

AD HOC OR INSTITUTIONAL ARBITRATION—A CLEAR-CUT DISTINCTION? A CLOSER LOOK AT BORDERLINE CASES

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ABSTRACT

It is generally accepted in both theory and practice of arbitration that there are two basic forms of arbitration, ad hoc and institutional. This long established dichotomy has rarely been questioned, and it has mostly worked well in international arbitration practice.

The present contribution investigates the traditional distinction between ad hoc and institutional arbitration in more detail by looking at “borderline cases”, i.e. constellations that cannot easily be allocated to one of these two categories. Four groups of borderline cases are discussed: (1) UNCITRAL arbitrations, in particular those administered by arbitral institutions; (2) cases in which the parties have chosen institutional rules, but not the issuing institution (and vice versa), (3) the modification of institutional rules by the parties and the identification of a possible “mandatory” core of institutional rules, and (4) “mix and match” (or “hybrid”) arbitrations combining one arbitral institution’s rules with the case’s administration by a different arbitral institution.

By identifying the factors that were decisive for these borderline cases being regarded as institutional or ad hoc, the article is trying to gain insight into the core characteristics underlying each arbitration category. Drawing on these insights, it develops and explains a novel definition of “institutional arbitration”.

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KEYWORDS: *ad hoc arbitration, institutional arbitration, international arbitration, arbitral institutions, 1958 New York Convention, 1961 Geneva Arbitration, UNCITRAL Model Law, UNCITRAL Arbitration Rules, mandatory institutional rules, hybrid arbitrations, mix and match arbitrations, administration of arbitrations*

I. INTRODUCTION

In both theory and practice of arbitration, it is generally agreed that there are two basic forms of arbitration, *ad hoc* and institutional.¹ This truism is so self-understood that it has rarely been challenged, and few attempts have been made to identify what precisely makes an arbitration institutional or *ad hoc*. The latter is somewhat surprising, given that the principle of party autonomy prevailing in arbitration can result in a great variety of dispute settlement designs that may not always be easily accommodated by these two categories that have interchangeably been referred to as “forms”, “kind”,² “types” or “categories” of arbitration. (Article IV(6) of the 1961 European Convention on International Commercial Arbitration,³ one of the few provisions in international arbitration law that expressly addresses the distinction between *ad hoc* and institutional arbitration, speaks of “mode of arbitration”.)

The present article seeks to investigate the traditional distinction between the two forms of arbitration by looking at “borderline cases”, i.e., constellations that are not easily allocated to either category. By identifying the factors eventually decisive for making the respective arbitrations institutional or *ad hoc*, it is hoped that insight can be gained into the core characteristics of each arbitration type. The article will proceed as follows: In Part II, it will outline accepted definitions of the two traditional arbitration categories, before clarifying in Part III whether and why the distinction matters at all. Part IV turns to four types of borderline cases and the lessons to be learned from them for the delimitation of arbitration categories. Part V summarizes the results and draws consequences by outlining a novel definition of institutional arbitration, before Part VI briefly concludes.

¹ Bovis Lend Lease Pte. Ltd. v. Jay-Tech Marine & Projects Pte. Ltd., [2005] SGHC 91, ¶ 21 (Sing.) [hereinafter Bovis]; Gerald Aksen, *Ad Hoc Versus Institutional Arbitration*, 2(1) ICC BULL. 8, 8 (1991); GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 169 (2d ed. 2014); P. A. Lalive, *Problèmes Relatifs à l'Arbitrage International Commercial*, 120 ACADÉMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS 568, 664 (1967); JULIAN D. M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION ¶ 3-4 (2003); MICHAEL MCILWRATH & JOHN SAVAGE, INTERNATIONAL ARBITRATION AND MEDIATION: A PRACTICAL GUIDE ¶ 1-063 (2010); Jan Heiner Nedden & Axel Benjamin Herzberg, *Einleitung*, in ICC-SCHO/DIS-SCHO: PRAXISKOMMENTAR ZU DEN SCHIEDSGERICHTSORDNUNGEN 1, ¶ 9 (Jan Heiner Nedden & Axel Benjamin Herzberg eds., 2014); Anne Véronique Schlaepfer & Angelina M. Petti, *Institutional Versus Ad Hoc Arbitration*, in INTERNATIONAL ARBITRATION IN SWITZERLAND: A HANDBOOK FOR PRACTITIONERS 13 (Elliott Geisinger & Nathalie Voser eds., 2d ed. 2013).

² Insignia Technology Co. Ltd. v. Alstom Technology Ltd., [2009] SGCA 24, 3 Singapore Law Reports (Reissue) 936, ¶ 34 (Sing.) [hereinafter *Insignia v. Alstom*].

³ European Convention on International Commercial Arbitration, *opened for signature* Apr. 21, 1961, 484 U.N.T.S. 364 [hereinafter 1961 Geneva Convention].

II. ACCEPTED DEFINITIONS OF ARBITRATION CATEGORIES

A. The Traditional Ad Hoc/Institutional Arbitration Dichotomy

The importance of party autonomy is well established in international arbitration.⁴ Its exercise can take various forms. One of these forms, namely party autonomy to submit to arbitration, is primarily exercised by the parties jointly deciding whether to go to *ad hoc* arbitration or to choose institutional arbitration.⁵ It is therefore not surprising that these two traditional modes of arbitration are most often discussed with a view to the parties' choice between them,⁶ and the categories of *ad hoc* arbitration on one hand and institutional arbitration on the other are generally presented in terms of their perceived advantages and disadvantages.⁷ This approach accordingly regards the dichotomy of arbitration categories as a menu that parties can choose from: There are set meals (institutional arbitration), and there is dining *à la carte* (*ad hoc* arbitration).

When it comes to defining the two categories on the menu, it is interesting that no truly universally used definition for either *ad hoc* arbitration or institutional arbitration can be identified.⁸ In spite of this, the definitions used in major arbitration textbooks are at least quite similar. In addition, many arbitration treatises also agree by first defining institutional arbitration and addressing *ad hoc* arbitration second, thereby indicating *ad hoc* arbitration's default character.

⁴ THOMAS E. CARBONNEAU, *THE LAW AND PRACTICE OF ARBITRATION* 21-22 (2d ed. 2007); FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION ¶ 46 (Emmanuel Gaillard & John Savage eds., 1999) [hereinafter FOUCHARD GAILLARD GOLDMAN]; NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 6.07 (6th ed. 2015).

⁵ Karl-Heinz Böckstiegel, *Party Autonomy and Case Management—Experiences and Suggestions of an Arbitrator*, 11 SCHIEDSVZ 1, 2 (2013); BORN, *supra* note 1, at 168-69; Kinga Timár, *The Legal Relationship Between the Parties and the Arbitral Institution*, 2013(1) ELTE L.J. 103, 105 (2013).

⁶ CARBONNEAU, *supra* note 4, at 10, 626; BLACKABY ET AL., *supra* note 4, ¶¶ 1.140, 2.79; Timár, *supra* note 5, at 105-07; ANDREW TWEEDDALE & KEREN TWEEDDALE, *ARBITRATION OF COMMERCIAL DISPUTES* ¶ 3.01 (2005).

⁷ See BORN, *supra* note 1, at 171; Dana H. Freyer, *Practical Considerations in Drafting Dispute Resolution Provisions in International Commercial Contracts: A US Perspective*, 15(4) J. INT'L ARB. 7, 20-23 (1998); BLACKABY ET AL., *supra* note 4, ¶¶ 1.140-56; Schlaepfer & Petti, *supra* note 1, at 14-17, 20-21; William K. Slate II, *International Arbitration: Do Institutions Make A Difference?*, 31 WAKE FOREST L. REV. 41, 52-59 (1996).

⁸ Pilar Perales Viscasillas, *The Role of Arbitral Institutions Under the 2010 UNCITRAL Arbitration Rules*, 6 LIMA ARB. 26, 31 (2014).

B. Defining Institutional Arbitration

In doing so, an “institutional” arbitration has been described as one that is administered by a specialist arbitral institution under its own rules of arbitration.⁹ According to another definition, institutional arbitrations are conducted pursuant to institutional arbitration rules, almost always overseen by an administrative authority with responsibility for various aspects relating to constituting the arbitral tribunal, fixing the arbitrators’ compensation and similar matters.¹⁰ A yet different definition regards institutional arbitration as an arbitration procedure conducted under the auspices of or administered or directed by an existing institution.¹¹

The above range of definitions indicates that no single comprehensive definition of institutional arbitration has yet been developed.¹² Nevertheless, the already mentioned attempts at a definition as well as a few others¹³ show significant similarities by mostly employing the same two components: The institution’s administration of arbitration proceedings, and its publication of institutional arbitration rules. Differences primarily result from the emphasis, if any, that is put on one or the other component. While some consider the administration by the institution as the more important factor,¹⁴ others focus primarily on the institutional rules,¹⁵ and yet others regard both components as equally important.¹⁶

⁹ BLACKABY ET AL., *supra* note 4, ¶ 1.140; Bovis, *supra* note 1, ¶ 21; Slate, *supra* note 7, at 47; MIRKO WIDDASCHECK, DIE UNCITRAL ARBITRATION RULES ALS SEMI-INSTITUTIONELLE SCHIEDSVERFAHRENSREGELN 14 (2016); *see also* CHRISTIAN BÜHRING-UHLE ET AL., ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS 33 (2d ed. 2006); Rolf A. Schütze, *Introduction*, in INSTITUTIONAL ARBITRATION 1, ¶ 1 (Rolf A. Schütze ed., 2013).

¹⁰ BORN, *supra* note 1, at 169.

¹¹ LEW ET AL., *supra* note 1, ¶ 3-6; *see also* Perales Viscasillas, *supra* note 8, at 32.

¹² BARBARA ALICJA WARWAS, THE LIABILITY OF ARBITRAL INSTITUTIONS: LEGITIMACY CHALLENGES AND FUNCTIONAL RESPONSES 20 (2017); *see also* Lalive, *supra* note 1, at 664.

¹³ *See also* KARL HEINZ SCHWAB & GERHARD WALTER, SCHIEDSGERICHTSBARKEIT ¶ 10 (7th ed. 2005); TWEEDDALE & TWEEDDALE, *supra* note 6, ¶ 3.01.

¹⁴ Helena Hsi Chia Chen, *A Review of the Taiwanese Court’s Ruling on Ad Hoc Arbitral Awards*, 20 ASIA PAC. L. REV. 89, 92 (2012); JACOB GRIERSON & ANNET VAN HOOFT, ARBITRATING UNDER THE 2012 ICC RULES 28 (2012); LEW ET AL., *supra* note 1, ¶ 3-6; Perales Viscasillas, *supra* note 8, at 32; Friederike Schäfer, *Institutionelle Schiedsgerichtsbarkeit – Allgemeines*, in HANDBUCH SCHIEDSGERICHTSBARKEIT ¶ 308 (Hellwig Torggler et al. eds., 2017); Schlaepfer & Petti, *supra* note 1, at 19; PETER SCHLOSSER, DAS RECHT DER INTERNATIONALEN PRIVATEN SCHIEDSGERICHTSBARKEIT ¶ 599 (2d ed. 1989); WEI SUN & MELANIE WILLEMS, ARBITRATION IN CHINA 10 (2015); TWEEDDALE & TWEEDDALE, *supra* note 6, ¶ 3.01.

¹⁵ BORN, *supra* note 1, at 169; BÜHRING-UHLE ET AL., *supra* note 9, at 33; SCHWAB & WALTER, *supra* note 13, ¶ 10; HERMAN VERBIST ET AL., ICC ARBITRATION IN PRACTICE 10 (2d ed. 2015).

¹⁶ BLACKABY ET AL., *supra* note 4, ¶ 1.140; Schütze, *supra* note 9, ¶ 1; Slate, *supra* note 7, at 47; P.J. VAN OMMEREN, RAPPORT AU CONGRÈS INTERNATIONAL DE L’ARBITRAGE 2 (1961).

C. Defining Ad Hoc Arbitration

In contrast, *ad hoc* arbitration has primarily been defined as the opposite of institutional arbitration, as a category encompassing all arbitrations that are not institutional.¹⁷ “Negative” definitions of this kind describe *ad hoc* arbitration as arbitrations that are conducted without the involvement of any arbitral institution,¹⁸ that are independent of all institutions,¹⁹ that are conducted without the benefit of an appointing and administrative authority or (generally) preexisting arbitration rules²⁰ or that are not administered by an arbitral institution.²¹ Almost mirroring the various attempts at defining institutional arbitration,²² they thereby range from no institutional involvement at all via neither institutional administration nor use of institutional rules to (merely) no institutional administration. The prevailing “negative” approach of these definitions reflects the default nature of *ad hoc* arbitration, given that an arbitration will be *ad hoc* whenever parties are silent about their desired arbitration mode.²³

Positive descriptions of this arbitration type are only rarely encountered. An example can be found in Article I(2)(b) of the 1961 Geneva Convention, where *ad hoc* arbitration is defined as “settlement by arbitrators appointed for each case”.

D. Challenges to the Traditional Dichotomy

In recent years, the traditional *ad hoc*/institutional dichotomy has occasionally been challenged in legal writings. Authors have *inter alia* pointed out that the borderline between the two categories is not always clear,²⁴ and that difficulties are encountered in certain cases to distinguish between them.²⁵ Much in the same way, it has been regarded as generally inappropriate to only consider the differences between *ad hoc* and

¹⁷ Pieter Sanders, *Commentary on UNCITRAL Arbitration Rules*, 2 YEARBOOK COM. ARB. 172, ¶ 2.4 (1977).

¹⁸ FOUCHARD GAILLARD GOLDMAN, *supra* note 4, ¶ 253; BLACKABY ET AL., *supra* note 4, ¶ 1.140.

¹⁹ LEW ET AL., *supra* note 1, ¶ 3-9; Schlaepfer & Petti, *supra* note 1, at 13-14.

²⁰ BORN, *supra* note 1, at 169.

²¹ DAVID ST. JOHN SUTTON ET AL., RUSSELL ON ARBITRATION ¶ 2-006 (23th ed. 2007); Jennifer Kirby, *Insigma Technology Co. Ltd. v. Alstom Technology Ltd.: SIAC Can Administer Cases Under the ICC Rules?!*, 25(3) ARB. INT’L 319, 324 (2009); BÜHRING-UHLE ET AL., *supra* note 9, at 35; SUN & WILLEMS, *supra* note 14, at 10.

²² *Supra* Section II.B.

²³ LEW ET AL., *supra* note 1, ¶ 3-5; Perales Viscasillas, *supra* note 8, at 35.

²⁴ Jean-Baptiste Racine, Note, 22 Janvier 2010, *Tribunal de Grande Instance de Paris*, 2010(3) REVUE DE L’ARBITRAGE 571, 581-82 (2010); TWEEDDALE & TWEEDDALE, *supra* note 6, ¶ 3.02; CHRISTIAN WOLF, DIE INSTITUTIONELLE HANDELSCHIEDSGERICHTSBARKEIT 10 (1992).

²⁵ Perales Viscasillas, *supra* note 8, at 51.

institutional arbitration in the extreme without considering hybrid models.²⁶ Others have stressed that the distinction in any case should not be overestimated.²⁷

The present contribution takes up these challenges and tests their justification by looking at a number of “borderline cases”, i.e., cases in which the seemingly clear-cut line between institutional and *ad hoc* arbitration has proven difficult to draw. In investigating such borderline constellations and their treatment both in case law and in academic discussions, an attempt will be made to determine what lessons, if any, can be learned from them for the general distinction between arbitration categories.

III. WHY DOES THE DISTINCTION MATTER?

Before we turn to these borderline cases, it seems appropriate to ask why the distinction between *ad hoc* and institutional arbitration, clear-cut or not, actually matters. Commentators have stressed in a generic manner that institutional arbitrations are different, both in fact and law, from *ad hoc* arbitrations,²⁸ and that these differences are vitally important.²⁹ In looking for the source of these differences, three possible reasons come to mind.

A. Differences in Applicable Procedural Rules

First of all, the distinction between *ad hoc* and institutional arbitration seemingly matters because of the different rules of procedure that apply in these arbitrations. Indeed, the difference between the parties “own” rules of procedure established in an *ad hoc* arbitration and the time-tested, but generic procedural rules laid down by established arbitral institutions, sometimes likened to the difference between a tailor-made suit and one that is bought “off the peg”,³⁰ has often been stressed.

However, upon closer scrutiny it becomes clear that the differences in the applicable procedural rules do not (or at least not primarily) depend on the arbitration type that a specific arbitration belongs to, but on the specific rules that apply to a particular arbitration due to either the parties’ agreement, or according to the default regime of the *lex arbitri*. In other words, the decisive factor is not the distinction between *ad hoc* arbitration on one hand and institutional arbitration on the other, but rather the specific

²⁶ JEFFREY WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION ¶ 3.16 (2012).

²⁷ Racine, *supra* note 24, at 581-82.

²⁸ FOUCHARD GAILLARD GOLDMAN, *supra* note 4, ¶ 812.

²⁹ BORN, *supra* note 1, at 169.

³⁰ BLACKABY ET AL., *supra* note 4, ¶ 1.143; TWEEDDALE & TWEEDDALE, *supra* note 6, ¶ 3.77.

set of rules governing the specific arbitration proceedings. In this respect, it should be kept in mind that significant differences also exist between different institutional rules and the role they allocate to the administering institution,³¹ sometimes referred to as “hands-off approach” (as e.g., London Court of International Arbitration (LCIA) arbitrations) vs. “hands-on approach” (as notably ICC International Court of Arbitration (ICC) arbitrations).³² Notwithstanding the differences in procedural rules, these arbitrations are nevertheless indiscriminately recognized as “institutional”.³³ In fact, an arbitration involving an arbitral institution that fulfils only very limited tasks may well appear closer to an *ad hoc* proceeding than to a fully-administered institutional arbitration. It is therefore submitted that the differences in applicable procedural rules are not what gives relevance to the precise delimitation between arbitration categories.

B. Practical Differences

A second group of reasons why the *ad hoc*/institutional distinction matters may be referred to as “practical differences”, in the sense that these differences do not directly lie in the rules of procedure applicable to the two types of arbitrations. Some of these practical differences are direct consequences of the procedure in *ad hoc* vs. institutional arbitration,³⁴ as e.g., the strategic options available to a claimant when confronted with a respondent who refuses to nominate an arbitrator. Insofar, differences of this type are mere extensions of the differences in the respective rules of procedure addressed earlier.³⁵

Other practical differences are less directly determined by procedural rules. An example is the extra cachet that institutional awards supposedly carry in comparison to awards rendered *ad hoc*.³⁶ In an oft-quoted assessment, this not strictly judicial, but rather ‘soft’ factor has been described as there being “something more majestic, more dignified and more comforting” about institutional arbitral awards.³⁷ However, it is submitted that this perception and the practical consequences emanating therefrom (as e.g., an easier enforceability of institutional awards) depend

³¹ Timár, *supra* note 5, at 107.

³² See RÉMY GERBAY, THE FUNCTIONS OF ARBITRAL INSTITUTIONS 45 (2016); PRACTITIONER’S HANDBOOK ON INTERNATIONAL COMMERCIAL ARBITRATION ¶ 18.20 (Frank-Bernd Weigand ed., 2009); see also LEW ET AL., *supra* note 1, ¶ 3-19.

³³ *Infra* Section IV.A.3.(c).

³⁴ See MCILWRATH & SAVAGE, *supra* note 1, ¶ 1-146.

³⁵ *Supra* Section III.A.

³⁶ LEW ET AL., *supra* note 1, ¶ 3-20; BORN, *supra* note 1, at 171; BÜHRING-UHLE ET AL., *supra* note 9, at 36; Schlaepfer & Petti, *supra* note 1, at 20.

³⁷ Francis J. Higgins et al., *Pitfalls in International Commercial Arbitration*, 35 BUS. L. 1035, 1051 (1980).

less on the arbitration being “institutional”, but rather on the particular institution’s reputation in the field. Instead of the cachet of institutional arbitration as a category, it is therefore the cachet of a particular arbitral institution that makes the practical difference.³⁸ The same is true for another practical advantage of institutional arbitration that is sometimes mentioned, namely the “comfort” element in an arbitral institution’s existence:³⁹ As parties will draw such comfort from a particular institution’s experience and reputation, that institution’s involvement in an arbitration makes the difference, and not the proceedings’ categorization as “institutional”.

C. Legal Differences That Depend on the Precise Definition of Arbitration Categories

Accordingly, it is but a third reason that can make the precise distinction between *ad hoc* and institutional arbitration relevant: The exact delimitation of these traditional kinds of arbitration matters where legal rules of arbitration law, either of international or domestic provenance, attach legal consequences to this distinction by distinguishing between the two categories. Such rules of law are not common, but they do exist. In addressing them, it is helpful to differentiate according to the consequences that a rule attaches to the *ad hoc*/institutional distinction. The result is a group of legal provisions we can refer to as “category inclusive” rules of arbitration law, to be addressed first, before we turn to a second group of “category exclusive” rules of arbitration law.

1. “Category Inclusive” Rules of Arbitration Law — The first group of arbitration law provisions refers to *ad hoc* and/or institutional arbitrations, but treats both types of arbitration alike. Category inclusive rules therefore connect no legal consequences to the *ad hoc*/institutional distinction. An example from international arbitration law is Article I(2) of the 1958 New York Convention,⁴⁰ which provides that “[t]he term ‘arbitral awards’ shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.” Although the reference to “permanent arbitral bodies” was historically inserted in order to accommodate permanent bodies like Arbitration Commissions for External Trade that were a feature of jurisprudence in the then-Socialist States,⁴¹ case law under Article I(2) of

³⁸ See LEW ET AL., *supra* note 1, ¶ 3-20; BÜHRING-UHLE ET AL., *supra* note 9, at 36.

³⁹ Lalive, *supra* note 1, at 668; LEW ET AL., *supra* note 1, ¶ 3-20.

⁴⁰ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 15, 1958, 330 U.N.T.S. 38 [hereinafter 1958 New York Convention].

⁴¹ RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 21 (Herbert Kronke et al. eds., 2010); MARIKE R. P. PAULSSON,

the 1958 New York Convention has also applied the term to arbitral institutions⁴² like the Court of Arbitration at the Bulgarian Chamber of Commerce and Industry,⁴³ the Arbitral Tribunal at the Vienna Commodity Exchange,⁴⁴ the Arbitration Board of the Coffee Trade Federation in London,⁴⁵ the Arbitral Tribunal according to the Conditions of Business of the Waren-Verein der Hamburger Börse e.V.⁴⁶ or the ICC International Court of Arbitration.⁴⁷ Similar provisions can be found in Article I(2)(b) of the 1961 Geneva Convention, stating that “the term ‘arbitration’ shall mean not only settlement by arbitrators appointed for each case (*ad hoc* arbitration) but also by permanent arbitral institutions”,⁴⁸ and Article 2(a) of the 1985/2006 UNCITRAL Model Law on International Commercial Arbitration,⁴⁹ which provides that “arbitration” means “any arbitration whether or not administered by a permanent arbitral institution”. In domestic arbitration laws, comparable provisions are *inter alia* Article 182(1) of the Swiss Arbitration Law (IPRG),⁵⁰ § 1042(3) of the German Code of Civil Procedure, Article 832 of the Italian Code of Civil Procedure, Articles 1446, 1452-1454, 1456, 1464(3) and 1508 of the French Code of Civil Procedure, and section 24(2) of the 1996 English Arbitration Act.

Legal rules of this type primarily aim at confirming the existence and legitimacy of institutional arbitration.⁵¹ Today they may seem superfluous, as they merely confirm an internationally recognized principle.⁵² Due to their inclusive purpose, it does not matter under such provisions how the terms employed therein—“permanent arbitral bodies”, “permanent arbitral

THE 1958 NEW YORK CONVENTION IN ACTION 121 (2016). More details on such arbitration commissions, also see Lalive, *supra* note 1, at 667-68.

⁴² Equating “permanent arbitral bodies” under Article I(2) of the 1958 New York Convention with arbitral institutions, see SUN & WILLEMS, *supra* note 14, at 12.

⁴³ Cassazione Sezione Civile [Cass.], Apr. 17, 1978, 4 YEARBOOK COM. ARB. 282, 282-83 (1979) (It.).

⁴⁴ Corte di Appello di Ancona [App.], June 8, 1981, 8 YEARBOOK COM. ARB. 389, 389 (1983) (It.).

⁴⁵ Tribunal Supremo [S.T.S.], Oct. 8, 1981, 8 YEARBOOK COM. ARB. 406, 406 (1983) (Spain).

⁴⁶ Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 2, 1982, III ZR 85/81, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1267 (1268), 1983 (Ger.).

⁴⁷ *FG Hemisphere Associates LLC v Democratic Republic of Congo* [2010] NSWSC 1394, ¶¶ 8, 10 (Austl.).

⁴⁸ See Art. I(2)(b) of the 1961 Geneva Convention, *supra* Section II.C.

⁴⁹ United Nations Commission on International Trade Law Model Law (UNCITRAL) Model Law on International Commercial Arbitration (2006), http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf [hereinafter UNCITRAL Model Law].

⁵⁰ Article 182(1) of the Swiss IPRG provides that the parties may regulate the arbitral procedure directly or by reference to rules of arbitration (*schiedsgerichtliche Verfahrensordnung*). The term “reference to rules of arbitration” is generally equated with a choice of institutional arbitration; see BERNHARD BERGER & FRANZ KELLERHALS, INTERNATIONAL AND DOMESTIC ARBITRATION IN SWITZERLAND ¶ 22 (3d ed. 2015).

⁵¹ On Article I(2) of the 1958 New York Convention, see FOUCHARD GAILLARD GOLDMAN, *supra* note 4, ¶ 253; see also BORN, *supra* note 1, at 2920.

⁵² PAULSSON, *supra* note 41, at 120.

institutions” or similar—are precisely defined, because awards emanating from such bodies are treated in the same way as other arbitral awards, notably those rendered in *ad hoc* arbitrations.⁵³ Accordingly, “category inclusive” provisions make the distinction between *ad hoc* and institutional arbitration a moot point, leaving the precise delimitation of the two categories irrelevant.

2. “*Category Exclusive*” Rules of Arbitration Law — The position is different under “category exclusive” rules of arbitration law that refer to a particular arbitration category in order to treat it differently from another arbitration category. Provisions of this type are rare when compared to “category inclusive” legal provisions, but do occasionally occur.

(a) *The 1961 Geneva Convention as an Example* — Examples from international arbitration law can be found in Article IV of the 1961 Geneva Convention. Under the heading “Organization of the arbitration”, Article IV(1) provides that the parties to an arbitration agreement are free to submit their disputes to either a permanent arbitral institution (Article IV(1)(a)) or an *ad hoc* arbitral procedure (Article IV(1)(b)), and stipulates different rules about the organization of these different “modes” of arbitration.⁵⁴ Article IV(5) lays down a procedure for the determination of a permanent arbitral institution where the parties have agreed to submit their disputes to an arbitral institution, but have not determined which.⁵⁵ Both Article IV(1)(a) and (b) as well as Article IV(5) of the 1961 Geneva Convention therefore only apply to institutional or *ad hoc* arbitrations and are accordingly “category exclusive”. (In contrast, the neighbouring provisions in Articles IV(4)(d) and (6) of the same convention arguably belong to the ‘category inclusive’ type discussed earlier.⁵⁶)

(b) *PRC Arbitration Law as an Example* — Among domestic arbitration laws, the most prominent “category exclusive” rule is probably Article 16 in conjunction with Article 18 of the Arbitration Law of the Peoples’ Republic of China. Article 16(2) of the Chinese Arbitration Law

⁵³ See MÜNCHENER KOMMENTAR ZUR ZPO ¶ 7 (Jens Adolphsen et al. eds., 2013).

⁵⁴ See Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 2, 1982, III ZR 85/81, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1267 (1268), 1983 (Ger.).

⁵⁵ Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 2, 1982, III ZR 85/81, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1267, 1983 (Ger.) concerned an imperfectly drafted arbitration clause with an unclear reference to “Hamburger freundschaftliche Arbitrage aufgrund der Waren-Verein der Hamburger Boerse e.V./Arbitraggio amichevole in conformita alle condizioni del Waren-Verein der Hamburger Boerse e.V.”: The German Federal Supreme Court held that both arbitral tribunals of the Hamburger freundschaftliche Arbitrage and arbitral tribunals under the Rules of the Waren-Verein der Hamburger Börse e.V. equally qualify as “permanent arbitral institutions” in accordance with Article IV(1) of the 1961 Geneva Convention, but declared the arbitration clause invalid because it remained unclear which of the two arbitral institutions it referred to. The decision has been criticized for not applying Article IV(5), (6) of the 1961 Geneva Convention; see SCHLOSSER, *supra* note 14, ¶ 559.

⁵⁶ *Supra* Section III.C.1.

expressly lists “[t]he arbitration commission chosen” as one of the mandatory requirements of a valid arbitration agreement, and Article 18 of the Arbitration Law provides that the arbitration agreement will be considered invalid if the parties fail to designate an arbitration institution in the arbitration agreement. The requirement to choose an “arbitration commission”—a term that equals the more commonly used “arbitration institution”⁵⁷—is particular to the PRC’s current arbitration law⁵⁸ and effectively rules out any *ad hoc* arbitration in mainland China.⁵⁹ While this means that the precise distinction between *ad hoc* and institutional arbitration matters under the arbitration law of the PRC, the general delimitation of the two categories does not necessarily follow the same principles used elsewhere: This is so because Article 10 of the Arbitration Law provides a specific definition of the term “arbitration commission”,⁶⁰ although its applicability in the context of Articles 16 and 18 is not entirely uncontroversial.⁶¹ According to commentators, the purpose of the Chinese *lex arbitri*’s focus on institutional arbitration is to allow the government to conveniently monitor arbitral institutions and cases,⁶² a goal less easily reached in *ad hoc* arbitration.

(c) *Taiwan Arbitration Law as an Example* — A further example of “category exclusive” domestic arbitration rules is provided by the arbitration law of Taiwan. In the *Jin Cheng Feng* case, the Taiwanese courts adopted a (controversially) narrow interpretation of Article 37(1) of the 1998 Taiwan Arbitration Act and held that only an arbitration institution’s award is binding on the parties and has the same validity as a final court judgment.⁶³ A possible reason for this interpretation is that Taiwanese arbitration law does not include a counterpart to Article 2(a) of the UNCITRAL Model Law,⁶⁴ a “category inclusive” provision mentioned

⁵⁷ John Mo, *Probing the Uniformity of the Arbitration System in the PRC*, 17(3) J. INT’L ARB. 1, 29 (2000); Jingzhou Tao & Clarisse von Wunscheim, *Articles 16 and 18 of the PRC Arbitration Law: The Great Wall of China for Foreign Arbitration Institutions*, 23(2) ARB. INT’L 309, 311 (2007).

⁵⁸ Tao & von Wunscheim, *supra* note 57, at 311.

⁵⁹ Chen, *supra* note 14, at 105-06; Mo, *supra* note 57, at 29; SUN & WILLEMS, *supra* note 14, at 11; Tao & von Wunscheim, *supra* note 57, at 312; Jane Willems, *The Arbitrator’s Jurisdiction at Risk: The Case of Hybrid and Asymmetrical Arbitration Agreements*, in THE POWERS AND DUTIES OF AN ARBITRATOR: LIBER AMICORUM PIERRE A. KARRER 403, 407 (Patricia Shaughnessy & Sherlin Tung eds., 2017); Jian Zhou, *Arbitration Agreements in China: Battles on Designation of Arbitral Institution and Ad Hoc Arbitration*, 23(2) J. INT’L ARB. 145, 146 (2006).

⁶⁰ Mo, *supra* note 57, at 22.

⁶¹ See Tao & von Wunscheim, *supra* note 57, at 311.

⁶² Zhou, *supra* note 59, at 169.

⁶³ See Chen, *supra* note 14, at 89; see generally Houchih Kuo, *Refusal of Taiwanese Court to Recognize Ad Hoc Arbitration: Implications and the Future of Ad Hoc Arbitration in Taiwan*, ASIAN DISP. REV. 59 (2012).

⁶⁴ Kuo, *supra* note 63, at 59.

earlier⁶⁵ that expressly defines arbitration as any arbitration whether or not administered by a permanent arbitral institution. In light of the current case law, the distinction between *ad hoc* and institutional arbitration matters under Taiwan arbitration law as it stands,⁶⁶ although Taiwanese scholars argue that both categories of arbitration should be permitted under the Taiwan Arbitration Act.⁶⁷ This does not necessarily mean that the delimitation between these two arbitration categories as developed in other contexts can also be used in Taiwan arbitration law, because—not unlike the arbitration law of the PRC—Article 54 of the Taiwan Arbitration Act provides its own definition of the term “arbitration institution” that effectively covers only arbitral institutions whose establishment has been approved by the Taiwanese government.⁶⁸

(d) *Need for an Autonomous Construction of Each “Category Exclusive” Rule* — Under “category exclusive” rules of arbitration law,⁶⁹ the precise definition of the arbitration category (or categories) employed therein accordingly matters, because it determines whether the legal consequences provided for in such provisions are triggered. The distinction between the categories of institutional arbitration, *ad hoc* arbitration and conceivable other types of arbitration is therefore of legal relevance under such rules of law.

While it is tempting to conclude that this fact automatically grants relevance to the topic discussed here, a note of caution is in order: The general distinction between arbitration categories to be attempted in the following does not necessarily have to dovetail with the definition of arbitration categories used in individual provisions of arbitration law, may they be domestic or international. The reason is simple: Each of these provisions has to be construed in accordance with the rules of interpretation applicable to the respective legal norm, and these rules may well differ. Interpretation rules furthermore often look to the purpose of the respective provision, its legislative history and systematic relationship with other provisions of law, and these factors will frequently be unique to a particular “category exclusive” rule of arbitration law.

⁶⁵ *Supra* Section III.C.1.

⁶⁶ Kuo, *supra* note 63, at 60 (stresses that parties are strongly advised not to choose *ad hoc* arbitration in Taiwan.).

⁶⁷ See Chen, *supra* note 14, at 97 with numerous references; Kuo, *supra* note 63, at 61.

⁶⁸ Kuo, *supra* note 63, at 60.

⁶⁹ *Supra* Section III.C.2.

D. Merits of a Comparative Law and Practice Perspective on Arbitration Categories

In contrast, the present article adopts a comparative approach, looking at “borderline cases” that have been addressed under various domestic arbitration laws and institutional arbitration rules, and trying to identify a common core of principles underlying the treatment of these cases. As a result, the conclusions to be developed below are not *tel quel* applicable to each existing provision that distinguishes between arbitration categories, and should not be so understood.

What are then the merits of the comparative law and practice perspective followed here? In response to this well-justified question, one may refer to the traditional purposes of comparative legal research: Such research has famously been described as an “*école de vérité*” which extends and enriches the “supply of solutions” available,⁷⁰ and offers jurists the opportunity of finding a better solution to a pertinent problem in their time and place.⁷¹ An important practical use of comparative law is its function as a tool in the construction of domestic and international legal rules, in the area of arbitration as much as elsewhere.⁷² As issues of construction from time to time concern the specific question tackled in the present article, its results may prove helpful to arbitrators, courts and counsel in determining where the line between *ad hoc* arbitration and institutional arbitration precisely runs. Last but not least, the arguments to be developed below are a modest contribution to the ongoing discussion about the theory of arbitration,⁷³ including the alleged “institutionalization” of international commercial arbitration.⁷⁴

IV. BORDERLINE CASES—AND WHAT WE CAN LEARN FROM THEM

As already indicated,⁷⁵ the traditional *ad hoc*/institutional arbitration dichotomy has increasingly been challenged in recent years, and it has been pointed out that the boundaries between these established categories can become blurred. The latter phenomenon becomes apparent in “borderline cases”, i.e., cases that cannot without difficulties be filed under one of the two categories. Four such borderline constellations will be investigated, in

⁷⁰ Ernst Zitelmann, *Aufgaben und Bedeutung der Rechtsvergleichung*, 5 DEUTSCHE JURISTEN-ZEITUNG 329, 329-32 (1900).

⁷¹ KONRAD ZWIEGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 15 (3d ed. 1998).

⁷² See Jürgen Basedow, *Comparative Law and Its Clients*, 62(4) AM. J. COMP. L. 821, 839-42 (2014); ZWIEGERT & KÖTZ, *supra* note 71, at 18.

⁷³ See BORN, *supra* note 1, at 214-17; FOUCHARD GAILLARD GOLDMAN, *supra* note 4, ¶¶ 44-57; LEW ET AL., *supra* note 1, ¶¶ 5-1 to 5-33.

⁷⁴ FOUCHARD GAILLARD GOLDMAN, *supra* note 4, ¶ 53.

⁷⁵ *Supra* Section II.D.

order to determine what lessons can be learned from their treatment in case law and in academic discussions for the distinction between institutional and *ad hoc* arbitration in general.

All four constellations to be addressed below have one factor in common: They are the result of party autonomy, the fundamental principle of all arbitration that, at least in principle, also applies in institutional arbitration.⁷⁶ Where the parties have exercised their autonomy in a particular manner, the traditionally clear-cut line between *ad hoc* and institutional arbitration blurs.

A. UNCITRAL Arbitrations Involving Arbitral Institutions

The first group of borderline cases are arbitral proceedings conducted under the UNCITRAL Arbitration Rules. The well-known set of rules was initially adopted by the United Nations Commission on International Trade Law (hereinafter “UNCITRAL”) in 1976 in order to contribute to the development of harmonious international economic relations through the establishment of rules for *ad hoc* arbitration that are acceptable in countries with different legal, social and economic systems.⁷⁷ After their successful use by parties in a wide variety of circumstances covering a broad range of disputes,⁷⁸ the Rules underwent a partial revision in 2010.

As UNCITRAL itself does not administer arbitrations,⁷⁹ the UNCITRAL Arbitration Rules were designed as a set of stand-alone arbitration rules not necessarily depending on institutional support. Arbitrations under the UNCITRAL Rules therefore display one of the features commonly associated with institutional arbitration⁸⁰ (namely the use of preexisting arbitration rules), but not the other (the proceedings’ administration by an institution). This characteristic has led to controversial discussions about the position of UNCITRAL arbitrations within the traditionally “bifocal” world of *ad hoc* and institutional arbitrations.

⁷⁶ Andrea Carlevaris, *The Bounds of Party Autonomy in Institutional Arbitration*, in INTERNATIONAL ARBITRATION UNDER REVIEW: ESSAYS IN HONOUR OF JOHN BEECHEY 103, 103-04 (Andrea Carlevaris et al. ed., 2015); Freyer, *supra* note 7, at 14; Schäfer, *supra* note 14, ¶ 339; MAXI SCHERER ET AL., ARBITRATING UNDER THE 2014 LCIA RULES: A USER’S GUIDE 36 (2015); SHAI WADE ET AL., A COMMENTARY ON THE LCIA ARBITRATION RULES 2014 ¶ 1-019 (2015).

⁷⁷ G.A. Res. 31/98 (Dec. 15, 1976).

⁷⁸ G.A. Res. 65/22 (Dec. 6, 2010); Sarah Grimmer, *The Expanded Role of the Appointing Authority Under the UNCITRAL Arbitration Rules 2010*, 28(5) J. INT’L ARB. 501, 501 (2011).

⁷⁹ CLYDE CROFT ET AL., A GUIDE TO THE UNCITRAL ARBITRATION RULES ¶ 6.1 (2013); Stephen L. Drymer, *The Revised 2010 UNCITRAL Arbitration Rules: New Rules/New Roles for Designating and Appointing Authorities*, 28(4) ASA BULL. 869, 871 (2010); Paolo Michele Patocchi & Tilman Niedermaier, *UNCITRAL Rules*, in INSTITUTIONAL ARBITRATION, *supra* note 9, 1007, ¶ 13.

⁸⁰ *Supra* Section II.B.

1. Arbitration Proceedings According to the UNCITRAL Arbitration Rules Without any Institution's Involvement — As a preliminary issue, it could be considered whether an arbitration conducted in accordance with the UNCITRAL Arbitration Rules, but without any arbitral institution being involved, is already something different than a “normal” (i.e., non-UNCITRAL Arbitration Rules) *ad hoc* arbitration. If this assumption was accurate, every arbitration under the UNCITRAL Arbitration Rules would constitute a “borderline case”, with such arbitrations possibly forming a separate category of arbitrations. And indeed, commentators have argued in favour of such a view, seemingly because the use of preexisting arbitration rules (as notably the 1976 UNCITRAL Rules) decisively distinguishes such arbitrations from typical *ad hoc* arbitrations.⁸¹

It is correct that the UNCITRAL Arbitration Rules were designed to remedy the lack of established procedures that can be a disadvantage when proceeding *ad hoc*,⁸² and that their rules of procedure are precise enough to preclude the need for any subsidiary recourse to national arbitration laws.⁸³ It is nevertheless clear that the UNCITRAL Rules were developed for use in *ad hoc* arbitrations,⁸⁴ and there is no indication that the drafters intended the Rules' off-the-shelf provisions to change the *ad hoc* character of resulting proceedings. In his commentary on the 1976 UNCITRAL Arbitration Rules, Pieter Sanders, the principal drafter and “father” of the Rules, specifically stressed that the UNCITRAL Rules “do not compete with institutional arbitration since, unlike the arbitration rules of every arbitral institution, the UNCITRAL Rules do not provide for the administration of the arbitration”,⁸⁵ and that accordingly “arbitration under the UNCITRAL Arbitration Rules cannot be regarded as institutional, administered arbitration”.⁸⁶ Their historical background thus clarifies that the UNCITRAL Arbitration Rules merely ease the exercise of procedural party autonomy by providing expertly-designed default rules to govern the arbitration proceedings, in place of the *lex arbitri*'s otherwise applicable default provisions. However, they do not change the nature of UNCITRAL arbitrations as *ad hoc* arbitrations.⁸⁷

What does this discussion teach us about the distinction between arbitration categories? It clarifies that the use of preexisting arbitration

⁸¹ In this sense see SCHLOSSER, *supra* note 14, ¶ 179.

⁸² Freyer, *supra* note 7, at 23.

⁸³ FOUCARD GAILLARD GOLDMAN, *supra* note 4, ¶ 201.

⁸⁴ See Aksen, *supra* note 1, at 11; BORN, *supra* note 1, at 173; FOUCARD GAILLARD GOLDMAN, *supra* note 4, ¶ 253; Slate, *supra* note 7, at 53.

⁸⁵ Sanders, *supra* note 17, ¶ 2.2.

⁸⁶ *Id.* ¶ 2.4.

⁸⁷ Freyer, *supra* note 7, at 23; Patocchi & Niedermaier, *supra* note 79, ¶ 13; Perales Viscasillas, *supra* note 8, at 38-39; Schlaepfer & Petti, *supra* note 1, at 14; TWEEDDALE & TWEEDDALE, *supra* note 6, ¶ 3.84; probably see also Chen, *supra* note 14, at 92.

rules alone does not make an arbitration “institutional”,⁸⁸ although the use of arbitration rules not tailor-made for a particular proceeding is one of the usual components in the prevailing definitions of institutional arbitration. The application of the UNCITRAL Arbitration Rules alone therefore leaves an arbitration’s *ad hoc* character unaffected, without turning it into a third (“hybrid”) type of arbitration.

2. *Arbitration Proceedings According to the UNCITRAL Arbitration Rules with an Institution Acting as Appointing Authority* — More frequently, the role of the appointing authority under the UNCITRAL Arbitration Rules has been the focus of suggestions to treat certain proceedings under the UNCITRAL Rules as a special category of arbitrations.

(a) *Appointing Authorities Under the 1976 UNCITRAL Arbitration Rules* — Already the 1976 UNCITRAL Arbitration Rules provided for an “appointing authority” to be agreed upon by the parties, and for the Secretary-General of the Permanent Court of Arbitration at The Hague to designate an appointing authority if the parties have not so agreed. Under the 1976 UNCITRAL Rules, an appointing authority had the task to appoint arbitrator(s) in case parties or party-appointed arbitrators had failed to make a necessary appointment (Articles 6-8); in addition, it decided on challenges of arbitrators (Article 12). The 2010 UNCITRAL Arbitration Rules maintained these tasks of appointing authorities (in Articles 6, 8-10, 13(4) and 14(2)), but added further tasks to be addressed below.⁸⁹

(b) *Arbitration Institutions Acting as Appointing Authority* — Under both the 1976 and the 2010 UNCITRAL Arbitration Rules, arbitral institutions can be agreed upon or be designated as appointing authority.⁹⁰ Such a possibility, while not expressly addressed in the Rules’ text, had already been foreseen by Pieter Sanders soon after the 1976 UNCITRAL Arbitration Rules were adopted.⁹¹ Although most important arbitral institutions were at first apparently reluctant to act as appointing authority,⁹² this practice soon became more and more common. Reacting to this development, UNCITRAL issued a set of recommendations to assist arbitral institutions with regard to arbitrations under the UNCITRAL Arbitration Rules.⁹³ Today, e.g., ICC, the LCIA, the American Arbitration

⁸⁸ GERBAY, *supra* note 32, at 13.

⁸⁹ *Infra* Section IV.A.3.(a).

⁹⁰ BORN, *supra* note 1, at 1706; CARBONNEAU, *supra* note 4, at 501; Patocchi & Niedermaier, *supra* note 79, ¶ 19; Perales Viscasillas, *supra* note 8, at 41; Schlaepfer & Petti, *supra* note 1, at 18; WIDDASCHECK, *supra* note 9, at 30; Willems, *supra* note 59, at 407.

⁹¹ Sanders, *supra* note 17, ¶ 2.4.

⁹² SCHLOSSER, *supra* note 14, ¶ 182.

⁹³ *Recommendations to Assist Arbitral Institutions and Other Interested Bodies with Regard to Arbitrations Under the UNCITRAL Arbitration Rules Adopted at the Fifteenth Session of the Commission*, 13 YEARBOOK (UNCITRAL) 420 (1982) (on the 1976 UNCITRAL Arbitration

Association (hereinafter “AAA”), the Arbitration Institute of the Stockholm Chamber of Commerce (hereinafter “SCC”), the German Institution of Arbitration (DIS), the Hong Kong International Arbitration Centre (hereinafter “HKIAC”), the Permanent Court of Arbitration (hereinafter “PCA”) and various other institutions all expressly offer to act as appointing authority under the UNCITRAL Rules.⁹⁴ Some of these arbitral institutions have even adopted specific rules governing this task, as e.g. the ICC in form of its “Rules of ICC as Appointing Authority in UNCITRAL or Other *Ad Hoc* Arbitration Proceedings” of Jan. 1, 2004,⁹⁵ the AAA in form of its “Procedures for Cases under the UNCITRAL Arbitration Rules” as amended and effective on Sept. 15, 2005 or the SCC with its “Procedures and Services under the UNCITRAL Arbitration Rules”.

In a number of jurisdictions, arbitral institutions furthermore not only act in this function when parties have so agreed, but are designated as appointing authority by law in the local *lex arbitri*. Such jurisdictions mostly did so in implementing Article 6 of the 1985/2006 UNCITRAL Model Law, choosing to name a national arbitration institution as “authority for certain functions of arbitration assistance and supervision”⁹⁶ instead of State courts that perform such functions in other jurisdictions.⁹⁷ Examples are *inter alia* the arbitration laws of Australia (designating the Australian Centre for International Commercial Arbitration),⁹⁸ of Hong Kong (designating the HKIAC),⁹⁹ of Malaysia (designating the Director of the Kuala Lumpur Regional Centre for Arbitration)¹⁰⁰ and of Singapore (designating the Chairman of the Singapore (designating the Chairman of the Singapore International Arbitration Centre)).¹⁰¹

Rules); *Note by the Secretariat on Settlement of Commercial Disputes: Recommendations to Assist Arbitral Institutions and Other Interested Bodies with Regard to Arbitration Under the UNCITRAL Arbitration Rules, as Revised in 2010*, 43 YEARBOOK (UNCITRAL) 251 (2012) (on the 2010 UNCITRAL Arbitration Rules).

⁹⁴ See FOUCHARD GAILLARD GOLDMAN, *supra* note 4, ¶ 202; LEW ET AL., *supra* note 1, ¶ 3-12.

⁹⁵ Jan Heiner Nedden & Axel Benjamin Herzberg, *Art. I/Anh. I, II ICC-SchO*, in ICC-SCHO/DIS-SCHO: PRAXISKOMMENTAR ZU DEN SCHIEDSGERICHTSORDNUNGEN, *supra* note 1, 11, ¶ 10.

⁹⁶ UNCITRAL Model Law, *supra* note 49, art. 6.

⁹⁷ Note that under Article 6 of the UNCITRAL Model Law, non-judicial authorities like arbitral institutions may only be designated to perform functions in relating to the appointment of arbitrators (Article 11 of the Model Law), to challenges of arbitrators (Article 13 of the Model Law) and to the termination of their mandate (Article 14 of the Model Law). In contrast, decisions on the jurisdiction of the arbitral tribunal (Article 16(3) of the Model Law) and on applications for setting aside the award (Article 34(2) of the Model Law) remain in any case reserved for State courts; see HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 239 (1989).

⁹⁸ International Arbitration Regulations 2011 (Cth) s 4 (Austl.).

⁹⁹ Arbitration Ordinance, (2014) Cap. 609, § 13 (H.K.).

¹⁰⁰ Arbitration Act 2005, sec. 13 (Malay.).

¹⁰¹ International Arbitration Act 2002, c. 143A, sec. 8 (Sing.).

(c) *Effect on the Categorization of an Arbitration?* — The role of arbitral institutions as appointing authority under the UNCITRAL Arbitration Rules, a set of rules originally designed for *ad hoc* arbitrations,¹⁰² begs the question whether their involvement gives such UNCITRAL arbitrations a more institutional character than “normal” *ad hoc* arbitrations.

A number of commentators have indeed argued in favour of such an effect on the categorization of UNCITRAL arbitrations, although the approaches vary: Some authors regard all UNCITRAL arbitrations as not *ad hoc* arbitrations proper, but rather a “hybrid system”¹⁰³ or a cross-breed lying somewhere between *ad hoc* arbitration and institutional arbitration,¹⁰⁴ irrespective of the person chosen as appointing authority being an arbitral institution or not. For them, the UNCITRAL Arbitration Rules’ use of an appointing authority alone suffices to make UNCITRAL arbitrations different from *ad hoc* arbitrations proper.¹⁰⁵ Other authors draw the latter conclusion only where an arbitration provides for resort to be had to an arbitral institution as appointing authority, rendering (only) such arbitrations a “hybrid model”.¹⁰⁶

However, it is submitted that the presence of an appointing authority does not deprive an arbitration under the UNCITRAL Arbitration Rules of its character as *ad hoc* arbitration.¹⁰⁷ This is primarily due to the fact that the role of an appointing authority is foreseen in most domestic arbitration laws today, not the least as a result of the 1985 UNCITRAL Model Law providing for a court or other authority for certain functions of arbitration assistance and supervision (Articles 6, 11(3), 11(4), 13(3), 14, 16(3) and 34(2) of the UNCITRAL Model Law). If the mere involvement of a third party potentially fulfilling the role of an appointing authority would render an arbitration a “hybrid” proceeding, this category would encompass the vast majority of arbitrations that have traditionally been regarded as *ad hoc*. For the same reason, an arbitral institution acting as appointing authority does not make the arbitration “institutional”. This becomes particularly obvious when considering that in some jurisdictions, as mentioned earlier,¹⁰⁸ arbitral institutions have been designated as statutory appointing authorities: If this role alone would affect the categorization of arbitrations

¹⁰² *Supra* Section II.A.1.

¹⁰³ THOMAS WEBSTER, HANDBOOK OF UNCITRAL ARBITRATION ¶¶ 0-51, 6-9 (2010).

¹⁰⁴ Philippe Fouchard, *Les Travaux de la C.N.U.D.C.L.: Le Règlement d'arbitrage*, JOURNAL DU DROIT INTERNATIONAL 816, 829 (1979); *see also* Patocchi & Niedermaier, *supra* note 79, ¶ 17.

¹⁰⁵ WIDDASCHECK, *supra* note 9, at 13 (regards it as an “institutionalization” of the arbitral proceedings).

¹⁰⁶ WAINCYMER, *supra* note 26, at ¶ 3.16.

¹⁰⁷ *See* BORN, *supra* note 1, at 1706 (“non-institutional arbitration”); Perales Viscasillas, *supra* note 8, at 49 (“still an *ad hoc* arbitration, and it is not a third type of arbitration”); SCHLOSSER, *supra* note 14, at ¶ 599.

¹⁰⁸ *Supra* Section IV.A.2.b.

concerned, there would be no more *ad hoc* arbitrations in Australia, Hong Kong, Malaysia or Singapore.

The drafting history of the 1976 UNCITRAL Arbitration Rules supports the position taken here, although its message is admittedly mixed. On one hand, the drafters were of the opinion that UNCITRAL arbitrations were not institutional arbitrations (as already discussed¹⁰⁹), and seemingly so in spite of the role they had given to appointing authorities in the Rules.¹¹⁰ On the other hand, the rather complicated procedure under the 1976 UNCITRAL Arbitration Rules for having an arbitrator appointed where the parties have not agreed on an appointing authority in their contract—with the Secretary General of the PCA at the Hague merely designating an appointing authority, but not appointing the arbitrator himself¹¹¹—was explained as “the only solution UNCITRAL could find without making its arbitration a fully administered, institutional arbitration”.¹¹² The latter remark could be read as an indication that direct appointments of arbitrators by the Secretary General of the PCA (or any other institution) would have been viewed as making such UNCITRAL arbitrations “institutional” in nature—an assessment that would seem at least doubtful under today’s arbitration law and practice.

Finally, case law has similarly found “a clear distinction” between an arbitral institution which administers an arbitration and an arbitral institution designated as an appointing authority for the purpose of appointing the arbitral tribunal.¹¹³

(d) Lessons Learned for the Distinction Between Arbitration Categories — The present discussion has confirmed that the involvement of an appointing authority in an arbitration does not make the arbitration institutional. This is true even if the parties have agreed on an arbitral institution to act as appointing authority, and remains true if they have furthermore agreed on a pre-existing set of rules (as the UNCITRAL Arbitration Rules) to govern the proceeding, as long as these arbitration rules are not the institutional rules issued by the arbitral institution involved. On a more general level, it can therefore be said that the involvement of an appointing authority eventually remains without any effect for the categorization of arbitrations.

3. Arbitration Proceedings According to the UNCITRAL Arbitration Rules Administered by an Institution — A third and final variation of this

¹⁰⁹ *Supra* Section IV.A.1.

¹¹⁰ See Sanders, *supra* note 17, at ¶¶ 2.2, 2.4.

¹¹¹ United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, art. 6(2) (1976).

¹¹² Sanders, *supra* note 17, at ¶ 6.2.

¹¹³ *Subway Systems Australia Pty. Ltd. v Aaron Ireland and Lynette Ireland* [2013] VSC 550, ¶ 51 (Austl.); similarly see BORN, *supra* note 1, at 1703; SUTTON ET AL., *supra* note 21, at ¶ 2-062; Nedden & Herzberg, *supra* note 95, at ¶ 10.

discussion has emerged relatively recently. Its source is the expansion of administrative tasks that may be allocated to an arbitral institution under the 2010 UNCITRAL Arbitration Rules, due to changes introduced into the UNCITRAL Rules in their 2010 revision.

(a) *Expansion of the Appointing Authority's Role Under the 2010 UNCITRAL Arbitration Rules* — As a result of these changes, an arbitral institution acting as appointing authority may now be requested, under certain circumstances, e.g. to constitute the arbitral tribunal (and in doing so, revoke any appointment already made and appoint or reappoint each of the arbitrators); to determine whether a party may be deprived of its right to appoint a substitute arbitrator and authorize a truncated tribunal to proceed and issue an award; and to revise—with binding effect—a tribunal's decision on its fees.¹¹⁴ The expansion of the appointing authority's role under the 2010 UNCITRAL Arbitration Rules has therefore been described as “significant”, not only in regard of the number of tasks assigned to it, but also in view of the increased gravity of those tasks.¹¹⁵

A related scenario arises when parties provide in their arbitration agreement for the arbitration to be held in accordance with the 1976 or 2010 UNCITRAL Arbitration Rules, but to be “administered” by an arbitral institution.¹¹⁶ It has been held that the administration of an arbitration involves more than just acting as an appointing authority¹¹⁷ by additionally including some assistance provided by the administering institution throughout the arbitral proceeding. While a party agreement on an “administered” UNCITRAL arbitration may indeed suggest an institutional involvement that extends beyond an appointing authority's role, it remains a matter of interpretation what the desired administration includes in a particular case.

(b) *Effect on the Categorization of an Arbitration?* — Against this background, some commentators have argued that arbitrations under the 2010 UNCITRAL Arbitration Rules no longer constitute *ad hoc* arbitrations, but rather administered arbitrations with the UNCITRAL Arbitration Rules as rules of the arbitration,¹¹⁸ or that UNCITRAL arbitrations now at least “potentially” belong to the institutional arbitration

¹¹⁴ Grimmer, *supra* note 78, at 501, with a detailed discussion of the respective UNCITRAL Rules changes at 504-16.

¹¹⁵ Drymer, *supra* note 79, at 877; Grimmer, *supra* note 78, at 502; *see also* CROFT ET AL., *supra* note 79, at ¶ 6.3; WIDDASCHECK, *supra* note 9, at 79-80.

¹¹⁶ *See Subway Systems Australia Pty. Ltd. v Aaron Ireland and Lynette Ireland* [2013] VSC 550, ¶ 43 (Austl.) (“The arbitration will be held in accordance with the United Nations Commission on International Trade Regulations and Law (UNCITRAL) Arbitration Rules administered by an arbitration association, such as the American Arbitration Association or the Institute of Arbitrators or Mediators Australia, at a hearing to be held in Queensland.”).

¹¹⁷ *Id.* at ¶ 49; PAUL FRIEDLAND, *ARBITRATION CLAUSES FOR INTERNATIONAL CONTRACTS* 37 (2d ed. 2007); Perales Viscasillas, *supra* note 8, at 45.

¹¹⁸ Perales Viscasillas, *supra* note 8, at 62 (“[N]ot an *ad hoc* arbitration”).

category.¹¹⁹ Occasionally, the 2010 UNCITRAL Arbitration Rules have been characterized as “semi-institutional”.¹²⁰ Yet other commentators argue that the expansion of the appointing authority’s role has led to the 2010 UNCITRAL Arbitration Rules resembling institutional rules more than the 1976 UNCITRAL Rules, with UNCITRAL arbitrations nonetheless stopping short of being institutional.¹²¹ In the related cases of arbitration agreements providing an UNCITRAL arbitration ‘administered’ by an arbitral institution, it has been held that such an arbitration no longer qualifies as *ad hoc*.¹²²

However, the more convincing view is that the appointing authorities’ expanded role under the 2010 UNCITRAL Rules has not changed the character of UNCITRAL arbitrations, which remain non-institutional.¹²³ This is first of all due to the lack of any indication that the drafters of the 2010 rules revision intended such a change—on the contrary, it was their declared goal to “maintain the original structure and spirit of the UNCITRAL Arbitration Rules”.¹²⁴ Consistent with this aim, the additional tasks assigned to the appointing authority mainly deal with exceptional circumstances,¹²⁵ barring the added power under Article 7(2) to submit a case to a sole arbitrator. Arbitral institutions also continue to distinguish between the role of an appointing authority under the 2010 UNCITRAL Arbitration Rules and the administration of arbitrations under the UNCITRAL Rules: For example, the ICC will act as an appointing authority, but—unlike some other arbitral institutions—it will not administer arbitrations under the UNCITRAL (or other) Rules.¹²⁶

It is a different and more complex question whether the possible case administration by an arbitral institution foreseen under the 2010 UNCITRAL Rules may change an arbitration’s character from *ad hoc* to something different, if the administration is sufficiently broad and intensive. To this issue we turn next.

(c) Minimum Degree of Administration Required for Effect on the Categorization of an Arbitration? — Some authors indeed regard an

¹¹⁹ GERBAY, *supra* note 32, at 14.

¹²⁰ WIDDASCHECK, *supra* note 9, at 85.

¹²¹ Grimmer, *supra* note 78, at 516; Drymer, *supra* note 79, at 877 (the 2010 Rules “institutionalise, to a certain degree, UNCITRAL arbitration”).

¹²² *Subway Systems Australia Pty. Ltd. v Aaron Ireland and Lynette Ireland* [2013] VSC 550, ¶ 49 (Austl.).

¹²³ See Drymer, *supra* note 79, at 875-76 (“[T]he UNCITRAL Rules are not institutional rules, and UNCITRAL arbitration is not institutional.”).

¹²⁴ U.N. Secretary-General, *Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules*, ¶ 2, U.N. Doc. A/CN.9/703 (Mar. 5, 2010); see also U.N. GAOR, 61th Sess., at ¶ 184, U.N. Doc. A/61/17 (July 14, 2006).

¹²⁵ Grimmer, *supra* note 78, at 516.

¹²⁶ YVES DERAÏNS & ÉRIC A. SCHWARTZ, *A GUIDE TO THE ICC RULES OF ARBITRATION* 10 (2d ed. 2005).

UNCITRAL arbitration's administration by an arbitral institution alone as insufficient to render the arbitration "institutional", but in addition look to the amount and type of administrative services offered by the institution. In doing so, they require a certain minimum degree of administration as a prerequisite for administered UNCITRAL arbitrations no longer being *ad hoc* arbitrations.¹²⁷

The question then immediately becomes what degree of administration is supposed to change an arbitration's category from *ad hoc* to institutional or to a third, intermediate category. The answer is difficult because the administrative services offered differ significantly between arbitral institutions, both in scope and in content.¹²⁸ A leading international textbook¹²⁹ distinguishes between wholly administered and semi-administered arbitrations: In a wholly administered arbitration, the arbitral institution provides a full service to the arbitral tribunal (an example being ICSID), while in a semi-administered arbitration the institution collects the initial advance on costs from the parties, appoints the arbitral tribunal, and then leaves it to the arbitral tribunal to communicate with the parties, arrange meetings and hearings, and so forth (an example being arbitrations conducted in England under the Chartered Institute of Arbitrators' Rules).¹³⁰ But this rough distinction is of limited use when it comes to capturing the various approaches of arbitral institutions to case administration and their effect, if any, on the categorization of arbitrations. The following examples are indicative of the uncertainties:

1. The London Maritime Arbitrators Association (hereinafter "LMAA") only makes default appointments of arbitrators as an appointing authority without providing any other services,¹³¹ but has nevertheless been described as an arbitral "institution".¹³² In spite of its institutional characterization, arbitration in accordance with the terms of the LMAA is mostly considered *ad hoc* arbitration.¹³³
2. Similarly, the very limited support offered by the Federation of Oils Sees and Fats Associations (hereinafter "FOSFA") to parties conducting arbitration under FOSFA's arbitration rules supposedly falls short of what is conventionally considered as institutional

¹²⁷ GERBAY, *supra* note 32, at 14; Viscasillas, *supra* note 8, at 74; *see also* WIDDASCHECK, *supra* note 9, at 59-60.

¹²⁸ SUTTON ET AL., *supra* note 21, at ¶ 3-052; Schäfer, *supra* note 14, at ¶ 310; Schlaepfer & Petti, *supra* note 1, at 22; Schütze, *supra* note 9, at ¶¶ 9-10; Slate, *supra* note 7, at 47; Timar, *supra* note 5, at 119-20; WIDDASCHECK, *supra* note 9, at 15; WOLF, *supra* note 24, at 16-35.

¹²⁹ BLACKABY ET AL., *supra* note 4, at ¶ 1.146 n.157.

¹³⁰ *Id.*

¹³¹ WADE ET AL., *supra* note 76, at ¶ 1-009.

¹³² Bertie Vigras, *The Role of Institutions in Arbitration*, in HANDBOOK OF ARBITRATION PRACTICE 461 (Ronald Bernstein & Derek Wood et al. eds., 2d ed. 1993).

¹³³ Bruce Harris, *London Maritime Arbitration*, reprinted in 77 ARBITRATION 116, 122 (2011); GERBAY, *supra* note 32, at 6.

arbitration,¹³⁴ although it remains far from clear what that alleged conventional standard is. FOSFA arbitration is in general regarded as *ad hoc*,¹³⁵ which is remarkable given that FOSFA even operates and maintains an appeal panel.¹³⁶ Only occasionally has FOSFA arbitration been viewed as “institutionalized”.¹³⁷

3. In arbitration according to the long-standing rules of the so-called Hamburg friendly arbitration (*Hamburger freundschaftliche Arbitrage*), no administration services are offered, although the Hamburg Chamber of Commerce potentially acts as the appointing authority. Due to the lack of administration, Hamburg friendly arbitration is predominantly categorized as *ad hoc* arbitration.¹³⁸ In contrast, the German Federal Supreme Court qualified the *Hamburger freundschaftliche Arbitrage* as a permanent arbitral institution (and thereby the related arbitrations supposedly as institutional¹³⁹), although the degree of administration played no role in this context; instead, the court regarded the use of the institution’s own arbitration rules as the decisive point.¹⁴⁰
4. Among the major international arbitral institutions, the LCIA is often characterized by its supposed “light touch” approach to case administration,¹⁴¹ although its administrative involvement appears less light when compared with that of the LMAA, the FOSFA or the Hamburg friendly arbitration. When instead the ICC is used as comparative standard, LCIA arbitration may well be described as “less ‘institutionalized’ and interventionist”,¹⁴² or even as occupying an

¹³⁴ GERBAY, *supra* note 32, at 7.

¹³⁵ *Id.* at 7; ROBERT MERKIN, *ARBITRATION LAW* 36 (3d ed. 2004).

¹³⁶ See Brian Chapman, *FOSFA International Arbitration*, 2(4) *ARB. INT’L* 323, 330-31(1986).

¹³⁷ Jacques Covo, *Commodities, Arbitrations and Equitable Considerations*, 9(1) *ARB. INT’L* 57, 60 (1993).

¹³⁸ Mike Oliver Korte, *Die Hamburger Freundschaftliche Arbitrage – Ein Überblick Anlässlich des 100-jährigen Jubiläums des § 20 Platzzusancen für den Hamburgischen Warenhandel*, in *ZEITSCHRIFT FÜR SCHIEDSVERFAHREN* 240, 241 (2004); ROLF A. SCHÜTZE ET AL., *HANDBUCH DES SCHIEDSVERFAHRENS* ¶ 792 (2d ed. 1990); Karl Heinz Schwab & Gerhard Walter, *Kapitel 41. Grundlagen des Internationalen Schiedsverfahrens*, in *SCHIEDSGERICHTSBARKEIT* ¶ 16 (7th ed. 2005); Hanspeter Vogel, *Institutionalisierte Schiedsgerichtsbarkeit*, in *RECHT UND JURISTEN IN HAMBURG* 22 (1994).

¹³⁹ In this sense, Karl Heinz Schwab & Gerhard Walter, *Kapitel 41. Grundlagen des Internationalen Schiedsverfahrens*, in *SCHIEDSGERICHTSBARKEIT* ¶ 16 (Schwab & Walter et al. eds., 2000).

¹⁴⁰ Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 2, 1982, *NEUE JURISTISCHE WOCHENSCHRIFT* [NJW] 1268, 1983 (Ger.).

¹⁴¹ Adrian Winstanley, *Review of the London Court of International Arbitration*, in *INTERNATIONAL COMMERCIAL ARBITRATION PRACTICE: 21ST CENTURY PERSPECTIVES* 3 (Horacio Grigera Naón ed., 2010). For a sceptical view of this assessment see SCHERER ET AL., *supra* note 76, at 24.

¹⁴² Lew et al., *supra* note 32, at ¶ 18.20; see also SUTTON ET AL., *supra* note 21, at ¶ 3-053; in more detail Sabine Konrad & Robert Hunter, *LCIA Rules*, in *INSTITUTIONAL ARBITRATION*, *supra*

historical position “halfway between full institutional arbitration and *ad hoc* forms of arbitration”.¹⁴³ In any case and in spite of their divergent administrative styles, both ICC and LCIA arbitration are generally regarded as institutional.¹⁴⁴

These examples—and various others could be mentioned—demonstrate the difficulty of classifying existing approaches to case administration, and how subjective (and sometimes random) categorizations derived from such classifications can be. A related issue is the difficulty of defining the degree of administration that marks the line between *ad hoc* and institutional arbitration in a clear and workable manner, given the need for foreseeable criteria and the variety of administrative services offered by different institutions. Some basic assumptions are intuitively convincing, as e.g., simple administrative services not being sufficient to render an arbitration “institutional”, because mere office centres would otherwise qualify as arbitral institutions.¹⁴⁵ But beyond this point, both generally acceptable and workable criteria are almost impossible to define. For example, suggested distinctions like the one between partial administrative services (resulting in *ad hoc* arbitration)¹⁴⁶ and a fully administered arbitration under the 2010 UNCITRAL Rules (being an institutional arbitration)¹⁴⁷ leave practitioners with significant uncertainty, given the differences between the “full” services as offered by different arbitral institutions.

In essence, the lack of agreed criteria therefore render the “degree” of case administration an unconvincing guidepost for the delimitation of arbitration categories. Against this background, it is submitted that neither the use of administrative services as such¹⁴⁸ nor the breadth of such administration should be decisive in this respect. Accordingly, arbitrations under the 2010 UNCITRAL Arbitration Rules may on occasion be “administered” *ad hoc* arbitrations, but are *ad hoc* arbitrations nonetheless.¹⁴⁹

(d) Lessons Learned for the Distinction Between Arbitration Categories — The present discussion has shown that the additional tasks carried out by an appointing authority under the 2010 UNCITRAL Arbitration Rules do not turn UNCITRAL arbitrations into institutional

note 9, 413, ¶¶ 67-73. But see MCILWRATH & SAVAGE, *supra* note 1, at ¶ 1-100, who argue that in practical terms, the LCIA does not differ substantially from the ICC in many respects.

¹⁴³ V.V. Veeder, *The New 1998 LCIA Rules*, in YEARBOOK COMMERCIAL ARBITRATION 1998: VOLUME XXIII 366, 366 (Albert Jan van den Berg ed., 1998).

¹⁴⁴ Lalive, *supra* note 1, at 665; SUTTON ET AL., *supra* note 21, at ¶ 3-053 (on both ICC and LCIA arbitration); WADE ET AL., *supra* note 76, at ¶ I-009 (on LCIA arbitration).

¹⁴⁵ Perales Viscasillas, *supra* note 8, at 46.

¹⁴⁶ *Id.* at 74.

¹⁴⁷ Perales Viscasillas, *supra* note 8, at 72.

¹⁴⁸ Lalive, *supra* note 1, at 665; Zhou, *supra* note 59, at 146.

¹⁴⁹ Willems, *supra* note 59, at 408-09.

arbitrations.¹⁵⁰ The same is true for the administration of an arbitration by an arbitral institution where the institution does not act under its own institutional rules, but based on a clause in the arbitration agreement.¹⁵¹ The underlying *ratio* in both constellations is that the degree of institutional administrative services provided is too vague and uncertain a criterion to distinguish between arbitration categories, given that the services offered vary so much from institution to institution.

B. Parties' Choice of Institutional Rules, but Not of the Issuing Institution (and Vice Versa)

The textbook definitions of the term “institutional arbitration” presented earlier¹⁵² demonstrated that almost every definition attempt combines two components, namely the arbitral institution and arbitration rules issued by that institution. What effect, if any, does it then have for an arbitration’s categorization if the parties have only chosen one of these two components in their arbitration agreement?

1. Choice of Institutional Rules Only — Cases in which arbitration agreements refer only to an institution’s arbitration rules are particularly frequent, not the least because the standard arbitration clauses of most institutions only speak of the respective rules, but not of the issuing institution itself. Examples are the LCIA’s recommended clause (“Any dispute . . . shall be referred to and finally resolved by arbitration under the LCIA Rules,”) or the Standard ICC Arbitration Clause (“All disputes . . . shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce”), among many others. In order to avoid any uncertainty about the role of the rules-issuing institution in these cases, some institutional rules expressly provide that a choice of the rules is deemed to be also a choice of the institution. For example, Article 6(2) of the 2017 ICC Rules states that “[b]y agreeing to arbitration under the Rules, the parties have accepted that the arbitration shall be administered by the [ICC] Court.” But the same result could arguably be reached without an explicit provision through a reasonable construction of the arbitration agreement.¹⁵³ An interpretation of such arbitration agreements thereby

¹⁵⁰ *Supra* Section IV.A.3.b.

¹⁵¹ *Supra* Section IV.A.3.(c).

¹⁵² *Supra* Section II.B.

¹⁵³ *Insigma v. Alstom*, *supra* note 2, ¶ 33; *York Research Corp. v. Landgarten*, 927 F.2d 119, 123 (2d Cir. 1991) (arbitration clause that any dispute “shall be determined and settled by binding arbitration in New York pursuant to [the AAA’s rules]” is an agreement that “the AAA should administer the arbitration process and apply its Commercial Arbitration Rules”); *Prostyakov v. Masco Corp.*, 513 F.3d 716, 724 (7th Cir. 2008) (parties “did, in fact, submit to AAA participation by agreeing that the arbitration would be governed by AAA rules”); *Zhou*, *supra* note 59, at 145. A different conclusion was reached by the Supreme Court of New York in *Nachmani v. By Design, LLC*, 901 N.Y.S.2d 838, 839 (1st Dep’t. 2010), where an arbitration clause’s reference to

usually guarantees that both traditional components of an institutional arbitration are present.

The situation can be more difficult where legal provisions impose particular requirements on the choice of an arbitral institution in arbitration agreements. The most prominent example is Article 16(2) of the Arbitration Law of the Peoples' Republic of China and its mention of "[t]he arbitration commission chosen" as a necessary content of any valid arbitration clause.¹⁵⁴ Not surprisingly, the model clause used by the China International Economic and Trade Arbitration Commission (CIETAC) therefore explicitly refers to both the institution and its rules ("Any dispute arising from or in connection with this Contract shall be submitted to China International Economic and Trade Arbitration Commission for arbitration which shall be conducted in accordance with the Commission's arbitration rules . . ."). And for parties wishing to have an ICC Arbitration in Mainland China, the ICC has supplemented its standard arbitration clause for this purpose, recommending to also include an explicit reference to the institution ("All disputes . . . shall be submitted to the International Court of Arbitration of the International Chamber of Commerce and shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce . . ."). In case an arbitration agreement refers exclusively to institutional arbitration rules, the PRC's Supreme People's Court has described its effect under the Chinese *lex arbitri* as follows:

Where the arbitration agreement only agrees upon the applicable arbitration rules, it shall be deemed that no arbitration institution has been agreed upon, except where the parties concerned have reached a supplementary agreement, or where the arbitration institution can be determined according to the arbitration rules that have been agreed on.¹⁵⁵

The latter *caveat*—"except where . . . the arbitration institution can be determined according to the arbitration rules that have been agreed on"—was one of the reasons for the introduction of Article 6(2) of the 2012 and 2017 ICC Rules, the provision mentioned earlier.¹⁵⁶

arbitration "in accordance with AAA Commercial Arbitration Rules" was interpreted as only a 'choice of law . . . clause' and not an agreement that the arbitration be administered by the AAA"; see the critical remarks in BORN, *supra* note 1, at 833 ("That conclusion, and its reasoning, is plainly wrong").

¹⁵⁴ *Supra* Section III.C.2.(b).

¹⁵⁵ Zuigao Renmin Fayuan Kuanyu Shihyung Zhunghua Renmin Guongheguo Chungtsaifa Jogan Wenti de Chiehhsieh [Interpretation of the Supreme People's Court concerning Some Issues on Application of the Arbitration Law of the People's Republic of China] art. 4 (Ch.).

¹⁵⁶ JASON FRY ET AL., THE SECRETARIAT'S GUIDE TO ICC ARBITRATION ¶ 3-4 (2012).

Nevertheless, certain cases remain in which an arbitration agreement referring only to institutional rules cannot be interpreted as also selecting the issuing institution. One example are cases in which the parties have explicitly agreed on their arbitration to be conducted *ad hoc*, but under institutional rules¹⁵⁷—a rare case, and an approach that has rightfully been discouraged.¹⁵⁸ Another example are cases in which the arbitration agreement calls for the arbitrator to be appointed by one institution and provides that this arbitrator must then conduct the proceedings in accordance with the rules of another institution.¹⁵⁹ In neither of such situations, the mere agreement on institutional arbitration rules affect the arbitration's *ad hoc* nature,¹⁶⁰ indicating that the use of institutional rules alone does not make an arbitration “institutional”.

2. *Choice of Institution Only* — The reverse constellation—party agreements that refer only to an arbitral institution, but not to its rules—similarly raises the question which category the resulting arbitration belongs to. Some standard arbitration clauses are framed in this way, as for example the clause recommended by the Court of Arbitration of the Hamburg Chamber of Commerce (“Any dispute . . . shall be finally settled by the Court of Arbitration of the Hamburg Chamber of Commerce . . .”).

Similar to what was described a moment ago,¹⁶¹ a reasonable construction of such “institution only” clauses will usually reveal that the parties intended the arbitral rules of that institution to apply.¹⁶² Article IV(1)(a) of the 1961 Geneva Convention even contains a legal assumption to his end. After confirming under the heading “Organization of the arbitration” that the parties to an arbitration agreement are free to submit their disputes to a permanent arbitral institution, Article IV(1)(a) provides that “in this case, the arbitration proceedings shall be held in conformity with the rules of the said institution”. Whenever either the interpretation of the arbitration clause or the application of Article IV(1)(a) of the 1961 Geneva Convention thus supplements an “institution only” clause by adding the institution's rules of arbitration, the arbitration will be

¹⁵⁷ TWEEDDALE & TWEEDDALE, *supra* note 6, at ¶ 3.02; Heiko A. Haller, § 24 *DIS-SCHO*, in ICC-SCHO/DIS-SCHO: PRAXISKOMMENTAR ZU DEN SCHIEDSGERICHTSORDNUNGEN, *supra* note 1, 806, ¶ 24.

¹⁵⁸ BLACKABY ET AL., *supra* note 4, ¶ 1.144 n.154; Haller, *supra* note 157, 806, ¶ 24; Schlaepfer & Petti, *supra* note 1, at 14.

¹⁵⁹ Bovis, *supra* note 1, ¶ 19 (“It is in accordance with the principle of party autonomy that the parties were free to choose one body as their appointing authority and another body as their rules provider.”).

¹⁶⁰ *Id.* ¶¶ 21-22; Lalive, *supra* note 1, at 665; BLACKABY ET AL., *supra* note 4, ¶ 1.144 n.154; Schlaepfer & Petti, *supra* note 1, at 14.

¹⁶¹ *Supra* Section IV.B.1.

¹⁶² *Insignia v. Alstom*, *supra* note 2, ¶ 33; FOUCHARD GAILLARD GOLDMAN, *supra* note 4, ¶ 359; DAVID JOSEPH, JURISDICTION AND ARBITRATION AGREEMENTS AND THEIR ENFORCEMENT ¶ 4.27 (2005); MCILWRATH & SAVAGE, *supra* note 1, ¶ 1-063.

institutional in nature, at least according to the traditional definitions¹⁶³ outlined earlier.

However, there remain cases in which neither the arbitration agreement's reasonable construction nor a legal presumption will result in the applicability of the selected institution's arbitration rules, thereby leaving the arbitral institution as the sole institutional aspect agreed upon. This is necessarily so where no such institutional rules exist: While a good number of arbitral institutions (in particular the well-known international institutions) have their own arbitration rules, a great deal more do not.¹⁶⁴ Another constellation are party agreements that designate arbitral institutions as appointing authorities or as case administrators under the UNCITRAL Arbitration Rules.¹⁶⁵ In such cases, the arbitration is not institutional in spite of the parties' (isolated) choice of an institution, but rather *ad hoc*.¹⁶⁶

3. Lessons Learned for the Distinction Between Arbitration Categories — Legal practice with regard to arbitration agreements choosing only an arbitral institution (without the institution's in-house arbitration rules) or only institutional arbitration rules (without the issuing institution's administration) shows a strong tendency to construe such clauses as also selecting the missing component, either by relying on express legal rules in this respect or on general rules of interpretation. Whenever such a constructive approach succeeds, the arbitration concerned qualifies as institutional. In the remaining cases, the involvement of only an arbitral institution or only institutional arbitration rules usually means that the arbitration is regarded as *ad hoc*. Borderline cases of this type thereby demonstrate that both components are required for an arbitration to be "institutional": In addition to the use of institutional rules, at least some involvement of the arbitral institution beyond having drafted the respective rules is needed.

C. Modification of Institutional Rules by the Parties

The third type of borderline cases concerns the modification of institutional arbitration rules by the parties to an arbitration, or—maybe more to the point—the limits of such modifications. It is generally recognized that party autonomy also reigns supreme in institutional arbitration,¹⁶⁷ allowing the parties to modify institutional arbitration rules to meet the needs of their particular transaction. Some institutional rules

¹⁶³ *Supra* Section II.B.

¹⁶⁴ GERBAY, *supra* note 32, at 13.

¹⁶⁵ *Supra* Section IV.A.2., 3.

¹⁶⁶ Zhou, *supra* note 59, at 146.

¹⁶⁷ *See supra* note 76.

contain express provisions to this end.¹⁶⁸ At the same time, there is widespread agreement that party autonomy in institutional arbitration is not unlimited,¹⁶⁹ but in fact more limited than in *ad hoc* arbitration: While *ad hoc* and institutional arbitrations alike have to respect the mandatory provisions of the *lex arbitri*,¹⁷⁰ institutional arbitration rules may contain further provisions from which the parties cannot derogate.¹⁷¹ Article 7(6) of the 2013 Vienna Rules¹⁷² explicitly provides that the International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC) can refuse to administer proceedings if the arbitration agreement “deviates fundamentally from and is incompatible with” the Vienna Rules. However, already under the Vienna Rules’ previous version that still indiscriminately referred to any agreement “deviating from” the institutional rules, commentators agreed that a refusal to administrate was only justified in very narrow circumstances¹⁷³ where the parties attempt to modify provisions from which they are not allowed to derogate.¹⁷⁴

1. Non-Derogatable (“Mandatory”) Provisions in Institutional Arbitration Rules — Provisions in institutional rules from which the parties may not derogate are often referred to as “mandatory” arbitration rules,¹⁷⁵ although this term is arguably misleading:¹⁷⁶ Given that institutional

¹⁶⁸ International Centre for Dispute Resolution (ICDR) International Dispute Resolution Procedures, art. 1(1) (2014), <https://www.adr.org/sites/default/files/ICDR%20Rules%20English%20Version%20June%202014.pdf>; American Arbitration Association (AAA) Commercial Arbitration Rules and Mediation Procedures, art. R-1(a) (2013), <https://www.adr.org/sites/default/files/Commercial%20Rules.pdf>.

¹⁶⁹ Böckstiegel, *supra* note 5, at 2; Carlevaris, *supra* note 76, at 115; Elliott Geisinger, *The Expedited Procedure Under the Swiss Rules of International Arbitration*, in THE SWISS RULES OF INTERNATIONAL ARBITRATION 67, 77 (Gabrielle Kaufmann-Kohler & Blaise Stucki eds., 2004); Patocchi & Niedermaier, *supra* note 79, ¶ 17; BLACKABY ET AL., *supra* note 4, ¶ 6.16; Schäfer, *supra* note 14, ¶ 340; SCHERER ET AL., *supra* note 76, at 36; Robert H. Smit, *Mandatory ICC Arbitration Rules*, in LIBER AMICORUM IN HONOUR OF ROBERT BRINER 845, 847 (2005); VERBIST ET AL., *supra* note 15, at 16.

¹⁷⁰ Anthony C. Nicholls & Christopher Bloch, *ICC Hybrid Arbitrations Here to Stay: Singapore Courts’ Treatment of the ICC Rules Revisions in Article 1(2) and 6(2)*, 31 J. INT’L ARB. 393, 404 (2014); BLACKABY ET AL., *supra* note 4, ¶ 1.140.

¹⁷¹ *Supra* note 169.

¹⁷² Vienna International Arbitration Centre (VIAC) Rules of Arbitration and Mediation, art. 7(6) (2013).

¹⁷³ Vienna International Arbitration Centre (VIAC) of the Austrian Federal Economic Chamber Rules of Arbitration and Conciliation, art. 9(6) (2006); FRANZ T. SCHWARZ & CHRISTIAN W. KONRAD, THE VIENNA RULES: A COMMENTARY ON INTERNATIONAL ARBITRATION IN AUSTRIA ¶¶ 9-092, 9-093 (2009).

¹⁷⁴ Christoph Liebscher, *Vienna Rules*, in INSTITUTIONAL ARBITRATION, *supra* note 9, at 316, ¶ 109-15.

¹⁷⁵ See Böckstiegel, *supra* note 5, at 2; Sébastien Besson, *Introduction to the Swiss Rules*, in SWISS RULES OF INTERNATIONAL ARBITRATION: COMMENTARY ¶ 30 (Tobias Zuberbühler et al. eds., 2005); Geisinger, *supra* note 169, at 78; SCHERER ET AL., *supra* note 76, at 36; Smit, *supra* note 169, at 845; THOMAS H. WEBSTER & MICHAEL W. BÜHLER, HANDBOOK OF ICC ARBITRATION: COMMENTARY, PRECEDENTS, MATERIALS ¶ 1-30 (2014).

¹⁷⁶ Carlevaris, *supra* note 76, at 114; Nicholls & Bloch, *supra* note 170, at 404.

arbitration rules apply by the parties' choice and not by law, any provisions in arbitration rules chosen are no more mandatory than contractual clauses purporting to derogate from them. In other words, the conflict is not between the will of the parties and the law, but between two different expressions of the parties' will.¹⁷⁷ As a result, an arbitration agreement attempting to derogate from a non-derogatable (or non-amendable¹⁷⁸) institutional arbitration rule is not (or not necessarily) invalid.¹⁷⁹ However, it gives the arbitration institution the right to refuse the arbitration's administration if the parties do not accept the unfettered application of the institutional rules' non-derogatable provisions.¹⁸⁰

For the purposes of the present article, cases involving a modification of institutional arbitration rules are of interest as a "borderline case" because they attempt to combine a crucial characteristic of institutional arbitration – the proceedings' administration by an institutional body – with a distinguishing feature of *ad hoc* arbitration—the parties' freedom to tailor their arbitration's procedure to their specific needs. When regarded in this manner, non-derogatable (or "mandatory") provisions of institutional arbitration rules could be expected to reflect the core characteristics of institutional arbitration, the very features that parties cannot dispense with without losing the institutional character of their arbitration.

Do the limits of party autonomy unique to institutional arbitration therefore show us what makes institutional arbitration "institutional"?

2. *Examples of Non-Derogatable Institutional Rules* — In order to answer this question, we must first identify the provisions in institutional arbitration rules that parties may not derogate from. Insofar, we are not concerned with those non-derogatable provisions in institutional rules that merely mirror mandatory rules of the *lex arbitri* (or, more rarely, of other legal orders), as notably provisions imposing a duty on arbitrators to remain impartial and independent of the parties or guaranteeing the parties' equal treatment and their right to be heard.¹⁸¹ Given that such standards already flow from the mandatory standards of most *leges arbitri*, the content of such institutional provisions do not reflect what is unique to institutional arbitration. Beyond this, arbitration experts generally admit that the non-derogatable, institution-specific core of institutional rules is far from

¹⁷⁷ Carlevaris, *supra* note 76, at 114.

¹⁷⁸ This term is used by Nicholls & Bloch, *supra* note 170, at 404-05.

¹⁷⁹ Besson, *supra* note 175, ¶ 37; Nicholls & Bloch, *supra* note 170, at 404-05; *see also* CARBONNEAU, *supra* note 4, at 617.

¹⁸⁰ Carlevaris, *supra* note 76, at 115; LAURENCE W. CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 295 (2000); Geisinger, *supra* note 169, at 77; Andreas Reiner & Christian Aschauer, *ICC Rules*, in INSTITUTIONAL ARBITRATION, *supra* note 9, 38, ¶ 27; SCHWARTZ & DERAIS, *supra* note 126, at 7-8; Smit, *supra* note 169, at 847; VERBIST ET AL., *supra* note 15, at 16; WEBSTER & BÜHLER, *supra* note 175, ¶ 1-29.

¹⁸¹ See in more detail the overview in BORN, *supra* note 1, at 2163-84.

clear.¹⁸² To make matters worse, this core differs from institution to institution.

In case of the ICC Rules, “mandatory” features identified by commentators are the fixing of arbitrators’ fees and expenses by the ICC Court¹⁸³ (Article 2(4) of Appendix III to the 2017 ICC Rules expressly saying so); the appointment and confirmation of arbitrators in ICC arbitrations¹⁸⁴ (Articles 12(8) and 13 of the 2012 ICC Rules); the ICC’s court role in screening requests for arbitration and jurisdictional objections as well as deciding on its own competence to administer a case¹⁸⁵ (Articles 6(3) and (4) of the 2017 ICC Rules); the uneven number of arbitrators on the tribunal (Articles 12(1) of the 2012 ICC Rules), unless the parties have agreed on a procedure to resolve a possible deadlock;¹⁸⁶ the majority requirement for awards made by a three-member tribunal¹⁸⁷ (Article 32(1) of the 2017 ICC Rules); and the scrutiny of draft awards by the ICC Court¹⁸⁸ (Article 34 of the 2017 ICC Rules).¹⁸⁹ The Terms of Reference procedure (Article 23 of the 2017 ICC Rules) has also often been named,¹⁹⁰ although commentators have more recently started to doubt its non-derogatable nature.¹⁹¹ The latter position has received support by the 2017 ICC Rules now dispensing with the Terms of Reference whenever an arbitration is conducted under the new Expedited Procedure Rules (Article 3(1) of Appendix VI to the 2017 ICC Rules).

¹⁸² With regard to the ICC Rules see Richard H. Kreindler, *Impending Revision of the ICC Arbitration Rules: Opportunities and Hazards for Experienced and Inexperienced Users Alike*, 13(2) J. INT’L ARB. 45, 56 (1996); SCHWARTZ & DERAINS, *supra* note 126, at 8; with regard to the LCIA Rules see SCHERER ET AL., *supra* note 76, at 37; with regard to the Swiss Rules see Besson, *supra* note 175, at ¶ 30.

¹⁸³ Carlevaris, *supra* note 76, at 116; FRY ET AL., *supra* note 156, ¶ 3-17; VERBIST ET AL., *supra* note 15, at 16; WEBSTER & BÜHLER, *supra* note 175, ¶ 1-30; *but see* Smit, *supra* note 169, at 867-68.

¹⁸⁴ Carlevaris, *supra* note 76, at 123-24; Reiner & Aschauer, *supra* note 180, at ¶ 27; Smit, *supra* note 169, at 858, 860.

¹⁸⁵ Carlevaris, *supra* note 76, at 120; Smit, *supra* note 169, at 853-54.

¹⁸⁶ Reiner & Aschauer, *supra* note 180, ¶ 27.

¹⁸⁷ Smit, *supra* note 169, at 863.

¹⁸⁸ Carlevaris, *supra* note 76, at 119; CRAIG ET AL., *supra* note 180, at 295; CROFT ET AL., *supra* note 79, ¶ 1.1; FRY ET AL., *supra* note 156, ¶ 3-17; MARTIN F. GUSY ET AL., A GUIDE TO THE ICDR INTERNATIONAL ARBITRATION RULES ¶ 1.92 (2011); Reiner & Aschauer, *supra* note 180, at ¶ 27; Schäfer, *supra* note 14, ¶ 314; Smit, *supra* note 169, at 865; VERBIST ET AL., *supra* note 15, at 16; WEBSTER & BÜHLER, *supra* note 175, ¶ 1-30.

¹⁸⁹ Further, mandatory provisions are Article 1(2) of the 2017 ICC Rules dealing with “mix and match” arbitrations (to be discussed in detail *infra* at IV.D.), and Article 6(2) of the 2017 ICC Rules (already addressed *supra* at IV.B.1.).

¹⁹⁰ FRY ET AL., *supra* note 156, at ¶ 3-17; GUSY ET AL., *supra* note 188, at ¶ 1.92; SCHWARTZ & DERAINS, *supra* note 126, at 5-6; VERBIST ET AL., *supra* note 15, at 16; WEBSTER & BÜHLER, *supra* note 175, ¶ 1-30.

¹⁹¹ Smit, *supra* note 169, at 862-63; Carlevaris, *supra* note 76, at 120-21.

Under the LCIA Rules, the LCIA Court's power to appoint the arbitral tribunal (Article 5.7 of the 2014 LCIA Rules),¹⁹² its power to decide on the arbitration costs (Article 28.1 of the 2014 LCIA Rules) as well as the LCIA's Schedule of Costs in general have been identified as non-derogable.¹⁹³

In case of the Swiss Rules of International Arbitration, non-derogable provisions concern the confirmation of arbitrators by the Swiss Chambers (Article 5(1) of the 2004 Swiss Rules), the challenge and revocation of the appointment of arbitrators by the Special Committee (Articles 11 and 12 of the 2004 Swiss Rules), and provisions protecting the interest of the Swiss Chambers, like the rules on the scrutiny of awards on the issue of costs (Article 40(4) of the 2004 Swiss Rules and Appendix B about the costs of the proceedings, at least to the extent that the registration fee and the Chambers' administrative costs are concerned) or the exclusion of the Chambers' liability (Article 44 of the 2004 Swiss Rules).¹⁹⁴ The matter is viewed as less clear for the arbitral tribunal's duty to prepare a provisional timetable (Article 15(3) of the 2004 Swiss Rules)¹⁹⁵ and for the rules about the expedited procedure (Article 42(2) of the 2004 Swiss Rules).¹⁹⁶

Under the DIS Arbitration Rules, the provisions on the confirmation of arbitrators by the institution (§ 17 of the 1998 DIS Arbitration Rules),¹⁹⁷ on the termination of arbitral proceedings by the tribunal (§ 32 and § 39 of the 1998 DIS Arbitration Rules),¹⁹⁸ on administrative fees and on the provisional advance on costs (§ 7, §§ 11(1), (2), § 25 and § 40 of the 1998 DIS Arbitration Rules)¹⁹⁹ are regarded as non-derogable.

¹⁹² SCHERER ET AL., *supra* note 76, at 36-37; *see also* WADE, CLIFFORD & CLANCY, *supra* note 76, ¶ 5-044.

¹⁹³ SCHERER ET AL., *supra* note 76, at 36-37; *see generally* Adrian Winstanley, *Party Autonomy and Institutional Rules*, in 8TH BIENNIAL IFCAI CONFERENCE (2005).

¹⁹⁴ Besson, *supra* note 175, at ¶ 32. For a more flexible view, *see* Geisinger, *supra* note 169, at 78.

¹⁹⁵ *See* Besson, *supra* note 175, at ¶ 32 ("possibly"); Tina Wüstemann & Cesare Jermini, *Article 15*, in SWISS RULES OF INTERNATIONAL ARBITRATION: COMMENTARY, *supra* note 175 ¶ 6 ("probably"); Daniel B. Wehrli et al., *Management of the Proceedings and Quality Control Under the Swiss Rules*, in THE SWISS RULES OF INTERNATIONAL ARBITRATION, *supra* note 169, 87, 97 ("the only mandatory organizational tool under the Swiss Rules").

¹⁹⁶ *See* Geisinger, *supra* note 169, at 78-79.

¹⁹⁷ Thomas Klich, § 17 *DIS-SchO*, in ICC-SCHO/DIS-SCHO: PRAXISKOMMENTAR ZU DEN SCHIEDSGERICHTSORDNUNGEN, *supra* note 1, ¶ 20-21.

¹⁹⁸ Friederike Stumpe & Heiko A. Haller, § 32 *DIS-SchO*, in ICC-SCHO/DIS-SCHO: PRAXISKOMMENTAR ZU DEN SCHIEDSGERICHTSORDNUNGEN, *supra* note 1, ¶ 12; Meike von Levetzow, § 39 *DIS-SchO*, in ICC-SCHO/DIS-SCHO: PRAXISKOMMENTAR ZU DEN SCHIEDSGERICHTSORDNUNGEN, *supra* note 1, ¶ 78.

¹⁹⁹ Alexander Schilling, § 7 *DIS-SchO*, in ICC-SCHO/DIS-SCHO: PRAXISKOMMENTAR ZU DEN SCHIEDSGERICHTSORDNUNGEN, *supra* note 1, ¶ 15; Simon Manner, § 11 *DIS-SchO*, in ICC-SCHO/DIS-SCHO: PRAXISKOMMENTAR ZU DEN SCHIEDSGERICHTSORDNUNGEN, *supra* note 1, ¶ 12; Heiko A. Haller, § 25 *DIS-SchO*, in ICC-SCHO/DIS-SCHO: PRAXISKOMMENTAR ZU DEN SCHIEDSGERICHTSORDNUNGEN, *supra* note 1, ¶ 17.

In contrast, the generously-drafted Article 1(1) of the 2014 ICDR (AAA) International Arbitration Rules (“subject to whatever modifications the parties may adopt in writing”) seems to grant absolute precedence to party autonomy.²⁰⁰

3. *Non-Derogatable Institutional Rules as “Core” of Institutional Arbitration?* — The overview of the non-derogatable provisions contained in the institutional rules of a few selected arbitral institutions has most of all made apparent that these “mandatory” institutional rules are far from uniform, rendering it difficult to regard them as an indication of the core of institutional arbitration in a general sense. Instead of reflecting the characteristic features of institutional arbitration that are not present in *ad hoc* arbitration, they rather reflect cornerstones of a particular institution’s arbitration.²⁰¹ The latter becomes notably apparent when taking into account the many institutional arbitration rules that have been closely modelled on the UNCITRAL Arbitration Rules²⁰² (including the changes introduced by their 2010 revision²⁰³), with some institutional rules being virtual copies of the UNCITRAL Rules: As any “mandatory” core of such institutional rules would necessarily resemble the non-derogatable provisions of the UNCITRAL Arbitration Rules, this core can by definition not be characteristic for institutional arbitration only, because it is similarly present in UNCITRAL (and therefore, as addressed earlier,²⁰⁴ *ad hoc*) arbitrations.

In other words, it is not the content of non-derogatable institutional arbitration rules that can inform us about the nature of institutional arbitration. As will be demonstrated below, the “mandatory” core of institutional rules nevertheless provides us with important input about the borders of institutional arbitration, albeit for a different reason.

4. *Case Law on Attempted Party-Derogations from Non-Derogatable Institutional Rules* — The effects of party attempts to derogate from “mandatory” institutional arbitration rules became apparent in *Samsung Electronics v. Qimonda*, a case decided by the Tribunal de Grande Instance

²⁰⁰ See GUSY, HOSKING & SCHWARZ, *supra* note 188, ¶¶ 1.91-92; similarly on Article 1(1) of the 2009 ICDR Rules Martin F. Gusy et al., *ICDR International Arbitration Rules*, in PRACTITIONER’S HANDBOOK ON INTERNATIONAL COMMERCIAL ARBITRATION ¶ 17.53 (Frank-Bernd Weigand ed., 2009). On the comparable wording of Article 2(1) of the 1988 ICC Rules see Kreindler, *supra* note 182, at 56.

²⁰¹ See Geisinger, *supra* note 169, at 77 (writing in general); VERBIST ET AL., *supra* note 15, at 16; WEBSTER & BÜHLER, *supra* note 175, ¶ 1-30 (both on the ICC Rules); Besson, *supra* note 175, ¶ 31 (on the Swiss Rules).

²⁰² See BORN, *supra* note 1, at 173-74; Perales Viscasillas, *supra* note 8, at 53-54; BLACKABY ET AL., *supra* note 4, ¶ 1.157.

²⁰³ See WIDDASCHECK, *supra* note 9, at 29.

²⁰⁴ *Supra* Section IV.A.

de Paris in 2010.²⁰⁵ It arose from a license contract in which the parties had agreed to have any dispute decided by ICC arbitration, but without the arbitrators' appointment having to be confirmed by the ICC Court or the arbitral award undergoing scrutiny by the ICC Court. Their arbitration agreement accordingly derogated from not only one, but two features of the ICC Rules that are commonly viewed as non-derogatable,²⁰⁶ attempting to exclude the arguably most invasive powers of the ICC.²⁰⁷ Because of those derogations, the ICC Secretariat refused to administer the arbitration²⁰⁸ and, when the defendant did not agree to remove those derogations, declared the arbitration proceedings terminated.²⁰⁹ In light of this development, the parties agreed to conduct an *ad hoc* arbitration, with the two already party-appointed arbitrators and with the ICC as appointing authority, should one be needed in order to appoint the presiding arbitrator.²¹⁰

The decision in *Samsung Electronics* provides two important insights into the factors determining the nature of an arbitration as institutional or *ad hoc*. The first insight is the confirmation of an arbitral institution's power (here: the power of the ICC) to decide whether an arbitration can go forward where the parties have attempted to derogate from provisions in the institution's rules that the institution considers to be non-derogatable. Although the parties to the arbitration have agreed upon the derogations from the institutional rules as much as upon the institutional rules' application to their arbitration, the institution possesses the right to determine the institutional nature of the arbitration: If it decides (one may add: in accordance with its institutional rules) that an arbitration cannot continue, the proceedings are no longer institutional. In institutional arbitration, the arbitral institution therefore exercises what may be called a "gatekeeper function".

The second insight from the *Samsung Electronics* case concerns an arbitration's nature once the "gatekeeping" institution has exercised its gatekeeper function to a negative end, deciding that the arbitration cannot continue under its administration as an institutional arbitration. In *Samsung*, the parties had seemingly agreed under the court's guidance (with the court acting as *juge d'appui* in accordance with the French law of arbitration) to continue the proceedings that commenced as an institutional arbitration as an *ad hoc* arbitration. The institutional arbitration thereby "mutated" into

²⁰⁵ Tribunal de Grande Instance [TGI] [ordinary court of original jurisdiction] Paris, Jan. 22, 2010, 10/50604, 571 (Fr.) [hereinafter *Samsung v. Qimonda AG*].

²⁰⁶ *Supra* Section IV.C.2.

²⁰⁷ Racine, *supra* note 24, at 578.

²⁰⁸ *Samsung v. Qimonda AG*, *supra* note 205, at 574-75.

²⁰⁹ *Id.* at 575.

²¹⁰ *Id.*

an *ad hoc* arbitration.²¹¹ But even if no such subsequent agreement would have been reached between the parties, the result would arguably have been the same: Irrespective of the applicable *lex arbitri* (i.e., also where the applicable arbitration law is that of a jurisdiction other than France), an interpretation of the arbitration agreement would lead to the conclusion that the parties intended to continue their proceedings even if the institution named refuses its administration, although it would then be an *ad hoc* arbitration²¹² (and neither an institutional nor a third category of arbitration).

5. *Institution's Gatekeeper Function as Decisive Characteristic of Institutional Arbitration* — The case law on attempted derogations from non-derogatable institutional rules provides a crucial guidepost in defining institutional arbitration: It is submitted that it is an arbitral institution's power, given to the institution through the parties' agreement on its institutional arbitration rules, to unilaterally preserve the core characteristics of its arbitration procedure (as, in *Samsung Electronics*, the ICC's confirmation of arbitrator appointments and its scrutiny of arbitral awards) what makes an institutional arbitration "institutional". The authority of an institution to protect the core characteristics of its institutional arbitration, its final decision about desired derogations from its rules, constitutes a decisive third-party involvement well-suited to distinguish institutional from other arbitrations. The focus on this "gatekeeper function" avoids the uncertainties inherent in both a reliance on the characteristic "core" of institutional arbitration rules²¹³ and in attempts to define arbitral institutions, because it is unclear what factors make an institution an arbitral institution.²¹⁴ Instead, the present approach looks to the institution's decision-making power in relation to the parties to an arbitration.

A gatekeeper function as described here is particular to certain arbitral institutions. On the one hand, it distinguishes them from mere appointing authorities, because and as far as the parties cannot overrule the arbitral institution's decision and nevertheless preserve the institutional nature of their arbitration. An institution's decision-making power of this kind exceeds an appointing authority's power to appoint arbitrators under domestic laws because the latter appointments are not binding on both parties, who in spite of it could agree on different arbitrators. (To be clear,

²¹¹ Racine, *supra* note 24, at 576; see generally CARBONNEAU, *supra* note 4, at 11 ("Too great an emphasis on the use of party discretion, however, can transform an institutional arbitration into an *ad hoc* proceeding.")

²¹² Detlev Kühner, *Anmerkung*, in ZEITSCHRIFT FÜR SCHIEDSVERFAHREN 239, 240 (2013); Nicholls & Bloch, *supra* note 170, at 405.

²¹³ *Supra* Section IV.C.3.

²¹⁴ On the difficulties to define the similar term "permanent arbitral institution", see *supra* Section IV.A.3.(c).

the power to make decisions that are binding on only one party is insufficient in this regard, as such a power is typical for appointing authorities in *ad hoc* and institutional arbitrations alike.²¹⁵) On the other hand, a gatekeeper function is not necessarily exercised by every arbitral institution (however defined), because the required decision-making power must be delegated to the institution through the institutional rules. The presence of a gatekeeper function therefore depends on the role given to the respective institution by its rules, which means that not every arbitral institution conducts “institutional” arbitrations in the sense proposed here.

The present approach does not presuppose any specific content of the rules that an arbitral institution is entitled to preserve. It thereby accommodates the procedural differences between the various arbitral institutions, including the differences in the non-derogatable part of their respective arbitration rules that was outlined earlier.²¹⁶

Where it is present, the gatekeeper function implements an additional limit to the parties’ autonomy not existent in *ad hoc* arbitration. In case an arbitral institution vested with the necessary decision-making power denies its consent to have an arbitration move forward under its rules, such an arbitration no longer qualifies as “institutional”, even if it nevertheless should be continued by the parties.

6. Lessons Learned for the Distinction Between Arbitration Categories

— If an arbitration institution named in an arbitration agreement refuses to administer the arbitration because the parties have derogated from provisions in the institutional arbitration rules that the institution considers non-derogatable, the arbitration cannot proceed as an institutional arbitration.²¹⁷ If the parties and the arbitral tribunal proceed nonetheless in such a situation, the arbitration continues as an *ad hoc* arbitration.²¹⁸ This indicates that an arbitral institution’s power to unilaterally preserve the core characteristics of its institutional arbitration procedure is what makes an institutional arbitration “institutional”.²¹⁹ Where this gatekeeper function has resulted in the institution not allowing an arbitration to proceed under its auspices, this decision cannot prevent the parties from nevertheless using the institutional arbitration rules—however, such a proceeding would then be an *ad hoc* arbitration.²²⁰

In contrast, the content of the non-derogatable provisions of institutional arbitration rules does not seem to reflect a universal core of institutional arbitrations, but rather demonstrates the significant variety of

²¹⁵ See UNCITRAL Model Law, *supra* note 49, arts. 11(3)-(5) and further *infra* Section V.B.2.(a).

²¹⁶ See *supra* Section IV.B.2.

²¹⁷ *Supra* Section IV.C.4. and Nicholls & Bloch, *supra* note 170, at 405.

²¹⁸ Kühner, *supra* note 212, at 240; Nicholls & Bloch, *supra* note 170, at 405.

²¹⁹ *Supra* Section IV.C.5.

²²⁰ See also SCHWARZ & KONRAD, *supra* note 173, ¶ 9-102.

arbitral proceedings and of the procedural involvement of different institutions.²²¹

D. “Mix and Match” (or “Hybrid”) Arbitrations

The fourth and last group of borderline cases are so-called “mix and match” arbitrations, often also referred to as “hybrid”²²² arbitrations.

1. *Characteristics of “Mix and Match” Arbitrations* — In such cases, that—luckily—are rare, the parties agree to conduct their arbitration under the rules of one arbitral institution, but to have it administered by another arbitral institution. In doing so, they therefore “mix and match” institutional rules and administering institution. In a manner of speaking, such arbitration agreements constitute a sub-type of the borderline cases just discussed²²³ that involve the modification of institutional arbitration rules by the parties. They are nevertheless particular because they take the modifications to the extreme, by exchanging the entire arbitral institution that has designed the applicable rules for a different administering institution.

The first case to put “mix and match” arbitrations into the spotlight was the famous (or rather infamous) case *Insignia Technology Co. Ltd. v. Alstom Technology Ltd.*,²²⁴ decided by the Singapore High Court in 2008. It involved an arbitration clause that called for “arbitration before the Singapore International Arbitration Centre in accordance with the Rules of Arbitration of the International Chamber of Commerce”.²²⁵ Similar cases that have resulted in published court decisions concerned agreements about arbitrations to be conducted pursuant to the ICC Rules, but to be administered by the AAA,²²⁶ another one to be conducted pursuant to the ICC Rules, but to be administered by the SCC;²²⁷ and—again—disputes to “be referred to Singapore International Arbitration Center (hereinafter “SIAC”) for arbitration in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce.”²²⁸ Practitioners

²²¹ *Supra* Section IV.C.3.

²²² *HKL Group Co. Ltd. v. Rizq International Holdings Pte. Ltd.*, [2013] SGHCR 5, ¶ 28 (Sing.) [hereinafter *HKL v. Rizq*]; Kirby, *supra* note 21, at 325; Nicholls & Bloch, *supra* note 170, at 393.

²²³ *Supra* Section IV.C.

²²⁴ See generally *Insignia Technology Co. Ltd. v. Alstom Technology Ltd.*, [2008] SGHC 134 (Sing.) [hereinafter *Insignia v. Alstom 2008*].

²²⁵ *Id.* ¶ 3.

²²⁶ *Exxon Neftegas Ltd. v. WorleyParsons Ltd.*, Supreme Court of the State of New York, County of New York, Order of 16 July 2014, Case no. 654405/2013, per Ramos J [hereinafter *Exxon v. Worley Parsons*].

²²⁷ *Russian Federation v. I.M. Badprim S.R.L.*, Svea Court of Appeal, Judgment of 23 January 2015, Case no. 2454-14.

²²⁸ *Top Gains Minerals Macao Commercial Offshore Ltd. v. TL Resources Pte. Ltd.*, [2015] C.F.I. 2101, ¶¶ 43-45 (H.K.); see also *HKL v. Rizq*, *supra* note 222, ¶ 1 (where the arbitration clause used referred to a (non-existent) “Arbitration Committee at Singapore” and to the ICC Rules.).

assume more cases to have occurred²²⁹ that have remained confidential, because none of the parties involved has resorted to court proceedings.

2. *Potential Insight into the Factors that Make Arbitrations Institutional* — For the discussion about arbitration categories, “mix and match” arbitrations are of interest because they aim at a separation of the two components traditionally considered characteristic for institutional arbitrations,²³⁰ namely an institution’s arbitration rules and an institution’s administration of the proceedings. While, as a rule, arbitral institutions administer proceedings in accordance with their own (“in-house”) rules, ‘mix and match’ arbitrations constitute an exception. Can their unusual disconnection of rules and administration provide us with additional insight into the nature of institutional arbitration?

3. *Case Law on “Mix and Match” Arbitrations* — As “mix and match” arbitrations involve not only one, but two arbitral institutions (albeit in a particular way), one could be tempted to think that such arbitrations must *a fortiori* qualify as institutional arbitrations.²³¹ Other commentators regard hybrid arbitrations as neither institutional nor *ad hoc* arbitrations, but rather a third category.²³²

(a) *Insigma Technology v. Alstom Technology* — In *Insigma*, the Singapore Court of Appeal adopted a yet different position. In affirming the High Court’s views in this regard, it held as follows:

The arrangement provided for in [the Arbitration Agreement] would be unworkable if the SIAC was unable to provide similarly equipped actors to fulfil the roles that the ICC Rules gave to the institutional bodies of the ICC. However, while it might not be advisable to use the ICC Rules for most *ad hoc* arbitrations because of the need for an administering body, if the *ad hoc* arbitration nominates a substitute institution to administer the arbitration and such substitute can arrange organs to carry out similar functions to those carried out by the different parts of the ICC apparatus, there should be no practical problem, as well as no objection in principle, to providing for such a hybrid *ad hoc* arbitration administered by one institution but governed by the rules (as adapted where necessary) of another. This freedom is inherent in the flexible nature of arbitration, especially *ad hoc* arbitration. In any case, inefficiency alone cannot render a clause

²²⁹ SIMON GREENBERG ET AL., INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA-PACIFIC PERSPECTIVE (2011), ¶ 4.176; Kirby, *supra* note 21, at 325 (“not uncommon”); Nedden & Herzberg, *supra* note 95, ¶ 16.

²³⁰ *Supra* Section II.B.

²³¹ In this sense see Perales Viscasillas, *supra* note 8, at 39.

²³² Nicholls & Bloch, *supra* note 170, at 405.

invalid so long as the parties had agreed and intended for the arbitration to be conducted in this manner.²³³

For the purposes of the present investigation, it is striking that the Singapore Court of Appeal did not consider the ‘mix and match’ arbitration to be institutional in nature, but rather an *ad hoc* proceeding of a particular kind.²³⁴ More precisely, it spoke of an “hybrid *ad hoc* arbitration administered by one institution but governed by the rules (as adapted where necessary) of another”.²³⁵ While authors have generally agreed that any arbitration conducted under the ICC Rules but not administered by the ICC cannot qualify as an ICC arbitration,²³⁶ the Singapore Court of Appeal went further by ruling that it constitutes no institutional arbitration at all.

Unfortunately, the Court of Appeal did not elaborate on the reasons underlying its approach. Commentators have noted that the High Court in *Insignia* did not use the term “*ad hoc* arbitration” to refer to arbitration that is not administered by an arbitral institution, as is most frequently done,²³⁷ but in order to refer to an arbitration that “is conducted pursuant to rules agreed by the parties themselves or laid down by the arbitral tribunal”,²³⁸— but not, one could add, pursuant to rules laid down by an arbitral institution.²³⁹ Based on this relatively broad understanding of *ad hoc* arbitration, the High Court essentially treated the arbitration rules agreed by the parties as an *ad hoc* version of the ICC Rules.²⁴⁰

(b) *Exxon Neftegas v. WorleyParsons* — In *Exxon Neftegas*,²⁴¹ parties had mixed and matched the ICC Rules with the proceedings’ administration by the AAA. In spite of the arbitration agreement, *Exxon* brought a suit in a New York court. *WorleyParsons* filed a motion to stay and to compel arbitration in the Supreme Court of the State of New York, and at the same time commenced an arbitration before the ICC under the ICC Rules. *Exxon*

²³³ *Insignia v. Alstom*, *supra* note 2, ¶ 35.

²³⁴ Willems, *supra* note 59, at 405.

²³⁵ *Id.*

²³⁶ FRY ET AL., *supra* note 156, ¶ 3-194; Perales Viscasillas, *supra* note 8, at 37; Reiner & Aschauer, *supra* note 180, ¶ 28.

²³⁷ Kirby, *supra* note 21, at 324.

²³⁸ *Insignia v. Alstom 2008*, *supra* note 224, ¶ 31.

²³⁹ *See also id.* ¶ 25:

It is obvious from the clause, taking an objective view of its wording, that the parties did not bargain for an ICC institutional arbitration, but for an SIAC administered one and even that was not to be institutional in nature because they intended the SIAC to apply the rules of the ICC in administering the proceedings. By specifying a different set of procedural rules that was not the SIAC’s in-house rules, the parties showed their desire for an *ad hoc* arbitration.

²⁴⁰ Kirby, *supra* note 21, at 327.

²⁴¹ *Exxon v. Worley Parsons*, *supra* note 226.

opposed the motion to stay the court proceedings, and in addition filed a cross-motion to stay the ICC arbitration. The Supreme Court of the State of New York's order was two-pronged:

First, it directed the parties to have “any arbitration administered by the American Arbitration under the ICC Rules [i.e., in exact compliance with the wording of their arbitration clause], with the parties to seek the court's assistance if they are unable to agree to any modifications of the ICC Rules required for AAA administration”. In contrast to the Singapore High Court in *Insigma*, the court in *Exxon Neftegas* did not address whether the arbitration resulting from the mix and match clause accompanied by necessary rules modification would be institutional or *ad hoc*. (Under the standards of *Insigma*, it would arguably be *ad hoc*.)

Second, the court held that “[i]f the AAA is unwilling or unable for any reason to administer the arbitration under the ICC Rules, the reference to the ICC Rules in the arbitration clause in the Engineering Agreement is severed and the parties shall arbitrate pursuant to arbitration rules designated by the AAA according to its procedures.”²⁴² In doing so, the court made clear that it considered the parties' choice of the administering institution as more important than their choice of institutional rules. Furthermore, it stressed two factors that were to determine the nature of the arbitration proceeding to arise from the unmodified “mix and match” clause: The administering arbitral institution's right to decide whether it wants to administer an arbitration under another institution's rules, and, in case it is unwilling to do so, the administering institution's right to designate the arbitration rules to be used in the proceedings. By focusing on the arbitral institution's right to decide as the factor of last resort, the court in *Exxon Neftegas* essentially confirmed the importance of the institution's “gatekeeper function” identified earlier.²⁴³

4. Lessons Learned for the Distinction Between Arbitration Categories — The curious cases of ‘mix and match’ arbitrations provide us with additional insight into the factors relevant for the distinction between arbitration categories. While the scholarly discussion in this respect is still developing, case law²⁴⁴ has clarified that a combination of one arbitral institution's rules with a case administration by another arbitral institution does not *a fortiori* make the respective arbitration institutional, but rather *ad hoc*. This confirms that the mere combination of any institution's administration with any institution's rules is not enough for an arbitration to qualify as institutional, in spite of these two components appearing in most traditional “institutional arbitration” definitions.²⁴⁵ *Insigma* thereby

²⁴² *Id.*

²⁴³ *Supra* Section IV.C.5.

²⁴⁴ *Supra* Section IV.D.3.

²⁴⁵ *Supra* Section II.B.

stands in conformity with the prevailing view on arbitrations in which the parties have chosen an arbitral institution without its institutional rules, that are generally categorized as *ad hoc*²⁴⁶—according to *Insigma*, this approach similarly applies to the party choice of an arbitral institution (here: the SIAC) together with arbitration rules issued by a different institution (here: the ICC Rules). In other words, it is only the combination of an arbitral institutions with the application of *its own* institutional rules that makes an arbitration institutional. In addition, the case law on “mix and match” arbitrations confirms the widely-agreed notion that *ad hoc* arbitration is the default category,²⁴⁷ while institutional arbitration is the exceptional category.

The maybe most interesting lesson to be learned from “mix and match” arbitrations is the importance that court decisions give to arbitral institutions’ decision-making power. In *Insigma*, the court stressed that the arbitration agreement “was rendered certain and workable by the SIAC agreeing to administer the arbitration under the ICC Rules,”²⁴⁸ before concluding: “In our view, the only aspect of uncertainty or inoperability with regard to the Arbitration Agreement was the contingency of the SIAC declining to administer the arbitration according to the ICC Rules”²⁴⁹ In focusing on the institution’s decision to administer or not to administer the hybrid arbitration, the court’s reasoning ran parallel to the French court’s approach in *Samsung Electronics*.²⁵⁰ It thereby confirms the significance of arbitral institutions’ gatekeeper function outlined earlier,²⁵¹ given that only SIAC’s decision to administer the arbitration under the ICC Rules enabled the arbitration to proceed, albeit in form of an *ad hoc* arbitration. (The change from one arbitration category to the other resulted from the combination of one institution’s rules with another institution’s administration, a distinguishing factor not present in case of attempted deviations from other non-derogatable institutional rules, as eg in *Samsung Electronics*.) A focus on the arbitral institution’s gatekeeper function is also apparent in *Exxon Neftegaz*, when the Supreme Court of the State of New York orders the parties to “arbitrate pursuant to arbitration rules designated by the AAA according to its procedures”, “[i]f the AAA is unwilling or unable for any reason to administer the arbitration under the ICC Rules”²⁵². By explicitly declaring the institution’s unwillingness to administer the hybrid (*ad hoc*) arbitration sufficient for the proceedings to continue under the AAA’s auspices pursuant to AAA-designated institutional rules (and

²⁴⁶ *Supra* Section IV.B.2.

²⁴⁷ *Supra* Section II.C.

²⁴⁸ *Insigma v. Alstom*, *supra* note 2, ¶¶ 5, 40 (emphasis added).

²⁴⁹ *Id.* ¶ 40 (emphasis added).

²⁵⁰ *Supra* Section IV.C.5.

²⁵¹ *Supra* Section IV.C.4.

²⁵² *Exxon Neftegaz v. WorleyParsons*, *supra* note 226.

therefore arguably as an institutional arbitration), the court in *Exxon Neftegas* similarly looked to the arbitral institution’s power to make a decision that binds both parties. Finally, and in the same spirit, the Singapore High Court in *HKL Group Co. Ltd. v Rizq International Holdings Pte. Ltd.* considered a “mix and match” arbitration clause to be workable and not null and void if the parties were “able to secure the agreement of an arbitral institution” to conduct a hybrid arbitration as described in the clause²⁵³—by leaving the decision to administer an arbitration under rules other than its in-house arbitration rules to the unnamed institution’s discretion, the court in essence acknowledged its gatekeeper function.

V. CONSEQUENCES FOR THE DEFINITION OF ARBITRATION CATEGORIES

In order to identify consequences to be drawn for the definition of arbitration categories, it is helpful to first briefly summarize the lessons learned from the treatment of the four groups of borderline cases.²⁵⁴ Based on these results, a novel definition of ‘institutional arbitration’ will then be outlined.²⁵⁵

A. Summary of the Lessons Learned from Borderline Cases

On one hand, the earlier discussions have demonstrated that a party agreement on an arbitral institution alone does not give an arbitration an ‘institutional’ character, as long as it does not encompass the application of that institution’s arbitration rules.²⁵⁶ On the other hand, neither the use of a pre-existing set of arbitration rules (like the UNCITRAL Arbitration Rules)²⁵⁷ nor the use of institutional arbitration rules alone (i.e., without the use of the issuing institution’s services)²⁵⁸ suffice to make an arbitration “institutional”. As an intermediate result, it is therefore clear that *both* the use of institutional arbitration rules and the involvement of an arbitral institution are necessary for an arbitration to be “institutional”—a requirement reflected in some, but not all traditional textbook definitions.²⁵⁹

Since the *Insignia* case, we furthermore know that the combination of one institution’s administration with another institution’s rules results in an

²⁵³ *HKL v. Rizq*, *supra* note 222, at ¶¶ 29, 37.

²⁵⁴ *Infra* Section V.A.

²⁵⁵ *Infra* Section V.B.

²⁵⁶ *Supra* Section IV.B.2.

²⁵⁷ *Supra* Section IV.A.1.

²⁵⁸ *Supra* Section IV.B.1.

²⁵⁹ *Cf. supra* Section II.B.

ad hoc arbitration,²⁶⁰ meaning that an institutional arbitration presupposes the proceeding's administration by an arbitral institution under that very institution's own arbitration rules.

The last and arguably most difficult question concerns the type of institutional involvement necessary to give an arbitration an institutional character. It has become clear that an arbitral institution's role as a mere appointing authority under either the UNCITRAL Arbitration Rules or domestic arbitration law is in any case insufficient for that purpose.²⁶¹ Something more is required, which at the same time means that not every involvement of an arbitral institution makes an arbitration institutional. In searching for the threshold of a sufficient institutional involvement, a focus on the degree of administrative services offered has proven unhelpful, as no workable minimum standard could be identified.²⁶² Instead, the *Samsung Electronics* case demonstrated that it is an arbitral institution's power to make binding decisions on certain procedural matters, having been delegated to the institution by the parties through their agreement on the institution's arbitration rules, that makes an arbitration "institutional".²⁶³ Such a delegated power to decide provides the arbitral institution with the authority to protect certain characteristic and therefore non-derogable features of that institution's arbitration (referred to here as "gatekeeper function"), thereby restricting the parties' autonomy to design their dispute resolution proceedings more than it is restricted in *ad hoc* arbitration, where merely the *lex arbitri*'s mandatory rules must be observed. The crucial role of an arbitral institution's power to make procedural decisions binding on the parties has been confirmed by case law on "mix and match" arbitrations, in particular in the *Insigma* and the *Exxon Neftegas* case.²⁶⁴

Finally, the discussion of borderline cases has confirmed that the traditionally prevailing approach of distinguishing between merely two categories of arbitration—*ad hoc* arbitration on one hand, and institutional arbitration on the other²⁶⁵—continues to be convincing, even in the face of borderline constellations that may be difficult to qualify. In other words, it is neither necessary nor helpful for the purposes identified earlier²⁶⁶ to introduce further (e.g., "hybrid") categories of arbitration. Among the two arbitration categories, *ad hoc* arbitration functions as the default category. It comprises all arbitrations that lack a sufficient involvement of arbitral institutions or of their institutional rules, among them arbitrations with

²⁶⁰ *Supra* Sections IV.D.3.a. & IV.D.4.

²⁶¹ *Supra* Section IV.A.2.

²⁶² *Supra* Section IV.A.3.

²⁶³ *Supra* Sections IV.C.4. & IV.C.5.

²⁶⁴ *Supra* Sections IV.D.3. & IV.D.4.

²⁶⁵ *Supra* Section II.A.

²⁶⁶ *Supra* Section III; in particular at Section III.D.

some institutional involvement, but not of an institution with the necessary “gatekeeper function”.

B. Novel Definition of Institutional Arbitration

1. *The Definition* — In light of the lessons learned, a novel definition of “institutional arbitration” could read as follows: “An arbitration is institutional if the parties, by agreeing on an institution’s arbitration rules, have delegated to this arbitral institution the power to make binding decisions on certain procedural matters.” Any arbitration not or no longer fulfilling these requirements is an *ad hoc* arbitration.

2. *Explanation of the Definition* — The components of the definition proposed here require a brief explanation.

(a) *Arbitral Institution’s Power to Make Binding Decisions* — The crucial factor in an institutional arbitration is the respective arbitral institution’s power to make binding decisions, its “gatekeeper function”. By focusing on the institution’s decision-making power and not on the administrative services rendered by the institution, the definition reflects lessons learned from case law on party agreements excluding “mandatory” (non-derogatable) institutional rules²⁶⁷ and on “mix and match” arbitration agreements.²⁶⁸ At the same time, it avoids the difficulties arising from measuring the type and degree of administrative services offered by an institution.²⁶⁹ In other words, the present definition does not focus on *which* tasks an administering institution provides (quantitative approach), but rather on *how* it administers its arbitrations (qualitative approach). An institution’s “gatekeeper function” that results from its power to make binding decisions enables it to prevent party derogations from the core of its institutional arbitration rules, thereby protecting the characteristic features its institutional arbitrations. Although the gatekeeper function thereby restricts party autonomy in institutional arbitration more than it is restricted in *ad hoc* arbitration, it serves not only the institution’s self-interest²⁷⁰ by protecting its “brand”,²⁷¹ but also has advantages for parties, arbitrators, supervising State courts and the interested public: By somewhat standardising each institution’s institutional arbitrations, it guarantees the foreseeability of a particular institutional arbitration’s core characteristics, thereby creating a reliable point of reference for an institutional award’s

²⁶⁷ *Supra* Section IV.C.4.

²⁶⁸ *Supra* Section IV.D.3.

²⁶⁹ *Supra* Section IV.A.3.c.

²⁷⁰ See the oft-quoted remark by the Singapore Court of Appeal in *Insignia v. Alstom*, *supra* note 2, ¶ 26 (“Party autonomy should trump institutional self-interest.”).

²⁷¹ See *id.* ¶ 36 (“We would agree that branding in services is just as crucial as the branding of products.”).

extra cachet.²⁷² In contrast, the gatekeeper function does not primarily protect an arbitration's minimum standard of fairness, as notably the parties' right to be heard and the arbitrators' impartiality: As such minimum standards must be similarly observed in *ad hoc* arbitration, they are guaranteed by the mandatory rules of the *lex arbitri*²⁷³ and enforced by the competent State courts. Insofar, a gatekeeping institution's actions may well result in an additional extra layer of protection, but are not the primary purpose of its gatekeeper function.

A focus on an arbitral institution's decision-making power is as such not entirely new in the present context. As far back as 1967, Professor Lalive considered it decisive for institutional arbitration that the institution "*ne se contente pas de mettre à la disposition des parties son règlement de procédure, ses locaux, ses services administratifs, mais qu'il se réserve lui-même une compétence dans l'application dudit règlement arbitral.*"²⁷⁴ His definition differed from the approach suggested here by not requiring the power to make binding decisions, but seemingly letting any institutional competence ("*une compétence*") suffice. More recently, another author has also regarded the institution's decisional powers as important,²⁷⁵ but focused on whether exercising these powers is "outcome-determinative".²⁷⁶

By requiring an arbitral institution's power to make "binding" decisions, the institution's gatekeeper function as suggested here assumes a decision-making power that goes beyond the legal authority to bind merely one of the parties. An institution's power of the (insufficient) latter type is present in any institution operating as appointing authority under either institutional arbitration rules, under the UNCITRAL Arbitration Rules, under a tailor-made *ad hoc* arbitration arrangement or under domestic arbitration laws: For example, an appointing authority's decision to appoint an arbitrator where a party has failed to appoint one in time²⁷⁷ is binding on the inactive party, an appointing authority's decision on the challenge of an arbitrator²⁷⁸ is binding on the party that had appointed the arbitrator and has not agreed to the challenge, and an appointing authority's decision to appoint a substitute arbitrator²⁷⁹ is binding on a party that has failed to exercise its right to appoint or to participate in the appointment of the substitute arbitrator. However, in each of these cases both parties in theory have the right to jointly deviate from the appointing authority's decision by

²⁷² See *supra* Section III.B.

²⁷³ See UNCITRAL Model Law, *supra* note 49, art. 18.

²⁷⁴ Lalive, *supra* note 1, at 665.

²⁷⁵ GERBAY, *supra* note 32, at 187-88.

²⁷⁶ *Id.* at 195.

²⁷⁷ United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, arts. 8, 9(2), (3), 10(3) (2010) [hereinafter UNCITRAL Arbitration Rules].

²⁷⁸ *Id.* art. 13(4).

²⁷⁹ *Id.* art. 14(2).

agreeing on a different arbitrator, as unlikely as this may seem in practice. An arbitral institution's decisions made as an appointing authority are accordingly not binding on both parties, but merely on the party whose inactivity gave rise to the decision in the first place. The same is arguably true for an appointing authority's decision to appoint a sole arbitrator where the parties had not agreed on the number of arbitrators, as allowed under Article 7(2) of the 2010 UNCITRAL Arbitration Rules, because the parties can reach a contrary (and prevailing) agreement after the appointing authority's decision has been made.

In contrast, the gatekeeper function developed here requires more, namely the authority to bind both parties to an arbitration even where they act in agreement. In other words, the arbitral institution's decision has to be binding for the parties in the sense that they cannot deviate from the decision, even if both parties should agree on such a deviation. When construed in this way, the institution's gatekeeper function restricts procedural party autonomy in institutional arbitrations, and thereby guarantees that certain characteristic features of the institution's arbitration procedure²⁸⁰ are always preserved.

Whether and to which extent a particular arbitral institution possesses decision-making powers as envisaged here is not always easy to determine. Only occasionally institutional arbitration rules clearly address the question, as in case of Article 29.1 of the 2014 LCIA Rules: By expressly providing that “[t]he determinations of the LCIA Court with respect to all matters relating to the arbitration shall be conclusive and binding upon the parties and the Arbitral Tribunal, unless otherwise directed by the LCIA Court”, the 2014 LCIA Rules specifically grant the institution the power to make decisions that are binding on both parties. Under other institutional rules, the issue remains a matter of interpretation, with non-derogatable (“mandatory”) provisions²⁸¹ being an important indicative factor in this respect.

(b) On Certain Procedural Matters — The topic of the arbitral institution's required decision-making power has deliberately been framed in a non-specific manner (“on certain procedural matters”). Imposing a minimum content in this regard appears to be both unnecessary and inappropriate because a particular institution's decision-making power does not protect characteristics of institutional arbitration in general, but the indispensable features of proceedings administered by the institution concerned.

By way of clarification, it should be pointed out that an institution's power to decide on its own administrative fees or on the arbitrators'

²⁸⁰ On the topics covered by the institution's decision-making power, see *infra* Section V.B.2.b.

²⁸¹ See, e.g., *supra* Section IV.C.2.

remuneration – often named as one of the main advantages of institutional over *ad hoc* arbitration²⁸²—is insufficient for the present purpose. The reason is that these decisions do not concern the procedural relationship between the parties, but rather their relationship to the administering institution or the arbitrators. Put differently: The fixing of the arbitral institution’s administrative fees as well as of the arbitrators’ remuneration isn’t a matter of the parties’ autonomy in the first place, because the institution (respectively the arbitrators) always have to agree to the fees suggested by the parties. Decision-making powers with regard to this issue are accordingly also found in rules designed for *ad hoc* proceedings, as notably the UNCITRAL Arbitration Rules that authorize the appointing authority to make adjustments to the arbitral tribunal’s proposal about the determination of its fees and expenses²⁸³ and/or the arbitral tribunal’s subsequent determination of fees and expenses²⁸⁴—decisions that Articles 41(3) and (4)(c) of the 2010 UNCITRAL Arbitration Rules expressly declare to be “binding upon the arbitral tribunal”, without the parties being mentioned.

The definition’s reference to “procedural” matters clarifies that no institutional decision-making power is required with respect to the substance of the dispute. This task—of course—rests with the arbitral tribunal only, in *ad hoc* as in institutional arbitration (however defined).

(c) *Delegation of the Decision-Making Power by the Parties* — Under the present definition, the arbitral institution’s power to render binding decisions on procedural matters has to follow from the parties’ delegation. It is therefore a creature of party autonomy, as much as international arbitration in general and the choice between *ad hoc* and institutional arbitration in particular.²⁸⁵ Only by granting an institution such a power, the parties can lend their arbitration an institutional character. In contrast, arbitral institutions designated as statutory appointing authorities in some jurisdictions²⁸⁶ draw their decision-making powers not from the parties’ delegation, but from the *lex arbitri*. If such an arbitration law authorizes them to render procedural decisions binding on both parties, this statutory power will not make the arbitrations concerned institutional in nature.

The relevant factor should be the parties’ delegation of powers, rather than their actual use by the arbitral institution in the proceedings concerned. This is necessary in order to enable the parties to foresee their arbitration’s type at the moment they conclude the arbitration agreement. In addition,

²⁸² BORN, *supra* note 1, at 171; GERBAY, *supra* note 32, at 86-87; LEW ET AL., *supra* note 1, at ¶ 3-23; Schäfer, *supra* note 14, at ¶ 326.

²⁸³ UNCITRAL Arbitration Rules, *supra* note 277, art. 41(3).

²⁸⁴ *Id.* art. 41(4)(c).

²⁸⁵ See *supra* Section II.A.

²⁸⁶ *Supra* Section IV.A.2.b.

focusing on the exercise of an institution's decision-making power would result in the arbitration potentially changing its nature in the course of the proceedings, a result that would not sit well with "category exclusive" provisions of law attaching legal consequences to the arbitration category.²⁸⁷

(d) *By Agreeing on Institutional Arbitration Rules* — It is a difficult question whether such a delegation of decision powers necessarily must occur through institutional arbitration rules in order to make the arbitration "institutional",²⁸⁸ or whether a delegation by way of other contractual agreements would also suffice.²⁸⁹ The definition suggested here adopts the first approach in order to reflect the Singapore courts' position in *Insignia*, where the delegation of powers to the SIAC by way of the parties' "mix and match" arbitration agreement was viewed as an insufficient base for an institutional arbitration, resulting in the SIAC-administered arbitration under the ICC Rules being categorized as *ad hoc*.²⁹⁰ From the perspective of party autonomy, this requirement can be questioned, given that an individual agreement of this kind is an equally valid (and, due to its specific nature, arguably even stronger) delegation of decision-making power. However, considerations of foreseeability support a limitation to delegations via institutional rules, because it reserves the institutional arbitration category to proceedings in accordance with an institution's usual, off-the-shelf procedures.

As a related requirement also resulting from the *Insignia* decisions,²⁹¹ the decision-making power must have been delegated through institutional arbitration rules to the very institution that has issued these rules ("have delegated to *this* arbitral institution"), and not to a different institution.

(e) *Consequence of an Arbitration not Being in Conformity with the Definition* — If a given arbitration does not conform to the suggested definition as explained here, it is not an "institutional", but an *ad hoc* arbitration. The same is true if the arbitration was commenced as an institutional arbitration, but the parties continue the proceedings in defiance of a binding decision by the arbitral institution: In such a case, the arbitration is no longer institutional, but *ad hoc*. (It is a separate question not to be discussed here in detail, whether their arbitration agreement obliges the parties to continue the arbitration *ad hoc*—this essentially depends on the interpretation of the arbitration agreement.²⁹²)

²⁸⁷ See *supra* Section III.C.2.

²⁸⁸ In this sense probably see Lalive, *supra* note 1, at 665.

²⁸⁹ In this sense see GERBAY, *supra* note 32, at 17.

²⁹⁰ *Supra* Section IV.D.3.a.

²⁹¹ *Id.*

²⁹² SCHLOSSER, *supra* note 14, at ¶ 452; SCHWARZ & KONRAD, *supra* note 173, at ¶ 9-102; Viscasillas, *supra* note 8, at 36.

The limited consequences of an arbitration at first sight appearing to be “institutional”, but not meeting the requirements for this category confirm that the present definition is merely concerned with the delimitation of an arbitration category, but neither with the validity of arbitral agreements nor their capability of being performed.²⁹³ Put differently: In an institutional arbitration in the sense defined here, the institution is exclusively “gatekeeping” the arbitration’s institutional character, not the parties’ access to arbitration in general.

Finally, the present definition maintains the long-standing dichotomy of institutional and *ad hoc* arbitration, thereby confirming that no third or further categories of arbitration are needed.²⁹⁴

VI. CONCLUSION

The distinction between institutional arbitration on the one hand and *ad hoc* arbitration on the other is a basic truth of arbitration theory and practice. Used primarily for descriptive purposes, the precise delimitations of these two traditional arbitration categories are not often investigated. The present article has attempted to gather some insights into the factors that make an arbitration “institutional” or “*ad hoc*” by looking at four groups of borderline cases: Arbitrations conducted under a preexisting set of arbitration rules, but without or with only limited involvement of an arbitral institution acting as appointing authority or providing administrative services; isolated party choices of only institutional rules or only an arbitral institution; the modification of institutional arbitration rules by the parties (and the limit of “mandatory” provisions in those rules); and “mix and match” arbitrations combining one institution’s arbitration rules with the proceedings’ administration by a different arbitral institution.

The discussion of these borderline cases in case law and by scholars throws some light upon the nature of the different modes of arbitration. The conclusions drawn have resulted in the development of a novel definition of “institutional” arbitration that focuses on certain arbitral institutions’ “gatekeeping function”. Under this definition, not every arbitration involving an arbitral institution or institutional rules qualifies as “institutional”, but only those arbitrations in which the parties have delegated to an arbitral institution the power to make binding decisions on certain procedural matters. The result of comparative research of international arbitration law and practice, the definition presented here cannot necessarily be used *tel quel* for the construction of domestic and international provisions addressing institutional arbitration. By contributing

²⁹³ See UNCITRAL Model Law, *supra* note 49, art. 8(1).

²⁹⁴ Viscasillas, *supra* note 8, at 52.

to the ongoing discussion about arbitration categories, the present article has already fulfilled its purpose.

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