

# Chapter 2

## Status and Functions of Modern Arbitral Institutions

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### 2.1 Introduction

Chap. 1 set forth the arguments for a discussion on the changing status and functions of arbitral institutions in and outside arbitration proceedings. As early as the turn of the nineteenth and twentieth centuries, arbitral institutions were mostly perceived as facilitators of commercial disputes that were arising between traders within the socio-political context(s) of the time. By contrast, the legitimacy and functions of contemporary arbitral institutions have been subject to new challenges. On the one hand, these reflect the dissatisfaction of business parties with increasingly formalized, lengthy, and costly institutional arbitration services. On the other hand, they include public demands placed on arbitral institutions by new users as a result of the increasing public interest in institutional administration of highly sensitive types of disputes. These new developments of institutional

arbitration, entailing the shifting and often self-aggravating private–public dichotomy in contemporary institutional arbitral regimes, have not yet been subject to a wide academic debate. In fact, rather scarce definitions of arbitral institutions existent in literature appear to overlook these transformations. Hence, the purpose of this chapter is threefold.

First, the chapter aims at providing a critical analysis of the current mainstream definitions of institutional arbitration by pointing to the inadequacy of these definitions, interpreted in isolation from one another, due to the emerging functions of contemporary arbitral institutions. Given the fact that, to date, no single comprehensive definition of institutional arbitration has been developed, this chapter puts together the existent discussion on arbitral institutions. It distinguishes between the following categories in which the concept of institutional arbitration can be captured: (1) the legal definition of arbitral institutions as provided in the legal textbooks of prominent arbitration scholars and practitioners; (2) the internal, institutional definition stemming from arbitration rules, guides to these rules and public appearances of the members of institutional regimes; and (3) the scholarly definition of institutional arbitration provided by academics not necessarily predominantly specialized solely in arbitration such as sociologists, political scientists, and economists. Second, the chapter presents an innovative functional definition of the contemporary dual function of institutional arbitration, incorporating the traditional, commercial function of arbitral institutions together with its changing variables and the emerging public function of institutional arbitration. Lastly, the chapter analyses the interplay between the efficiency and legitimacy of the traditional commercial function of arbitral institutions and the emerging public function of institutional arbitration, especially with regard to the goals of traditional institutional arbitration users. This analysis serves as an explanation of the emerging trends among contemporary commercial arbitration users to increasingly challenge the legitimacy of institutional arbitration and eventually sue arbitral institutions in the courts of law.

## **2.2 Arbitral Institutions as Service Providers? The Mainstream Definitions of Institutional Arbitration Condemned**

### ***2.2.1 International Legal Textbooks***

The leading treatises on international commercial arbitration mention private arbitral institutions next to *ad hoc* arbitration in the context of the organization of the arbitration process. Most of these textbooks are written by prominent legal academics that are also renowned practitioners in the field of international arbitration. To this extent, the explanation of institutional arbitration appearing in these textbooks should be regarded as the major source of information on the practicalities

of institutional arbitration that reflects the prevailing contemporary legal approach to the objectives and functions of arbitral institutions.

These interpretations of institutional arbitration usually focus on the following features: (a) the private nature of commercial arbitral institutions; (b) their administrative functions in the organization of arbitrations expressed in institutional arbitration rules; and (c) the advantages and disadvantages of institutional arbitration in juxtaposition to *ad hoc* arbitration.<sup>1</sup> Moreover, most of the treatises in question provide brief explanations of the leading arbitral institutions such as the ICC Court, the LCIA, or the SCC Institute. They point out the divergences among institutional infrastructures and procedural rules that usually concern different methods of costs allocations developed by arbitral institutions, and the level of institutional involvement in the conduct of arbitrations (be it reflecting the “hands-off” or “hands-on” administrative models).<sup>2</sup> These variables are said to be the major determinants of the parties’ consent regarding the recourse to a particular institutional arbitration regime.

Only a few legal commentaries on arbitration, including the famous *Fouchard, Gaillard, Goldman on International Commercial Arbitration* published in 1999, go beyond such conventional understanding of institutional arbitration and explain more complex and often problematic issues that institutional arbitration may entail. These include the potential impact of institutional procedural competences on both the limits to party autonomy and the outcomes of institutional arbitrations or the possible contractual matrix in institutional arbitration.<sup>3</sup> By way of comparison, most contemporary commentaries on arbitration point to rather superficial characteristics suggest that arbitral institutions, as purely private law organizations, provide nothing beyond flexible and neutral arbitration services to disputing parties, entailing solely procedural and logistical frameworks for the resolution of disputes by institutional arbitrators. In sum, according to the mainstream legal definition, private arbitral institutions solely administer international arbitration cases, with varying degree of institutional involvement in the conduct of arbitration proceedings.

Additionally, the authors of arbitration commentaries often describe private arbitral institutions vis-à-vis public international law institutions such as the Permanent Court of Arbitration (PCA) or the ICSID, and the specialized arbitral institutions that have been established and operate within the auspices of national or international professional organizations such as the Grain and Feed Trade Association in the UK.<sup>4</sup> The former institutions deal mostly with the resolution of

<sup>1</sup>Born 2009, 150–151; Lew et al. 2003, 36–37; Moses 2012, 9–10.

<sup>2</sup>Moses 2012, 10. The two models reflect the level of institutional involvement in arbitration proceedings, with the hands-on model (i.e. the ICC Court, the CAM) providing for an in-depth institutional supervision of the process and the “hands-off” model (i.e. Belgian Centre for Arbitration and Mediation (CEPANI), Danish Institute of Arbitration (DIA), SCC Institute) entailing more procedural freedom for the parties to tailor the various stages of arbitration proceedings according to their expectations associated with dispute resolution and business goals.

<sup>3</sup>Gaillard and Savage 1999, 450.

<sup>4</sup>Lew et al. 2003, 41–42.

investor-State or inter-State disputes to which a State or State-like entity is a party, and as such the consent to arbitrations administered by the public law institutions is usually based on the international treaty underlying the arbitration in question. The latter institutions enjoy jurisdiction over the disputes covered by the model arbitration clauses included in the codes of practice or general conditions referring to the sale of goods binding upon the members of the relevant professional organization. The consent to such institutional arbitrations is hence rooted in those codes or conditions. Additionally, special purpose arbitral institutions are distinguished from private arbitral institutions that concern various tribunals operating under international law conventions or other international law instruments such as the Iran-US Claims Tribunal.<sup>5</sup>

As opposed to the explanation of private arbitral institutions, the analysis of public law arbitral institutions provided in the textbooks on arbitration brings about more compound arguments stemming from the private–public dichotomy inherent in institutional arbitrations involving public actors. These rather sensitive issues mostly concern the role of public international law institutions in the formulation of the standards of independence and impartiality of arbitrators, the appointment of arbitrators or additional institutional obligations of ensuring the confidentiality of arbitration proceedings given the sensitive subject matter that such arbitrations usually entail. It is questionable, however, whether the distinction between private arbitral institutions and public law or specialized institutions, as contained in the conventional definition of arbitration provided in the textbooks, is still accurate in view of the contemporary status and functions of private arbitral institutions. In fact, the mainstream legal definition of private institutional arbitration appears ambiguous and incomplete for various reasons. This is mainly because it continues to view institutional arbitration as a purely private animal, according little or no public functions to private arbitral institutions.

Regarding the legal nature of institutional arbitration, the mainstream definition of private arbitral institutions does not fully explain the legal status of these institutions in the arbitration process. Moreover, it does not analyse all potential sources of institutional powers acquired by institutions, or accorded to them, both within and outside arbitration proceedings (whether rooted in traditional, private interest in arbitration of arbitration users or in the increasing public interest in arbitration as expressed by State/public authorities). Take, for example, a recent lively debate on the possible involvement of the private arbitration sector (including private arbitral institutions) in the resolution and/or administration of a variety of disputes under the Transatlantic Trade and Investment Partnership (TTIP).<sup>6</sup>

The legal textbooks ordinarily do not refer to the statutes or constitutions of arbitral institutions, which constitute a useful indicator of their organizational form as legal entities (whether operating as private or public legal entities) as well as of their purpose, objectives, and financial organization (whether for-profit or

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<sup>5</sup>Lew et al. 2003, 41–42.

<sup>6</sup>Cole et al. 2014, 269–270.

not-for-profit oriented). The detailed analysis of the internal documents of arbitral institutions may therefore shed light on the original purpose of early arbitral institutions, while at the same time helping to confront such purpose with the contemporary institutional activity.

The fact that most private arbitral institutions aim at promoting arbitration and ADR by responding to the commercial goals of the parties involved in arbitrations does not necessarily exclude the existence of limited yet important public aims underlying the activity of such institutions. In fact, not only have arbitral institutions started to popularize and represent more general aims of either regional or international arbitration communities towards the public but there has also been a growing public interest in the operation of arbitral institutions from some legislators. The first situation can be illustrated by institutions promoting institutional regimes among different sectors traditionally falling beyond the scope of arbitration,<sup>7</sup> by institutions entering the market for mediation services as a result of legislative reforms at the EU and domestic levels,<sup>8</sup> or when acting as *amicus curiae* in judicial proceedings that involve legal questions on arbitration.<sup>9</sup> The second argument can be seen in the increasing powers to administer particular types of arbitrations granted to some arbitral institutions through legislative acts or on the basis of the self-regulatory practices of multinational corporations. Some national laws on arbitration (e.g. Italian or Spanish) established exclusive institutional authority in the organization and/or administration of arbitration concerning corporate law.<sup>10</sup> In Malta, the only arbitral institution, namely the Malta Arbitration Centre, was granted exclusive power to administer mandatory arbitration that constitutes a distinctive feature of Maltese arbitration law. Additionally, the Registrar of the Malta Arbitration Centre enjoys distinctive authority in collecting evidence in the course of arbitration proceedings that usually lie within the prerogatives of the parties or arbitral tribunals such as to produce documents or to issue subpoenas to compel witnesses to provide evidence in domestic arbitration.<sup>11</sup> Notably, under Romanian arbitration law parties must comply with institutional arbitral rules at all stages of arbitration proceedings and any derogations from such rules are allowed solely

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<sup>7</sup>For example, the ICC encouraging arbitration in international tax disputes in: ICC Commission on Taxation. 2000. "Policy Statement: Arbitration in International Tax Matters." ICC Publication No. 180/438.

<sup>8</sup>Cf. the Italian Legislative Decree No. 69 of 21 June 2013 (which entered into force on 24 June 2013) that introduced mediation in certain civil and commercial matters following the enactment of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters.

<sup>9</sup>David 1985, 37.

<sup>10</sup>Cf. the amendments to Spanish and Italian arbitration laws: Spanish Act 11/2011, of May 20, Reforming Act 60/2003, of December 23, on Arbitration, and Regulating Institutional Arbitration within the Public Administration; and the Italian Legislative Decree No. 5 of 17 January 2003 (which entered into force on 1 January 2004) introducing the regulation of certain facets of arbitration in unlisted corporations.

<sup>11</sup>Cole et al. 2014, 39.

upon the consent from particular arbitral institutions.<sup>12</sup> The fact that more and more national arbitration laws have outlined such a broad scope of exclusive institutional authority not only favours institutional arbitration over *ad hoc* proceedings in those jurisdictions,<sup>13</sup> but also encourages institutions to further expand the scope of their arbitration services. In this vein, few European arbitral institutions entered in coalitions with regulatory organizations to support their distinct dispute resolution practices. For example, the Czech Arbitration Court through its Arbitration Centre for Internet Disputes acts as the Internet Corporation for Assigned Names and Numbers (ICANN) approved service provider by managing ICANN's mandatory administrative proceedings that are said to resemble traditional arbitration.<sup>14</sup>

These facts imply that contemporary arbitral institutions have expanded their "arbitration services" beyond their traditional scope. Furthermore, there are clearly additional goals underlying statutory mission of arbitral institutions, different from the objectives of typical institutional arbitration users in particular and of international arbitration community in general.<sup>15</sup> This not only makes a discussion on the non-profit character of institutional services more puzzling but also questions the legitimacy of contemporary institutional arbitration in and of itself.

As for the sources of institutional powers, the mainstream definition—regardless of its focus on the consensual aspect of institutional arbitration—tends to disregard the nature of contractual provisions that *de facto* bind arbitral institutions and the parties at the moment of the emergence of institutional contracts and in the course of arbitration proceedings. Although arbitral institutions operate on the basis of the parties' arbitration agreements or submissions to institutional arbitration that are deemed to expressly reflect the parties' consent, no consensus exists on the matter of whether, and if so, *when* and *how*, institutional contract (or contracts) come into existence in institutional arbitration. It is also unexplored how the institutional contract relates to the parties' initial arrangements regarding the organization of arbitration. Does the institutional contract constitute a separate legal instrument (or instruments) which somehow links to the arbitration agreement, or is the institutional contract contained in the arbitration agreement and only complements or "perfects" the latter once the actual arbitration proceedings

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<sup>12</sup>Cole et al. 2014, 39.

<sup>13</sup>In fact, some national laws tend to limit the use of *ad hoc* arbitration within national borders by imposing restrictive provisions regarding the effectiveness of *ad hoc* arbitration. For example, Latvian arbitration law states that the awards rendered in the course of domestic *ad hoc* arbitration will be refused enforcement in Latvian courts. Moreover, Czech law requires that all arbitration agreements referring to arbitral rules of arbitral institutions other than Czech permanent institutions be accompanied by a relevant copy of the arbitration rules of the institution in question. See: Cole et al. 2014, 41–42.

<sup>14</sup>See List of Approved Dispute Resolution Service Providers. <https://www.icann.org/resources/pages/providers-6d-2012-02-25-en>. Accessed 25 April 2016.

<sup>15</sup>On the discussion of arbitration actors on the new challenges to the European arbitration see: Alison Ross, "What Lies Ahead for Europe?" Global Arbitration Review 6, no. 5. <http://globalarbitrationreview.com/news/article/29866/europe-ahead>. Accessed 25 April 2016.

commence? The prevailing statement that arbitration rules, once referred to by the parties in their arbitration agreement or the submission to arbitration, are incorporated into the contracts containing arbitration clauses does not address the above concerns related to the contractual matrix in institutional arbitration. Little has also been said on the interplay between institutional arbitration rules and the parties' consent to arbitration. Some authors provide studies on the contractual relations involving arbitral institutions.<sup>16</sup> However, none of them examine the actual sources of authority of arbitral institutions in and outside the arbitration process in isolation from the arbitrator's contract, and in relation to a *single* party to arbitration. These issues appear theoretical only superficially. In fact, contractual analysis of institutional arbitration has significant practical implications inasmuch as it serves as an explanation of the precise moment the institutional contractual duties come into existence and of the content of these duties vis-à-vis the parties and arbitrators, which is determinative of the nature and scope of institutional arbitral liability.

These issues become even more problematic once confronted with the analysis of the “judicialization” of institutional arbitration and its impact on the possible decrease in the role of party autonomy in designing the outlook of private institutional arbitration proceedings. The process of judicialization of arbitration, which has been widely discussed in literature for at least two decades,<sup>17</sup> can be defined as the formalization of arbitration procedures in a litigation-like manner, though “in a private setting”.<sup>18</sup> Already in the mid-1990s, in their ground-breaking piece on the sociology of arbitration, Professors Dezalay and Garth spoke about the practical implications of the “ICC bureaucracy” for the “Americanization” of the European arbitration.<sup>19</sup> Dezalay and Garth noticed the then increasing efforts of the ICC to proceduralize arbitration process by introducing Terms of Reference and reviving the scrutiny of arbitral awards by the ICC Court, which was seen as a tool to maintain the universality of the ICC arbitration by inviting new arbitrators of new nationalities into the ICC institutional regime.<sup>20</sup> Discussing institutionalization of arbitration, also Professor Gaillard pointed to the risks emerging from the arbitration clauses contained in general conditions of trade binding upon a party which do not fall within the membership scheme of professional association that ordinarily relies on institutional arbitration.<sup>21</sup> Today, however, such “judicialization”, “proceduralization”, or “formalization” of arbitration,<sup>22</sup> especially in its institutional variant, is often explained by arbitral institutions as being the result of

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<sup>16</sup>Clay 2001; Schöldström 1998; Onyema 2010.

<sup>17</sup>Stipanowich 2010; Stipanowich et al. 2010; Drahozal 2009; Horvath 2011; McIlwrath and Schroeder 2008 where arbitration is analysed vis-à-vis court litigation.

<sup>18</sup>Gaillard and Savage 1999, 32.

<sup>19</sup>Dezalay and Garth 1998, 46–47.

<sup>20</sup>Ibid.

<sup>21</sup>Gaillard and Savage 1999, 34.

<sup>22</sup>All these expressions mean precisely the same thing.



responding to the demands placed on institutions by parties relating to the proper administration of arbitration cases by institutions.<sup>23</sup> In turn, the parties themselves have increasingly begun to criticize the formalization of institutional arbitration because of the higher costs and the increasing length of time that this type of arbitration involves.<sup>24</sup> Although both sides seem to make valid points in this discussion, formalization of arbitration has undeniably put arbitral institutions in a position to influence the way parties would usually tailor various steps of arbitration proceedings according to their business needs and procedural expectations, hence in line with the core principle of party autonomy in arbitration. The questions remain whether such institutional interference in the conduct of arbitration went too far and whether arbitral institutions misunderstood the judicialization of arbitration by focusing on the pedantic drafting of the details of almost every aspect of their arbitration rules (in a “rules for rules’ sake” spirit),<sup>25</sup> instead of on enforcement of such rules, in particular vis-à-vis institutional arbitrators.<sup>26</sup>

In view of these arguments, the mainstream definition of arbitral institutions also does not address the question: what kind of service do arbitral institutions in fact provide to the parties? Institutional arbitration “service” is said to concern the procedural support for institutional arbitration actors, and the remuneration of institutional arbitrators directly by institutions in order to ensure the “material detachment” of arbitrators from the parties.<sup>27</sup> Indeed, institutional arbitration, especially as presented in front of *ad hoc* arbitration, is usually seen as being suitable for both repeat users of institutional services and parties with little or no knowledge of arbitration. The former prefer in-depth logistical and procedural support in the course of the proceedings because of their relative satisfaction with institutional involvement in arbitration, while the latter require institutional assistance due to their lack of awareness of technicalities of arbitration in more general terms. It is questionable, however, whether institutional arbitration is still such a good alternative to *ad hoc* arbitration and whether it would not be more accurate today to list its advantages (if any) next to litigation, given the increasing similarity of these two processes. Additionally, the advantages of institutional arbitration, defined in this manner, only increase confusion about the scope of the administrative support of arbitral institutions and the nature of the interplay between the members of institutional organs, parties, and arbitrators, as well as other actors

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<sup>23</sup>Justice Stream B2; Premise: Arbitral Institutions Can Do More To Further Legitimacy. True or False? Legitimacy: Myths, Challenges, Realities. ICCA Miami 2014. [http://www.arbitration-icca.org/conferences-and-congresses/ICCA\\_MIAMI\\_2014-video-coverage/ICCA\\_MIAMI\\_2014\\_B2.html](http://www.arbitration-icca.org/conferences-and-congresses/ICCA_MIAMI_2014-video-coverage/ICCA_MIAMI_2014_B2.html). Accessed 25 April 2016.

<sup>24</sup>Queen Mary University of London, School of Arbitration, and White & Case. 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration. <http://www.arbitration.qmul.ac.uk/docs/164761.pdf>. Accessed 25 April 2016.

<sup>25</sup>Sabharwal and Zaman 2014, 709.

<sup>26</sup>Bernini 2007 as cited in Horvath 2011, 263.

<sup>27</sup>Lew et al. 2003, 37.



participating in arbitration proceedings, particularly in view of the interconnect-  
edness of the work of such actors in arbitration.

What does *administrative institutional support* mean in the context of a day-to-day arbitration practice? Where does institutional arbitration service end and where does the work of arbitrators begin, and *vice versa*? Is the institutional arbitration service provided only to the parties or, additionally, to other actors such as arbitrators (and potentially their secretaries), experts, counsel of the parties,<sup>28</sup> and witnesses, just to mention a few? If so, how are the interests of all institutional arbitration actors balanced by arbitral institutions? Finally, are arbitral institutions the only actors providing a specific type of service in the course of the arbitral proceedings today? Is it plausible that the parties themselves as well as institutional arbitrators provide certain service to arbitral institutions as a result of the response to the demands put on them by contemporary arbitral institutions? None of these issues has been addressed comprehensively in legal literature, whereas more and more arbitration practitioners openly call for more transparency on the side of arbitral institutions regarding the methods adopted by them to both appoint and monitor the work of arbitrators.<sup>29</sup> This information is crucial for the parties to understand the changing functions of institutional arbitration that to date still leave arbitration users confused about the work behind institutional arbitration doors.

These observations allow the assumption that arbitral institutions, notwithstanding their ordinary definition as service providers, may assume additional powers in the arbitration process that surpass even the parties' prerogatives in arbitration. Clearly, arbitral institutions have transformed into independent private actors endowed with limited but important public powers. Meanwhile, these same institutions have begun to assume additional private powers in the arbitration processes through the modifications of arbitration rules that increasingly call into question the preferences of institutional arbitration users, as well as the freedom of contract and party autonomy in arbitration. These developments are often missing from contemporary mainstream definitions of institutional arbitration.

### 2.2.2 Arbitration Rules and Guides to the Rules

Another way to learn about the status and functions of institutional arbitration is through the information provided by arbitral institutions themselves. Here, it is essential to begin with the analysis of the legal status and objectives of arbitral institutions as determined in the founding documents of such institutions, before

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<sup>28</sup>At least in situations in which the reputation of such counsel expressed by tight bonds with one of the institutional local communities (such as the ICC National Committees) increases the probability of the future nomination of the counsel in question as arbitrator within a particular institutional infrastructure.

<sup>29</sup>McIlwrath and Schroeder 2013, in particular 97–105.

proceeding with the explanation of the functions of institutional arbitration as provided by arbitral institutions in their arbitration rules, guides to these rules or in the course of public appearances of the members of institutional bodies.

Most internationally recognized arbitral institutions, such as the ICC Court or the SCC Institute, are independent bodies of their home institutions (the ICC and the SCC, respectively), which were established as not-for-profit organizations under relevant national laws.<sup>30</sup> The others, such as the AAA and the LCIA themselves function as complex not-for-profit legal entities. While the AAA, founded in 1926 under the Membership Corporation Act, is a not-for-profit public service organization committed to the service and education in the field of ADR, the LCIA, whose roots date back to 1891, operates as a not-for-profit company limited by guarantee, providing administrative service for the conduct of arbitrations and other types of ADR procedures.<sup>31</sup> In both cases, arbitral institutions claim to be independent from any judicial or governmental bodies, and to operate largely on the basis of the voluntary membership of the representatives of local or international business communities.

The non-profit status of institutional activity of most prominent arbitral institutions is problematic given the progressing professionalization and specialization of these arbitral institutions, in particular in the eyes of arbitration users who have faced increasing costs of institutional services in the past decades. The arbitral institutions mentioned above, while offering their support in the conduct of arbitrations, are said to fulfil more general aims underlying their own policies or the policies of their home institutions such as the preservation of the “communitarian” or societal values of business communities through a fair and expertise resolution of commercial disputes. In this vein, the ICC Court is supposed to execute the ICC’s goals, enshrined in the ICC Constitution, to further develop an open world economy through the facilitation of international economic exchanges.<sup>32</sup> Similarly, the SCC Institute, as a third neutral party, assists businesses in the maintenance of business relations to continue the SCC’s goals to “realize the vision of Stockholm as the centre of economic growth in Northern Europe”.<sup>33</sup>

It is questionable, however, whether such broad and idealistic objectives contained in the founding documents of these arbitral institutions—drafted decades ago in different economic and political circumstances—can still easily explain the financial organization of contemporary arbitral institutions. It is no secret that

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<sup>30</sup>The ICC was established as an association under the French law of 1901. Derains and Schwartz 2005, 1; for the SCC see: About the SCC. <http://www.sccinstitute.com/about-the-scc/>. Accessed 25 April 2016.

<sup>31</sup>“Events in the History of the AAA and Alternative Dispute Resolution”; <http://www.lectlaw.com/files/adr07.htm>. Accessed 25 April 2016 “LCIA—The London Court of International Arbitration—History of the LCIA. Based on the Report from the Law Quarterly Review; 1898.” <http://www.lcia.org/LCIA/history.aspx>. Accessed 25 April 2016.

<sup>32</sup>See the Preamble and Article 1 of the ICC Constitution. <http://www.iccwbo.org/constitution/>. Accessed 25 April 2016.

<sup>33</sup>See About the SCC. <http://www.sccinstitute.com/about-the-scc/>. Accessed 25 April 2016.

arbitration is not a charity, a fact that is supported by the institutionalization of arbitration. Perhaps the not-for-profit character of institutional arbitration services had its *raison d'être* in the post-war reality, when institutional arbitration was to contribute to the rebuilding of the market economy, and when arbitral institutions, assuming almost gratuitous tasks, were not the sophisticated market players that they are today. Even though the financial organization of most arbitral institutions is confidential, it is conventional knowledge that arbitral institutions administer cases with millions of US dollars at stake, and that they charge the parties for their services according to certain percentage or hourly rates. In this view, the non-profit nature of arbitral institutions as defined in their statutes or constitutions appears to have little correlation with the demands of business people wishing to resort to institutional arbitration today, who still want to perceive arbitral institutions as nothing more than the providers of cost-effective arbitration services. Paradoxically, however, what arbitration users can witness is the growing formalization of institutional arbitration entailing additional arbitration costs; all these under the shield of elaborate institutional goals to serve as guarantors of the prosperity of global or regional economic growth. In fact, one could ask the question why arbitral institutions, as non-profit organizations, have been so actively involved in competition for institutional fees within the market for arbitration services. The most likely explanation emerges with regard to the potential need for institutions to secure the best quality arbitrators to act within institutional structures and to increase the yearly caseload that can be subsequently published on the institution's website to attract new users.<sup>34</sup>

This is not to suggest that remuneration of institutional members and employees constitutes the high percentage of financial contributions to the budget of arbitral institutions. Rather, the discussion of the not-for-profit nature of arbitral institutions may be indicative of the changing reasons why arbitration users tend to choose one arbitral institution over another (and why future users may, potentially, begin to favour new arbitral institutions with more transparent financial accounts over those institutions with convoluted financial organization). Some academic studies have shown that the financial organization of dispute resolution service providers may influence the selection of particular service providers by commercial parties in that non-profit service providers (as well as public service providers) appear to be more dependable, thus acting more in line with parties' expectations than for-profit service providers.<sup>35</sup> Although such theory requires further verification based on reliable empirical data, it is likely that due to the confusion about the nature of prominent arbitral institutions by their users (whether

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<sup>34</sup>Joshua Karton in his recent book on *The Culture of International Arbitration and the Evolution of Contract Law* claims that the major reason why arbitral institutions—as, after all not-for-profit entities—compete for their clients by means of institutional fees relates to the institutional desire to gain a greater share in the arbitration market, which is indicative of the efficiency of particular institutional regime. Karton 2013, 64–65.

<sup>35</sup>Davis 2012, 222–229 with further references.

for-profit or not-for-profit oriented) some arbitration users will recourse to new arbitral institutions whose financial structure appears relatively clear as compared to prominent arbitral institutions. Furthermore, the parties may start to rely more often on truly commercial, for-profit dispute resolution service providers (only because they will see no difference in provision of such services by for-profit providers as compared to the services offered by traditional arbitral institutions). Additionally, business parties may begin to increasingly request more transparency regarding the allocation of institutional fees. This observation has standing on its own in view of the complex organizational structure of most prominent contemporary arbitral institutions, highlighted by the increasing costs of their institutional services. The not-for-profit organization of arbitral institutions therefore calls for more accountability of institutional regimes, both in front of international arbitration community and the public.

To add to this debate, prominent arbitral institutions, traditionally perceived as administrators of purely commercial, private disputes fail to define their contemporary goals in a fashion that would reflect the engagement of these institutions in new types of arbitration beyond purely commercial institutional objectives. The self-proclaimed mission of the institutional arbitration “sector”, with solely commercial values of business communities underpinning such mission, seems inaccurate for two reasons. First, this is due to the already-mentioned public international law objectives of some pioneer arbitral institutions. Second, it is because of the increasing expansion of institutional arbitration services as discussed in Sect. 2.3.1.1.

Although prominent arbitral institutions boast of their independence from public powers, many cooperate with governmental authorities in numerous programmes involving dispute resolution, even in regulated industries. Reading from the AAA’s leaflet, every year the AAA administers “thousands of cases under governmental authority”.<sup>36</sup> The AAA’s tight bonds with the US government and Congress were established at the outset of the AAA’s operation, which was dictated by the specificity of the American arbitration. Undoubtedly, such cooperation popularized other forms of arbitration involving also statutory or civil rights (i.e. consumer or employment arbitrations), and confirmed the AAA’s authority in the administration of the emerging forms of arbitrations in the US, often without an express consent from the parties interested in the case. Even if these observations are relevant mostly in the American, domestic setting, they show that the profile of the AAA goes beyond purely commercial aims, which in practice may have an impact on the (in)correct application of specific sets of institutional arbitration rules to commercial or other types of disputes administered by the AAA or other institutions. In fact, the alleged misapplication by the AAA of its rules resulted in the legal proceedings against the AAA in the past that largely showed the

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<sup>36</sup>The American Arbitration Association: A Long History of Working with Government. [http://www.adr.org/aaa/ShowPDF?doc=ADRSTG\\_017603](http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_017603). Accessed 25 April 2016.

arbitrariness of the AAA in determining the set of applicable arbitration rules to the case in question, contrary to the expectations of the parties.<sup>37</sup>

Another troubling issue regarding the scope of institutional services against the background of the early objectives of the most prominent arbitral institutions concerns the lack of the proper explanation of the casework of these institutions relating to other, non-commercial types of disputes or commercial disputes involving States or State-like entities. Although the statistics of most prominent institutions have been increasingly detailed, they still remain rather vague when it comes to the explanation by arbitral institutions of the application of traditional, commercial arbitration rules to new types of disputes and the possible alteration of these rules given the particular nature of arbitrations that new disputes entail. The latter observation has significant practical implications for business parties that may have legitimate expectations to be better informed by institutions whether, and if so, how the amendments to the rules compromise the business goals of the parties for whom the commercial rules were, *nota bene*, originally designed. The major limitation for arbitral institutions to provide detailed information in this regard is undoubtedly rooted in the confidentiality of the highly sensitive types of institutional arbitration, possibly involving matters of public policy. Bearing in mind, however, that most prominent arbitral institutions such as the ICC Court and the LCIA, offer to all parties solely one set of arbitration rules (including schedules of costs valid for all types of arbitrations), it appears well grounded to require from these institutions that the growing adaptability of their rules is clarified with regard to both business parties and new arbitration users.

Consistent with the preceding discussion is the growing popularity of new, regional arbitral institutions with somewhat more transparent statutes and objectives, as defined by the internal documents of these institutions. For example, Section 1(3) of the Statutes of the German Institution on Arbitration (DIS) states:

The Association solely and directly pursues only non-profit (“gemeinnützige”) objectives within the meaning of the Chapter “Tax Exempt Objectives” of the Tax Code. The Association is non-profit oriented; it does not primarily pursue its own commercial aims. The means of the Association may be used only for purposes in conformity with the statutory objectives. Members do not receive any grants out of the funds of the Association. No

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<sup>37</sup>*Strategic Resources Co. v. BCS Life Insurance Co. No. 26022, 2005 WL 1943536* (S.C. Aug. 15, 2005) discussed in detail in Chap. 5. To be more precise, the alleged misapplication of the rules concerned the choice of the AAA’s Supplementary Rules for the Resolution of Intra-Industry United States Reinsurance and Insurance Disputes instead of the AAA’s Commercial Rules. It should also be noted that the international branch of the AAA, the ICDR adopted new rules in addition to its standard rules and procedures to be used in the resolution of commercial disputes. These include: ICDR Procedures for Final Review of Perceived Inconsistent or Unreasonable String Confusion Objection Expert Determinations of 2015, or the Final Offer Supplementary Arbitration Procedures of 2015, to mention a few.

person may benefit from expenditures which are not compatible with the objectives of the Association or receive disproportionately high remunerations.<sup>38</sup>

Furthermore, as set forth in Section 5(1) of the Statutes in question entitled “Contribution and Financial Year”:

The Association is financed by:

- (a) membership contributions,
- (b) grants,
- (c) fees derived from the conduct of arbitral proceedings,
- (d) revenues from the conduct of events and the distribution of publications.

DIS, which operates as a registered non-profit association (“eingetragener Verein”) with its seat in Berlin,<sup>39</sup> also clearly defines its main objectives in Section 1 of the DIS Statutes. Accordingly, DIS aims at promoting arbitration by means of the following activities: (1) through “the preparation, support and administration of arbitral proceedings” by the DIS Court of Arbitration; (2) the organization of various academic and training events in the field of arbitration, including the support of research projects; and (3) knowledge dissemination in relation to arbitration through publications and information events.<sup>40</sup> Moreover, the involvement of DIS in different forms of arbitration has been specified by means of different sets of arbitration rules offered by DIS for particular types of disputes, including but not limited to, corporate disputes or disputes relating to sport.<sup>41</sup> Although the language of some provisions contained in DIS Statutes may require further precision (i.e. the expression on the necessary avoidance of “disproportionately high remunerations” for DIS officials calls for further explanation), both the financial organization and the objectives of DIS appear relatively straightforward and more transparent, in particular as compared to the financial structures and aims of more international arbitral institutions such as the ICC Court, LCIA, and the SCC Institute.

In the same vein, the Preamble to the Arbitration Rules of another regional arbitral institution, the Chamber of Arbitration of Milan (CAM), in its Section on the “Tasks and bodies of the Chamber of Arbitration”, specifies the nature and

<sup>38</sup>DIS Statutes are available at the DIS website: *Deutsche Institution Für Schiedsgerichtsbarkeit (DIS) e.V.—German Institution of Arbitration—Statutes*. <http://www.dis-arb.de/en/13/content/satzung-id9>. Accessed 25 April 2016.

<sup>39</sup>According to the information provided on DIS’ website, DIS started its operation in 1992 following the merger of the German Arbitration Committee (*Deutscher Ausschuss für Schiedsgerichtswesen e.V.*, DAS) (founded as early as in 1920) and the German Arbitration Institute (*Deutsches Institut für Schiedsgerichtswesen*, DIS) (established in 1974). As such, DIS should be regarded as the most prominent arbitral institution operating in Germany after its reunification in 1990. “About the DIS”. <http://www.dis-arb.de/en/57/content/about-the-dis-id46>. Accessed 25 April 2016.

<sup>40</sup>Section 1 “Aims and objectives of the Association” in: *Deutsche Institution Für Schiedsgerichtsbarkeit (DIS) e.V.—German Institution of Arbitration—Statutes*. <http://www.dis-arb.de/en/13/content/satzung-id9>. Accessed 25 April 2016.

<sup>41</sup>DIS Rules. <http://www.dis-arb.de/en/16/rules/overview-id0>. Accessed 25 April 2016.

objectives of the CAM. Hence, the CAM, as an entity of the Chamber of Commerce of Milan, performs arbitration services that fall within the following categories: (1) the administration of arbitration proceedings under the CAM Rules; (2) acting as appointing authority under arbitration rules different than CAM Rules; and (3) acting as appointing authority under the UNCITRAL Arbitration Rules. The Commentary to the CAM Rules adds to the understanding of the nature and functions of the CAM. Hence, the CAM, established in 1986 as a “special operating unit” (“azienda speciale”) of the Milan Chamber of Commerce, has been entrusted to perform a wide scope of ADR services including arbitration and mediation, as well as, more broadly, the promotion of the dispute resolution “culture”.<sup>42</sup> In line with these objectives, and in addition to the standard arbitration services administered under the CAM Rules, the CAM offers its services for the resolution of domain name disputes pursuant to the rules developed by international authorities in this field such as the Internet Assigned Numbers Authority and ICANN.<sup>43</sup>

Although the broad scope of CAM’s activities may at first glance correspond with the objectives of the prominent arbitral institutions, the CAM certainly appears as a significant competitor vis-à-vis the renowned international arbitral institutions mostly because of its strong regional profile that entails less complex questions regarding both the scope of its institutional goals and the “universalization” of its arbitration rules as opposed to the rules of most prominent arbitral institutions. This observation appears relevant for the discussion on the changing legitimacy of prominent arbitral institutions, as it suggests that the universalization or internationalization of arbitration rules is no longer the major determinant of the parties’ choices to rely on particular institutional infrastructure. Beyond any doubt, the proliferation of arbitral institutions as well as the progressive specialization of their services contributed to the increased diversity among arbitral institutions, both with regard to their organizational (here also, financial) structure and the scope of their arbitration services. Hence, arbitral institutions are not and will never become universal enough to share the same characteristics in front of their users. Be that as it may, arbitral institutions should, to the utmost degree, ensure clarity regarding their services to avoid confusing their users as to the scope of their modern activities. This is valid especially with regard to the most prominent arbitral institutions whose objectives have become ambiguous in front of their early, commercial goals, as well as vis-à-vis relatively straightforward activity of the emerging, regional arbitral institutions attracting more and more business people from local arbitration communities.

The question also arises regarding the scope and character of institutional arbitration *services* in the eyes of the arbitral institutions. It was already noted that the scope of institutional involvement in the conduct of arbitrations differs from

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<sup>42</sup>Fumagalli 2012, 9–13.

<sup>43</sup>See CAM: Domain Names Disputes, <http://www.camera-arbitrale.it/en/Domain+Names+Disputes/index.php?id=13>. Accessed 25 April 2016.



one institution to another, with some institutions providing an in-depth administration of disputes and other institutions allowing for more freedom of the parties to tailor the procedural aspects of their proceedings. While trying to find a common denominator for both models, one could enlist the following stages of institutional work: (a) assistance to the parties in the composition of the arbitral tribunal; (b) setting time limits; (c) allocation of institutional arbitration costs; and (d) further monitoring of various stages of arbitration proceedings. In any event, the institutional administration of arbitration is supposed to be efficient, that is cost-effective and fast, and it is advertised as such by most arbitral institutions.

Regrettably, such promotion of institutional services does not correspond to the actual character of these services, nor does it truly reflect on the character of institutional involvement in arbitration proceedings. Are all institutional decisions purely administrative in their nature? Do all such decisions, even in arbitration proceedings entailing an in-depth institutional involvement in the conduct of arbitration, concern only procedural support of the work of arbitrators? Some, by now rather isolated, opinions of current or former officials of arbitral institutions suggest contrary answers.

At the ASA Seminar on “Arbitral Institutions under Scrutiny”, held on 9 September 2011 in Zurich concerning the functions of the ICC Court, the former Deputy Secretary General of the ICC, Simon Greenberg pointed to some possible pitfalls in the ICC’s process of the scrutiny of arbitral awards, which concerned, *inter alia*, the ICC Court’s interference with the liberty of decision of the arbitral tribunal.<sup>44</sup> There are some substantive aspects of the ICC’s scrutiny procedure that can be visible from the moment of the evaluation by the ICC counsel of the conformity of an award with the ICC rules and practices until the deliberations of the ICC Court on the draft awards. The ICC Court’s recommendations that result from such evaluations, as noted by Greenberg, “can cause a change in the outcome of the award”.<sup>45</sup> However, according to Greenberg, this falls under the arbitrators’ control while rendering the awards.<sup>46</sup> Additionally, an interesting explanation of the rationale of Article 40 of the 2012 ICC Arbitration Rules on Limitation of Liability of the ICC arbitration actors sheds light on the functions of ICC officials in the course of arbitration proceedings as seen by those same officials. A commentary note to Article 40 states that: “where such bodies and individuals [including the ICC and its employees] were exposed to liability, this could hinder their work, making it difficult for them to provide the required level of service”.<sup>47</sup> Although it is challenging to capture the understanding of the nature of the ICC arbitration services from this, rather vague statement of the drafters of the ICC Guide, justification of limitation of liability, as noted above, suggests that the ICC service together with the work of ICC arbitrators taken as a whole falls beyond

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<sup>44</sup>The speech has been written up into an article. See Greenberg 2013.

<sup>45</sup>Greenberg 2013, 105.

<sup>46</sup>*Ibid.*

<sup>47</sup>A commentary note in: Fry, Greenberg, and Mazza 2012, 421.

pure provision of services in the meaning of any known contractual law theory. If this were not the case, why would ICC employees as professional lawyers be excluded from liability for the performance of their duties, whereas other professional contractors cannot enjoy such a privilege?

Such declarations, coming from the members of institutional organs, intensify doubts about the scope and nature of all institutional acts. The complex institutional involvement in arbitration creates room for more substantive context of arbitral institutions' decisions. This may be especially important in situations in which an institution steps in between the parties and arbitrators or decides jurisdictional challenges. This observation also makes procedural institutional authority in formation of contracts in institutional arbitration more problematic. As stated by the Commentary to the CAM Rules, "the performance by the CAM, through its bodies [...] leads to, and/or is based on, the creation of legal relations between all the subjects involved in arbitration".<sup>48</sup> How does the contract formation in institutional arbitration look like in practice? Regrettably, neither the CAM nor any other arbitral institution, at least as known to the author, provides the answer to this issue.

### 2.2.3 Other Disciplines

A few sociologists and political scientists have devoted attention to arbitral institutions in a more general context of the interplay between arbitration and *lex mercatoria*, which—according to them—are "intriguing cases" of private ordering.<sup>49</sup> Dirk Lehmkuhl recalls the aforementioned sociological study on arbitral institutions conducted by Professors Dezalay and Garth, and points out the institutional "shares" in a globalized arbitration industry.<sup>50</sup> Lehmkuhl notes the linkages between the competing dynamics between arbitration service providers and the creation and subsequent evolution of self-regulatory transnational commercial arbitration. This adds to the multifaceted objectives of institutional arbitration, and shifts the mainstream discussion on arbitral institutions to the transnational level, in which particular institutional objectives meet. Hence, the socio-political aspects of institutional arbitration involve intriguing questions regarding the traditional understanding of legitimacy of institutional arbitration regimes, and suggest additional functions that contemporary arbitral institutions assume in transnational arbitration systems, on behalf of international arbitration community as a whole.

Institutional arbitration has also become an interesting case study for economists. In the 1990s, Alessandra Casella provided an analysis of the interplay between international commercial arbitration (involving also arbitral institutions)

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<sup>48</sup>Fumagalli 2012, 10.

<sup>49</sup>Dezalay and Garth 1998; Lehmkuhl 2006, 101–125.

<sup>50</sup>Lehmkuhl 2006, 101–125, in particular 112–113.

and the emergence of supranational arbitration jurisdiction through the production of “self-made economic law” by international traders.<sup>51</sup> In her equilibrium model, Casella shows that arbitration “centres”, as specific forms of “private coalitions of individuals”, do have an impact on the expansion of international trade, as they facilitate the accumulation of public goods that are necessary for efficient trade.<sup>52</sup> Casella also argues that the attempts of arbitral institutions to publish the extracts of arbitral awards of precedential value contribute to the development of the legal doctrine on arbitration, which is created from the bottom, by the very members of the “arbitration club”.<sup>53</sup> Yet again, the economic analysis of institutional arbitration substantiates the emerging functions of arbitral institutions in a more global context of market integration. Even if these functions overlap with the goals of such complex institutions as the ICC Court, they might appear as new, and not yet well-mapped dynamics to the smaller centres whose primary aims were directed towards the demands of local business communities. Furthermore, Casella notices a particular dialogue between the work of institutions and the law, which requires an analysis of the “legalization” of arbitration procedures, especially in view of the recent demands for the increased legality and certainty of the arbitration processes.<sup>54</sup>

Moreover, more and more legal practitioners and scholars have begun to depict institutional arbitration within the broader context of sociological interactions within international and local arbitration communities. In addition to the already-mentioned sociological studies of Professors Dezalay and Garth<sup>55</sup> and Joshua Karton,<sup>56</sup> Professor Gaillard most recently presented the sociological “representation” of arbitration in which arbitral institutions appear as “merchants of recognition” with whom the local and international communities of arbitration actors (including parties and arbitrators) are associated.<sup>57</sup> These studies point to the changing landscape of institutional arbitration, the new allocation of power among institutional arbitration players, and suggest novel functions of these players within new academic disciplines such as behavioural economics.

The above presentation showed both the shortcomings of the mainstream definition of institutional arbitration and the inaccuracy of the institutional explanation of their own mission and of the scope and character of the contemporary institutional arbitration services. The major arguments involve the following:

- (1) The simplification of the definition of private arbitral institutions in the comparative legal discourse based mainly on the reduction of institutional status and goals to purely private arbitration services.

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<sup>51</sup>Casella 1996, 155–186.

<sup>52</sup>Ibid.

<sup>53</sup>Casella 1996, 161.

<sup>54</sup>Ibid.

<sup>55</sup>Dezalay and Garth 1998.

<sup>56</sup>Karton 2013.

<sup>57</sup>Gaillard 2015.

- (2) Confusion regarding the character of institutional arbitration services, particularly in the context of the recent increased specialization of institutional arbitration, which calls into question the original mission of arbitral institutions and suggests the emergence of the new functions of arbitral institutions, often in response to the public interest in arbitration.
- (3) The possible interdisciplinary approach to institutional activity, which explains additional functions of arbitral institutions and questions the orthodox understanding of the legitimacy of institutional arbitration as a purely commercial dispute resolution process.

Against this background, in the following part of Chap. 2, an innovative functional definition of institutional arbitration is proposed. This should both address the above-mentioned doctrinal and practical shortcomings and accommodate the novel trends in the field of contemporary institutional arbitration.

### 2.3 Dual Function of Arbitral Institutions in the Contemporary Arbitration System

In view of the preceding discussion on the shortcomings of the contemporary mainstream definitions of institutional arbitration, the following part of this chapter presents the emerging, public function of institutional arbitration against the background of the traditional, commercial function of arbitral institutions, stemming from the provision of institutional arbitration services. This book proposes that institutional arbitration be treated as a hybrid that simultaneously assumes dual commercial and public functions. The commercial function encompasses the dynamics of competition between arbitration institutions, and to this extent it ensures the maintenance by institutions of traditional demands placed on institutional arbitration by business parties, corresponding to the *efficiency* of institutional regimes. In contrast, public function embodies the emerging public role of arbitral institutions in governing the private arbitration system as a whole, which, in turn, is stipulated by the need for *legality* in arbitration called for by both institutional arbitration actors and public authorities.

The dual function analysis intends to demonstrate the evolving profile of the typical users of particular institutional regimes, together with its implications for the changing understanding of efficiency of institutional arbitration, both internally (that is, in the eyes of the arbitration users, institutional arbitrators, and arbitral institutions themselves) and externally (as seen by representatives of public powers). It will be shown that the emergence of the public function influences the development of additional dynamics of competition between arbitration centres, which brings into question the efficiency of the traditional, commercial function of institutional arbitration. These variables, entailing the ongoing interaction between commercial and public functions, will be of particular importance for the discussion on the necessary improvements in the modern institutional liability regimes.

### ***2.3.1 Traditional Commercial Function***

As already noticed, the commercial function involves an analysis of the dynamics of competition between arbitration centres. Arbitral institutions (referred to as “arbitration centres” in this section) are therefore presented here as repeat market players that compete for their users within the market for institutional arbitration services. The dominant paradigm of the commercial function concerns the efficiency of arbitration services from the perspective of business parties to institutional arbitration proceedings. The notion of *efficiency* in the context of institutional arbitration does not fully conform to the explanation of efficiency by the law and economics nomenclature. Rather, it reflects the efficiency of institutional services through the institutional response to the traditional demands of arbitration users such as cost-effectiveness of institutional services and expeditiousness of institutional arbitration proceedings.<sup>58</sup> These demands are regarded as traditional because they correspond with the original goals of arbitral institutions as defined in early institutional statutes or constitutions. In this sense, the commercial function of institutional arbitration is also considered as traditional to the extent that it addresses the gradual evolution of commercial services by institutional arbitration centres.

#### **2.3.1.1 Evolving Profile of Institutional Arbitration Users: New Challenges for the Leading Arbitral Institutions**

In order to assess the implications of the competing dynamics in the institutional arbitration market for the efficiency of institutional regimes, as understood by business parties, it is necessary to first examine the changing nationality of the users of different institutional arbitration regimes. Given the context of the analysis involving the commercial function of institutional arbitration, the focus will be placed on the geographical origins of the business parties to the institutional arbitration. Moreover, the question will be posed whether particular centres are better suited to administer disputes between the parties representing certain legal traditions and geographical areas, and, if so, how this affects the competition between the studied institutions. The major assumption concerns the possible effects of the universalization of institutional arbitration rules, stimulated by the forces of globalization and professionalization of institutional arbitration services, on the decline in the efficiency of institutional regimes, at least as perceived by traditional institutional arbitration users.

The ICC and its Court of Arbitration aimed high from the very outset of its operation, which has been reflected in the current, truly international aspect of the ICC Court’s activities. The founding goal of the ICC spoke to the institutional aspiration to manage disputes between international businessmen on a more

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<sup>58</sup>The notion of efficiency will be further elaborated in the course of the following analysis.

horizontal level, as opposed to domestic disputes. Both the early ICC structure (concerning the activity of numerous ICC National Committees) and the policy underlying the early ICC Rules of Procedure expressed institutional interest in transcending any particular geographical area by serving the business community as a whole and at the international level.<sup>59</sup> According to the statistics provided for by the ICC,<sup>60</sup> the ICC arbitration is used by a variety of parties from Asian, Latin American, and African countries.<sup>61</sup> The ICC arbitration has continuously tried to respond to the demands of European users, with the rising number of disputants coming from Central and Eastern Europe in 2007.<sup>62</sup> As such, the ICC Court has undoubtedly secured its position as the most international and the most prominent arbitral institution in the world.

In this vein, the organizational structure of the Secretariat of the ICC Court reflects the geographical diversity of the ICC parties, as it comprises nine different case management teams (with the latest one established in New York), each headed by the counsel and supported by two or three deputy counsel and secretaries.<sup>63</sup> The teams represent the following language groups or geographical areas: (a) French, (b) American, (c) Latin American, (d) German, (e) UK, (f) Italian, Swiss, and Austrian, and (g) Eastern-European.<sup>64</sup> Moreover, the Secretariat of the ICC Court launched its Hong Kong branch in November 2008, which constituted the eighth team to oversee the arbitral proceedings involving Asian parties.<sup>65</sup> The members of the Hong Kong team supervise the cases and provide ordinary reports on the progress of the caseload during the weekly ICC staff meetings organized in the form of teleconferences. The launch of the Hong Kong branch of the ICC Court's Secretariat, which was a response to the growing demand for arbitration services in the Asia-Pacific region, proves the indefatigable attempts of the ICC to increase the worldwide applicability of the ICC Arbitration Rules to the disputes between arbitration users from various cultural and legal backgrounds. The ICC's ambition to "cover all major time zones" has recently been emphasized by the

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<sup>59</sup>Kelly 2001.

<sup>60</sup>"ICC Arbitration: A Ten Year Statistical Overview." 2008. ICC International Court of Arbitration Bulletin 19, no. 1; Tercier 2008.

<sup>61</sup>Ibid.

<sup>62</sup>As far as Eastern Europe is concerned, Polish parties were strongly represented in 2007, while Turkish parties maintained their lead in Central Europe. There was also an increase in the number of Czech and Ukrainian parties. "2007 Statistical Report." 2008. ICC International Court of Arbitration Bulletin Vol. 19 No. 1.

<sup>63</sup>See Secretariat of the Court. <http://www.iccwbo.org/About-ICC/Organization/Dispute-Resolution-Services/ICC-International-Court-of-Arbitration/Secretariat-of-the-Court/>. Accessed 25 April 2016.

<sup>64</sup>Ibid.

<sup>65</sup>"ICC Court Focuses on Hong Kong and Eastern Europe" 2008. 3 Global Arbitration Review 6. <http://globalarbitrationreview.com/journal/article/15641/icc-court-focuses-hong-kong-eastern-europe>. Accessed 25 April 2016.

ICC's opening of an office of the ICC Court's Secretariat in New York.<sup>66</sup> This established an additional case management team to work on North American cases.

In case of the LCIA, which for a long time remained reluctant to publish its Statistical Reports, the English parties prevail as the LCIA typical users.<sup>67</sup> Two following observations should be pointed out: (1) the long-established perception of the LCIA as a London-based institution, and (2) the recent shift in the international expansion of the LCIA involving the foundation of two prominent partnerships such as the LCIA India and the Dubai International Financial Centre LCIA (the DIFC-LCIA)<sup>68</sup>. Although the LCIA promotes itself as a “thoroughly international” institution, providing flexible administration of the cases for “all parties, regardless of their location, and under any system of law”,<sup>69</sup> it has long been perceived as a London-centric institution with limited “international” tools for the administration of cross-border disputes. This was mainly due to the provisions of Articles 16.1 and 17.1 of the 1998 LCIA Rules, which determined London as the default seat of arbitration and English as the default language of the proceedings for non-participating parties as well as for the purpose of the communications with the Registrar.<sup>70</sup> Regardless of the rationale underpinning these provisions, such as to decrease the staying of the proceedings when the parties fail to stipulate the place of their arbitration, the LCIA's attachment to the institutional seat was for a long time seen as a sign that the LCIA's procedure did not fully express the international spirit of arbitration.<sup>71</sup> However, the time for more variability has also come for London. The recently amended LCIA Rules that entered into force as of 1 October 2014, authorize an arbitral tribunal as soon as it is constituted to change the default seat of arbitration (which remained London in cases in which the

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<sup>66</sup>“ICC to Open Office of the Court in New York. <http://www.iccwbo.org/News/Articles/2012/ICC-to-Open-Office-of-the-Court-in-New-York/>. Accessed 25 April 2016.

<sup>67</sup>Pursuant to the statistical data presented in LCIA's Report of 2013, English parties were the leading national group of the common parties to the LCIA arbitration in both 2013 and 2012, representing 18.6 % of all LCIA arbitration users in 2013 and 16 % in 2012. Registrar's Report 2013. <http://www.lcia.org/LCIA/reports.aspx>. Accessed 25 April 2016.

<sup>68</sup>As of 1 June 2016 the LCIA will administer disputes between users in India from its London offices. See: “LCIA Adopts a Changed Approach to Indian Arbitration Market”, <http://www.lcia-india.org>. Accessed 25 April 2016.

<sup>69</sup>About the LCIA: Introduction. <http://www.lcia.org/LCIA/introduction.aspx>. Accessed 25 April 2016.

<sup>70</sup>Turner and Mohtashami 2009, Sect. 1.14.

<sup>71</sup>The already-mentioned section on Arbitration of the LCIA website confirms that in the cases in which one of the parties will still insist on an alternative default seat of arbitration other than London, the LCIA Court will decide on the issue. See: LCIA—The London Court of International Arbitration—LCIA Arbitration. [http://www.lcia.org/Dispute\\_Resolution\\_Services/LCIA\\_Arbitration.aspx](http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration.aspx). Accessed 25 April 2016. See also: Koepp et al. 2013, 261–262.



parties fail to agree on a seat of their choice) upon written submissions from the parties.<sup>72</sup> Moreover, the new Article 17.1 of the 2014 LCIA Rules no longer specifies English as the default language for non-participating parties and for the purposes of the communications with the Registrar. The recent cooperation between the LCIA and the Financial Centre of Dubai,<sup>73</sup> as well as the foundation of the LCIA India,<sup>74</sup> is also evidence of the growing international aspirations of the LCIA. However, it remains to be seen if the LCIA manages to truly universalize its activity in line with its contemporary efforts.

As far as the ICDR is concerned, the two following variables appear particularly significant with regard to internationalization and universalization of its activities: (a) the development of the ICDR as an international branch of the AAA in 1996, and (b) the maintenance by the ICDR of its Global Strategic Alliances. To start with the launch of the ICDR in the late 1990s, the ICDR was established as an international branch of the AAA that was originally perceived as an American arbitral institution aided by the promotion of the arbitration among *peoples* and within different industrial sectors in the US.<sup>75</sup> This does not mean, however, that prior to this date the AAA did not administer international cases via its network of local offices in the US. It was not until the launching of the ICDR in the mid-1990s, when the international activity of the AAA's hub was popularized due to the hiring of the international staff as part of the ICDR's Case Management Teams.<sup>76</sup> Today, the members of the ICDR's teams come from a number of countries, including Brazil, Colombia, Mexico, Italy, Ireland, Germany, Romania, Russia, Iran, Ghana, and Sri Lanka.<sup>77</sup> Moreover, in addition to its standard International Dispute Resolution Procedures (ICDR Procedures), with the recent

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<sup>72</sup>Article 16.1 of the 2014 LCIA Rules.

<sup>73</sup>The DIFC-LCIA was founded in February 2008 as a joint venture of DIFC and the LCIA for the administration of international arbitration and mediation. The arbitration centre of DIFC-LCIA adopted its own Arbitration Rules that are modelled on the LCIA Rules. For more information, visit the LCIA website at: "LCIA: International Offices & Overseas." <http://www.lcia.org/LCIA/international.aspx>. Accessed 25 April 2016. "DIFC/LCIA Arbitration Centre". <http://www.difc-lcia.org/Default.aspx>. Accessed 7 July 2016.

<sup>74</sup>The LCIA India was launched on 18 April 2009 as the first independent overseas office of the LCIA. Also the Arbitration Rules of the LCIA India were adopted as a "legal transplant" of the LCIA Rules. As of 1 June 2016 the LCIA will administer disputes between users in India from its London offices on the basis of the LCIA Rules (for new referrals under these Rules) and the LCIA India Rules (for existing cases and new referrals under these Rules based on existing contracts and arbitration and/or mediation clauses). See: LCIA Adopts a Changed Approach to Indian Arbitration Market. <http://www.lcia-india.org>. Accessed 25 April 2016. "LCIA: International Offices & Overseas." <http://www.lcia.org/LCIA/international.aspx>. Accessed 25 April 2016.

<sup>75</sup>See: the analysis of the historical emergence of the AAA provided in Sect. 3.3.1.1 of Chap. 3.

<sup>76</sup>Luis Manuel Martinez 2012, 7.

<sup>77</sup>See: the information provided in The ICDR International Arbitration Reporter. 1, 2011, no. 2: 1–8.

version effective as of 1 June 2014, the ICDR most recently adopted the Canadian Dispute Resolution Rules and Procedures as a result of the establishing of the ICDR Canada for the resolution of Canadian domestic disputes.<sup>78</sup>

Furthermore, the emergence of the ICDR was not the last of the AAA's attempts to respond to the demands of a worldwide group of its arbitration users. Within the above-mentioned policy of the Global Strategic Alliances, the ICDR maintains partnerships with different organizations including: the Bahrain Chamber of Dispute Resolution (BCDR-AAA),<sup>79</sup> the SIAC (ICDR Singapore),<sup>80</sup> the CANACO<sup>81</sup>, and the IACAC.<sup>82</sup> Moreover, the ICDR also operates via its established offices in Dublin (the only Europe-based ICDR office), Mexico, Bahrain, and Singapore. All these support the growing interest in the ICDR arbitrations of the arbitration users from the Americas, Asia, and also European countries such as Spain or Portugal.

In contrast, the SCC Institute is still viewed as a more local institution that only recently started to compete for arbitration business and that has served the most homogenous group of arbitration users since its foundation in 1917. However, the slow evolution of the SCC arbitration users is also visible in the case of the SCC Institute. The popularity of the SCC arbitration is a complex issue insofar as it concerns the involvement of the external political factors in the SCC position within the arbitration market. These factors include the development of the so-called "Optional Arbitration Clause for Use in Contracts in US-USSR Trade 1977" as a result of cooperation between the then USSR Chamber of Commerce and Industry, the AAA, and the SCC itself,<sup>83</sup> and the establishment of the new Swedish Arbitration Act of 1999, which inspired the SCC Institute to amend its

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<sup>78</sup>Canadian Dispute Resolution Rules and Procedures (Including Arbitration and Mediation) effective 1 January 2015.

<sup>79</sup>The Bahrain Chamber for Dispute Resolution (BCDR-AAA) was established in January 2010 in partnership with the Kingdom of Bahrain. The institution, which administers arbitration cases pursuant to different sets of arbitration rules (including the ICDR International Rules of Procedures and the BCDR-AAA's own Rules), was meant to provide state-of-the-art arbitration facilities which would address the unique, legal and cultural tradition in Bahrain and neighbouring countries. See: "ICDR International Arbitration Reporter" 2010, 1, no. 1, 3.

<sup>80</sup>The ICDR Singapore is the ICDR's Asian Centre, established as a joint venture with the Singapore International Arbitration Centre (SIAC) in order to maintain the ICDR arbitration services in collaboration with the practitioners from Asia. See: *Ibid*

<sup>81</sup>Within the cooperation with the Mediation and Arbitration Commission of the Mexico City National Chamber of Commerce (CONACO), which was inspired by the creation of the NAFTA, the ICDR opened its office in Mexico City to facilitate and promote the ICDR international arbitrations throughout Mexico. See: *Ibid*.

<sup>82</sup>The ICDR is the member of the Inter-American Commercial Arbitration Commission (IACAC) that maintains a network of institutions from the Americas, Spain, and Portugal in order to provide a consistent dispute resolution through arbitration for the parties coming from the above territories. See: *Ibid*.

<sup>83</sup>Hope 2008, 23.

Rules of Arbitration to address the objectives of a wider group of arbitration users.<sup>84</sup> The Optional Arbitration Clause was an impulse for the SCC arbitration in a sense that it brought considerable attention to Stockholm as a major arbitration venue within a specific, East-West niche.<sup>85</sup> Despite this impulse, the number of cases handled by the SCC Institute remained relatively small until the adoption of the new Swedish Arbitration Act of 1999, which constituted the grounds for the modern Swedish arbitration law.<sup>86</sup> Even though the SCC statistics prove the historical reliance on the SCC arbitration predominantly by Swedish, Russian, German, North American or Nordic parties, there is a growing interest in the SCC arbitration services coming from disputants from the UK, France, China and the Middle East, Caribbean, as well as Eastern Europe.<sup>87</sup> Today, the SCC Institute promotes itself as an international dispute resolution centre with the parties of around 40 different nationalities using its dispute resolution services every year.<sup>88</sup> Out of the most prominent commercial arbitral institutions under analysis here, the SCC Institute is also one of the most popular administrators of investment arbitration cases worldwide.<sup>89</sup>

This brief presentation of the changing nationality of typical institutional arbitration users demonstrates that within each of the prominent arbitral institutions under analysis—even in the most modest SCC system—there has been an increasing tendency for the expansion and universalization of institutional arbitration rules to attract the parties from any jurisdiction, representing any legal tradition. This also means that the competition between the most prominent arbitration centres has gone far beyond their original local communities and shifted towards more unified international level. Even though the institutional services still bear some degree of divergence, the universalization of arbitration rules in the course of the twentieth century has resulted in the increased unification of the practices of most prominent arbitral institutions. This has also certainly increased their reputation beyond traditional arbitration communities and even among parties with little or no knowledge of arbitration. In line with this observation is the changing profile

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<sup>84</sup>Dezalay and Garth 1998.

<sup>85</sup>Dezalay and Garth 1998, 188.

<sup>86</sup>Dezalay and Garth 1998, 182–196.

<sup>87</sup>Indeed, in 2014 Swedish and Russian parties continued to be the most frequent SCC arbitration users, with English, Chinese, German, and French users constituting the other common nationalities relying on the SCC arbitration services. <http://www.sccinstitute.com/statistics/>. Accessed 25 April 2016.

<sup>88</sup>Dispute Resolution Services. <http://www.sccinstitute.com/dispute-Resolution/>. Accessed 25 April 2016.

<sup>89</sup>The SCC Institute claims to be the second largest arbitral institution, next to the ICSID, to administer investment arbitration cases worldwide. See The Administration of Investment Disputes. <http://www.sccinstitute.com/dispute-Resolution/investment-Disputes/>. Accessed 25 April 2016; and also A Record Year for Investment Treaty Disputes. <http://www.sccinstitute.com/statistics/investment-disputes-2015/>. Accessed 25 April 2016.

of arbitration users of the predominant institutions under analysis, involving States or State-like entities or disputants from more specialized business industries. The 2012 version of the ICC Arbitration and ADR Rules (2012 ICC Arbitration Rules) serves as a pivotal example for the escalated adaptability of the arbitration rules. The recent changes in the ICC Rules respond to the complexity and demands of emerging institutional arbitration users such as States or State-like entities, even in situations in which States act in arbitration proceedings solely in their commercial capacity. Although, as already noted, such universalization tendencies appear as a generally positive development for arbitral institutions (meaning the increased caseload), it seems that the prominent arbitral institutions, now more than ever, need to reassure the traditional business parties to institutional arbitration that the adaptability of their rules did not proceed at the expense of these parties.

It appears as though the compromises proposed by the institutions, even if guided by the need for greater efficiency of institutional arbitration regimes as a whole, have either directly or indirectly contributed to the way in which the typical institutional arbitration users perceive the most prominent arbitration centres today. This implies the decline in the efficiency of the traditional commercial function of institutional arbitration, at least as seen by those typical users. This is the potential reason why more regional arbitral institutions have gained prominence among parties from more local business communities that prefer to rely on less sophisticated and perhaps less reputed arbitral institutions with potentially higher flexibility as to business expectations and desires of traditional arbitration users and less costly arbitration services. This is the case with the Vienna International Arbitration Centre (VIAC) with its increasing popularity in Eastern Europe, the Swiss Chambers' Arbitration Institution with regard to international arbitration in Switzerland, the CAM in relation to Italian and North African parties,<sup>90</sup> and the Singapore International Arbitration Centre (SIAC) in Asia, to mention a few.<sup>91</sup>

### 2.3.1.2 Features of the Institutional Arbitration Market: Introduction to the Competition Dynamics

The market for institutional arbitration services can be characterized by means of two major variables. First, by relatively low barriers for the entry to the market. Second, by the dynamics of competition based, in particular, on the following instruments: (1) differences within the sets of various institutional arbitration rules; (2) soft-law mechanisms; and (3) the marketing techniques aiming at the promotion of particular institutions and/or arbitration in general.

<sup>90</sup>Cole et al. 2014, 57, 122, 185.

<sup>91</sup>There are also other regional arbitral institutions that have witnessed an increased caseload, also concerning international arbitration cases, such as the Madrid Court of Arbitration, the Brussels-based CEPANI, the Hong Kong International Arbitration Centre (HKIAC), DIS, DIA, or the Netherlands Arbitration Institute (NAI).

There have been many studies of the proliferation of arbitral institutions worldwide.<sup>92</sup> It is also usually implied that arbitration centres, unless based in jurisdictions providing for heavy legal regulations for the establishment of arbitral institutions,<sup>93</sup> do not face serious obstacles when entering the arbitration market. There are even some jurisdictions with an unreasonably high amount of arbitration institutions in place. For example, over 200 arbitral institutions have been reported to exist in Latvia,<sup>94</sup> with 130 arbitral institutions operating in Slovakia due to the relatively liberal regime for the establishment and operation of arbitral institutions under Slovak law.<sup>95</sup> In addition to more regional arbitral institutions established in different geographical locations in the 1980s and 1990s, such as the CAM in Italy or DIS in Germany, more and more specialized arbitral institutions have recently come into existence. This is the case with the Panel of Recognized International Market Experts in Finance in The Hague (P.R.I.M.E. Finance). The example of P.R.I.M.E. Finance is particularly intriguing as it shows that arbitral institutions can even spring from the individual initiative of academics representing strong moral and financial capital for starting up the institutional arbitration business.<sup>96</sup>

P.R.I.M.E. Finance was founded upon the idea of Jeffrey Golden, a prominent academic and practitioner, to advance the resolution of disputes related to financial products.<sup>97</sup> Note that in the case of P.R.I.M.E. Finance, as in the case of any other arbitral institution that wishes to gain international or local recognition upon its establishment, the prerequisites for entering into the arbitration market involve the prior affiliations of the founders of the institutions with the existing players in the arbitration field (be it distinguished international arbitrators, academics specializing in arbitration and/or arbitration practitioners). What cannot be forgotten is the importance of institutional networks and cooperation with most prominent arbitral institutions that increases the legitimacy of small institutions that begin to operate more locally. As such, the market for institutional arbitration services comprises the dynamics of both competition and complementarity of all arbitration actors operating on a local or international arbitration platform.

As for the means of competition, arbitration centres are said to compete based mostly on the differences in the sets of their arbitration rules, which, as already noted, are regularly amended to accommodate the possible demands of

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<sup>92</sup>Law Guides at Harnish Law Library: International Arbitration. Pepperdine University School of Law; Arbitral Institutions & Rules: Index of Arbitral Institutions Rules. <http://lawguides.pepperdine.edu/c.php?g=399520&p=2715723>. Accessed 25 April 2016. Davidson et al. 1992.

<sup>93</sup>This is the case with the laws of the Czech Republic, Greece, and Hungary. Cole et al. 2014, 39.

<sup>94</sup>According to the recent Study on the Legal Instruments and Practice of Arbitration in the EU Member States and Switzerland 214 permanent arbitral institutions were registered with the Register of Companies of the Ministry of Justice in Latvia in March 2014. See: Cole et al. 2014, 126–128 with further references.

<sup>95</sup>Cole et al. 2014, 163–164.

<sup>96</sup>“P.R.I.M.E. Finance (Panel of Recognized International Market Experts in Finance)” <http://primefinancedisputes.org/about-us/>. Accessed 25 April 2016.

<sup>97</sup>Brabandere 2011.

institutional arbitration users. Here, although progressively applied by other arbitral institutions (i.e. CEPANI and the Arbitration Centre of the Chamber of Commerce of the Grand-Duchy of Luxembourg), the ICC's distinctive provisions regarding the process of scrutiny of arbitral awards by the ICC Court should be recalled. Also, tracing back to 2010, one should not forget the then pioneering role of the SCC Institute in introducing the framework for modern emergency arbitrator proceedings by means of its 2010 Rules.<sup>98</sup> Similarly, the provisions of both the 1998 and 2014 LCIA Rules making London a default arbitration seat in respective cases reflect the distinctive aspect of the LCIA procedural regime.

In fact, between 2010 and 2015 the majority of arbitration rules of the most prominent arbitral institutions have been amended. Beginning with the changes to the SCC Rules in 2010, the ICC amended its rules in 2012, and finally the LCIA as well as the ICDR in 2014. Furthermore, the most prominent arbitral institutions internalized some soft-law international arbitration guidelines into their respective regimes as means of competition. Hence, in the spirit of the 2014 International Bar Association (IBA) Guidelines on Party Representation in International Arbitration, the LCIA annexed to its 2014 Rules the “General Guidelines for the Parties’ Legal Representatives” that need to be complied with by each party’s representative upon the instructions from the parties. Moreover, in 2014 the ICC published a document entitled: “Effective Management of Arbitration—A Guide for In-House Counsel and Other Party Representatives”. Similarly, the wordings of the model arbitration clauses proposed by institutions should also be perceived within the meaning of dynamics of competition. The competition among the most prominent arbitral institutions regarding their rules and other soft-law mechanisms, however, has proven increasingly problematic.

An increasing amount of scholars and arbitration practitioners have criticized the introduction of soft-law guidelines by arbitral institutions, with a few authors even trivializing the increasing convergence of procedural rules of the most prominent arbitral institutions. As argued by Sabharwal and Zaman, although in 2010 the SCC Institute was an isolated arbitral institution offering emergency arbitrator procedures to its users, today most other prominent arbitral institutions provide similar services<sup>99</sup>. In a similar vein, although it was the SCC who first addressed the issue of third-party treatment and consolidation of arbitration proceedings in its 2010 Rules, today the ICC, the LCIA, as well as the ICDR provide their own rules that regulate these issues. One question that has been recently addressed by arbitration scholars and practitioners is whether such convergence of procedural rules and policies (i.e. the ones on party representatives in arbitration) is still the function of thoughtful competition between arbitral institutions or rather the expression of the growing imitation of the rules with a view of simply not staying behind the competitors or multiplying procedural errors “in a good company”.<sup>100</sup> Sabharwal and Zaman rightly observe that it is

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<sup>98</sup>Sabharwal and Zaman 2014, 704. See also: Warwas, 2012, 44-54.

<sup>99</sup>Sabharwal and Zaman 2014, 704–705.

<sup>100</sup>Sabharwal and Zaman 2014, 711 with further references.

also questionable whether the unification of arbitration rules of the prominent arbitral institutions, in fact, reflects and continues to prioritize the preferences of arbitration users relating to their desirable outlook of institutional arbitration procedures.

Leaving these questions open for now, the means of competition (and collaboration) adopted by other, more local arbitral institutions appear as a positive alternative to the competition mechanisms developed by more sophisticated institutions such as the ICC and LCIA. One particular example emerges in this regard. Four arbitral institutions, the CAM, DIS, VIAC, and the SCC Institute, conventionally known under the name “Gang of Four”, an informal coalition of small or medium-size arbitral institutions, have been organizing a number of events during which the institutions exchange their practices in relation to the management of institutional arbitration cases.<sup>101</sup> Interestingly, they do so by pointing to the divergences in their handling of arbitration cases rather than by focusing on similarities in their rules.<sup>102</sup> This is a remarkable initiative in that it brings together the Secretaries General of these institutions and practitioners who can discuss different ways in which arbitration services are provided to the parties (although often still relating to similar procedural rules) rather than by simply pointing to the universalization of arbitration rules as in the case of the most prominent institutions such as the ICC and the LCIA.

Translations of arbitration rules, which address the heterogeneity of institutional users, also constitute an instrument of competition between arbitral institutions. Even though most institutions name the native versions of their arbitration rules as the official versions in case of any discrepancy or inconsistency, a number of institutions translate their rules into several languages, which corresponds to the cultural diversity among institutional arbitration users. While the ICC Court provides its rules in 13 languages, the previous version of the LCIA rules was available in 10 language versions, in both cases with the rules referring to the origins of the parties representing large economies such as China, Germany, Russia, or the Arab countries, as well as the emerging arbitration users coming from Eastern Europe. The recent set of the LCIA Rules of 2014 is, by now, available in two language versions (English and Russian), but it seems to be just a matter of time before the LCIA will provide further translations. The ICDR Procedures, originally available in English, were translated into Spanish, Arabic, and Portuguese, whereas the SCC Rules are offered in English, Swedish, Russian, and Chinese. Although these means of competition might not seem significant at first glance, in fact the quality of the translation of different rules (in particular of model institutional arbitration clauses) has an enormous impact on both the decisions on jurisdiction and the duration of institutional arbitration proceedings. The recent research on “100 Translation Errors in Institutional Arbitration Rules” conducted

<sup>101</sup>Cole et al. 2014, 58, 123.

<sup>102</sup>Cole et al. 2014, 58; Michael, McIlwrath, “The Gang of Four Rides Again: Pathological Clauses.” 30 July 2015. Kluwer Arbitration Blog. <http://kluwerarbitrationblog.com/2013/07/30/the-gang-of-four-rides-again-pathological-clauses/>. Accessed 25 April 2016. For the comparison of certain rules of arbitral institutions falling within the “Gang of Four” see Coppo 2010.



by Isabelle Liger unveils that the translations of arbitration rules into different languages within the same arbitral institution often contain contradictions, which may affect the diligence and expeditiousness of institutional arbitration proceedings with regard to the parties coming from different geographical locations.<sup>103</sup>

Additionally, arbitral institutions compete by virtue of different marketing strategies, including publications on institutional arbitration and the organization of conferences or educational events concerning recent developments in the institutional arbitration practice. Most institutions also publish specialized brochures in different language versions explaining particularities of institutional regimes along with the distinctiveness of national laws on arbitration in jurisdictions where institutions have their assets. These attempts appear especially helpful for the accidental and new users, which, unlike repeat market players, are not familiar with the general features and objectives of a specific arbitral institution. In this light, the organization of seminars and other educational events is aided by the promotion of arbitration services as a product for both repeat market players and new, potential users of arbitration from the emerging economies.

Moreover, some international events of arbitral institutions take the form of international trainings for young lawyers.<sup>104</sup> As such, institutional marketing strategies expand the competition beyond arbitration users, and prove institutional interest in educating future institutional arbitration actors such as parties' legal representatives, arbitrators, or even the future institutional employees. In addition to such purely competitive strategies, arbitral institutions participate in numerous political and academic events regarding international arbitration, which address both policy-making in the field of arbitration (such as the vivid discussion on the future of the EU investor-State arbitration<sup>105</sup>) and the emerging juridical problems in the context of arbitration.<sup>106</sup> These initiatives also demonstrate the growing private, institutional awareness of the public challenges facing modern institutional arbitration practice. In this way, they will be relevant for the analysis of the public function of institutional arbitration in Sect. 2.3.2.

### 2.3.1.3 “Cost-Effective Arbitration Without Delay?” Understanding Competition Dynamics

When traditional arbitral institutions were emerging at the turn of the nineteenth and twentieth centuries, arbitration was relatively cheap and rapid, particularly in

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<sup>103</sup>Liger 2011.

<sup>104</sup>The ICC actively participates in various academic events and legal trainings. “Opportunities and Materials for Arbitrators and Legal Practitioners”. <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Opportunities-and-materials-for-arbitrators-and-legal-practitioners/>. Accessed 25 April 2016.

<sup>105</sup>Ross 2011.

<sup>106</sup>“The ICC 2012 Programme Action.” <http://www.iccwbo.org/news/brochures/>. Accessed 25 April 2016.

comparison to litigation. Regrettably, this is not the case today. Progressively, the critics of arbitral institutions have flagged the increasingly high price of institutional arbitration services, as well as the inefficiency of these institutions in terms of controlling the duration of the proceedings in general and the timely rendering of the awards by arbitrators in particular.<sup>107</sup> The criticism has come mainly from arbitration users themselves, including in-house counsel who has less financial incentives to support lengthy arbitration proceedings than external counsel working based on high hourly rates. In fact, the increasing complaints regarding the bureaucratization of institutional arbitration and its implications for time and costs of the proceedings should be depicted from a more holistic perspective, in that they point to the (il)legitimacy of the contemporary international arbitration system as a whole.<sup>108</sup> All these require new institutional responses that have been reflected in new dynamics of competition visible among the arbitral institutions.

#### 2.3.1.3.1 Competition Regarding Institutional Arbitration Costs

To understand the dynamics of competition among arbitral institutions in terms of arbitration costs, it is necessary to examine the following issues: (1) what kind of fees constitute institutional arbitration costs; (2) how they are calculated; and (3) what the institutional tools to decrease these costs are (if any).

Generally, the costs of institutional arbitration are comprised of: (a) arbitrators' fees; (b) expenses of the arbitral tribunal; and (c) administrative fees of an arbitral institution.<sup>109</sup> In principle, it is the arbitration centre itself that stipulates arbitrators' fees, within its own discretion and in accordance with the arbitration rules and schedules of costs developed within each institutional regime. The scope of institutional authority to fix arbitrators' fees is remarkable to the extent that it diminishes any form of direct stipulations of arbitration costs by parties and arbitrators and therefore places arbitral institutions at the epicentre of all contractual relations coming into existence in institutional arbitration. In this way, from the contractual perspective, the institutional authority regarding the determination of arbitration costs has another practical implication for the parties. It affects the assessment of the parties of who in fact bears any potential responsibility for the conduct of arbitration proceedings (be it arbitrators who decide on the outcomes of a dispute or arbitral institutions that administer the proceedings and enjoy almost ultimate authority in fixing the costs for their services, including the fees and expenses of arbitral tribunals). This has further significance when identifying a plausible claimant in relation to liability claims against arbitral institutions (and/or arbitrators). The correlations between institutional contractual authority and the liability of institutional arbitration actors will be discussed further in Sect. 2.3.2.

<sup>107</sup>See Draetta 2011.

<sup>108</sup>See generally QC Menon 2012.

<sup>109</sup>There are also the costs that might be directly incurred by the parties in connection with arbitration.

The way in which arbitrators' fees are fixed by arbitral institutions varies among the four main institutions under analysis. Both the ICC Court and the SCC Board determine these charges on the basis of the amount of the dispute in question according to the Scales of Arbitrators' Fees.<sup>110</sup> The ICC also provides for a special regulation that forbids any separate fee arrangements between the parties and arbitrators.<sup>111</sup> The ICC arbitral tribunals may only decide on the costs *other* than those to be fixed by the ICC Court, including the fees and expenses of the experts appointed by the arbitral tribunal in accordance with Article 25(4) of the ICC Arbitration Rules, the parties' reasonable legal and other costs, total costs of arbitration to be included in the final award, and parts of the costs of arbitration to be fixed or allocated between the parties.<sup>112</sup> By contrast, the LCIA and the ICDR set the fees of the arbitral tribunal according to the time to be spent on the dispute by arbitrators (i.e. hourly rates in the case of the LCIA<sup>113</sup> and daily or hourly rates in the case of the ICDR).

Interestingly, in the case of the LCIA arbitration, the LCIA Court determines the fees and expenses of LCIA arbitral tribunals at the outset of each arbitration proceeding, and it normally also secures such costs of its own deposits.<sup>114</sup> Prior to their appointment, the members of the LCIA arbitral tribunal agree in writing to be bound with the rates contained in the LCIA Schedule of Fees and, at the time of the appointment, these rates are communicated to the parties by the Registrar, including a reservation that they are subject to change should the duration of the proceedings or change in the circumstances so required.<sup>115</sup>

The ICDR (through its Case Administrators) consults with the parties and arbitrators regarding the rate of compensation due to arbitral tribunal at the beginning of arbitration with regard to the arbitrators' stated rate of compensation in view of

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<sup>110</sup>See Scale of Arbitrators' Fees in the Appendix III to the 1998 ICC Rules (Article 4); Scale of Arbitrator's Fees in the Appendix III to the 2012 ICC Arbitration Rules (Article 4); Appendix II to the SCC Rules (Article II), respectively.

<sup>111</sup>Any separate fee arrangements are contrary to the ICC Rules. See Article 2 Section 4 of the Appendix III to the 1998 ICC Arbitration Rules. The 2012 ICC Arbitration Rules provide for the same solution. Additionally, the fact that separate fee arrangements between the parties and arbitrators are not permitted is clarified in the Statement of Acceptance, Availability, Impartiality and Independence that shall be signed by all arbitrators before being considered for the confirmation or appointment.

<sup>112</sup>See Article 31(2) of the 1998 ICC Arbitration Rules and Article 37(3) of the 2012 ICC Arbitration Rules. See a commentary note to Articles 37(1) and 37(3)-(5) in: Fry, Greenberg, Mazza, 2012, 404–411.

<sup>113</sup>See: "Hourly rates for arbitrators shall not exceed £450 save in exceptional circumstances when they can be higher". In: "Schedule of LCIA Arbitration Costs." [http://www.lcia.org/Dispute\\_Resolution\\_Services/schedule-of-Costs-Lcia-Arbitration.aspx](http://www.lcia.org/Dispute_Resolution_Services/schedule-of-Costs-Lcia-Arbitration.aspx). Accessed 25 April 2016.

<sup>114</sup>A commentary note to Article 28 of the 2014 LCIA Rules in: Wade et al. 2015, 305–314.

<sup>115</sup>"Schedule of LCIA Arbitration Costs." [http://www.lcia.org/Dispute\\_Resolution\\_Services/schedule-of-Costs-Lcia-Arbitration.aspx](http://www.lcia.org/Dispute_Resolution_Services/schedule-of-Costs-Lcia-Arbitration.aspx). Accessed 25 April 2016.

the size and complexity of the arbitration in question.<sup>116</sup> In addition, the ICDR case administrator has an exclusive authority to decide on any dispute regarding the fees and expenses of the arbitrators between arbitrators and the parties.<sup>117</sup> In ICC and SCC arbitrations, it is the ICC Court and the Board, respectively, that fix the arbitrators' remuneration at the end of every arbitration proceeding. These assessments should keep in line with: (a) the advance stipulation of the arbitration costs; (b) the decision on costs in the arbitration award; and (c) the exceptional circumstances which appeared in the course of the proceedings. The SCC Rules expressly oblige the arbitrators to recourse to the Board before rendering the award to finally determine the costs of arbitration.<sup>118</sup>

Since the arbitrators' fees are said to constitute the major part of all costs in institutional arbitration, it is also significant to understand the factors that arbitral institutions take into account while fixing arbitrators' fees, and whether any mechanisms have been implemented by these institutions to contribute to a considerable decrease of such fees. Usually, relevant members of institutional bodies will determine the amount of arbitrator's fees on a case-by-case basis, taking into account the duration of the proceedings, the workload (hence the number of submissions made by the parties and the complexity of a dispute), diligence of arbitrators in fulfilling their tasks and any other circumstances that may affect the work of arbitral tribunal (i.e. resignation of co-arbitrators, the highly contentious character of arbitration proceedings requiring additional workload from arbitrators).

The ICC reported that it departed from its average arbitrator's fee and set a lower fee on many occasions. For example, in cases of extensive delays in submitting the final award by arbitral tribunal (with at least partial responsibility on the part of arbitrators), where the arbitral tribunal waited too long to prepare a brief addendum to a partial award, or in cases in which the amount in a dispute was simply too high, therefore providing for equally high arbitrator's fees that turned out to be disproportionate to the amount of arbitrators' work in arbitration in question.<sup>119</sup>

At the same time, most leading arbitral institutions, including the ICC Court itself, appear eager to increase the amount of arbitrator's fees against the average fee contained in a schedule of costs should the complexity of the case, high efficiency on the part of arbitrators, or other circumstances require. This makes it particularly challenging for the parties to truly understand the institutional mechanisms that are applicable when fixing arbitrator's fees on a case-by-case basis. Here, a remarkable document prepared by the SCC should be noted. The SCC issued a special guide for its arbitrators that deals with the framework for arbitrators' fees, and which mentions the possibility of reducing fees for arbitrations in special cases, including situations in which the award was rendered

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<sup>116</sup>Article 35.2 of the ICDR Procedures.

<sup>117</sup>Article 35.3 of the ICDR Procedures.

<sup>118</sup>See: Article 43(2) of the 2010 SCC Arbitration Rules.

<sup>119</sup>A commentary note: Articles 37(1) and 37(2) in: Fry, Greenberg, Mazza, 2012, 392–404.

without ruling on the merits of the case and/or when the arbitrators had been previously released.<sup>120</sup> Although this document is clearly directed to SCC arbitrators, it also serves as a practical tool for the parties to SCC arbitration proceedings in that it allows them to understand the complexity of the costs' allocation within the SCC framework, including the potential impact of arbitrator's inefficiency on the final institutional arbitration costs. The LCIA, in turn, suggests to its prospective parties to carefully consult the fees of their advocates and counsel in order to further decline the cost of the LCIA arbitrations.<sup>121</sup>

Regarding institutional administrative costs, the ICC, the SCC Institute, and the ICDR take into account the amount of the dispute as the major determinant of these costs. Unlike these institutions, the LCIA Court calculates the LCIA's fees, as in the case of the LCIA arbitrators, according to the time spent by the Registrar and the Secretariat on the dispute on the basis of the hourly rate.<sup>122</sup> As for the registration fee, the SCC Institute collects the lowest amount of €2,000, whilst the ICC and LCIA require the fee of US\$3,000<sup>123</sup> and £1,750, respectively, to be paid by the claimant at the outset of each arbitration.<sup>124</sup> The ICDR offers two administrative fee options including the Standard and the Flexible Fee Schedule. The basic difference between the two schedules relates to the number of instalments that should be paid to the ICDR (i.e. a two payment schedule in the standard option and a three payment schedule in the flexible option), depending on whether the parties prefer to pay a higher amount upfront or if they chose to have the administrative costs spread out into slightly smaller payments in the course of the proceedings.<sup>125</sup>

It is remarkable that, unlike in the case of arbitrators' fees that are subject to readjustment (e.g. they are usually decreased or increased based, to a certain degree, upon the performance of arbitrators), in practice, arbitral institutions rarely use their discretion to lower the amount of arbitration costs corresponding to their own services.<sup>126</sup> For example, it appears that the ICC Court derogated from its scales contained in the schedule of costs only on a few occasions; when it was

<sup>120</sup>The SCC Arbitrator's Guidelines 2014. <http://sccinstitute.com/about-the-scc/legal-resources/arbitrators-guidelines/>. Accessed 25 April 2016

<sup>121</sup>Information on the LCIA website in the Section "About the LCIA" as provided in 2009.

<sup>122</sup>This includes: £250 per hour for the Registrar/Deputy Registrar, £225 per hour for a Counsel, and between £175 and £150 per hour for Case Managers and other personnel providing casework accounting functions, respectively. "Schedule of LCIA Arbitration Costs." [http://www.lcia.org/Dispute\\_Resolution\\_Services/schedule-of-Costs-Lcia-Arbitration.aspx](http://www.lcia.org/Dispute_Resolution_Services/schedule-of-Costs-Lcia-Arbitration.aspx). Accessed 25 April 2016.

<sup>123</sup>This filing fee was set in the new 2012 ICC Arbitration Rules.

<sup>124</sup>"Schedule of LCIA Arbitration Costs." [http://www.lcia.org/Dispute\\_Resolution\\_Services/schedule-of-Costs-Lcia-Arbitration.aspx](http://www.lcia.org/Dispute_Resolution_Services/schedule-of-Costs-Lcia-Arbitration.aspx). Accessed 25 April 2016.

<sup>125</sup>Administrative Fees, which are attached to the ICDR Procedures.

<sup>126</sup>See, for example, Article 2(5) of Appendix III to the 2012 ICC Arbitration Rules, that authorizes the ICC Court to deviate from the scales included in the schedule of costs and set the amount of costs at either lower or higher rates.

necessitated by the number of frivolous challenges against arbitrators and in the case where arbitral tribunal proved to be highly unprofessional so as to affect the level and quality of communications in the course of the proceedings, at the same time calling for a more in-depth assistance from the ICC Secretariat.<sup>127</sup> Based on these examples, the readjustment of the administrative costs in institutional arbitration can be seen as the function of the interconnectedness of the work of arbitral institutions and institutional arbitrators, all in view of the performance of the parties that requires institutional arbitration services to be tailored to the level of cooperativeness of both the arbitrators and the parties to the proceedings. Although such justification seems more than legitimate, it is surprising that arbitral institutions do not provide for a possible decline in the amount of their administrative costs due to the error or misconduct on the part of institutional staff or officials (should such behaviour occur), in particular if similar situations gave rise to the decrease in the amounts due to institutional arbitrators as visible from institutional practices in the field of arbitration costs.

Against this background, there is no clear-cut formula for identifying the most attractive institutional regime regarding the costs of institutional arbitration from the perspective of its users. Consequently, it is difficult to assess whether hourly rates are better suited for the parties than calculations based on the amount of disputes to be collected by an institution. Some commentators have noted that the SCC Institute provides relatively cheap arbitration service.<sup>128</sup> To the contrary, the ICC arbitration costs are relatively high in the arbitration market, which can be seen as the result of the in-depth involvement of the ICC Court in the administration of the arbitration cases.<sup>129</sup> It is reasonable to think that the LCIA system of the hourly rates could, in principle, affect dilatory tactics on the part of arbitrators, institutions, or even the parties to arbitration proceedings, which could increase the hazard of overrating, especially given the limited procedural tools for the parties to control arbitrators, the institutions, and recalcitrant parties in cases of the possible delays. At the same time, it is also hard to determine which system of cost allocation offers more transparency, and therefore also more predictability to the parties from the start until the closure of the proceedings. Given that, it appears particularly important for the parties to remain proactive and cautious when determining the degree of their involvement in arbitration proceedings both prior to and in the course of such proceedings. This can be achieved by carefully drafting arbitration agreements to avoid them being pathological, when appointing arbitrators and making submissions in the course of arbitration, when appointing witnesses or experts, or managing other logistical costs.<sup>130</sup> The effectiveness of the parties' arrangements in these regards will depend, *inter alia*, upon the flexibility of the institutional arbitration rules and the level of cooperation from their

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<sup>127</sup>A commentary note 3–1475 in: Fry, Greenberg, and Mazza 2012.

<sup>128</sup>Hope 2008, 25–27.

<sup>129</sup>For a general discussion on the costs of arbitration see: Bühler 2005.

<sup>130</sup>Cf. Chao and Schurz 2007.

counterparties. Here, the parties should first and foremost examine the institutional techniques and tools aiming at controlling both the costs and the length of arbitration proceedings.

### 2.3.1.3.2 Competition Regarding the “Effective” Case Management Techniques

In light of the progressing pressure placed on arbitral institutions under overwhelming criticism regarding institutional arbitration costs and speed, the majority of institutional rules and policies increasingly reflect the greater need for improving the efficiency of institutional arbitration proceedings and the diligent performance of arbitrators and the parties. Accordingly, the 2012 version of the ICC Rules contains a number of provisions dealing exclusively with effective case management techniques, which should be taken into account by parties and arbitrators for controlling time and costs of the proceedings. Such techniques are mentioned in Appendix IV to the 2012 ICC Arbitration Rules and have been reflected in the main body of these rules. Hence, Articles 22(1) and 22(2) expressly set forth general duties with regard to the parties and arbitrators concerning the effective management of arbitration proceedings. Furthermore, Article 24(1) in accordance with Article 24(4) requires that arbitral tribunals organize and conduct the obligatory case management conference at the outset of the proceedings. The latter rule is tailored at the early consensus between the parties and arbitrators regarding all procedural matters and case management techniques relevant for the quick and cost-effective resolution of a dispute. Additionally, the ICC published the aforementioned “Guide for In-House Counsel and Other Party Representatives” to address the need for effective management of ICC arbitration proceedings that is also applicable to any other institutional arbitration proceedings should the parties to such proceedings wish to rely on the guidance contained in the Guide.<sup>131</sup> Indeed, the ICC’s Guide for In-House Counsel serves as a detailed toolkit for the parties, their legal representatives, and arbitrators in securing the effective conduct of almost all stages of their arbitration proceedings. It should be emphasized here that already in 2012 the ICC adopted a similarly noteworthy document entitled “Techniques for Controlling Time and Costs in Arbitration” that also provides a guidance for the parties and an arbitral tribunal concerning the procedural support for the conduct of arbitration.<sup>132</sup>

Similarly, other leading arbitral institutions have also recently adopted certain case management techniques aimed at reducing the time and costs of arbitration.

<sup>131</sup>ICC Commission on Arbitration and ADR. 2014. Effective Management of Arbitration: A Guide for In-House Counsel and Other Party Representatives. International Chamber of Commerce.

<sup>132</sup>ICC Arbitration Commission Report on Controlling Time and Costs of Arbitration of 2012. <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2012/ICC-Arbitration-Commission-Report-on-Techniques-for-Controlling-Time-and-Costs-in-Arbitration/>. Accessed 25 April 2016.



The SCC Institute, in Article 23 of its Rules, authorizes the arbitral tribunal to establish a provisional timetable for the conduct of the arbitration.<sup>133</sup> Once the timetable is sent to both the parties and the Secretariat, the SCC should observe whether the proceedings are delayed per the agreed upon schedule. The SCC Rules also require that arbitral tribunals conduct arbitration proceedings in “practical” and “expeditious” fashion in any case with respect of due process requirements in arbitration.<sup>134</sup> Furthermore, the SCC itself is obliged, under Article 9 of the SCC Rules, to ensure the expeditious conduct of the SCC arbitration.

The ICDR Procedures also offer to the parties the possibility of participating in the conference organized at the start of the proceedings.<sup>135</sup> Article 4 provides for the possibility of the organization of an administrative conference by the ICDR Administrator, even before the constitution of the arbitral tribunal, “to facilitate party discussion and agreement on issues such as arbitrator selection, mediating the dispute, process efficiencies, and any other administrative matters”. In the same spirit, the ICDR Procedures encourage the parties and arbitrators (once appointed) to conduct the proceedings in an expedited manner to eliminate any possible delays and additional costs to be incurred in the course of arbitration proceedings.<sup>136</sup> Although the ICDR to date did not issue any guidelines for the parties’ legal representative, it leaves such possibility open through the new provision of Article 16 of the ICDR Procedures that sets forth a broad authority for the ICDR to regulate the conduct of legal counsel in the future.

In addition, the recent amendments to the LCIA Rules as well as new LCIA policies regarding the conduct in arbitration by the parties and arbitrators put more emphasis on the need for the increased cost-effectiveness and expeditiousness of LCIA arbitration proceedings. One notable feature can be seen in the wording of Article 14.1 of the 2014 LCIA Rules, under which the parties and the arbitral tribunal must get in contact with one another within 21 days as of the composition of the arbitral tribunal. This provision, although potentially problematic,<sup>137</sup> makes it mandatory for LCIA arbitrators and the parties to liaise at the outset of the arbitration proceedings to decide on any potential procedural issues in an expedited manner. In addition, Article 28.4 of the 2014 LCIA Rules introduces, for the first time, the specific authority of LCIA arbitrators in allocation of both the legal costs to be borne by the parties and the arbitration costs. Under this new provision, LCIA arbitrators are entitled to decide on the costs’ allocation also based on the performance and cooperativeness of the parties to a dispute. Should the parties’ conduct

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<sup>133</sup>See Article 18(1) which provides for the conclusion of the Terms of Reference by the parties and the arbitrators, and Article 23 of the SCC Rules.

<sup>134</sup>See Article 19(2) of the SCC Rules.

<sup>135</sup>See Article 20(2) of the ICDR Procedures.

<sup>136</sup>See in particular: Articles 20(2) and 20(7) of the ICDR Procedures.

<sup>137</sup>As explained by Remy Gerbay, it is unclear how a 21-day deadline set forth in Article 14.1 of the 2014 LCIA Rules will apply in view of the requirement provided for in Article 24.3 of the LCIA Rules preventing the arbitral tribunal to proceed with arbitration if the initial deposits have not been covered by the parties. See Gerbay, forthcoming 2016.

appear to be in bad faith, LCIA arbitrators will be allowed to reflect on this behaviour in their decisions regarding the apportionment of arbitration costs. In fact, two other new provisions introduced under the 2014 LCIA Rules make express reference to the obligation of “good faith” with regard to the parties’ conduct and, to some degree, in relation to the conduct of LCIA arbitrators and the LCIA itself.

Under Article 14.5 of the 2014 LCIA Rules: “[A]t all times the parties shall do everything necessary in good faith for the fair, efficient and expeditious conduct of the arbitration, including the Arbitral Tribunal’s discharge of its general duties”. Furthermore, Article 32.2 states that: “For all matters not expressly provided in the Arbitration Agreement, the LCIA Court, the LCIA, the Registrar, the Arbitral Tribunal and each of the parties shall act at all times in good faith, respecting the spirit of the Arbitration Agreement [...]”. These amendments aim at encouraging the cooperation between the LCIA arbitration actors in order to potentially increase the efficiency of LCIA arbitrations. On top of the changes to the LCIA Rules, the LCIA has also introduced some soft-law instruments (called “LCIA Notes for Parties” and “LCIA Notes for Arbitrators”) that explain the procedural matrix of the LCIA arbitration to the parties, their legal representatives and LCIA arbitrators in order to improve the efficiency in the performance of these actors in the course of the arbitration proceedings. In addition, as already noted, the LCIA has also included in its 2014 Rules (Articles 18.5 and 18.6) as well as in the Annex to its Rules, the “General Guidelines for the Parties’ Legal Representatives” that should be understood as the code of conduct for legal counsel of the LCIA parties to arbitration. Without a doubt, such a soft-law instrument aimed at increasing the quality of performance of litigation counsel in the course of the LCIA arbitration should be read as a remarkable step vis-à-vis other arbitral institutions in that the LCIA is undoubtedly the first most prominent arbitral institutions that codified loose ethical norms and standards for legal representatives in arbitration proceedings. Given the increased calls for ethical regulation in international arbitration,<sup>138</sup> the LCIA efforts in this field certainly strengthens the LCIA’s position within the institutional arbitration market, while at the same time further contributing, at least indirectly, to the increase in the effectiveness of the counsel’s conduct in arbitration.

### 2.3.1.3.3 Competition in the Field of the Length of Arbitration Proceedings: Time Limits and Expedited Proceedings

One of the institutional techniques to control the length of arbitration (that, at the same time, is strongly interlinked with the institutional efforts to decrease the costs of the proceedings) concerns the supervision of the time of both the arbitration proceedings and of issuing of the awards by arbitrators. Increasingly, the majority of institutional arbitration rules also contain procedures for the expedited

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<sup>138</sup>Rogers 2014.

formation of arbitral tribunal in extraordinary circumstances, which, at least at first glance, serve as an efficient tool for the parties wishing to secure the prompt resolution of a dispute, especially in view of the unstable financial situation or the insolvency of one or more parties to arbitration proceedings. The efficiency of these solutions will now be analysed in greater detail.

Most leading arbitral institutions set forth time limits for the completion of different stages of arbitration proceedings. By way of illustration, different sets of arbitration rules promulgated by the leading arbitral institutions often provide for default time frames for the receiving of the response to the request of arbitration, and for the constitution of the arbitral tribunal or the appointment of a sole arbitrator, to mention a few.

Regarding the time frame for the submission of the answer to the request of arbitration to be transmitted to arbitral institutions, the 2012 ICC Arbitration Rules set the time limit of 30 days from the moment of the receiving of the request by the ICC Secretariat;<sup>139</sup> the 2014 LCIA Rules provide for the answer to the request to be submitted within 28 days from the commencement of arbitration (compared to 30 days from the delivery of the request to arbitration to respondent as provided for in the 1998 version of the LCIA Rules);<sup>140</sup> the ICDR Procedures set forth the time frame of 30 days after the commencement of the arbitration;<sup>141</sup> and the SCC Rules leave the time limit for the submitting of the answer to the request within the discretion of the SCC Secretariat.<sup>142</sup>

As far as the time limits for the constitution of a three-member arbitral tribunal in cases in which the parties have agreed that a dispute shall be decided by three arbitrators is concerned, the ICC first invites the parties to nominate the co-arbitrators in their request for arbitration and the answer to the request. Here, the deadlines for submitting these documents apply. If the parties fail to do so, the ICC Court would invite each party to nominate the co-arbitrator as soon as practicable and normally within the extendable deadline of 15 days.<sup>143</sup> If respondents fail to nominate the co-arbitrators within the specified time, in most cases the ICC Court will refuse to extend the time limit and will itself proceed with the nomination of co-arbitrators.<sup>144</sup> The parties to the ICC arbitration should also fix a time limit for the nomination of the president of the ICC arbitral tribunal. If they fail to do so, the default time limit of 30 days from the date of the confirmation or appointment of the second co-arbitrator will apply under the new provision included in Article 12(5) of the 2012 ICC Arbitration Rules. This time frame, however, may still be

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<sup>139</sup>Article 5(1) of the 2012 ICC Arbitration Rules.

<sup>140</sup>Cf. Article 2.1 of the 2014 LCIA Rules and Article 2.1 of the 1998 LCIA Rules.

<sup>141</sup>Article 3 of the ICDR Procedures.

<sup>142</sup>Article 5 of the SCC Rules.

<sup>143</sup>A commentary note to Article 12(4) of the 2012 ICC Arbitration Rules in: Fry, Greenberg, Mazza, 2012, 142–144.

<sup>144</sup>There is a slightly different procedure to be followed by the ICC Court in cases in which the parties have fixed their own deadlines for the nomination of co-arbitrators in their arbitration agreements. See: *Ibid.*

altered by the ICC upon the request of the parties and/or one of the parties or on its own initiative; similarly, the parties themselves are free to agree on the extension of such deadline even in cases in which the time limit was fixed by the ICC Court. The ICC Rules concerning the deadlines regarding the appointment of a sole arbitrator are equally flexible as in the case of time limits for the nomination of co-arbitrators in a three-member arbitral tribunal. Under Article 12(3) of the ICC Arbitration Rules, the parties are encouraged to nominate a sole arbitrator within 30 days of the date in which the respondents received the request for arbitration. If they fail to meet this deadline, they may be granted extension, and if they fail to meet the extended time limit, a sole arbitrator will be appointed by the ICC Court.

In turn, in the case of the LCIA arbitration the arbitral tribunal and a sole arbitrator will be appointed “promptly” by the LCIA after the receipt of the Response to Arbitration by the Registrar. Additionally, if no response has been transmitted to the Registrar, the LCIA Court will appoint members of the arbitral tribunal and a sole arbitrator within 35 days from the start of arbitration. The SCC Rules do not provide for any time limit for the appointment of a three-member tribunal by the parties or the SCC itself (which is authorized to appoint the chair of the arbitral tribunal). In case of the appointment of a sole arbitrator, the SCC provides for the joint appointment by the parties within 10 days or, failing such procedure, for the appointment by the SCC itself. The ICDR Procedures provide for a time limit of 45 days from the commencement of the ICDR arbitration for the appointment of arbitrators (or a sole arbitrator) by the parties. If the parties fail to do so within this time frame, or within the alternative time limit as agreed by them, the ICDR Case Administrator will appoint all arbitrators unless the parties have agreed otherwise within 45 days from the commencement of arbitration.<sup>145</sup>

Most importantly, arbitral institutions also set time limits for arbitrators to render arbitral awards or require from arbitrators to inform relevant institutional organs or staff members about the provisional time frame within which the arbitral tribunal or a sole arbitrator expects to render an award. Both the ICC and the SCC Rules require the arbitral tribunal to render an award within 6 months from the moment of: (a) the drafting of the Terms of Reference (or upon the notification to the arbitral tribunal of the approval of the Terms of Reference by the ICC Court), as in case of the ICC Rules;<sup>146</sup> and (b) referring the arbitration to the arbitral tribunal, as for the SCC arbitration.<sup>147</sup> The LCIA Rules are again silent in this respect, however, Article 15.10 of the LCIA Rules obliges the arbitral tribunal to “seek to make its final award as soon as reasonably possible following the last submission from the parties (whether made orally or in writing), in accordance with a timetable notified to the parties and the Registrar as soon as practicable”. In turn, the

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<sup>145</sup>Article 12.3 and 12.5 of the ICDR Procedures.

<sup>146</sup>Article 30(1) of the 2012 ICC Arbitration Rules.

<sup>147</sup>Even if these time limits can be successively extended, they “ethically oblige” an arbitrator to deal with arbitrations in a relatively short time.

ICDR Procedures mention that the award should be rendered “as quickly as possible after the hearing” in no case later than 60 days from the date of the closing of a hearing.<sup>148</sup> Additionally, the ICC Rules state that, on the closing of the proceedings, the arbitral tribunal must indicate to the ICC Secretariat when it expects to submit a draft award.<sup>149</sup> This may increase the pressure on arbitrators to complete their work expeditiously. From the practical perspective, however, the provisions setting time limits for the issuance of arbitral awards have little effect, in that such time limits can be easily extended, in some cases even on institution’s own initiative. Furthermore, the lack of specific time limits for the LCIA arbitrations may bring serious economic consequences for the parties, especially while considering the hourly rate as a general basis for fixing the arbitrators’ remuneration and the LCIA’s administrative fees.

Another particular feature of the competition between the leading arbitral institutions is that the majority of the arbitration rules of these institutions provide for accelerated arbitration procedures. This is ensured either by means of the specific sets of arbitration rules for the so-called “fast track” institutional arbitrations (as in the case of the SCC Expedited Arbitration Rules of 2010) or through the limited provisions included in the main sets of institutional arbitration rules that support the parties’ decisions regarding expedited stages of different phases of arbitration proceedings (as in the case of the ICC, LCIA, and ICDR Rules).

The SCC advertises its expedited procedures mainly in relation to small-value disputes.<sup>150</sup> In contrast, the ICDR Expedited Procedures will be applied by default to disputes where “no disclosed claim and counterclaim exceeds US\$250,000 exclusive of interest and the costs of arbitration” and to any other disputes in which the parties expressly agree on the application of these Procedures. In turn, the specific provisions on expedited arbitration contained in the ICC and LCIA Rules (such as the provision of Article 38 of the ICC Arbitration Rules authorizing the parties to request for shortening the time limits set forth in the ICC Rules,<sup>151</sup> and the provisions of Article 9A and 9C of the LCIA Rules regarding the expedited formation of arbitral tribunal and of the replacement of arbitrator, respectively) can be invoked in any case if any party to the proceedings wishes to conduct their arbitration in a fast-track manner.

Two questions arise with regard to the efficiency of these solutions. First, are expedited procedures realistic in complex arbitrations? Second, how would the

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<sup>148</sup>Article 30.1 of the ICC Rules and Procedures.

<sup>149</sup>See Article 27(b) of the 2012 ICC Arbitration Rules (Cf. former Article 24(1) of the 1998 ICC Arbitration Rules).

<sup>150</sup>Expedited Arbitration. <http://www.sccinstitute.com/dispute-Resolution/expedited-Arbitration/>. Accessed 25 April 2016.

<sup>151</sup>In any case, even when parties to ICC arbitration decide on the expedited conduct of their proceedings and the arbitral tribunal further approves the parties’ decision in this regard, the ICC Court, on its own initiative, may subsequently extend such time limits “if it decides that it is necessary to do so in order that the arbitral tribunal and the Court may fulfil their responsibilities in accordance with the Rules.” See Article 38(2) of the ICC Arbitration Rules.

parties' choices on accelerated conduct of certain stages of arbitration impact arbitration costs? By way of example, as reported by a prominent chief litigation counsel of a multinational company, in one dispute where the arbitration agreement provided for an arbitral tribunal to issue the award within 9 months from the appointment of a chairman (which was in fact slightly longer than the time limit contained in the applicable institutional arbitration rules), the institution qualified the clause in the meaning of the fast-track arbitration proceedings and doubled the advance of costs calculated in the dispute in question<sup>152</sup>. This forced the parties to redraft their arbitration clause and refer their dispute to *ad hoc* arbitration instead where the award was rendered within 10 months from the appointment of a chairman and the costs of arbitration appeared to be 50 % lower than the provisional costs determined by the institution. This example shows that some arbitral institutions in fact have little understanding of the provisions on expedited treatment and that, in any case, the reference to such provisions by the parties may mean additional costs to be borne by the parties. Consequently, it is questionable whether the provisions on accelerated arbitration as included in institutional arbitration rules correspond with the institutions' commitment to efficient arbitration proceedings that seems to be emphasized more in theory rather than in actual arbitration practice.

#### 2.3.1.3.4 Competition Regarding the Procedural Framework Encouraging Settlement, in Particular by Means of the Mediation Attempts

Although encouraging settlement in the course of arbitration proceedings lies usually within the arbitrators' responsibility, the institutional arbitration rules certainly do build procedural framework within which such settlement can be facilitated and eventually reached by the parties. Most arbitration rules of the leading arbitral institutions regulate the context in which the award by consent can be rendered following the settlement between the parties.<sup>153</sup> More interestingly, however, some arbitration rules facilitate settlement by means of encouraging parties to mediate their dispute (either prior the commencement of arbitration proceedings or in parallel to the proceedings that have already started). As already noted, most arbitral institutions include provisions regulating mediation in their sets of arbitration rules.<sup>154</sup> Certainly, the recent increased popularity of mediation and other ADR

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<sup>152</sup>McIlwrath and Schroeder, 2008, 4–5.

<sup>153</sup>Article 32 of the ICC Arbitration Rules, Article 26.9 of the LCIA Rules, Article 32.1 of the ICDR Procedures, and Article 39(1) of the SCC Rules.

<sup>154</sup>The ICC Mediation Rules are in force as of 1 January 2014; the LCIA adopted its Mediation Rules in 2012, the SCC Mediation Rules came into force on 1 January 2014, and the recent version of the ICC Rules and Procedures contains the ICDR Mediation Procedures that entered into force in 2014.

services, supported by legal regulations at national and regional levels, allowed most prominent arbitral institutions to feel the momentum for new means of competition in this field. Leaving aside the significance of institutional mediation rules in and of themselves, the question arises regarding the efficiency of the provisions encouraging mediation in the context of the future and pending arbitration proceedings (to be) initiated by the parties, in particular in so far as the costs are concerned. In other words, it is crucial for the parties to arbitration proceedings to understand if the mediation services in the forms offered by arbitral institutions can in fact facilitate settlement in the context of their arbitration and, if so, how much it will cost.

The relationship between the provisions encouraging the use of mediation and the potential mediation and arbitration costs is not entirely straightforward. In the cases of most arbitral institutions, the parties can initiate mediation proceedings, even concurrently to arbitration proceedings, that will simply mean parallel costs to be borne by the parties for two different types of services provided by arbitrator(s) and mediator under the institutional shield. The recent set of the ICDR Procedures provide for a particularly interesting solution in that the rules not only encourage the parties to express their potential interests in mediation in the notice of arbitration, the answer to the notice, or during the preparatory conference (Articles 2, 3, and 4, respectively) but also authorize the ICDR Case Administrator to expressly invite the parties to mediate following the submission of the answer (Article 5). Article 5 also allows the parties to seek for mediation at any stage of arbitration proceedings. Notwithstanding the remarkable innovation that such rules entail, it is questionable whether they are in fact cost-effective. It is therefore unclear whether the parties can expect any refund from an arbitral institution in cases in which they settle by means of mediation while the arbitration proceedings are still pending. Out of four leading arbitral institutions under analysis only the ICC provides for a straightforward provision that states that when a mediation is preceded by the request of arbitration under the ICC Arbitration Rules submitted with regard to the same parties and the same or parts of the same dispute, the “filing fee paid for such arbitration proceedings shall be credited to the administrative expenses of the mediation”, provided that the total administrative expenses covered by the parties to the underlying arbitration exceed US\$ 7,500.<sup>155</sup> Given the limited regulation of the relationship between the costs of arbitration and the parallel mediation in arbitration and/or mediation rules of the institutions under analysis, it appears that arbitral institutions have not yet developed efficient competition means in this regard.

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<sup>155</sup>Article 4 of the Appendix to the 2014 ICC Mediation Rules. Although the ICDR provides for a tiered schedule of costs that allows refunds in certain circumstances, the relationship between the costs of arbitration and the parallel mediation under the ICDR schedule remains unclear.



### 2.3.1.3.5 On Why the Institutional Efforts in Terms of Controlling Time and Costs Remain Inefficient

In view of the preceding discussion, it should be apparent that arbitral institutions have implemented increasing numbers of rules and/or techniques aimed at decreasing the time and costs of arbitration. The following question, however, remains open. Why are institutional arbitration rules and other soft-law instruments, despite continuous alteration to respond to the challenges to the efficiency of institutional arbitration proceedings, still largely inadequate and therefore inefficient from the perspective of institutional arbitration users?

One possible explanation is that the institutional provisions concerning the allocation of cost and time are more arbitrator-oriented than party-oriented. Each arbitration centre has their own policy referring to the institutional costs, which comprises, in most cases, the exclusive institutional power to fix the arbitrators' fees and to increase the diligence of arbitrator's performance in view of the costs of arbitration. Arbitrators' authority is largely minimized to simply allocate the costs fixed by arbitral institution between the parties in the final award. Some institutional arbitration rules allow respective institutional organs to adjust those costs with regard to the efficiency of arbitrators in rendering arbitral awards. For example, the ICC Court may take into consideration the "diligence and efficiency of the arbitrator, the time spent, the rapidity of the proceedings" while setting the arbitrators' fees.<sup>156</sup> Although not expressly provided in the arbitration rules of other leading arbitral institutions, it is reasonable to assume that efficient conduct of an arbitrator may be a determinative factor in fixing arbitrator's fees also in the case of other arbitral institutions.

The main problem remains, however, regarding the vagueness of such potential institutional actions, especially in view of the relative flexibility of institutional time limits for rendering arbitral awards by arbitrators. In this vein, it seems necessary for the arbitration centres to take responsibility for their own policies and procedural rules regulating arbitrators' fees. Yet, arbitral institutions seem to lack the authority over arbitrators to execute and enforce such rules and policies. This is particularly striking when taking into account the fact that some arbitration centres rely on the lists of arbitrators, which create different pools of institutional arbitrators, that would require certain accountability of the "affiliated" arbitrators vis-à-vis their "home" arbitral institution. Why do arbitral institutions not place more emphasis on the reputational dynamics when dealing with diligence and efficiency of arbitrator's performance at the stage when the arbitrator's fees are determined? Could they do better when encouraging new, less reputed arbitrators with more flexible agendas to offer their services to the parties? Or, would it not be helpful for the parties to understand in which cases they can expect that the arbitrators' fees be decreased due to the poor performance of arbitrators and to increase the transparency of institutional practices in this regard? Professor Ugo Draetta, an

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<sup>156</sup>Article 2(2) of the Appendix III to the 2012 ICC Arbitration Rules.

experienced international arbitrator and a former in-house counsel, openly admits that arbitration centres simply assume no power to monitor the work of individual arbitrators, which resembles the case of “responsibility with no authority”.<sup>157</sup> Surprisingly, this is so in view of the broad contractual authority that arbitral institutions enjoy in regards to the legal relationships that come into existence in institutional arbitration.

In contrast, arbitral institutions have designed various means for securing the payment of the arbitration costs from the parties. Both the LCIA and the SCC adopted provisions expressly stating that the parties are jointly and severally liable to the institution and to arbitral tribunal for the costs of arbitration.<sup>158</sup> The ICDR established an alternative rule for securing the payment of the arbitration costs, which provide for the suspension or termination of the proceedings in the situation that parties did not cover the deposits required by the ICDR Case Administrator.<sup>159</sup> The SCC Institute and the ICC established similar provisions, which involve the consequences of the non-payment of the advance of costs by the parties.<sup>160</sup> In the same spirit, Article 2(7) of Appendix III to the ICC Arbitration Rules introduces the so-called “Abeyance Fee” in that it authorizes the ICC Court to request the additional payment of the ICC administrative fees corresponding to putting arbitration in abeyance.<sup>161</sup> These provisions, despite being necessary for the proper functioning of institutional arbitration, can be seen by the arbitration users as too “disciplinarian”, in particular in view of the less rigid provisions aiming at increasing the diligence and efficiency of institutional arbitrators. Arbitral institutions, on a number of occasions, suggest to the parties how to plausibly decrease the arbitration costs. One example can be seen in the increasing guidelines for the parties and their legal representatives on effective case management techniques. Another example concerns the recommendations by arbitral institutions to the parties regarding more accurate negotiations of the fees of their attorneys, with the implication that this is the most burdensome part of institutional arbitration costs. All these certainly appear in line with the “best practices” in institutional arbitration. Arbitration is expensive and it is the parties that should first and foremost bear the responsibility of any delays or counterproductive practices that contribute to the increase in arbitration costs. Be that as it may, there are complex arbitration cases, where the relationships between the parties are far beyond friendly, that require the arbitral institutions to act in their professional spirit more than in other, more straightforward cases. This concerns institutional responsibility in both ensuring the speed and cost-effectiveness of arbitration within institutional powers and the adequate institutional control of arbitrators.

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<sup>157</sup>Draetta 2011, 104.

<sup>158</sup>Articles 28.1 and 28.6 of the LCIA Rules and 43(6) of the SCC Rules.

<sup>159</sup>Articles 32.2 and 32.3 of the ICDR Procedures.

<sup>160</sup>Article 30(4) of the 1998 ICC Arbitration Rules (Cf. Article 36(6) of the 2012 ICC Arbitration Rules) and Article 45(4) of the SCC Rules.

<sup>161</sup>A commentary note to Articles 37(1) and 37(2) in: Fry, Greenberg, Mazza, 2012, 403.

From the perspective of individual arbitration users, it is desirable that institutional rules address the efficiency of all arbitration actors in a similar manner so that the parties are treated as serious and sophisticated entities in the course of arbitration proceedings. Doing so could bring the institutional authority in line with the original commercial function of institutional arbitration that placed at its core the parties' satisfaction with the arbitration process.<sup>162</sup> This could be achieved by increasing the transparency of institutional arbitration regimes. Indeed, as seen in recent requests for greater time and cost efficiency in institutional arbitration, the transparency of institutional practices, as well as the "clarification" of the rules and best practices of arbitral institutions applied in different stages of arbitration proceedings, is increasingly "on demand".<sup>163</sup> The lacklustre institutional response in this regard is surprising because the opening up of the institutional practices, currently conducted behind closed doors of arbitral institutions, would enhance the parties' understanding of the institutional control. By now, what the parties are left with is the frustration relating to the fact that they often do not understand the intricacies of institutional internal operation and how their disputes are handled. More transparency could decrease this frustration. This could also increase the parties' compliance with institutional decisions made to reduce the time and address the cost-effectiveness of the arbitration, even where the final outcome of such decisions is unfavourable to individual parties. This could happen only when the parties are duly informed by arbitral institutions of the crucial aspects of their arbitration proceedings, together with the rationale behind the institutional decisions.<sup>164</sup>

Three preliminary observations arise with regard to the efficiency of institutional arbitration proceedings. First, different institutional arbitration actors define efficiency in different ways. Second, the dynamics of competition between arbitration centres are aided more by the understanding of the efficiency by institutional arbitrators rather than by the institutional arbitration users. Finally, due to the emerging bureaucratization of institutional arbitration entailing the intensification of procedural tactics (in a convergent manner), arbitral institutions are no longer able to ensure the efficiency in terms of costs and speed, as expected by the traditional parties to institutional arbitrations. Rather, the increased formalization of institutional procedures implies more expensive and lengthier arbitration

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<sup>162</sup>The parties' satisfaction is difficult to be measured. Some commentators state that a satisfactory decision in the arbitration context does not need to imply only the winning of the case, but "rather having a fast procedure, well managed, with a complete exchange of memoranda." See Philippe-Gazon 1997, 463.

<sup>163</sup>Cf. Gillion 2012.

<sup>164</sup>One of the recent examples of the institutional practices in increasing the transparency of the proceedings concerns the announcement of 8 October 2015 by the ICC that it will begin to communicate the reasons for many administrative decisions issued under the ICC Arbitration Rules. See ICC Court to Communicate Reasons as a New Service to Users. <http://www.iccwbo.org/News/Articles/2015/ICC-Court-to-communicate-reasons-as-a-new-service-to-users/>. Accessed 25 April 2016.

processes, contrary to the core principle of efficiency of the commercial function of institutional arbitration.

Institutional arbitration actors understand the efficiency of the commercial function of arbitral institutions in different and often discordant ways. Whereas business parties demand cost-effectiveness and expeditiousness of the proceedings that would be guaranteed by both arbitral institutions and institutional arbitrators, institutional arbitrators, seem to largely rely on the institutional support as the “guarantors” of efficiency of institutional arbitration processes.<sup>165</sup> Yet, the understanding of efficiency by arbitration centres remains largely affected by the need to facilitate the resolution of disputes by prominent arbitrators with extremely busy agendas. The analysis of the implications of the competition between arbitration centres suggests that arbitral institutions are usually directed into individual arbitrators and the arbitrators’ community as such when ensuring the efficiency of arbitrations.<sup>166</sup> For example, in terms of costs and time, institutional competition shows that different institutional policies aim mostly at attracting the participation of prominent arbitrators in institutional arbitrations (to increase the reputation of arbitral institutions themselves). Arbitral institutions are more aided by offering a friendly environment to arbitrators rather than by responding to the individual demands of traditional arbitration users expressed in the calls for relatively cheap and fast arbitration services. Again, this is because, as continuously explained by arbitral institutions, in most cases it is the parties and their counsel that could do better.

There exists considerable differentiation regarding the calculation of institutional arbitrators fees within the studied regimes. However, the reason for these differences is not necessarily due to arbitral institutions trying to decrease the costs of institutional arbitrations for the sake of the disputing parties. Instead, it is largely to attract new arbitrators to institutional regimes by corresponding to the methods of calculating legal fees established in the jurisdictions in which these arbitrators practice. Moreover, arbitral institutions remain reluctant to decrease the costs of their administrative fees in cases of poor performance of institutional case managers or members of institutional bodies. In light of this, some commentators have proposed that institutions should adopt more flexible and realistic measures for reducing both the arbitrators’ and administrative fees, should the amounts of disputes decrease in the

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<sup>165</sup>This argument appears valid with regard to both prevailing perceptions of the role of arbitrators (whether acting as service providers or private judges whose mandate should be understood in terms of “status” that arbitrators enjoy in the course of the proceedings) in the eyes of the arbitrators themselves. Both perceptions seem to correspond with the need for the “furtherance” of institutional goals as expressed in institutional rules by institutional arbitrators, with different incentives for arbitrators associated with these perceptions. In cases in which institutional arbitrators perceive themselves as service providers they would need to obey institutional rules and policies to receive their remuneration. In the case in which institutional arbitrators perceive themselves as private judges, they would need to follow the arbitration rules at hand to ensure the due process requirements in the course of arbitration.

<sup>166</sup>See Draetta 2011, 102.

course of the proceedings, that could actually respond better to the expectations of the arbitration users.<sup>167</sup> This does not only concern the refunds to the parties that are already provided for in the arbitration rules. The important step would also be to respect the institutional provisions on fast-track arbitration by arbitral institutions themselves that, as noted in the preceding analysis, are often enforced in the manner detrimental to arbitration users, contributing to the increase in the costs of arbitration, instead of ensuring the cost-effectiveness of arbitration proceedings. Such institutional interpretations of their own rules simply appear to be counterproductive.

Moreover, it appears necessary that the provisions on costs of arbitration correspond in a better way with the principle of party autonomy and the freedom of contract. The parties themselves have little to say on the costs of their arbitration when the arbitration centre amends its schedule of costs or the amount of the hourly rate for the institutional charges after drafting institutional arbitration agreement by the parties. All of the amendments regarding the issue at hand are effective upon the publication of the new institutional instruments, and the parties to arbitrations commenced after that date need to comply with the new institutional schedules regardless of the date in which their arbitration clause or agreement came into force. This not only limits the role of the parties' consent in relying on carefully chosen schedules of costs but also proves the institutional arbitrariness in the field of the costs of institutional arbitrations. Such arbitrariness also decreases the predictability of the costs of institutional arbitration, which is said to be one of the advantages of institutional regimes over *ad hoc* arbitrations. In this view, the institutional regulations in the field of costs of arbitration do not seem to fully respect the parties' legitimate expectations and commercial goals regarding the institutional arbitration proceedings at the moment of the drafting of institutional arbitration clauses.

This critique also applies to the topic of institutional control over the length of arbitrations. Although arbitral institutions do not settle disputes themselves, and therefore they do not render arbitral awards, it seems they could exercise more control over the observance of time limits in institutional arbitration proceedings (be it with relation to the parties, arbitrators, or institutional own actions) in order to increase efficiency. This brings us to the last preliminary observation concerning the question of whether sophisticated and bureaucratized arbitral institutions are, in fact, still capable of ensuring the efficiency of institutional regimes from the perspective of their traditional commercial arbitration users. It appears that the intensified procedural supervision of the relationships between the parties and arbitrators *de facto* contributes to the decline in the flexibility and expeditiousness of the institutional arbitration procedures. Perhaps it is relevant for the arbitral institutions to reflect further on this tendency, in particular in view of the possibility of more frequently encouraging the parties to mediation, for example by offering the parties the provisions to set off some proportions of their arbitration costs when settlement is reached by means of mediation. The following analysis of the public function of arbitral institutions will further address the concerns related to the increased formalization of institutional procedures.

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<sup>167</sup>Draetta 2011, 108.

### 2.3.2 *Emerging Public Function*

Undoubtedly, it may appear controversial to identify the emerging public function of such a private process as institutional commercial arbitration. Although some of the literature introduces certain accidental public functions underlying the rationale of contemporary international arbitration<sup>168</sup> (in particular with regard to the investor-State arbitration<sup>169</sup>), none of the authors consider the transformation of the activity of private arbitral institutions in the context of the legal, political, and ideological denotations of arbitration. This part of the chapter aims at addressing this gap.

This chapter looks at arbitral institutions from a broader perspective of the democratic legitimacy of arbitration as dispute resolution, which concerns the responses of arbitral institutions to the increasing legal and political considerations regarding the regulation of arbitration at national, regional (e.g. European), and international levels. The term “public function” denotes the tendency that arbitral institutions as private actors have been increasingly taking on roles traditionally understood as public, often with no express consent in this regard from disputing parties. This is in contrast with the principle of party autonomy and therefore may invite public criticism regarding the increasing functions of arbitration (and arbitral institutions). By way of illustration, not only have arbitral institutions developed new procedural functions that often limit party autonomy in traditional, commercial arbitration proceedings, but also, mostly due to the universalization and formalization of institutional arbitration rules, arbitral institutions have begun to adapt their rules to new types of disputes involving public entities or non-commercial parties by compromising the traditional commercial model of arbitration procedure. This, in turn, questions the traditional understanding of private institutional arbitration as a process of solely private dimension, hence limiting to the resolution of individual disputes with no impact on third parties.<sup>170</sup> Notably, these changes have occurred with either express or tacit support from the broader

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<sup>168</sup>Werlauff 2009.

<sup>169</sup>Schill 2010.

<sup>170</sup>The use of the expression an “impact on third parties” is not intended to claim that the procedural decisions of arbitral institutions are outcome-determinative in and beyond a single institutional arbitration proceeding. Rather, it is stated that the procedural changes in institutional arbitration rules have sanctioned the increasing applicability of the private model of commercial dispute resolution to non-commercial disputes or disputes of any sorts (be it public or private disputes) involving public entities that sheds light on the truly private function of these new types of arbitration proceedings. As such, the distinction between private and public function presented in this chapter largely corresponds to the definition of private and public functions of dispute settlement mechanisms as presented by Stephan Schill in his article on “Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator.” As stated by Schill: “[t]he distinction, as used here, relates to the purpose, function, and effect a dispute settlement proceedings has in relation to the parties to the proceedings. The private function is one that is limited to the solution of the dispute; any function beyond that is understood as a public function.” See Schill 2010, 407.

arbitration community and/or public authorities such as policy-makers in the field of arbitration and legislators.

The public function is analysed here from two angles: bottom-up and top-down.<sup>171</sup> The *bottom-up* dimension of the public function refers to the institutional procedural safeguards developed to ensure the *legality* of institutional arbitration processes. To this extent, it involves institutional powers assumed on behalf of the parties to ensure the enforceability of institutional arbitral awards, as well as the exclusive powers developed by arbitral institutions against the background of the changing democratic legitimacy of institutional regimes that corresponds to the increasing pressure of new public demands on more traditional, commercial function of arbitration. In contrast, the *top-down* dimension of the public function entails more problematic variables, namely the increasing exclusive authority of arbitral institutions in the administration of new types of public disputes, based on statutory or private rights of the parties. The term public disputes as well as the expression “public function” should be understood here broadly, including but not limited to: (1) disputes between private actors (e.g. investors) and public actors (e.g. States or State-like entities) emerging from public international law relationships; (2) disputes between private actors and public actors acting in their commercial capacity; (3) disputes of public policy relevance arising in various contexts such as consumer disputes, tax disputes, financial disputes, etc., broadly called “regulatory disputes”. Moreover, the public function tackled from the top-down perspective has additional implications in the US, which concern the institutional authority in stipulating parties’ consent regarding the participation in class arbitrations. The following analysis will grasp both understandings of the public function and their consequences. This analysis will conclude with legal and political questions regarding the condition of the contemporary institutional arbitration regimes. It will be conducted, in particular, in view of the potential *democratic deficits* of the emerging forms of institutional arbitration that call for increasing public accountability of institutional arbitration regimes and hence distort the traditional private–public axis in commercial arbitration.

### 2.3.2.1 Bottom-up Analysis of the Public Function

Professors W. Michael Reisman and Brian Richardson, in their article on the architecture of international commercial arbitration, consider the changes to the private regime of international commercial arbitration.<sup>172</sup> After looking back to mediaeval times, when arbitration represented a truly private and self-sufficient dispute resolution system, they argue that:

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<sup>171</sup>This distinction is made from the perspective of institutional arbitration regimes (bottom-up approach) vis-à-vis the law and public demands placed on arbitration processes externally to traditional, private dynamics developed within institutional arbitration regimes (top-down approach).

<sup>172</sup>Reisman and Richardson 2012.



international commercial arbitration, no less than arbitration within nation-states, while conducted in the sphere of private law, is a public legal creation whose operation and effectiveness is inextricably linked to prescribed actions by national courts.<sup>173</sup>

Reisman and Richardson then claim that arbitration actors have to decide on the level of the necessary relationship between arbitral tribunal and national courts in the field of enforceability of arbitration agreements and arbitral awards in order to make the process more functional.

In this part of the chapter, it will be argued that arbitral tribunals and public courts are not the only architects designing the public facet of private international arbitration. Furthermore, it will be claimed that arbitral institutions possess increasing *private regulatory powers* that are exercised in the conduct of arbitration proceedings in front of the parties in all types of arbitration (whether involving traditional private arbitration users or public actors or both) and institutional arbitrators. Moreover, it will be argued that these powers make arbitral institutions independent actors and therefore as significant as arbitrators and national courts in the discussion on the public enforceability of private institutional settings. Although there have not been any studies conducted heretofore showing that national judges are more eager to enforce institutional awards than *ad hoc* awards, it can be speculated that the name of an arbitral institution with a good reputation standing behind the institutional arbitral award increases the confidence of the judges at the enforcement stage.<sup>174</sup>

In this context, the following analysis will address the question of how arbitral institutions in fact ensure the legality of institutional arbitration processes. This discussion goes beyond the debate regarding the qualifications of institutional involvement in arbitrations in either purely “administrative” or “jurisdictional” terms.<sup>175</sup> Rather, it distinguishes the institutional tasks in relation to the principle of party autonomy to grasp the development of private regulatory functions of arbitral institutions vis-à-vis the traditional understanding of institutional functions by private arbitration users. Hence, the following part contains the discussion on the institutional tasks assumed on behalf of the parties as a continuation of case management techniques, as well as on the exclusive prerogatives developed by arbitral institutions from the perspective of the more generalist and holistic administration of arbitration cases. In the second case, institutional performance is organized around the exclusive, unquestioned, and inherent authority of arbitral institutions to decide on the conduct of arbitration proceedings pursuant to the set(s) of rules adopted by a particular arbitral institution and also the institutional policies based on different soft-law mechanisms. The majority of the institutional powers (falling within both groups) respond to the legal requirements for arbitration, as enshrined in the only legal instrument governing arbitration at the

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<sup>173</sup>Reisman and Richardson 2012, 17.

<sup>174</sup>Lew et al. 2003, 38–39.

<sup>175</sup>For an excellent discussion on the theoretical “representations” of the functions of arbitral institutions see: Gerbay, forthcoming 2016.

international level, that is the New York Convention.<sup>176</sup> To this extent, the institutional activity within the public function is guided by broader legal prerequisites concerning the *legality* of the arbitration process itself, which may have divergent meaning for different institutional arbitration actors. This is primarily because of the vagueness of certain provisions enshrined in the New York Convention itself that invite varying legal interpretations.<sup>177</sup>

The disputing parties understand legality primarily in the meaning of institutional arbitration service to ensure the enforceability of institutional awards issued in institutional arbitration proceedings concerning these parties directly, thus satisfying their commercial goals associated with the transaction underlying arbitration in question. Arbitral institutions, in turn, seem to be responding rather to the broader, systemic requirements existent in the public realm of arbitration to have a vital voice in the architecture of international commercial arbitration by ensuring legality of any and all arbitration processes understood as the most formalized form of contemporary ADR mechanisms. This means that the understanding of legal certainty by institutions corresponds more with the legal standards for institutional arbitration processes, *even though* the context of institutional activity also involves the private goals of institutional arbitration users. In other words, arbitral institutions have begun to perceive the arbitration process from additional perspectives external to the understanding of arbitration by individual parties to a dispute. This perspective corresponds, on the one hand, to the understanding of institutional arbitration as a holistic private arbitration process that requires a certain level of uniformity, even at the cost of party autonomy, due to the minimal legal requirements placed on it. On the other hand, this more generalist understanding of the private function of institutional arbitration in the legal context invites the further “legalization” of institutional arbitration rules to allow their applicability to disputes that traditionally fell outside the scope of arbitration. At the same time, arbitration users still treat institutional safeguards as a contractual service, which makes them overlook the systemic role which institutions exercise in the arbitration proceedings. This dissonance regarding the legality of arbitration proceedings underlying the rationale of the institutional public function has a significant impact on the parties’ objectives while filing liability claims against arbitral institutions in cases in which the institutional processes simply fail to accommodate the parties’ expectations. This argument will be returned to in Sect. 2.3.2.

To recognize the development of the public function of institutional arbitration from bottom-up it is crucial to first understand the legal requirements for the validity and enforceability of arbitration settings as enshrined in the New York Convention. The grounds for refusing enforcement, or for setting aside arbitral awards under Article V of the New York Convention, are thus the following: (1) incapacity of the parties under applicable law, and the procedural and substantive invalidity of the arbitration agreement; (2) lack of due process, (3) lack of jurisdiction and extension of the scope of arbitration agreement; (4) improper composition

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<sup>176</sup>The New York Convention, 1958.

<sup>177</sup>Gerbay, forthcoming 2016 with further references.

of the arbitral tribunal and the irregularities in the procedure in comparison with the arbitration agreement; (5) award not binding, set aside or suspended; and lastly (6) violation of public policy. As will be shown in the following analysis, most institutional safeguards address these legal concerns to assure that institutional awards are enforceable in law.<sup>178</sup> While some of those safeguards can be seen as the continuation of the parties' expectations regarding the institutional arbitration process based on the principle of party autonomy, arbitral institutions have also developed exclusive prerogatives that concern the supervisory powers in the institutional arbitration processes that often appear to be at odds with the autonomy of the parties to design their arbitration processes as they see fit. In this vein, the analysis below distinguishes between two groups of institutional prerogatives that correspond to: (a) the institutional safeguards provided on behalf of the parties, and (b) the exclusive procedural autonomy of arbitral institutions understood within the meaning of the private regulatory functions of arbitral institutions.

#### 2.3.2.1.1 Safeguards on Behalf of the Parties

Although the level of institutional involvement varies considerably from one institution to another, there are certain shared features of most institutional arbitration processes that correspond to the original demands of arbitration users concerning the formal organization of institutional arbitration proceedings. The institutional activity in this regard is exercised in the continuation of the parties' will to have their dispute resolved with the institutional support (as opposed to *ad hoc* arbitration). This activity concerns: (a) the institutional assistance in the communications between the parties and to some extent also between the parties and the members of the arbitral tribunal or sole arbitrators; (b) the assistance with regard to the composition of the arbitral tribunal or the appointment of a sole arbitrator and also involving the oversight of the standards of independence and impartiality of arbitrators; and (c) the general responsibility of arbitral institutions to ensure the proper application of the rules by institutional arbitrators and that the institutional award will be enforceable at law. Thus, each of these will be considered in turn.

##### 2.3.2.1.1.1 Assistance Regarding Communications

The assurance of proper communications between and by the parties increases the legality of arbitration award in the sense that it addresses due process standards as well as the right of the parties to a fair hearing set forth in Article V(1)(b) of the New York Convention. Based on the wording of the aforementioned article, recognition and enforcement of arbitral award may be refused if "the party against whom the award is invoked was not given a proper notice of [...] the arbitration proceedings or was otherwise unable to present its case".

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<sup>178</sup>Article V of the New York Convention.

Beside the formal requirements regarding time limits for the completion of different procedural stages of institutional arbitration proceedings, discussed in detail in one of the preceding sections,<sup>179</sup> as well as regarding the necessary content of parties' submissions, most arbitration rules regulate the delivery of submissions and service of documents in the course of arbitration and the post-arbitration proceedings. In practice, proper communication with and between the parties as well as between the parties and the arbitral tribunal (and the arbitral institution) is crucial for the proper understanding by *all* parties of the developments of their arbitration case. This is especially the case because the notification of such developments usually triggers the time limits for the parties to react to the pleadings and submissions of the counterparty and/or the procedural orders issued by arbitrators and/or arbitral institutions. Although the parties are generally free to determine how the communications will be handled in their arbitration agreement, the institutional arbitration rules set up default standards that aim at addressing the legal regulations of the delivery of documents under mandatory provisions of national laws. Since no universal legal framework exists in this regard, it is usually the case that any provisions of national laws on the delivery of documents and communications between the parties will apply in the absence of the agreement of the parties themselves. Hence, arbitration rules on the service of documents and communications can be seen as a specific proxy between the parties' arrangements and the mandatory provisions of national laws governing arbitration in question. This proxy increases the likelihood that the parties will be able to be notified of any and all procedural steps in the course of arbitration as well as that they will be given the chance to fully present their case. The institutional safeguards regarding the service of documents and the communications between the parties, as well as the communications by arbitrators and institutions themselves to the parties have significant practical implications. They are particularly relevant when the delivery of the request of arbitration and the answer to the request is concerned, so that the parties can enjoy the sufficient amount of time prescribed for the submission of those documents in the arbitration rules. If, for example, the delivery of the request of arbitration is delayed due to the institutional error in notifying the erroneous respondent or the respondent proper yet at the wrong postal address, the party may find it problematic to prepare the answer to the request within the prescribed period of time. This is especially problematic if the claims presented in the request reflect a complex legal and commercial relationship between the claimant and the respondent. Although there is still the room for the parties' agreement regarding the application for a possible extension of time limits for the submission of counterclaims or pleadings to arbitral institution, if the relationship between the parties to arbitration is hostile, the institutional errors in the field of parties' notifications can prove to be particularly weighty to the parties in that they can determine the atmosphere of arbitration and even the outcome of a particular arbitration case.

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<sup>179</sup>See Sect. 2.3.1.3.3.

For this reason, arbitral institutions have developed a number of procedural rules that aim at minimizing the consequences of improper notifications, lack of communications between the parties and by the arbitrators and arbitral institutions themselves, and finally the potential issues concerning the delivery of documents in the course of arbitration proceedings as well as following the issuance of the arbitral award by arbitrators.<sup>180</sup> As reads from *The Secretariat's Guide to ICC Arbitration*, the ICC provisions of Article 3 of the 2012 ICC Arbitration Rules set forth the requirements regarding “how to send communications, to whom, in how many copies, and to which address”. Such framework will usually be set forth also by other arbitral institutions.<sup>181</sup> Hence, most arbitration rules contain provisions specifying the exact number of copies of documents (e.g. the request for arbitration, the answer to the request, or other communications in the course of the arbitration) which the respective party (or parties) are to submit to the specific organ of the arbitral institutions—mainly the Secretariat—at each stage of the proceedings.<sup>182</sup> Arbitral institutions require copies of all written communications and pleadings, which both secures the validity of the “legal” actions in the course of the proceedings for the sake of due process requirements and increases the institutional oversight of the whole institutional arbitration proceedings.<sup>183</sup> Although some arbitration rules of the leading arbitral institutions under analysis provide for the institution to transmit the copies of certain documents, such as the request for arbitration to the respondent (e.g. the ICC Rules,<sup>184</sup> the SCC Rules<sup>185</sup>), other arbi-

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<sup>180</sup>Since the detailed analysis of the institutional arbitration rules regarding communications, notifications, and the delivery (or service) of the documents submitted or produced in the course of arbitration proceedings falls outside the scope of this section, the discussion here concerns mostly the common institutional patterns that aim at securing the requirements set forth in Article V(1)(b) of the New York Convention regarding due process standards and the proper notification of the arbitration proceedings.

<sup>181</sup>It is necessary to stress here that in any case the parties and the arbitrators are free to decide on how the documents will be submitted in the course of the proceedings as well as on the ways the arbitral tribunal will notify the parties to the proceedings. Arbitrators can also issue directions to the parties in this regard.

<sup>182</sup>Article 3(1) of the 2012 ICC Arbitration Rules, Article 1.2 of the LCIA Rules, Article 2 of the ICDR Procedures, which do not expressly refer to the number of copies to be provided by the party but require the party to give due notice to the other party of the commencement of arbitration.

<sup>183</sup>See: Article 3(1) of the 2012 ICC Arbitration Rules and Article 13.1 of the LCIA Rules that requires simultaneous copies of all correspondence between arbitral tribunal and the parties to be sent to the Registrar. The 2012 ICC Arbitration Rules also require from the arbitral tribunal that all written documents submitted in the course of the proceedings are sent to the Secretariat which supervises the particular arbitration file. This has also a consequence for the effectiveness of the ICC's process of scrutiny of the awards, which will be discussed in Sect. 2.3.2.1.2.4 of this chapter.

<sup>184</sup>Article 4(1) of the 2012 ICC Arbitration Rules.

<sup>185</sup>Article 5 of the SCC Rules.

tration rules (e.g. the LCIA Rules<sup>186</sup> and the ICDR Procedures<sup>187</sup>) will require the claimant itself to serve a notice of arbitration to the respondent. In both cases, arbitral institutions secure the proper notification to the respondent due to the provision requiring the parties to obtain the receipt of each notice, which increases the probability that all parties will be duly informed of all the exchanges and submissions. This is particularly important given the wide range of communications allowed by the institutions due to modern technological developments.<sup>188</sup>

In addition, institutional provisions require the parties to provide institutions with their most recent address as well as the address of their representatives (together with the power of attorney) to potentially eliminate the probability that the documents will be served and notifications will be made at erroneous address.<sup>189</sup> Furthermore, most arbitration rules set out the circumstances under which documents are deemed to have been served by default. This rule also relates to the determination of the effective date of the written communications that under most arbitration rules should be a date of their receipt.<sup>190</sup> Thus, the date of the receipt of the request for arbitration (notice of arbitration)—which is said to be a date of the commencement of the proceedings under most arbitration rules<sup>191</sup>—is of particular importance, as it guarantees that all parties are duly informed that their arbitration was actually set in motion, which is necessary for the award to be enforceable at law.

In addition, there are a number of instances in post-arbitration proceedings in which arbitral institutions have become increasingly active with regard to the enforcement of institutional arbitral awards. These include: the institutional rules providing for the transmission of the award to the parties by arbitral institutions themselves,<sup>192</sup> the institutional assistance with the correction and/or interpretation of arbitral awards,<sup>193</sup> or even the institutional involvement in certification and authentication of arbitral awards for enforcement purposes.<sup>194</sup> These competences

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<sup>186</sup>The notification of the Request for Arbitration under the LCIA Rules is the responsibility of the claimant and as such it falls within Article 4 of the LCIA Rules. See Wade et al. 2015, 57.

<sup>187</sup>Article 2 of the ICDR Procedures.

<sup>188</sup>Cf. Article 3(2) of the 2012 ICC Arbitration Rules and Article 18.1 of the ICDR Procedures.

<sup>189</sup>Cf. Article 4(3) of the 2012 ICC Arbitration Rules, Article 2 of the SCC Rules, Article 1.1(a) of the LCIA Rules.

<sup>190</sup>Article 3(3) of the 2012 ICC Arbitration Rules, Article 4.4 of the LCIA Rules, Article 8(3) of the SCC Rules.

<sup>191</sup>Article 4(2) of the 2012 ICC Arbitration Rules, Article 4 of the SCC Rules, Article 1.2 of the LCIA Rules, and Article 2.2 of the ICDR Procedures.

<sup>192</sup>Article 34(1) of the 2012 ICC Arbitration Rules, 26.7 of the 2014 LCIA Rules, Article 30.4 of the ICDR Procedures. In contrast, the provisions of Article 36(6) of the SCC Rules require the arbitral tribunal to deliver the copies of the award to all parties and the SCC.

<sup>193</sup>See, for example, Article 35(4) of the 2012 ICC Arbitration Rules.

<sup>194</sup>This is the case with SIAC that has been authorized by means of Section 19C of the Singapore International Arbitration Act of 1994 (with further amendments) to certify and authenticate arbitral awards. See Gerbay, forthcoming 2016.

certainly increase institutional involvement in the final oversight of the legal products of each institutional arbitration proceeding and also in assisting the parties (at least the winning party) in obtaining the court's decision regarding the recognition and enforcement of the arbitral award in the jurisdiction where such legal actions are being sought.

#### 2.3.2.1.1.2 *Proper Composition of Arbitral Tribunals Versus Independence and Impartiality of Arbitrators*

Institutional activities concerning the composition of an arbitral tribunal fall within the group of the most significant, and hence the most developed, tasks assumed by institutions. They are crucial because they assure that arbitral tribunals will be constituted in accordance with the parties' will expressed in their arbitration agreement,<sup>195</sup> and that each party will be given a full right to present its case.<sup>196</sup> Moreover, as due process requirements and the impartiality of arbitrators are also enshrined in the concept of public policy, institutional activities concerning the issue at hand secure the enforceability of an arbitral award under Article V(2)(b) of the New York Convention. The institutional role is even more significant while appointing arbitrators in cases in which the parties fail to do so in the arbitration agreement or in the submission to arbitration.

Numerous arbitral institutions, while appointing arbitrators, try to ensure the neutrality, ability, and the expertise of the arbitrators.<sup>197</sup> This concern arises not only from the original goals of the arbitration process such as neutrality of arbitration but also from the professionalization of the arbitration practice, which results in the fact that different arbitration actors play interchangeable roles in different arbitration proceedings. Today it is already a given for arbitration practitioners who act as arbitrators in one case to act as counsel of the same parties in another proceeding, and *vice versa*, often within the same institutional arbitration regime. To this extent, institutions tend to ensure high standards for the neutrality, independence, and impartiality of arbitrators in each particular case. This gives institutions, at least in theory, certain powers to exercise quality control over the arbitration proceedings.

Most of the rules require that the presiding arbitrator and the sole arbitrator are not of the same nationality as any of the parties to a dispute.<sup>198</sup> Although all stud-

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<sup>195</sup>See Article V(1)(d) of the New York Convention.

<sup>196</sup>See Article V(1)(b) of the New York Convention.

<sup>197</sup>As regards the prospective arbitrator's ability, the ICC Court should take into consideration whether an arbitrator-to-be will be able to conduct the ICC arbitration for the following reasons: (1) the language abilities of arbitrator are good enough to assume that he/she manages to decide a case, (2) the legal qualifications of an arbitrator fall within the subject matter of a dispute, and (3) an arbitrator is experienced enough not only in arbitration in general but also in ICC arbitration in particular. Derains and Schwartz 2005, 158.

<sup>198</sup>Article 13(5) of the 2012 ICC Arbitration Rules, Article 13(5) of the SCC Rules, and Article 6.1 of the LCIA Rules.



ied arbitral institutions have developed divergent models for the appointment of arbitrators, the ICC's system requires particular attention here, as it involves the assistance of the ICC National Committees in the composition of the arbitral tribunal. Moreover, the ICC Court exercises a distinctive function that authorizes the Court to confirm each arbitrator, even in situations in which an arbitrator had been previously nominated by a party (or the parties).<sup>199</sup>

The ICC National Committees—comprising organizations, legal entities, or individuals, which assist the ICC Court on a case-by-case basis—represent the chief economic interest of the country in which they were established.<sup>200</sup> In this way, the ICC National Committees are perceived as lobby groups (local networks) among business communities of the respective State. The 2012 version of the ICC Rules sets forth the requirement for the ICC Court to rely on the National Committees in each case in which institution appoints arbitrators.<sup>201</sup> However, the ICC Court gained the power to directly appoint an arbitrator under the following circumstances: (a) one or more of the parties is a State or claims to be a State-like entity; (b) the Court decides that it is reasonable to appoint an arbitrator from a country or territory where there is no ICC National Committee; (c) a direct appointment is appropriate in the eyes of the President of the ICC Court.<sup>202</sup> The new Rules still allow the Court to choose a sole arbitrator or a chairman of an arbitral tribunal from the country where there is no National Committee, provided that suitable circumstances arise and the parties do not object.<sup>203</sup> The interplay between the ICC Court and its National Committees involves the following two issues: (a) the question of which National Committee is appropriate to deal with the proposal of an arbitrator to the ICC Court; and (b) whether the ICC Court should accept the proposal made by that Committee.

There are a number of circumstances to be considered by the ICC Court while deciding upon which National Committee will be suitable to make a proposal of an individual arbitrator to the Court. The first concerns the nationality of the parties, which, as already stated, is the most relevant issue to be taken into account while composing the arbitral tribunal. Thus, the ICC Court will ordinarily begin the nomination of the National Committee by excluding the Committee operating in the country of origin of the parties to arbitration.<sup>204</sup> Then, the ICC Court will

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<sup>199</sup>See the discussion on the contractual relations in institutional arbitration in Sect. 3.2.1.1.2.2 of Chap. 3.

<sup>200</sup>Craig 1985, 53; ICC Constitution. <http://www.iccwbo.org/constitution/>. Accessed 25 April 2016.

<sup>201</sup>Article 13(3) of the 2012 ICC Arbitration Rules.

<sup>202</sup>Article 13(4) of the 2012 ICC Arbitration Rules.

<sup>203</sup>Article 9(4) of the 1998 ICC Arbitration Rules and Article 13(5) of the 2012 ICC Arbitration Rules.

<sup>204</sup>The explanation of the ICC Court cooperation with its National Committees provided in this part of the chapter is based on the information included in: Derains and Schwartz 2005, 168–176. See also: Article 13 of the 2012 ICC Arbitration Rules.

usually send its request to the Committee which, in the opinion of the Court, could be of help for selecting an arbitrator concerning such circumstances as: (a) the language of arbitration; (b) the nature of a dispute; (c) the place of arbitration; and (d) the law governing a dispute (provided that these issues were specified by the parties in their agreement). In some cases, the ICC Court will send more than one request in order to ensure that at least one satisfying proposal is sent back to the Court. Whenever the ICC National Committee fails to nominate an arbitrator or the ICC Court is not satisfied with the work of the selected ICC National Committee and the ICC Court refuses to accept the candidate proposed by the Committee, the Court will either repeat its request or address the new request to another committee that it considers appropriate. This demonstrates that the 2012 ICC Arbitration Rules establish an appointment mechanism that gives the ICC Court great room to manoeuvre with regard to the reliance on the assistance of National Committees. In any case, it is the ICC Court that has the last word regarding the appointment of an arbitrator. The understanding of the interactions between the Court and the National Committees shows how the ICC Court makes all efforts to eliminate the composition of a tribunal that may appear to favour one of the parties. Some authors, however, have criticized the ICC's cooperation with its National Committees, in particular when the National Committee does not represent the prominent "epistemic community" of a particular region.<sup>205</sup> To this extent, some doubts arise about the functionality of the ICC dialogue with its regional "branches".

Leaving aside the peculiarities of the ICC arbitration, it seems sufficient to address here all safeguards developed by the leading arbitral institutions under analysis to secure the impartiality and independence of arbitrators. Every LCIA arbitrator is required, under Article 5.3 of the LCIA rules, "to be and remain impartial and independent of the parties; and none shall act in the arbitration as advocate for or representative of any party. No arbitrator shall advise any party in the parties' dispute or the outcome of the arbitration". Moreover, pursuant to Article 5.4 "before appointment by the LCIA Court, each arbitral candidate shall furnish to the Registrar (upon the latter's request) a brief written summary of his or her qualifications and professional positions (past and present) [...]; the candidate shall give a written declaration stating: (i) whether there are any circumstances currently known to the candidate which are likely to give rise in the mind of any party to any justifiable doubts as to his or her impartiality or independence and, if so, specifying in full such circumstances in the declaration [...]". These provisions, that impose obligation of impartiality and independence of arbitrators both vis-à-vis arbitrators themselves and the parties, result in the situation in which every LCIA arbitrator is required to sign the Statement of Impartiality and Independence, as well as the Consent to Appointment in which all potential

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<sup>205</sup>Draetta 2011, 97–117.

circumstances pertaining to conflict of interest must be disclosed.<sup>206</sup> There are two different versions of the Statement of Impartiality and Independence under the LCIA arbitration regime; Statement A in which the arbitrator affirms his independence and impartiality and Statement B, also known as a “qualified” statement, in which the arbitrator expresses his or her willingness to serve in the case in question yet leaving any potential justifiable grounds creating conflict of interest for further consideration of the LCIA Court.<sup>207</sup> This allows the latter to make a relevant decision regarding the appointment of arbitrators and invites the parties to oppose to the appointment in the form of a challenge.

As for the ICDR, Article 13 of the ICDR Procedures sets forth the standards for independence and impartiality of ICDR arbitrators. Under Sections 1 and 2 of Article 13, arbitrators accepting their appointments should sign a Notice of Appointment in which they should disclose any and all potential circumstances that may give rise to justifiable doubts as to their independence and impartiality. Moreover, Article 13.6 states that neither the party nor its representative shall *ex parte* communicate with an arbitrator in the course of an arbitration nor should the party or its representative initiate such communications, except while needing information for the proper assessment that the arbitrator is suitable to resolve the case. Under no circumstances should the parties or their representatives contact *ex parte* a candidate for a presiding arbitrator. Any forbidden communication may result in further challenge to, or the replacement of, the allegedly biased arbitrator.

The SCC has also developed mechanisms to secure the impartiality and independence of its arbitrators. The confirmation by an SCC arbitrator that there are no circumstances that could question her independence or impartiality shall be provided by an arbitrator-to-be before and after his/her appointment. Before the appointment, the arbitrator shall disclose any facts that show her connections with any party to a dispute, whereby upon the appointment an arbitrator has to provide the Secretariat of the SCC with a signed statement of impartiality and independence.<sup>208</sup> Subsequently, the Secretariat will send a copy of the statement to the parties and other members of the arbitral tribunal (if any) so that the further steps regarding the prospective challenges to, and replacements of, a biased arbitrator may be taken.

The ICC also provides for elaborate provisions regarding the independence and impartiality of ICC arbitrators. Each ICC arbitrator needs to sign a Statement of Acceptance, Availability, Impartiality and Independence, in which an arbitrator-to-be shall disclose any facts or circumstances that may shed light on his or her independence *in the eyes of the parties*.<sup>209</sup> An arbitrator has two options while signing

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<sup>206</sup>Wade et al. 2015, 63–81.

<sup>207</sup>Ibid.

<sup>208</sup>Article 14(2) of the SCC Rules.

<sup>209</sup>See: Article 7(2) of the 1998 ICC Arbitration Rules and Article 11(2) of the 2012 ICC Arbitration Rules. Cf. also: ICC’s Arbitrator’s Statement of Acceptance, Availability and Independence 2010 (1998 ICC Arbitration Rules).

this statement. The first option is to confirm that there are no facts or circumstances that may question his or her independence (“nothing to disclose” option).<sup>210</sup> The second option is for “acceptance with disclosure” in cases where there:

exists any past or present relationship, direct or indirect, between an arbitrator and any of the parties, their related entities or their lawyers or other representatives, whether financial, professional or any of any other kind. Any doubt must be resolved in favour of disclosure. Any disclosure should be complete and specific, identifying inter alia relevant dates [...], financial arrangements, details of companies and individuals, and all other relevant information.<sup>211</sup>

The catalogue of circumstances to be disclosed by an arbitrator-to-be is provided for in a Statement that supplements Article 11(2) of the 2012 ICC Arbitration Rules. Here, the rather vague expression “[in] the eyes of the parties” is used regarding the prospective facts that may call into question the arbitrator’s independence.<sup>212</sup>

Regardless of the development of the procedural safeguards for the appointment of arbitrators on behalf of the parties, some procedural aspects of the selection and appointment of arbitrators often transcend the principle of party autonomy and allow arbitral institutions to issue procedural decisions on their own initiative. This also means that the institutional prerogatives to select arbitrators could be regarded as decisions of certain jurisdictional relevance that fall outside pure case management tasks. Some national authorities recognize the relevance of institutional appointments of arbitrators. For example, the provisions of the UK Arbitration Act of 1996 grant arbitral institutions immunity concerning the appointment of institutional arbitrators.<sup>213</sup> Similarly, the institutional decisions regarding the challenges to arbitrators, which will be analysed in detail in Chap. 4, may take the form of more authoritative procedural orders issued in the continuation of the parties’ initial authorization of arbitral institutions to supervise the proceedings, yet in the absence of the express agreement of the parties in this regard.

<sup>210</sup>The most recent version of the document, Arbitrator’s Statement of Acceptance, Availability, Impartiality and Independence of 2012, is available via the ICC Dispute Resolution Library. [http://www.iccdri.com/itemContent.aspx?XSL=arbSingle.xml&XML=\\PRACTICE\\_NOTES\\SNFC\\_0001.xml&CONTENTTYPE=PRACTICE\\_NOTES&TOC=IlocPracticeNotesAll.xml&TITLE=Arbitrator's%20Statement%20of%20Acceptance,%20Availability,%20Impartiality%20and%20Independence%20\(2012%20ICC%20Rules%20of%20Arbitration\)](http://www.iccdri.com/itemContent.aspx?XSL=arbSingle.xml&XML=\\PRACTICE_NOTES\\SNFC_0001.xml&CONTENTTYPE=PRACTICE_NOTES&TOC=IlocPracticeNotesAll.xml&TITLE=Arbitrator's%20Statement%20of%20Acceptance,%20Availability,%20Impartiality%20and%20Independence%20(2012%20ICC%20Rules%20of%20Arbitration)). Accessed 11 July 2016. For the discussion on the most recent changes to the Statement cf. Hauser 2010.

<sup>211</sup>ICC’s Arbitrator’s Statement of Acceptance, Availability and Independence 2010 (1998 ICC Arbitration Rules). The wording of this paragraph remained practically unchanged in the recently amended Statement 2012.

<sup>212</sup>Article 11(2) of the 2012 ICC Arbitration Rules.

<sup>213</sup>Sect. 5.2.1.2.3 of Chap. 5.

### 2.3.2.1.1.3 *Provisions Ensuring the Application of Institutional Rules*

The majority of arbitral institutions contain in their rules provisions obliging arbitrators and all other institutional actors to act in the spirit of the relevant set of arbitration rules in order to ensure that the award is legally enforced.<sup>214</sup> To this extent, institutions secure the legal requirement set forth in Article V (1) (d) of the New York Convention relating to compliance of the arbitral procedure with the parties' arbitration agreement. This is mostly achieved by means of the encouragement in the arbitration rules of the parties to participate in a preparatory conference during which the parties may submit proposals regarding the conduct of the proceedings and agree on procedural issues even before the arbitral tribunal is constituted.<sup>215</sup> Some arbitration rules, including the ICC Rules, make the participation in a case management conference at the outset of the proceedings mandatory.<sup>216</sup> The ICC additionally secures these provisions by means of Article 23 of the 2012 ICC Arbitration Rules, which sets forth the components of the unique document called "Terms of Reference".

The Terms of Reference is a document prepared by arbitrators and signed both by the members of an arbitral tribunal and the parties to a dispute. The Terms of Reference deal with the procedural aspects of arbitration, and, if the ICC arbitral tribunal decides so, they may also contain the list of the main substantive concerns of a dispute. To this extent, the Terms of Reference may be regarded as the provisional plan of the matters to be resolved by means of arbitration. Under Article 23(3) of the 2012 ICC Arbitration Rules, the ICC Court approves the Terms of Reference only in cases in which either of the parties refuses to sign them. However, in practice, the ICC Court examines these documents on a case-by-case basis to support the work of arbitrators and, whenever it seems sufficient to the Court, to oversee the arbitrators' performance in this regard.<sup>217</sup> In this way, both the establishment of Terms of Reference by the ICC Arbitration Rules and the equipment of the ICC Court with the respective supervisory powers over such a document ensure, at the beginning of every arbitral process, that the subject matters of the particular arbitration will be determined in accordance with the agreement of the parties.

### 2.3.2.1.2 Private Regulatory Powers of Arbitral Institutions

There are several stages of institutional arbitration proceedings in which institutional activity limits party autonomy and determines the conduct of arbitrations at

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<sup>214</sup>See: Articles 7(5) and 35 of the 2012 ICC Arbitration Rules, Article 32.2 of the LCIA Rules, Article 48 of the SCC Rules, Article 36 of the ICC Rules and Procedures.

<sup>215</sup>Article 4 of the ICDR Procedures, Article 14 of the LCIA Rules, and Article 24 of the 2012 ICC Arbitration Rules.

<sup>216</sup>Article 24 of the ICC 2012 Rules.

<sup>217</sup>Craig et al. 2001, 23.

the discretion of the arbitral institution even before the relevant decision of an arbitral tribunal is made. These “exclusive” institutional prerogatives can be understood as private regulatory powers developed by arbitral institutions in the course of their supervisory activities in the arbitration proceedings and as such they should be analysed in the context of self-regulatory functions of institutional arbitration regimes. In this particular understanding of arbitral institutions, the concept of transnational private regulation appears particularly relevant inasmuch as it set up a framework in which various private self-regulatory regimes operate today in a transnational context. Such a framework involves rule-making, monitoring, and enforcement<sup>218</sup>. Although it is not the purpose of this analysis to present the functions of arbitral institutions in view of all components of the above-mentioned framework, the concept of transnational private regulation is particularly relevant when distinguishing the private regulatory functions of arbitral institutions that fall beyond a single arbitration proceeding. In a sense, these functions can be perceived as setting forth the standards and requirements for all institutional arbitration actors (including the future parties and arbitrators). This also means that private regulatory functions of arbitral institutions are not limited to individual disputes (where they still may appear to be contrary to the principle of party autonomy). Instead, these functions have effects for the whole group of arbitration users of a particular institutional regime, as well as the arbitrators working within such a regime, and even on other institutional regimes in that the prerogatives of particular institution inform the self-regulatory framework of other arbitral institutions.<sup>219</sup> This latter observation can be illustrated by means of the aforementioned universalization of the institutional arbitration policies and rules at more horizontal, transnational level that results in the situation in which most leading arbitral institutions offer to the parties similar procedural frameworks for the resolution of disputes that are often at odds with the parties’ demands placed on institutional arbitration regimes. These demands mostly arise because such frameworks appear burdensome and too formal to traditional arbitration users.

In this vein, private regulatory functions are seen here as having broader implications for the public function of institutional arbitration taken as a whole and at the transnational level simply because they fall beyond the private function of any single arbitral institution understood in the context of the resolution of individual disputes. These functions explain, to a certain degree, why some arbitral institutions amend their rules to incorporate the recent procedural developments of other institutional regimes even if such amendments do not necessarily correspond to the legal framework for arbitration in the jurisdiction where a particular institution

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<sup>218</sup>Cafaggi, 2014, 71.

<sup>219</sup>In this vein, institutional settings of procedural norms in arbitration bear resemblance to “experimentalist governance architecture” as defined by Professors Jonathan Zeitlin and Charles Sabel, meaning that arbitral institutions learn through and from comparison of various approaches to the governance of arbitration processes. See Sabel and Zeitlin 2008.

has its assets.<sup>220</sup> It is necessary to emphasize here that most exclusive prerogatives of arbitral institutions differ from one institution to another due to the different models of institutional involvement in the arbitration proceedings as adopted by arbitral institutions. However, there are some shared private regulatory functions that can be distinguished among the leading arbitral institutions within the following categories: (1) institutional decisions on jurisdictional challenges; (2) decisions regarding non-signatories and consolidation of the proceedings; and (3) the institutional choices regarding the applicability of the altered arbitration rules with regard to the parties' arbitration agreement.

### 2.3.2.1.2.1 *Institutional Decisions on Jurisdictional Challenges*

The nature of the institutional decisions regarding the admissibility of an arbitration case has raised a number of controversies, mostly concerning the administrative versus jurisdictional character of such decisions. As already mentioned, the members of the ICC organs openly discuss the possibility for such decisions to be jurisdictional in nature.<sup>221</sup> Even though the mechanisms for the scrutiny of the arbitration agreement differ from one institution to another, these mechanisms determine whether the arbitration may preliminarily proceed in regard to the parties, be it those disclosed or undisclosed in the arbitration agreement. In any event, this institutional prerogative ensures the requirements of the New York Convention concerning the procedural validity of the arbitration agreement.

There are only a few arbitral institutions whose arbitration rules authorize them to make decisions on jurisdiction instead of allowing the arbitrators to exclusively rule on the jurisdiction pursuant to the doctrine of competence–competence.<sup>222</sup> Most institutions, however, have developed mechanisms that either create an implicit procedural framework for arbitral institutions to *prima facie* allow or disallow the case or that directly authorize the relevant institutional bodies to issue *prima facie* decisions on jurisdiction. Hence, the significance of the institutional determinations of jurisdiction can be classified into two groups. The first group involves institutions such as the LCIA and the ICDR, which do not expressly provide for the exclusive competence of the institution to allow or disallow the case in the arbitration rules but that invite the analyses of jurisdictional challenges by the members of institutional organs by means of the established institutional practices. The second group comprises arbitral institutions such as the ICC and the SCC, which explicitly authorize the relevant organ of the institution to preliminarily determine jurisdiction.<sup>223</sup>

<sup>220</sup>This concerns the argument that emergency orders may not be treated as final decisions in some jurisdictions. See Sabharwal and Zaman 2014, 710–711 with further references.

<sup>221</sup>Sect. 2.2.2 of this chapter.

<sup>222</sup>These include: the CIETAC, CMAC, and the Beijing Arbitration Commission (BAC). See Gerbay, forthcoming 2016.

<sup>223</sup>Article 6(4) of the 2012 ICC Arbitration Rules and Articles 6, 9(i) and 10(i) of the SCC Rules.



Within the first group, the LCIA Secretariat exercises implicit combined authority with the LCIA arbitral tribunal regarding possible jurisdictional challenges.<sup>224</sup> Once a request for arbitration has been submitted to the LCIA, the LCIA Secretariat writes a letter to the parties in which it refers to the relevant arbitration agreement and alerts the parties of any possible queries the Secretariat may have regarding jurisdiction.<sup>225</sup> Consequently, where there are justified reasons for believing that the provisions of the contract (including the arbitration clause itself) signed by the parties are vague and/or when the respondent questions the LCIA's jurisdiction, it is standard procedure for the LCIA Secretariat's to address jurisdictional challenges. These decisions will mostly be issued to confirm that the arbitration agreement does not refer to the arbitration rules of other arbitral institutions and to draw the parties' attention to arbitration agreements that do not contain the reference to any arbitral institution and/or institutional arbitration rules.<sup>226</sup> Subsequently, the LCIA arbitral tribunal needs to issue a final decision concerning jurisdiction.

As for the ICDR, the *prima facie* jurisdictional issues fall within the responsibility of the ICDR's case management team. This means that the case management staff of the ICDR, in instances where one party objects to arbitral jurisdiction, will contact the party in question, requesting the party to support its standing with further comments and supplementary documentation.<sup>227</sup> Therefore, the provisional institutional determinations on this matter are based on the written materials provided for by the parties. Usually, preliminary jurisdictional controversies are resolved within 30 days of receiving a notification of arbitration.<sup>228</sup> Again, as in the case of the LCIA, the ICDR arbitral tribunal will make subsequent determinations either in the preliminary decision or in the final award.<sup>229</sup>

Regarding the second group of institutions, both the ICC Arbitration Rules and the SCC procedures provide for more elaborated institutional involvement in determinations of jurisdictional challenges. The new 2012 ICC Arbitration Rules empower the ICC Court to preliminarily determine whether: (1) arbitration should be set in motion based on the valid arbitration agreement; (2) the arbitration file should be dismissed due to the invalidity of the arbitration agreement; (3) arbitration should proceed in relation to all or some parties referred to in the arbitration

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<sup>224</sup>Pursuant to Article 23 of the LCIA Arbitration Rules "the Arbitral Tribunal shall have the power to rule upon its own jurisdiction and authority, including any objection to the initial or continuing existence, validity, effectiveness or scope of the Arbitration Agreement".

<sup>225</sup>Chan 2009, 410.

<sup>226</sup>Wade et al. 2015, 262.

<sup>227</sup>Chan 2009, 411.

<sup>228</sup>Ibid.

<sup>229</sup>Moreover, the preliminary jurisdictional controversies "raised prior to the constitution of the tribunal shall not preclude the [ICDR] from proceeding with administration and shall be referred to the tribunal for determination once constituted." See Article 19.4 of the ICDR Procedures.

agreement; and (4) arbitration should proceed with regard to all or certain claims submitted in the request for arbitration.<sup>230</sup> Moreover, pursuant to the modifications incorporated into the new Article 6(3) of the 2012 ICC Arbitration Rules, it is the Secretary General who may refer the case to the ICC Court for preliminary determination of jurisdiction once he or she decides that the circumstances require such determination.<sup>231</sup> In the case of the SCC, Article 9 of the SCC Arbitration Rules authorizes the Board to rule on jurisdiction *ex officio*, not only when the Board is not *prima facie* satisfied that the alleged arbitration clause constitutes a proper basis for an arbitration to be set in motion in whole or in part, but also when there are justified reasons for assuming that a respondent against whom a request for arbitration was filed is not bound by an alleged arbitration agreement.<sup>232</sup> In such cases, the Board will likely raise a jurisdictional issue on its own motion.<sup>233</sup> Subsequently, if it finds that arbitration cannot proceed, the Board will dismiss the arbitration case when the SCC Institute manifestly lacks jurisdiction over a dispute concerning the existence of the SCC arbitration clause in general or its existence with regard to the particular party to arbitration.

In all cases concerning the institutional mechanisms analysed here, every arbitral institution preliminarily screens arbitration agreements in order to assess: (1) whether such arbitration agreements in fact exist (control over the procedural validity); and (2) if the institution which received the request for arbitration has *de facto* authority to supervise the case (the screening of the accurate wording of the institutional arbitration agreement). Although the determinations made by the LCIA or the ICDR are not final, they set forth all the prerequisites for the arbitral tribunal, which largely determine the ultimate ruling of the latter. Although it is up to the arbitral tribunal to finally determine the jurisdiction, the institutional assistance is of great importance for such determination as it points to the potential gaps in arbitration agreements, which may eventually result in the refusal by the arbitral tribunal to hear the case.

Finally, the dynamics established in the ICC Arbitration Rules expressly entail the finality of the ICC Court's preliminary decisions on jurisdiction, rendered pursuant to Article 6(3) in accordance with Article 6(4) of the 2012 ICC Arbitration Rules. Hence, the Court's decisions concerning the dismissal of the case in regard to some parties or some claims will not be referred to the ICC arbitral tribunal for

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<sup>230</sup>A commentary note to Article 6(3) of the 2012 ICC Arbitration Rules in Fry, Greenberg, Mazza, 2012, 71–74.

<sup>231</sup>Article 6(3) in accordance with Article 6(4) of the 2012 ICC Arbitration Rules.

<sup>232</sup>It happened so in the following cases: SCC case 121/1998 and SCC case 90/1999, reported in Stockholm Arb. Rep. 2000:2, 178, and SCC case 87/2002, reported in Stockholm Arb. Rep. 2004:2, 57.

<sup>233</sup>Magnusson and Shaughnessy 2006, 46.

further deliberation. Although such decisions may still be challenged in any court having jurisdiction in the case giving rise to arbitration, they prove the private regulatory functions of arbitral institutions—exercised by the ICC Court in front of the ICC arbitrators and the parties. These functions are fulfilled in the arbitration, self-regulatory sense, not in a purely legal meaning. If the parties against whom the “negative” decision on jurisdiction has been issued still wish to have their dispute resolved by means of institutional arbitration, they must submit a new request to the ICC Secretariat accompanied by the new registration fee.

#### *2.3.2.1.2.2 Decisions Regarding Non-Signatories, Joinders, and Consolidation of the Proceedings*

The institutional decisions on jurisdiction also take the form of determinations regarding the effects of the arbitration agreement with respect to the parties who did not originally sign the arbitration agreement (so-called “non-signatories”), the joinder of third parties, and the consolidation of the proceedings under more than one arbitration agreement into a single arbitration. These issues become even more problematic in disputes arising out of complex, multiparty contracts. Different institutional arbitration rules grant arbitral institutions different levels of autonomy in these regards vis-à-vis institutional arbitrators. However, there is a visible trend among most leading arbitral institutions to shift certain powers to preliminary determine the validity of arbitration agreements with regard to non-signatories or in the context of the consolidations of the proceedings from arbitrators to arbitral institutions. This shift can be viewed yet again in the context of the increased formalization of arbitration rules in similar direction at the transnational level. In many cases, institutional private regulatory functions in the above-mentioned procedural aspects of the proceedings may have significant practical implication for the parties to the proceedings, as they often run contrary to the principle of party autonomy. Thus this allows arbitral institutions increasing discretion when deciding on who shall be bound by the arbitration agreement and whether the arbitral institution in question (together with institutional arbitrators) is in fact authorized to proceed with the arbitration case.

It is generally acknowledged under different theories of national contract laws that arbitration agreements do not necessarily need to bind only the parties that actually signed them.<sup>234</sup> Arbitral institutions such as the ICC follow this reasoning by “extending” the effects of the arbitration agreements to parties that did not sign the original agreement, though actively participated in the negotiations, performance, and termination of the contract containing the ICC arbitration clause. These theories, known as “group of companies”, “alter ego”, or “piercing the

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<sup>234</sup>See generally Brinsmead 2007.

corporate veil” have long been applied by the ICC arbitrators and for some time now have also been referred to by the ICC Court.<sup>235</sup> As reads from *The Secretariat’s Guide to ICC Arbitration*, the ICC Court will allow the continuing of the proceedings with regard to non-signatories in the following situations:

- (i) [...] the non-signatory has participated in the negotiation, performance, and/or termination of the contract (e.g. in its capacity as a parent or other company related to the signatory); (ii) [...] the non-signatory is an assignee of the original signatory’s obligations under the contract; (iii) [...] the non-signatory is the guarantor of a signatory (although some additional evidence of its acceptance of the arbitration agreement will usually be required).<sup>236</sup>

The ICC decisions on the effects of arbitration agreements on non-signatories are particularly sensitive as they deal with the interpretation of the implied consent of the parties to be bound by the arbitration agreement or the interpretation of the agreement binding upon the non-signatory sometimes even “in disregard of corporate personality” of the original signatory to the arbitration agreement.<sup>237</sup> These issues also enjoy different treatment by various national laws and hence the enforceability of the decisions on non-signatories largely depends on the case law developed in this regard by national courts. This is why the analyses of the treatment of the effects of arbitration agreements for non-signatories shall also be done in the context of the laws governing different arbitration proceedings.

The institutional decisions regarding non-signatories appear even more ambiguous in regards to arbitration proceedings involving States or State entities, where the consent to arbitration is usually expressed tacitly by means of the compliance with various provisions of international law such as international treaties. In these cases, the authority to determine the implied consent of public actors to arbitration may be particularly controversial in situations where the preliminary decisions are made by arbitral institutions (or even private arbitrators authorized to decide on their jurisdiction at the later stage).

In addition, the arbitration rules of the leading arbitral institutions have increasingly granted more elaborate powers to arbitral institutions in the field of joinder of third parties to arbitration. The new 2012 ICC Arbitration Rules empower the ICC Secretariat to collect requests for the joinder of additional parties, provided that the arbitral tribunal has not yet been constituted and that the arbitrators have not yet been confirmed by the ICC Court.<sup>238</sup> By means of such requests, the additional parties will almost automatically be added to the pending arbitration proceedings.<sup>239</sup> Yet the ICC Court (and, at the further stage, the ICC arbitral tribunal)

<sup>235</sup>Vidal 2005; Besson 2010; Youssef 2010.

<sup>236</sup>A commentary note to Article 6(4) of the 2012 ICC Arbitration Rules in: Fry, Greenberg, Mazza, 2012, 78.

<sup>237</sup>Section 1.14–1.16 Park 2009.

<sup>238</sup>Article 7(1) of the 2012 ICC Arbitration Rules.

<sup>239</sup>A commentary note to Article 7 of the 2012 ICC Arbitration Rules in: Fry, Greenberg, Mazza, 2012, 94–104.

has the power to remove the additional party from the proceedings if it is not *prima facie* satisfied with the continuation of the proceedings with regard to this party based on the provisions of Articles 6(3) and 6(4) of the 2012 ICC Arbitration Rules.<sup>240</sup> Similarly, the ICDR Procedures also authorize the parties to submit the notice of arbitration against an additional party until the constitution of the arbitral tribunal unless otherwise agreed by the parties.<sup>241</sup> The new LCIA Rules, although leaving the decision on joinders within the scope of arbitrators' prerogatives, have also created the possibility for the arbitral tribunal to join the parties to arbitration proceedings even with no express consent of the remaining parties that only need to "be given a reasonable opportunity to state their views" in this regard.<sup>242</sup>

Moreover, arbitral institutions tend to exercise greater control over the consolidation of arbitration proceedings. For example, under the 2012 ICC Arbitration Rules, the ICC Court gained the power to preliminarily determine the consolidation of the proceedings arising from different arbitration agreements,<sup>243</sup> which requires the Court to both decide on the compatibility of arbitration agreements and to interpret the parties' initial consent regarding the prospective consolidation of the arbitrations.<sup>244</sup> While deciding on the compatibility of the arbitration agreements, the Court will ordinarily assess whether disputes arise out of the same legal relationship, and for that reason the Court will look at the *place* where arbitration agreements were signed, and the respective *intentions* of the parties. Correspondingly, the SCC Board may decide on the consolidation of the proceedings following the request for the party and after conducting relevant consultations in this regard with all parties to the proceedings as well as with arbitrators.<sup>245</sup> Notably, under the new provision of Article 22.1 of the LCIA Rules the LCIA arbitral tribunal was empowered with the possibility to order, with the approval of the LCIA Court:

(ix) [...] the consolidation of the arbitration with one or more other arbitrations into a single arbitration subject to the LCIA Rules where all the parties to the arbitrations to be consolidated so agree in writing;

(x) [...] the consolidation of the arbitration with one or more other arbitrations subject to the LCIA Rules commenced under the same arbitration agreement or any compatible arbitration agreement(s) between the same disputing parties, provided that no arbitral tribunal has yet been formed by the LCIA Court for such other arbitration(s) or, if already formed, that such tribunal(s) is(are) composed of the same arbitrators [...].

What is more, the LCIA Court, by means of Article 22.6 of the LCIA Rules, was directly authorized to decide on the consolidations of the proceedings where

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<sup>240</sup>Ibid.

<sup>241</sup>Article 7.1 of the ICDR Procedures.

<sup>242</sup>Article 22.1(viii) of the 2014 LCIA Rules. Wade et al. 2015, 246.

<sup>243</sup>Article 6(3) of the 2012 ICC Arbitration Rules.

<sup>244</sup>Article 4(ii) in accordance with Article 10 of the 2012 ICC Arbitration Rules.

<sup>245</sup>Article 11 of the SCC Rules.

arbitrations were commenced under the same arbitration agreement, in relation to the same parties, and the arbitral tribunal has not yet been constituted in the arbitrations in question. This new function of the LCIA Court can be exercised even without express consent from the parties.<sup>246</sup>

Institutional decisions regarding joinder or consolidation of the proceedings whether of preliminary or final nature<sup>247</sup> have in fact significant relevance for both the parties to the pending arbitration proceedings and the additional parties. This is mostly visible with regard to the additional parties' rights to affect the composition of the arbitral tribunal in consolidated proceedings.<sup>248</sup> By way of illustration, the Arbitration Rules of the Swiss Chambers' of Commerce Association for Arbitration and Mediation (Swiss Chambers) of 2012 provide for the institutional authority to revoke the appointment or confirmation of arbitrators, and apply the new procedure, once the Court decides on the consolidation of the new arbitration with the pending proceedings.<sup>249</sup> In other words, the Swiss Chambers' Rules waive the right of the parties to appoint an arbitrator, should the consolidation occur. Moreover, the rules further allow the arbitral tribunal to decide on the joinder of the new parties even *without* consent from the joining party or the parties to the pending proceedings. Naturally, the last argument does not fully support the private regulatory functions of all arbitral institutions. However, it gives a general picture of the system of the Swiss Chambers regarding the further implications of the consolidation of the proceedings and joinders for the conduct of the proceedings. The institutional determinations in this regard—whether they are supported by arbitrators' rulings or not—deal with the matters which touch upon party autonomy and the consent of the signatories or non-signatories to arbitration. Regardless of the possibility of the parties to move institutional decisions on jurisdiction in the courts of law, the institutional determinations may, in practice, be final. It may also be extremely difficult to challenge such decisions, especially in jurisdictions that protect institutional activity under the doctrine on immunity.

We see this, for example, in the judgement of the US Southern District Court for New York in *Global Gold Mining, LLC v. Peter M. Robinson et al*, where the US Court was faced with a claim filed by the unsatisfied non-signatory to the ICC arbitration agreement (Mr. Vardan Ayvazin, the Armenian Minister for the

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<sup>246</sup>Wade et al. 2015, 254.

<sup>247</sup>Usually, the institutional decisions regarding the joinder of the parties will be subject to the further review by the arbitral tribunal. In contrast, the institutional decisions concerning consolidations of the proceedings will have more autonomous character and thus will be rarely reviewed by arbitral tribunals.

<sup>248</sup>Some authors present other plausible scenarios where institutional decisions regarding joinder of the parties or the consolidation of the proceedings will impact the conduct of arbitrations. See Gerbay, forthcoming 2016 where the relationship between the decisions on consolidation of the arbitration proceedings is discussed in view of its potential influence on the seat of arbitration.

<sup>249</sup>Article 4(1) of the Arbitration Rules of the Swiss Chambers' Arbitration Institution.

Environment) to review the ICC Court's decision refusing the participation of Mr. Ayvazin in the ICC arbitration.<sup>250</sup> The US Southern District Court of New York questioned the admissibility of the legal action against the ICC. It also stated that in any case judicial actions against institutional arbitration actors should not violate the rule on immunity protecting arbitration organizations, and therefore should not be brought in ill-considered manner.<sup>251</sup> This ruling demonstrates the interplay between the preliminary decisions of arbitral institutions on the early conduct of arbitration and the public review of such decisions, which may be governed by general national approach to institutional arbitration, developed to support the integrity of the arbitration processes.

#### 2.3.2.1.2.3 Which Rules Shall Apply?

The clarification of the institutional rules stemming from the parties' respective choices of the arbitral procedure guarantees that arbitration proceeds in accordance with the rules under which the parties in fact meant to resolve their dispute. It is a general rule that once the parties agreed to submit to arbitration, they shall be deemed to have submitted to the rules in effect on the date of the commencement of arbitration unless the parties agreed otherwise.<sup>252</sup>

However, institutions often do not expressly clarify the issue of which rules shall apply once an institution adopts new set of arbitration rules after the parties sign the arbitration agreement. This is not an unusual case in recent institutional arbitration practice. Shall all new rules apply immediately? If not, and if the parties remain tacit as to the applicability of the new rules, will the arbitration proceed in accordance with: (a) the rules in effect on the date of the signature of the arbitration agreement; (b) the rules in force on the date of submitting the request for arbitration by the claimant; or (c) the rules in effect when the actual arbitration proceedings begin? The 2012 ICC Arbitration Rules should apply to all arbitrations commenced after the date when the new rules came into force, that is, after 1 January 2012. Although the new ICC Arbitration Rules seem to provide for transitional measures regarding their applicability (i.e. the parties that signed the arbitration agreement prior to the coming into force of the new Rules should not be bound by the new provisions on the Emergency Arbitrator),<sup>253</sup> there is a risk that if the parties are not equipped with the possibility to opt in or opt out of the new

<sup>250</sup>Cf. Chan 2009; *Global Gold Mining, LLC v. Peter M. Robinson et al.*, No. 636 United States District Court, Southern District of New York, 6 February 2008, 07 Civ. 10492 (GEL), with a commentary in Yearbook Commercial Arbitration Vol XXXIII, 1117–1125, in particular 1117.

<sup>251</sup>*Global Gold Mining, LLC v. Peter M. Robinson et al.*, No. 636 United States District Court, Southern District of New York, 6 February 2008, 07 Civ. 10492 (GEL), with a commentary in Yearbook Commercial Arbitration Vol XXXIII, 1117–1125.

<sup>252</sup>See Article 6(1) of the 2012 ICC Arbitration Rules.

<sup>253</sup>See Article 29(6) of the 2012 ICC Arbitration Rules. See also: Steindl 2012.



rules, the latter will affect the parties' procedural safeguards. This may eventually impact the predictability of the institutional arbitration proceedings, the feature of institutional arbitration that is said to constitute one of the advantages of institutional arbitration over *ad hoc* arbitration. Similar concerns arise with regard to the recent LCIA Rules. According to the LCIA Notes for Parties:

8. The LCIA Arbitration Rules presently in force are the LCIA Arbitration Rules 2014, which came into effect on 1 October 2014 (the 2014 Rules). With the exception of the Emergency Arbitrator provisions (discussed below), the 2014 Rules apply to all arbitrations subject to the LCIA Rules commenced on or after 1 October 2014, regardless of when the underlying agreement to arbitrate was concluded.<sup>254</sup>

And further:

9. The LCIA Rules effective 1 January 1998 (the 1998 Rules) continue to apply to arbitrations that were commenced before 1 October 2014, as well as to arbitrations where the parties' agreement expressly refers to the LCIA Rules 1998 or, for example, to "the LCIA Rules in force as at the date of the agreement" (where that date was before 1 October 2014).<sup>255</sup>

Although this commentary certainly provides useful guidance regarding the applicability of the new LCIA Rules, some issues remain open mostly because the parties to the new Rules (that is the parties to arbitration agreements referring to the LCIA Rules concluded on or after 1 October 2014) were not granted the right to opt out of all new provisions contained in the LCIA Rules. This is the case with the provisions on the joinder and consolidation of the proceedings under Article 22 of the LCIA Rules, as discussed above.<sup>256</sup> The fact that the parties to newly effective rules are faced with entirely new provisions that they cannot derogate from puts the LCIA Court in the position of the private rule-maker vis-à-vis both the repeat and accidental LCIA arbitration users as well as the arbitrators working under the LCIA aegis. Thus the LCIA Court is a specific private regulator with the powers exceeding the party autonomy in any and all arbitration proceedings.

Similarly, the provisions of Article 1 of the new ICDR Procedures grant certain discretionary powers to the ICDR itself when determining the applicability of its international arbitration rules to disputes submitted to the ICDR/AAA arbitration. Under Article 1.1 of the Rules:

Where parties have agreed to arbitrate disputes under these International Arbitration Rules ("Rules"), or have provided for arbitration of an international dispute by the International Centre for Dispute Resolution (ICDR) or the American Arbitration Association (AAA) without designating particular rules, the arbitration shall take place in accordance with these Rules as in effect at the date of commencement of the arbitration, subject to modifications that the parties may adopt in writing.

<sup>254</sup>LCIA Notes for Parties. <http://www.lcia.org/adr-services/guidance-notes.aspx>. Accessed 25 April 2016.

<sup>255</sup>*Ibid.*

<sup>256</sup>Wade et al. 2015, 239.

Further, in accordance with Article 1.3 of the same Rules:

When parties agree to arbitrate under these Rules, or when they provide for arbitration of an international dispute by the ICDR or the AAA without designating particular rules, they thereby authorize the ICDR to administer the arbitration.

These provisions in fact authorize the ICC to make respective decisions regarding the applicability of its set of international arbitration rules. This is because the ICC may exercise its discretion when determining the international character of arbitration even when the parties themselves predetermine such dispute as being of domestic nature.<sup>257</sup>

Moreover, the new provision contained in Article 6(2) of the 2012 ICC Arbitration Rules expressly limits the principle of party autonomy, as it excludes the possibility for the parties to participate in the “combined” arbitration proceedings with the ICC Court administering the arbitration case in accordance with the rules of another arbitral institution and *vice versa*; which was possible, at least in theory, under the previous ICC arbitration regime. Under the 2012 ICC Arbitration Rules, the ICC Court became the only ICC organ capable of both administering the ICC arbitration and assuring the compliance with ICC procedure.<sup>258</sup> This provision cannot be altered even by means of dispositive arrangements of the parties.<sup>259</sup> Keeping in mind that the ICC has exclusive authority to both fix the costs of arbitration and arbitrators’ fees at its own discretion and to apply the new schedule of costs to the new arbitration proceedings without the consent of the parties, this proves the increasing private regulatory functions of the ICC Court, exercised within the meaning of the public function. Although the extension of the authority of the ICC Court aims at securing the legality and enforceability of the arbitration proceedings and awards, it interferes with the autonomy of the parties to fully control the conduct of their arbitrations.

#### 2.3.2.1.2.4 *The ICC Court of Appeal versus Supervisory Functions of Other Institutions*

The bottom-up analysis of the public function of arbitral institutions would remain incomplete without reference to the ICC’s peculiar mechanism concerning the scrutiny of draft ICC arbitral awards. Under Article 33 of the 2012 ICC Arbitration Rules,<sup>260</sup> the ICC Court is authorized to lay down mandatory modifications as to the form of arbitral awards, and also to draw the attention of the ICC arbitrators to the points of substance of the ICC awards. By exercising its function under Article 33 of the Rules, the ICC Court contributes to the better compliance of the ICC arbitral awards with the scope of the parties’ agreements to arbitrate and the Terms of Reference, while, at the same time, the ICC Court secures that the ICC arbitral tribunal will not exceed its jurisdiction.

<sup>257</sup>Gerbay, forthcoming 2016.

<sup>258</sup>Article 6(2) of the ICC Arbitration Rules.

<sup>259</sup>Steindl 2012, 236

<sup>260</sup>See Article 27 of the 1998 ICC Arbitration Rules.

In practice, the authority of the ICC Court to review the draft awards resembles the procedural review of the lower court's decision by a court of appeal. Whenever the ICC Court determines that arbitrators decided on the issue which was not determined at the outset of arbitration or is contrary to the parties' agreement, it will ordinarily invite the ICC arbitral tribunal to reconsider its ruling. It will do so by listing all the matters which need to be re-examined in accordance with the parties' arrangements, or by pointing out all of the issues which go beyond the parties' submission. To this extent, the ICC Court—even prior to respective review of the public court having jurisdiction to decide on the enforcement of the ICC award—secures the fulfilment of the legal requirement set forth in Article V(1)(c) of the New York Convention, that the award would deal with a difference contemplated by or falling within the terms of the submission to arbitration and that it would contain decisions on matters determined in parties' submission. This does not mean that the ICC Court decides on the merits of the dispute, however, and as confirmed by the members of the ICC, in some cases the ICC Court may affect the procedural liberty of the ICC arbitrators to ensure procedural integrity of the ICC arbitral awards. This prerogative, increasingly adopted by other arbitral institutions,<sup>261</sup> could have significant implications for the operation of the whole institutional arbitration system. It could further increase the private regulatory powers of arbitral institutions in arbitration proceedings and also strengthen the institutional “position” in the architecture of international commercial arbitration, as analysed by Reisman.<sup>262</sup>

The analyses of both institutional safeguards on behalf of the parties and the institutional private regulatory functions ensuring enforceability of institutional arbitral awards prove the shared public function of all arbitral institutions under analysis in the international arbitration system and also vis-à-vis public actors such as domestic courts. Some of the institutional prerogatives are exercised in verbatim continuation of the parties' arbitration agreement and as such they fall within the meaning of the management of arbitration cases and are often called by commentators and arbitral institutions themselves “administrative” tasks. This concerns, for example: assistance regarding communications, assistance in the composition of the arbitral tribunal, and the ensuring of the applicability of institutional rules by all institutional arbitration actors. Other prerogatives are consonant with the private regulatory powers of arbitral institutions that, although building off of the principle of party autonomy, often run contrary to this core principle in arbitration resembling the decisions of a jurisdictional nature. This involves, for example: decisions on jurisdictional challenges, decisions regarding non-signatories, amendments to the institutional rules and schedules of costs, and the additional ICC Court's prerogatives such as the scrutiny of the ICC awards. In other

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<sup>261</sup>Some arbitral institutions such as SIAC, and CIETAC, and the Arbitration Centre of the Chamber of Commerce of the Grand-Duchy of Luxembourg adopted similar mechanisms of the scrutiny of the awards. Cf. Greenberg 2013, 94–96.

<sup>262</sup>Sect. 2.3.2.1.

words, arbitral institutions exercise their private regulatory powers vis-à-vis both repeat and accidental arbitration users by limiting party autonomy in the arbitration process. They also exercise these powers vis-à-vis institutional arbitrators by controlling, at least by means of monitoring their compliance with arbitration rules, the consistency of the decision-making of individual arbitrators that work under the aegis of particular institutions on a case-by-case basis.

The institutional competences falling within both groups are interconnected and so they are assumed in a general context of self-regulatory dynamics of institutional regimes rather than as accidental institutional supervisory powers in single arbitration proceedings. Additionally, in some cases arbitral institutions use their private regulatory powers also vis-à-vis public courts, either tacitly, when the courts assume higher procedural compliance of institutional awards while assessing the enforceability of these awards, or more explicitly, when the courts refuse to move institutional decisions on jurisdiction under the doctrine on judicial immunity. As such, institutional attempts to secure the legality of arbitration proceedings and arbitral awards can be viewed within the meaning of the concept of the *managerial rule of law* that forces the arbitral institutions to ensure the enforceability of their own rules vis-à-vis all institutional arbitration actors (including the parties, arbitrators, experts, etc.). At the same time this concept encourages the members of arbitral institutions to seek the convergence with public regulatory framework for institutional arbitration proceedings, as enshrined in the New York Convention and further enforced by courts at domestic levels.

### 2.3.2.2 Top-Down Analysis of the Public Function

As noted in the introduction to this part of the chapter, the top-down understanding of the public function concerns the authority of arbitral institutions to administer new types of disputes that traditionally fell outside the scope of interest of early institutional arbitration communities. Broadly speaking, these new types of disputes should be understood as any types of disputes that bear “public” relevance and therefore fall beyond the determination of rights and obligations of disputants in any individual disputes.

The expression “public relevance” also has a broad meaning, as it pertains to any potential legal, societal, and political influence by institutional arbitration of new types of disputes on the repeat or future members of institutional arbitration communities but also the publics, hence the subjects external to institutional arbitral regimes. More specifically, the top-down analysis of the public function presents the arguments on the interrelation between the legal and political (public) goals associated with arbitration by public actors (i.e. legislators, policy-makers, public users of private commercial arbitration regimes) and the scope of disputes that are today increasingly subject to institutional arbitration. In other words, the public function from the top-down aims at explaining the increasing institutional involvement in the administration of disputes involving public actors (States and State entities) whether arising out of or in connection with commercial law

relationships (e.g. commercial arbitrations) or public law settings (e.g. investment disputes). It also concerns disputes involving commercial and non-commercial parties that have been increasingly encouraged to rely on private commercial arbitration rules in so-called regulatory disputes that have long been subject to the resolution by administrative authorities or public courts at national levels. Moreover, the additional dimension of the public function as analysed from the top-down perspective concerns the responses of arbitral institutions in the US to the legal questions regarding the consent of the parties to rely on class arbitration.

The following top-down analysis of the public function turns to normative arguments. Since the recent developments involving exclusive institutional competence in administering new types of arbitration cases stem, indirectly, from national regulations of arbitrability, the discussion will concern the existent and emerging implications of the recent changes in domestic arbitration laws for the architecture of arbitration at the international and transnational levels. Against this background, the following part starts with the increasing liberalization of the concept of arbitrability both in the selected EU Member States and in the US. Here, the focus is first made on the developments of the notion of arbitrability in jurisdictions in which the leading arbitral institutions under analysis have their assets in order to present how such developments inform the liberalization of the concept of arbitrability at the international level, which, in turn affects the regional peculiarities of the notion of arbitrability. It continues with the debate on the emergence of new dynamics of competition within the public function, in light of the proliferation of institutional arbitration due to the liberalized arbitrability as defined by domestic legislatures. Furthermore, the analysis focuses on the consequences of this liberalization for the public function of arbitral institutions, as well as for the efficiency of their traditional commercial function assumed within the market for arbitration services. Questions of the legitimacy of these transformed institutional regimes are also raised. This leads to the concluding discussion regarding the interplay between a dual function of institutional arbitration and the corresponding responsibility of arbitral institutions in the arbitration process, particularly in view of the increasing liability lawsuits against arbitral institutions.

#### 2.3.2.2.1 Liberalization of Arbitrability Versus New Institutional Authority in Public Disputes

Regardless of the parties' freedom concerning their contractual arrangements in the context of arbitration, public determination of arbitrable disputes (so-called substantive or objective inarbitrability<sup>263</sup>) also affects the contractual inarbitrability of disputes that the parties may wish to settle by means of arbitration. The

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<sup>263</sup>While the first term refers to the distinction under American law, the other term deals with the relevant "definition" of arbitrability provided by the French jurisprudence. See Carbonneau and Janson 1994, 210.

extension of the category of arbitrable disputes is a matter of national laws, and to this extent no international body may, in a binding fashion, impose the stipulations of arbitrability into national legislation. However, since the emergence of early institutional arbitration regimes at the beginning of nineteenth century, there has been an ongoing liberalization of arbitrability in many jurisdictions. On the one hand, this opens national arbitration to new disputes, and, on the other hand, it adds to the understanding of “international” or “transnational public policy” in arbitration, hence informing the increasing liberalization or autonomy of international arbitration. These changes, which imply the shifting recognition of the arbitration process by national and regional legislators as well as by international regulatory bodies in the field of arbitration, appear particularly significant for arbitral institutions. This is due to the increasingly formalized and universalized arbitration rules adopted by arbitral institutions that contribute to the growing trust of public authorities to further extend the concept of arbitrability to new types of disputes often falling beyond traditional commercial arbitration. It is thus hypothesized below that arbitral institutions have become important actors in shaping the regulation of arbitrability, at least indirectly, by signalling their readiness to take on new types of disputes mostly by means of their private regulatory powers as exercised in and outside arbitration regimes thus vis-à-vis institutional arbitration communities and public actors.

The discussion on the liberalization of arbitrability should begin with the comparison of the regulations of arbitrability in the US, the UK, France, and Sweden, thus in jurisdictions in which the leading arbitral institutions have their assets.<sup>264</sup> On the one hand, the statutory law and case law developed in the US, France and Sweden seem to have expressed the most adaptable approach to the notion of arbitrability. On the other hand, the UK—ordinarily perceived as an inflexible arbitration forum—also seems to be responding to the trend of liberalization of arbitrability.

As the provisions on arbitrability codified in the Federal Arbitration Act of 1925 (FAA) are not exhaustive,<sup>265</sup> the US judges have been consequently extending the category of arbitrable disputes, which stays in line with the US policy

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<sup>264</sup>The discussion on the potential role of other arbitral institutions in the development of the scope of arbitrability at national levels follows at the end of this section. It is necessary to stress here that the focus on the leading arbitral institutions is made here with regard to the evolution of the relationship between arbitration and the law (involving the regulations of arbitrability) in the course of the development of arbitration practice in traditional arbitration jurisdictions.

<sup>265</sup>Cf. Section 2 of the Federal Arbitration Act; Pub.L. 68–401, 43 Stat. 883, Enacted February 12, 1925, Codified at 9 U.S.C. § 1 et Seq., which reads as follows:

“Section 2.

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”

favouring arbitration.<sup>266</sup> Already at the moment of promulgation of the FAA, labour disputes were admissible for arbitration. Doubts stemming from domestic public policy concerns still existed, however, as to arbitrability of statutory disputes involving securities or consumer cases. The situation changed with the judgement in *Southland Corp. v. Keating* in 1984,<sup>267</sup> where arbitration was encouraged in domestic cases arising out of the relationships in the securities market (be it statutory claims based on securities acts, antitrust laws or the Racketeer Influenced and Corrupt Organizations Act (RICO)),<sup>268</sup> or in business-to-consumer (B2C) transactions involving a broad context of health care, selling of goods, or finance.<sup>269</sup> In addition, the use of international arbitration in regulatory disputes was confirmed.<sup>270</sup> Since the judgement in *Allied-Bruce Terminix Companies, Inc. v. Dobson* in 1995, the US judges further promoted arbitration of consumer disputes. This extreme liberalization of arbitrability in the US was recently subject to open criticism, especially because of the increased enforcement by the US judges of pre-dispute arbitration agreements binding consumers in standard business-to-business (B2B) transactions.<sup>271</sup> This observation will be relevant for the further discussion in the course of this chapter.

Similarly, French authorities encourage the emancipation of arbitration, and thus also the liberalization of arbitrability. French law distinguishes between the

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<sup>266</sup>Such policy, according to Carbonneau, was preliminarily determined in *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.* in 1983 (460 U.S. 1 1983), where Section 2 of the FAA was defined as a congressional intention of implementing the policy favouring arbitration agreements. See: Carbonneau and Janson 1994, 203.

<sup>267</sup>See: Ibid. quoting *Southland Corp. v. Keating* (465 US, 1, 1984).

<sup>268</sup>For example, in *Shearson/American Express v. McMahon*, No. 86-44 argued 3 March 1987 decided 8 June 1987 482 U.S. 220, the US Supreme Court stated that: “The Arbitration Act establishes a federal policy favouring arbitration, requiring that the courts rigorously enforce arbitration agreements. This duty is not diminished when a party bound by an agreement raises a claim founded on statutory rights. The Act’s mandate may be overridden by a contrary congressional command, but the burden is on the party opposing arbitration to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue. Such intent may be discernible from the statute’s text, history, or purposes. [...]”. Moreover, in the case at hand the Court encouraged the use of arbitration also in Respondents’ claims under both the Securities Exchange Act of 1934 and the RICO.

<sup>269</sup>Cf. Brunet et al. 2006.

<sup>270</sup>It is said that the promotion of arbitration and of the concept of arbitrability in international disputes was determined by the American economic interest in arbitration. One of the most prominent cases introducing the reformed stance to arbitrability in international transactions concern the so-called “Mitsubishi case”, in which the US Supreme Court held that antitrust claims could be submitted to international arbitration. Cf. *Mitsubishi v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985) US Supreme Court.

<sup>271</sup>Cf. the text of H.R. 2087: the Arbitration Fairness Act of 2015 and the text of H.R. 1844 (113th): the Arbitration Fairness Act of 2013.



notion of arbitrability in domestic and international arbitration. The regulation of arbitrability was provided in Articles 2059, 2060 and 2061 (Book III, Title XVI) of the French Civil Code.<sup>272</sup> Under Article 2059 of the Civil Code, the parties may refer to arbitration all disputes involving the contractually accessible rights (“*droits disponibles*”). Furthermore, Article 2060 sets forth the limits to the contractual inarbitrability by indicating the following categories of disputes, which are not arbitrable: (a) matters of status and personal capacity concerning divorce or judicial separation; (b) controversies concerning public bodies and institutions (exclusive of the bodies or institutions of an industrial or commercial character that were authorized to enter into arbitration agreements under a relevant decree); and (c) public policy-related matters. Moreover, in accordance with the provision of Article 2061 of the French Civil Code, an arbitration clause regarding certain statutory provisions may be valid for contracts coming into existence as an effect of professional activity of the parties. The codification of these provisions has been an outcome of a long debate in the French courts over the appropriate approach to public policy issues.

Already in the judgment in *Tissot v. Neff* of 1950, it was confirmed that the very fact that contractual dispute touches upon public policy matters did not make the case inarbitrable *per se*.<sup>273</sup> This decision contributed to the French doctrine on the “selective inarbitrability of statutory rights”, which constituted permissible submission to arbitration of statutory rights, provided that the right was admissible in individual cases under specific circumstances.<sup>274</sup> As a result of this decision, the French approach to arbitrability has been progressively liberalized, and currently the employment rights claims,<sup>275</sup> consumer disputes, securities disputes, antitrust or intellectual property (IP) rights are arbitrable, *only if* the courts control the application of public policy by arbitrators after the arbitral awards in these matters are issued.<sup>276</sup>

As for arbitrability in international arbitration, two prominent French decisions need to be presented here, namely the judgement of the Paris Court of Appeal in *Société Ganz v. Société Nationale des Chemin de Fers Tunisiens* of 1991,<sup>277</sup> and

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<sup>272</sup>The major changes regarding arbitrability were introduced by means of the reform of 2001. See: Jean de la Hosserraye, Stéphanie de Giovanni and Juliette Huard-Bourgeois “Arbitration in France”, CMS Guide to Arbitration Vol I (2012), 333–334.

<sup>273</sup>See the judgment of 28 November 1950, Cass. Com [1950] Bull. Civ., No. 316, together with the commentary in: Carbonneau and Janson 1994, 213; Gaillard and Savage 1999, 334.

<sup>274</sup>See Carbonneau and Janson 1994 referring to the work of Patrice Level, *L'Arbitrabilité*, Revue de L'Arbitrage 213, 219 (1992).

<sup>275</sup>In particular after the expiration of the employment contract. See Carbonneau and Janson 1994, 215–216.

<sup>276</sup>Cf. Honlet et al. 2010.

<sup>277</sup>*Société Ganz v. Société Nationale Des Chemin de Fers Tunisiens*. 1991. Revue de L'Arbitrage 478 (1991) *Cour d'appel de Paris*; Carbonneau and Janson 1994, 218.

the *Mors/Labinal* case decided by the Paris Court of Appeal in 1993.<sup>278</sup> In *Ganz*, the Paris Court of Appeal authorized arbitrators to apply the rules of international public policy to international arbitrations. This included giving the green light to arbitrators to impose contractual sanctions on the parties in cases of their incompliance with the international public policy. This specific “rule of law for international arbitration”<sup>279</sup> was subsequently acknowledged in the decision in *Mors/Labinal*, in which any interdependency of the national understanding of the arbitrability of statutory rights on international arbitration was eventually rejected.

As far as Sweden is concerned, the Swedish Arbitration Act of 1999 follows the solutions developed by its predecessor (the Act of 1927), and provides for the broad autonomy of the parties to contractually regulate the resolution of their disputes by means of arbitration.<sup>280</sup> Thus, the category of arbitrable disputes under Swedish law involves similar disputes to those from the already-presented jurisdictions, namely: controversies involving consumers (provided that the consumer contract was issued after a dispute had arisen), certain disputes concerning the application of mandatory statutory provisions, or matters involving environmental law and financial markets.<sup>281</sup> Yet again, the very fact that certain disputes involve public policy concerns does not automatically rule out the possibility of arbitration of those cases in Sweden. Apart from the general trends presented above, the arbitrability of each dispute will be assessed on a case-by-case basis by the Swedish courts once the controversy in this regard is raised by one of the parties. This was also the case in the recent judgment of the Supreme Court of Sweden dated 23 November 2012, which declared that disputes should be non-arbitrable if they concern matters not designed for out-of-court dispute settlement, and in particular dealing with the application of the peremptory laws that involve the interest of the society or a third-party interest.<sup>282</sup>

The presentation of the regulation of arbitrability in the UK needs to begin with the emphasis on the traditional hostility of the UK public authorities to arbitration. It seems, however, that the traditional UK approach to the issue at hand has also witnessed some changes. The UK Arbitration Act of 1996 distinguished between

<sup>278</sup>Jarrosson 1993; Redfern et al. 2004, 140.

<sup>279</sup>See Carbonneau and Janson 1994, 218.

<sup>280</sup>See Section 1 of the Swedish Arbitration Act of 1999, which reads as follows: “Disputes concerning matters in respect of which the parties may reach a settlement may, by agreement, be referred to one or several arbitrators for resolution. Such an agreement may relate to future disputes pertaining to a legal relationship specified in the agreement. The dispute may concern the existence of a particular fact. In addition to interpreting agreements, the filling of gaps in contracts can also be referred to arbitrators. Arbitrators may rule on the civil law effects of competition law as between the parties.”

<sup>281</sup>Sundin and Wernberg 2007, 64.

<sup>282</sup>Swedish Arbitration Portal: The Supreme Court. <http://www.arbitration.sccinstitute.com/Swedish-Arbitration-Portal/Supreme-Court/The-Supreme-Court2/The-Supreme-Court/>. Accessed 25 April 2016. The website contains relevant links to the decision at hand, both in English and in Swedish language versions.

contractual and non-contractual disputes that may be submitted to arbitration. The non-contractual disputes involve tort claims, IP rights, and other statutory claims concerning civil proceedings.<sup>283</sup> To this extent, criminal matters shall not be arbitrable in the UK. As for the contractual disputes, the recent judgment of the UK Court of Appeal in *Fiona Trust & Holding Corporation and others v. Yuri Privalov and others* may suggest the liberalization of the UK approach to arbitration in general and to arbitrability in particular under English law.<sup>284</sup> In *Fiona Trust*, the Court of Appeal underlined the necessity of a more *liberal construction* of arbitration agreements due to the demands of international commerce. This allows one to look prospectively also into the future developments of the concept of arbitrability in the UK. When discussing the concept of arbitrability in the UK it is also necessary to notice the particular UK approach to consumer arbitration. Under English law, the consumer arbitration clauses should be unfair if the claim involves less than £5,000.<sup>285</sup> This distinct stance to consumer arbitration in England, unlike the US approach, is determined by the particular regime for the consumer protection in Europe. In the same way, pre-dispute arbitration clauses, which are rather easily enforced in the US, would be considered unfair in most European jurisdictions, including the UK.<sup>286</sup>

It can therefore be speculated that the national regulations of arbitrability have had an impact on the admissibility of new categories of disputes also at international level in that the determinations of arbitrability in the context of international arbitration have often been conducted by judges or legislators directly in contrast to more rigid provisions in this regard relating to domestic arbitrations. Albeit each jurisdiction distinguished between national and international concept of arbitrability in view of the necessary interpretations of national and international public policy, and even if the latter seems to escape from any public regulation, it appears that the prior liberalization of arbitrability at domestic levels has largely informed and determined the expansion of international arbitration. Such expansion proceeded with an active involvement of arbitral institutions. This has at least two implications for the public function of arbitral institutions analysed from the top-down perspective. First, arbitral institutions have gained more credibility in front of domestic authorities deciding on arbitrability (mostly due to the increased formalization of institutional regimes), and therefore some national or regional arbitral institutions have been awarded exclusive competence to administer new category of disputes that fall within so-called “grey zones” of arbitrability. These “grey zones” encompass categories of disputes falling between the universally

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<sup>283</sup>Miles and Davies 2013.

<sup>284</sup>*Fiona Trust & Holding Corporation & Ors v Yuri Privalov & Ors* [2007] EWCA Civ 20 (24 January 2007).

<sup>285</sup>Cf. the UK Arbitration Act 1996, Chapter 23, Section 91(1); The Unfair Arbitration Agreements (Specified Amount) Order 1999.

<sup>286</sup>See generally Drahozal and Friel 2003.

arbitrable disputes and the obviously non-arbitrable disputes.<sup>287</sup> Second, arbitral institutions have received an increased recognition by regional and international authorities that can be recently seen in the debate on the inclusion of the investor-State arbitration into the TTIP and other international agreements entered into by the EU following the adoption of the Lisbon Treaty. On the one hand there has been continuous criticisms by the European public(s) of the potential determination of regulatory and public policy issues by private arbitrators due to the lack of the democratic legitimacy of the latter, making the final regulation of investor-State arbitration within the EU unsure. On the other hand the current debate concerns the arguments of some public functions of private arbitral institutions in the arbitration process, especially as far as the procedural safeguards and transparency of new forms of arbitrations are concerned. Overall, the expansion and liberalization of arbitrability at the domestic levels, that also informed the public understanding of international arbitration, have contributed to the new dynamics of competition between arbitral institutions within the public sphere thus transcending the traditional commercial function of institutional arbitration activity.

#### 2.3.2.2.2 Proliferation of Arbitral Institutions and the Development of Additional Dynamics of Competition

The growing external recognition of institutional arbitration not only contributed to the proliferation of institutional arbitration but also implied the changing dynamics of competition between arbitration centres. This can be illustrated by the following examples. First, as already noted, the category of disputes that may be arbitrated under the supervision of arbitral institutions has been expanded at national and international levels that prompted arbitral institutions to reflect these developments in institutional arbitration rules. Second, the dynamics under discussion directly or indirectly contributed to the creation of new arbitral institutions that deal solely with new forms of arbitrations allowed by means of recent changes to the regulation of arbitrability. Lastly, the emergence of new forms of arbitration was promoted that hardly correspond to the original goals of commercial arbitration, which questions the traditional commercial function of arbitral institutions in the arbitration system.

Only the first two issues, which concern the interplay between the increasing proliferation of institutional arbitration in view of the national liberalization of the scope of arbitrability and the emergence of new dynamics of competition between arbitral institutions (be it traditional ones or emerging institutions), will be analysed here. The latter issue entails the interaction between the new forms of arbitration in a more general context of the transformation of the ADR and the role of

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<sup>287</sup>Cole et al. 2014, 10.

institutional service providers in facilitating these forms of ADR mostly as a consequence of the public encouragement of out-of-court dispute settlement in new types of disputes—and, to this extent, it falls outside the scope of this book.<sup>288</sup>

Moving back to the discussion at hand, the emerging public function of arbitral institutions encourages the existent arbitral institutions to expand their traditional goals beyond the administration of purely *commercial* disputes at national level. This trend is mostly visible within the institutional regime of the AAA that expresses a particular dialogue with the US authorities. The AAA actively participates in numerous governmental programmes involving the Automobile Industry Special Binding Program, the former cooperation with the US Department of Justice in a 2010 antitrust case settlement, the cooperation with federal Centres for Medicare & Medicaid Services (CMS), or the AAA's involvement in the resolution of disputes under the United States Anti-Doping Agency (USADA) Protocol for Olympic Movement Testing and the AAA Olympic Sport Doping Disputes Supplementary Procedures—to name a few.<sup>289</sup> The last AAA's activity in sports arbitration is particularly absorbing, as it concerns the AAA's cooperation—through its international division, the ICDR with the Court of Arbitration for Sports in Lausanne in anti-doping arbitrations. These two institutions offer a common pool of arbitrators specialized in anti-doping disputes. Moreover, the AAA

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<sup>288</sup>This is indicated by, among other developments, the encouragement of arbitration and ADR in the resolution of various EU sectorial disputes (Warwas 2014) and the introduction of consumer ADR across the Union (Cole et al. 2014, 52–52; 204–212). There are intriguing questions that relate to the developments of the new forms of ADR, especially at the EU level that imply the growing privatization of civil justice systems within the EU. Moreover, the encouragement of new forms of ADR in increasingly sensitive disputes such as consumer disputes, often administered by for-profit service providers, as well as the interplay between the activity of arbitral institutions in some specific “regulatory” sectors such as sports arbitration call for further questions. What are the linkages between the new forms of arbitration, so-called new “laws” (e.g. *lex sportiva*, *lex informatica* or even *lex energetica*) whose normativity the new variants of institutional arbitration are to support (such as the Court of Arbitration for Sport) and the traditional arbitral institutions? To what extent do traditional arbitral institutions respond to the external dynamics concerning the development of new laws? Do the new forms of arbitration entail the necessity for the emergence of new arbitration service providers such as e-associations or simplified arbitral institution to provide quasi-arbitration services? And finally, what would be the implications of these developments for the functionality and legitimacy of traditional institutional arbitration? One of the effects can be identified already now against the background of the additional dynamics of competition between traditional arbitration centres and newly established arbitral institutions.

<sup>289</sup>See the AAA Government Programmes via: Government & Consumer: Federal, State, Local Governments. [http://www.adr.org/aaa/faces/aoe/gc/government?\\_afLoop=735865533092255&\\_afWindowMode=0&\\_afWindowId=null#%40%3F\\_afWindowId%3Dnull%26\\_afLoop%3D735865533092255%26\\_afWindowMode%3D0%26\\_adf.ctrl-state%3Dagxlw73i2\\_4](http://www.adr.org/aaa/faces/aoe/gc/government?_afLoop=735865533092255&_afWindowMode=0&_afWindowId=null#%40%3F_afWindowId%3Dnull%26_afLoop%3D735865533092255%26_afWindowMode%3D0%26_adf.ctrl-state%3Dagxlw73i2_4). Accessed 25 April 2016.

provides for specialized rules in the field of employment, consumer, and labour arbitration.<sup>290</sup> The AAA even adopted the Consumer Due Process Protocol that constitutes a form of private regulation of consumer arbitrations in the US. Moreover, many European arbitral institutions went beyond the purely commercial patterns of dispute resolution and expanded their services into new areas. As already noted, DIS implemented rules for corporate law disputes.<sup>291</sup> Similarly, the CAM and the Czech Arbitration Court Arbitration Centre for Internet Disputes offers Rules for Domain Name Disputes that correspond with the ICANN's regulation of the Internet.<sup>292</sup>

In view of the progressive liberalization of national laws on arbitration, the wider use of institutional arbitration has also been permitted in various company-related disputes. For example, the Italian law through the Legislative Decree No. 5 of 17 January 2003 (which took effect on 1 January 2004) allowed arbitration of disputes regarding the operation of close corporations, though without a reference to publicly held or listed corporations.<sup>293</sup> Furthermore, the recent reform of Spanish arbitration law expressly confirmed the possibility of arbitration of company law disputes.<sup>294</sup> These changes authorize arbitral institutions to exclusively administer company-related disputes (Spain), or to appoint an arbitral tribunal once the use of arbitration in companies' by-laws or statutes has been approved by the majority of two-thirds of the votes reflecting the corporate capital (Italy). All this accords Spanish—and to some extent also Italian—arbitral institutions extraordinary prerogatives in the management of company-related disputes, which even *ad hoc* arbitrators cannot enjoy.

Similarly, some national laws such as Hungarian law and Maltese law, empowered arbitral institutions with competences that cannot even be exercised by *ad hoc* arbitrators in these jurisdictions. Yet, in some aspects, they mirror the powers of national courts. Hungarian arbitration is governed by Act LXXI of 1994 on Arbitration (HAA) that has recently imposed restrictive rules regarding arbitrability that increased the authority of domestic arbitral institutions in Hungary. Under Section 2(3) of the HAA parties to the disputes over a right in rem relating to the real estate located in Hungary (as well as its lease and tenancy) may submit these types of disputes only to institutional arbitration seated and administered in

<sup>290</sup>See: the AAA Consumer, Employment and Labour Rules in the section on: Rules & Procedures [https://www.adr.org/aaa/faces/rules/searchrules?\\_afLoop=1533029715880923&\\_afWindowMode=0&\\_afWindowId=eulkhplnj\\_32#%40%3F\\_afWindowId%3Deulkhplnj\\_32%26\\_afLoop%3D1533029715880923%26\\_afWindowMode%3D0%26\\_adf.ctrl-state%3Deulkhplnj\\_114](https://www.adr.org/aaa/faces/rules/searchrules?_afLoop=1533029715880923&_afWindowMode=0&_afWindowId=eulkhplnj_32#%40%3F_afWindowId%3Deulkhplnj_32%26_afLoop%3D1533029715880923%26_afWindowMode%3D0%26_adf.ctrl-state%3Deulkhplnj_114). Accessed 25 April 2016.

<sup>291</sup>See: DIS Rules. <http://www.dis-arb.de/en/16/rules/overview-id0>. Accessed 25 April 2016

<sup>292</sup>Domain Names Disputes. <http://www.camera-arbitrale.it/en/Domain+Names+Disputes/index.php?id=13>. Accessed 25 April 2016.

<sup>293</sup>The Italian Legislative Decree No. 5 of 17 January 2003.

<sup>294</sup>Spanish Act 11/2011, of May 20, Reforming Act 60/2003, of December 23, on Arbitration, and Regulating Institutional Arbitration within the Public Administration.

Hungary. The requirement is that all the parties to the contract underlying the right in rem or to the lease or tenancy agreement have their seats or permanent establishments in Hungary.<sup>295</sup> Moreover, Hungarian law sanctions the exclusive jurisdiction of some arbitral institutions conferred to them by the act of the Hungarian Parliament. For example, the most prominent Hungarian arbitral institution, the Arbitration Court attached to the Hungarian Chamber of Commerce and Industry (HCCI) enjoys exclusive jurisdiction to administer international arbitration proceedings, unless otherwise stipulated by an act of the Hungarian legislators. This means that whenever the parties agree on international arbitration administered by an arbitral institution to be seated in Hungary in their arbitration agreement or the submission to arbitration, they have no other choice than to select the HCCI Arbitration Court as an administrator of their dispute, unless a specific legislative act authorizes them to choose another arbitral institution.

Likewise, the Malta Arbitration Centre, the only arbitral institution that was established in Malta (nota bene by means of Malta's arbitration law<sup>296</sup>) enjoys extensive powers in the arbitration proceedings that some authors even compare to the functions of domestic courts.<sup>297</sup> The members of the main organ of the Centre, namely the Board, are elected by the Prime Minister of Malta. The Centre is authorized to administer both domestic and international arbitration proceedings, and, most importantly, also the mandatory arbitration that constitute a particular feature of Malta's arbitration law. In addition to these prerogatives, the Registrar of the Centre was equipped with extensive functions relating to document production and collection of evidence in the course of arbitration that usually fall within the scope of arbitrators' duties or the competences of national courts.

As noted, some existent arbitral institutions also engage in the resolution of new types of disputes at the international level. For example, some private commercial arbitral institutions such as the SCC and the ICC, have been occasionally participating in both commercial arbitrations and investment law arbitrations involving States and State-like entities. The way in which the ICC Court responded to the new dynamics of competition in this regard can be illustrated by the recent changes to the ICC Arbitration Rules (2012). The recent developments in the ICC Rules are meant to further attract States and State-like entities to the ICC arbitration.

States or State-like entities may use ICC arbitration either in commercial or investment disputes.<sup>298</sup> In order to make the rules adaptable to investment arbitra-

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<sup>295</sup>See: 2012 Amendments to the HAA, Cole et al. 2014, 114–115.

<sup>296</sup>Arbitration Act, Ch. 387 of the Laws of Malta of 1996, as Subsequently Amended with the Major Changes Implemented in 2004 by Means of the Legal Notice 421.

<sup>297</sup>Cole et al. 2014, 136.

<sup>298</sup>For a study on the involvement of commercial arbitral institutions in all types of arbitrations concerning States and State-like entities see: Cole et al. 2014, 229–246.



tion involving States, in the 2012 ICC Arbitration Rules the requirement provided for in the previous version of the Rules that the ICC arbitration refers to business disputes was deleted. Moreover, and as already analysed in the previous section on the procedural dimension of the public function, the 2012 ICC Arbitration Rules authorize the ICC Court to directly appoint a sole arbitrator or presiding arbitrator. This amendment was underpinned by the rationale that investment arbitrations would need more neutrality for the appointment of arbitrators, which apparently, some ICC National Committees were not able to offer. The new ICC provisions also strengthened the principle of impartiality of the arbitral tribunal by adding an express requirement of impartiality in new Articles 11 (dealing with the appointment) and 14 (concerning the challenges to arbitrators) of the 2012 ICC Arbitration Rules.

Another significant change involves the limitation of the ICC's arbitral tribunal autonomy to apply provisions of contract or trade usages. Since the application of trade usages to investment arbitrations was one of the major concerns of States and State-like entities concerning the ICC arbitration,<sup>299</sup> the new Article 21(2) of the 2012 ICC Arbitration Rules states that arbitral tribunals shall take into account the provisions of contract, *if any* (since majority of investment arbitrations would arise out of Bilateral Investment Treaties), and any relevant trade usage. This is a serious departure from the previous Article 17(2) of the 1998 ICC Arbitration Rules, which required arbitral tribunal to take account of provisions of contract and trade usages *in all cases*. To this extent, the 2012 ICC Arbitration Rules seem to also undermine the original goals of the business community to have any dispute resolved under *lex mercatoria*.

Furthermore, the recent ICC practice allows the modification of the general arbitration features such as confidentiality and transparency of arbitration proceedings, by encouraging the new ICC arbitration users (State and State-like entities) to make their submissions, proceedings, or awards public.<sup>300</sup> Although such practices respond to the continuous critique of the lack of transparency in arbitration, it is dubious whether it will correspond with the demands of traditional arbitration users who tend to keep all the aspects of arbitration (even the very fact of the emergence of a dispute) secret. All these amendments create room for the ICC to manoeuvre to further broaden its horizons by administering investment disputes possibly arising out of the EU investment treaties. The members of leading European arbitral institutions confirmed their eagerness to deal with investment disputes at the EU level during the European Forum for New Ideas, which was held in Poland on 26–28 September 2011.<sup>301</sup> Currently, although the debate on the resolution of investment disputes within the EU has taken various directions, the

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<sup>299</sup>ICC Arbitration Commission Report 2015. Arbitration Involving States and State Entities under the ICC Rules of Arbitration.

<sup>300</sup>*Ibid.*

<sup>301</sup>Ross 2011.

fact that arbitral institutions remain significant actors within such debate demonstrates the institutional involvement in the public dialogue on arbitration (pertaining to policy-making in this field) at the international level.

Under the Lisbon Treaty, the EU was accorded an exclusive competence in the field of foreign direct investment within the EU Common Commercial Policy. This allows the EU to enter into international investment or trade agreements with the investors from outside the EU (either within the EU's exclusive capacity or jointly with other EU Member States). These developments require novel dispute settlement procedures to be contained in future free trade agreements and investment agreements, as well as transitional mechanisms for the BITs—already binding upon EU member states and third countries. Since the EU does not have a capacity to become a signatory of the ICSID Convention—the most prominent regime for the resolution of investment disputes—new solutions need to be found to address the existent gap. The current proposals at the EU level relying on the ICSID mechanisms are thus insufficient.<sup>302</sup> It seems that the recent transformations of arbitral institutions in general, and the recent amendments to the 2012 ICC Arbitration Rules in particular, point to the adaptability of institutional arbitration regimes in view of the public challenges and demands placed on them (even if only indirectly). Although this argument is of the utmost normative character, this may have additional consequences for the traditional arbitration users. The necessary revisions of the traditional commercial arbitration rules, required in view of the need for the increased transparency and confidentiality of the new institutional arbitration processes, may be viewed as adopted in order to undermine the traditional features of institutional commercial arbitration.

The final implication of the liberalization of arbitrability and the emergence of new dynamics of competition in the institutional arbitration regime concerns the development of new arbitral institutions that focus exclusively on “regulatory” arbitrations. This is the case of the P.R.I.M.E. Finance that was established in order to “assist judicial systems in the settlement of disputes on complex financial transactions”.<sup>303</sup> This means that P.R.I.M.E. Finance, while fulfilling its private goals ensured by the independence of the institution from any industry associations and participants to financial market,<sup>304</sup> also assumes certain public function in mixed, private–public regulation of financial markets. In line with this, P.R.I.M.E. Finance not only competes with other private arbitral institutions that developed similar tools regarding regulation of financial disputes, but also enters into the competition with public courts by offering complementary resolution of financial disputes for the members of the industry. This new dimension of competition affects not only the market for institutional arbitration services, but also the

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<sup>302</sup>Cf. Regulation (EU) No 1219/2012 of the European Parliament and the Council of 12 December 2012 Establishing Transitional Arrangements for Bilateral Investment Agreements between Member States and Third Countries; Happ and Tietje 2013.

<sup>303</sup>“P.R.I.M.E. Finance (Panel of Recognized International Market Experts in Finance)” <http://primefinancedisputes.org/about-us/>. Accessed 25 April 2016.

<sup>304</sup>Ibid.

system of *ad hoc* arbitration, which seems to be losing its significance vis-à-vis newly established arbitral institutions that cooperate with public actors. In addition, arbitral institutions have begun to split their shares in the institutional arbitration market with public courts.

### 2.3.2.2.3 Additional Components of the Public Function in the US

The particular relationship between public regulations of arbitration and institutional activity to potentially extend the scope of its “services” concerns the AAA’s interference with the parties’ consent regarding their participation in class arbitrations previously sanctioned by means of the decision of the public court. Although the issue at hand, as it relates to the specificity of the arbitration in the US, does not yet seem to have broader implications outside the US, it is significant to the extent that it proves the AAA’s *public* authority vis-à-vis AAA’s arbitrators, the parties, and the US courts in setting up the framework for class arbitrations.

Without a doubt, the admissibility of class arbitration in the US has long been a subject of stormy debate between Republicans and Democrats, and to this extent such debate entails mostly political questions.<sup>305</sup> The judgement of the US Supreme Court in *Green Tree Financial Corp. v. Bazzle*,<sup>306</sup> together with the subsequent promulgation by the AAA of the Supplementary Rules for Class Arbitrations (AAA’s Class Arbitrations Rules)<sup>307</sup> on 8 October 2003, unquestionably added to this debate. It is striking that the AAA, while adopting its Class Arbitration Rules, responded immediately to the possibility for class arbitrations created by a public court. The US Supreme Court in *Green Tree* decided that, when the arbitration clause is silent as to the recourse to class arbitration, it is a matter for the arbitral tribunal to determine the admissibility of class action. The AAA did not wait long to make the most of this ruling. The AAA’s Class Arbitration Rules—which mirror the Federal Rule of Civil Procedure 23,<sup>308</sup> and to this extent they show the “public” authority of the AAA over its arbitrators and arbitration users—allow class arbitration once a party resorted to the AAA’s arbitration in the agreement, and when the party submits the dispute against or on behalf of a class.<sup>309</sup> If there is doubt regarding the admissibility of the class relief in view of the parties’ original intentions, the dispute will be resolved by the AAA’s arbitrators instead of the US courts. Moreover, the AAA’s Class Arbitration Rules applied even to pending arbitrations, which questioned the very consent of the parties to the already pending proceedings to rely on the new AAA’s Class

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<sup>305</sup>Park 2012.

<sup>306</sup>*Green Tree Financial Corp. v. Bazzle Et. Al.* 2003. 539 U.S. 444 US Supreme Court.

<sup>307</sup>“AAA’s Supplementary Rules for Class Arbitrations” 2003.

<sup>308</sup>Braken II and Dixon 2004, 215–217; see also Rau 2011.

<sup>309</sup>Braken II and Dixon 2004, 215–217.

Arbitration Rules in case of the submission of the class action by other disputants. It is particularly important to notice that the Class Arbitration Rules do not provide for confidentiality of the proceedings, and all submissions and documents produced in the course of class arbitration should be made available on the AAA's website. The awards rendered as a result of class actions can also be accessed upon the filing of the relevant fee.<sup>310</sup>

The above presentation indicated the increasing public function of the AAA, which on the one hand stems from the specific nature of arbitration in the US, and on the other hand, permits the AAA to regulate various legal issues concerning the arbitration proceedings. The question comes to mind here what is the permissible level of such regulation, and how does it correspond with the *consensuality* and *fairness* of the arbitration proceedings in the US? Although the increased transparency of the AAA's class arbitration should be regarded as a positive development, it remains unclear who exercises control over these socially oriented processes, in particular while taking into consideration the exclusion of liability of both the AAA and its arbitrators for any acts provided in the course of class arbitrations.<sup>311</sup> Given the limited right of appeal in institutional arbitration, the transparency and legitimacy of the AAA's class arbitration may be easily undermined vis-à-vis democratic principles and constitutional rights, which the AAA's users should be able to enjoy in the course of the arbitrations, as well as at the post-arbitration level. This appears to overlap with more general concerns regarding "the outsourcing" of public disputes to private institutional arbitration regimes corresponding to the discussion on the "unaccountable private power" in decision-making.<sup>312</sup>

These points are definitely generalizable: uncontrolled private authority in regulating the design of dispute settlement aggravates the problems of democratic legitimacy of private, institutional arbitration vis-à-vis private arbitration users, as well as the *public*—be it the US government or social and political order taken as a whole. This is mostly because of the lack of sufficient accountability mechanisms (be it of private or public nature) of those institutional arbitration regimes that have been increasingly empowered with new public functions. These observations

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<sup>310</sup>Ibid. Rule 16(b).

<sup>311</sup>Ibid. Rule 12.

<sup>312</sup>"Chomsky.info: The Noam Chomsky Website. Radical Democracy, Noam Chomsky Interviewed by John Nichols." Chomsky notes that: "There are plenty of good arguments, in my opinion, against centralized government authority. On the other hand, there's a much worse danger right outside. The centralized government authority is at least to some extent under popular influence, and in principle at least under popular control. The unaccountable private power outside is under no public control. What they call minimizing the state—transferring the decision-making to unaccountable private interests—is not helpful to human beings or to democracy or, for that matter, to the markets. In this time when we are told there is "a triumph of the market", the markets are threatened themselves, aren't they? What's developing is a kind of corporate mercantilism with huge centralized, more or less command economies, integrated with one another, closely tied to state power—relying very heavily on state power, in fact—and enforcing social policies and a conception of social and political order that happen to be highly beneficial to the interests of the top sectors of the population, the richest sectors."

lead us to the conclusion of this chapter, which stresses the interdependence of the emerging public function of institutional arbitration, and the changing dynamics of efficiency and legitimacy of institutional processes, by calling for more responsibility of institutional arbitral regimes in and outside arbitration processes.

## **2.4 Conclusion in the Context of Institutional Liability: On the Relationship Between the Emerging Public Function, Efficiency, and Legitimacy of Institutional Regimes**

This chapter argued that arbitral institutions have increasingly started to assume public function in international commercial arbitration system. The distinction between traditional commercial function and the emerging public function of arbitral institutions pointed out the following issues: (1) the evolving profile of arbitration users of particular arbitration regimes from traditional commercial arbitration parties to public actors including States and/or State-like entities; (2) the expanding category of institutional arbitration “services”; that (3) contributes to the development of the new types of disputes administered by arbitral institutions and vis-à-vis new public actors which surpasses classical understanding of arbitral institutions as private service providers; and finally (4) the declining efficiency of the traditional commercial function of institutional arbitration in view of the changing legitimacy of traditional institutional regimes.

The arbitral institutions that ordinarily competed in the field of cost and speed of arbitration proceedings universalized their arbitration procedures which started to resemble formalized judicial proceedings, entailing additional private regulatory powers of arbitral institutions, exercised on top of the institutional safeguards on behalf of the parties thus in continuation of the principle of party autonomy. Such additional prerogatives, analysed from the internal, *bottom-up* perspective of the public function, as well as the increasing liberalization of arbitrability presented from the *top-down* perspective of the public function, also encourage arbitral institutions to expand their arbitration “services” towards a new, more publicly oriented disputes. This is achieved by attracting the new, usually non-arbitrable categories of disputes to be administered by arbitral institutions, or different arbitration users such as public actors (e.g. States and State-like entities) or non-commercial parties to rely on institutional arbitration.

The analysis of the commercial function showed that arbitral institutions are no longer able to respond effectively to the demands of traditional arbitration users, which still require their arbitrations to be fast and cost-effective, and at the same time providing the parties with the perfect outcomes of arbitration cases. Instead, the amendments of the institutional arbitration rules are aided by the increasing public interests in institutional arbitration. It appears therefore that the traditional commercial function is declining, notwithstanding the institutional attempts to

offer arbitration rules of worldwide applicability, and that—paradoxically—the emerging public function of arbitral institutions becomes a major means of competition between private arbitration centres.

The declining efficiency of the commercial function is exemplified in the recent liability claims against arbitral institutions, which are indicative of the failure of arbitral institutions in providing efficient administration of commercial disputes from the perspective of traditional arbitration users. This dissatisfaction of traditional parties to arbitration is often rooted in the confusion about the role of arbitral institutions in the arbitration proceedings in the context of the emerging public function of arbitral institutions.

In contrast, the top-down analysis of the public function showed the increasing public trust in private institutional arbitration process. Public regulation of arbitrability (which deals with the content of the legal norms on arbitration) has been developed in conjunction with private actors as represented by arbitral institutions. Thus, just as private arbitration users are increasingly questioning the efficacy, efficiency, and ethical neutrality of institutional arbitral regimes, the public actors regulating arbitrability are increasingly opting to use private arbitration exactly because these private systems are perceived to be effective, efficient, and ethically neutral. This trend shows no sign of abating.

This results in the transformations of private institutional arbitration regimes based on two different legitimacy pressures: bottom-up (legitimacy stemming from institutional private regulatory functions) and top-down (democratic legitimacy of institutional arbitration as dispute resolution). This also means that the effectiveness of new, public forms of institutional arbitration is not indicative of the national, regional, or international hard or soft laws but runs in parallel with the changes being adopted by private institutional arbitration regimes. In other words, although different public officials have begun to encourage institutional arbitration in disputes of public interest, the effectiveness of such laws or policies—including the potential introduction of democratic safeguards into arbitration processes—are still largely dependent on the recognition of such policies by private institutional arbitration actors. These conflicting legitimacy pressures also imply a new private–public axis in institutional arbitration regimes that requires arbitral institutions to address the legitimacy concerns of traditional commercial arbitration users, thus from the perspective of the traditional commercial public function of institutional arbitration. At the same time, it calls for the adoption of certain democratic safeguards into institutional regimes in order to respond to public values and the necessary democratic legitimacy of the new forms of institutional arbitration.

Against this background, the following chapter will argue that the public accountability of institutional arbitration process, as well as the legal responsibility of institutional arbitration actors (which are desirable under the recent changes in institutional arbitration regimes), could be addressed by means of the institutional arbitral liability. Modern institutional liability regimes are required in order to respond to the emerging public function of institutional arbitration. Additionally, such liability regimes are needed in view of the traditional commercial function of arbitral institutions that confirms that arbitral institutions operate

on a contractual basis and triggers civil liability of private arbitral institutions for the potential misconduct in the course of arbitrations. In view of this, Chap. 3 will analyse the sources, and the optimal scope, of institutional arbitral liability.

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