PARTY AUTONOMY AND DEFAULT RULES REGARDING THE CHOICE OF NUMBER OF ARBITRATORS

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I. Introduction

It would have been futile if the law—whether the law of the seat or institutional rules—rendered the selection of the number of arbitrators a matter of compulsion on the parties. The parties to international arbitration are presumed to understand which number suits their particular needs, for the purposes of amassing sufficient expertise for the exigencies of their dispute. Moreover, given that the appointment of arbitrators gives rise to significant expenditure, arbitral proceedings would be out of the parties' control if the state dictated the appropriate number of arbitrators. Even so, it is not always clear how many arbitrators the parties have chosen, or that in the event of multi-party arbitration each party is entitled to select one arbitrator. Hence, default rules are important in order for arbitral proceedings to continue unabated, as well as to avoid rendering arbitration too expensive or too onerous for one or more parties. Although there is some divergence among states as to whether or not the parties may appoint an even or odd number of arbitrators, the general positions on party autonomy and its default counterpart are generally not contentious. These have been expressed in the two key international arbitration instruments: Article 10 of the United Nations Convention on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration and Article 7 of the UNCITRAL Arbitration Rules.[1] The former contemplates that: "(i) The parties are free to determine the number of arbitrators[.] (ii) [F]ailing such determination, the number of arbitrators shall be three."[2]

Article 10 sets out the principle that the choice as to the number of arbitrators rests with the parties to the disputes first and

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[1] U.N. Comm. on Int'l Trade L., UNCITRAL Model Law on International Commercial Arbitration, U.N. Sales No. E.08.V4 (2008) [hereinafter UNCITRAL].

[2] *Id.* at art. X.

foremost. This choice is further supplemented by other rules and principles in the Model Law and elsewhere, all of which are largely dispositive and which settle the method of appointment as well as challenges against arbitrators, among others. Although the issue as to the number of arbitrators seems simple enough,[3] it has been the subject of some division within UNCITRAL, particularly regarding the capacity of parties to choose an even number, as opposed to only an odd numbered panel. Even the very concept of 'arbitrator' is not without some controversy. Some legal systems are prepared to stretch the limits of party autonomy in this respect by permitting the appointment of legal persons as arbitrators.[4] A legal person serving as arbitrator is not, of course, without problems due to the absence of sufficient transparency and lack of personal and ethical accountability, among others. Just like many other provisions in the Model Law, Article 10 introduces a default rule in situations where the parties have omitted to designate their preferred number of arbitrators or cannot subsequently agree on this matter. The default number is three, but this is not followed uniformly throughout the world and the suggestion here is that even where the three-member default rule has been implemented in domestic law it should not be strictly construed. It should only be applied where the parties are unable to reach agreement prior to the proceedings, but not in situations where: (1) they have consensually adopted another number following the constitution of the tribunal without set aside claims by any of the parties; and (2) they have consensually adopted another number that is inconsistent or even prohibited under the *lex arbitri* (i.e. even) and the losing party subsequently raises set aside claims.

This article is divided in two main parts. The first focuses on the party autonomy paradigm in international commercial arbitration. This includes an examination of rules and practices allowing the parties to choose both an even and odd number of arbitrators. The second part looks at the variety of default options, including the appropriate number of arbitrators in multi-party proceedings. Two smaller sections follow these. The first examines, albeit briefly, the position with respect to truncated tribunals. The second analyzes the appropriate number of arbitrators in the event

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[3] *See* MARTIN F. GUSY, JAMES M. HOSKING, & FRANZ T. SCHWARTZ, A GUIDE TO THE ICDR INTERNATIONAL ARBITRATION RULES 58 (2011) (referencing a study conducted of ICC arbitrations, in which only a quarter to a third of the submission agreements made explicit reference to the number of arbitrators).

[4] Sogecable S.A. v. Auna Telecomunicaciones S.A. (Court of Appeal of Madrid 2005).

that the parties choose one or more legal persons as arbitrators, particularly where there is a conflict with the *lex arbitri* or their chosen institutional rules.

II. The Party Autonomy Paradigm

Paragraph 1 of Article 10 of the Model Law clearly defers to party autonomy.[5] The parties are free to determine the number of arbitrators of their choice, even if this is not ultimately cost-effective or expedient. The same provision implies that the parties are moreover free to select an even number of arbitrators (i.e. two, four, etc.) and hence are not restricted to an odd number, which would guarantee the efficiency of proceedings and avoid recourse to the courts of the forum. This will be discussed in more detail below.

A. *Odd and Even Number of Arbitrators*

If party autonomy is to be meaningful it should be absolute, especially where other rules are available, if required, to supplement the wishes of the parties.[6] Paragraph 1 does not impose a particular number of arbitrators, nor does it impose an odd over an even number, despite the fact that the default option in Paragraph 2 favors an odd number. This result is confirmed by the *travaux* of the Model Law.[7] The rationale justifying an odd number is the avoidance of unnecessary impasses in situations of disagreement between party-appointed arbitrators. It is precisely for this reason that several institutional rules[8] and legal systems, such as Article 1451(2) of the French Code of Civil Procedure ("CCP"), provide that even where the parties' express agreement provides for an even number, an additional arbitrator shall be appointed lest the

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[5] UNCITRAL, art. X, ¶ 1.

[6] *See Electra Air Conditioning BV v Seeley International Pty Ltd. ACN 054 687 035* (2008) FCR 169 (Austl.); *see also Gordian Runoff Ltd. v The Underwriting Members of Lloyd's Syndicates* (2002) NSWSC (Eq) 1260 (Austl.).

[7] U.N. Secretary-General, International Commercial Arbitration, Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, U.N. Doc. A/CN.9/264, at 26–27 (Mar. 25, 1985).

[8] *See, e.g.*, Rules of Arbitration of the Vietnam International Arbitration Centre, art. 11–12 (Mar. 2017); *see also* Arbitration Rules of the German Arbitration Institute, art. 10–13, (2018).

agreement is invalid and the award set aside.[9] This does not, however, constitute a general principle, because it is assumed that parties to transnational contracts are rational and capable creatures and their intention is not to frustrate the arbitral process. Rather, they naturally presume that the party-appointed arbitrators will ultimately agree among themselves the outcome of the dispute or that in any event they will effectively exercise the role of chairman in casting the deciding vote, or at the very least that other secondary rules will undertake this task.

In the eventuality that an award is rendered by an even number of arbitrators in a seat that specifically requires an odd number, the award may be set aside from a formalistic legal perspective. However, given that the rationale underlying odd panels is to enhance party autonomy and not to obfuscate or restrict it, the more sensible solution would be to allow such awards where both parties freely participated in the process and no other irregularities arose. At the very least there are legitimate estoppel grounds for such an argument and it is in any event wholly consistent with the *travaux* and spirit of the Model Law and the party autonomy principle (the latter as far as non-Model Law states are concerned).[10] In *M.M.T.C. v. Sterlite Industries (India) Ltd*., the Indian Supreme Court upheld the parties' choice of an even number of arbitrators even though Section 10(1) of the Indian Arbitration and Conciliation Act prohibited the appointment of an even number of arbitrators. The Supreme Court held that an agreement in favor of an even panel did not invalidate the submission agreement, deferring to the predominance of party autonomy.[11]

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[9] ZIVILPROZESSORDNUNG [ZPO] [CIVIL PROCEDURE STATUTE] § 586(1) (Austria); Codice di procedura civile. [C.p.c.] art. 809 (Italy); Lei n. °63/2011 de 14 de dezembro [Act no. 63/2011], art. 8, no. 1, https://dre.pt/web/en/home/-/contents/145578/details/normal (Port.); Book IV, Law no. 134/2010, art. 586(1) C. Proc. Civ. (Rom.); Royal Decree no. M/34, June 8, 2012, ch. 3, art. 13 (Saudi Arabia); Ley 60/2003 de 23 de diciembre, de Arbitraje Art. 12 (Spain); 2017. Act LX on Arbitration, §§ 11, 12 (Hung.) (*see also* § 54, dictating that if the parties go ahead with proceedings where the number of arbitrators is even the ensuing award may validly be set aside by the court).

[10] Settlement of Commercial Disputes, Revision of the UNCITRAL Arbitration Rules: Note by the Secretariat, U.N. Doc. A/CN.9/WG.II/WP.145 (Dec. 6, 2006) (relating that in the latest revision to the UNCITRAL Rules, a proposal to include a provision was made whereby the parties could decide a number of arbitrators other than one or three, thus recognizing the ability of the parties to choose an even number).

[11] M.M.T.C. v. Sterlite Industries (India) Ltd., (1997) AIHC 605 (relied upon in National Council of Y.M.C. v. Sudhir Chandra Datt, (2012) A.C. No. 34/2012); Narayan Prasad Lohia v. Nikunj Kumar Lohia, (2002) S.C 1382/2002; and M/S Rapti Contractors v. Reliance Energy Ltd. and Ors, (2009) Delhi H.C. AA No. 6/2008).

III. The Default Rule

Article 10 of the Model Law was very much influenced by the 2010 UNCITRAL Arbitration Rules, Article 7 (Article 5 of the 1976 Rules), which provides that in the absence of party agreement, "if within thirty days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed."[12] This default rule is the cornerstone of Paragraph 2 of Article 10 of the Model Law.[13] Even so, the UNCITRAL Working Group has never exhibited significant consensus regarding the default option of three arbitrators. A significant focus on cost, fairness, and speed swayed several delegates to propose the option of a sole arbitrator.[14] The same arguments in favor of a sole arbitrator were echoed in the latest revision to the UNCITRAL Rules.[15] Against the cost-based arguments, the *travaux preparatoires* of the Rules demonstrate a more widespread inclination towards a default rule of three arbitrators, chiefly because this was perceived as being consistent with customary international law,[16] because it enhances the panel's degree of competence and expertise (including diverse commercial practices),[17] all of which are clearly imperative in complex cases.[18] Divisions among UNCITRAL delegates over a single or three-member default panel persisted in both the 1976 drafting

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12 *See* Report of Working Group II (Arbitration and Conciliation) on the Work of its Forty-Ninth Session, U.N. Comm'n Int'l Trade L., U.N. Doc. A/CN.9/665, at ¶ 65 (Sept. 30, 2008) (in which the Working Group expanded the time limit from 15 to 30 days); *see also* Report of the UNCITRAL, *Summary of Discussion of the Prelim. Draft*, ¶ 41, U.N. Doc. A/CN.9/SER.A/1975 (1975), *reprinted in* (1975) VI UNCITRAL Y.B. 24, at 29 (in which it was also agreed that the period of eight days, which was initially set forth, was insufficient for the parties to reach agreement on the desired number of arbitrators).

13 *See* Alan Uzelac, *Number of Arbitrators and Decisions of Arbitral Tribunals*, 23 Arb. Int'l 573 (2007); *see also* Gusy et al., *supra* note 3, at 55–64.

14 Summary Record of the Third Meeting of the Committee of the Whole (II), U.N. Doc. A/CN.9/9/C.2/SR.3, at ¶¶ 1, 5 (Apr. 13, 1976).

15 Report of Working Group II (Arbitration and Conciliation) on the Work of its Forty-Fifth Session, U.N. Doc. A/CN.9/614, at ¶ 60 (Oct. 5, 2006); Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules: Notes by the Secretariat, U.N. Doc. A/CN.9/WG.II/WP.147, at 34–35 (Aug. 3, 2007).

16 U.N. Doc. A/CN.9/SER.A/1975, *supra* note 12, at 39; Gusy et al., *supra* note 3, at 58–59 (To the degree that private practice in international commercial arbitration may constitute state practice or *opinio juris*, it is worth mentioning that more than 60 percent of ICC arbitrations involve submission agreements appointing three arbitrators.).

17 U.N. Doc. A/CN.9/SER.A/1975, *supra* note 12, at 39.

18 *Id.* at 58.

round as well as in the Rule's latest revision, although ultimately the three-member rule prevailed.

From the outset of the drafting of the Model Law, three default variants were put forward: (a) a three-member panel; (b) a number equal to the number of the parties, but increased by one in the event this turns out to be even; and (c) a sole arbitrator.[19] Despite these options, early on in the discussions the current phrasing of Article 10 remained largely uncontested.[20] At some point, Sudan put forward the proposition that the default number, notwithstanding the principle of party autonomy, should always be odd.[21] This proposal did not survive. India supported the view that the default rule should encompass a sole arbitrator for the sake of economy and expediency.[22] The 2006 amendments to the Model Law, unsurprisingly, had no impact on Article 10. As this article goes on to demonstrate, the issues that divided delegates and other stakeholders during the deliberations of the UNCITRAL Model Law and the Arbitration Rules have not been eliminated. Some national laws support even-numbered panels (or they are, at the very least, willing to tolerate them absent other procedural irregularities), while others strictly accept only odd-numbered panels. In equal manner, the default three-member rule is not universal. Moreover, few statutes cater to the number of arbitrators in multiparty proceedings and this has caused problems in the practice of arbitration. In general, Article 10 of the Model Law, as supported by its *travaux*, is a paradigm of flexibility and absolute deference to the party autonomy rule, to which all default rules are subservient.

In Paragraph 2 of Article 10 of the Model Law, the default rule states that, where the parties have failed to expressly state the number of desired arbitrators, there shall be three. There is a clear divide on this issue, with common law jurisdictions opting for a sole

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19 Note by the Secretariat: Model L. on Int'l Com. Arb., Draft Articles, U.N. Doc. A/CN.9/WG.II/WP.37, at 1–24 (1963), *reprinted in* 14 Y.B. Comm'n on Int'l Trade L. 51, U.N. Doc. A/CN.9/SER.A/1983, at 53–54 (1983).

20 Redrafted Articles I–XII on Scope of Application, General Provisions, Arb. Agreement and the Courts and Composition of an Arb. Tribunal, U.N. Doc. A/CN.9/WG.II/WP.45 (1983), *reprinted in* [1984] 15 Y.B. U.N. Comm'n on Int'l Trade L. 183, at 186; *see also* Note by the Secretariat: Composite Draft Text of a Model L. on Int'l Com. Arb., U.N. Doc. A/CN9/WG.II/WP.48 (1984), *reprinted in* [1984] 15 Y.B. U.N. Comm'n on Int'l Trade L. 218, at 221.

21 U.N. Comm'n on Int'l Trade L., *infra* note 22, at 8.

22 U.N. Comm'n on Int'l Trade L., Analytical Compilation of Comments by Gov'ts and Int'l Orgs., U.N. Doc. A/CN.9/263, at 23 (1985).

arbitrator,[23] whereas their civil law counterparts are inclined towards the number adopted in Article 10(2) of the Model Law.[24] In *Itochu Corp. Johann v. M.K. Blumenthal GMBH Co. & KG and Another*, the parties had expressly stipulated in a letter of guarantee—which was effectively their submission agreement—the appointment of 'arbitrators,' without specifying their preferred number. Given that the *lex arbitri* was English law, the Commercial Court and later the Court of Appeal were asked to decide whether the express preference for multiple arbitrators (by way of the letter 's'), but without any further mention of a precise number, triggered the default rule of a sole arbitrator under Section 15(3) of the English AA. The Court of Appeal, siding with the judgment of the Commercial Court, held that the default rule prevailed.[25]

No doubt, the failure of the parties to designate a precise number of arbitrators and the avoidance of the operation of the *lex arbitri*'s default rule may be remedied by their chosen institutional rules. Unlike the Model Law, however, the rationale of institutional rules in the absence of party agreement is to allow tribunals a wide margin of discretion based on the particular circumstances of each case. By way of illustration, Article 12(2) of the ICC Arbitration Rules provides that:

> Where the parties have not agreed upon the number of arbitrators, the Court shall appoint a sole arbitrator, save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators. In such case, the claimant shall nominate an arbitrator within a period of 15 days from the receipt of the notification of the decision of the Court, and the respondent shall nominate an arbitrator within a period of 15 days from the receipt of the notification of the nomination made by the claimant. If a party fails to nominate an arbitrator, the appointment shall be made by the Court.[26]

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[23] Arbitration Act 1996, c. 23, § 15(3) (Eng.); 9 U.S.C. § 5 (1926); Arbitration and Conciliation Act, c. 3, art. 10(2) (India); Int'l Arbitration Act 1994, § 9 (Sing.); Hong Kong Arbitration Ordinance, (2015) Cap. 609, art. 8 (H.K.).

[24] § 586(2) ABGB [ZPO] (Austria); Art. 1681(3) B.W. (Belg.); Lov nr. 553 af 24.06.2005 [Danish Arbitration Act] c. 3, § 10(2) (Den).

[25] Itochu Corp. v. Johann M.K. Blumenthal GMBH & Co. KG and Another, [2012] EWCA (Civ) 996 (Eng.).

[26] *See* 2017 Arbitration Rules, INT'L CHAMBER OF COM., art. 12(2) (2017); International Dispute Resolution Procedures, INT'L CTR. FOR DISP. RESOL., art. 11 (June 1, 2014); *see also* LCIA Arbitration Rules, ARB. & ADR WORLDWIDE, art. 5(8)–5(9) (Oct. 1, 2014).

This is certainly the most sensible option because a strict default rule may ultimately lead to injustices, particularly if the nature and size of the case does not justify three arbitrators.

The limited, available judicial practice of Model Law jurisdictions suggests that where the forum has adopted the default three-arbitrator rule into its domestic law, its courts will be unable to modify it in on other compelling grounds, such as cost-effectiveness or proportionality.[27] This is sensible because it would prejudice party autonomy in favor of judicial discretion, and in any event, it is assumed that the parties can always reach agreement (even at the last minute) and avoid the application of the default rule. Moreover, their counsel is, or should be, well aware of the default rule under the pertinent *lex arbitri*.

A. *More Than Three Arbitrators*

It is highly exceptional for parties, even in complex multi-party proceedings, to agree to a panel of more than three arbitrators. This not only raises costs but may produce delays related to their appointment or as regards coordination. Even in investment arbitration, the parties typically appoint a panel of three arbitrators.[28] Five or more arbitrators are usually reserved, but not always, in certain inter-state disputes under rules agreed in treaty form.[29] Moreover, it is also normal practice for boundary disputes administered ad hoc or by the Permanent Court of Arbitration ("PCA") for the parties to appoint at least five arbitrators.[30]

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27 Thésaurus Inc. v. Xpub Média Inc., [2007] QCCQ 10436 (Can.).

28 For a discussion specifically within the ICSID context, *see* CHRISTOPH H. SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY 475–79 (2d ed. 2009).

29 North American Free Trade Agreement art. 2011, Dec. 17, 1992, 32 I.L.M. 289 (1993) (stating that five arbitrators may be appointed); *see also* U.N. Convention on the Law of the Sea, *annex* 7, art. 3, *annex* 8, art. 3, Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994).

30 *See* Gov't of Sudan v. The Sudan People's Liberation Movement/Army ("Abyei Arbitration") (Arb. Trib. July 22, 2009), where five arbitrators were appointed on the basis of the parties' arbitration agreement of July 7, 2008.

B. *Number of Arbitrators in the Event of Multiple Parties*

Although domestic arbitral statutes have not, as a rule, dealt with this issue,[31] it has caused considerable agitation to the international arbitration community and has subsequently resulted in the extensive redrafting of several institutional rules. In the *Dutco* case, Dutco had entered into an agreement with a consortium of two German companies and, following a dispute, commenced arbitral proceedings against them under the ICC Rules in France. As this was meant to be a tribunal composed of three arbitrators, the ICC requested the consortium to designate its preferred arbitrator so that the two party-appointed arbitrators could go on to choose the president. Alas, each of the parties to the consortium wanted to appoint their own arbitrator but reluctantly agreed to appoint one jointly, reserving their right to subsequently challenge the ICC's decision on the grounds that it deprived them of the right to choose an arbitrator of their choice. The argument certainly makes sense from a strictly legal perspective, given that unlawful arbitral composition is grounds for setting aside[32] and non-enforcement of awards,[33] but at the same time, it is clearly impractical. In the case at hand, the French Court of Cassation approached the issue from a public policy perspective and held that the absence of equality in the appointment of arbitrators sufficed to set the award aside.[34] As a direct result of the *Dutco* judgment, the ICC swiftly amended its Rules in order to dispel any uncertainty for future litigants. Article 12(6)–(8) of the ICC Rules now stipulates that:

> 6. Where there are multiple claimants or multiple respondents, and where the dispute is to be referred to three arbitrators, the multiple claimants, jointly, and the multiple respondents, jointly, shall nominate an arbitrator for confirmation pursuant to Article 13.
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> 7. Where an additional party has been joined, and where the dispute is to be referred to three arbitrators, the additional party

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31 Art. 556(3) C. Proc. Civ. (Rom.) (stipulating that if there are multiple claimants or multiple respondents, the parties having common interests shall appoint a joint (one) arbitrator); *see* Maltese Arbitration Act 1996, c. 387, art. 21(A)(1) (Malta); *see also* Portuguese Voluntary Arbitration Law 2012, art. 11(1)–(2) (Port.).

32 U.N. Comm. on Int'l Trade L., UNCITRAL Model Law on International Commercial Arbitration, U.N. Sales No. E.08.V4, art. 34(2)(a)(iv) (2008).

33 *Id.*

34 Siemens A.G. & BKMI Industrienlagen GmbH v. Dutco Consortium Constr. Co., Jan. 7, 1992 (French Court of Cassation), *reprinted in* [1993] 18 Y.B. Comm. Arb. 140; *see also* U.N. Comm'n on Int'l Trade L., Rep. of the Working Group on Arb. and Conciliation on the Work of its Forty-Sixth Session, U.N. Doc. A/CN.9/619, at 19 (2007).

> may, jointly with the claimant(s) or with the respondent(s), nominate an arbitrator for confirmation pursuant to Article 13. 8. In the absence of a joint nomination pursuant to Articles 12(6) or 12(7) and where all parties are unable to agree to a method for the constitution of the arbitral tribunal, the Court may appoint each member of the arbitral tribunal and shall designate one of them to act as president. In such case, the Court shall be at liberty to choose any person it regards as suitable to act as arbitrator, applying Article 13 when it considers this appropriate.[35]

In this manner it is now clear that several parties to a single arbitration agreement, whether as claimants or respondents, must nominate and appoint a single (joint) arbitrator. Although some commentators suggest, albeit faintly, that this 'restriction' may lead to enforcement failure in some countries, allegedly because of the deprivation of the right to appoint one's preferred arbitrator (unlawful composition),[36] this is highly unlikely. By designating the Stockholm Chamber of Commerce ("SCC") or other institutional rules[37] in their arbitration agreement, the parties expressly accept that their choice of arbitrator will be undertaken by joint, mutual consent, and that in case of disagreement, the arbitral institution will make the appointment on their behalf.[38] The parties to a multi-party submission agreement may choose their method of ap-

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35 *See* 2017 Arbitration Rules, INT'L CHAMBER OF COM., art. 12(6)–(8) (2017); LCIA Arbitration Rules, ARB. & ADR WORLDWIDE, art. 8 (Oct. 1, 2014) (enunciating the same default rule); *see also* Portuguese Voluntary Arbitration Law 2012, art. 11(1)–(2) (Port.) (stipulating that as a matter of default the "court may appoint all arbitrators and indicate which one of them shall be the chairman, if it becomes clear that the parties that failed to jointly appoint an arbitrator have conflicting interests regarding the substance of the dispute, and in such event the appointment of the arbitrator meanwhile made by one of the parties shall become void"); *see also* G.A. Res. 65/22, UNCITRAL Arbitration Rules, at 9 (Dec. 6, 2010).

36 U.N. Conf. on Int'l Com. Arb.: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), art. V(1)(d) (1958).

37 *See* Arbitration Rules, ARB. INST. OF THE STOCKHOLM CHAMBER OF COM., art. 13(4) (2017).

38 Codice di procedura civile [C.p.c.] art. 816 (Italy) (stating that should more than two parties be bound by the same arbitration agreement, each party may request that all or some of them be summoned in the same arbitral proceedings and may by common agreement appoint an equal amount of arbitrators. If the parties fail to reach a common agreement as to the joinder of their cases, there will be as many arbitrators as there are individual respondents (paragraph 2). Where, however, a joinder of the cases is necessitated by law and the parties do not reach mutual agreement on a joinder the arbitration cannot proceed (paragraph 3).). *See also* ILIAS BANTEKAS, AN INTRODUCTION TO INTERNATIONAL ARBITRATION 96–97 (CUP, 2015).

pointment,[39] rather than rely on their chosen institutional rules or the default rules of the *lex arbitri*.

An extension of these developments clearly suggests that where the parties have agreed on the number of arbitrators but are unable to agree on their persons, the court upon which this task befalls cannot increase or decrease the parties' expressly chosen number. In *BP Exploration Libya Ltd. v. ExxonMobil Libya Ltd.*, the parties had opted for three arbitrators, each choosing its own, all of which would then elect the chairman. However, there were three parties in the submission agreement and following the selection of three arbitrators, (which meant that there was no room for a chairman,) the dispute as to the tribunal's constitution was decided by the district court, which went on to direct the parties to proceed with a five-member panel. This decision was reversed upon appeal, on the grounds that the courts cannot ignore the parties' preferred number.[40]

IV. Truncated Tribunals

The principles emanating from Article 10 of the Model Law apply *mutatis mutandis* to the appointment of arbitrators in situations of truncated tribunals under Article 15 of the Model Law. It suffices to say here that, although Article 15 of the Model Law stipulates that a substitute arbitrator may be appointed, if the agreement to arbitrate specifically named the parties' chosen arbitrators or their number thereof, a breach of the agreement might occur where the parties opt to continue the proceedings solely with the remaining arbitrators (truncated tribunal) or without one or more of the originally named arbitrators.[41] More institutional rules are increasingly catering to truncated proceedings and unless there is disagreement between the parties, there is little reason why truncated awards should be viewed as suffering from a defect that ren-

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[39] U.N. Comm. on Int'l Trade L., UNCITRAL Model Law on International Commercial Arbitration, U.N. Sales No. E.08.V4, art. 11, ¶ 2 (2008); *see also id.* at 10, ¶ 2.

[40] BP Exploration Libya Ltd. v. ExxonMobil Libya Ltd., 689 F. 3d 481 (5th Cir., 2012).

[41] U.N. Comm. on Int'l Trade L., UNCITRAL Model Law on International Commercial Arbitration, U.N. Sales No. E.08.V4, art. 15 (2008); *see generally* International Centre for Settlement of Investment Disputes Convention. Regulations and Rules art. 56 (Apr. 2006), https://icsid.worldbank.org/sites/default/files/documents/ICSID%20Convention%20English.pdf (no explicit rejection of the proposition that a truncated tribunal might render an award but envisage that the truncated period will be short, the vacancy filled as soon as possible by a substitute arbitrator).

ders them unenforceable.[42] A string of cases suggests that it is only where the operation of a truncated tribunal is deemed contrary to the (constitutional) principle of equal treatment that an award may be set aside.[43] This will only affect the parties' choice of number if the truncated tribunal were to resume the proceedings with a number not specified in the submission agreement and to which the parties' disagreed.[44]

In the *IBM/Fujitsu* arbitration, which lasted nearly ten years, the parties had agreed on the appointment of three arbitrators. One of the arbitrators retired during the course of the proceedings, yet rather than appoint a replacement, the parties chose to proceed with an even number; such a result was warranted by the amount of time they had invested in the case.[45] Given that such an arrangement suited their needs and aspirations, there was never any claim that the award suffered from any irregularity arising from the tribunal's numerical composition. The same position has been upheld by the Indian Supreme Court. In *Narayan Prasad Lohia v. Nukunj Kumar Lohia*, the Court held that where the third arbitrator makes himself absent for whatever reason while the proceedings are ongoing, or even during the drafting of the award, the award does not suffer from any irregularity if issued in common by the two remaining arbitrators.[46]

V. Number of Arbitrators in the Event of Appointment of Legal Persons

We have already stated in the introduction to this paper[47] that parties are generally free to appoint legal persons as arbitrators to

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42 Himpurna California Energy Ltd. v. Indonesia, (1999); *Int'l Council of Com. Arb.*, 25 Y.B. Com. Arb. 186, at 194 (2000), is considered a landmark case in favor of the validity of truncated tribunal awards. There, the tribunal emphasized that it was not only entitled, but obliged, to continue.

43 *See* ATC-CFCO v. Compagnie Minière de l'Ogooue–Comilog S.A., Paris Appeals Court judgment (July 1, 1997), [1998] *Rev Arb* 131; *see also* First Inv. Corp. of the Marshall Islands v. Fujian Mawei Shipbuilding, Ltd., 858 F. Supp. 2d 658 (E.D. La. 2012).

44 By analogy, the Greek Areios Pagos in judgment 329/1977 accepted that where the parties had agreed to two arbitrators and subsequently one of them failed to appoint the second arbitrator, the award of the sole arbitrator was valid.

45 Christian Bühring-Uhle, *The IBM - Fujitsu Arbitration: A Landmark in Innovative Dispute Resolution*, 2 Am. Rev. Int'l Arb. 113 (1991).

46 *See* Narayan Prasad Lohia v. Nikunj Kumar Lohia & Ors, (2002) 3 SCC 572 (India); *see also* Shailesh Dhairyawan v. Mohan Balkrishna Lulla, (2015) (6) Arb LR 79 (India).

47 Sogecable S.A. v. Auna Telecomunicaciones S.A., (Court of Appeal of Madrid 2005).

a dispute.[48] Naturally, such an appointment would be valid if permissible under the law of the seat, the legal person's rules of incorporation and the pertinent institutional rules, if any. It should be noted that some states are skeptical of such appointments, especially if the legal entity in question is unable to appoint an arbitrator, if its rules of incorporation or bylaws are silent on this issue, or if it is unclear that said appointment will not lead to procedural irregularities.[49] Where legal obstacles as to the appointment of a legal person as arbitrator are overcome, it is clear that the legal person's rules of incorporation or association cannot override the arbitration agreement on the number of arbitrators. By way of illustration, where the rules of association of the appointed legal person require that two of its board members serve as arbitrators, although the chosen institutional rules dictate that each party may solely appoint one arbitrator, the institutional rules prevail and the appointee may either appoint someone else or instead the default rules come into operation.

VI. Conclusion

It is generally agreed that the maturity of commercial parties in international arbitration justifies a liberal and permissive approach regarding the number of appointed arbitrators. This is hardly unreasonable. Cost and expertise will ultimately determine the appropriate number, although it is common for three arbitrators to be appointed, save for minor cases where the parties will seek to minimize their expenses by appointing one arbitrator. While the party autonomy paradigm is clear, problems may arise in situations where the parties' choice of arbitrators is unclear or gives rise to indeterminate outcomes. It is now generally settled that the courts of the seat, as well as arbitral tribunals themselves (through their *kompetenz-kompetenz*[50] powers) possess the authority to determine the appropriate number in case of doubt. It would be 'wrong' in such cases if the court or tribunal did not consult the parties before reaching its determination. The parties' right to choose an arbitrator(s) in the context of multi-party proceedings

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48 *See* Jacques Beguin & Michel Menjucq, Droit du Commerce International 971 (2005).

49 For the position of Taiwan & Macao, *see* Lin Yifei, Judicial Review of Arbitration: Law and Practice in China (2018).

50 German jurisprudential doctrine meaning "competence competence."

should equally be thought of as settled international law. Developments following the *Dutco* judgment have effectively closed this gap and it is universally agreed that the existence of multiple parties does not, unless the chosen rules are silent, entitle each party to choose its own arbitrator.