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***Institutional Arbitration: Harmony, Disharmony
and the “Party Autonomy Paradox”***

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Summary: I. Introduction. II. What is “Institutional” Arbitration? – III. Institutional Arbitration and Party Autonomy. 1. The Parties’ Stand-Alone Choice of an Arbitral Institution or its Rules. 2. The Parties’ “Disharmonious” Choice of Arbitral Institution and Arbitration Rules. 3. The Parties’ Deviation from “Mandatory” Provisions in the Arbitration Rules. 4. Party Autonomy and Institutional Discretion: The “Party Autonomy Paradox”. IV. Conclusion.

Abstract: Institutional Arbitration: Harmony, Disharmony and the “Party Autonomy Paradox”

In international arbitration, there is an intrinsic tension between the autonomy of arbitral institutions and that autonomy of the parties. This tension is caused by the increasing role played by arbitral institutions, both with respect to the quasi-normative force of their rules and their enhanced decisional powers in the implementation of these rules. In light of the vast authority granted to some arbitral institutions, the quality of institutional administrative decision-making is sometimes even closely linked to the person holding the relevant office. Due to the potentially harmful effect on party autonomy, modern institutional arbitration is regarded by some as not entirely in keeping with the principle of the primacy of the parties’ intentions. Others even see the interventionist attitude of some arbitral institutions as an additional ground for legitimacy concerns

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which are being raised with respect to the international arbitral system as a whole. Where the arbitration rules grant the institution discretion to decide matters concerning the administration of the proceedings, party agreements should, as a rule, trump the discretion of the institution. This approach serves to avoid potential damage to both the attractiveness and the legitimacy of institutional arbitration inflicted by the party autonomy paradox.

Keywords: INTERNATIONAL ARBITRATION – AUTONOMY OF THE PARTIES – ARBITRAL INSTITUTIONS – ARBITRATION RULES.

Resumen: Arbitraje institucional: armonía, desarmonía y la “paradoja de autonomía de las partes”

En el arbitraje internacional, existe una tensión intrínseca entre la autonomía de las instituciones arbitrales y la autonomía de las partes. Esta tensión obedece al creciente papel desempeñado por las instituciones arbitrales, tanto con respecto a la fuerza cuasi-normativa de sus reglas, como en relación a sus poderes de decisión mejorados en la implementación de estas reglas. A la luz de la gran autoridad otorgada a algunas instituciones arbitrales, la calidad de la toma de decisiones administrativas institucionales a veces está estrechamente vinculada a la persona que ocupa el órgano competente. Debido al efecto potencialmente dañino sobre la autonomía de las partes, el arbitraje institucional moderno es considerado por algunos no del todo acorde con el principio de la primacía de las intenciones de las partes. Otros incluso ven la actitud intervencionista de algunas instituciones arbitrales como un elemento adicional para las preocupaciones de legitimidad que se plantean con respecto al sistema arbitral internacional en su conjunto. Cuando las reglas de arbitraje otorgan a la institución discreción para decidir sobre asuntos relacionados con la administración de los procedimientos, los acuerdos de las partes deben, por regla general, prevalecer sobre la discreción de la institución. Este enfoque sirve para evitar el daño potencial tanto al atractivo como a la legitimidad del arbitraje institucional infligido por la “paradoja de la autonomía de las partes”.

Palabras clave: ARBITRAJE INSTITUCIONAL – AUTONOMÍA DE LA VOLUNTAD DE LAS PARTES – INSTITUCIONES ARBITRALES – REGLAMENTOS DE ARBITRAJE.

I. Introduction

In his seminal work *De Jure Belli ac Pacis* (“*On the Law of War and Peace*”), which was based on the work of the Spanish theologian, philosopher and lawyer *Francisco de Vitoria* and with which he laid the foundation for modern international law, *Hugo Grotius* coined the famous phrase: “Liberty [...] is the power, that we have over ourselves [...]”¹. *Grotius* derived this liberty from natural law and described it as a fundamental “private right [...] established for the advantage of each individual”. In international arbitration, the parties exercise this individual power in their arbitration agreement as an expression of their

¹ Hugo Grotius, *On the Law of War and Peace: Including the Law of Nature and of Nations*, translated from the original Latin by Rev Campbell A.M., vol. I, 1814, 12.

personal or “private” autonomy². Today, many of these agreements provide for institutional arbitration. This variety of arbitration has always been one of the cornerstones of the international arbitration process. Its central role is mirrored, *e.g.* in Art. 2 (a) UNCITRAL Model Law on International Commercial Arbitration of 1985³. It provides that, throughout the Model Law, “‘arbitration’ means any arbitration *whether or not administered by a permanent arbitral institution*” (emphasis added). The paramount significance of institutional arbitration is confirmed by the fact that the number of institutional arbitrations has grown steadily since the mid–twentieth century⁴. Likewise, the proliferation of arbitral institutions, whether on a global, regional or domestic level, whether offering specialized services for disputes arising in a particular branch of trade or industry, or offering arbitration services for all types of disputes, has accelerated in recent times⁵. Due to this global trend towards the “institutionalization of arbitration”⁶ and the “multifaceted reality”⁷ of institutional arbitration the

² *Vid.*, for example R. Mullerat, “The Contractual Freedom of the Parties (Party Autonomy) in the Spanish Arbitration Act 2003”, in G. Aksen, K.H. Böckstiegel, M.J. Mustill, P.M. Patocchi and A.—M. Whitesell (eds.), *Global Reflections on International Law, Commerce and Dispute Resolution. Liber Amicorum in Honour of Robert Briner* (ICC 2005), 544: “Spanish arbitration is based [...] on the prior decision each [party] makes to submit disputes to arbitration. The primary manifestation of the parties’ free will is their deciding to opt out of ordinary litigation and to submit their disputes to arbitration”; see also B. Cremades, “Les effets de la clause d’arbitrage dans la jurisprudence espagnole recente”, in J. Schultsz and A. van den Berg (eds.), *The Art of Arbitration, Liber Amicorum Pieter Sanders*, (Kluwer 1982); E. Gaillard and J. Savage (eds), *Fouchard / Gaillard / Goldman on International Commercial Arbitration* (Kluwer 1999), No 46: “The contract between the parties is the fundamental constituent of international arbitration”; G.A. Bermann, “Arbitration and Private International Law, General Course on Private International Law”, (2017) 381 *Collected Courses of the Hague Academy of International Law* 58 *et seq.*; C. Blackaby and N. Partasides (eds), *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015), No 6.07.

³ The Model Law “reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world”, *vid.* www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html; *vid.* also G.B. Born, *International Commercial Arbitration* vol. I (2nd edn, Kluwer 2014), § 1.04 [B] [1] [a], who concludes that: “the Model Law’s contributions to the international arbitral process are enormous and it remains, appropriately, the dominant ‘model’ for national legislation dealing with international commercial arbitration”; Blackaby/Partasides, *ibid.*, No 1.220: “It may be said that if the New York Convention put international arbitration on the world stage, it was the Model Law that made it a star, with appearances in states across the world”.

⁴ R. Gerbay, *The Functions of Arbitral Institutions* (Kluwer 2016), § 2.01 [A].

⁵ *Vid.* Gaillard and Savage (n 2), No 323 *et seq.*; Blackaby and Partasides (n 2), No 1.158.

⁶ P. Fouchard, *L’Arbitrage Commercial International* (Daloz 1965), No 21; Gaillard and Savage (n 2), No 57.

⁷ Gerbay (n 4), § 3.01.

number of existing arbitral institutions has become almost countless, both on the domestic and international level⁸, as have the tasks they are performing.

The UNCITRAL Model Law also reflects the vital link between institutional arbitration and party autonomy. Art. 2 (d) of the Model Law provides:

“... where a provision of this Law [...] leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination”.

The fact that the parties, by choosing a specific arbitral institution, endow this institution with the performance of numerous tasks during the arbitration leads to fundamental questions: Are the parties bound by this institution's arbitration rules to the extent that they are considered “mandatory”⁹ by the arbitral institution? Does the arbitral institution, in exercising the administrative discretion granted to it under its rules, have the power to “overrule” a procedural agreement by the parties? Answering both questions in the affirmative would lead to a “party autonomy paradox”: by agreeing to institutional arbitration as an exercise of party autonomy, the parties would at the same time agree to limit that very same autonomy. That outcome would be both paradoxical and problematic, given that “[t]he argument for arbitration begins with respect for private agreements”¹⁰. In fact, it is the respect for the parties' autonomy that has made arbitration distinctly different from, and more attractive than, the conduct of proceedings before domestic courts, which are usually trapped in a straight-jacket of mandatory procedural norms.

II. What is “Institutional” Arbitration?

Any discussion related to the relationship between institutional arbitration and party autonomy requires the identification of the essential characteristics of this type of arbitration. Very often, this determination

⁸ *Ibid.*, § 2.01 [B].

⁹ *Vid.* for the reason why this term appears in quotation marks *infra* section 3.3.

¹⁰ J. Paulsson, *The Idea of Arbitration* (OUP 2013), 2; *vid.* also W. Park, “When and Why Arbitration Matters”, in: G. Beresford Hartwell (ed.) *The Commercial Way to Justice*, 1997, 73, 83, n. 26: “[...] the origin of the arbitrator's power lies in an act evidencing the parties' intent to waive the otherwise applicable rules of judicial jurisdiction in favor of private adjudication”; *vid.* also for party autonomy as the “juristic foundation of international commercial arbitration M. Mustill, “A New Arbitration Act for the United Kingdom?” (1990) 6 *Arbitration International* 3, 31.

is made by reference to the traditional “*ad hoc*”/“institutional” dichotomy¹¹. While the first is governed by rules tailor-made by the parties themselves, the latter is governed by rules which are pre-formulated and published by a body, the arbitral institution, which also administers the arbitration. By reference in their arbitration agreement – usually the model clause provided by the respective arbitral institution –, the parties make the rules of that arbitral institution part of their arbitration agreement¹². The rules, therefore, “serve as the parties’ procedural law”¹³.

It was due to this code-like quality¹⁴ of institutional arbitration rules that, in the early days of modern arbitration practice, the question was raised whether the increasing “institutionalization” of arbitration would lead to a “complete metamorphosis of international commercial arbitration” into a system that comes close to dispute resolution before domestic courts¹⁵. However, this effect of institutional arbitration follows from the will of the parties as expressed in their arbitration clause¹⁶. In this respect, institutional arbitration is just as much a “creature of contract”¹⁷ as its *ad hoc* counterpart. The effect of private arbitration rules as “*quasi codes*” also follows from the fact that institutional rules are intimately, if not inextricably, linked to the issuing institution¹⁸. For that reason, the institutions, when publishing

¹¹ Blackaby / Partasides (n 2), No 1.140; Born (n 3), § 1.04 [C]; Gerbay (n 4), § 1.02 [A] [1]; see for a critical appraisal of these views B. Warwas, *The Liability of Arbitral Institutions: Legitimacy Challenges and Functional Responses* (Springer 2017), 20 *et seq.*

¹² *Vid.* generally Born (n 3), § 9.03 [A]: “When parties agree to arbitrate under institutional rules, they are deemed to have incorporated those rules into their agreement, and are therefore bound by such rules as a contractual matter”; see also Gaillard/Savage (n 2) No 359; Blackaby/Partasides (n 2), No 1–99; *vid.* also *Fabergé Inc. v Felsway Corp*, 539 N.Y.S. 2d 944, 946 (1st Dep’t. 1989); *Haviland v Goldman Sachs & Co.*, 947 F.2d 601, 604 (2nd Cir. 1991).

¹³ *Thomson CSF v Groupement Sanitec Megco (Beyrouth)*, *Rev. arb.* 1998, 414 (French Cour de Cassation); Gaillard/ Savage (n 2), No 366; see also T. Landau, “The Effect of the New English Arbitration Act on Institutional Arbitration” (1996) 13 *J. Int’l Arb.* 113.

¹⁴ *Vid.* for the “quasi normative” potential of private texts N. Jansen, *The Making of Legal Authority* (OUP 2010), 43 *et seq.*, concluding that “non-legislative reference texts may gain similar or even greater authority than legislative codifications” and complaining that so far “legal scholars [in analysing factors determining, legal authority of such texts] have mostly focused on factors of pure legal rationality”, *ibid.* at 138 and 141.

¹⁵ Fouchard (n 6), No 21.

¹⁶ *Ibid.*, No 22: “[...] le fondement juridique de cet arbitrage-jurisdiction, on pourrait presque dire sa, couverture’, reste toujours, officiellement, l’autonomie de la volonté: la licéité de l’arbitrage institutionnel, de l’arbitrage ,pre-fabrique’ résulte, en droit positif, de cette autonomie [...]”.

¹⁷ Bermann (n 2), 60.

¹⁸ A. Carlevaris, “The Bounds of Party Autonomy in Institutional Arbitration”, in A. Carlevaris, L. Lévy, A. Mourre and E.A. Schwartz (eds.), *International Arbitration Under Review. Liber Amicorum John Beechey* (ICC 2015), 118.

their rules and model clauses, make a permanent offer ("*offerta ad incertas personas*") to administer arbitrations under their rules¹⁹. That offer is not accepted at the time of inclusion of the reference in the parties' arbitration agreement²⁰. Rather, the parties tacitly accept the institution's offer to administer the arbitration when they initiate the proceedings, typically by serving the request for arbitration on the institution²¹. At that moment, a service contract is concluded between the institution and the parties jointly, pursuant to which, the institution will administer the arbitration in accordance with the version of its rules in force at the time the arbitration is commenced²².

Institutional arbitration is thus characterized by three essential and defining features. All three criteria must be met to qualify an arbitration as institutional:

- 1) arbitral proceedings conducted under pre-formulated arbitration rules,
- 2) the existence of a permanent body – the arbitral institution – which has issued these specific rules and
- 3) the administration of the arbitration by that institution as a contractual duty arising out of a service contract concluded with the parties²³.

III. Institutional Arbitration and Party Autonomy

To accommodate the will of the parties, most institutional arbitration rules, while providing rules for the general framework of the arbitration proceedings, leave ample freedom for party agreements on specific procedural issues. However, there are various scenarios in which arbitral institutions and their rules may conflict with this overriding principle of international arbitration law. These scenarios have

¹⁹ *Vid.* for ICC arbitration Y. Derains and E.A. Schwartz, *A Guide to the ICC Rules of Arbitration* (2nd rev edn, Kluwer 2005), 7 *et seq.*

²⁰ But see *Société SNF SAS v Chambre de Commerce Internationale*, *Rev arb.* 2009, 233 (Paris Court of Appeal); *vid.* for arbitration under the VIAC Rules F.T. Schwarz and C.W. Konrad, *The Vienna Rules: A Commentary on International Arbitration in Austria* (Kluwer 2009), No 1–022.

²¹ *Vid.* R.A. Schuetze, in: R.A. Schuetze (ed.), *Institutionelle Schiedsgerichtsbarkeit* (3rd rev edn, C. Heymanns 2018), Einleitung, No 42.

²² *Vid.* for this general principle *infra* note 94.

²³ *Vid.*, e.g. Ph. Fouchard (n 6), Nos. 21, 403; K.P. Berger, *International Economic Arbitration* (Kluwer 1993), 53 *et seq.*; Gerbay (n 4), § 1.02 [B]; Blackaby/Partasides (n 2), No 1.146 *et seq.*

one common origin: the characteristic feature of institutional arbitration as a combination of an arbitration governed by a set of pre-formulated arbitration rules and its administration by the arbitral institution which has issued these rules²⁴. The proper and smooth operation of this interplay between the administering institution and its rules must necessarily lead to certain frictions with the notion of fully-fledged party autonomy. In other words: while party autonomy can be freely exercised in choosing an arbitral institution and its rules, that choice may have a price in the form of limitations on that autonomy when it comes to the conduct of the proceedings under the chosen rules.

1. The Parties' Stand-Alone Choice of an Arbitral Institution or its Rules

A conflict with party autonomy may arise where parties make a "stand-alone" reference to an arbitral institution (without its rules), or *vice versa*, to the rules (without the issuing institution).

The first scenario can usually be resolved through a reasonable and liberal "harmonious" interpretation of the parties' agreement to arbitrate. If parties agree to arbitration administered by an arbitral institution without mentioning this institution's arbitration rules (*e.g.* by not using the model arbitration clause recommended by that institution), that agreement must reasonably be construed as a "harmonious" choice of institutional arbitration under the institution's rules²⁵. This principle of "harmonious" interpretation must be regarded as a sub-species of the general transnational principle of effective interpretation ("*in favorem validitatis*") of arbitration clauses²⁶. This result is confirmed by Art. IV (1) (a) of the 1961 European Arbitration Convention which provides that if the parties have submitted their dispute to an arbitral institution "the arbitration proceedings shall be held in conformity with the rules of the said institution".

In the second scenario, where the parties refer to the rules of a certain arbitral institution but do not specifically stipulate that (or any)

²⁴ *Vid. supra*, section 2.

²⁵ U. Schroeter 'Ad Hoc or Institutional Arbitration – A Clear-Cut Distinction? A closer look at Borderline Cases' (2017) 10 *Contemp. Asia Arb. J.* 141, 166 *et seq*; D. Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement*, (1st edn, Sweet & Maxwell 2005), § 4.27.

²⁶ *Vid.* for the principle *in favorem validitatis* as a transnational principle for the construction of international arbitration agreements TransLex–Principle XIII.1.1, www.translex.org/968902; K.P. Berger, *Private Dispute Resolution in International Business* vol II (3rd edn, Kluwer 2015), No 20–75; for a more balanced approach Born (n 3), § 9.02 [C].

institution to administer the arbitration, the result can and should be the same in the vast majority of cases. In some cases, the arbitration rules themselves contain a provision specifying that by agreeing to the rules of the institution, the parties are deemed to have also accepted that the arbitration shall be administered by that institution²⁷. Other rules are less explicit and, like Art. 2.1 2018 DIS Arbitration Rules, merely provide that the institution “administers arbitrations under the Rules”. However, such language should also be understood to express the parties’ acceptance of the inherent connection between the application of the rules and the administration of the proceedings by the issuing institution, which are two of the three characteristic features of institutional arbitration²⁸. In yet another group of cases the arbitration rules to which the parties have agreed do not contain any such provision. However, a reasonable interpretation of the parties’ reference to a set of institutional arbitration rules must lead to the conclusion that this reference is to be understood in line with the above definition of institutional arbitration, *i.e.* as a “harmonious” choice of *both* the rules and the administration of the arbitration by the issuing institution in accordance with these rules²⁹.

2. The Parties’ “Disharmonious” Choice of Arbitral Institution and Arbitration Rules

The principle of harmonious interpretation reaches its limits when the parties’ agreement reflects their clear intention to opt for “disharmony”. This is for example the case, when parties opt for “wild cat arbitration”³⁰, *i.e.* stipulate for the arbitration to be governed by certain institutional rules, but to be administered by a different institution.

Four cases provide examples of such disharmonious choices of arbitral institution and arbitration rules by parties to international arbitration agreements. In the *Insignia* case before the High Court of Sin-

²⁷ *Vid.* for example, Art. 6 (2) 2017 ICC Rules.

²⁸ *Vid. supra*, section 2.

²⁹ *Schroeter* (n 25), 166; *York Research Group v Landgarten*, 927 F. 2d. 119, 123 (2d Cir. 1991); one notable exception to this rule concerns the Chinese arbitration law, here the Chinese supreme court has held that: “Where the arbitration agreement only agrees upon the applicable arbitration rules, it shall be deemed that no arbitration institution has been agreed upon, except where the parties concerned have reached a supplementary agreement, or where the arbitration institution can be determined according to the arbitration rules that have been agreed on” [Interpretation of the Supreme People’s Court concerning Some Issues on Application of the Arbitration Law of the People’s Republic of China] Art. 4, available at “<http://www.bjac.org.cn/english/page/ckzl/htf3.html>”.

³⁰ *Berger* (n 23), 132.

gapore in 2008³¹, which was affirmed on appeal by the Singapore Court of Appeal³², the parties had agreed to arbitration under the ICC Arbitration Rules, to be administered by the Singapore International Arbitration Centre (SIAC). In the *HKL Group* case decided by the Singapore High Court in 2013, the parties had agreed to institutional arbitration before the – non-existent – “Arbitration Committee at Singapore”, but under the ICC Arbitration Rules³³. In a third case, decided by the Supreme Court of New York in 2014, the parties had agreed to arbitration under the ICC Arbitration Rules, to be administered by the American Arbitration Association (AAA)³⁴. In the fourth decision, rendered in 2015 by the Svea Court of Appeal, the arbitration agreement provided for institutional arbitration under the ICC Rules to be administered by the Arbitration Institute of the Stockholm Chamber of Commerce (SCC)³⁵. The courts upheld the validity of the arbitration agreements in all four of these cases.

The reasoning of the Singapore Courts in *Insigma* provide a good example as to how domestic courts resolve such “mix and match”³⁶ situations through a reasonable interpretation of the parties’ agreement. At the outset of its reasoning, the Singaporean Court of Appeal followed the Tribunal’s reasoning that in view of the “strong international public policy [...] in favour of the arbitration of international commercial disputes”, arbitral tribunals “must make every reasonable effort to give effect to the arbitration agreement”. The Court also held that the arbitration agreement before it was not contrary to the law as, according to the High Court’s previous case law³⁷, “the rules of an arbitral institution can be legally divorced from the administration of an arbitration by that institution”³⁸. This pro-arbitration and pro-autonomy judicial approach is in

³¹ *Insigma Technology Co. Ltd v Alstom Technologies Ltd*. [2008] SGHC 134; *vid. generally* J. Kirby, “*Insigma Technology Co. Ltd v Alstom Technology Ltd*: SIAC Can Administer Cases under the ICC Rules?!” (2009) 25 *Arb Int’l* 319.

³² *Insigma Technology Co. Ltd v Alstom Technologies Ltd*. [2009] SGCA 24.

³³ *HKL Group C. Ltd v Rizq International Holdings Pte Ltd*, [2013] SGHCR 5 (*HKL Group No 1*) and [2013] SGHCR 8 (*HKL Group No 2*); *vid. S. Izor*, “*Insigma* Revisited: Singapore High Court finds arbitration clause to be operable” (Kluwer Arbitration Blog, 25 February 2013) “<http://kluwerarbitrationblog.com/2013/02/25/insigma-revisited-singapore-high-court-finds-arbitration-clause-to-be-operable>” accessed 24 April 2018.

³⁴ *Exxon Neftegas Ltd. v Worleyparsons Ltd.*, 2014 WL 9873313 (N.Y. Sup.)

³⁵ *The Government of the Russian Federation v I.M.Badprim S.R.L.*, Case No T 2454–14 (Svea Court of Appeal), unofficial English translation available at www.arbitration.sccinstitute.com/views/pages/getfile.ashx?portalId=89&docId=2281406&propId=1578.

³⁶ Schroeter (n 25), 178 *et seq.*

³⁷ *Bovis Lend Lease Pte Ltd v Jay–Tech Marine & Projects Pte Ltd* [2005] SGHC 91.

³⁸ *Insigma* (n 31), para. 21 a, b.

line with transnational arbitration law and practice³⁹. The Court then went on to argue that the only way of reconciling the contradictory choices by the parties, while upholding the validity of the arbitration agreement, is to requalify the arbitration as *ad hoc* arbitral proceedings:

“(a) The parties had not bargained for an ICC institutional arbitration but for a hybrid *ad hoc* arbitration to be administered by the SIAC, applying the ICC Rules only and not the SIAC Rules.

(b) In principle, so long as no significant inconsistency arose, there was no problem with parties agreeing to an arbitration agreement providing for one arbitral institution to administer an *ad hoc* arbitration under the procedural rules of another arbitral institution.

(c) The substitution by the SIAC of the various actors (*i.e.*, the ICC Secretariat, the ICC Secretary General and the ICC Court) designated under the ICC Rules with the appropriate corresponding actors in the SIAC to perform their respective functions was within the degree of flexibility allowed by the ICC Rules which respected party autonomy. Party autonomy also meant that the parties were free to decide the conduct of the arbitration and the constitution of the arbitral tribunal and such freedom was an inherent feature of arbitration, especially *ad hoc* arbitration”⁴⁰.

It is true that with this reasoning, the Singapore Courts interpreted the arbitration clause “to mean something other [*ad hoc* arbitration] than what it literally says [institutional arbitration]”⁴¹. However, taking the above definition⁴² of institutional arbitration seriously necessarily leads to the conclusion reached by the Singapore Courts: in light of the disharmony created by the parties’ conflicting choice of rules and institution, the nature of the arbitration changes from institutional to *ad hoc*⁴³:

“The change from one arbitration category to the other resulted from the combination of one institution’s rules with another institution’s administration [...]. In other words, it is only the combination of an arbitral institution with the application of *its own* institutional rules that makes an arbitration institutional”⁴⁴.

In the *HKL Group* case, the Singapore High Court not only reaffirmed its *Insignia* jurisprudence (*HKL Group No. 1*), it also had the

³⁹ *Vid.* for this general principle of international arbitration Principle XIII.1.2 Trans-Lex–Principles, www.trans-lex.org/968902; Born (n 3), § 9.02 [A]; J. Lew, L. Mistelis and S. Kröll, *Comparative International Commercial Arbitration* (Kluwer 2003), Nos. 7–61 *et seq.*; *Law Debenture Trust Corporation Plc v Elektrim Finance BV*, [2005] 2 *Lloyd’s Rep.* 755 (Ch.) (English High Ct.).

⁴⁰ *Insignia* (n 32), para. 26 (a) – (c).

⁴¹ Kirby (n 31), 327.

⁴² *Vid. supra*, section 2.

⁴³ *Vid.* also W.L. Craig, W.W. Park and J. Paulsson, *International Chamber Of Commerce Arbitration* (3rd edn, ICC 2000), § 38.07.

⁴⁴ Schroeter (n 25), 182 (emphasis in the original); *see also* Gerbay (n 4), § 1.02 [B] [3]; P.A. Lalive, “Problèmes relatifs à l’arbitrage international commercial” (1967) 120 *Collected Courses of the Hague Academy of International Law* 569, 665.

opportunity to address a subsequent development (*HKL Group No. 2*): As part of the 2012 revision of its rules, the ICC amended Art. 1 (2). This provision now states that: “[...] The [ICC] Court is the only body authorized to administer arbitrations under the [ICC] Rules [...]”. The Singaporean High Court specifically addressed this provision in *HKL Group No. 2* and held that it cannot lead to the invalidity of “hybrid” arbitration clauses. Thereby, the Court affirmed that due to the primacy of party autonomy arbitral institutions cannot enjoin parties from conducting “wild cat arbitrations” under their rules if this is what the parties have agreed to in their arbitration agreement:

“Although Art 1(2) of the ICC Rules claims for the International Court of Arbitration the sole authority to administer ICC arbitrations, the power of the rules to bind emanates from the consent of the parties. Art 1(2) cannot curtail the freedom of parties to agree to be bound by the result of an arbitration administered by a different arbitral institution applying the ICC Rules”⁴⁵.

In the *Insignia* case, the arbitration proceeded on the basis of a written confirmation by SIAC that its bodies were able and willing to perform the various functions which, under the ICC Arbitration Rules, are to be performed by the ICC Court and its Secretariat⁴⁶. Referring to this aspect of the *Insignia* case, the Singapore High Court in *HKL Group* stayed the court proceedings in favour of arbitration on “the condition that parties obtain the agreement of the SIAC or any other arbitral institution in Singapore to conduct a hybrid arbitration applying the ICC rules”⁴⁷. Similarly, in the case before the Svea Court of Appeal, the SCC had agreed to and did administer the arbitration under the ICC Rules⁴⁸. The Court upheld the arbitration agreement, arguing that “the agreement must be understood so that the main purpose was that possible disputes between the parties would be resolved by arbitration and that the purpose was that the arbitration should take place in Stockholm before the SCC”⁴⁹.

In considering the hypothetical opposite scenario where the SIAC declines to administer the arbitration, the Singapore Court of Appeal, in its

⁴⁵ *HKL Group No 2* (n 33), para 10.

⁴⁶ *Insignia* (n 31) para. 6 indicating that the SIAC had informed the parties in writing that “If the case is submitted to the SIAC, the arbitration will be administered under the SIAC Rules with the ICC Rules to be applied as a guide to the essential features the parties would like to see in the conduct of the arbitration, e.g., use of the Terms of Reference procedure, the scrutiny of the awards. Accordingly, the SIAC is prepared and intends to undertake the Terms of Reference procedure and scrutiny of awards as contemplated under the ICC Rules”.

⁴⁷ *HKL Group No 1* (n 33), para 29.

⁴⁸ *The Government of the Russian Federation v I.M.Badprim S.R.L.* (n 35), 14.

⁴⁹ *Ibid.*

Insigma decision, qualified that situation as “the only aspect of uncertainty or inoperability with regard to the arbitration agreement”⁵⁰. Judge *Schöldström*, in his dissenting opinion to the judgement in the case before the Svea Court of Appeal, reached the same conclusion⁵¹. Similarly, in *HKL Group* the Singapore High Court, held that:

“... the arbitration clause is workable and *not* ‘null and void, inoperative or incapable of being performed’ [...] *if the parties are able to secure the agreement of an arbitral institution* in Singapore, such as the SIAC, to conduct a hybrid arbitration, applying the ICC rules”⁵².

However, applying the *in favorem*–principle for the interpretation of international arbitration agreements⁵³, such confirmation is not required to prevent the parties’ arbitration agreement from becoming inoperative or invalid. Even if the institution refuses to act as the administering body of the arbitration proceedings, the *ad hoc* arbitration agreement of the parties is not inoperative, let alone void. As long as the arbitration can proceed *in principle*, the fact that the parties, through their own agreement, have made the arbitration more burdensome or inefficient for themselves and the arbitrators, does not mean that the parties’ intention to arbitrate their disputes, should be ignored. The German Federal Supreme Court has adopted a similar approach and has requalified the parties’ reference to a non-existing arbitral institution as an *ad hoc* arbitration agreement.⁵⁴ Likewise, under Art. II (3) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, it is generally acknowledged that arbitration agreements do not become inoperative merely because they are inconvenient or burdensome for the parties⁵⁵. In fact, in affirming the High Court’s decision in *Insigma*, the Singapore Court of Appeal held that:

⁵⁰ *Insigma* (n 32), para 40.

⁵¹ *The Government of the Russian Federation v I.M.Badprim S.R.L.* (n 35), 16 *et seq.* “Another conclusion [*i.e.* that the arbitration agreement is invalid] might be reached in the event that one arbitration institute has refused to apply the rules devised by another arbitration institute”.

⁵² *HKL Group No 1* (n 33) para 29 (emphasis added).

⁵³ *Vid.* for this principle (n 26).

⁵⁴ BGH *SchiedsVZ* 2011, 284, 285; OLG Frankfurt, *SchiedsVZ* 2007, 217, 218; P. Huber and I. Bach, in K.H. Böckstiegel, S. Kröll and P. Nacimiento (eds.) *Arbitration in Germany: The Model Law in Practice*, (2nd edn, Kluwer 2015), § 1032 ZPO, No 22; *vid.* also *Lucky-Goldstar International (H.K.) Ltd. v Ng Moo Kee Engineering Ltd.* [1993] HKCFI 14 (Hong Kong High Ct); *but see Ferguson Bros. of St. Thomas v Manyan Inc.* [1999] OJ No 1887 (Ontario Superior Ct of Justice); *Mugoya Construction & Engineering Ltd. v National Social Security Fund Board of Trustees & another*, Civil Suit 59 of 2005 (Kenya High Ct, Nairobi).

⁵⁵ S. Wilske and T.J. Fox, in: R. Wolff (ed.) *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Commentary* (Beck 2012), Art. II, No 310.

“In any case, inefficiency alone cannot render a clause invalid so long as the parties had agreed and intended for the arbitration to be conducted in this manner”⁵⁶.

The Court made it clear that this approach is the result of a reasonable interpretation of the arbitration clause pursuant to the “*in favorem validitatis*”-principle:

“[W]here the parties have evinced a clear intention to settle any dispute by arbitration, the court should give effect to such intention, even if certain aspects of the agreement may be ambiguous, inconsistent, incomplete or lacking in certain particulars [...] so long as the arbitration can be carried out without prejudice to the rights of either party and so long as giving effect to such intention does not result in an arbitration that is not within the contemplation of either party. This approach is similar to the ‘principle of effective interpretation’ in international arbitration law”.⁵⁷

The Svea Court of Appeal upheld the arbitration agreement before it and gave a similar reasoning, without, however, indicating whether that would change the nature of the arbitration from institutional to *ad hoc*:

“If an arbitration agreement in some respect provides a self-contradicting or otherwise ambiguous procedure, which is not practicably doable, the general principle is that the agreement should, to the extent possible, be interpreted in line with the parties’ basic intentions with the arbitration agreement, i.e. that disputes between the parties should be settled by arbitration. This could entail that the court will disregard a contradicting provision if it is clear that the remainder of the arbitration agreement otherwise represents the parties’ actual intentions”⁵⁸.

Finally, the New York Court also found that the arbitration agreement was valid and therefore compelled the parties to conduct “hybrid” arbitration, *i.e.* administered by the AAA under the ICC Rules. What is particularly remarkable about this case, however, is that the court indicated – albeit without further reasoning – that the party agreement on the administration by the AAA would prevail over the agreement on the ICC Rules if the “hybrid” arbitration could not proceed:

⁵⁶ *Insignia* (n 32) para 35 in fine; *vid.* also Paulsson (n 10), 2: “The arbitral process would be transformed (and rejected) if it were kept under review by commissars requiring it to meet whatever might be their notion of efficiency”.

⁵⁷ *Insignia* (n 32), para 31

⁵⁸ *The Government of the Russian Federation v I.M.Badprim S.R.L.* (n 35), 13; but see the dissenting opinion of Judge *Schöldström*, *ibid.*, 16 *et seq* stating that “an arbitration agreement is not invalid merely because it provides that arbitration shall take place by application of the arbitration rules of one arbitration institute, but be administered by another arbitration institute. *Another conclusion might be reached in the event that one arbitration institute has refused to apply the rules devised by another arbitration institute*” (emphasis added).

"If the AAA is unwilling or unable for any reason to administer the arbitration under the ICC Rules, the reference to the ICC Rules in the arbitration clause in the Engineering Agreement is severed and the parties shall arbitrate pursuant to arbitration rules designated by the AAA in accordance with its procedures"⁵⁹.

While adopting slightly different approaches in detail, all courts thus agreed on the general principle that it is not the task of domestic courts to protect the parties from themselves⁶⁰, if, although they have willingly maneuvered themselves into a highly inconvenient situation, their will to arbitrate is undoubtedly established in their contractual agreement⁶¹.

3. The Parties' Deviation from "Mandatory" Provisions in the Arbitration Rules

The principles outlined above also help to resolve problems that arise, where the parties agree to institutional arbitration administered by the same institution that has issued the agreed-upon arbitration rules, but deviate from individual provisions contained in those rules. In these situations, there is no disharmony between the parties' choices of arbitration rules and administering institution, but a conflict between the chosen rules and the parties' additional procedural agreements. Therefore, the question as to the relationship between these two arises. As a matter of principle, the parties' freedom to tailor the proceedings according to the specific character of their disputes, obviously also exists in institutional arbitration:

"As the overriding principle in international arbitration is party autonomy, the parties' specific agreement in their arbitration clause should take precedence over the LCIA Rules in most cases"⁶².

In many cases, no conflict arises in these situations. Often, the institutional rules themselves allow the parties to conclude specific pro-

⁵⁹ *Exxon Neftegas Ltd. v WorleyParsons Ltd* (n 34), para (c).

⁶⁰ Paulsson (n 10), 2: "The restrictions on arbitration are not only those intended to prevent the parties from harming the public interest, but also those which purport to save the parties from themselves. Yet it is precisely a matter of public policy in free societies – occasional doubts notwithstanding – that citizens should not be herded about by anti-foolishness guardians."

⁶¹ The inconvenience and impracticality of such an arbitration clause is highlighted by the fact that the application to have the *Insigma* award enforced was rejected by the Chinese Supreme Court because the appointment of the arbitrators by SIAC was not in accordance with the ICC Rules, *Alstom v Insigma* (2012), Supreme People's Court of the PRC, [2012]民四他字第54号(SPC) & [2012]浙商外确字第1号(Zhejiang HPC), 30 November 2012; English translation "www.kluwerarbitration.com/document/kli-ka-cacds-e-144?q=%22insigma%22".

⁶² M. Scherer, L.M. Richman and R. Gerbay, *Arbitrating under the 2014 LCIA Rules. A User's Guide*, (Kluwer 2015), Ch 4, No 30.

cedural agreements with respect to the course of their arbitration proceedings. Sometimes, such carve-outs for party autonomy relate to specific situations, such as the fixing of the number of arbitrators or the language of the proceedings. Some rules also contain sweeping authorizations for party agreements, such as Art. 21.2 of the 2018 DIS Arbitration Rules:

“The Rules shall apply to the proceedings before the arbitral tribunal except to the extent that the parties have agreed otherwise”⁶³.

The situation is different, though, if the parties either exceed the limits for party agreements set by such provisions or agree on a procedural arrangement which is in conflict with other provisions of the rules which the institution considers “mandatory”⁶⁴.

The reason why the term “mandatory” is put in quotation marks is that it is not the classical conflict of party autonomy and mandatory statutory law with which one is faced here⁶⁵. Rather, the conflict is between two different types or levels of party agreements: one by which the parties have agreed to institutional arbitration under the rules of the chosen institution as “the parties’ procedural law”⁶⁶ and another by which the parties (intend to) modify certain provisions in these rules which the institution does not regard as subject to a contrary agreement of the parties⁶⁷.

One might argue that because the parties’ agreement on individual procedural details is more specific and in some cases also more recent than the parties’ agreement on the institutional arbitration rules in the arbitration clause, the first must prevail over the latter.

⁶³ *Vid. also* K.H. Böckstiegel, “Party Autonomy and Case Management – Experiences and Suggestions of an Arbitrator”, *SchiedsVZ* 2013 1, 2: “[...] subject to – normally few – mandatory rules, all institutions provide a wide discretion for the parties and the arbitrators to frame the procedure for a given case. And that – indeed – is one of the great advantages of arbitration. It should be used to frame the best procedure for the case at hand”.

⁶⁴ *Vid.* for an analysis as to which rules in the ICC Arbitration Rules can be qualified as “mandatory”, R.H. Smit, “Mandatory ICC Arbitration Rules”, in G. Aksent, K.H. Böckstiegel, M.J. Mustill, P.M. Patocchi and A.M. Whitesell (eds.), *Global Reflections on International Law, Commerce and Dispute Resolution. Liber Amicorum in Honour of Robert Briner* (ICC 2005), 850 *et seq.*; Carlevaris (n 18), 116 *et seq.*

⁶⁵ *Vid.* for those conflicts Lew/Mistelis/Kröll (n 39), Nos. 17–27 *et seq.*

⁶⁶ *Vid.* (n 13).

⁶⁷ Carlevaris (n 18) 22, 114: “The conflict here is not between the will of the parties and the law, but between two different expressions of the parties’ will. Likewise, the use of the term ‘mandatory’ and ‘institutional public policy’ in relation to institutional rules could be misleading given that the rules apply by choice, not by law.”

In many cases, however, the conflict will be resolved by the institution itself. If the institution insists on the "mandatory" nature of the relevant provision in its arbitration rules, *e.g.* because it considers this provision to be highly relevant for the "spirit" of its rules or the nature and reputation of its administrative services, it will simply refuse to administer the parties' arbitration⁶⁸. In other words, the "*offerta ad incertas personas*" extended to potential parties does not cover arbitrations in which the parties have manifested their intention to deviate from core provisions in its rules⁶⁹. The ICC International Court of Arbitration, for example, would most certainly refuse to administer an arbitration in which the parties have agreed to opt out of the Terms of Reference procedure pursuant to Art. 23 of its Arbitration Rules which is a "distinctive feature of ICC arbitration, not found in the rules of other major international arbitral institutions"⁷⁰. Arbitral institutions thus perform a type of "supervisory" or "gatekeeper"⁷¹ function with respect to the proper course of arbitrations conducted under their rules.

This supervisory role of arbitral institutions can be justified from three different perspectives. First and foremost, this role is the result of the intimate link between the arbitral institution and the rules issued by it. Secondly, it is also a natural consequence of the service contract between the parties and the institution: if the institution is liable to the parties under that contract for a proper administration of the proceedings according to its rules⁷², then the institution has a legitimate right to make sure that the parties do not evade those core provisions of its rules which the institution considers essential for arbitrations conducted under its auspices. Finally, if the parties agree to arbitration under the rules of a given arbitral institution, while at the same time derogating from some of the core provisions which shape the "spirit" of those rules, their conduct comes close to a violation of the general principle of the prohibition of contradictory behaviour ("*venire contra factum proprium*")⁷³. That principle sets legal

⁶⁸ *Vid.* for example J. Fry, S. Greenberg and F. Mazza, *The Secretariat's Guide to ICC Arbitration* (ICC 2012), No 3–1183 who mention a case in which the ICC refused to administer an arbitration because the parties had opted out of the aforementioned scrutiny process.

⁶⁹ *Vid.* for ICC arbitration Derains/Schwartz (n 19), 7 *et seq.*; R.H. Smit (n 64), 847 *et seq.*

⁷⁰ Frey/Greenberg/Mazza (n 68), Art. 23 No. 3–826.

⁷¹ Schroeter (n 25), 175.

⁷² *Vid.* Warwas (n 11), 197 *et seq.*

⁷³ *Vid.* for this general principle of transnational commercial law Principle I.1.2 Trans-Lex–Principles, <http://www.trans-lex.org/907000>; P. Bowden, "*L'interdiction des se*

limits to the autonomy of the parties in cases where one party has justified reasons to rely on the other party's conduct⁷⁴. In the present context, the institution has the legitimate expectation that by agreeing to arbitrate under its rules, parties also accept that they cannot derogate from provisions, which are integral to the specific character of the chosen rules.

This supervisory power which arbitral institutions possess with respect to the parties' compliance with the core provisions of their arbitration rules comes at a price: their refusal to administer the arbitration has a considerable limiting effect on the parties' autonomy, *i.e.* on one of the central pillars of the arbitration process. However, that limitation itself is based on the parties' presumed will. When agreeing to arbitration under the rules of a given arbitral institution, parties are assumed to have accepted the "mandatory" rules contained therein as restrictions on their general autonomy to tailor the proceedings as they wish⁷⁵.

The institution's refusal to administer the arbitration, issued in the exercise of its supervisory function, also has an important effect on the classification of the arbitration in question within the binary matrix "*ad hoc*/institutional". It means that, once again, one of the essential features of the above definition of institutional arbitration⁷⁶, the administration of the proceedings by the institution that issued the operative rules, is missing. Consequently, if the parties, faced with the institution's refusal to administer the arbitration, decide not to terminate the arbitration, but to continue the proceedings without the administering services of the institution, the nature of the arbitration changes from institutional to *ad hoc*⁷⁷. In line with this view, the parties to an ICC arbitration, who had opted out of the ICC Court's core prerogative under the ICC Arbitration Rules to confirm arbitrators nominated by the parties⁷⁸ and to scrutinize the final award before it is served on the parties⁷⁹, decided to continue their arbitration as *ad*

contredire au détriment d'autrui (estoppel) as a Substantive Transnational Rule in International Commercial Arbitration", in E. Gaillard (ed), *Transnational Rules in Commercial Arbitration* (ICC 1993), 125 *et seq.*

⁷⁴ *Vid.* Principle I.1.2 TransLex–Principles, *ibid*, Commentary, para 2.

⁷⁵ Carlevaris (n 18), 115.

⁷⁶ *Vid. supra*, section 2.

⁷⁷ Schroeter (n 25), 175 *et seq.*; J.P. Racine, *Rev arb.* 2010, 576; A. Nicholls and C. Bloch, "ICC Hybrid Arbitrations Here to Stay: Singapore Courts' Treatment of the ICC Rules Revisions in Articles 1(2) and 6(2)", (2014) 31 *J. Int'l. Arb.* 393, 405; D. Kühner, *Rev arb.* 2012, 808, 810.

⁷⁸ Art. 13 (2) ICC 2017 Arbitration Rules.

⁷⁹ Art. 34 ICC 2017 Arbitration Rules.

hoc proceedings and conferred on the ICC Court the power to act as appointing authority, when the ICC Court declined to administer their arbitration⁸⁰. This is further proof of the fact that, irrespective of their different forms, *ad hoc* and institutional arbitration belong to the same “family” of alternative dispute resolution mechanisms and the boundaries between them are permeable, given that one can be transformed into the other, be it by agreement of the parties⁸¹, by decision of a state court⁸² or, in rare instances, even by legislative decree⁸³. The limits on party autonomy, set by the institutions’ refusal to administer the arbitration, thus do not frustrate the parties’ *general* intention to have their dispute resolved outside the domestic courts, but only their choice as to *how* that alternative dispute resolution process is to be conducted.

4. Party Autonomy and Institutional Discretion: The “Party Autonomy Paradox”

Finally, there are scenarios in which the arbitral institution, rather than flatly denying to administer the proceedings, ignores the parties’ agreement on a procedural issue when exercising its administrative discretion granted to it by its rules. Recently, the question as to how to resolve such conflicts was raised in the context of the global trend towards the inclusion of expedited procedures into institutional arbitration rules⁸⁴.

⁸⁰ *Samsung Electronics v Oimonda AG* Rev d’Arb 2010, 571 (Tribunal de Grande Instance de Paris); *Racine* (n 77), 576 *et seq*; *Carlevaris* (n 18), 120; *Schroeter* (n 25), 174 *et seq*.

⁸¹ *Racine*, *ibid.*, at 581.

⁸² *Vid. supra*, section 3.2.

⁸³ *Vid.* for the latter scenario the Russian arbitration legislation of 29 December 2015 (Law No 382–FZ “Law on Arbitration (Arbitral Proceedings) in the Russian Federation” and No 409–FZ “Law on Amending the Associated Legislative Acts of the Russian Federation and Annulment of Article 6 (1)(3) of the Federal Law on Self-Regulating Organizations in connection with the Adoption of the Federal Law “On Arbitration (Arbitral Proceedings) in the Russian Federation”); pursuant to Art. 44 of the Law No 382–FZ, a foreign arbitral institution, upon filing of an official request with the Russian “Council for the Development of Arbitration”, must be officially recognised by the Russian governmental authorities to acquire the right to act as a “Permanent Arbitral Institution” for institutional arbitrations conducted under its rules with a seat in the territory of Russia; in case the foreign institution has not received such authorization, such institutional proceedings are requalified as *ad hoc* and any award rendered by such a tribunal is qualified as an award by an *ad hoc* tribunal; such requalification leads to disadvantages for the parties as *ad hoc* arbitrations with a seat in Russia are subject to a number of restrictions under the new Laws, *vid. Kulkov/Lysov*, Russian Arbitration Law: key issues, “<http://uk.practicallaw.com/w0054916>”.

⁸⁴ *Vid.* for example K.P. Berger, ‘The Need for Speed in International Arbitration – Supplementary Rules for Expedited Procedures of the German Institution of Arbitration (DIS)’ (2008) 25 *J Int'l Arb* 595; J. Tarjuelo, ‘Fast Track Procedures: A New Trend in

One method typically employed to expediate proceedings is to provide for a one-member rather than a three-member tribunal, if the amount in dispute remains below a certain threshold as fixed within the rules. Sometimes, it is left to the discretion of the institution to decide whether a one- or three-member tribunal shall be appointed in these expedited cases.

In two almost identical cases, the Singapore High Court⁸⁵ and the Shanghai No.1 Intermediate People's Court⁸⁶ had to address the question whether the SIAC-President has the discretion to appoint a sole arbitrator in an expedited case scenario even though the arbitration agreement provides for a three-member tribunal. The cases mainly revolved around Art. 5.2 (b) of the SIAC Rules 2010 and 2013 which provides that "[t]he case shall be referred to a sole arbitrator, unless the President determines otherwise". In contrast to the scenarios dealt with above, this provision in the rules is not "mandatory". Rather, the appointment of a sole arbitrator is the institution's default position for expedited cases, from which the President has the discretionary authority to deviate in favor of a three-member tribunal in individual cases.

In the proceedings before the Singapore High Court, the parties had concluded their arbitration agreement, which referred all disputes between them to SIAC arbitration to be conducted by a three-member tribunal, before the 2010 SIAC Rules, which for the first time contained provisions on expedited proceedings, had entered into force. When the Claimant initiated arbitration in March 2013, the 2010 Rules applied to the proceedings pursuant to its Art. 1.2. This provision contains the widely accepted rule that the parties are generally bound to the version of the rules which is in force when they

Institutional Arbitration", (2017) 11 *Disp. Res. Int'l.*,105; P. Morton, "Can a World Exist Where Expedited Arbitration Becomes the Default Procedure?", (2010) 26 *Arb Int'l*103.

⁸⁵ *AQZ v ARA* [2015] SGHC 49; see for a commentary on the decision G. Born and J. Lim, "AQZ v ARA: Singapore High Court Upholds Award Made under SIAC Expedited Procedure" (*Kluwer Arbitration Blog*, 9 March 2015) "<http://arbitrationblog.kluwerarbitration.com/2015/03/09/aqz-v-ara-singapore-high-court-upholds-award-made-under-siac-expedited-procedure/>" accessed 24 April 2018.

⁸⁶ *Noble Resources International Pte. Ltd v Shanghai Good Credit International Trade Co., Ltd.* 11 August 2017, (2016) Hu 01 Xie Wai Ren No 1; see for commentary on the decision J. Kwan, "PRC Court refuses to enforce SIAC arbitral award made by one arbitrator under expedited arbitration procedures when arbitration agreement provided for three arbitrators" (*Hogan Lovells Publ*, August 2017) "<https://www.hoganlovells.com/en/publications/prc-court-refuses-to-enforce-siac-arbitral-award-arising-out-of-the-expedited-procedure-where-arbitration-agreement-provided-for-three-arbitrators>", accessed 2 April 2018.

commence proceedings⁸⁷. The SIAC President allowed the Claimant's application to conduct the arbitration as expedited proceedings and appointed a sole arbitrator pursuant to Art. 5.2 (b) SIAC Rules 2010. The Respondent, who had objected to the appointment of a sole arbitrator from the outset of the proceedings, applied to have the final award set aside, arguing that the appointment of a sole arbitrator was not in accordance with the parties' express agreement. In its decision, the Court first confirmed the view held by the sole arbitrator in a previous SIAC Award⁸⁸, resulting from proceedings in which the parties had expressly chosen a version of the SIAC Rules which contained the provisions on expedited proceedings:

"[...] The parties chose the SIAC Rules to govern the arbitration and they accepted the entirety of the SIAC Rules including the Expedited Procedure in Rule 5 together with the powers that the Rule reserves to the Chairman and Registrar of the SIAC to administer and guide the proceedings. There is no derogation from party autonomy and it is precisely the parties' choice of the SIAC Rules that requires acceptance of the Chairman's decision. It may be otherwise if the parties had stipulated that there shall be 3 arbitrators even if the proceedings were under the Expedited Procedure but that is not the case here"⁸⁹.

The Court concluded that in a scenario in which the parties have expressly chosen a version of the SIAC Rules which contained the expedited procedure provisions, "[...] it was consistent with party autonomy for the Expedited Procedure provision to override their agreement for arbitration before three arbitrators"⁹⁰.

The Singapore High Court reached the same conclusion for cases such as the one before it, in which the version of the rules in force when the arbitration agreement was concluded did not yet contain the expedited procedure provisions. It based that conclusion on a commercially reasonable interpretation⁹¹ of the parties' arbitration agreement providing for SIAC arbitration. In the Court's view, such an interpretation did not require an "express assent" of the parties, for the provisions on expedited proceedings to override the parties' agreement (for arbitration before three arbitrators):

⁸⁷ *Vid.* for this rule: Born (n 3), § 9.03 [C]; Craig/Park/Paulsson (n 43), §10.03; *Bunge v Kruse* [1979] 1 *Lloyd's Rep.* 279, 286 (Comm.) (English High Ct.); BGH NJW-RR 1986, 1059, 1060; *Navigator Investment Services Ltd v Acclaim Insurance Brokers Pte Ltd* [2009] SGCA 45 (Singapore Ct. of Appeal).

⁸⁸ SIAC Award *W Company v Dutch Company and Dutch Holding Company* [2012] 1 SAA 97.

⁸⁹ *AQZ v ARA* (n 85), para.131 referring to para 19 of the Award.

⁹⁰ *Ibid.*

⁹¹ *Vid.* for the principle (n 26).

“A commercially sensible approach to interpreting the parties’ arbitration agreement would be to recognise that the SIAC President does have the discretion to appoint a sole arbitrator. Otherwise, regardless of the complexity of the dispute or the quantum involved, a sole arbitrator can never be appointed to hear the dispute notwithstanding the incorporation of the SIAC Rules 2010 which provide for the tribunal to be constituted by a sole arbitrator when the Expedited Procedure is invoked. That would be an odd outcome, especially since the Supplier appears to accept that the Expedited Procedure provision is no different from any other procedural rule contained in the SIAC Rules 2010”⁹².

The Court found further support for its reasoning in the expedited procedure provisions which were included in the 2012 version of the ICC Arbitration Rules. Art. 29 (6) a) of the ICC Arbitration Rules specifically provides that the expedited procedure provisions do not apply to arbitration agreements that were entered into before the date (1 January 2012) at which the new ICC Rules came into force. Since the SIAC’s Expedited Procedure provision did *not* contain a similar exclusion, the Court was confident in concluding “that the Expedited Procedure provision [in the SIAC Rules] can override parties’ agreement for arbitration before three arbitrators even when the contract was entered into before the Expedited Procedure provisions came into force”⁹³.

In its judgement on 11th August 2017, the Shanghai No.1 Intermediate People’s Court reached the contrary conclusion under the same factual circumstances. The Court argued that Art. 5.2 (b) of the SIAC Rules should not be interpreted in a way that endows the President of SIAC with absolute discretion as to the composition of the arbitral tribunal. In the Court’s view, the President, in exercising its discretion, must give full consideration to the parties’ agreement on a three–member tribunal in order to preserve party autonomy⁹⁴. The Court reasoned that party autonomy with respect to the determination of the number of arbitrators should prevail over the discretionary powers of the SIAC President under Art. 5.2 (b). Therefore, the SIAC President should have referred the case to expedited arbitration before a three–member tribunal. While the appointment of a sole arbitrator was in accordance with Article 5.2 (b) of the SIAC Rules, it was considered by the Court as a breach of the parties’ arbitration agreement. The Shanghai Court, therefore, refused to recognize and enforce the award pursuant to Art. V(1)(d) of the New York Convention⁹⁵.

⁹² *AQZ v ARA* (n 85), para 132.

⁹³ *Ibid.*, para. 135.

⁹⁴ *Vid.* *Kwan* (n 86).

⁹⁵ *Ibid.*

The two opposing court decisions reveal the uncertainty that lies in the determination of the proper relationship between party autonomy on the one hand and the institutions' discretionary powers under provisions such as Art. 5.2 (b) SIAC Rules on the other. The Singapore Court decided that conflict, perhaps not surprisingly, in favour of the SIAC President's powers. The fact that the parties had stipulated a three-member tribunal in their agreement was regarded by the Court as *just one* element to be considered by the President before making its decision. Other relevant factors are the complexity of the dispute, the quantum involved and whether the contract concerned was signed before the Expedited Procedure provision came into force⁹⁶. The Singapore High Court made it clear that as long as the President exercises his discretion "judiciously", taking into account all these factors, the appointment of a different number of arbitrators from that stated in the parties' clause will not be regarded as a sufficient ground for challenge of the expedited award⁹⁷.

With this approach, the Singapore High Court established an "institutional judgement rule"⁹⁸, in the sense of a safe harbour for the institution's exercise of its administrative discretion granted to it by its own rules. That approach is understandable, given that in exercising the institutional authority entrusted to them by the parties' choice of the particular institution and its rules, arbitral institutions routinely engage in discretionary "decision-making" with respect to the administration of the proceedings⁹⁹. In fact, one of the main reasons for users to opt for institutional arbitration lies in the competence reserved to the institution to resolve impasses through the exercise of its decisional powers¹⁰⁰. To safeguard the smooth functioning of this institutional system, many domestic courts grant arbitral institutions broad discretion to interpret their rules and give effect to such interpreta-

⁹⁶ *AQZ v ARA*, (n 85), para. 131.

⁹⁷ *Ibid.*; *vid. also* Born/Lim (n 85).

⁹⁸ *Vid.* for the "Procedural Judgement Rule" (named after the Business Judgement Rule of corporate law) for procedural decision-making by international arbitrators K.P. Berger and O. Jensen, "Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators", (2016) 32 *Arb Int'l* 415, 428 *et seq.*

⁹⁹ Gerbay (n 4), § 4.03 [B]; *vid. also* H. Grigera-Naon, in *Arbitration in the Next Decade – ICC Bulletin Special Supplement*, 1999, 56: "the ICC arbitration system [...] should probably be considered as the one vesting the arbitral institution with more controlling powers in the arbitral process and its outcome than any other and, from that standpoint, as the one providing the institution with the most far-reaching decisional powers binding on the parties and the arbitral panel regarding the conduct and outcome of the arbitration proceedings governed by its rules."

¹⁰⁰ Gerbay (n 4), § 4.03 [C] *in fine*.

tions¹⁰¹. As a US court has stated: “[w]here [...] the parties have adopted [particular institutional arbitration] rules, the parties are also obligated to abide by the [relevant arbitral institution’s] determinations under those rules”¹⁰².

Because of that safe harbour, the Singapore Court did not regard the existence of the party agreement on a three-member tribunal *alone* as an absolute bar to the appointment of a sole arbitrator by the SIAC President. The real reason behind that conclusion of the Court might be that the one-member Tribunal is the fallback rule provided for in Art. 5.2 (b) SIAC Rules, thereby indicating a strong preference of SIAC for that option in the interest of procedural efficiency. Above all, the court assumed that the parties’ consent on the SIAC Rules *as a whole*, *i.e.* including the provisions on expedited procedures, validates the decision arrived at by the SIAC president¹⁰³. In the eyes of the Chinese Court, however, aspects of procedural efficiency, even if enshrined in the institutional fallback rule, cannot trump the autonomy of the parties as the fundamental basis of every arbitration.

In view of the significance of the Shanghai Court’s reference to the primacy of party autonomy, the SIAC, in the 2016 version of its Rules, addressed the question at issue. Art. 5 (3) now stipulates:

“By agreeing to arbitration under these Rules, the parties agree that [...] the rules and procedures set forth in Rule 5.2 shall apply even in cases where the arbitration agreement contains contrary terms.”

The 2017 ICC Arbitration Rules adopt a similar approach. Art. 30 (1) ICC Rules states that “[b]y agreeing to arbitration under the Rules, the parties agree that this Article 30 and the Expedited Procedure Rules [...] shall take precedence over any contrary terms of the arbitration agreement.” More specifically, Art. 2 (1) of Appendix VI to the

¹⁰¹ Born (n 3), § 9.03 [B]; *Crawford Group, Inc. v Holekamp*, 543 F.3d 971, 977 (8th Cir 2008); *Koch Oil, SA v Transocean Gulf Oil Co.*, 751 F.2d 551 (2d Cir 1985); *NGC Network Asia, LLC v PAC Pacific Group Intern., Inc.*, 2012 WL 377995, *3 (S.D.N.Y. 2012); *Global Gold Mining, LLC v Robinson*, 533 F. Supp. 2d 442, 446 (S.D.N.Y. 2008); *Diemaco v Colt’s Mfg Co.*, 11 F. Supp. 2d 228, 232 (D. Conn. 1998); *vid. also* A. Mourre, “Institutional Arbitration Rules: Do They Deserve More Deference from the Judiciary?”, in P. Wautelet, T. Kruger and G. Coppens (eds.), *The Practice of Arbitration, Essays in Honour of Hans van Houtte* (Hart 2012), 159: “Courts [...] cannot be truly supportive of arbitration if they fail to fully support arbitral institutions”.

¹⁰² *Reeves Bros., Inc. v Capital–Mercury Shirt Corp.*, 962 F. Supp. 408, 411 (S.D.N.Y. 1997).

¹⁰³ S. Joshi and B Chhatrola, “Expedited Procedure Vis–a–Vis Party Autonomy, Enforceable?” (*Kluwer Arbitration Blog*, 12 May 2018) “<http://arbitrationblog.kluwerarbitration.com/2018/05/12/expedited-procedure-vis-vis-party-autonomy-enforceable/>” accessed 18 May 2018.

ICC Arbitration Rules provides that the ICC Court “may, notwithstanding any contrary provision of the arbitration agreement, appoint a sole arbitrator”. That solution is indeed remarkable given that it leads to the unique and paradoxical situation that the parties, by referring to the 2016 SIAC Rules or 2017 ICC Rules, specifically agree to invalidate their own agreements, in so far as they are contrary to the expedited procedure provisions within these rules¹⁰⁴.

This scenario provides yet another striking example in which the parties’ exercise of party autonomy leads to the limitation of that very same autonomy, *i.e.* to the “party autonomy paradox” in institutional arbitration, this time, however, in a more striking fashion than in the cases discussed above. This is especially true for the SIAC Rules, given that the reference to the President’s discretion to deviate from the one–member–tribunal fallback rule clearly indicates that even the institution itself does not consider this rule as a “must”. What other element, if not an agreement of the parties, should lead or even bind the SIAC President to exercise his discretion in deviation from the sole–arbitrator fallback rule, especially if that agreement relates to the parties’ “hallowed right”¹⁰⁵ to appoint their own arbitrator? The same question could be asked with respect to Art. 2 (1) Appendix VI ICC Rules.

It is therefore not surprising that the Hong Kong International Arbitration Centre (HKIAC) has taken a different, “pro–autonomy” as well as dialogue–oriented approach to the resolution of the conflict between implementing the will of the parties and the need for procedural efficiency in expedited proceedings. Art. 41.2 HKIAC Arbitration Rules provides that if the case is to be conducted pursuant to the expedited procedure provisions:

“(a) the case shall be referred to a sole arbitrator, unless the arbitration agreement provides for three arbitrators;

(b) if the arbitration agreement provides for three arbitrators, HKIAC shall invite the parties to agree to refer the case to a sole arbitrator. If the parties do not agree, the case shall be referred to three arbitrators; [...]”

¹⁰⁴ *Vid.* for a critical analysis of this provision F Bonke, ‘Overriding an Explicit Agreement on the Number of Arbitrators – One Step Too Far under the New ICC Expedited Procedure Rules’ (*Kluwer Arbitration Blog*, 22 May 2017), “<http://arbitrationblog.kluwerarbitration.com/2017/05/22/overriding-an-explicit-agreement-on-the-number-of-arbitrators-one-step-too-far-under-the-new-icc-expedited-procedure-rules/>”, accessed 24 April 2018.

¹⁰⁵ D. Hacking, “Arbitration is Only as Good as its Arbitrators”, in: S. Kröll, L. Mistelis, P. Perales Viscasillas and V. Rogers (eds.) *International Arbitration and International Commercial Law: Synergy Convergence and Evolution: Liber Amicorum Eric Bergsten* (Kluwer 2011), 223.

A similar approach has been adopted in Art. 42 (2) Swiss Rules (2012)¹⁰⁶.

Allowing party autonomy to ultimately prevail over the discretionary powers of the arbitral institution does in fact seem to be the wiser approach in these circumstances. The SIAC President was not confronted with a pathological situation leading to an unworkable procedure. There was thus no need to protect the parties from themselves. There was also no need to safeguard public policy or mandatory rules of law so that the enforceability of the ultimate award was not at risk¹⁰⁷. In addition, the SIAC Rules themselves make it clear that the sole–arbitrator–rule is not carved in stone. Most importantly, the choice of arbitrators, including the determination of the number of arbitrators, is one of the most fundamental decisions through which the parties to an international arbitration exercise their freedom to tailor the proceedings as they deem fit and it is what distinguishes arbitration from proceedings before domestic courts¹⁰⁸. Contrary to the Singapore High Court’s reasoning¹⁰⁹, it would have been a commercially sensible approach to interpret the parties’ arbitration agreement on a three–member tribunal as binding upon the SIAC President. The same applies to the “party autonomy paradox” manifested in the new Art. 5 (3) SIAC Rules and Art. 2 (1) Appendix VI ICC Rules.

IV. Conclusion

Hugo Grotius has rightly emphasized the strong force and value of the contractual promise, concluded in the exercise of the parties’ free will¹¹⁰. In international arbitration, there is an intrinsic tension be-

¹⁰⁶ Art. 42 (2) 2012 Swiss Rules states: “[...] (b) The case shall be referred to a sole arbitrator, unless the arbitration agreement provides for more than one arbitrator; (c) If the arbitration agreement provides for an arbitral tribunal composed of more than one arbitrator, the Secretariat shall invite the parties to agree to refer the case to a sole arbitrator [...]”.

¹⁰⁷ *Vid.* for such situations Carlevaris (n 18), 114 *et seq.*; R.H. Smit (n 64), 847.

¹⁰⁸ Gaillard/Savage (n 2), No 752: “In most modern international arbitration statutes, the primacy of the agreement of the parties is the fundamental principle underlying the whole of the arbitral proceedings, and especially the constitution of the arbitral tribunal”; see also Blackaby/Partasides (n 2), No 1.100; see, *Sociétés BKMI et Siemens v Société Dutco*, 119 *Journ. dr. int.* 707 (French Cour de Cassation); K.P. Berger, “Schiedsrichterbestellung in Mehrparteienschiedsverfahren; Der Fall ‘Dutco Construction vor französischen Gerichten’”, *RIW*1993, 702, 703; C.R. Seppala, “Multi–party arbitrations at risk in France”, (1993) 12 *Int’l Fin. L. Rev.* 33.

¹⁰⁹ *AQZ v ARA* (n 85), para 132.

¹¹⁰ Grotius (n 1), 12: “For he who has received the promise, in some measure takes and holds the person, that has made the engagement. A meaning not ill expressed by Ovid in

tween the autonomy of arbitral institutions and that autonomy of the parties. This tension is caused by the increasing role played by arbitral institutions, both with respect to the quasi-normative force of their rules and their enhanced decisional powers in the implementation of these rules. In light of the vast authority granted to some arbitral institutions, the quality of institutional administrative decision-making is sometimes even closely linked to the person holding the relevant office¹¹¹. Due to the potentially harmful effect on party autonomy, modern institutional arbitration is regarded by some as “not entirely in keeping with the principle of the primacy of the parties’ intentions”¹¹². Others even see the interventionist attitude of some arbitral institutions as an additional ground for legitimacy concerns which are being raised with respect to the international arbitral system as a whole¹¹³. Institutional stakeholders take the opposite view and argue that trust in arbitration “rests on the reliability and legitimacy of arbitral institutions”¹¹⁴.

Respect for the private agreement of the parties has in fact always been and must remain one of the organizing principles for arbitration as a social institution and a “commercial way to justice”¹¹⁵, whether institutional or *ad hoc*¹¹⁶. The other is the judicial duty to monitor the

the second book of his *Metamorphoses*, where the promiser says to him, to whom he had promised, “My word has become yours”.

¹¹¹ *Vid. e.g.*, for the extensive powers of the Director under the KLRCA (now: AIAC) 2017 Arbitration Rules: J. Ding, H. Sippel, “The 2017 KLRCA Arbitration Rules” (2017) 35 *ASA Bulletin* 888, 906: “Speaking of the Director: any arbitration is in safe hands with the current Director, Datuk Professor Sundra Rajoo, who is a very prominent arbitration practitioner both internationally and in Malaysia. That being said, a question persists, asking what will happen to the position once the current Director retires. Whoever takes over from Datuk Professor Sundra Rajoo will have big shoes to fill, which may even render it necessary to distribute the Director’s overall responsibilities among a commission/panel, etc”.

¹¹² Gaillard/Savage (n 2), No 53.

¹¹³ Gerbay (n 4), § 2.02 [A]; *vid. generally* on the question whether arbitral institutions can do more to foster the legitimacy of arbitration B. McRae, “Arbitral Institutions Can Do More to Further Legitimacy. True or False?”, in: A.J. van den Berg (ed) *Legitimacy: Myths, Realities, Challenges* (Kluwer 2015), 663 *et seq.*

¹¹⁴ Statement of Alexis Mourre, President of the ICC International Court of Arbitration in a speech in Atlanta, March 2018, “https://globalarbitrationreview.com/article/1166513/mourre-calls-for-institutions-to-join-forces?utm_source=Law%20Business%20Research&utm_medium=email&utm_campaign=9257741_GAR%20Headlines%2010%20FO3%20F2018&dm_i=1KSF,5IFBH,9GPJQC,LDLAA,1”.

¹¹⁵ G. Beresford Hartwell, *Arbitration: The Commercial Way to Justice?*, in G. Beresford Hartwell (ed.) *The Commercial Way to Justice* (Kluwer, 1997), 7.

¹¹⁶ Paulsson (n 5), 300: “Can we, in this fluid universe, find an organizing principle to guide our appraisal of the social institution we call arbitration? Perhaps a transcendent *objective* may itself play the role of an organizing principle. This objective is fulfilment of

fairness of the arbitral process¹¹⁷. In many cases, however, that respect for the agreement of the parties is not endangered in institutional arbitration. The tension is resolved by the institutions themselves. They leave ample room in their rules for procedural arrangements by the parties. In other scenarios, the tension can be resolved through a reasonable, "harmonious" interpretation of the arbitration agreement or an open dialogue between the parties and the institution. In cases in which the institution, in exercising its "gatekeeper function", considers provisions in its rules from which the parties have deviated to be "mandatory", upholding the parties' will to arbitrate comes at a price: the requalification of institutional into *ad hoc* arbitration. That requalification may be the result of an agreement by the parties, or will be ordered by law or the courts. Where the arbitration rules grant the institution discretion to decide matters concerning the administration of the proceedings, party agreements should, as a rule, trump the discretion of the institution. This approach serves to avoid potential damage to both the attractiveness and the legitimacy of institutional arbitration inflicted by the "party autonomy paradox".

Bibliografía

- BERESFORD HARTWELL, G.: "Arbitration: The Commercial Way to Justice?", in G. Beresford Hartwell (ed.) *The Commercial Way to Justice* (Kluwer, 1997).
- BERGER, K.P.: *Private Dispute Resolution in International Business*, Vol II (3rd edn, Kluwer 2015).
- BERGER, K.P.: "The Need for Speed in International Arbitration – Supplementary Rules for Expedited Procedures of the German Institution of Arbitration (DIS)" (2008) 25 *J Int'l Arb* 595.
- BERGER, K.P.: "Schieds–richterbestellung in Mehrparteienschiedsverfahren; Der Fall 'Dutco Construction vor französischen Gerichten'", *RIW*1993.
- BERGER, K.P.: *International Economic Arbitration* (Kluwer 1993).

the very idea of arbitration as the binding resolution of disputes likely to be accepted with serenity by those who bear its consequences because of their special trust in a chosen decision–maker. If we take this aspiration as fundamental to the way we view, nurture, and control arbitration, it also appears to have a corollary. It is a simple principle, suggested as a lodestar for other social institutions, such as courts and legislatures, in their interaction with arbitrators: *consensual arrangements for the resolution of disputes should be presumed valid.*"

¹¹⁷ W.W. Park, "Explaining Arbitration Law", in J.C. Betancourt (ed.), *Defining Issues in International Arbitration: Celebrating 100 Years of the Chartered Institute of Arbitrators* (OUP 2016), No 1.45.

- BERMANN, G.A.: "Arbitration and Private International Law, General Course on Private International Law", (2017) 381 *Collected Courses of the Hague Academy of International Law* 58 *et seq.*
- BLACKABY, C. and PARTASIDES, N. (eds.): *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015), No 6.07.
- BÖCKSTIEGEL, K.H., KRÖLI, S. and NACIMIENTO, P. (eds.): *Arbitration in Germany: The Model Law in Practice*, (2nd edn, Kluwer 2015).
- BÖCKSTIEGEL, K.H.: "Party Autonomy and Case Management – Experiences and Suggestions of an Arbitrator", *SchiedsVZ* 2013.
- BONKE, F. "Overriding an Explicit Agreement on the Number of Arbitrators – One Step Too Far under the New ICC Expedited Procedure Rules" (*Kluwer Arbitration Blog*, 22 May 2017).
- BORN, G. and LIM, J.: "AOZ v ARA: Singapore High Court Upholds Award Made under SIAC Expedited Procedure" (*Kluwer Arbitration Blog*, 9 March 2015).
- BORN, G.B.: *International Commercial Arbitration* vol. I (2nd edn, Kluwer 2014).
- BOWDEN, P.: "L'interdiction des se contredire au détriment d'autrui (estoppel) as a Substantive Transnational Rule in International Commercial Arbitration", in E Gaillard (ed), *Transnational Rules in Commercial Arbitration* (ICC 1993).
- CARLEVARIS, A.: "The Bounds of Party Autonomy in Institutional Arbitration", in A. Carlevaris, L. Lévy, A. Mourre and E.A. Schwartz (eds.), *International Arbitration Under Review. Liber Amicorum John Beechey* (ICC 2015).
- CRAIG, W.L., PARK, W.W. and PAULSSON, J.: *International Chamber Of Commerce Arbitration* (3rd edn, ICC 2000).
- CREMADES, B.: "Les effets de la clause d'arbitrage dans la jurisprudence espagnole recente", in J. Schultsz and A. van den Berg (eds.), *The Art of Arbitration, Liber Amicorum Pieter Sanders*, (Kluwer 1982).
- DERAINS, Y. and SCHWARTZ, E.A.: *A Guide to the ICC Rules of Arbitration* (2nd rev edn, Kluwer 2005).
- DING, J. and SIPPEL, H.: "The 2017 KLRCA Arbitration Rules" (2017) 35 *ASA Bulletin* 888, 906–
- FOUCHARD, Ph.: *L'arbitrage commercial international* (Daloz 1965).
- FRY, J., GREENBERG, S. and MAZZA, F.: *The Secretariat's Guide to ICC Arbitration* (ICC 2012), No 3–1183.
- GAILLARD, E. and SAVAGE, J. (eds): *Fouchard / Gaillard / Goldman on International Commercial Arbitration* (Kluwer 1999).
- GERBAY, R.: *The Functions of Arbitral Institutions* (Kluwer 2016).
- HACKING, D.: "Arbitration is Only as Good as its Arbitrators", in: S. Kröll, L. Mistelis, P. Perales Viscasillas and V. Rogers (eds.) *International Arbitration and International Commercial Law: Synergy Convergence and Evolution: Liber Amicorum Eric Bergsten* (Kluwer 2011).
- IZOR, S.: "Insignia Revisited: Singapore High Court finds arbitration clause to be operable" (*Kluwer Arbitration blog*, 25 february 2013).
- JANSEN, N.: *The Making of Legal Authority* (OUP 2010).
- JOSEPH, D.: *Jurisdiction and Arbitration Agreements and their Enforcement*, (1st edn, Sweet & Maxwell 2005).

- JOSHI, S. and CHHATROLA, B.: "Expedited Procedure Vis-a-Vis Party Autonomy, Enforceable?", (*Kluwer Arbitration Blog*, 12 May 2018).
- KIRBY, J.: "Insignia Technology Co. Ltd v Alstom Technology Ltd: SIAC Can Administer Cases under the ICC Rules?!" (2009) 25 *Arb Int'l* 319.
- LALIVE, P.A.: "Problèmes relatifs à l'arbitrage international commercial" (1967) 120 *Collected Courses of the Hague Academy of International Law* 569.
- LANDAU, T.: "The Effect of the New English Arbitration Act on Institutional Arbitration" (1996) 13 *J. Int'l Arb.*
- LEW, J., MISTELIS, L. and KRÖLL, S.: *Comparative International Commercial Arbitration* (Kluwer 2003).
- MCRAE, B.: "Arbitral Institutions Can Do More to Further Legitimacy. True or False?", in: A.J. van den Berg (ed) *Legitimacy: Myths, Realities, Challenges* (Kluwer 2015).
- MORTON, P.: "Can a World Exist Where Expedited Arbitration Becomes the Default Procedure?", (2010) 26 *Arb Int'l* 103.
- MOURRE, A.: "Institutional Arbitration Rules: Do They Deserve More Deference from the Judiciary?", in P. Wautelet, T. Kruger and G. Coppens (eds.), *The Practice of Arbitration, Essays in Honour of Hans van Houtte* (Hart 2012).
- MULLERAT, R.: "The Contractual Freedom of the Parties (Party Autonomy) in the Spanish Arbitration Act 2003", in G. Aksen, K.H. Böckstiegel, M.J. Mustill, P.M. Patocchi and A.—M. Whitesell (eds.), *Global Reflections on International Law, Commerce and Dispute Resolution. Liber Amicorum in Honour of Robert Briner* (ICC 2005).
- MUSTILL, M.: "A New Arbitration Act for the United Kingdom?" (1990) 6 *Arbitration International*.
- NICHOLLS, A. and BLOCH, C.: "ICC Hybrid Arbitrations Here to Stay: Singapore Courts' Treatment of the ICC Rules Revisions in Articles 1(2) and 6(2)", (2014) 31 *J. Int'l Arb.* 393, 405.
- PARK, W.W.: "Explaining Arbitration Law", in J.C. Betancourt (ed.), *Defining Issues in International Arbitration: Celebrating 100 Years of the Chartered Institute of Arbitrators* (OUP 2016).
- PARK, W.W.: "When and Why Arbitration Matters", in: G. Beresford Hartwell (ed.) *The Commercial Way to Justice, 1997*.
- PAULSSON, J.: *The Idea of Arbitration* (OUP 2013).
- SCHERER, M., RICHMAN, L.M. and GERBAY, R.: *Arbitrating under the 2014 LCIA Rules. A User's Guide*, (Kluwer 2015).
- SCHROETER, U.: "Ad Hoc or Institutional Arbitration – A Clear-Cut Distinction? A closer look at Borderline Cases", (2017) 10 *Contemp. Asia Arb. J.* 141, 166 *et seq.*
- Schuetze, R.A. (ed.): *Institutionelle Schiedsgerichtsbarkeit* (3rd rev edn, C. Heymanns 2018).
- SCHWARZ, F.T. and KONRAD, C.W.: *The Vienna Rules: A Commentary on International Arbitration in Austria* (Kluwer 2009).
- SEPPALA, C.R.: "Multi-party arbitrations at risk in France", (1993) 12 *Int'l Fin. L. Rev.* 33.
- SMIT, R.H.: "Mandatory ICC Arbitration Rules", in G. Aksen, K.H. Böckstiegel, M.J. Mustill, P.M. Patocchi and A.M. Whitesell (eds.), *Global Reflections on International*

al Law, Commerce and Dispute Resolution. Liber Amicorum in Honour of Robert Briner (ICC 2005).

TARJUELO, J.: "Fast Track Procedures: A New Trend in Institutional Arbitration", (2017) 11 *Disp. Res. Int'l.*, 105.

WARWAS, B.: *The Liability of Arbitral Institutions: Legitimacy Challenges and Functional Responses* (Springer 2017).

WOLFF, R. (ed.): *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Commentary* (Beck 2012).