Chapter 3: Opting-out aspect - derogation from institutional rules

An agreement on hybrid arbitration is a coin with two sides: On the one hand, parties opt out of the rules issued by the designated institution. On the other hand, they opt into the rules of another institution. Both aspects pose distinctive problems. This chapter shall first focus on the opting-out aspect, which to date has received much more attention by case law and doctrine, before the next chapter discusses the problem of opting-into the rules of another institution.

There is one main obstacle to effectively opting-out of an institution's rules: the risk that such designated institution would decline the case on that basis. Having already highlighted the quasi-regulative force of institutional practice,¹ it is prudent to first look at the positions revealed by different institutions on whether they would accept or refuse cases under modified or different rules (§10), before providing a legal analysis of an institution's right to such refusal (§11). On that basis, the relationship between the autonomy of the parties to choose their rules and the autonomy of the institution to determine its rules will be made clear (§12).

§10 Institutions' flexibility in relation to their rules

Generally, there are some good policy reasons why arbitral institutions may be little inclined to accept major modifications of or even a complete opt-out of their rules by the parties. These reasons include:

- assurance of the quality of arbitrations held under the institutions auspices
- preservation of trust in the services of the institution
- promotion of distinctive features of the institution's own rules
- security in calculating effort and costs associated with administering the proceedings.

On the other hand, an institution not at all prepared to accept rule modifications may likely encounter the following reproaches (whether justified or not):

1  Supra at pp. 104-106 (§4C.II.2.c).
Chapter 3: Opting-out aspect - derogation from institutional rules

- not to respect party autonomy
- to be too bureaucratic
- to cause the parties' arbitration agreement to fail.

For this reason, most arbitral institutions show some flexibility when parties want to adjust their rules. However, flexibility depends on the designated institution's attitude in general (A), the specific rule modifications parties want to make (B) and the interests at stake (C).

A. Institutional attitudes towards rule modifications: a case study

The following subsections shall give an overview of existing arbitral case law or statements of institutional representatives in order to characterise different institutions as to their rigorousness or leniency towards opting-out attempts by the parties.

I. An example for the ICC's position: The Qimonda arbitration

The ICC Court is likely to reject a case if the parties want to depart from ICC Rules deemed essential for the ICC's arbitration system.²

»[T]he attitude of the institution is not laissez-faire«.³

An example is the Qimonda case: An arbitration clause in a contract between Qimonda AG and Samsung Electronics provided for ICC arbitration to the exclusion of the ICC Court's confirmation of arbitrators and scrutiny and approval of awards.⁴ After Qimonda AG's filing of insolvency and upon Samsung Electronics' request for arbitration against the liquidator Mr. Jaffé, the ICC Secretariat informed the parties that it would only administer the case and assist in the appointment of arbitrators if the parties waived the

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² See infra at pp. 219-220 (§10B.I).
³ See Craig, Park, and Paulsson, ICC Arbitration, 295, para. 16.01 (»institutional bias of ICC arbitration«); Schwartz, »Choosing Between Broad Clauses and Detailed Blueprints«, 111; Waincymer, Procedure and Evidence, para. 3.9.1 (with further references); see also Takla, »Non-ICC Arbitration Clauses«, 8–10 (with more examples).
⁴ Craig, Park, and Paulsson, ICC Arbitration, 1, para. 1.01.
§10 Institutions' flexibility in relation to their rules

modifications of the ICC Rules (1998).\(^6\) Mr. Jaffé, in his position as liquidator for Qimonda AG, refused to agree to such waiver and did not participate in the arbitrator nomination process. By letter of 10 December 2010, the ICC Court's secretariat informed the parties of the administrative closing of the proceedings.\(^7\)

The case is the prime example for difficulties that may arise when parties try to derogate from rules of the ICC Court as one of the more controlling institutions.\(^8\)

»The ICC is unwilling to administer proceedings fundamentally different from its own basic concepts; it does not wish to lend its authority to an arbitration that does not allow the ICC Court to exercise its customary control.«\(^9\)

However, the ICC Court has less problems with rule modifications that do not relate to its own duties and powers but only to internal procedure before the tribunal or parties' rights to apply to state courts.\(^10\)

II. SIAC's search for an acceptable position

SIAC's flexibility towards rule modifications by parties is difficult to assess. One can notice the following - partially conflicting - developments. First, SIAC changed its rules a number of times in recent years,\(^11\) coming from a system close to ad hoc arbitration with rules strongly resembling the UNCITRAL Rules to a system more and more controlling.\(^12\) This suggests that SIAC would now keep a strong hand on arbitrations conducted under its auspices. SIAC's current Practice Note for UNCITRAL Cases supports this

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\(^7\) Ibid., 575.

\(^8\) See Craig, Park, and Paulsson, ICC Arbitration, 41, para. 4.05 (»supervised institutional arbitration«).

\(^9\) Ibid., 715, para. 38.08.

\(^10\) As exemplified by the ICC Court's administration of the Kyocera arbitration despite parties' derogation from principle of finality of awards under the rules (\textit{but cf. Kyocera}, 341 F.3d. 987, 1000 [9th Cir. 1997] - expansion of grounds for judicial review finally found invalid; overruling: \textit{LaPine I}, 130 F.3d. 884 [9th Cir. 1997]).

\(^11\) The latest revision was launched in August 2016.

\(^12\) See Wegen and Barth, »Die neue Schiedsgerichtsordnung des SIAC«, 88 (already making this observation for the SIAC Rules [2007]).
assumption since it effectively allows SIAC to closely control even arbitrations facilitated under ad hoc rules.

However, the available case law portrays a contrary development from a very rigid stance towards more flexibility. Concerning the arbitration clause underlying *Bovis Lend v. Jay-Tech*, SIAC did not allow an outside appointing authority to step in, expressing the view that parties could not derogate from its rules at all, as it was at the time even expressly stipulated in SIAC's domestic arbitration rules. A short while later, regarding the *Alstom–Insigma* arbitration, SIAC's position changed to the opposite extreme, when it agreed to administer an arbitration under a completely different set of rules, the ICC Rules (1998).

About the motives for this change in position, one may only speculate:

- The *Alstom–Insigma* arbitration, in contrast to the *Bovis Lend–Jay-Tech* case, was international, arguably demanding more deference to party autonomy.
- The *Alstom–Insigma* arbitration was more lucrative, economically arguing in favour of accepting it.
- The Singapore High Court had disapproved of SIAC's lack of flexibility in *Bovis Lend v. Jay–Tech*.

The latter, presumed motive for adopting a more flexible approach - obedience with local court authority - cannot be seriously criticised and the Singapore courts' subsequent jurisprudence certainly encourages SIAC to continue accepting rules modifications by the parties. Whether SIAC would again go so far to administer arbitrations under different institutional rules is another matter, relating to the opting-in aspect of hybrid arbitration.

III. CIETAC's apparent position

CIETAC is said to be willing to administer cases under modified rules or even a completely different set of rules of another institution, as now clarified in article 4 (3) of the CIETAC Rules (2012 and 2015). Chinese author

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14 SIAC Domestic Rules, art. 1.5 (2002).
15 See supra at pp. 35-39.
16 See supra at p. 155.
17 See infra at Chapter 4, pp. 272 et seq.
Tao Jingzhou even takes the view that this was the only approach in line with international practice:

»For example, prior to 1998, all disputes submitted to the CIETAC for arbitration were conducted pursuant to the rules of the CIETAC. This practice conflicted with international practice, which generally permits the parties to select not merely the applicable law, but also the procedural rules that will govern the arbitration.«

Although there are no reported cases, the Vice Chairman of CIETAC, Yu Jianlong, answered an interview question by Michael Moser as follows:

»Mr. Moser: The Rules also allow the parties to agree to conduct arbitrations in China under rules other than the CIETAC Rules. Has this happened yet?

Mr. Yu: Yes. I think an agreement for such a procedure is usually a compromise between the Chinese party and the foreign party. CIETAC will in no way act against the principle of party autonomy, so long as the selected rules are neither inoperative nor contradictory to the mandatory provisions of the lex arbitri.«

IV. The LCIA's flexibility proven in the Softwood Lumber Arbitrations

The LCIA's administration of the highly political and prominent dispute between the United States and Canada over trade duties and regulations concerning softwood lumber (the so-called »Softwood Lumber Arbitrations«) demonstrates that flexibility concerning the modification of institutional rules can be an important competitive advantage. In the Softwood Lumber Agreement (cited as »SLA«), the United States and Canada agreed to resort to LCIA administered arbitration to the exclusion of the dispute settlement mechanisms available under the WTO and NAFTA Agreements.

Under the Softwood Lumber Agreement, the parties agreed on a considerable number of modifications of the LCIA Rules (1998), notably:

- They modified article 21 so that all experts shall be party-appointed rather than tribunal-appointed.
- They changed article 5 (5) so that the LCIA Court shall »endeavour« to appoint the co-arbitrators to be nominated by each party and the
Chapter 3: Opting-out aspect - derogation from institutional rules

The arbitral tribunal was obliged to endeavour to render the award within 180 days from appointment. Derogating from the default rule in article 28 (2), the arbitral tribunal was not supposed to render an award on costs. The parties excluded the confidentiality obligation in article 30 in favour of transparency of matters of public interest.

These modifications pay tribute to the fact that the Softwood Lumber Arbitrations concern public international trade law rather than commercial matters for which the LCIA Rules are designed. One of the more critical modifications was certainly the obligation of the LCIA Court to appoint the arbitral tribunal as nominated within five days. Since the LCIA Court was itself not a party to the Softwood Lumber Agreement, the parties could not have been sure of their agreement being operable. This is probably the reason why the parties, well advised, formulated this aspect very carefully as a best-endeavours obligation only. The arbitrations then proceeded without encountering any administrative obstacles. Redacted versions of the awards rendered and submissions and exhibits are publicly available.

However, despite the flexibility evidenced by the Softwood Lumber Arbitrations, the LCIA would probably not accept a complete derogation of its rules in favour of other institutional rules - as opposed to UNCITRAL Rules - as will be further explained in the next chapter about the problems relating to the opting-in aspect of hybrid arbitration.

22 Ibid., art. XIV (11).
23 Ibid., art. XIV (19).
24 Ibid., art. XIV (21).
25 Ibid., art. XIV (16)–(18).
27 See Department of Foreign Affairs, Trade and Development Canada, »Softwood Lumber - Dispute Settlement« (for all case materials).
28 »Maximum flexibility for parties and tribunals to agree on procedural matters« is also celebrated as first advantage on the LCIA's website (LCIA, »LCIA Arbitration«).
29 See LCIA, »LCIA Services in Ad Hoc Proceedings«; see generally Gergley, »The LCIA«, para. 4–21, see also supra at pp. 147-150 (§7C.I, II) on appointing authority and other services under UNCITRAL Rules.
V. A recall of the »ICC 500« case to indicate the AAA-ICDR's position

Although perceived as little controlling, there are some limitations as to which derogations from its rules the AAA-ICDR would accept, as evidenced by the application filed with it referring to »The American Arbitration Association or to any other U.S. court« and »the Rules and Regulations of the International Chamber of Commerce (ICC 500).«30 As noted, the AAA-ICDR refused to administer these proceedings because it found the application of ICC Rules incompatible with AAA-ICDR arbitration.31 This case evidences that the AAA-ICDR would not habitually accept arbitrations under other institutional rules, despite a few authors claiming in a very general way, without citing case references and without duly distinguishing between UNCITRAL Rules and institutional rules, that

»AAA and the LCIA [would] also administer arbitrations using rules other than their own.«32

It appears decisive whether modifications are compatible with AAA-ICDR arbitration, a complete opt-out in favour of ICC Rules is certainly not.

VI. Recall of the DIS/DAS awards

As mentioned, two DIS-appointed tribunals showed some flexibility in 2010 when assuming jurisdiction under agreements relating to the DIS' predecessor, the DAS.33 Here, however, the emphasis is on tribunals as it remains entirely unclear which position the DIS as an institution took in this respect, if any. Apparently, the DAS Rules were so similar to the then

30 See supra at pp. 181-184 (§8C.I.3.b).
32 Greenblatt and Griffin, »Towards the Harmonization of International Arbitration Rules«, 108, 109; see also Waincymer, Procedure and Evidence, 194, para. 3.9.2, n. 224; all referring imprecisely to Freyer, »Practical Considerations in Drafting Dispute Resolution Provisions«, 15 (stating that AAA and LCIA »will now administer arbitrations using the UNCITRAL Rules »).
33 See supra at p. 188.
current DIS Rules that a real issue concerning the administrative aspects of the arbitration did not arise.

As further elaborated in the next chapter, the DIS Rules are some of the least controlling, being very similar to ad hoc rules like the UNCITRAL Rules and giving the institution hardly any influence on the arbitration. This, of course, makes it easy for the DIS to react flexibly to opting-out attempts by the parties, as these will often not dramatically influence its own position.\textsuperscript{34}

VII. The approach of one Swiss cantonal chamber of commerce

In an interesting decision, the Swiss Federal Supreme Court confirmed an interim decision (partial award) on jurisdiction\textsuperscript{35} rendered by a tribunal appointed under the auspices of the Zurich Chamber of Commerce - prior to the founding of the Swiss Chambers' Arbitration Institution. The case concerned potentially conflicting references to three different sets of arbitration rules.\textsuperscript{36} The arbitration agreement provided that all disputes should be finally

»[...] settled under the Rules of Conciliation and Arbitration of the Zurich Chamber of Commerce, Zurich/Switzerland, in accordance with the UNCITRAL Arbitration Rules. The number of arbitrators shall be three (3). ICC shall be the appointing authority acting in accordance with the rules adopted by ICC for that purpose.«

The Zurich Chamber of Commerce (hereinafter »ZCC«), different from what might have been the approach of the ICC or the AAA-ICDR in view of above cases,\textsuperscript{37} had not refused to administer the arbitration entirely but had simply chosen to ignore the deviation from its rules with respect to arbitrator appointment. The President of the ZCC had appointed the chairman of the tribunal from a permanent list who had then appointed the co-arbitrators from a list of four provided by the President of the ZCC in line with

\textsuperscript{34} On the other hand, applying another, more controlling institution's rules - the opting-in aspect, \textit{infra} at pp. 344-400 (§14) - would be a greater obstacle to DIS administered hybrid arbitration, since the DIS is not prepared to exercise far-reaching powers.

\textsuperscript{35} On the question if pure jurisdictional decisions can be considered awards, \textit{see infra} at pp. 409-412 (§16A.I.4).


\textsuperscript{37} \textit{See supra} at pp. 210 and 215-215 (§10A.I, V).
articles 11 (2) and 12 (4) of the ZCC Rules (1989). The respondent party had later raised a jurisdictional challenge with the arbitral tribunal, which had been rejected.

Upon respondent's appeal claiming an irreconcilable conflict between arbitral rules, the Swiss Federal Supreme Court upheld this decision finding that - referring to good faith and effective interpretation principles - the primarily applicable ZCC Rules were to be complemented by the UNCITRAL Rules. Concerning the constitution of the arbitral tribunal the court found that there was a potential conflict of jurisdiction as the ICC Rules provide for a different constitution procedure. It deemed an appointment by the ICC Court impossible in institutional, non-ICC arbitration and hence approved of the ZCC's disregard of the reference to ICC appointment:

»[E]ine am Zweck der Vereinbarung orientierte Streichung der unmöglichen Ernennungsbestimmung zu Gunsten der prioritären ZHK-Schiedsordnung [ist] durchaus vertretbar [...].«

[Having regard to the purpose of the arbitration agreement, simply deleting the impossible appointment provision in favour of the ZCC Arbitration Rules, which enjoy contractual priority, is by all means reasonable.]

This case illustrates that in the interest of efficiency it could seem a practical option for an institution to accept a case despite feeling unable to attend completely to the parties' agreement and to proceed with the appointment...
of the arbitral tribunal in accordance with its own rules, ignoring the deroga-
tion therefrom.44

The case is no clear authority on how the Swiss Chambers' Arbitration
Institution, of which the ZCC now forms part, would react to modifications
of its rules in general since it mainly raised issues of opting-into another
institution's rules, here the ICC Rules, and potential inoperability of the pro-
cedural agreement arising therefrom.45 Nevertheless, one may assume on
the basis of this example case that the Swiss Chambers' would have reser-
vations about any procedural agreement to opt out of essential features of
the Swiss Rules for fear of inefficiency.

B. A focus on essential (»mandatory«) institutional rules

The normative analysis provided by Chapter 1, underlined by the concep-
tual discussion of institutional arbitration in Chapter 2, contested the fol-
lowing kind of statement in theory:

«[T]he mandatory rules established by the arbitration institution […] constitute […]
procedural provisions by which the parties to an arbitration proceeding as well as
their arbitral tribunal are absolutely bound.«46

Nevertheless, as the previous overview suggests, many institutions do not
accept major derogations from their rules in practice - and have good rea-
sons not to - in particular, when it comes to protecting features deemed es-
sential. Accordingly, arbitration rules may be factually »mandatory«. Parties
that do not want to risk that their arbitration agreement becomes inca-
parable of being performed or that it can only be performed with a high num-
ber of adjustments should be aware of those rules whose derogation the is-
suing institution would likely object to.

As this risk is only a factual rather than a legal constraint to party auton-
omy, it seems more appropriate to speak of rules deemed »essential« by the
institution instead of »mandatory« rules. The more rules an institution con-
siders essential the less likely would it agree to administer hybrid arbitra-
tions, in particular when the rules chosen by the parties differ considerably
with regard to such essential elements. Unfortunately, institutional rules,

44 For the corresponding contractual analysis, see infra at pp. 263 et seq.
(§11B.IV).
45 Discussed in detail in Chapter 4, infra at pp. 344-400 (§14).
46 Sandrock, »How Much Freedom Should an International Arbitrator En-
joy?«, 41.
similar to national laws, are not always self-explaining in this respect. They contain a »no man's land«\textsuperscript{47} of rules of which parties are neither expressly permitted to nor not allowed to contract out of.\textsuperscript{48} It is only sure, that all institutions will consider their administrative fee provisions and schedules essential. Like for almost every contract, the price is one of the essentialia negotii. Accordingly, the designated institution would usually not comprehend a hybrid arbitration agreement as derogation from its administrative fee scheme.\textsuperscript{49} The following subsections describe the difficulty of identifying other possible essential rules of various institutions.

I. Essential ICC Rules

The most commonly mentioned examples of essential institutional arbitration rules relate to ICC arbitration. The reason for this is not only the international importance of the ICC Rules and consequent familiarity of lawyers and scholars with them but also the ICC Court's reputation for being more controlling than other institutions.\textsuperscript{50} Moreover, article 19 (1) of the ICC Rules tries to establish a preference of the ICC Rules over party agreements, allowing the latter only »where the Rules are silent.«

Most importantly, the ICC Court sees in its own the administration of the arbitration, as now regulated in article 6 (2) of the ICC Rules, an essential principle that cannot be derogated from.\textsuperscript{51} However, logically, this can only become relevant if a party files a request for arbitration with the ICC Court despite an indication in the arbitration agreement that the ICC Court should not administer the arbitration.\textsuperscript{52}

Doctrine further regards the Court's power to scrutinise draft awards, the need to draw up Terms of Reference and the requirement of a reasoned award as essential features of ICC arbitration.\textsuperscript{53}

\textsuperscript{47} Schöldström, *The Arbitrator's Mandate*, 415.
\textsuperscript{48} Viewed critically by Kreindler, »Impending Revision of the ICC Arbitration Rules«, 56.
\textsuperscript{50} See supra at p. 210 (§10A.I); see also Waincymer, *Procedure and Evidence*, 195, para. 3.9.2.
\textsuperscript{51} Bassiri, »Art. 6 ICC SchO«, para. 53, 56.
\textsuperscript{52} See also supra at pp. 152-154 (§7C.IV.1).
\textsuperscript{53} See e.g. Schäfer, Verbst, and Imhoos, *Die ICC Schiedsgerichtsordnung in der Praxis*, 107–8; Craig, Park, and Paulsson, *ICC Arbitration*, 295, para. 16.01; Waincymer, *Procedure and Evidence*, para. 3.9.1; Landolt,
Chapter 3: Opting-out aspect - derogation from institutional rules

On the other hand, the ICC Rules undeniably also accord parties a great deal of flexibility. They can freely choose the place of arbitration, the language, the applicable law and the method for constituting the arbitral tribunal. These liberties follow directly from the wording of the rules. Nevertheless, one should even regard such advance approvals of party derogations with caution. E.g., under article 11 (6) of the ICC Rules, the ICC Court accepts if parties agree on a specific method for nominating arbitrators, for example by applying an UNCITRAL-type list procedure. In contrast, the ICC Court is less inclined to accept any derogation from the requirement of Court appointment or confirmation of all arbitrators as evidenced by the ICC Court's refusal to administer the Qimonda arbitration.

II. Essential SIAC Rules

In light of SIAC's administration of the Alstom–Insigma arbitration under ICC Rules, one could assume that SIAC adopted a policy of utmost flexibility with respect to party derogations from its rules. However, when taking a closer look, this conclusion does not impose itself. It has to be kept in mind that the ICC Rules (1998) applied in the Alstom–Insigma arbitration accorded SIAC, once it decided to substitute its organs for those of the ICC Court, the same if not greater control over the arbitration than it would have had applying the SIAC Rules then in force. Accepting to administer the arbitration under ICC Rules was therefore not connected to giving up any

»Antitrust Arbitration under the ICC Rules«, 1813, n. 368 (»quasi mandatory«; »not certain whether the arbitrating parties can contract out of it«); see generally Takla, »Non-ICC Arbitration Clauses«, 8–10.

54 ICC Rules, art. 18 (1) (2012; 2017).
55 Ibid., art. 20.
56 Ibid., art. 21 (1).
57 Ibid., art. 11 (6).
58 See also Schäfer, Verbst, and Imhoos, Die ICC Schiedsgerichtsordnung in der Praxis, 106–7.
59 Cf. UNCITRAL Rules, art. 8 (2) (2010).
60 See ICC Rules, art. 12 (3)–(5), 13 (2012; 2017).
62 See supra at pp. 210-212 (§10A.I)
SIAC may have worried about increased responsibilities and additional workload but not about a lack of influence. The case therefore does not give a sufficient indication on whether SIAC would be open to all modifications of its rules, including those that would reduce its own involvement. Moreover, SIAC changed its rules significantly since the Alstom–Insigma arbitration. That the SIAC Rules are now more comparable to ICC Rules concerning the degree of institutional supervision implies that SIAC, whose personnel has also undergone changes, might now also take a more restrictive view concerning derogating party agreements, similar to that of the ICC Court.

Unfortunately, the SIAC Rules itself are not explicit in this respect. Article 1 (1) only provides that »[w]here parties have agreed to refer their disputes to SIAC for arbitration, the parties shall be deemed to have agreed that the arbitration shall be conducted and administered in accordance with these [SIAC] Rules [subject to any] mandatory provision of the applicable law of the arbitration.«

If and to what extent the parties may or may not derogate from the SIAC Rules is unclear. However, it is instructive to look again at the SIAC Practice Note on UNCITRAL Cases. The directives therein, which SIAC applies when providing facilitation services in arbitrations under UNCITRAL Rules, highlight which aspects of its own rules SIAC deems to be essential for effective administrative work. Therein, SIAC insists on the President's right to appoint arbitrators in accordance with the SIAC Rules should the UNCITRAL list procedure be inappropriate and on controlling all financial aspects of the proceedings including the fixing and collection of advances and the fixing of the arbitrators' fees in accordance with the SIAC schedule. Given that SIAC purports to apply these aspects of its rules even when the parties have chosen UNCITRAL rather than SIAC Rules, it is very likely that SIAC would also not welcome parties to modify SIAC Rules concerning these issues.

However, in contrast to the ICC Court, SIAC does not seem to consider its right to scrutinise awards as fundamental and non-derogatory. The Practice Note on UNCITRAL Cases provides that before issuing an award a tribunal »may« submit it in draft form to the Registrar, giving the tribunal

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63 See already supra at pp. 129-131 (§7A.III) and pp. 157-157 (§7D), rejecting a qualification as »ad hoc« for these reasons.
64 SIAC Practice Note for UNCITRAL Cases, para. 8 (2014).
65 Ibid., para. 12–31.
66 Ibid., para. 34.
discretion to use this service or not. Accordingly, the parties, whose agreements on procedure bind the tribunal in principle,\footnote{See supra at pp. 116-122 (§5C, D)} can exclude this option. In light of this, it is unlikely that SIAC would refuse administering arbitration under SIAC Rules only because parties exclude article 28 (2) - despite the imperative language of its last sentence:

»No award shall be made by the Tribunal until it has been approved by the Registrar as to its form [emphasis added].«

This rule intends to protect the parties by limiting the powers of the arbitral tribunal and not to restrict party autonomy in favour of institutional control.

III. Essential CIETAC Rules

CIETAC Rules used to be subject to criticism for lacking recognition of party autonomy.\footnote{Tao, »CIETAC Rules Art. 4«, 519, para. 3–4.} However, to compete successfully in an increasingly international market, CIETAC progressively allows parties’ to make their own procedural choices.\footnote{See Born, International Arbitration and Forum Selection Agreements, 55.} CIETAC now lists »Party Autonomy« as first advantage of arbitration on its website.\footnote{China International Economic and Trade Administration Commission, »Advantages of Arbitration«.} When parties have agreed on CIETAC Rules, it is neither compulsory to conduct proceedings in Chinese nor to choose arbitrators from the CIETAC panel.\footnote{Cf. CIETAC Rules, art. 24 (2), 28 (2012) = art. 26 (2), 28 (2015).} In principle, although this is uncommon in practice, parties could even agree on CIETAC arbitration seated outside mainland China.\footnote{See also Brock and Feldman, »Recent Trends in the Conduct of Arbitrations«, 180 (but assuming that this could currently only apply to Hong Kong, where the first CIETAC subcommission outside mainland China is based); cf. China International Economic and Trade Administration Commission, »Home« (for further information of CIETAC’s Hong Kong branch) and CIETAC Rules, art. 73 et seq. (ch. VI) (2015).}

As pointed out, CIETAC Rules (2012 and 2015) now also allow the choice of a complete set of different rules. Since the revision of 2005, the requirement of an express approval of any modifications or choice of different rules by the CIETAC Commission does no longer exist.\footnote{Tao, »CIETAC Rules Art. 4«, 519, para. 3–4.}
Article 4 (3) of the CIETAC Rules stresses that the parties' agreement shall prevail over the rules only subject to mandatory law (not: rules).

Nevertheless and despite the wording of article 4 (3), one author finds it «evident» that not all CIETAC Rules may be modified, regrettably, without further specifications.\footnote{Lu, »The New CIETAC Arbitration Rules of 2012«, 314.} In contrast, another author stresses that

»[f]ull effect is given to the parties' chosen arbitration rules, except where such an agreement is inoperative or in conflict with the Lex Arbitri«

and that such choice »no longer depends on the CIETAC's consent.«\footnote{Tao, Arbitration Law and Practice in China, para. 599.}

Article 13 (1) of the CIETAC Rules underlines this by providing that CIETAC shall accept a case in accordance with an arbitration agreement providing that disputes are to be referred to arbitration by CIETAC. This provision does not confer any discretion to CIETAC to refuse a case because of modifications to its rules. Articles 13 (1) and 4 (3) of the CIETAC Rules therefore extend CIETAC's offer to administer arbitrations also to cases where parties modified CIETAC Rules.\footnote{See infra at pp. 244-245 (§11A.III.1) on the prevailing and here preferred theory that the institution's offer to administer arbitrations is made to the public.} However, no one would deny that CIETAC could still refuse a case if parties imposed additional duties on CIETAC not contemplated by its rules and fee structure or if the parties tried to modify fee rules to CIETAC's disadvantage.

In any case, all modifications of standard CIETAC practice require an express written agreement by the parties and thus special care in drafting.\footnote{Born, International Arbitration and Forum Selection Agreements, 56.} Moreover, it is entirely unclear how CIETAC would accommodate rule modifications in practice. In light of - unverified - reports on excessive factual influence by the institution's staff on award making,\footnote{Discussed infra at pp. 384-386 (§14B.VI).} it is not excluded that CIETAC could formally accept arbitration under less-controlling rules, e.g. UNCITRAL Rules, but would nevertheless exercise its usual supervision and, e.g. scrutinise awards possibly even without parties noticing. Instead of entering into an argument with the parties by insisting on applying rules granting it certain powers, CIETAC might possibly just exercise such powers anyway.

\footnote{Lu, »The New CIETAC Arbitration Rules of 2012«, 314.} \footnote{Tao, Arbitration Law and Practice in China, para. 599.} \footnote{See infra at pp. 244-245 (§11A.III.1) on the prevailing and here preferred theory that the institution's offer to administer arbitrations is made to the public.} \footnote{Born, International Arbitration and Forum Selection Agreements, 56.} \footnote{Discussed infra at pp. 384-386 (§14B.VI).}
IV. Essential LCIA Rules

»The LCIA is known for its ›light-touch‹ approach. This approach seeks to give the parties and the tribunal maximum flexibility«79

However, slight changes to article 14 of the LCIA Rules indicate that the LCIA may now be more reserved towards party modifications of its rules than prior to the 2014 revision. Moreover, there is some uncertainty to which extent the proclaimed »principle of overriding party autonomy«,80 if still valid, would apply to administrative aspects.

1. Party autonomy under article 14 of the LCIA Rules (1998)

The LCIA Rules (1998) were widely understood to stress the importance of party agreements on procedure more than any other arbitration rules.81 The emphasis on party autonomy in article 14 has been labelled as the »Magna Charta« of the LCIA Rules (1998):82

»The parties may agree on the conduct of their arbitral proceedings and they are encouraged to do so [...].«83

The way it is phrased, this provision expected parties to agree on the conduct of their proceedings individually. Moreover, party agreements expressly restricted the arbitrators' discretion pursuant to article 14 (2) of the LCIA Rules (1998) (»Unless otherwise agreed by the parties«), overruled only by the tribunal's duties to respect »natural justice and procedural fairness« and to avoid »unnecessary delay and expense.«84

79 Gerbay, »The LCIA«, para. 4–39.
81 Cf. Nesbitt, »LCIA Arbitration Rules, Introductory Remarks«, 401 (listing this emphasis as a distinguishing feature).
84 Ibid., art. 14.1 (i), (ii); see also Turner, A Guide to the LCIA Arbitration Rules, 1.42.
§10 Institutions' flexibility in relation to their rules

2. Revisions introduced by the LCIA Rules (2014)

Surprisingly, the LCIA Rules (2014) confine the previously celebrated reign of party autonomy, now only providing in their article 14 (2):

»The parties may agree on joint proposals for the conduct of their arbitration for consideration by the Arbitral Tribunal. They are encouraged to do so in consultation with the Arbitral Tribunal and consistent with the Arbitral Tribunal's general duties under the Arbitration Agreement [emphasis added].«

The slight changes in sentence structure now indicate that the »encouragement« relates only to the consultation with the tribunal rather than agreements on procedure. Moreover, article 14 (5) of the LCIA Rules now attempts to place the tribunal's discretion above the autonomy of the parties, no longer containing the caveat »Unless otherwise agreed.« These changes appear to be not merely editorial but rather seem to indicate a much greater emphasis on efficiency, possibly to the detriment of procedural flexibility for the parties.86

3. General restrictions to modify powers of the institution

Generally, it is unclear whether article 14 of the LCIA Rules (both in the 1998 and 2014 version) also applies to agreements on the tasks, rights and powers of the LCIA institutional organs. The fact that the article, next to addressing party autonomy, only mentions duties, powers and discretion of the arbitral tribunal suggests that »conduct« of the arbitral proceedings means the proceedings in the stricter sense only, like rules on submissions, hearings and evidence. Party autonomy concerning administrative aspects of arbitration procedure, like the appointment of arbitrators, challenges and other tasks of the LCIA Court and its Registrar may not be subject to this rule at all.87 The systematic context of article 14 of the LCIA Rules backs

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86 Cf. Gerbay, »The LCIA«, para. 4–64 (expecting a balance »between the two principles of flexibility (a corollary of the autonomy of the parties) and speed«).
87 But see Greenblatt and Griffin, »Towards the Harmonization of International Arbitration Rules«, 108 (assuming »complete autonomy« of the parties without differentiation).
this understanding, being placed after the rules on the constitution of the arbitral tribunal.

Undeniably, limits to party autonomy by administrative powers under the LCIA Rules are less noticeable than under the ICC Rules. However, this is less a consequence of an emphasis of the LCIA Rules on party autonomy but rather owed to the fact that the LCIA Court does generally not exercise the same degree of supervision as the ICC Court. Elements like the scrutiny of Terms of Reference or awards, compulsory in ICC arbitration,\(^88\) are unknown to the LCIA Rules, which renders the question moot if the parties could exclude such controlling features.\(^89\)

However, a question that may come up under LCIA Rules just like under ICC Rules\(^90\) is the possibility of restricting the respective Courts' power to appoint or confirm all arbitrators, including the party-nominated arbitrators. Article 5 (7) of the LCIA Rules (2014) states:

»the LCIA Court alone is empowered to appoint arbitrators (albeit taking into account any written agreement or joint nomination by the parties).«\(^91\)

If parties wished to exclude this requirement in general, this might not be accepted, even if the prospective arbitrators' impartiality and independence were not at issue.\(^92\) A commentator remarks that the

»LCIA's insistence that it alone is empowered to appoint an arbitrator, rejecting where appropriate the nominations of the parties, goes back at least as far as the 1915 edition of the LCIA rules.«\(^93\)

\(^88\) See supra at pp. 219-220 (§10B.I).
\(^89\) Contra Turner, A Guide to the LCIA Arbitration Rules, para. 1.41.
\(^90\) See supra at pp. 210-215 (§10A.I) on the ICC Court's refusal to administer an arbitration where parties tried to exclude both scrutiny of the award and confirmation of party-nominated arbitrators, leading to Samsung Electronics v. Mr. Jaffe (Qimonda), [2010] Rev. Arb. 571.
\(^91\) See also LCIA Rules, art. 5 (5) (1998).
\(^92\) On impartiality of party-appointed arbitrators see generally: Paulsson, »Are Unilateral Appointments Defensible?«; by the same author: »Moral Hazard in International Dispute Resolution«; Mourre, »Are Unilateral Appointments Defensible? On Jan Paulsson's Moral Hazard in International Arbitration«; Brower and Rosenberg, »The Death of the Two-Headed Nightingale«; Jiménez-Blanco and Iturmendi, »Los Llamados »Árbitros de Parte.«
\(^93\) Nesbitt, »LCIA Arbitration Rules, Art. 5, Formation of the Arbitral Tribunal«, para. 9.
In contrast, to its proclaimed »light touch« in general, the LCIA »retains an extremely firm hand« on the appointment of arbitrators. If parties insisted on excluding LCIA appointment in advance, sacrificing the LCIA's ability to refuse arbitrators it deems not sufficiently independent or impartial or otherwise unsuitable, the LCIA Court might therefore refuse administering the case. However, reports on cases where this happened are not known here.

V. Essential AAA-ICDR Rules

Article 1 (1) of the AAA-ICDR Rules highlights the general respect of party autonomy by providing that rules apply »subject to modifications that the parties may adopt in writing.«

The systematic position of this proviso in the first article of the rules suggests that such modifications can be agreed pertaining to all aspects of the AAA-ICDR Rules, including those concerning the administrative powers and duties of the AAA-ICDR. It indicates that there are no limits to party autonomy under the AAA-ICDR Rules except for mandatory law. By including such provision, the AAA-ICDR has certainly limited its discretion to reject cases because of modifications to the rules. However, it is noteworthy that the latest revision of the AAA-ICDR Rules weakened the emphasis on party autonomy. Under article 1 (a) of the AAA-ICDR (2009) Rules, parties were expressly allowed to agree on »whatever« modifications in writing. Based on this wording, one might have easily drawn the conclusion that the AAA-ICDR would consider none of its rules so essential - or a »core characteristic« - that it would refuse to

94 See Gerbay, »The LCIA«, para. 4–39.
97 See also supra at pp. 213-210 (§10A.IV) on the Softwood Lumber Arbitrations where the LCIA Court exceptionally accepted a »best-endeavors« obligation to appoint all arbitrators as nominated, restricting its right to refuse appointment.
100 Derains and Schwartz, A Guide to the ICC Rules, 8.
administer the arbitration if the rule was modified.\textsuperscript{101} Obviously, the AAA-ICDR, similar to the LCIA as evidenced by its latest rule revisions,\textsuperscript{102} realised that in the interest of efficiency, it could not realistically accept and implement all kinds of derogations from its rules.\textsuperscript{103}

Officially, the AAA-ICDR exercises little control over arbitrations conducted under its auspices, even less than the LCIA. In particular, it does not reserve a right to confirm/appoint party-nominated arbitrators.\textsuperscript{104} Therefore, rules which the institution would probably deem essential are difficult to identify. This is also due to the fact that administrative aspects of AAA-ICDR arbitration are less transparent than for example under the ICC Rules. Many administrative practices of the AAA-ICDR, like e.g. its informal scrutiny of awards by the secretariat, are not reflected in its rules at all.\textsuperscript{105} For this reason, parties' wishes regarding the procedure and administration of the proceedings and the practice of the AAA-ICDR might occasionally conflict but such conflict would often go unnoticed.

VI. Essential DIS Rules

Article 24 (1) of the DIS Rules provides:

»Statutory provisions of arbitral procedure in force at the place of arbitration from which the parties may not derogate, the Arbitration Rules set forth herein, and, if any, additional rules agreed upon by the parties shall apply to the arbitral proceedings. Otherwise, the arbitral tribunal shall have complete discretion to determine the procedure [emphasis added].«

Similar to article 19 (1) of the ICC Rules, the wording of this provision suggests that parties' autonomy to determine arbitral procedure is limited to

\textsuperscript{102} As outlined \textit{supra} at p. 224 (IV.2).
\textsuperscript{104} \textit{See infra} at pp. 368-371 (§14B.III.2) for details on institutional arbitrator confirmation.
\textsuperscript{105} \textit{See infra} at pp. 384-386 (§14B.VI) for details on official and informal scrutiny of awards.
§10 Institutions’ flexibility in relation to their rules

aspects not governed by the institutional rules, unless the rules explicitly allow party agreements.\textsuperscript{106}

However, just like German arbitration law,\textsuperscript{107} the DIS Rules do not exhaustively enumerate all dispositive provisions. The DIS accepts modifications of its rules even where the rules do not expressly contemplate an opting-out. One commentator even asserts that concerning all issues not determined by mandatory arbitration law »the parties’ autonomy prevails« and that parties choosing DIS Rules could »amend or modify« these rules at any time, even after the DIS accepted the case.\textsuperscript{108}

The fact that the DIS Rules do not foresee any institutional decision on the validity of the arbitration agreement supports this understanding. The DIS would even proceed with the appointment of arbitrators under arbitration clauses with missing or ambiguous references to the DIS and leave all questions of jurisdiction and applicable rules entirely to the arbitral tribunal.\textsuperscript{109} Given the overall reduced influence it exercises, a procedural rule that the DIS would consider essential to perform its services can at present not be identified, rather it would expect the arbitral tribunal to appropriately deal with any modifications to its rules. Certainly, however, the DIS - like any other institution - would take issue with attempts to opt out of the more substantive conditions regarding payment and limitation of liability for its services.\textsuperscript{110}

VII. Essential Swiss Rules

The Swiss Rules were originally inspired by the UNCITRAL Rules and accordingly reduced institutional influence on the proceedings to a minimum, which is certainly to the advantage of party autonomy.\textsuperscript{111}

\textsuperscript{106} Cf. DIS Rules, art. 1 (2), 2 (2)–(3), 13 (1)–(2), 18 (2), 20 (1), 21 (1)–(2), 27 (2)–(3), 33 (3), 33 (4), 35 (1), 37 (2) (1998) (»unless otherwise agreed«).

\textsuperscript{107} See supra at pp. 87 et seq. (§4C.I).

\textsuperscript{108} Risse, »§ 24 DIS Rules«, para. 2.

\textsuperscript{109} Bredow and Mulder, »DIS Rules, § 1«, para. 12, 19, 20. See also supra at pp. 189 and 215 (§10A.VI) on the DIS’ acceptance of notices based on DAS arbitration clauses.


\textsuperscript{111} Peter, »Die neue Schweizerische Schiedsordnung«, 59 (on the Swiss Rules [2004]).
The parties’ freedom to derogate from the provisions of the Swiss Rules is hence the rule rather than the exception.\textsuperscript{112}

However, the latest revision has increased administrative control by the newly created Swiss Chambers of Commerce Court of Arbitration and Mediation (hereinafter »SCCAM«; sometimes the organisational body is also referred to as »Swiss Court«), possibly making the Swiss Rules more prone to rigidity. In particular, article 1 (4) of the Swiss Rules provides:

»By submitting their dispute to arbitration under these Rules, the parties confer on the Court, to the fullest extent permitted under the law applicable to the arbitration, all of the powers required for the purpose of supervising the arbitral proceedings otherwise vested in the competent judicial authority, including the power to extend the term of office of the arbitral tribunal and to decide on the challenge of an arbitrator on grounds not provided for in these Rules [emphasis added].«

It is doubtful whether the SCCAM would happily agree to surrender these far-reaching powers.

It is also unlikely that a derogation from the SCCAM's right to confirm arbitrators under article 5 (1) of the Swiss Rules would be accepted without opposition. Already about the former Swiss Rules (2004), a commentator remarked that party autonomy to deviate from the Swiss Rules was limited where »the powers of the Chambers, of the Arbitration Committee and of the Special Committee« are touched.\textsuperscript{113} The requirement to prepare a provisional timetable under article 15 (3) of the Swiss Rules is also considered essential.\textsuperscript{114}

Unlike the AAA-ICDR Rules and the CIETAC Rules, the Swiss Rules do not contain a general provision on modifications being supported. Among Swiss authors, the view prevails that »over-customization« may be incompatible with institutional rules and that combining features of different rules should only be done in ad hoc arbitration.\textsuperscript{115}

\textsuperscript{112} Zuberbühler, Müller, and Habegger, \textit{Swiss Rules of International Arbitration}, Introduction, para. 30.
\textsuperscript{113} Ibid., art. 15, para. 6.
\textsuperscript{114} Geisinger and Ducret, »The Arbitral Procedure«, 80, n. 32.
\textsuperscript{115} Ibid., 77.
C. Controlling or lenient: negotiability of institutional services and rules

It is commonly suggested - and this section has largely supported that assumption - that some institutions are more controlling than others, making them less receptive to parties' wishes to individualise arbitration rules.

Among the institutions here compared, the ICC Court is certainly on the more controlling side whereas the DIS and the AAA-ICDR provide for a more lenient administration probably more inclined to accept party-autonomous rule modifications. The LCIA's administration is strictly organised at the beginning of the proceedings, keeping a firm hand on arbitrator appointments, but fades as soon as the arbitral tribunal is in office. Accordingly, rule modifications not affecting the appointment process would be relatively easy to accommodate.

SIAC's and CIETAC's positions regarding opting-out attempts by parties are most difficult to ascertain. On the one hand, one may assume considerable flexibility, with SIAC even agreeing to administer the Alstom–Insignia arbitration under ICC Rules and CIETAC officially proclaiming that parties may choose whatever set of rules they prefer for CIETAC administered arbitration. On the other hand, one also has to take into account that SIAC's and CIETAC's own rules give these institutions substantial influence they might not want to give up. Since administration of the Alstom–Insignia arbitration under ICC Rules actually increased rather than decreased SIAC's control, the case may therefore not be an indication of a general leniency towards party-autonomous rules modifications. Correspondingly, for CIETAC it is unclear if its proclaimed willingness to accommodate the parties' wishes concerning the applicable rules involves a less-controlling exercise of its functions in practice. Possibly, CIETAC would only consider the arbitral tribunal bound by such rule modifications but less so its own actors and staff.

This overview of institutional practice has also shown that institutional flexibility depends largely on the bargain powers of the parties. If a particular arbitration is attractive, as a fee generator or to improve the visibility of the institution's services on a world market, an institution will accept more compromises as to the applicable rules than for small, unimportant cases. Not only SIAC's endorsement of the Alstom–Insignia arbitration, a multi-million dollar dispute, exemplifies this but also the extraordinary

116 See generally infra at pp. 355 et seq. (§14B).
117 In contrast to the less compromising position taken regarding the Bovis Lend-Jay-Tech dispute, see supra at pp. 211-212 (§10A.II).
adaptations of its rules accepted by the LCIA for the highly prominent Softwood Lumber Arbitrations.\(^\text{118}\) Accordingly, institutional rules, like other contract terms, are negotiable, even those herein identified as potentially deemed essential by the institution. It is just a question of the price to pay (in a literal and figurative sense). Correspondingly, accepting or declining to administer hybrid arbitrations is primarily an economic decision of evaluating benefits and costs - not only financially but also in consideration of effects on the institution's reputation and its relationship to other institutions.

§11 The institution's right to refuse the administration of a case

> 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, a position it appeared to have taken originally [...] but one which it sensibly abandoned subsequently [...] (internal cross-references omitted).\(^\text{119}\)

The normative analysis in Chapter 1 has shown that arbitration institutions are not able to limit the parties' freedom to agree on the arbitration procedure by force of law.\(^\text{120}\) To the contrary, institutional rules only become binding if the parties agree to them, they are therefore never mandatory in a formal sense.

However, it is commonly assumed that the institution can refuse to participate in the administration of arbitration\(^\text{121}\) and the previous section has identified major derogation from an institution's rules as a likely ground for such refusal. A verification of the assumption that institutions are allowed to decline cases requires an analysis of the contract entered into between parties and an administering institution, in particular the manner and timing of the conclusion of such contract (A) and the right to terminate it (B). Moreover, the question arises how an institution's refusal to administer an...
arbitration, if contractually allowed, affects the parties' arbitration agreement and a pending or prospective arbitration (C).

A. No duty of the institution to conclude a contract with the parties

»Avec l’entrée du centre d’arbitrage dans la danse arbitrale, les relations juridiques se compliquent.«

[With the entry of the arbitral institution in the arbitral dance, legal relations get complicated.]

A distinctive feature of institutional arbitration lies in the multitude of the contractual relations. While ad hoc arbitration is based predominantly on the arbitration agreement concluded between the parties and the contract(s) between the parties and the arbitrators, institutional arbitration brings another actor into the game - the arbitral institution. This complicates the contractual framework, which may be the reason why scholarly analysis of contractual relationships often discards institutional arbitration from its focus.

The difficulties already start at the linguistic level. The general term »parties« may refer to those who refer their dispute to arbitration (hereinafter also: »arbitrants«). However, it can also mean the parties of one of the several contracts regulating institutional arbitration: the arbitration agreement itself, the contract between the arbitrants and the institution as discussed in the following or the contracts(s) of the arbitrants and/or the institution with arbitral tribunal.

Basis of the activity of an arbitral institution is a contract with the arbitrants. Descriptively, this contact can be called a contract for the organisation or administration of an arbitration (hereinafter »Administration

122 Clay, L’arbitre, para. 695.
123 In a multi-arbitrator tribunal, there is a contract with each arbitrator.
124 Inspired by its corollary »litigants« and also the English title to the partially preserved Greek play »Épitrepontes« [The Arbitrants] by Menander, which features an arbitration-like scene (reproduced in: Capps, Four Plays of Menander, 25–127).
125 Clay, »Note, C.Cass., 20.02.2001«, 514, para. 4 (claiming to have first named this contract); Rüßmann, »Zwingendes Recht in den Schiedsregeln einer Schiedsinstanz?«, 483; Gottwald, Internationale Schiedsgerichtsbarkeit, 41, para. 21; but see Morgan, »International Arbitration in Hong Kong«, 448, para. 22.1 (»no formal connection with their users«).
Chapter 3: Opting-out aspect - derogation from institutional rules

For now, legal doctrine has hardly covered the Administration Contract at all. It has to be clearly distinguished from the contract obliging an arbitrator to do his work (»arbitrator's contracts), which is not discussed herein in detail, as this would surpass the scope of this thesis.

126 German: »Schiedsorganisationsvertrag« or »Administrierungsvertrag« or »Institutionsvertrag«, French: »contrat d'organisation« (see e.g. Wolf, Die Institutionelle Handelsschiedsgerichtsbarkeit, 70, 228 et seq.; Münch, »vor § 1034 ZPO«, para. 70; Lachmann, Handbuch für die Schiedsgerichtspraxis, para. 1587, 1723; Wilke, »Prozessführung in administrierten internationalen Handelsschiedsverfahren«, 18; Vogt, »Der Schiedsrichtervertrag nach schweizerischem Recht«, 84; Clay, L'arbitre, para. 699–700).

127 See e.g. Schäfer, Die Verträge zur Durchführung des Schiedsverfahrens, 1:204, 383 (incorrectly assuming this contract to be just a specific arbitrator's contract); more accurate but equally brief: Wilke, »Prozessführung in administrierten internationalen Handelsschiedsverfahren«, 18–19. For more thorough analyses, see only Wolf, Die Institutionelle Handelsschiedsgerichtsbarkeit, 70 et seq, 228 et seq.; Kuckenburg, »Vertragliche Beziehungen«; Clay, L'arbitre, 699 et seq.; with a special mention of Schöldström, The Arbitrator's Mandate, chap. 13, p. 399 et seq. (innovatively suggesting to regard each party's contract with the institution separately).

128 This »enigmatic phenomenon« (Lionnet, »The Arbitrator's Contract«, 161; idem, »Der Schiedsrichtervertrag«, 64: »schillerndes Phänomen«) already received a lot of attention, see e.g. Onyema, International Commercial Arbitration and the Arbitrator's Contract; Fouchard, »Final Report on the Status of the Arbitrator«; Derains and Lévy, International Chamber of Commerce and ICC Institute of World Business Law, Is Arbitration Only as Good as the Arbitrator?; Smith, »Contractual Obligations Owed by and to Arbitrators«; Clay, L'arbitre; Bucher, »Was macht den Schiedsrichter?«; Hausmann, »Der Schiedsrichtervertrag«; Hoffet, Rechtliche Beziehungen zwischen Schiedsrichtern und Parteien; Hoffmann, »Der internationale Schiedsrichtervertrag«; Oetting, Der Schiedsrichtervertrag nach dem UML im deutschen Recht unter rechtsvergleichenden Aspekten; Prütting, »Die rechtliche Stellung des Schiedsrichters«; Real, Der Schiedsrichtervertrag; Schwab, »Schiedsrichterennennung«; Strieder, Rechtliche Einordnung und Behandlung des Schiedsrichtervertrages; Vogt, »Der Schiedsrichtervertrag nach schweizerischem Recht«; idem Der Schiedsrichtervertrag nach schweizerischem und internationalem Recht.
I. Nature and content of the Administration Contract

As remarked with regards to the arbitration agreement, it is questionable if the Administration Contract is a contract of procedural nature. However, for the Administration Contract such qualification is even less convincing. While the arbitration agreement has at least the one procedural consequence to exclude state court jurisdiction, the Administration Contract does not directly influence the procedural situation before state courts. Of course, if the institution refuses to enter into an Administration Contract or terminates this contract, state courts may again assume jurisdiction. However, this would not be a question of the existence or non-existence of the Administration Contract but rather of the operability of the arbitration agreement itself. The main effects of the Administration Contract are material: The institution is obliged to render administration services, the parties undertake to pay administrative fees.

Only of marginal practical relevance appears to be the determination of the contract type.\(^{129}\) It is here assumed that the Administration Contract is essentially a specific contract for services, but a qualification as a *sui generis* contract appears equally appropriate.\(^{130}\) In any case the Administration Contract, like the arbitrator's contract,\(^{131}\) is not a contract for works. Of course, the arbitral institution does not owe a successful arbitration, an enforceable award or any rendering of an award by an arbitral tribunal at all. The arbitral institution only owes services. These services encompass but are not restricted to appointing an arbitral tribunal as outlined above.\(^{132}\) In the *Cubic* case, one of the very rare lawsuits brought against an arbitral institution,\(^{133}\) the Cour de Cassation clarified with respect to the duties of arbitral institutions under the Administration Contract that these are best

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129 See *e.g.* Waincymer, *Procedure and Evidence*, para. 2.4, 3.14.1 (only speaking of *some form of contractual arrangement* without even mentioning controversies on the contract type); Fouchard, *Rights and Obligations of the Arbitrator with Regard to the Parties and the Arbitral Institution*, 15, 16, para. 15, 17 (noting that such classification is *dear to lawyers of civil law countries* but doubtlessly seen *as a rather pointless operation* by common law lawyers).

130 See Münch, *vor § 1034 ZPO*, para. 70.

131 Cf. *e.g.* Schwab, Walter, and Baumbach, *Schiedsgerichtsbarkeit*, chap. 11, para. 8.

132 See *supra* at pp. 128-129 (§7A.I); *contra* Vogt, *Der Schiedsrichtervertrag nach schweizerischem Recht*, 84.

efforts obligations (»obligations de moyen«) to strive for an effective arbitration in the interests of the parties.\textsuperscript{134}

In detail, the arbitral institution's obligations follow from its arbitration rules, which can vary tremendously concerning the arbitral institution's tasks.\textsuperscript{135} For example, the answer to the question if the arbitral institution has a best efforts obligation to ensure an enforceable award depends decisively on the supervisory functions the arbitral institution offers.

From an arbitral institution that offers scrutiny of awards also with respect to matters of substance, like the ICC Court, arbitrans can expect that it would advise the arbitral tribunal on issues, which may endanger the enforceability of the award. Whether the arbitral tribunal follows such advice is another matter. In this respect, article 41 of the ICC Rules explicitly provides that

»the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law.«

In contrast, institutions that do not offer scrutiny services have no power and consequently no duty to influence the award making process. This applies to all other institutions here considered except for SIAC\textsuperscript{136} and CIETAC.\textsuperscript{137}

The main duty owed by the arbitrans under the Administration Contract is to pay the administrative fees charged by the institution.

II. Law applicable to the Administration Contract

The few scholars that mention this contractual relationship do not\textsuperscript{138} all agree on the law applicable to questions of conclusion and interpretation of the Administration Contract. Again,\textsuperscript{139} the discussion will follow a modern,
§11 The institution's right to refuse the administration of a case

material or direct approach, as most arbitral tribunals would pursue.\textsuperscript{140} If such questions transpired in front of a state court, the following considerations may at least be helpful in the application of the forum's conflict rules, which usually provide for some flexibility and alternatives.\textsuperscript{141}

Failing an unlikely direct choice of the applicable law,\textsuperscript{142} the prominent views all more or less rely on a closest connection test, some proclaiming a  »better law«  approach notwithstanding the risks for legal certainty involved.\textsuperscript{143} In detail, most see the Administration Contract governed by the law of the seat of the arbitral institution,\textsuperscript{144} others by the law of the arbitration agreement.\textsuperscript{145}

1. Law of the seat of the institution

The first view has the advantage of certainty if the place of arbitration is not yet determined. Moreover, the institution's staff and its decision-making bodies are usually located at the seat of the institution and provide their services from there; hence, the characteristic performance rule supports such finding.\textsuperscript{146} However, this view is difficult to reconcile with the concept of arbitral institutions as international organisations administering arbitrations worldwide.\textsuperscript{147} Furthermore, it complicates conflict of laws questions

\begin{itemize}
\item \textsuperscript{140} Blackaby et al.,  \textit{Redfern and Hunter}, para. 3.217, 3.218, 3.223 (on the so-called  »voie directe«); a little more conservative: Schütze,  \textit{Institutionelle Schiedsgerichtsbarkeit: Kommentar}, chap. I, para. 13 (introduction) (referring to connecting factors accepted in civilised legal orders).
\item \textsuperscript{141} See e.g. Rome-I-Regulation 2008 art. 4 (1)(b), (3), (4) (EU).
\item \textsuperscript{142} In particular, institutional rules are silent on the matter.
\item \textsuperscript{143} Cf. Schöldström,  \textit{The Arbitrator's Mandate}, 425, 426.
\item \textsuperscript{144} E.g. Wilke,  »Prozessführung in administrierten internationalen Handelsrichterverfahren«, 18; Aden,  \textit{Internationale Handelsschiedsgerichtsbarkeit}, pt. B, para. 1; Schütze,  \textit{Institutionelle Schiedsgerichtsbarkeit: Kommentar}, chap. 1, para. 38; Lionnet and Lionnet,  \textit{Handbuch Schiedsgerichtsbarkeit}, 196; unclear: Nedden and Herzberg,  \textit{ICC-SchO/DIS-SchO}, Introduction, para. 14 ( »Recht am Tätigkeitsort der Institution« [Law at the place of work of the institution]).
\item \textsuperscript{145} Cf. Schöldström,  \textit{The Arbitrator's Mandate}, 429; Müller-Freienfels,  »Der Schiedsrichtervertrag in kollisionsrechtlicher Beziehung«, 153. \textit{See supra} at pp. 75-86 (§4B.II).
\item \textsuperscript{146} See Schöldström,  \textit{The Arbitrator's Mandate}, 432.
\item \textsuperscript{147} Ibid., 432–33 (suggesting a distinction between regional arbitration institutions whose rules have been designed against the background of a
\end{itemize}
by adding a law of a jurisdiction possibly different from those determining the procedural lex arbitri, the substantive law applicable to the contract, the law applicable to the arbitration agreement and the law applicable to the relationship between parties and arbitrators and between arbitrators and the institution.  

2. Law applicable to the arbitration agreement

The method of collateral or accessory connection, in contrast to *dépeçage*, would argue in favour of applying the law of the arbitration agreement. However, criticism against this concept is twofold: First, if the parties chose the law applicable to the arbitration agreement, its collateral application to the relationship with the institution would be critical because the institution did not actively participate in this choice of law and contracts cannot be concluded to the detriment of a third party. Even though the institution has the implied duty to administer the arbitration as agreed by the parties, the principle of privity of contract argues against imposing the parties' choice of applicable law upon the institution. Second, if the parties have not made a choice, another controversy intervenes on how to determine the law applicable to the arbitration agreement as outlined above. In particular, the application of the law of the main contract may be justifiable for the relationship between the arbitrants, but for arbitral institutions, who have no connection with that contract apart from administering a procedure where it is in dispute, this would create unreasonable unforeseeability. Generally, the principle of privity of contract opposes the application of particular national law and institutions whose rules are supposed to work under many laws, like the ICC Rules; *see also* Wolf, *Die Institutionelle Handelsschiedsgerichtsbarkeit*, 244; but *cf.* Turner, *A Guide to the LCIA Arbitration Rules*, para. 1.38–1.40 (remarking that, despite the LCIA's »international pretensions« even the LCIA Rules »track the [English] Arbitration Act with utmost fidelity«, »go hand in glove« with it).

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Which used to be »virtually unheard of« (Petsche, *The Growing Autonomy of International Commercial Arbitration*, 77), *but see now* LCIA Rules, art. 16 (4) (2014); Hong Kong International Arbitration Centre, »Model Clauses«.

*See supra* at pp. 75-86 (§4B.II).
§11 The institution’s right to refuse the administration of a case

collateral connection considerations in multi-party, multi-contract situations. The theory of collateral connection departs from the idea of subjecting all connected contracts to one »dominant contract.«¹¹¹ However, a party to one of the connected contracts will understandably not welcome the presumption of a contract being dominant to which it is not a party.¹¹²

3. Law of the place of arbitration

Directly applying the law of the place of arbitration is equally problematic. First, parties may create a contractual relationship with the institution before determining the place of arbitration. Under many arbitration rules, the institution may fix the place of arbitration, which may again change during the proceedings if the parties or the arbitral tribunal so decide. It is little practical if obligations or breaches of contract are governed by a different law before and after the fixing or redetermination of the place of arbitration.

In this context, the law of the place of arbitration could not mean the lex arbitri (in sensu strictu),¹¹³ because national arbitration laws, which are essentially procedural laws, usually do not contain provisions on material obligations of arbitral institutions.¹¹⁴ Rather, the contract law of the place of arbitration would have to be applied which may be surprising to parties only having considered the arbitration regime of the place of arbitration. From the point of view of the institution, it would be equally unfortunate to be bound by and possibly liable under the contract law of a foreign jurisdiction with which it shares no further connection. Applying the contract law of the place of arbitration to the Administration Contract would entail unpredictability, which could seriously endanger the work of arbitral institutions. To be on the safe side, arbitral institutions would have to adjust their rules for every arbitration or provide different sets of rules depending on the place of arbitration, which seems virtually impossible.

¹¹¹ Hoffmann, »Der internationale Schiedsrichtervertrag«, 150.
¹¹² But see Schöldström, The Arbitrator’s Mandate, 428 (concluding that arbitration doctrine favours collateral connection also in situations involving different parties).
¹¹³ See supra at p. 80, n. 136.
¹¹⁴ See supra at pp. 91-106 (§4C.II.2) for details.
4. Own view and determination of the administering institution's »seat«

To avoid such complications and given that courts in the jurisdiction where the institution is located have general (personal) jurisdiction over claims against it, it is preferable to apply the contract law of the seat of the institution notwithstanding the undisputable weaknesses of this view addressed above. In the famous *Cubic* affair, French courts have ruled accordingly and applied French law to the relationship between the ICC and a party to an ICC arbitration,\(^{156}\) surprisingly not considering an »autonomous« approach as proclaimed in France for the law applicable to the arbitration agreement.\(^{157}\) This jurisprudence was confirmed in the following by the rulings of Paris' courts in the case *SNF v. ICC*.\(^{158}\)

A few remarks are necessary to explain what is meant by »seat« of the institution. As the »seat rule« here favoured stems from closest connection and characteristic performance considerations under the private international law of contract,\(^{159}\) doctrines on the personal regime governing a company like the real seat and corporation theory or any mixed theories\(^{160}\) provide little guidance. Rather, it seems more appropriate to rely on the law of the place of business from which the relevant service is provided, either from the institution's headquarters, but possibly from a branch office.\(^{161}\)

Often, this determination seems straightforward. For example, the ICC is incorporated as a non-governmental organisation under the laws of France and has its headquarters in Paris, where most of the secretariat's staff and in particular the ICC Court as the administrative decision-making body is located. Its seat is therefore principally in France, even though the ICC Court maintains representative offices in other jurisdictions. Likewise, the DIS is incorporated under the laws of Germany in Berlin and its secretariat

\(^{155}\) The ICC Court is a mere service of the ICC without legal personality (*Cubic v. ICC*, [1999] Rev. Arb. at 110).


\(^{157}\) *See supra* at pp. 75-86 (§4B.II).


\(^{159}\) *See supra* at p. 237, 146.

\(^{160}\) *Cf.* Eidenmüller, *Ausländische Kapitalgesellschaften im deutschen Recht*, § 1, para. 2–9.

\(^{161}\) *Cf.* *e.g.* Rome-I-Regulation 2008 art. 19 (EU).
administrates arbitrations mainly from Cologne and Berlin, its seat is therefore in Germany. Correspondingly, SIAC is seated in Singapore, the LCIA in London, England.

For decentralised arbitral institutions, determination of the relevant place of business is a little more complicated: While the Swiss Chambers' Arbitration Institution itself is headquartered in Basel, the secretariats handling the cases are located at the different cantonal Chambers of Commerce and the SCCAM itself does not have a physical location. Similarly, the AAA-ICDR administers arbitrations through AAA Secretariats located across the United States. Although CIETAC is headquartered in Beijing, the regionally established subcommissions administer cases relatively independently.

The arising difficulties to determine the relevant seat of decentralised institutions within one state may not be decisive if the contract law of such state is relatively uniform even if the state - like Switzerland and the US - generally has a federal organisation. However, the assessment becomes difficult if one also takes into account that some institutions have created agencies or representative offices and subsidiaries in other jurisdictions in order to attract users in these areas. The ICC Court for example maintains an office in Hong Kong, accommodating a secretariat's team handling Asian cases, another in New York for North-American cases and a mere representative office, without case management staff, in Singapore. CIETAC opened a subcommission in Hong Kong.162 While a former AAA-ICDR office in Dublin, Ireland, is now closed, the AAA-ICDR opened joint offices with other institutions in Mexico City and Singapore, the latter in cooperation with SIAC, and an independent institution created by legislative decree in Bahrain called the Bahrain Chamber for Dispute Resolution (BCDR-AAA).163 The AAA-ICDR also maintains a number of cooperation agreements according to which it may provide arbitration services through facilities of other institutions - but the extent of such cooperation is unclear.164 The LCIA created independent spin-offs, partly in cooperation with other institutions and government authorities, having their own

162 See China International Economic and Trade Administration Commission, »Home«.
164 See infra at pp. 398-399 (§14C.IV).
rules and being located in India,\textsuperscript{165} Mauritius\textsuperscript{166} and the Dubai International Financial Centre (DIFC), a »neutral« zone within Dubai.\textsuperscript{167}

In all these cases, it is decisive for determining the law applicable to the Administration Contract whether a branch is legally independent and where administrative decisions under the applicable rules are taken. For all ICC cases, including those handled by the secretariat teams in Hong Kong and New York, the relevant seat of the institution remains Paris, France, because the meetings of ICC Court are located there and because the offices in Hong Kong and New York are legally dependent branch offices only. Staff meetings take place in Paris and the Hong Kong and New York staff are connected by video conferencing with the Paris based teams and managing counsel. Similarly, Administration Contracts with CIETAC should follow the laws of the People's Republic of China as this subcommission, like the subcommissions in mainland China, is a dependent branch of CIETAC, Beijing.\textsuperscript{168} For AAA-ICDR cases, the seat is New York, as the Mexico City and Singapore offices serve representative purposes only.

The BCDR-AAA however is a fully independent institution with its own rules that has no further connection to the AAA-ICDR except for having been opened by it. BCDR-AAA institutions are administered by the Bahrain Chamber of Dispute Resolution established under the laws of Bahrain and providing its services from its location in Manama, Bahrain.\textsuperscript{169} Therefore, the laws of Bahrain rather than New York would be applicable.

To determine the law applicable to Administration Contracts with the LCIA's legally independent subsidiaries is slightly more difficult. Their status as independent subsidiaries, established under the laws of India, Mauritius and the DIFC respectively, and the fact that the responsible secretariat staff is based there indicate the application of the contract law of the subsidiaries' locations. However, under their respective arbitration rules, the LCIA Court, based in London, remains the official administrative decision-

\textsuperscript{165} LCIA India, »Home«.
\textsuperscript{166} LCIA-MIAC, »LCIA-MIAC Arbitration Centre«.
\textsuperscript{167} DIFC, »DIFC | LCIA Arbitration Centre«; see Gerbay, »The LCIA«, para. 4–33.
\textsuperscript{168} Cf. CIETAC Rules, art. 2 (3), (7) (2012; 2015).
\textsuperscript{169} Cf. BCDR-AAA Rules, art. 1 (c) (2010). Similarly, the Jerusalem Arbitration Centre, an ICC Palestine and ICC Israel joint venture, is not only »wholly independent« from the ICC Court but also has its own »international arbitration committee (the JAC court)« (see International Chamber of Commerce, »Historic Opening of Arbitration Centre Set to Advance Palestine/Israel Commercial Dispute Resolution«).
making body for arbitrations administered by these centres.\textsuperscript{170} Nevertheless, this fact appears insufficient to apply English contract law to Administration Contracts with these centres. When rendering decisions in LCIA India, LCIA-MIAC and DIFC-LCIA arbitrations, the LCIA Court is not acting in its authority as an LCIA (London) organ but on behalf of the independent centres.

The following considerations on the formation of the Administration Contract are therefore subject to the governing law, dependent on the seat of the relevant business presence of the approached institution. However, there is some consistency among contract laws regarding formation questions, most departing from the idea of matching declarations of will, often described as offer and acceptance. In accordance with the transnational approach followed herein, such basic principles are applied without resorting to particular laws.\textsuperscript{171} Nevertheless, the previous conflict of laws considerations may be helpful to evaluate specific cases.

III. Contract formation theories

As noted, it is the essence of contract negotiation that even provisions designated as non-derogatory are open to discussion.\textsuperscript{172} However, the conclusion of the Administration Contract is seldom the result of a real negotiation. Rather, the rules of the institution have been drafted for a large number of contracts and are induced by the institution as the provider. Therefore, they have all elements of standard business terms,\textsuperscript{173} which the parties may

\textsuperscript{170} See LCIA India Rules, art. 3 (2010); LCIA-MIAC Rules, art. 3 (2012); DIFC-LCIA Rules, art. 3 (2008); Gerbay, »The LCIA«, para. 4–38.

\textsuperscript{171} Instead, private harmonising instruments like the UNIDROIT Principles or the Draft Common Frame of Reference (cited to the full edition as von Bar et al., DCFR) are referred to not as law but as doctrinal attestation of the transnational acceptance of a particular principle.

\textsuperscript{172} See supra at pp. 231-232 (§10C).

\textsuperscript{173} Rüßmann, »Zwingendes Recht in den Schiedsregeln einer Schiedsinstitution?«, 486; Spohnheimer, Gestaltungsfreiheit, 109; Schlosser, \textit{Das Recht der internationalen privaten Schiedsgerichtsbarkeit}, 404; Lachmann, \textit{Handbuch für die Schiedsgerichtspraxis}, 343. See also supra at p. 115 (§5B).
agree to or not. For this reason, many think institutional arbitration is a »package deal«. Other commentators even claim that

> [i]t is not necessarily the individual provisions of the chosen arbitration rules that apply contractually but rather the type of arbitration chosen, for example, »ICC arbitration«.

The following elaboration of the different theories on how and when the Administration Contract is concluded can help to support or refute this understanding.

1. Theory 1 - parties accept the institution's offer ad incertas personas

A widespread view assumes that the publication of arbitration rules is an offer of the institution to the public - *ad incertas personas* - to administer arbitrations under these rules.

Some advocates of this theory maintain that the parties accept this offer already with the conclusion of the arbitration agreement referring to a certain institution. The institution is deemed to have waived the requirement of a notice of acceptance. However, there is no benefit in seeing the parties already bound by a contract with an arbitration institution long before a dispute arises. To the contrary, this concept would make it difficult for the parties to modify their arbitration agreement without the institution's

174 Picture used by Schöldström, *The Arbitrator's Mandate*, 413; see e.g. Takla, »Non-ICC Arbitration Clauses«, 7–9; Paulsson, »Vicarious Hypochondria and Institutional Arbitration«, 236.

175 Greenberg and Mange, »Institutional and Ad Hoc Perspectives on the Temporal Conflict of Arbitral Rules«, 213 (but correctly adding that a choice of an institution »regardless of the content of its arbitration rules« may only be assumed »[s]ave indicating a contrary intention«).

176 For German law: *cf.* BGB § 151 (GER); Schlosser, »vor § 1025 ZPO«, vol. 9, para. 12; Lionnet and Lionnet, *Handbuch Schiedsgerichtsbarkeit*, 197 (arguing that this would apply also under other laws); for French law: *cf.* Jarrosson, »Le rôle respectif«, 386–87; *see also* Ditchev, »Le ›contrat d’arbitrage‹«, 397–98 (but distinguishing for the ZCC between arbitrations introduced by members and non-members); *contra* Kuckenburg, »Vertragliche Beziehungen«, 83 (arguing that French law differs in this respect from German law); unclear: Kassis, *Réflexions*, para. 34; *cf. generally* von Bar et al., *DCFR*, II.–4:205 (3) (with notes at p. 342, para. 13–17 on different legal orders); *cf. also* UNIDROIT Principles, art. 2.6 (3).
consent or even to accept state court litigation by waiving the arbitration plea.\footnote{Cf. Rüßmann, »Zwingendes Recht in den Schiedsregeln einer Schiedsinstitution?«, 485; Schütze, Institutionelle Schiedsgerichtsbarkeit: Kommentar, chap. I, para. 42.} This limits party autonomy unwarrantedly and appears rather excessive, given that the majority of contracts with institutional arbitration clauses will never be in dispute. Furthermore, according to this view always the version of the rules in force at the time of the conclusion of the arbitration agreement would be applicable - a result neither in the interest of institutions,\footnote{See e.g. Jarrosson, »Le rôle respectif«, 387; Kuckenburg, »Vertragliche Beziehungen«, 82–84.} nor of the parties since later revisions usually serve the business community better.

If the publication of arbitration rules was an offer by the institution, it is therefore preferable to assume that a party accepts this offer by sending a request for arbitration or notice of arbitration to the other party and/or the institution.\footnote{See e.g. Waincymer, Procedure and Evidence, para. 3.14.1; Aden, Internationale Handelsschiedsgerichtsbarkeit, pt. B, para. 3.} An arbitration agreement that designates that institution or its rules would give the party initiating arbitration the power to represent the other party when concluding the Administration Contract binding both parties.\footnote{See Cubic v. ICC, [1997] Rev. Arb. 422; Born, Commentary and Materials (2001), 1614, n. 120; Rüßmann, »Zwingendes Recht in den Schiedsregeln einer Schiedsinstitution?«, 485.}

2. Theory 2 - request for arbitration as offer accepted by the institution

Another contractual model is to consider the publication of arbitration rules only as an \textit{invitatio ad offerendum} and not yet a binding offer.\footnote{See e.g. Rüßmann, »Zwingendes Recht in den Schiedsregeln einer Schiedsinstitution?«, 490; \textit{cf. also} ICC Rules, art. 6 (1) (2012; 2017); LCIA Rules, Preamble (2014); AAA-ICDR Rules, art. 1 (1) (2014); DIS Rules, art. 1 (2) (1998); Swiss Rules, art. 1 (3) (2012) (all providing for application of the version in force at the time of the commencement of the arbitration); \textit{see also} CIETAC Rules, art. 74 (2012) = art. 84 (2015).} According to that view, the party initiating arbitration makes an offer to the institution, thereby also representing the other party, to arbitrate under the auspices of the institution and its rules and to pay the corresponding fees. The institution
would be contractually bound once it expresses its consent to administer the arbitration. This may already be with the communication of the secretariat to the parties by which it forwards the request for arbitration to the respondent party and informs the claimant hereof. At that time, the case will have received a case number and the parties are informed about the case managers in charge of the file, indicating that the institution will provide its services.

This cannot be different, where the institution's arbitration rules provide for a specific decision on the prima facie admissibility of the arbitration. Any idea of postponing the acceptance of the institution and the conclusion of the Administration Contract to the time of such a decision would cause unsupportable legal uncertainty. The Administration Contract assigns to the institution the genuine task to decide on its own competence. A first instance court (Tribunal de Grande Instance) (TGI) in Paris held accordingly in the Cekobanka case, finding that when deciding prima facie on ICC jurisdiction, the ICC Court acts in performance of the ICC's contractual obligations.

The decision appears quintessentially correct with respect to the contractual foundation of the ICC Court's power and duty to assess the prima facie validity of the arbitration agreement. Unfortunately, the decision is nevertheless missing some logical links. In particular, the court left open whether the respondent party in the arbitration (Banque de la Méditerranée) was also part of the contractual relations with the ICC or if these only included the claimant (Cekobanka) and the ICC. Given that the ICC Court had decided that the arbitration should not proceed lacking a valid arbitration agreement, the conclusion of an Administration Contract including both arbitrants - if necessary - would have merited a comment.

182 Schütze, Institutionelle Schiedsgerichtsbarkeit: Kommentar, chap. I, para. 42 (»irgendeine affirmative Handlung« [any affirmative conduct]); cf. also Aden, Internationale Handelschiedsgerichtsbarkeit, pt. C, § 7 para. 1 (for the DIS); contra Clay, »Note, C.Cass., 20.02.2001«, 516, para. 10 (assuming this to be mere information, not acceptance).

183 Kuckenburg, »Vertragliche Beziehungen«, 81; but see ibid., 85 (contradictingly denying the ICC Secretariat's competence to declare an acceptance, thus negating an Administration Contract in case of ambiguous or derogating arbitration agreements until the Court's decision).


185 Ibid., 368.

186 See infra at pp. 247 et seq.; but see also Schöldström, The Arbitrator's Mandate, 403 (validly criticising the »implicit premise that there
3. Theory 3 - contract only concluded with the respondent's answer

A third concept requires that both parties declare their consent to the administration by the institution not only in the arbitration agreement but also upon initiation of the arbitration. In contrast to the two theories outlined above, this presupposes that the arbitration agreement does not give a party the power to engage the other party in a contract with the institution.\(^{187}\) Consequence of this theory would be that the Administration Contract is only completely concluded once the respondent party accepts the administration at least tacitly with its answer to the request for arbitration addressed to the arbitration institution.

At first sight, the appellate court (Cour d'appel) (CA) of Paris seems to have favoured this model in the Cubic case:

\[E\]n adressant son mémoire en réponse contenant demande reconventionnelle, la société Cubic qui avait reçu, le 3 octobre 1991, le règlement de conciliation et d'arbitrage de la CCI et les nouvelles règles et usages relatifs aux frais a ainsi donné son accord pour qu'un arbitrage soit organisé par la CCI\(^{188}\).

\[By filing its answer\] with a counterclaim, the company Cubic who received the ICC's rules on arbitration and conciliation and the new schedule of fees on 3 October 1991 therewith declared its consent that the arbitration was to be administered by the ICC.

However, the particularities of that case have to be borne in mind. The arbitration clause was not a classic ICC clause but rather a blanket clause only providing for arbitration in Zurich in accordance with the laws of Iran without mentioning any institution at all.\(^{189}\)

IV. Conclusions for requests for arbitration under different rules

The third theory, requiring another expression of consent also by the respondent party, is impractical. In many cases, the respondent never reacts to the request for arbitration, which could obstruct the contract conclusion

\[necessarily must be a contract between both arbitrants on one side and the arbitral institution on the other\].

\(^{187}\) See e.g. Ibid., 200, 401 (rejecting an »agency reasoning« as too complicated and little practical).


\(^{189}\) See ibid., 104.
indefinitely pursuant to that view.\textsuperscript{190} Usually, it is also unjustified to ask for such express acceptance since already the arbitration agreement creates an obligation of the parties \textit{inter se} to accept the agreed procedure including the designated institution's administration.

However, in extraordinary cases, where the reference to the institution in the arbitration agreement is missing or unclear, an Administration Contract binding the respondent may not be concluded until the respondent expresses its consent expressly or by conduct. In such cases, the arbitration agreement can hardly be understood to confer a party a power to represent the other party in the conclusion of a contract with an institution not previously contemplated. In the particular circumstances of the \textit{Cubic} case, the decision of the CA Paris was therefore correct.\textsuperscript{191}

One could suppose that hybrid arbitration agreements were also so unusual to require another expression of consent to the administration by the respondent. However, it is more convincing to differentiate: a declaration of the respondent is unnecessary if the arbitration agreement conveys a clear choice of both arbitrants to the administration of the approached institution. Then, not the administration of the arbitration by the institution is an issue but the rules to be followed. For the arbitrants, the question is not if an Administration Contract should be concluded with this institution at all but how such a contract would be performed. In accordance with the arbitration agreement, the arbitrants should have parallel interests;\textsuperscript{192} there is therefore no issue of lacking agency power. However, if the institution's declaration and conduct makes it clear that it is only willing to administer the case pursuant to its own rules without the modifications proposed in the request for arbitration, a party has no power of agency to bind the other party to these terms.\textsuperscript{193} The same applies if the claimant approached the rules issuing institution although the arbitration agreement clearly provides for another institution to administer the case.

When the arbitration agreement contains a clear reference to an institution, the first two theories both have its merits. To assume that an institution

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\\textsuperscript{190} Clay, »Note, C.Cass., 20.02.2001«, 516, 517, para. 11.
\textsuperscript{191} See also ibid., 517, para. 12 (proposing a distinction between cases with clear and ambiguous/erroneous references to the arbitration institution).
\textsuperscript{192} But see infra at p. 268 (§11C.II) on difficulties for one party to terminate the Administration Contract on its own.
\textsuperscript{193} Cf. Rüßmann, »Zwingendes Recht in den Schiedsregeln einer Schiedsinsti-
tution?«, 491 (on the parallel problem of the intertemporal application of institutional rules).
\end{flushleft}
§11 The institution's right to refuse the administration of a case

makes an offer to the public by publishing rules has the advantage of certainty for the users who can agree on institutional arbitration clauses without having to fear inoperability due to institutional refusal. The institution would need a valid cause to terminate the Administration Contract already concluded once it receives the request for arbitration; otherwise, it would be liable to the parties.

The second view pays more attention to the interests of institutions that may want to refuse administering even arbitrations under standard clauses, e.g. due to an unreasonable workload in relation to the expected fees and the amount in dispute. It cannot be estimated how many contracts with institutional arbitration clauses have been concluded in recent years and how many will be in dispute in the future. Most of these potential arbitrations will be profitable or at least cost effective for the institutions but there is a small chance that a large number of smaller but complicated cases might be filed with one institution at the same time. The second theory allows the institution to decline some of those cases. Even if one accepted that fundamental rights provisions like article 6 of the European Convention on Human Rights (ECHR) principally bind institutions,\(^\text{194}\) this would not amount to a denial of justice. If novation or effective reinterpretation in favour of ad hoc arbitration is not possible, the parties can still litigate before state courts since, due to the institutional refusal, the arbitration agreement would then be incapable of being performed. Access to justice does not encompass access to arbitration.

Nevertheless, the first theory seems more correct. It corresponds to the current practice of major arbitration institutions to administer all arbitrations filed and based on their rules. A grant of a right to terminate the contract if the parties do not pay the filing fee or advance on cost under the rules sufficiently addresses the institution's interest to refuse administering arbitrations without security for costs.\(^\text{195}\) Moreover, the parties trust in the services offered by the institution already when concluding the arbitration

\(^{194}\) But see Cubic v. ICC, [2001] Rev. Arb. 513 (completely rejecting the application of Art. 6 ECHR to institutional decisions); rightly criticised by Lalive, »Note, CA Paris, 15.09.1998«, 119, para. 28 (»fort contestable« [very contestable]).

\(^{195}\) Given the then obvious breach of contract by the parties, it seems that no jurisdiction would deny such right (contra Rüßmann, »Zwingendes Recht in den Schiedsregeln einer Schiedsinstanz?«, 485).
agreement, a trust that is generated by institutions encouraging parties to agree on their rules.  

Some of those authors preferring the second theory try to address the issue of parties' reliance on the availability of the institution's services by establishing an obligation to contract (German: »Kontrahierungszwang«) of the institution. Although they only see an invitatio ad offerendum in the publication of arbitration rules and standard clauses, they assume that an institution is obliged to accept any Administration Contract offered to it under its rules. That this proposition is imperfect already follows from the finding that there is no fundamental right to access to arbitration or in other words, the administration of arbitration is not so vital to justify an obligation to contract as a harsh restriction of contractual party autonomy. Coming to the same result, but dogmatically defendable, this thesis therefore favours the first theory, according to which the publication of arbitral rules and description of services is an offer ad incertas personas which the parties accept with the request for arbitration.

The controversy between the two predominant contractual theories is not really decisive for the question if an arbitral institution is obliged to administer the arbitration when the parties agreed on the application of different rules by way of a hybrid arbitration clause. Under both views, either the offer or the acceptance incorporates the institution's rules by reference. If the parties' arbitration agreement contains unforeseen modifications or, as in case of hybrid arbitration agreements, refers to a completely different set of rules, the institution is not required to accept such variations unless the rules expressly allow derogating party agreements. If one assumes, in accordance with the first theory, that the publishing of institutional rules is an offer by the institution, the sending of a request for arbitration with an indication that the parties want to opt out of some or all of the rules is a modified acceptance. Most jurisdictions qualify modified acceptances as

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196 See e.g. ICC, »Ten Good Reasons to Choose ICC Arbitration«; SIAC, »Why Choose Us«; LCIA, »The Case for Administered Arbitration«.

197 Rüßmann, »Zwingendes Recht in den Schiedsregeln einer Schiedsinsti-
tution?«, 488; see also Aden, Internationale Handelsschiedsgerichtsbarkeit, pt. B, art. 1 ICC Rules, para. 15–17 (but considering a duty not to discriminate of the ICC Court under European competition law).

198 Theories 1 and 2 (supra at pp. 244-247).

199 Rüßmann, »Zwingendes Recht in den Schiedsregeln einer Schiedsinsti-
tution?«, 487, 488.
counter-offers\(^{200}\) unless the modifications are immaterial.\(^{201}\) The institution can therefore refuse to accept that counter-offer with the consequence that an Administration Contract is not concluded.\(^{202}\) The second theory, according to which the request for arbitration is the offer, comes to the same result. An institution can simply refuse to accept the offer if it does not agree with the parties' wish to derogate from its rules.

Hence, in theory, the contractual analysis is simple. An institution that does not want to administer an arbitration under different rules or with material alterations of its rules can refrain from concluding the Administration Contract.

B. Practice test: refusal to administer as contract termination

In practice, one cannot explain the legal basis for institutional refusal to administer hybrid arbitrations or arbitration under modified rules so easily.

I. Problem: Timing and communication of the institution's refusal

Often the problem is one of timing. Of course, a careful institution would address the parties' wish to derogate from its rules in the first letter and request the parties to waive any rule modifications it does not agree with. That way it would avoid entering into an Administration Contract under terms it does not want to support. However, many institutions' secretariats send standardised first letters simply acknowledging the filing of a request for or notice of arbitration, notifying it to the respondent party and informing both parties of the case number and the responsible case managers after collecting a filing fee. The fact that the arbitration agreement provides for opting-out of the rules is at that stage often ignored.

In fact, of the rules here considered only the Swiss Rules (2004) used to provide that the Chamber of Commerce, in consultation with the Special

\(^{200}\) Cf. von Bar et al., \textit{DCFR}, II.–4:208 (1); for various legal orders, \textit{see} notes, ibid., 352, para. 1; similar: UNIDROIT Principles, art. 2.11 (1).

\(^{201}\) Cf. von Bar et al., \textit{DCFR}, II.–4:208 (2); UNIDROIT Principles, art. 2.11 (2).

\(^{202}\) \textit{See} Díaz-Candia, »El Rol Jurisdiccional de Los Árbitros y Su Constructiva Evolución: Deberes y Responsabilidad«, 90; Kuckenburg, »Vertragliche Beziehungen«, 85.
Committee, shall refuse to accept a case as early as possible by refraining from forwarding the notice of arbitration to the respondent party if »there is manifestly no agreement to arbitrate referring to these Rules.«\textsuperscript{203} However, this provision has been removed from the current version of the Swiss Rules. Instead article 3 (12) of the Swiss Rules (2012) requires a decision of the SCCAM to refuse to administer the case only when the respondent does not submit an answer or raises objections to the administration by the Arbitration Court. Similarly, in ICC arbitration, modifications of or a missing reference to ICC Rules will only be considered upon objection or lack of answer by the respondent in the \emph{prima facie} decision under article 6 (4) of the ICC Rules, whereunder the Court might decide that the arbitration shall not proceed. At that time however, the institution has effectively started administering the arbitration, which suggests that the Administration Contract is already concluded.\textsuperscript{204} Where institutional rules do not foresee a preliminary institutional decision on jurisdiction, even an arbitral tribunal may be constituted before a derogation from the institutional rules becomes an issue.\textsuperscript{205} A decision, by the institution or the arbitral tribunal, that the arbitration may not proceed would then imply a termination of the Administration Contract.

II. Solution: Flexible contract with a both-sided termination right

At present, arbitral doctrine appears to have overlooked the practical reality that disagreements between the arbitrants and the institution on the applicable rules would often not prompt an immediate rejection of a case by the institution. It seems inappropriate to solve such conflict by resorting to the idea of dissent, according to which a contract does not come into existence if declarations of will do not match. As shown, institutions effectively render services, such as deciding on the \emph{prima facie} validity of the arbitration

\textsuperscript{203} Swiss Rules, art. 3 (6) (2004).
\textsuperscript{204} Contra Kuckenburg, »Vertragliche Beziehungen«, 85 (alleging a lack of authority of the ICC Secretariat as opposed to the ICC Court to conclude a contract with the parties). But, ICC Rules, app. II, art. 5 (2) (2012) (ICC Internal Rules) assumes that documents by the Secretariat have the Court's approval
\textsuperscript{205} As in the case Chayaporn, (1985) 1987 Rev. Arb. 179 (FR TGI, Paris): Before rendering the already drafted award, the tribunal ordered the parties to seek an order from the TGI as \emph{juge d'appui} on the competence of the institution.
agreement or installing an arbitral tribunal even if the arbitrants' agreement on this institution or the applicable rules requires further clarification and assessment. To make the coming into force of an Administration Contract dependent on the result of such assessment would lead to significant uncertainty.206

1. Arguments for a right to terminate the Administration Contract

As a first attempt to deal with the practical reality outlined, it is here proposed that an Administration Contract, which comes usually into existence with the receipt of the request for arbitration,207 first only obliges the institution to assess its own competence and the applicable rules in line with its standard practice. If, following such assessment, disagreement on the application of the rules of the institution, of a modified version or the rules even of another institution persists, both sides - that is the institution but also the arbitrants acting together - have a right to terminate the Administration Contract. This takes into account that administration of arbitration is a service of higher nature requiring mutual trust, which should lower the requirements for termination.208 Where part of legal doctrine disputes that parties choose arbitral institutions based on such special trust,209 it neglects the important role played by arbitral institutions in organising and supervising the proceedings and the significant influence of many institutions on the work of the arbitrators. Especially, if the rules authorise the institution to reject party-nominated arbitrators,210 replace arbitrators even without a request by

206 One consequence of such view would be to deprive institutions of their right to keep the filing fee should the arbitration be terminated for lack of competence of the institution.
207 See supra at pp. 244-245 and 247-251 (§11A.III.1, IV)
208 For German law, this is stipulated in BGB § 627 (1); cf. e.g. Putzo et al., Zivilprozessordnung, before § 1029 ZPO, para. 11 (suggesting the application to arbitrator's services); contra Henssler, »§ 627 BGB«, para. 23 (quasi-judicial function would oppose a qualification as »service«); but cf. also ibid., para. 20 (naming lawyer and tax adviser services as examples).
209 Wolf, Die Institutionelle Handelsschiedsgerichtsbarkeit, 248 (reasoning that such trust can only exist towards natural persons); but see Henssler, »§ 627 BGB«, 26 (with references on case law applying the provision to dating agencies, major law firms etc.).
210 See e.g. ICC Rules, art. 13 (2012; 2017); cf. LCIA Rules, art. 5 (7), 5 (9) (2014).
a party\textsuperscript{211} or scrutinise arbitral awards,\textsuperscript{212} parties have an interest that such far-reaching powers are only exercised by the staff of an institution in which they have confidence. Even the assignment of the task to nominate arbitrators in case of default of a party or disagreement between the parties, a typical obligation of all arbitral institutions, requires trust in the institution's competence to evaluate the suitability, independence and impartiality of the candidates. Therefore, the Administration Contract obliges arbitral institutions to render services of higher nature. Consequently, both sides should have a right to terminate that contract without pleading a particular cause other than a disagreement on how services shall be performed.

2. Limit to the right to termination

To account for their mutual reliance, there has to be a time limit within which the institution or the arbitrants \textit{together} can exercise their termination right without being liable for damages.\textsuperscript{213} This limit should be the time of the constitution of the arbitral tribunal. Until this time, the Administration Contract obliges the institution only to examine the arbitration agreement and procedural choices made by the parties and evaluate their operability and feasibility while the parties' are obliged to pay the filing fee as a handling fee. Once the institution formally or incidentally, by appointing or confirming arbitrators, decides that the arbitration shall proceed, the institution is bound to respect the parties' procedural choices. If the institution prior to appointing the tribunal clearly declares not to accept the parties' derogations from the institutional rules, both parties - \textit{together} -\textsuperscript{214} are free to withdraw the case before the tribunal is constituted,\textsuperscript{215} failing which they would be bound by the institution's rules.

\begin{footnotesize}
\begin{enumerate}
\item See e.g. ICC Rules, art. 15 (2) (2012; 2017).
\item See ibid., art. 33; SIAC Rules, art. 28 (2) (2013) = art. 32 (2) (2016); CIETAC Rules, art. 49 (2012) = art. 51 (2015).
\item Cf. BGB § 627 (2) (GER) (disapproving of an untimely notice of termination - »zu Unzeit«).
\item See also Fouchard, »Note, CA Paris, 04.05.1988, TGI Paris, 23.06.1988«, para. 8. See infra at p. 268 (§11C.II) on the problem of arbitrants as a plurality of persons on one side of the Administration Contract.
\item As happened in the \textit{Insigma–Alstom} arbitration first filed with the ICC Court.
\end{enumerate}
\end{footnotesize}
3. Contractual termination & jurisdictional decision of the institution

Generally, this contractual solution corresponds with the procedural practice of institutions providing for an institutional decision on jurisdiction in their arbitration rules.\textsuperscript{216} Such a decision, that the arbitration shall or shall not proceed under the supervision of the institution, is usually taken before the appointment of arbitrators. However, it needs to be pointed out that the contractual termination of the Administration Contract by an institution, or generally its factual refusal to administer a case, and an institutional jurisdiction decision are conceptually different.\textsuperscript{217} This is evident if one considers that institutional determination of jurisdiction only takes place upon objection or non-participation of the respondent, thus it seeks to regulate a conflict among arbitrants rather than the conflict between the arbitrants on one side and the institution on the other as here discussed.

III. Support of the solution: hybrid arbitration and the »battle of forms«

According to the solution proposed, the Administration Contract is a flexible contract, which first only provides for an assessment of the institution's competence and the applicable rules, which only become strictly binding once an arbitral tribunal is constituted without that either side has previously terminated the Administration Contract. The need for such a practice-friendly solution becomes particularly obvious under the hypothesis that parties approach an institution based on a hybrid arbitration agreement, expecting it to administer the arbitration under another institution's rules. This is, as it will now be explained, a kind of »battle of forms« problem.

1. The »battle« of institutional rules

One could assume that, contractually, modifications agreed by the parties would prevail over institutional rules since the latter are only incorporated by reference into both the arbitration agreement and the Administration

\textsuperscript{216} As it applies to the ICC Court, SIAC, CIETAC and the Swiss Chambers' Arbitration Institution, see infra at pp. 361-366 (§14B.II) for details.

\textsuperscript{217} See infra at pp. 362-363 (§14B.II.1) for details on this distinction, which appears to be ignored by Hofbauer et al., »Survey on Scrutiny of Arbitral Institutions«, 7.
Contract. The general rule that individual agreements prevail over standard terms would support this assumption.\footnote{For German law \cf BGB § 305b (GER); on the transnational acceptance of this principle see UNIDROIT Principles, art. 2.1.21 (UN); Bar et al., DCFR, II. - 8:104; Restatement (Second) of Contracts 1981 § 203 (d) (US); see also Basedow, »§ 305b BGB,« para. 3 (with further references on this general principle of European private law).}

However, such argumentation ignores that institutions do not participate in the conclusion of the arbitration agreement. From the institution's point of view, the parties' terms in the arbitration agreement are therefore not individually negotiated. In the relationship between the parties on one side and the institution on the other, the institutional rules and the derogating terms of the arbitration agreement are therefore at the outset at the same level of contractual hierarchy.\footnote{As opposed to the relationship between the parties themselves, where individually negotiated terms definitely prevail (so held by China Natural v. Apex, 379 F.3d. 796, 800 [9th Cir. 2004]; see already Cargill, 25 F.3d. 223, 225 [4th Cir. 1994]).} When determining whether the institutional rules or the rules as agreed by the parties shall prevail, it is conceivable to apply theories developed for solving conflicts of colliding standard contract terms, also referred to as the »battle of forms.«\footnote{von Bar et al., DCFR, 354 (commentary to II.--4:209); see also Schneider, Die Kollision Allgemeiner Geschäftsbedingungen im internationalen geschäftsmännischen Verkehr, 9.}

Drawing this parallel is particularly convincing in case of hybrid arbitration agreements where the rules of the administering institution, as that institution's standard business terms, collide with the pre-drafted rules of another institution, which the parties refer to. In this case, all elements of standard terms are met:

- Both sets of rules are formulated in advance for »repeated use«/«several transactions.«
- Each side of the Administration Contract refers to them without negotiation.\footnote{See UNIDROIT Principles, art. 2.1.19; von Bar et al., DCFR, II.--1.109 (with references on many jurisdictions).}
That the rules referred to by the arbitrants were not drafted by either of them but by another body, the rules issuing institution, is no obstacle. Terms drafted by a third party may also qualify as standard terms.\textsuperscript{222} The only element questionable in this respect is that of »repeated use« or formulation for »several transactions.« Most parties would - hopefully - not have concluded a larger number of hybrid arbitration agreements. Accordingly, they would not frequently address a request for arbitration to an institution referring to another than the institution's rules. Rather, this will usually remain a one-time issue. If it were a condition that the supplying party intended to use the terms several times, the rules referred to by the arbitrants, as opposed to the administering institution's rules, would not be standard terms. However, if it were sufficient that the institution that issued the chosen rules, as the third party formulating the terms, prepared these rules for repeated use, they would qualify as standard terms. Grammatically, definitions in legislation and harmonising instruments like the UNIDROIT Principles and the Draft Common Frame of Reference (DCFR) correlate the »repeated use« or »several transactions« element to the »formulation« or »preparation« of the terms, not to their supply or a party's intention to supply them.\textsuperscript{223} Accordingly, if a third party formulated the terms, such third party's determination of the terms for several transactions is decisive. Terms formulated by a third party for several transactions are standard terms, even if the party supplying and using such terms for a contract intends to do so only in a single case.\textsuperscript{224} Accordingly, both the administering institution's rules and other institutional rules parties refer to in their arbitration agreement are standard terms.

2. Solutions discussed for »battle of forms« problems

With respect to conflicting standard terms, doctrine has developed a multitude of solutions. These differentiate between different contract conclusion situations, the content of and extent of conflict between the standard terms

\textsuperscript{222} See UNIDROIT Principles, p. 66 (comment to art. 2.1.19); cf. also von Bar et al., \textit{DCFR}, II.–1:110 (5) (but not covering b2b contracts).

\textsuperscript{223} UNIDROIT Principles, art. 2.1.19; von Bar et al., \textit{DCFR}, II.–1.109; see also BGB § 305 (1) (GER) (»für eine Vielzahl von Verträgen vorformu- lierten« [formulated in advance for a plurality of contracts]).

\textsuperscript{224} See Urteil [Judgment], [2010] 63 NJW 1131 (GER BGH) [10] (with further references).
Chapter 3: Opting-out aspect - derogation from institutional rules

and with respect to the use of language in the standard terms according to which conflicting terms are not accepted (protective or «paramount» clauses).225

Ideally, these solutions accommodate the following interests:

- The parties expect to have concluded a valid contract.
- If to its disadvantage, each side generally wants its own standard terms to apply and to exclude the other side's standard terms.226

Based on these considerations, a solution negating a valid contract in case of conflicting standard terms («mirror-image rule») is no longer vigorously applied in any jurisdiction or by any authority.227 A solution according to which always the standard terms of the party making the offer applies - referred to as theory of the first word or »first shot rule« - is also indefensible.228 It contradicts the general rule that offer and acceptance have to be matching in principle and that a modified acceptance is a counter-offer unless the modifications are immaterial.229 The only solutions sufficiently supported and worth discussing are the theory of the last word or »last shot rule«, the theory of partial dissent/validity or »knockout« rule and the »characteristic performance theory.«230

According to the last shot rule, a party is deemed to have accepted a counter-offer by conduct if it fails to object immediately. Consequently, the standard terms of the party last mentioning them before starting to perform

225 Schneider, Die Kollision Allgemeiner Geschäftsbedingungen im internationalen geschäftsmännischen Verkehr, 12–15, 17; Egeler, Konsensprobleme im internationalen Schuldvertragsrecht, 194; cf. von Bar et al., DCFR, 355 (explanation to II.--4:209).
226 Schneider, Die Kollision Allgemeiner Geschäftsbedingungen im internationalen geschäftsmännischen Verkehr, 17.
227 See ibid., 20 (considering 12 different legal orders); on the inappropriateness of such rule, cf. also von Bar et al., DCFR, 354 (explanation to II.--4:209).
228 Schneider, Die Kollision Allgemeiner Geschäftsbedingungen im internationalen geschäftsmännischen Verkehr, 21–22; see also Egeler, Konsensprobleme im internationalen Schuldvertragsrecht, 194.
229 See supra at p. 247-251 (§11A.IV).
230 Cf. Schneider, Die Kollision Allgemeiner Geschäftsbedingungen im internationalen geschäftsmännischen Verkehr, 20–24 (further theories are specific to certain contracts like contracts for sale).
the contract apply. Some want to make an exception to this rule if the first offer's contract terms contain a protective clause.

The **knockout rule** postulates that the parties have not reached an agreement on those standard terms that conflict, that are not »common in substance.« Consequence of that rule is that non-agreed issues are dealt with in accordance with the dispositive provisions of the law.

In the context of commercial contracts, the last shot rule is predominant in common law jurisdictions while doctrine and jurisprudence in civil law jurisdictions tend to favour the knockout rule. Despite the still persistent divergences, both the DCFR and the UNIDROIT Principles have adopted some version of the knockout rule, subject to a clear, prior or immediate declaration that a party does not want to be bound by a contract if its terms do not apply.

The **characteristic performance theory** is inspired from corresponding principles in private international law. Comparing the conflict of contract terms situation to a conflict of laws, the supporters of this view argue that the party rendering the characteristic performance not only knows best which terms are required but also relies and depends more on the application of its terms.

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231 Ibid., 20, 21 (colloquially called »Ping Pong« theory).
235 Cf. ibid., 58.
236 See Grüneberg, in: Palandt, *Bürgerliches Gesetzbuch*, § 305, para. 54; see also Schneider, *Die Kollision Allgemeiner Geschäftsbedingungen im internationalen geschäftsmännischen Verkehr*, 52 (solution absolutely prevailing in Germany; with further references); see generally ibid., 119–20 (on Germanic and Roman legal orders). Nordic jurisdictions show a tendency towards case-by-case solutions (see ibid., 34–38, 121).
237 UNIDROIT Principles, art. 2.1.22; von Bar et al., *DCFR*, II–4:209.
238 See e.g. Rome-I-Regulation 2008 art. 4 (2) (EU) (cf. also Recital 19).
239 See Schneider, *Die Kollision Allgemeiner Geschäftsbedingungen im internationalen geschäftsmännischen Verkehr*, 22.
Chapter 3: Opting-out aspect - derogation from institutional rules

3. Appeasing the battle of institutional rules

As a preliminary remark: None of the here discussed institutional rules contain an express protective clause that may be relevant for the evaluation. They do not clearly indicate which rules are deemed »mandatory«, in the sense that the institution would never accept a modification,\textsuperscript{240} nor do they provide that the institutional rules shall generally prevail over the parties' individual procedural agreements.\textsuperscript{241} Although institutions may prefer to see their rules to apply unaltered, they refrain from introducing protective clauses and from identifying essential rules in order to avoid the reproach of restricting party autonomy. With some restrictions introduced with the latest revisions, the AAA-ICDR Rules and the LCIA Rules even underline the parties' liberty to make their own arrangements.\textsuperscript{242} Therefore, the specific situation of a protective clause in one party's standard terms can be left out from the analysis.

As a transnationally accepted solution cannot be identified,\textsuperscript{243} the above-mentioned theories will be evaluated according to their usefulness\textsuperscript{244} in the specific situation of conflicts between the procedural rules chosen by the parties and the institution's rules without repeating general criticism to all solutions.

The last shot rule is only convincing when a performance of the contract by one party may lead the other party to think that its terms have been accepted. However, an arbitration institution starting to organise the proceedings, for example by inviting parties' arbitrator nominations and comments to jurisdiction, would commonly follow its own practice notwithstanding a derogating agreement by the parties. Although they are not law, institutional

\textsuperscript{240} See supra at p. 218 (§10B).
\textsuperscript{241} But see SIAC Domestic Rules, art. 1.5 (2002): »The parties, by agreeing to submit or refer their dispute to the Centre for arbitration in any of the cases in Rule 1.1, agree that these Rules take precedence over any and all provisions in the underlying contract between the parties relating to dispute resolution by arbitration« (not in force anymore).
\textsuperscript{243} See Schneider, Die Kollision Allgemeiner Geschäftsbedingungen im internationalen geschäftsmännischen Verkehr, 122 (negating a »common core« of legal orders).
\textsuperscript{244} Ibid. (»better law approach«).
rules are »drafted as a piece of legislation«\textsuperscript{245} and most institutions apply them as such. Neither institutions nor parties think of institutional rules as standard business terms that can be waived by conduct - even though they should perhaps start considering this issue.

For this reason, degree of reliance on the performance of the Administration Contract is lower than with respect to ordinary contracts for works, services or goods. Moreover, the initial steps in arbitration are often similar, independent of the administering institution and its rules. The first steps in the arbitration procedure prior to the constitution of the arbitral tribunal can therefore hardly be interpreted as consent to particular rules on either side. An institution can also not reasonably understand the mere fact that one party pays a filing fee or advance as total submission under the institutional rules. In any case, such conduct by the party paying the advance can never bind the other party.\textsuperscript{246}

Applying the knockout rule is equally unenlightening. Of course, one could assume that no agreement is reached where the rules agreed by the parties are different from the rules of the administering institution. However, the consequence of such solution would be that such questions have to be answered in accordance with the applicable law. This is problematic because most arbitration laws lack provisions on the functioning of institutional arbitration. Tasks and powers of arbitral institutions are defined neither by procedural nor by substantive law.\textsuperscript{247} Many arbitration laws follow the basic model of ad hoc arbitration that is often not wanted by any of the parties when an institution is addressed to administer arbitration under rules derogating from its own.\textsuperscript{248}

It is therefore necessary to find a solution to the issue of conflicting arbitration rules and party agreements that can cope with the reality of institutional arbitration. The most viable approach appears to be to give the institutional rules of the administering institution general priority over the parties' derogating agreements. This solution, which certainly facilitates the work of institutions, could be based on the characteristic performance theory. The arbitral institution undeniably renders the characteristic

\textsuperscript{245} Schöldström, \textit{The Arbitrator's Mandate}, 404.

\textsuperscript{246} See supra at pp. 247 et seq. (§11A.III.3) on the agency problem when concluding an Administration Contract under rules deviating from the arbitration agreement.

\textsuperscript{247} See supra at pp. 91-106 (§4C.II.2)

\textsuperscript{248} See supra at pp. 207-209 (§9) on the preference for an interpretative solution to a pathology which meets the parties' intentions best.
performance under the Administration Contract. However, the characteristic performance theory has faced strong and justified criticism by contract lawyers. The most important argument against this rule is that it carves a presumptive dominance of one party in stone, preferring the stronger rather than the weaker party.\footnote{See e.g. Egeler, \textit{Konsensprobleme im internationalen Schuldvertragsrecht}, 195.} Applying the characteristic performance rule to conflicting terms of the Administration Contract also diminishes the force of the principle of party autonomy and risks to disadvantage institutional over ad hoc arbitration. Accordingly, it is untenable to give general preference to the administering institution's rules.

However, in line with the solution proposed above,\footnote{Supra at pp. 252-255 (at II)} the characteristic performance rule has some merit for the purpose of determining the institution's obligations \textit{up to the constitution of the arbitral tribunal}. This moment has already been identified as the point in the proceeding until which both the institution and the arbitrants have a right to terminate their relationship without assuming liability for damages. With that restriction to the initial steps in the administration of the arbitration, several arguments support the preference of the administering institution's rules (terms) in accordance with the characteristic performance rule:

- Inspiration from the corresponding conflict of laws rule is appropriate because, although not laws, arbitration rules are authoritative provisions drafted in a quasi-legislative manner.
- The principle of effective interpretation calls to applying the rules of the administering institution to avoid further obstacles and delays.
- The application of the administering institution's rules is almost a customary norm in international arbitration.\footnote{Cf. Grüneberg, in: Palandt, \textit{Bürgerliches Gesetzbuch}, § 305, para. 55–57 (on the particular contractual force of such trade-specific standard terms).}

Resorting to this solution is only required in case of a real collision of the rules and practices of the institution with the rules chosen by the parties already at this stage of the proceedings. Where both sets of rules regulate the initial steps in the arbitration in compatible ways, it is unnecessary to discard the application of either of them (principle of congruence, German:
§11 The institution's right to refuse the administration of a case

»Kongruenzgeltung«).252 In this respect, the next chapter will discuss similarities and differences between institutional rules in detail.253

IV. The institution's restricted right to disregard rule derogations

Accordingly, when faced with a request for arbitration requiring the application of another institution's rules, an arbitral institution may notify the request, assign a case file and assess its own competence according to its own, ordinary rules and procedures despite the modification agreed by the arbitrants. However, it has to inform the parties if or to which extent it is not prepared to accommodate the rules agreed by them prior to initiating the process of constituting the arbitral tribunal.254 Usually, the arbitrants and the institution will then find an agreement. If not, the institution may terminate the Administration Contract and end its services; it should not, however, simply proceed with appointing arbitrators based on its own rules if the parties have not agreed to this approach.

Contractually, the institution therefore has a right to disregard such rule modifications agreed by the arbitrants that are incompatible with its services. However, this right is restricted to the very initial phase of the proceedings prior to the arbitrator appointment process. This proposed solution reflects the important role played by institutions until the constitution of the tribunal by granting institutions more autonomy and discretion how to administer the proceedings up to that point.255 It also encourages institutions to take their role as a guardian of the regularity of the procedure seriously and to ensure that conflicts and disagreements on procedural aspects are solved early.

252 See ibid., § 305, para. 54 (on the application of this principle also in relation to the knockout theory).
253 See infra at pp. 344-400 (§14).
254 Similar: Schöldström, The Arbitrator’s Mandate, 416–17 (noting that the ICC may be liable for imposing scrutiny of parties having opted out of this feature).
255 See supra at pp. 131-134 (§7A.IV).
C. Effect on the arbitration agreement

A question left to discuss is what happens to the arbitration agreement when an Administration Contract is not concluded in the first place or terminated following a conflict over the applicable rules.

I. Overview of the République of Guinée

The relationship or question of dependence or independence between the Administration Contract and the arbitration agreement was a central issue of a line of jurisprudence concerning two urgency arbitral proceedings against the Republic of Guinea introduced by different companies before the Chambre arbitrale de Paris. The decisions do not concern refusal to administer a case or termination of the Administration Contract by the institution but an attempt by one arbitrant to terminate this contract (or rather to demand its »résiliation judiciaire«) against the will of the other arbitrant.

1. The factual background

In substance, the dispute concerned several contracts concerning the construction of flats in Guinea which contained more or less ambiguous arbitration clauses, some of which were interpreted by the Paris court of first instance (Tribunal de Grande Instance, TGI) in its first decision in the matter (herein cited as République de Guinée I) to refer to the Chambre arbitrale de Paris.257 During the arbitration proceedings, the Republic of Guinea


introduced an action against the claimants in the arbitration and against the Chambre arbitrale de Paris.\(^{258}\) It requested \textit{inter alia} the annulment of the arbitration agreements or, in the alternative, the judicial termination (\textit{»résiliation judiciaire«}) of the contract with the institution, claiming to have erred about the arbitration institution and asserting faults committed by the Chambre arbitrale de Paris in the organisation of the two arbitrations. It also submitted to be willing to continue the proceedings ad hoc.

2. The decisions of the TGI, Paris

Partially following the requests, the TGI of Paris suspended the arbitration proceedings by interim order of 30 October 1986\(^{259}\) and, by decision of 28 January 1987\(^{260}\) and declared the resiliation of the contractual relations (\textit{«liens contractuels»}) between the parties and the Chambre arbitrale de Paris, but not of the underlying arbitration agreements. The court found the institution to have raised serious doubts concerning its ability to ensure a fair and equitable process.\(^{261}\) In consequence, the TGI ordered the arbitral tribunals to be replaced by ad hoc tribunals to be designated by the TGI as supporting judge (French: \textit{»juge d'appui«}).

3. Partial annulment of the decisions by the CA, Paris

In its decisions of 18 November 1987 and 4 May 1988, the CA confirmed the decisions to uphold the arbitration agreements in principle, stressing the negative effect of competence-competence under French law.\(^{262}\) Contrary to the TGI, however, the CA also found that a state court cannot suspend

\(^{258}\) Overall, there was some uncertainty if the Republic of Guinée sought procedural remedies against the opponent parties or wanted to engage the contractual responsibility of the arbitration centre; the distinction between both causes of action is discussed \textit{infra} at Chapter 5, pp. 459-461 (§16C).


\(^{261}\) \textit{Inter alia} finding that only three arbitrators were appointed although the rules provide for five and that the president of the Chamber had attended meetings with some arbitrators to the exclusion of the arbitrator nominated by the Republic of Guinée (ibid.).

ongoing arbitral proceedings because of a dispute concerning the arbitral institution nor, pending arbitral proceedings, declare the invalidity or resiliation of the Administration Contract. Rather, the arbitrators, whose personnel impartiality and independence was then not in doubt, should have considered these issues, including the allegations of disrespect of a fair and equitable process by the arbitral institution.\textsuperscript{263}

II. Evaluation of the CA's ruling

A French commentator understood that the CA found the Administration Contract and arbitration agreement to be inseparable (»pas dissociables«).\textsuperscript{264} This idea of »inseparability« could be understood to have the consequence that a defect of the Administration Contract would also affect the arbitration agreement. However, such idea of an inseparable connection between the arbitration agreement and the Administration Contract is little convincing and, essentially, the jurisprudence of the CA Paris does not seem to support it. Rather, the decision is not based on a contractual analysis at all but rather on the idea of judicial deference to institutional activity pending arbitral proceedings.\textsuperscript{265} According to the policy predominant in France, state courts should not interfere with any aspect of arbitral procedure, including the administration by a permanent institution, until the rendering of the award. On a contractual level, the concept of separability, and not: inseparability, between the contracts underlying institutional arbitration supports this jurisdictional argument best. The alleged breaches of contract by the arbitration institution where neither attributable to the claimants nor to the arbitrators. Any hypothetical invalidity or termination of the Administration Contract could thus affect neither the agreement to arbitrate nor the arbitral tribunal's jurisdiction or proper constitution. Therefore, the TGI as supporting judge was not competent to put an ad hoc tribunal in place, as a difficulty in the constitution of the arbitral tribunal did - strictly speaking - not exist.

Still, the decision of the CA is critical insofar as it appears to install a quasi-total immunity of arbitral institutions administering arbitral


\textsuperscript{264} Boisséson, La constitution du Tribunal arbitral dans l'arbitrage institutionnel, 352.

\textsuperscript{265} Fouchard, »Note, CA Paris, 04.05.1988, TGI Paris, 23.06.1988«.
The institution’s right to refuse the administration of a case

The CA confined its reasoning to the brief remark that the first instance court did not have the competence, under the cover of the alleged requirements of trust and serenity (»sous le couvert de prétendues exigences de confiance et de sérénité«), to break the contractual relations. The court perceived the lower court’s decision to sanction mistakes to the detriment of the claimants although the alleged mistakes were not attributable to them but only to the Chambre arbitrale de Paris. This reasoning lacks an explanation why a termination of the Administration Contract alone would have »sanctioned« the claimants, even if the arbitrations could have continued on an ad hoc basis arguably even with the same arbitrators. It is also based on the wrong assumption that the arbitral institution lost its ability to interfere with the arbitration (»a perdu tout pouvoir d'action«) with the constitution of the arbitral tribunal. This finding conflicts with the reality of institutional arbitration.

Despite the discussed weaknesses in reasoning, the outcome of the CA's decision is defendable because the Administration Contract is a multi-party contract that links the institution to at least two parties, claimant and respondent, having partially opposing interests.

»Il est sûr que l'obstacle essentiel tient au désaccord des parties à l'arbitrage; si elles convenaient ensemble de mettre fin aux fonctions d'organisation de l'arbitrage qu'elles ont confiées à un Centre, ce dernier ne pourrait que s'incliner […].«

[Certainly, the essential obstacle had to do with the parties disagreement; had they decided together to end the functions to organise the arbitration assigned to the centre, the latter could not have done anything but to resign…]

266 Ibid.
268 Ibid. at II., fifth paragraph.
269 See also Fouchard, »Note, CA Paris, 04.05.1988, TGI Paris, 23.06.1988«, para. 13.
270 Contra Schöldström, The Arbitrator's Mandate, 403–11 (arguing that each arbitrant enters into a separate contract with the institution); cf. also ibid., 9. However, Schöldström admits that his model mainly works for a »hypothetical run-of-mill ICC arbitration« and not for attempts by parties to opt out of institutional rules (ibid., 410, 416).
271 See generally Leverenz, Gestaltungsrechtsausübungen durch und gegen Personemehrheiten.
Generally, a plurality of persons on one side of a contract has to act together to terminate it.²⁷³ Materially, such problem might be overcome by assuming a duty to cooperate between the arbitrans.²⁷⁴ Procedurally, however, a claim between arbitrans based on such duty to cooperate in the termination of the Administration Contract falls within the scope of the arbitration agreement.²⁷⁵ Consequence of the French prima facie approach to reviewing arbitral jurisdiction,²⁷⁶ the CA Paris thus had to refrain from interfering.

III. Fate of the arbitration agreement: reconsidering the TGI's decisions

Only the TGI's first instance decisions in République de Guinée²⁷⁷ addressed the problem of the fate of the arbitration agreement when the Administration Contract with the institution is, for whatever reason, null, void or terminated. In contrast, the CA Paris did not have to reconsider this question as it rejected the motion to annul the Administration Contract. According to the TGI, the arbitration agreement could survive the termination of the Administration Contract as an ad hoc agreement in line with the principle »in favorem validitatis.«²⁷⁸

As a side note, this corresponds with the procedural solution proposed by Romanian law, which –exceptionally- covers institutional arbitration extensively in its arbitration law:

»If the organisation or institution specified in Article 616 refuses to administer the arbitration, the arbitration agreement shall remain valid, and the dispute between the parties shall be resolved pursuant to the provisions of the present Book.«²⁷⁹

²⁷³ Cf. Leverenz, Gestaltungsrechtsausübungen durch und gegen Personenmehrheiten, 154, n. 37 (on the example of a contract for lease with more than one lessee; with references to case law).
²⁷⁴ See ibid., 100.
²⁷⁵ But see Wolf, Die Institutionelle Handelsschiedsgerichtsbarkeit, 200–202 (suggesting procedural challenges against institutions by analogy to provisions on arbitrator challenges).
²⁷⁶ But see infra at pp. 415–419 (§16A.II.1.b) on divergent understandings of arbitral competence-competence.
²⁷⁷ Supra at pp. 265-265 (§11C.1.2).
²⁷⁸ See supra at pp. 161-163 (§8B) and pp. 207-209 (§9)
²⁷⁹ CPC art. 621 (RO); English translation by Ileana Smeureanu and Brooks Hickmann, published in: Paulsson, International Handbook on Commercial Arbitration, Romania, Annex I (supp. no. 74, last updated May 2013); see supra at pp. 98 et seq. (§4C.II.2.b.ii).
This obliges parties to arbitrate in ad hoc proceedings if the designated institution refuses to administer their arbitration.\footnote{The provision does not clarify when an institution has the right to refuse administering a case. Romanian doctrine recommends that arbitral institutions should adopt rules enumerating exemplary grounds for refusal (Bobei, Arbitrajul intern și internațional, art. 621, para. 2).
}

Another conceivable option would be to refer parties to another institution rather than to ad hoc arbitration. As already noted, striking out unworkable optional elements from an arbitration agreement like the reference to an unavailable institution, which can be based on the idea of partial (in-)validity, often appears less controversial than adding elements by way of contract adaptation for change of circumstances. However, party autonomy is endorsed best if a solution was found on a case-by-case basis in accordance with the principle »in favorem voluntatis.«\footnote{See supra at pp. 161-163 (§8B) and pp. 207-209 (§9).} In many cases, ad hoc arbitration with state court support in the constitution of an arbitral tribunal will be an appropriate solution. If, however, it was of particular importance to the parties that the arbitration is overseen by a permanent institution, it may be more appropriate to adapt the arbitration agreement to designate another institution and rules able to meet the parties' expectations.\footnote{Cf. Wolf, Die Institutionelle Handelsschiedsgerichtsbarkeit, 199 (but, in detail, going a little too far with his proposal, see supra at pp. 202-203, §8C.II.3).} In case of a hybrid arbitration agreement, the rules issuing institution would be the most obvious substitute.

Then, there may also be - few, exceptional - instances where the administration by a particular institution was of such importance to the parties that the non-conclusion or termination of the Administration Contract with such institution would deprive the arbitration agreement itself of its basis.\footnote{On jurisdictions hostile to ad hoc arbitration or with a monopolist institution, see supra at p. 180.}

\section*{§12 Hybrid arbitration agreements and autonomy of the institution}

Concluding this chapter, one has to admit that the operability of hybrid arbitration agreements depends critically on the will of the institution designated to administer the proceedings. Institutional flexibility regarding rule modifications varies but most institutions do not welcome a complete opting-out of their rules.
If an institution is unwilling to administer cases under modified rules or rules other than its own, it does not have to accept the parties' (counter-)offer to conclude an Administration Contract pursuant to their terms. Even were initial communication by an institution's secretariat amounts to acceptance, the institution should be able to terminate the Administration Contract prior to the constitution of a tribunal without liability consequences. Up to that point, an institution would usually follow its own practices in administering the arbitration and it has herein been argued that it is allowed to do so despite the agreement on other rules by the parties. Accordingly, the autonomy of the institution designated to administer an arbitration on the basis of a hybrid arbitration agreement is adversary to the principle of party autonomy calling to implement such agreements as precise as possible. The parties, in return, also have a termination right if they are not content with the institution's implementation of their agreement but they have to exercise this right together.

If the Administration Contract is not concluded or if it is terminated, the arbitration agreement can contractually survive as an agreement on ad hoc arbitration. However, for an originally hybrid arbitration agreement it may be even more appropriate, either for the parties themselves or a competent court,²⁸⁴ to then adapt it to refer to the rules issuing institution.²⁸⁵

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²⁸⁴ Chapter 5 discusses the extent to which arbitration laws provide supporting courts with the competence to install such solution, infra at pp. 422 et seq. (§16A.II.1.d).
²⁸⁵ See already supra at pp. 207-209 (§9).