed arbitrators: a reflection,": 5.

[37] White and Case, "2018 International arbitration survey: the evolution of international arbitration," https://www.whitecase.com/sites/whitecase/files/files/ download/publications/2018-international-arbitration-survey.pdf (accessed January 16, 2020).

public prosecutor is appointed in such cases.[38] Furthermore, the purpose of the bill or so-called "Amendment", issued on the 25th January 2019, by the National Legislative Assembly, was to amend the Thai Arbitration Act B.E. 2545 (2002) in an effort to address this issue and improve the arbitral proceedings in Thailand by allowing foreign arbitrators to arbitrate the proceedings in Thailand.

There are two kinds of out-of-court arbitration, namely, ad hoc and institutional. If the disputing parties agree to choose an ad hoc arbitration, they can choose the arbitrator(s) without involving an institution. They are free to negotiate the arbitrators' fees and do not have to pay for any extra services that may be provided by an arbitration institution, such as scheduled hearings or the distribution of documents. They also need access to sufficient information about the arbitrators they consider appointing in order to make an informed choice. The most used sources of information about arbitrators include "word of mouth", internal colleagues and publicly-available data.[39] For instance, in *Perkins Eastman Architects DPC* v. *HSCC (India) Limited,*[40] the Apex Court reiterated that a person who has an interest

[38] Administrative Court Order Black Case No. Kor.1/2554, Red Case No. Kor.5/2554.

[39] ICC Dispute Resolution Bulletin, *ICC Dispute Resolution Statistics* 2018, 3.

[40] Ashima Obhan and Akanksha Dua, "Interested Persons Cannot Appoint Sole Arbitrator," Cooperate Law https://www.obhanandassociates.com/blog/interested-persons-cannot-appointsolearbitrator/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration (accessed January 16, 2020).

in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator.

c) Efficiency of arbitration in decision-making

The benefit of a tri-panel is that it balances the decision-making process, which is central to effectively reaching an international agreement. International and regional organizations can make decisions based on applying various methods, such as majority, unanimity and consensus.[41] All arbitral tribunals refer to a mechanism of dispute management conducted via the process of consensus and make a decision based on a consensus.[42] This consists of a broad agreement achieved behind closed doors, in which members have limited choices in terms of public divisions and legalistic procedures.[43] Consensus-based decision-making does not imply unanimity,

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[41] Pattawee Sookhakich *"The implementation of the ASEAN Trade Dispute Settlement Mechanism for the preparation of the ASEAN Economic community (AEC),"* PhD Thesis, School of law University of Zaragoza and University Toulouse 1 Capital, 2017), 26.

[42] Alaz Uzelac, "Number of arbitrators and decisions of arbitral tribunals," *Central European Public Administration review (CEPAR)* 23,4 (2007): 583.

[43] The style of consensus can generally be seen in the ASEAN; for example, in the ASEAN, which consists of 10 member countries, when nine members agree to a certain scheme and one does not, this can be considered as a consensus, which can be beneficial for all the participants without damaging any others. More importantly, the requirement for all decisions to be reached by consensus means that further negotiations will continue if just one member country disagrees with the proposal. Read more, Koesrianti *"The development of the ASEAN trade dispute settlement mechanism: from diplomacy to legalism,"* (PhD thesis, University of New South Wales, 2005), 33.; see also, Mely Caballero-Anthony, *Mechanisms of dispute settlement: the ASEAN experience*

nor does it involve voting, since all members are not required to explicitly agree with the proposal being discussed, nor are all members required to have voted against it.[44]

Odd number (Single or three arbitrators)

As stated by Mel Brooks, "it's good to be king" as a single arbitrator. The advantages of being a sole arbitrator are self-evident. According to the 2010 International Arbitration Survey, "a sole arbitrator may assess the law and facts more fully, whereas with three arbitrators the result reflects closed door bargain" and Professor Alan Uzelac also adds that, if arbitrators had different opinions, it would make it impossible for them to reach a final decision or be a reason to terminate the arbitration proceedings. The arbitrators should be impartial and neutral in order to meet the procedural requirements and the award should be enforceable. The parties are entitled to select arbitrators with expertise and experience in the relevant matter. A neutral arbitrator is a person who hears the argument presented by the parties and listens to evidence from witnesses called by them. It is stated in Section 23 of the Thai Arbitration Act that arbitrators will not be

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(Contemporary Southeast Asia, 1998, 58. and Pushpa Thambipillai and J. Savaranamuttu, *ASEAN negotiations: two insights* (Singapore: Institute of Southeast Asian Studies, 1985), 11. Commercial Dispute Resolution blog, "Three heads better than one? Sole arbitrator vs panel" https://www.cdr-news.com/three-heads-better-than-one-sole-arbitrators-and-panels-compared

[44] Atena, S. Feraru, "ASEAN decision-making process: before and after the ASEAN Charter," *Asian development policy review,* www.aessweb.com/download.Php?id=3535 (accessed February 22, 2017).

liable for any act they perform during the course of their arbitral duty if it is not negligent and does not damage either party.[45] In the absence of an arbitral tribunal, the arbitrator's decision will not benefit from an exchange of views. Professor Gary Bond adds that "One arbitrator is three times less expensive than three and less prone to baby-sitting", as well as "This choice enables the parties to reach an award quicker because there is no need to coordinate calendars." A sole arbitrator is the most popular option to guarantee a security or credit documentation dispute.[46]

Three arbitrators

The parties need to have confidence in the arbitral tribunal. The arbitrators they appoint need to be able to understand the case because there may well be differences of language, tradition and culture between the parties in the formal matter at issue. These can sometimes be caused by problematic legal practices, which the arbitrator should be able to ensure are resolved before they lead to injustice.

Even numbers (Two arbitrators)

Two arbitrators working together are obliged to be impartial, even if they fail to make a unanimous decision due to their nature. Two arbitrators were appointed in the *Société d'études et d'Enterprises (SEEE) v Yugoslavia* case, and problems connected to appointing two arbitrators and an umpire

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[45] Thai Arbitration Act 2002, Sec. 23.

[46] Atena, S. Feraru, "ASEAN decision-making process: before and after the ASEAN Charter," 183.

were reported in the Bombay Court's judgment of *Eurrestra*. Many questions need to be considered; for example, who will lead in cases where there are two arbitrators? In cases where they cannot agree, how much time do they need to spend on such discussions? In a commercial context, the arbitrators are likely to come from different countries, which may waste time in selecting an umpire. If the umpire takes a back seat, which of the two arbitrators will preside over the hearings? Parties usually prefer not to have to consider these problems; hence, they avoid participating in a two-arbitrator system.[47]

Four or more arbitrators

As mentioned earlier, the tribunal in the case of *Iran-United States* is composed of nine arbitrators, which applies to interstate arbitrations, not international commercial arbitrations.

Five arbitrators

The parties can agree to appoint five or more persons to act as an arbitral tribunal, but this size is best reserved for arbitration between states. For example, five arbitrators can be appointed for state-state arbitrations based on Chapter 20 of the North American Free Trade Agreement (NAFTA).[48] Moreover, the gender of the arbitrators also adds to the diversity of a panel of arbitrators. According to a report from the International Chamber of

[47] Alan Redfern, Martin Hunter, Nigel Blackaby and Constantine Partasides, "Law and Practice of international commercial arbitration,",184.

[48] Chapter 20 of the North American Free Trade Agreement (NAFTA).

Commerce (ICC), the number of female arbitrators appointed has continued to increase since 2015 and is expected to almost double by 2020, and the number of women acting as president or sole arbitrator has also increased. It is also added that the proportion of younger arbitrators under the age of 50 has also increased to reach 35%.[49]

a) Value of claims

The reasons for making a special agreement may vary, and the cost of the arbitration will depend on the rules used and the arbitral venue. The arbitrator's fee for a Thai Arbitration of a matter concerning a disputed amount under THB 2 million is THB 30,000. There are fixed prices and percentages for disputes amounting to more than 2 million; for instance, the fee is THB 95,000 for amounts between THB 20 to 50 million, plus 0.2% of the amount exceeding THB 20 million. Hence, it is easier for one arbitrator to conduct the procedure without the need to consult the other members of the panel. This can save a significant amount of time and money, whereas a tri-panel may cause a substantial delay. In this paper, the cases are grouped into three different ranges of claim amounts. The first range consists of smaller claims, totaling 1 million baht or less. The second range includes cases with claim amounts of between 1 and 10 million, and the third range includes cases with the largest claim amounts totaling 10 million baht or more. Viewed from this perspective, the size of the claim appears to have an inverse relationship with the number of arbitrators. Parties often select a

[49] ICC Dispute Resolution Bulletin, *ICC Dispute Resolution Statistics* 2018. 6-7.

sole arbitrator in cases of lower quantum and less complexity.[50] This can be observed in Thailand, where the arbitration agreement provides for a sole arbitrator to be applied to a small claim and a three-person tribunal to be appointed in cases that involve a huge dispute.

One arbitrator may help to save arbitration costs in a higher-value case, but one that is less complex, or in cases of the same type of subject matter, and hence, realize the need for efficiency to the maximum extent. However, three arbitrators may reduce the possibility of personal bias or a wrong judgment in a smaller-value case, but one that is fairly complex. [51]

b) Cost and time

The benefits of referring a dispute to a sole arbitrator can be more easily achieved than with an arbitral tribunal comprising three arbitrators because there will be fewer people to consult. Also, the parties will only have to bear the fees and expenses of one arbitrator. The arbitral procedure will be completed more quickly with a sole arbitrator who does not have to spend time in consultation with others to arrive at an agreed or majority outcome of the dispute. The appointment of an arbitral tribunal of three arbitrators is more expensive than a sole arbitrator and it will usually take longer to obtain an arbitral award; on the other hand, three arbitrators are likely to prove the quality of justice and be more satisfactory for the parties.

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[50] White & case and Queen Mary University of London, "2010 International Arbitration Survey: Choices in international Arbitration," http://arbitrationblog.Kluwerarbitration.com/2018/08/07/the-fear-of-the-sole-arbitrator/ (accessed January 5, 2020).

[51] Ma Xiaoxiao, "How many arbitrators do you need in mainland China?."

c) other factors

Arbitral tribunals must consist of three arbitrators for the following legal and psychological reasons;

Legal reasons

This is based on the fact that different views may be better than one when deciding a dispute; for example; a sole arbitrator will find it difficult to fully understand a complex case. Three arbitrators should be appointed when each party appoints one arbitrator and each of them represents a different cultural perspective and has various insights of the national viewpoints and customs that may have a bearing on the arbitral deliberations.[52] Another reason is that the arbitral tribunal will protect the parties' trust in arbitration and increase the advantages of the arbitration mechanism. For example, according to Section 22[53], a substitute arbitrator shall be appointed based on the procedure for the appointment of arbitrators if the mandate of an arbitrator is terminated and the parties to the dispute have not agreed to it, a party to the dispute intends to challenge an arbitrator under Section 20, or an arbitrator's contract is terminated upon his death under Section 21[54], or because of his withdrawal from office, or because the parties agree to terminate the arbitrator's mandate or it is terminated for any other reason. Alternatively, provided that the parties

[52] Petar Sarcevic, "Essays on international commercial arbitration", 42.

[53] Thai Arbitration Act 2002. Sec. 22.

[54] Thai Arbitration Act 2002. Sec. 21.

consent, the two remaining arbitrators may continue the arbitral proceedings, make decisions and issue an award, with the approval of the chairman.

Psychological reasons

In fact, the appointment of a specific number of arbitrators is designed to understand the workings of their unconscious mind. There are many issues to consider when appointing three arbitrators, rather than one. For instance, groups of people can remember more facts than individuals and decision-makers may be better able to deliberate with one another and make a more accurate determination when they can share remembered information. Three arbitrators also bring different backgrounds and experience to the arbitral proceedings, which motivates the group with a more complete perspective of how a better-quality decision can be made.[55]

Conclusion

As mentioned above, the differences in the number of arbitrators have resulted in an arbitral award. In summary, the greatest benefit of arbitration is that the parties can select the arbitrators themselves. There are both advantages and disadvantages of using a sole arbitrator and three arbitrators. Most of the reported arbitration cases in the area of trade are adjudicated by a sole arbitrator or three arbitrators, but three carefully-chosen appropriately-qualified arbitrators should be sufficient to satisfy all the disputed issues in cases of major importance. The decision on the

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[55] Edna Sussman, "Biases and Heuristics in arbitrator decision-making: reflections on how to counteract or play to them" in Tony Cole, *The roles of Psychology in international arbitration* (Heague: Kluwer Law International, 2017), 70.

number of arbitrators can benefit from the consideration of multiple factors. The suggestion can be made in the case that if the arbitration clause is high value, three arbitrators will be worthwhile. A sole arbitrator may be best in the low value of arbitration clause. A single arbitrator may find it more difficult to detect and address errors, which may make parties reluctant to appoint a sole arbitrator. Three arbitrators on a panel are sure to spot mistakes better than an individual arbitrator and the parties are able to influence the selection of the tribunal.[56] On the other hand, three arbitrators not always better than one because the greater the number of arbitrators appointed, the greater the delay and cost of the proceedings.

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[56] María Angélica Burgos, "The fear of the sole arbitrator," Kluwer arbitration blog http://arbitrationblog.kluwerarbitration.com/2018/08/07/the-fear-of-the-sole-arbitrator/ (accessed February 1, 2020).

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