Kluwer Arbitration Blog

The Fear of the Sole Arbitrator

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During a recent conference on international arbitration, an in-house lawyer mentioned that whenever faced with the possibility of agreeing to an arbitration clause that provides for a sole arbitrator, she noted certain resistance within the company. There seemed to be a certain apprehension on placing the burden of deciding a dispute on a single person who may face greater difficulty in detecting and addressing errors and mistakes. During the discussion, an additional reason was pointed out for the general preference to select a multiple member tribunal: the possibility for a party to assert its right to select the tribunal and, in certain cases, to choose a party-appointed arbitrator.

These reasons appear convincing and create a tenable fear of the sole arbitrator: three persons can surely better spot a mistake than a single individual and a party has a better chance to influence the selection of its tribunal in a collegiate body in which it can at least nominate one of its members.

In response to this fear, parties often expressly select the number of arbitrators in the arbitration agreement,[1)] usually opting for a sole arbitrator in cases of lower quantum and less complexity.[2)]

The 2010 International Arbitration Survey confirmed that there was an overwhelming preference for three arbitrators – 87% of survey respondents – mainly because of a perception of greater neutrality and balance in the award, less risk of a poor decision, the possibility of appointing one of the arbitrators and of benefiting from diversity of background and experience in the panel. The ICC caseload for 2017 shows that parties opt for a three-member tribunal in 67% of the cases. Interestingly, the Court has submitted more cases to a sole arbitrator than to a three-member arbitral tribunal[3)] which suggests that arbitral institutions may fear the sole arbitrator less than parties do.

Specifically regarding quantum, a recent LCIA study on costs and time of arbitrations between 2013-2016 found that three-member tribunals tend to handle cases in which there are larger amounts in dispute (over 60% of the three-arbitrator cases refer to amounts in dispute exceeding USD 10 million) and that the median amount in dispute in a three-arbitrator case is approximately five times greater than that of a single arbitrator case.[4)]

Other factors that are weighed in to decide the number of arbitrators include the characteristics of the parties involved, the complexity of legal issues, the non-financial impact of the dispute and the budgetary concerns of the parties.

These considerations are not fixed as rules of thumb, but may lead to an excessive fear of the sole arbitrator and to overlook its advantages in certain circumstances.

Although opting for a sole arbitrator might reduce the influence the party will have on the selection of the tribunal (more so in cases in which it appoints one of the members of the tribunal), this does not necessarily imply that the party will not be able to partake in this decision (for instance, by attempting to jointly nominate the arbitrator) or that appointing authorities will select unfit individuals. In certain cases, users might even find that their preferred qualities in an arbitrator are better found in a single individual, rather than in a collegiate body. Moreover, in a single member tribunal it is not possible to distribute tasks, and arbitrators will exercise greater caution in order to avoid mistakes and errors. As one of the respondents in the 2010 International Arbitration Survey pointed out "a sole arbitrator may assess the law and facts more fully, whereas with three arbitrators the result reflects closed door bargaining". Further, the decision-making process might be swifter for a sole arbitrator than for a multiple member tribunal in which deadlocks can arise.

All in all, the decision on the number of arbitrators can benefit from taking multiple factors into consideration, which vary from one case to the other. Limiting this decision to a single factor – for example, the amount in dispute -, might overly exaggerate the fear of the sole arbitrator and disregard the advantages that it may have in certain types of disputes.

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References

?1 For example, in 2016 the ICC reported that in 91% of the cases parties chose the number of arbitrators. ICC Dispute Resolution Bulletin, 2018, issue 2, 2017 ICC Dispute Resolution Statistics

?2 White & Case and Queen Mary University School of London, 2010 International Arbitration Survey: Choices in International Arbitration.

?3 ICC Dispute Resolution Bulletin, 2018, issue 2, 2017 ICC Dispute Resolution Statistics

?4 London Court of International Arbitration, Facts and Figures: Costs and Duration 2013-2016.

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