EVEN-NUMBERED ARBITRAL TRIBUNALS

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Abstract

Even-numbered arbitral tribunals are rare. Many national laws and institutional rules discourage or prohibit them. The fear of deadlock between the arbitrators seems to be the main, and sometimes the only, underlying objection. Using a comparative method, this article outlines the various nuances in the approach adopted across a multitude of jurisdictions and attempts to explain the extent to which this fear is justified. Three key points stand out: first, the legal uncertainty in relation to even-numbered tribunals may actually be more problematic than that of a deadlock; second, recourse to even-numbered tribunals could work well under certain specific conditions; and third, the widespread prohibition or reluctance towards allowing even-numbered tribunals, combined with their rarity in practice, is indicative of the problems associated with today's physiognomy of international arbitration.

I. Introduction

The usual immediate reaction from lawyers to even-numbered arbitral tribunals is an objection. The main purpose of this article is to observe how this objection translates into practice and whether it is justified. In the course of this article, emphasis will be placed on two-member tribunals, the most prevalent (but not exclusive) configuration of even-numbered tribunals.

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The nature of this objection is essentially practical: arbitration runs the risk of being unworkable if the arbitral tribunal is composed of even number of arbitrators with conflicting views, and is unable to render a majority decision as a result. With two-member tribunals, a majority decision requirement will have to effectively require a unanimous decision, i.e., no dissenting opinion will be possible. The objection is mainly a result of the fear of "blockage" in the tribunal's ability to conduct the arbitration during and until a final award is issued. Despite the surprising level of rule diversity, the fear of the arbitration being rendered ineffective is often reflected in the arbitration laws and rules across jurisdictions and arbitral institutions, which either discourage or prohibit even-numbered arbitral tribunals. This will be discussed in the next part of this article.

Discouraging or prohibiting even-numbered arbitral tribunals protects the parties, especially those not well-versed with the arbitral procedure, from agreeing to a tribunal composition which may be a source of predictable and unpredictable difficulties. These difficulties may be avoided by simply mandating or opting for an odd number. The key avoidable difficulty or issue is the legal uncertainty in the parties' right to agree to such tribunals (in some jurisdictions and under some institutional rules). Another difficulty concerns the validity and recognition of awards rendered by such tribunals. The need to avoid such uncertainties may be more justified in law and in fact than the fear of deadlock.

Nevertheless, even-numbered arbitral tribunals raise separate, and often less discussed, questions of the direction in which arbitration is headed, and its possible improvement. In addition to undermining the principle of party autonomy, the general objection to even-numbered arbitral tribunals reflects a rather pessimistic view of the arbitrators' ability to comply with their obligation of objectivity, resulting in a possible stalemate, and not merely the anticipation of a legitimate disagreement between the arbitrators. The result is paradoxical and unfortunate because, however

rare their existence may be in practice (perhaps less than commonly imagined), even-numbered tribunals can facilitate conciliation between the parties and encourage greater objectivity in the decision-making process.

If the achievement of conciliatory outcomes and restoration of peace in business relations remains one of the key objectives of arbitration, then the categorical prohibition – under some arbitral rules – of even-numbered tribunals reflects a negative state of affairs (despite the expansion of arbitration). This should not serve as the ideal long-term solution.

This article is divided into four parts. **Part II** introduces the diversity of rules and approaches to even-numbered tribunals, particularly analysing the prohibitory and institutional approaches. The author then analyses the link between amiable composition and conciliation and even-numbered arbitral tribunals in **Part III**. Finally, the author concludes with his observations in **Part IV**.

II. The Diversity of Rules

Upon reviewing various national laws and arbitral rules, six main approaches can be observed:

1. The first approach is permissive: The parties are at liberty to choose an uneven or even number of arbitrators. If they choose an even number, there is no imposed or presumed third arbitrator who will have to be nominated. The United Nations Commission on International Trade Law [“**UNCITRAL**”] Model Law on International Commercial Arbitration [“**Model Law**”], and countries such as Switzerland and France follow this approach for international arbitration; separate regimes apply for domestic

arbitrations in both jurisdictions.[1] In practice, some of the Model Law jurisdictions depart from the textual authorization, for example, Egypt, India, and Tunisia. Article 15(2) of the Egyptian Law No. 27/1994 Promulgating the Law Concerning Arbitration in Civil and Commercial Matters states that "*[i]f there is more than one arbitrator, the tribunal must consist of an odd number, on penalty of nullity of the arbitration*"; Section 10(1) of the Indian Arbitration and Conciliation Act, 1996 states that "*[t]he parties are free to determine the number of arbitrators, provided that such number shall not be an even number*"; Article 18 of the Tunisian Law No. 93-42 of 26 April 1993 states that "*In case of plurality of the arbitrators, their number must be odd.*"

In the 1980s, a French legal comparatist observed that several Latin American countries, i.e., Argentina, Chile, Ecuador, Mexico and Panama, allowed even-numbered arbitral tribunals.[2] According to the available information, Peru and all of the

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1 United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, 1985 U.N.G.A. Res. 40/72 (Dec. 11, 1985), as amended by U.N.G.A. Res. 61/33 (Dec. 18, 2006), art. 10(1) [*hereinafter* "UNCITRAL Model Law"]; *See* LOI FÉDÉRALE SUR LE DROIT INTERNATIONAL PRIVÉ [LDIP] [FEDERAL STATUTE ON PRIVATE INTERNATIONAL LAW] Dec. 18, 1987, RS 291, art. 179(1) (Switz.) [*hereinafter* "Swiss PILA"]: "The arbitrators shall be appointed, removed or replaced in accordance with the agreement of the parties", *translation available at* https://www.swissarbitration.org/files/34/Swiss%20International%20Arbitration%20Law/IPRG_english.pdf; *See also* CODE DE PROCÉDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE] art. 1451 (Fr.) [*hereinafter* "French Civil Procedure Code"] states that an arbitral tribunal must consist of an odd number of arbitrators and if the parties provide for an even number of arbitrators, the tribunal will have to be "completed", i.e., a third arbitrator will be chosen. However, the same is not a requirement for international arbitration. *See* French Civil Procedure Code, art. 1506; The French Civil Procedure Code, art. 1508 provides that "An arbitration agreement may designate the arbitrator(s) or provide for the procedure for their appointment, directly or by reference to arbitration rules or to procedural rules".

2 René David, L'arbitrage dans le commerce international, 34 ECONOMICA ¶ 250 (1982) [hereinafter "David"].

previously mentioned countries, with the exception of Panama, do not explicitly prohibit even-numbered arbitral tribunals.[3]

No such rule is seen which goes so far as providing an even number of arbitrators as the preferred default position. Surprisingly, this was reportedly not always the case; Germany and Japan are examples at hand.[4]

2. The second approach is also permissive, but discourages an even number of arbitrators by creating a rebuttable presumption that an agreed even-numbered tribunal requires the appointment of an additional arbitrator as chairperson. This is the position in England and Wales and under Swiss domestic arbitration law. Section 15(2) of the (English) Arbitration Act 1996 states that "*Unless otherwise agreed by the parties, an agreement that the number of arbitrators shall be two or any other even number shall be understood as requiring the appointment of an additional arbitrator as chairman of the*

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[3] Luis E. Dates, *New Law on International Commercial Arbitration in Argentina*, BAKER MCKENZIE (July 27, 2018), *available at* https://www.bakermckenzie.com/en/insight/publications/2018/07/new-law-on-international-commercial-arbitration; Cristián Conejero et al., *Commercial Arbitration: Chile*, GLOBAL ARB. REV. (Mar. 21, 2018), *available at* https://globalarbitrationreview.com/jurisdiction/1004942/chile; Alejandro Ponce Martinez & Maria Belen Merchan, *Ecuador: International Arbitration 2019*, THE ICLG TO: INTERNATIONAL ARBITRATION LAWS AND REGULATIONS (Aug. 22, 2019), *available at* https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/ecuador; Luis Enrique Graham Tapia & Orlando F. Cabrera C., *Mexico: International Arbitration 2019*, THE ICLG TO: INTERNATIONAL ARBITRATION LAWS AND REGULATIONS, *available at* https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/mexico; José Carrizo, *Panama*, GLOBAL ARB. REV. (Aug. 29, 2017), *available at* https://globalarbitrationreview.com/chapter/1146881/panama; Alberto José Montezuma Chirinos & Mario Juan Carlos Vásquez Rueda, *Peru: International Arbitration 2019*, THE ICLG TO: INTERNATIONAL ARBITRATION LAWS AND REGULATIONS (Aug. 22, 2019), *available at* https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/peru.

[4] David, *supra* note 2, ¶ 251.

tribunal". Similarly, Article 360(2) of the Swiss Code of Civil Procedure states that "*If the parties have agreed on an even number of arbitrators, it is presumed that an additional arbitrator must be appointed as the chairperson*".[5] The approach is visibly less liberal in Swiss domestic arbitration law than in the Swiss international arbitration law.[6]

In practice, this means that parties will have to provide clear and explicit wording in their agreement if their intention is indeed to have their dispute decided by an even-numbered tribunal. Clear-worded language providing for an umpire, still a relevant possibility in certain common law jurisdictions including England, should effectively displace the rebuttable presumption. This is because an umpire cannot be assimilated in to a chairperson, whose functions will be exercised from the very commencement of the proceedings.

As will be seen in the course of this article, it is difficult to express any firm reliable view on even-numbered tribunals without examining the umpire. The umpire necessarily brings legal history back to the forefront, especially that of common law jurisdictions.

3. The third approach is also permissive, but instead of creating a rebuttable presumption in favour of an even-numbered tribunal, and unlike the second approach, it gives the right to any of the two arbitrators to request either the appointment of a third

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5 CODE DE PROCÉDURE CIVILE [C.P.C.] [CODE OF CIVIL PROCEDURE] Dec. 19, 2008, SR 727, art. 360(2) (Switz.) reads as follows (in French): "Lorsque les parties sont convenues d'un nombre pair d'arbitres, il est présumé qu'un arbitre supplémentaire doit être désigné en qualité de president".

6 Swiss PILA, *supra* note 1, art. 179(1), which states that "[t]he arbitrators shall be appointed, removed or replaced in accordance with the agreement of the parties."

arbitrator who will be the chairperson, or the appointment of an umpire. This is the position under the Israeli Law of 1968 and the Hong Kong Arbitration Ordinance (Cap. 609).[7] It is unclear how and when this unusual approach – in seemingly affording full discretion on any of the two arbitrators to request at any time the appointment of a chairperson or umpire – applies in practice.

4. The fourth approach is prohibitory, but with a remedial solution: the arbitration will proceed with an imposed third arbitrator, who will be the chairperson. This approach differs from the second one above where there was only a rebuttable presumption for the appointment of a third arbitrator, i.e., the chairperson. Here, the third arbitrator would be appointed by the two other arbitrators. This approach is followed in France for domestic arbitration; the Netherlands— under the rules of the Netherlands Arbitration Institute; the Organization for the Harmonization of Business Law in Africa ["**OHADA**"] Uniform Act on Arbitration, and reportedly in Austria, Belgium and Italy.[8]

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7 Arbitration Law, 5768-1968, add., § 2 (Isr.) reads as follows: "In an arbitration before an even number of arbitrators, the arbitrators will, on the demand of one of them, appoint an additional arbitrator. When an additional arbitrator has been appointed, he will be the arbitration chairman"; Arbitration Ordinance, (2011) Cap. 609, § 30 (H.K.) provides that "[i]n an arbitration with an even number of arbitrators, the arbitrators may, unless otherwise agreed by the parties, appoint an umpire at any time after they are themselves appointed".

8 Bij wet van 2 juli 1986, Stb. 1986, 372, art. 1026(3) (Neth.) [*hereinafter* "Netherlands Arbitration Institute"] reads as follows: "If the parties have agreed on an even number of arbitrators, the arbitrators shall appoint an additional arbitrator who shall act as the chairman of the arbitral tribunal"; Netherlands Arbitration Institute, art. 12(3) reads as follows: "If the parties have agreed an even number of arbitrators, the arbitrators shall appoint an additional arbitrator who shall act as the chair of the arbitral tribunal"; The French Civil Procedure Code, art. 1451 reads as follows: "If an arbitration agreement provides for an even number of arbitrators, an additional arbitrator shall be appointed. If the parties cannot agree on the appointment of the additional arbitrator, he or she shall be appointed by the other arbitrators within one month of having accepted their mandate or, if they fail to do so, by

This approach clearly aims to prevent even-numbered tribunals. Still, one must not lose sight of the fact that it represents, at least in some jurisdictions, including the Netherlands, a relaxation of the former rule which outrightly prohibited even-numbered tribunals. This would result in the nullity of the arbitration.

5. The fifth approach is prohibitory, with no remedial solution: if an even number of arbitrators is chosen, the arbitration and award will be, in principle, invalid. This seems to be the solution of choice in investment arbitration. It is found not only under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ["**ICSID Convention**"], but also under the International Centre for Settlement of Investment Disputes ["**ICSID**"] Additional Facility Rules and the 2017 Singapore International Arbitration Centre ["**SIAC**"] Investment Arbitration Rules.[9]

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the judge acting in support of the arbitration (*juge d'appui*) referred to in Article 1459." Acte Uniforme relatif au Droit de l'Arbitrage [UNIFORM ACT ON ARBITRATION], Mar. 11, 1999, 8 JOURNAL OFFICIEL DE L'OHADA [J.O. OHADA], May 15, 1999, art. 8; ZIVILPROZESSORDNUNG [ZPO] [CIVIL PROCEDURE STATUTE] § 586(1) (Austria), *available at* https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001699; CODE JUDICIAIRE [C.JUD.], art. 1681(1) (Belg.); Codice di procedura civile [C.p.c.] [Code of Civil Procedure] art. 809 (It.).

[9] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art. 37(2)(a), Mar. 18, 1965, 575 U.N.T.S. 159 [*hereinafter* "ICSID Convention"] reads as follows: "The Tribunal shall consist of a sole arbitrator or any uneven number of arbitrators appointed as the parties shall agree." This rule is mandatory. *See* CHRISTOPHER H. SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY 478-80 (2d ed. 2009) which states as follows: "The requirement that a tribunal must have an uneven number of arbitrators is one of the Convention's few mandatory provisions concerning the constitution and composition of the tribunal. The parties may not deviate from this rule by agreement. It is designed to avoid a stalemate if the tribunal is evenly divided […]. The early drafts to the Convention did not provide for an uneven number of arbitrators. The Working Paper and the Preliminary Draft made reference to a sole arbitrator or several arbitrators (History, Vol.

Interestingly, this approach has been taken by many Arab jurisdictions, including Egypt, Jordan, the Kingdom of Saudi Arabia ["**KSA**"], Lebanon, Oman, Qatar, Syria, Tunisia, and the United Arab Emirates ["**UAE**"].[10] Further, the rules of several Indian arbitral institutions, such as Rule 5 of the Madras High Court Arbitration Proceedings Rules, 2017 and Rule 8 of the Delhi International Arbitration Centre (Arbitration Proceedings) Rules, 2018 only second the literal prohibition found in the (Indian) Arbitration and Conciliation Act, 1996 (amended in

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I, pp. 176, 178). A suggestion to specify that an uneven number of arbitrators must be appointed in order to avoid a possible impasse was incorporated into the later drafts (History, Vol. II, pp. 329, 416)"; *See also* Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes, sch. A, art. 6(3), Sept. 27, 1978, as amended on Jan. 01, 2003 and Apr. 10, 2006, mandating an even number of arbitrators, and Investment Arbitration Rules of the Singapore International Arbitration Centre r. 5.8, Jan. 01, 2017 [*hereinafter* "SIAC Rules"].

10 *See* Federal Law No. (11) of 1992 (Concerning Issuance of the Civil Procedures Code), art. 206(2) (U.A.E.) [*hereinafter* "UAE Civil Procedures Code"]: "If there is more than one arbitrator, the number shall, at all times be odd"; Federal Law No. (6) of 2018 on Arbitration (U.A.E.) [*hereinafter* "UAE Arbitration Law"] specifies the sanction in case of non-compliance with the rule: "The number of arbitrators, if several, shall be uneven, otherwise the Arbitration is void"; Law No. 27 of 1994 (Law concerning Arbitration in Civil and Commercial Matters), *al-Jarīdah al-Rasmīyah*, vol. 16, Apr. 21, 1994, art. 15(2) (Egypt) [*hereinafter* "Egypt Arbitration Law"]: "If there is more than one arbitrator, the tribunal must consist of an odd number, on penalty of nullity of the arbitration"; Law of Arbitration in Civil and Commercial Disputes, Royal Decree 47/97, art. 1516(2) (Oman) [*hereinafter* "Oman Arbitration Law"]: "In case, the arbitrators are multiple in number, their number shall have to be uneven, otherwise the arbitration shall be treated as invalid". The prohibition of an even number of arbitrators is also found under the laws of Jordan, Lebanon, Saudi Arabia, Syria, and Tunisia as stated in Ahmed M. Al-Hawamdeh & A. Ababneh, *Odd vs. Even: The Case of Arbitral Tribunals,* DIRASAT, SHARI'A & L. 413, 421 (2018) [*hereinafter* "Al-Hawamdeh & A. Ababneh"]; *See also* Law No. 2 of 2017 (Promulgating the Law of Arbitration in Civil and Commercial Matters), art. 10 (Qatar) [*hereinafter* "Qatar Arbitration Law"], which states that "[t]he Arbitral Tribunal shall comprise one or more arbitrators, in accordance with the agreement of the Parties. If the Parties do not agree on the number of arbitrators, the number shall be three. In the event of several arbitrators, their number must be odd; otherwise the Arbitration shall be void".

2015).[11] However, the Supreme Court of India has adopted a *contra legem* solution that places the Indian position closer to the fourth approach mentioned above, where the arbitration and award will not in principle be invalidated,[12] regardless of whether the arbitration is international or domestic.

6. The sixth approach is 'institutional,' which is, admittedly, a misnomer. It is identified by the element of ambiguity of seemingly mandating an odd number of arbitrators, without expressly stating the same in the arbitral rules. While the institutional approach is not universal, with arbitrations under the ICSID Convention and the London Maritime Arbitrators Association ["**LMAA**"] being the major notable exceptions,[13] it is quite widespread, as seen in the Dubai International Financial Centre ["**DIFC**"] – London Court of International Arbitration

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11 The Arbitration & Conciliation Act, No. 26 of 1996, § 10(1) (India) [*hereinafter* "Arbitration Act, 1996"] reads as follows: "The parties are free to determine the number of arbitrators, provided that such number shall not be an even number".

12 Instead of invalidating the arbitration, a clause providing for two arbitrators and an umpire (at least in relation to clauses pre-dating the 1996 Act) will not be deemed unenforceable and will be interpreted as requiring the appointment of a third arbitrator who will act as the presiding arbitrator (the validity of an arbitration agreement not being found dependent on the number of arbitrators specified therein) – *see* M.M.T.C. Ltd. v. Sterlite Industries India Ltd., (1996) 6 SCC 716 (India). Moreover, the challenge of an award rendered by two arbitrators only will not be sustained simply on the ground that the tribunal was even-numbered (the statutory prohibition of an even number of arbitrators was found to be derogable) – *see* Narayan Prasad Lohia v. Nikunj Kumar Lohia, (2002) 3 SCC 572 (India).

13 ICSID Convention, *supra* note 9, art. 37(2)(a); *See also* the terms of the London Maritime Arbitrators Association, r. 8, 9, May 01, 2017: Rule 8(a) states as follows: "If the arbitration agreement provides that [the LMAA] Terms are to apply but contains no provision as to the number of arbitrators, the agreement shall be deemed to provide for a tribunal of three arbitrators […]" and Rule 9 states as follows: "Subject to the terms of the arbitration agreement, if the tribunal is to consist of two arbitrators and an umpire […]" which rule then provides further details with this arbitral configuration.

[“**LCIA**”] Rules, 2016,[14] International Chamber of Commerce [“**ICC**”] Arbitration Rules, 2017,[15] LCIA Arbitration Rules, 2014,[16] the Swiss Rules of International Arbitration, 2012 of the Swiss Chambers' Arbitration Institution [“**SCAI**”][17]and SIAC Arbitration Rules, 2016.[18]

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14 The Dubai International Financial Centre (DIFC) – London Court of International Arbitration (LCIA) Arbitration Centre is headquartered at the DIFC, which has its own arbitration law. When parties opt for the DIFC as the seat, the DIFC Law No. 1 of 2008 (Arbitration Law) applies as the governing law. DIFC Law No. 1 of 2008, art. 16 [*hereinafter* “DIFC Arbitration Law”] provides the following: “The parties are free to determine the number of arbitrators provided that it is an odd number. If there is no such determination, the number of arbitrators shall be one.” *See* Arbitration Rules of the DIFC-LCIA Arbitration Centre, art. 5(8), Oct. 01, 2016 which provides that “[a] sole arbitrator shall be appointed unless the parties have agreed in writing otherwise or if the LCIA Court determines that in the circumstances a three-member tribunal is appropriate (or, exceptionally, more than three)”.

15 Compare the Rules of Arbitration of the International Chamber of Commerce, art. 12 (1), Mar. 01, 2017 [*hereinafter* “ICC Rules 2017”] which states that “[t]he disputes shall be decided by a sole arbitrator or by three arbitrators” with art. 11(6): “Insofar as the parties have not provided otherwise, the arbitral tribunal shall be constituted in accordance with the provisions of Articles 12 and 13”.

16 *See* Arbitration Rules of the London Court of International Arbitration, r. 5.8, Oct. 01, 2014 [*hereinafter* “LCIA Rules 2014”] which states that “[a] sole arbitrator shall be appointed unless the parties have agreed in writing otherwise or if the LCIA Court determines that in the circumstances a three-member tribunal is appropriate (or, exceptionally, more than three)”.

17 *See* Swiss Rules of International Arbitration, art. 6(1), June 01, 2012 [*hereinafter* “SCAI Rules 2012”] (“If the parties have not agreed upon the number of arbitrators, the Court shall decide whether the case shall be referred to a sole arbitrator or to a three-member arbitral tribunal, taking into account all relevant circumstances”) and the Swiss Chambers' Arbitration Institution Rules 2012, art. 6(3) (“If the arbitration agreement provides for an arbitral tribunal composed of more than one arbitrator, and this appears in-appropriate in view of the amount in dispute or of other circumstances, the Court shall invite the parties to agree to refer the case to a sole arbitrator.”).

18 SIAC Rules 2016, *supra* note 9, r. 9.1 provides that “[a] sole arbitrator shall be appointed in any arbitration under these Rules unless the parties have otherwise agreed; or it appears to the Registrar, giving due regard to any proposals by the parties, that the complexity, the quantum involved or other relevant circumstances of the dispute, warrants the appointment of three arbitrators.” *See also* SIAC Rules 2016, *supra* note 9, r. 9.3 which states that: “[i]n all

> Even-numbered tribunals will accordingly be rare under the rules of the previously mentioned institutions because the prohibition and ambiguity can be prudently avoided by simply agreeing to a sole arbitrator or three-member panel. Even-numbered tribunals will be found more often in *ad hoc* arbitrations, and under the rules of the institutions, which unambiguously allow even-member tribunals. An example is the LMAA, which does not truly administer the arbitrations.[19]

The fifth and sixth approaches, i.e., the prohibitory approach with no remedial solution and institutional approach respectively, call for further comments. They present certain issues not discussed before, as well as the greatest need for change or clarification.

A. The Prohibitory Approach

The categorical prohibition of even-numbered tribunals is prevalent in investment arbitration. It is found equally in many Arab jurisdictions with no remedial "saving" mechanism by which a third arbitrator, acting as the chairperson, would be imposed on the parties, at least according to the

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cases, the arbitrators nominated by the parties, or by any third person including by the arbitrators already appointed, shall be subject to appointment by the President [of the Court of Arbitration of SIAC] in his discretion."; SIAC Rules 2016, *supra* note 9, rr. 10, 11 discuss the appointment of a sole arbitrator or three arbitrators respectively; SIAC Rules 2016, *supra* note 9, r. 11.3 states that "unless the parties have agreed upon another procedure for appointing the third arbitrator, or if such agreed procedure does not result in a nomination within the period agreed by the parties or set by the Registrar, the President shall appoint the third arbitrator, who shall be the presiding arbitrator."

19 *See* Paulo Fernando Pinheiro Machado, *The advantages of London ad hoc Maritime Arbitrations*, CIARB. FEATURES (Mar. 12, 2019), *available at* https://www.ciarb.org/resources/features/the-advantages-of-london-ad-hoc-maritime-arbitrations: "[…] the LMAA is an association of maritime arbitrators and does not itself administer the proceedings […]."

wording of the cited applicable laws.[20] Parties contemplating recourse to even-numbered tribunals in such cases should be careful.

The question of why such a prohibitory approach is followed in investment arbitrations as well as in many Arab jurisdictions, but not elsewhere, requires consideration. The participation of States in investment arbitration and the greater expectation that the party-appointed arbitrators will advocate the position and further the interests of the appointing party, finally resulting in the fear of 'blockage', appear to be the two main explanatory factors.

With the Arab jurisdictions, an additional religious explanation is tempting. Major differences exist between religious traditions and national legal systems, especially in international commerce. While there is no reported Islamic general prohibition of even-numbered tribunals,[21] Islamic law requires unanimous decisions, regardless of whether there is an odd or even number of arbitrators.[22] The Sharia practice of sole arbitrators is probably linked with the requirement of unanimous decisions. Moreover, as Samir Saleh opined, "*[t]he avoidance of an even number of arbitrators, common to most of the Arab countries, stems, inter alia, from the shari'a practice of one sole arbitrator [...].*"[23]

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20 UAE Civil Procedures Code, *supra* note 10; UAE Arbitration Law, *supra* note 10; Egypt Arbitration Law, *supra* note 10; Oman Arbitration Law, *supra* note 10; Qatar Arbitration Law, *supra* note 10; Al-Hawamdeh & A. Ababneh, *supra* note 10.

21 "According to the four Islamic Law Schools, contracting parties could appoint one arbitrator or more, whether it be an odd or even number", Al-Hawamdeh & A. Ababneh, *supra* note 10 at 415.

22 *Id.* at 419; *See also* Arthur J. Gemmell, *Commercial Arbitration in the Islamic Middle East*, 5 SANTA CLARA J. INT'L L. 169, 183 (2006).

23 SAMIR A. SALEH, COMMERCIAL ARBITRATION IN THE ARAB MIDDLE EAST: SHARI'A, LEBANON, SYRIA, AND EGYPT 388 (2d ed. 2006).

The present-day position in the Arab jurisdictions and several other institutions do not require unanimity in rendering an award.[24] In law, most of them, if not all, do not even prohibit dissenting opinions. The general prohibition of even number of arbitrators in Arab jurisdictions is better explained by pragmatic considerations, namely, the fear of deadlock which itself is largely linked with the practice of the advocate-arbitrator, i.e., the arbitrator favouring the appointing party. This may well be a pragmatic and even necessary solution to a real problem. It is not, however, indicative of a positive state of affairs. The fact that none of the major European arbitral seats, including Geneva, London and Paris, explicitly prohibit even-numbered tribunals in international arbitration should give pause for reflection.

B. The Institutional Approach

The reference to an "institutional" and textually ambiguous approach is a generalization. By definition, the generalization is not always true. Certain institutional rules are perfectly clear regarding the permissible number of arbitrators, for example the Casablanca International Mediation and

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24 *See, e.g.,* Royal Decree No. M/34 (Approving the Law of Arbitration) dated 24/5/1433H, art. 39(1) (Saudi Arabia) states that "[i]f the arbitration tribunal is composed of more than one arbitrator, its decision shall be made by majority vote of its members. Deliberation shall be in camera"; Law No. 11 of 1995 (organizing Ministerial Resolutions and the Civil & Commercial Procedure, Code No. 38 of 1980), art. 183 (Kuwait) states that "[t]he arbitrators' award shall be rendered by a majority opinion in writing […]. If one or more arbitrators refuse to sign the award this fact shall be stated therein. The award is deemed appropriately valid if signed by the majority of arbitrators"; Oman Arbitration Law, art. 40 states that "[a]rbitration board comprising of more than one arbitrator shall pass its award with majority vote after due deliberations in the manner specified by the arbitration board, unless the parties to the arbitration agree upon otherwise."; Qatar Arbitration Law, art. 29 states that "[w]hen there is more than one arbitrator, any award or other decision of the Arbitral Tribunal shall be made by a majority of the arbitrators"; UAE Arbitration Law, art. 12 states that "[i]n arbitral proceedings with more than one Arbitrator, any decision of the Arbitral Tribunal shall be made, unless otherwise agreed by the Parties, by a majority of all its members."

Arbitration Centre ["**CIMAC**"] Arbitration Rules, Dubai International Arbitration Centre ["**DIAC**"] Arbitration Rules, 2007,[25] the Rules of Procedure for Arbitration Proceedings (the Arbitration Rules) of ICSID, 2006,[26] LMAA Terms, 2017 [**"LMAA Terms"**] and the UNUM Arbitration Rules, 2018.[27]

However, many leading arbitral institutions discourage even-numbered tribunals without including an explicit prohibition or clear solution. As will be seen in this part of the paper, the prohibition, if there is one, has to be implied by an exclusive reference to a sole arbitrator or three arbitrators, or by the application of a separate provision regarding the formulation of the award, or by the spirit and distinctive features of the rules themselves.

For instance, the ICC and OHADA Arbitration Rules refer exclusively to a tribunal composition of either a sole arbitrator or three arbitrators.[28] An even number of arbitrators is arguably prohibited in the previously mentioned arbitral rules, but this is only an implication. There is no clear and simple provision stating that an even number of arbitrators is

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25 Arbitration Rules of the Dubai International Arbitration Centre, art. 8.1, May 07, 2007 states that: "[t]he Tribunal shall consist of such number of arbitrators as has been agreed by the parties. If there is more than one arbitrator, their number shall be uneven."

26 ICSID Rules of Procedure for Arbitration Proceedings, rr. 1, 3, Apr. 10, 2006.

27 Arbitration Rules of the UNUM Transport Arbitration & Mediation, r. 3.1, Sept. 2018 [*hereinafter* "UNUM Arbitration Rules"] provides that "[the disputes shall be settled by three arbitrators, unless the parties agree that the dispute shall be settled by a sole arbitrator."; *See also* Arbitration Rules of the Casablanca International Mediation and Arbitration Centre, art. 8.1, Jan. 01, 2017 [*hereinafter* "CIMAC Rules 2017"] states as follows: "Disputes will be determined by one arbitrator or more arbitrators in an uneven number."

28 *See* ICC Rules 2017, *supra* note 15, art. 12 ("The disputes shall be decided by a sole arbitrator or by three arbitrators"); Arbitration Rules of the Common Court of Justice and Arbitration, May 15, 1999, 8 JOURNAL OFFICIEL DE L'OHADA [J.O. OHADA], arts. 8 and 3.1 [*hereinafter* "CCJA Arbitration Rules"] ("The dispute may be settled by a sole arbitrator or by three arbitrators").

forbidden. In fact, both set of rules include other provisions that cast doubt on the implied prohibition. Article 11(6) of the ICC Arbitration Rules *prima facie* allows the parties to agree to an even-numbered tribunal by stating that "*[i]nsofar as the parties have not provided otherwise, the arbitral tribunal shall be constituted in accordance with the provisions of Articles 12 and 13.*"[29] Further, the OHADA Arbitration Rules, unlike many other institutional rules, seem to be compatible with an even-numbered tribunal insofar as they do not require that the award be made by a majority (or failing a majority, by the presiding arbitrator), both of which would be factually impossible in the case of two-member tribunals with no agreed, presumed or imposed third arbitrator or umpire.

In light of the above, would a practitioner advise a client who wishes to obtain a relatively quick and enforceable decision, to agree to a two-member tribunal under the ICC Rules, OHADA Arbitration Rules, or other similarly worded rules? The answer to this question is almost certainly negative. By reviewing the rules and commentaries thereof, the practitioner would realize that certain other provisions in the rules could create some additional difficulties. With the ICC Rules in particular, the question arises whether the ICC Court would allow the arbitration to continue, as an even-numbered tribunal with an umpire may be incompatible with the ICC Court's expectation that all members of the tribunal participate in the arbitral procedure. It could also lead to complications in relation to the Terms of Reference (for instance where such document was not signed by the umpire), and to the possible and

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[29] Compare the CIMAC Rules 2017, *supra* note 27, arts. 4(1), 1(1) and 14(1) with ICC Rules 2017, *supra* note 15, art. 11(6).

unusual need to divide the arbitration into different stages in case the tribunal is deadlocked.[30]

To give another example, many other institutional rules do not explicitly prohibit an even number of arbitrators, or exclusively refer to a tribunal composition consisting of either a sole arbitrator or three arbitrators, for example, the arbitral rules of LCIA, Mumbai Centre for International Arbitration ["**MCIA**"], SCAI, and UNCITRAL Arbitration Rules, 2010.[31]

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30 *See* Thomas H. Webster & Dr. Michael Buhler, Handbook of ICC Arbitration: Commentary, Precedents, Materials 196 (4th ed. 2018); Yves Derains & Eric A. Schwartz, A Guide to the ICC Rules of Arbitration (2d ed., 2005).

31 *See* LCIA Rules 2014, *supra* note 16, arts. 5.2 and 5.8 ("The expression the 'Arbitral Tribunal' includes a sole arbitrator or all the arbitrators where more than one" and "A sole arbitrator shall be appointed unless the parties have agreed in writing otherwise or if the LCIA Court determines that in the circumstances a three-member tribunal is appropriate (or, exceptionally, more than three))"; Arbitration Rules of the Mumbai Centre for International Arbitration, art. 1.3 and 3.1(g), Jan. 15, 2017 [*hereinafter* "MCIA Rules 2017"] ("'Tribunal' includes a sole arbitrator or all the arbitrators where there is more than one, and includes any arbitral tribunal constituted under these Rules" and (re: the specifics to be mentioned in the Request for Arbitration) "unless the parties have agreed otherwise, the nomination of an arbitrator, if the arbitration agreement provides for three arbitrators, or a proposal for a sole arbitrator if the arbitration agreement provides for a sole arbitrator"; SCAI Rules 2012, *supra* note 17, art. 6(1) ("If the parties have not agreed upon the number of arbitrators, the Court shall decide whether the case shall be referred to a sole arbitrator or to a three-member arbitral tribunal, taking into account all relevant circumstances"); SIAC Rules, *supra* note 9, arts. 1, 3.1(h) and 9 ("'Tribunal' includes a sole arbitrator or all the arbitrators where more than one arbitrator is appointed" and (re: the specifics to be mentioned in the Notice of Arbitration) "unless otherwise agreed by the parties, the nomination of an arbitrator if the arbitration agreement provides for three arbitrators, or a proposal for a sole arbitrator if the arbitration agreement provides for a sole arbitrator" and "A sole arbitrator shall be appointed in any arbitration under these Rules unless the parties have otherwise agreed; or it appears to the Registrar, giving due regard to any proposals by the parties, that the complexity, the quantum involved or other relevant circumstances of the dispute, warrants the appointment of three arbitrators."); UNCITRAL Arbitration Rules, G.A. Res. 65/22, art. 7, Aug. 15, 2010 [*hereinafter* "UNCITRAL Arbitration Rules"] ("If the parties have not previously agreed on the number of arbitrators, and if within 30 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.").

These rules, thus, signal permission, or at least tolerance, for even-numbered tribunals. Nevertheless, the same rules explicitly require the award to be rendered by a majority or the presiding arbitrator,[32] which necessarily excludes two-member tribunals. There is no reported practice under these rules, of one of the two arbitrators having the casting vote in case of deadlock between the two same arbitrators, and such a practice or contractual provision would create serious problems relating to equality between the parties and due process.

None of the previously mentioned institutional rules, including the LCIA Arbitration Rules, refer to the umpire.[33] The same is true for most national arbitration laws as well. In both cases, reference to a two-member

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32 LCIA Rules 2014, *supra* note 16, art. 26.5 ("Where there is more than one arbitrator and the Arbitral Tribunal fails to agree on any issue, the arbitrators shall decide that issue by a majority. Failing a majority decision on any issue, the presiding arbitrator shall decide that issue."); MCIA Rules 2017, *supra* note 31, art. 30.6 ("Where there is more than one arbitrator, the Tribunal shall decide by a majority"); SCAI Rules 2012, *supra* note 17, art. 31(1) ("If the arbitral tribunal is composed of more than one arbitrator, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators. If there is no majority, the award shall be made by the presiding arbitrator alone"); SIAC Rules, *supra* note 9, art. 30.7 ("Where there is more than one arbitrator, the Tribunal shall decide by a majority. Failing a majority decision, the presiding arbitrator alone shall make the Award for the Tribunal"); UNCITRAL Arbitration Rules, *supra* note 31, art. 33(1), ("When there is more than one arbitrator, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators.").

33 Interestingly, the appointment of an umpire was expressly envisaged in the ICC Rules prior to 1955. *See, e.g.,* Rules of Arbitration of the International Chamber of Commerce (1932), art. 12(2) (as amended in 1933): "When the parties each select one arbitrator, the Court shall appoint either an umpire or a third arbitrator in accordance with the terms of paragraph I of this article", and Rules of Arbitration of the International Chamber of Commerce (1947), arts. 12(1) & 21(1): "The parties may agree to the settlement of the difference by a sole arbitrator or, if necessary, by three arbitrators. If the reference is to three arbitrators, each of the parties shall, except when otherwise stipulated appoint an arbitrator and the and the Court of Arbitration shall appoint the third arbitrator (or umpire, as the case may be) […]" and "When two arbitrators and an umpire are appointed and the arbitrators fail to agree, the decision of the umpire shall be final and binding. The Umpire is not bound to adopt the opinion of either of the arbitrators".

tribunal is unlikely because the umpire, in general, is closely linked to the practice of two-member tribunals. The umpire gives psychological and legal comfort to parties that a practical solution will be possible in case of a deadlock.

It is also unclear if, and to what extent, the umpire would be given effect to in the context of an institutional rule or national arbitration law that does not know the institution as such.[34] There exists a lack of practical experience and intellectual familiarity with the concept of an umpire in the present times amongst both practitioners and judges alike. This is especially true outside common law jurisdictions, where the notion is often unknown or translated by different-sounding terms that are even less known, for example "*tiers arbitre*" in French. This is an important factor that explains the negative reaction typically displayed by many practitioners towards even-numbered tribunals.

Maritime arbitration is often said to be a different species. One reported difference is that even-numbered tribunals are more prevalent here than elsewhere.[35] The LMAA Terms clearly confirm this by their extensive references to the umpire, and an unusual definition of a tribunal. Article 2(c) of the LMAA Terms defines the term "tribunal" to include "*a sole arbitrator, a tribunal of two or more arbitrators, and an umpire.*" In passing, Article 8(a) of the LMAA Terms further differentiates the terms from the

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34 There is precedent that such arbitration would not be able to proceed under the ICC Rules; *see* Sumitomo Heavy Industries Ltd v. Oil Gas Commission of India, Award (June 27, 1995), ¶ 1.12, *available at* https://www.trans-lex.org/290024/_/sumitomo-heavy-industries-ltd-v-oil-gas-commission-of-india-/: "[…] the Secretariat of the ICC wrote to the parties' lawyers to the effect that, since the ICC Rules do not provide for Umpires, and since the parties were unable to agree upon the status of the Umpire in the context of the ICC Rules, the arbitration would not be able to proceed under the auspices of the ICC."

35 *See, e.g.*, Arbitration Rules of the Society of Maritime Arbitrators, Mar. 14, 2018 [*hereinafter* "SMA Rules"] which provide for the appointment of even-numbered arbitral tribunal, i.e., two arbitrators under § 5(b).

(English) Arbitration Act, 1996 and the LCIA Arbitration Rules[36] by deeming that an arbitration agreement provides for a tribunal of three arbitrators when it contains no provision as to the number of arbitrators.

The arbitration practitioners who are inexperienced in maritime arbitration might find the rules providing for even-numbered arbitral tribunals surprising, because such rules stand in marked contrast to the vast majority of the present-day arbitration laws and institutional rules, which make no mention of the umpire. It includes even those rules which are expected – by reason of historico-legal continuity or affiliation with the common law family – to include references to the umpire, but do not in reality, for example the (Indian) Arbitration and Conciliation Act, 1996, as revised in 2015, and the LCIA Rules, 2014.

It is difficult to know whether – outside the LMAA context – maritime arbitrations often provide for even-numbered tribunals. The personal experience of the author in maritime cases, and also exchanges with maritime arbitration practitioners suggest that even-numbered tribunals are rare in maritime arbitrations as well. The wording of other maritime institutional arbitration rules strengthens this tentative view, for example,

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36 Arbitration Act 1996, c. 23, § 15(3) (Eng.) provides that "[i]f there is no agreement as to number of arbitrators, the tribunal shall consist of a sole arbitrator."; LCIA Rules, *supra* note 16, arts. 5.7 and 5.8 provide that "[n]o party or third person may appoint any arbitrator under the Arbitration Agreement: the LCIA Court alone is empowered to appoint arbitrators (albeit taking into account any written agreement or joint nomination by the parties)" and that "[a] sole arbitrator shall be appointed unless the parties have agreed in writing otherwise or if the LCIA Court determines that in the circumstances a three-member tribunal is appropriate (or, exceptionally, more than three)".

UNUM Arbitration Rules, 2018,[37] Maritime Arbitration Chamber, and the Paris (CAMP) Arbitration Rules, 2019.[38]

It is important to note that even-numbered tribunals are also said to be more frequent in commodities and insurance disputes.[39] It is difficult to reliably repeat this assertion with any degree of certainty, as this assertion may well be less true at present than it was several decades ago.

In conclusion, there is no one particular "institutional" approach, but many institutions that allow a certain ambiguity in their arbitration rules regarding whether an even-numbered tribunal is possible. This should rarely present a concrete problem for parties who will simply opt for a sole arbitrator or three arbitrators or, if they indeed wish, for an even number of arbitrators and choose either *ad hoc* arbitration or institutional

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[37] UNUM Arbitration Rules, *supra* note 27, r. 3.1 provides that "[the d]isputes shall be settled by three arbitrators, unless the parties agree that the dispute shall be settled by a sole arbitrator".

[38] Arbitration Rules of the Chambre Arbitrale Maritime de Paris, art. VII(1), June 12, 2019 provides that "[the d]isputes under the jurisdiction of the Chambre Arbitrale Maritime shall be settled by a sole arbitrator or by a three-members Tribunal."; *See also* the Model Clause of the Emirates Maritime Arbitration Centre, 2016 (EMAC) saying that "[t]he number of arbitrators shall be [one or three]"; Arbitration Rules of the Cour Internationale d'Arbitrage Maritime et Aérien, art. 7.1 [*hereinafter* "CIAMA Rules"]: "[the d]isputes under the jurisdiction of "the Court" shall be settled by a sole arbitrator or by a three-members Tribunal"; Arbitration Rules of the Australian Maritime and Transport Arbitration Commission, r. 8, July 01, 2016 [*hereinafter* "AMTAC Rules"] : "[t]here shall be one arbitrator"; Rules of Arbitration & Conciliation of the Indian Council of Arbitration, r. 10(1), May 08, 2012 [*hereinafter* "ICA Rules"] : "[t]he number of arbitrators to hear dispute under these rules shall be either one or three to be appointed from and amongst ICA Maritime Panel of Arbitrators"; and Rules of the China Maritime Arbitration Commission, art. 29(1), Jan. 01, 2015: "[t]he arbitral tribunal shall be composed of one or three arbitrators".

[39] *See* Julian D. M. Lew et al., Comparative International Commercial Arbitration ¶¶ 10-28 (2003); Nigel Blackaby et al., Redfern and Hunter on International Arbitration ¶ 4.22 (6th ed., 2015); Al-Hawamdeh & A. Ababneh, *supra* note 10, at 414.

rules which clearly, unmistakably allow even-numbered tribunals, for example, the LMAA Terms in the context of maritime arbitration.

The institutional approach could be understood to have been born out of pragmatic considerations and the desire to avoid potentially serious difficulties, and not simply the fear of deadlock, which can be easily remedied by an umpire or third arbitrator. In particular, there is uncertainty at the enforcement stage which is much more difficult to remedy, especially in a situation where there is a conflict between the law of the seat and the law of the jurisdiction where enforcement is sought.[40] Simply stated, even if two arbitrators render a unanimous decision, and

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[40] *See* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1645-1646 (2d ed., 2014) [*hereinafter* "BORN"]: "Preliminarily, conflicts between the parties' agreed procedures for constituting an arbitral tribunal and the law of the arbitral seat can take a variety of forms. Parties may agree upon an even number of arbitrators, while the mandatory law of the seat may require an odd number […] Although there is substantial room for debate, the better interpretation of the Convention is that Articles II(3) and V(1)(d) generally require giving effect to the parties' agreed arbitral procedures in recognition actions, including where those procedures violate the mandatory law of the arbitral seat […] Only where the parties' agreed procedures for constituting the tribunal violated mandatory due process guarantees (under Article V(1)(b)) or the procedural public policies of the judicial enforcement forum (under Article V(2)(b), would the Convention permit non-recognition of the resulting award (under provisions other than Article V(1)(d)) [1668]. Although there is room for debate, the better view is that Contracting States are free under the Convention to apply such mandatory prohibitions (against even numbers of arbitrators) to annulment of awards in locally-seated arbitrations, but that Articles II and V(1)(d) require other Contracting States to give effect to the parties' agreement on an even number of arbitrators in recognition proceedings, notwithstanding contrary mandatory law in the arbitral seat. This would permit states to invoke mandatory local public policy with regard to arbitrations seated locally, as an exceptional escape mechanism, while allowing (and requiring) other Contracting States to give effect to the parties' agreement"; FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION ¶ 804 (Emmanuel Gaillard & John Savage eds., 1999): "One of the most innovative provisions of the 1958 New York Convention stipulates that the agreement of the parties as to the constitution of the tribunal takes precedence, and that the national law of the country where the arbitration takes place applies only where the agreement of the parties does not allow the tribunal to be properly constituted."

even if both parties had willingly participated in the procedure, the even composition of the tribunal may erupt or resurface at a post-award stage. The question of whether a national enforcement court would recognize an award rendered by an even-numbered tribunal or umpire needs to be considered. A prediction based on an exegesis of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ["**New York Convention**"] and national arbitration laws, is unlikely to offer the level of assurance that a well-advised party may wish for before agreeing to an even number of arbitrators. Aside from the common difficulty of predicting which national courts will be relevant at the enforcement stage, the rarity of even-numbered tribunals is matched by the rarity of clear and well-developed case laws by national courts.

For the future of international arbitration, especially at a time when it is heavily institutionalized, and despite efforts elsewhere to promote other methods of dispute resolution, the result could be a further separation of arbitration and conciliation. This is not entirely unlinked with the unfortunate large separation between the arbitration world and the contemporary legal comparatists.

III. The Links with Conciliation and Amiable Composition

Prohibiting or discouraging even-numbered tribunals does not always lead to positive results. The underlying negative assumption, that a tribunal composed of only two arbitrators will often result in a deadlock, may not even be grounded in fact. The inputs from arbitration practitioners who have actually participated in, or observed, an operational even-numbered tribunal, could prove to be very useful in the development of arbitration, by bringing new ideas to a topic that is often treated summarily, and in black and white terms.

Two main comparisons that support even-numbered tribunals are the truncated arbitral tribunals and two-member courts, especially divisional courts in common law jurisdictions such as England and Wales and India.

Both display present-day realities for which the fear and actuality of deadlock does not appear to be substantial.

The comparisons are admittedly not perfect, as, unlike the arbitral tribunals, the two judges are not nominated by the parties and an appeal would be possible. As for the truncated tribunals, the legal regime is often heavily fact-specific, dependent on timing, and very different from consciously choosing an even number of arbitrators from the very commencement of the arbitration as it allows an even number of arbitrators in an unlikely and undesired situation; where one of the arbitrators can no longer participate in the proceeding. Nevertheless, the risk of deadlock is still very much real with truncated tribunals and two-member courts, but has not been deemed sufficiently serious to prohibit their operational existence. The truncated tribunals and even-numbered national courts could, therefore, provide direction for even-numbered arbitral tribunals.

The question of why parties would agree to even-numbered tribunals in the first place also requires consideration. Many arguments can be raised against such tribunals, and these were concisely summed up by the Supreme Court of India in its decision dated February 20, 2002, in *Narayan Prasad Lohia* v. *Nikunj Kumar Lohia*, a case involving a family and property dispute where the parties had agreed at some point to a two-member arbitral panel:

"[The Respondent] submits that if there are an even number of Arbitrators there is a high possibility that, at the end of the arbitration, they may differ. [The Respondent] submits that in such a case parties would then be left remediless and would have to start litigation or a fresh arbitration all over again. [The Respondent] submits that this would result in a colossal waste of time, money and energy. [The Respondent] submits that to avoid such waste of time, money and energy the Legislature has, in public policy,

provided in a non-derogatory manner, that the number of arbitrators shall not be even.”[41]

At the same time, there are practical and perfectly valid reasons why parties may wish to choose an even-numbered tribunal. First, the parties, especially if improperly advised, may not be aware of the legal issues and potential complications arising out of even number of arbitrators. This, however, is unlikely to be frequent and does not call for further developments. Second, the parties may wish to have a more conciliatory dispute resolution procedure and outcome. This situation is not a marginal reality. Both of the previously mentioned factors may be especially relevant in family disputes and arbitrations of a more domestic nature, with which the international arbitration practitioners would be less familiar. Third, parties may expect a properly selected even-numbered tribunal to render a cost-efficient, fair and valid award, without undue concerns about the risk of deadlock.

Gary Born mentioned the possibility – without expressly endorsing the view – that an even number of arbitrators may more likely reach a pure

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41 Narayan Prasad Lohia v. Nikunj Kumar Lohia, (2002) 3 SCC 572 ¶ 10 (India). In that case, however, the apex court – as the Supreme Court is often referred to in India – ultimately held that the losing respondent had waived its right to object to the composition of the tribunal. In pertinent part, the Supreme Court stated that “[…] we see no reason, why the two arbitrators cannot appoint a third arbitrator at a later stage, i.e. if and when they differ. This would ensure that on a difference of opinion the arbitration proceedings are not frustrated. But if the two Arbitrators agree and give a common award there is no frustration of the proceedings. In such a case their common opinion would have prevailed, even if the third arbitrator, presuming there was one, had differed. Thus, we do not see how there would be waste of time, money and expense if a party, with open eyes, agrees to go to Arbitration of two persons and then participates in the proceedings. On the contrary there would be waste of time, money and energy if such a party is allowed to resile because the Award is not of his liking. Allowing such a party to resile would not be in furtherance of any public policy and would be most inequitable.”

'compromise decision'.[42] Despite the speculative, or at least debatable nature of this exercise, two main factors explain the reasons behind the possibility that an even number of arbitrators may have a specific impact on the arbitral procedure and outcome.

The first factor relates to the internal dynamics of an arbitral tribunal. With an even number of arbitrators, in particular, a two-member tribunal, the fear of deadlock has an advantage that it should incentivise the two arbitrators to make mutual concessions for arriving at a mutually satisfactory outcome, rather than seeing their decision being made by another person, like an umpire.

It is important to remember that parties are unlikely to blindly accept a pure two-member tribunal without a remedial solution, like an umpire, in case of a deadlock. This means that an arbitrator may be able to delay, but not entirely wreck the procedure. The mutual concessions may facilitate a more greyish and nuanced decision reflecting the complexity of the situation, rather than a black or white legalistic solution that may not necessarily do justice to the parties.

The second factor relates to the relationship between the parties and the community in which they operate. If the parties make an informed decision to choose an even number of arbitrators, the likelihood is that they will expect a certain level of fair play in the selection of the tribunal and the arbitration of their future dispute. Some of the reasons why parties could have such an expectation are the past dealings between the parties, desire to maintain long-term relations, and fairly closed community in which they operate, where the expectation of award compliance is high, and the reputational and other sanctions are relatively easy to apply in case of non-compliance.

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[42] BORN, *supra* note 40, at 1352.

The even number of arbitrators presents many similarities with amiable composition, one of the functions of which is also to allow fairer and more conciliatory approaches. Besides the fact that both, the number of the arbitrators and the special powers and obligations of *amiable compositeurs*, relate to the composition of the tribunal, their relative rarity, the suspicion that each creates amongst the practitioners, the institutional and national efforts aimed at preventing or discouraging their use, and the very reason why the parties may wish to have recourse to either of them in the first place, are all elements that bring them closer together at a theoretical level. These may constitute different techniques in different jurisdictions to reach a similar result.

The typical situation in which an *amiable compositeur* may be called upon, namely, long term contracts, the importance of good faith before and during the dispute, and the need to precisely draft the amiable composition clause for knowing the limits of the additional powers and obligations of the decision-makers, are all helpful elements to keep in mind, if and when the parties agree to an even number of arbitrators and umpire.

While the long-term nature of the underlying contract or relationship may be a less frequent element in the situation of even-numbered tribunals, good faith and precision in the arbitration clause and nomination process will always be paramount.

If the parties agree on an even number of arbitrators, but one of the parties nominates a specific arbitrator in bad faith, with the precise objective of preventing a common decision, then a sole arbitrator or three-member panel would certainly be preferable.

The rarity of even-numbered tribunals and *amiable compositeurs* at present should be contrasted with their past practice. When reviewing the institution of amiable composition, the author was surprised to learn that amiable composition was significantly more prevalent in the past, for

example in France.[43] In the jurisdictions where amiable composition was mistrusted and avoided, for example England, similar results could be achieved by arbitrators, who at the time were not obliged to, and often did not, provide reason in their awards.[44]

A review of the former national laws of England and India, i.e., the (Indian) Arbitration Act, 1940[45] and the (English) Arbitration Act, 1950, leaves one with the clear impression that the umpire and even-numbered tribunals were much more common before. It is not only the extensive references to the umpire, which are striking, especially in comparison to the (Indian) Arbitration and Conciliation Act, 1996, which does not make any such reference (in contrast, however, to the (English) Arbitration Act, 1996); it is also that the (English) Arbitration Act, 1950 presumes that: (i) unless indicated otherwise, a reference to two arbitrators shall be deemed to include a provision for the appointment of an umpire by the two arbitrators (the presumption now in the (English) Arbitration Act, 1996 is for the deemed appointment of a third arbitrator[46]) and (ii) the parties'

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43 See Régis Bonnan, Different Conceptions of Amiable Composition in International Commercial Arbitration: A Comparison in Space and Time, 6 J. INT'L DISP. SETTLEMENT 522, 530 n. 23 (2015).

44 *Id.* at 525.

45 The Arbitration Act, No. 10 of 1940, §§ 8, 9 (India) read as follows:
"8. Power of Court to appoint arbitrator or umpire -
(1)(c) Where the parties or the arbitrators are required to appoint an umpire and do not appoint him; any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy.
9. Power to appoint a new arbitrator or in certain cases, a sole arbitrator - Where an arbitration agreement provides that a reference shall be to two arbitrators, one to be appointed by each party […]."

46 *See* Arbitration Act 1950, 14 Geo. 6 c. 27, § 8(1) (Eng.) ("Unless a contrary intention is expressed therein, every arbitration agreement shall, where the reference is to two arbitrators, be deemed to include a provision that the two arbitrators shall appoint an umpire immediately after they are themselves appointed"). *Cf.* Arbitration Act, 1996, c. 23, § 15(2) (Eng.) ("Unless otherwise agreed by the parties, an agreement that the number of arbitrators

reference to three arbitrators will be interpreted as a reference to two arbitrators with an umpire.[47] The above is further confirmed by the apparently uncontroverted assertion made by a leading Indian jurist, who stated that even-numbered tribunals were not only possible but were "usual" prior to the deemed entry into force of the (Indian) Arbitration and Conciliation Act, 1996.[48]

It must assuredly have been easier to agree on an even-numbered tribunal at a time when the use of an umpire was much more frequent and the awards did not have to be motivated. No reference is made to any such obligation in the (Indian) Arbitration Act, 1940 or the (English) Arbitration Act, 1950, thereby facilitating unanimity and rendering irrelevant the question of who drafts what. Arbitration was also much less institutionalised and not overwhelmingly dominated by lawyers.[49]

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shall be two or any other even number shall be understood as requiring the appointment of an additional arbitrator *as chairman* of the tribunal"); Note that § 3(2) of the First Schedule of the Arbitration Act, 1940 also provided that a reference to two arbitrators would require the appointment of an umpire ("If the reference is to an even number of arbitrators, the arbitrators shall appoint an umpire not later than one month from the latest date of their respective appointments").

47 Arbitration Act 1950, 14 Geo. 6 c. 27, § 9(1) reads as follows: "Where an arbitration agreement provides that the Agreements reference shall be to three arbitrators, one to be appointed by for reference each party and the third to be appointed by the two appointed to three by the parties, the agreement shall have effect as if it provided for the appointment of an umpire, and not for the appointment of a third arbitrator, by the two arbitrators appointed by the parties."

48 Fali S. Nariman, *Even Number of Arbitrators: Article 10 of the UNCITRAL Model Law: India*, 15 ARB. INT'L 405 (1999) where the author summarized the litigant's position in stating, in pertinent part, that the "appointment of an even number of arbitrators was usual prior to 25 January 1996."

49 For the judicialization of international commercial arbitration, especially in the ICC Context, *see* Florian Grisel, *Competition and Cooperation in International Commercial Arbitration: The Birth of a Transnational Legal Profession*, 51 L. & SOC'Y REV. 790, 807-808 (2017). In particular, Mr. Grisel notes that "Professors were only a minority among all appointees, even though their relative weight steadily grew over time […] attorneys were the dominant group among ICC

The previously mentioned characteristics are clearly noticeable, and have left a deeper and lasting imprint on, the world of maritime arbitrations, especially in London. Along with this is the additional element that oral hearings were, and still are, less frequent,[50] even if party-appointed arbitrators appear to have often acted as advocate-arbitrators.

The following passage from Bruce Harris is informative:

"*[…] each of the parties would appoint an arbitrator, probably from the Baltic list. Those arbitrators would then seek to agree, but if they could not (and this was quite common) they would appoint a third person usually as 'umpire'. In English law, an umpire becomes the sole arbitrator once the party-appointed arbitrators have disagreed, and he alone makes the decision. This left the party-appointed arbitrators free to advocate their appointers' cases in front of the umpire, which they would often do. Nowadays, the concept of the arbitrator-advocate seems a strange one to us. That is partly because, due to some changes in shipping practices and in English arbitration law, the umpire is nowadays almost unknown, having been replaced by a third arbitrator who acts in conjunction with the other two arbitrators. It is also partly because the recent and present generations of arbitrators, unlike some of their predecessors, do not seek to take any position in relation to the disputes on which they*

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arbitrators after the Second World War, and […] their relative importance also increased. Conversely, the proportion of engineers/experts, businessmen/corporate executives and members of trade federations/unions dropped to insignificant levels. When considering the last sub-period (1963–1972), attorneys, judges, and professors accounted for more than 74 percent of all appointments. In other words, the influence of legal specialists grew over time to the point where business specialists held only a small share of all appointments."

[50] In the LMAA context, *see* Daniella Horton, *Adjusting the Sails…*, LONDON MAR. ARB. ASS'N 3 *available at* http://www.lmaa.london/uploads/documents/Daniella%20Horton%20Paper.pdf. ("In fact, for some time now, the majority of cases which proceed to an award on LMAA Terms, do so on documents alone").

have to adjudicate other than that which seems to them to be correct on their understanding of the evidence and the law."[51]

The search for conciliation may be a reason why parties today still wish to choose even-numbered tribunals, but it is not the sole reason. While even-numbered tribunals are more prevalent in maritime arbitration than elsewhere, conciliation is not reported to be the key objective in most maritime disputes. Perhaps, counter intuitively, parties acting in good faith could believe and expect that two party-appointed arbitrators will be able to reach a unanimous and objective decision, fairly, quickly, and in a cost-effective manner.

A dynamic of two arbitrators is different from one or three: the atmosphere will likely be less theatrical, more relaxed, and also more participative in the sense that one will not see the all too familiar situation in which the discussion is led essentially by two persons only, the third one being largely excluded or excluding himself. The idiom 'two is company, three is a crowd' may sometimes apply in the legal context as well.

The links between quantity and quality are complex, and depend on the context. In judicial and arbitral decision-making, having three or more decision-makers is not necessarily better than a lesser number, and there are ways to minimize the risk of deadlock and improve the process, including, by way of financial incentives to the arbitrators in the dispute resolution clause and, in case of deadlock, by placing more reliance on views of one of the two arbitrators, which would be similar to the 'referee' system or 'baseball arbitration' as referred to in the U.S. This would also promote reasonableness by the two arbitrators and efficiency if a deadlock still ensues.

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51 Bruce Harris, *London Maritime Arbitration*, 77 ARB. INT'L 116, 117-118 (2011).

The visibility of the number of arbitrators makes it easy for institutions and legislators to prohibit the even-numbered arbitral tribunals and to enforce the rule of prohibition. This rule is not necessarily wise. Allowing an even number of arbitrators, in some situations and with certain safeguards, may well provide effective means of promoting more cooperation, good faith and impartiality in the decision-making process, which are crucial in arbitrations.

There may also be cost considerations at play. A well-functioning two-member tribunal will involve lower arbitral fees than a three-member tribunal, even though the easy and legitimate argument can be made that a sole arbitrator will be even cheaper. The anticipated cost reduction with even-numbered tribunals is not simply limited to the fact that there will be one less arbitrator working and charging for the performance of his duties. It is also explained by the expectation that the entire atmosphere of the arbitration will be less adversarial and confrontational, the practitioners will be less argumentative and repetitive in their briefs, and the awards will accordingly tend to be shorter and more concise.

On the other hand, some serious drawbacks exist with even-numbered tribunals, including potentially the personality conflicts and important disparities between the two arbitrators in ability, experience, and knowledge. These should be avoided to prevent deadlock or, in effect, a decision by a sole arbitrator. Two-member tribunals may also lead to less culturally diverse tribunals than is usually the case, because of the anticipated insistence by both parties – in law or in fact – to have party-appointed arbitrators with the precise legal background and practice corresponding to the law governing the dispute.

IV. Conclusion

The objective of this article is not to promote the generalization of even-numbered arbitral tribunals. This would be inadvisable for most commercial disputes; the uncertainty at the enforcement stage, today, remains unfortunately too high. And yet parties in dispute (and their in-

house counsel in particular) should not automatically reject such an option without further thought. Maritime arbitration, truncated tribunals and two-member national courts would provide useful sources of information. The appeal of even-numbered tribunals might also increase if the textual ambiguity of many institutional rules, and position by national enforcement courts, is clarified and publicized in a more liberal and permissive direction.

Even-numbered tribunals raise issues and ideas that are less clear-cut and more interesting than often thought. It has certain links with the reality of the advocate-arbitrator and the possible promotion of conciliation, and so the widespread negative treatment given to even-numbered tribunals – manifested by either rule prohibition or discouragement and often justified out of prudence and pragmatism – is a cause for concern.