The number of arbitrators and a preliminary award in a multi-party arbitration in Cyprus

One of the main issues in the constitution of an arbitral tribunal is the number of arbitrators. Most of the times, either the arbitration agreement itself or the default rule of the national laws or the applicable institutional rules provide the number of arbitrators. Nevertheless, the constitution of the arbitral tribunal became one of the greatest challenges in a recent Cypriot arbitration involving multiple parties because the parties had not expressly agreed on the number of arbitrators. The aim of this article is to outline various approaches in respect of the number of arbitrators and present the Cypriot case on the matter.

Various approaches

Generally, the parties have freedom to agree on the number of arbitrators but arbitration by an uneven number of arbitrators is more desirable. National laws have adopted various approaches.

With regards to the UNCITRAL Model Law on International Commercial Arbitration, Article 10(1) grants to the parties freedom to determine the number of arbitrators based on the principle of party autonomy. In case the parties cannot reach an agreement, Article 10(2) contains the default rule

pursuant to which the number of arbitrators shall be three. The travaux préparatoires and the interpretation given by different national courts confirm the wording of the text of the Model Law entailing that an agreement for an even number of arbitrators is valid.[1]

On the contrary, there are national legislations which prohibit tribunals consisting of an even number of arbitrators. Article 1451 of the French Code of Civil Procedure constitutes a prime example since it sets forth that if an arbitration agreement provides for an even number of arbitrators, an additional arbitrator shall be appointed. Likewise, Article 1026(1) of the Netherlands Code of Civil Procedure and Article 809 of the Italian Code of Civil Procedure are instances of similar provisions. Article 15 (2) of the Egyptian Arbitration Law is an extreme case since arbitration agreements providing for arbitrations by an even number of arbitrators are invalid.

In the light of the above, as Gary Born has mentioned convincingly, Section 15(2) of the English Arbitration Act, 1996[2] is the wiser legislative approach because the law establishes a presumption in favor of a tribunal consisting of an odd number of arbitrators without ignoring the principle of party autonomy.[3]

A preliminary award in a multi-party arbitration in Cyprus

In a multi-party arbitration in Cyprus based on an arbitration clause provided for arbitration by one or more arbitrators, the question whether each of the three respondents were entitled to appoint a separate arbitrator arose.

In this case, which was a shareholder dispute, the claimants filed an application requesting from the Court to appoint a joint arbitrator for the respondents. Finally, the application was rejected by the Court, which held that the claimants were not entitled (a) to impose on the respondents the number of arbitrators they want to appoint on their behalf and (b) to an order enforcing the respondents to appoint jointly a single arbitrator. The Court highlighted that these conclusions were the same irrespective of the applicable law. In Cyprus, Cap.4 governs domestic arbitrations and the International Commercial Arbitration Law, Law 101/1987 (the "ICAL") governs international commercial arbitrations and is almost identical to the UNCITRAL Model Law. Neither the matter of the number of arbitrators to be appointed nor the applicable law, Cap. 4 or ICAL was decided by the Court. The court did not consider the question of whether the parties had in fact agreed or not on the number of arbitrators

[1] UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, https://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf, page 57

[2] Section 15(2) of the English Arbitration Act, 1996 "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 tribunal."

[3] Gary B. Born, International Commercial Arbitration, Second Edition, Kluwer Law International 2014, p.1668

to be appointed and therefore the presumption in the Model Law in favour of three arbitrators was not considered.

Subsequently, the four party-appointed arbitrators proceeded with the appointment of an additional arbitrator as the chairman of the tribunal. Following this, two of the respondents raised an objection to the appointment of the chairman claiming that the tribunal did not have the jurisdiction to do so. Their main allegation was that neither the arbitration clause nor the applicable arbitration law provided for the appointment of a chairman by the party-appointed arbitrators. Thus, the issue in this case was whether the appointment of an additional arbitrator as chairman was correct and therefore, whether the tribunal would consist of four or five arbitrators.

As a result, the tribunal issued a preliminary award on the matter. Firstly, the tribunal decided that the applicable arbitration law was the ICAL and then, the tribunal affirmed the valid constitution of the tribunal consisted of five arbitrators.

As for the reasoning of the award, the tribunal, firstly, pointed out that in the context of the abovementioned court proceedings, the respondents had admitted that the party appointed arbitrators would be able to appoint a president and so any practical problems would be addressed and the number of arbitrators would be odd. Subsequently, the tribunal noted that the number of arbitrators was not determined by the arbitration clause and there was no agreement by the parties on this issue.

The relevant articles of the ICAL are Article 10(2) and 11(3) of the ICAL, which are identical to Articles 10(2) and 11(3) of the UNCITRAL Model Law. However, the default rule of Article 10(2) of the ILAC was not applicable since the parties accepted that the four arbitrators were validly appointed and the question before the tribunal was whether they would continue with a four-member or five-member tribunal. The law does not include any provision for 4 or 5 arbitrators and the tribunal decided pursuant to the text and spirit of the arbitration clause and the intentions of the parties. Despite the above, the tribunal noted that there is a general direction towards an odd number of arbitrators under the UNCITRAL Model Law.

Unsurprisingly, the tribunal analyzed that an odd number of arbitrators would facilitate the arbitration proceedings by avoiding deadlocks. It was obvious that a tribunal consisting of four arbitrators may be incapable of issuing a final award and its members may agree to a “compromise” award. The tribunal further noted that the efficiency and finality of the arbitral process was in line with the intentions of the parties at the time they concluded the arbitration clause since the arbitration clause itself stated

that all disputes arising out of or in connection with the agreement shall be finally settled by arbitration.

Conclusion

In conclusion, it can be inferred that the party autonomy prevails with regards to the number of arbitrators but there is an inclination towards the tribunals consisting of an odd number of arbitrators. Interestingly, this preliminary award illustrates that when there is no agreement, court judgement, law or rule to determine the number of arbitrators, the tribunal should consist of an uneven number of arbitrators in order to facilitate the arbitral proceedings.

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