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Contents

Abbreviations

AAA	American Arbitration Association
ADR	Alternative Dispute Resolution
B2B	Business to business
B2C	Business to consumer
BCDR	Bahrain Chamber of Dispute Resolution
CAM	Milan Chamber of Arbitration
CANACO	Chamber of Commerce of the City of Mexico
CBOE	Chicago Board Options Exchange
CEPANI	Belgian Centre for Arbitration and Mediation
CIArb	Chartered Institute of Arbitrators
CICA	Court of International Commercial Arbitration
CIETAC	China International Economic and Trade Arbitration Commission
COMECON	Council for Mutual Economic Assistance
DIA	Danish Institute of Arbitration
DIFC	Dubai International Financial Centre
DIS	German Institution of Arbitration
FAA	Federal Arbitration Act
IACAC	Inter-American Commercial Arbitration Commission
IBA	International Bar Association
ICANN	Internet Corporation for Assigned Names and Numbers
ICC	International Chamber of Commerce
ICDR	International Centre for Dispute Resolution
ICSID	International Centre for Settlement of Investment Disputes
LCIA	London Court of International Arbitration
MAC	Maritime Arbitration Commission
NASD	National Association of Securities Dealers
ODR	Online Dispute Resolution
PCA	Permanent Court of Arbitration
P.R.I.M.E. Finance	Panel of Recognized International Market Experts in Finance

RICO	Racketeer Influenced and Corrupt Organizations Act
SCC	Stockholm Chamber of Commerce
SIAC	Singapore International Arbitration Centre
TTIP	Transatlantic Trade and Investment Partnership
UNCITRAL	United Nations Commission on International Trade Law
VIAC	Vienna International Arbitral Centre

Chapter 1
Introduction

Contents

1.1 Setting the Scene

This book investigates the issue of the civil liability of arbitral institutions (so-called "institutional arbitral liability")[1] by accommodating the changing *legal*, *societal*, and *economic* functions of arbitral institutions in and outside the international arbitration marketplace. The main thesis is that institutional arbitral liability is desirable and, hence, that the current regulations of liability of institutional arbitration actors—for the most part either excluding or strongly limiting any forms of liability for anything done or omitted in connection with arbitrations—are inadequate given the convoluted contractual obligations and the increasing scope of the multifaceted functional objectives underlying the performance of such actors.

[1]The term "institutional arbitral liability" accommodates any potential sources of civil liability of all institutional arbitration actors such as case managers, members of institutional organs and, to a certain degree, institutional arbitrators. In the majority of analyses conducted in this book this term nevertheless excludes the comprehensive regulation of liability of the actors external to institutional arbitration regimes, such as experts appointed by either arbitral tribunals or the parties.

B. Warwas, *The Liability of Arbitral Institutions: Legitimacy Challenges and Functional Responses*, DOI 10.1007/978-94-6265-111-1_1

International arbitration has changed significantly over the past decades. An increasing academic scholarship and many specialized arbitration periodicals have recently focused on the evolution of international arbitration including the explanation of its altering functions. This literature points to the intensification of the international arbitration practice exemplified by its growth in size, changes to the range of disputes and parties involved, procedural complexity, and interchangeability of the roles of the "players" competing for the arbitration market shares.[2] These transformations—suggesting the arrival of a new paradigm in international arbitration—prompt stimulating and well-timed calls for ethical regulation in international arbitration,[3] echoed in escalating requests for increased transparency of international arbitration proceedings.[4]

Another important development concerns the noticeable regionalization of arbitration, especially in the European context, and the implications of this phenomenon for international arbitration practice.[5] Due to the progressive liberalization of the concept of arbitrability at domestic levels of the EU Member States and the latest policies on promoting arbitration at regional, EU level, the interplay between EU law and domestic laws of the EU Member States, on one side, and arbitration, on the other side, has transcended its traditional axis. Regarding EU law developments, not only new, regulatory disputes within the EU regulated markets such as energy and telecommunications have been subject to arbitration and other alternative dispute resolution (ADR) mechanisms.[6] There have also been reforms of consumer arbitration accompanying a number of ADR and online dispute resolution (ODR) means, often based on their traditional commercial models. Furthermore, national practices of arbitration within the EU have revealed the increasing outsourcing of disputes of eminent social and public relevance to arbitration. These kinds of disputes differ significantly from commercial disputes lying at the core of traditional arbitration proceedings. For example, in 2011 Portugal introduced a law on tax arbitration before the Centre for Administrative Arbitration.[7] The 2011 Amendment to Spanish Arbitration Law set forth the framework for institutional arbitration of corporate disputes following similar reforms in Italy tracing

[2]Hanotiau and Mourre 2012; Rogers 2014.

[3]Rogers 2014.

[4]Be it as related to international commercial arbitration proceedings or other forms of international arbitration including but not limited to investor-State dispute settlement in the context of the latest EU comprehensive free trade agreements. Cf. McIlwrath and Schroeder 2013; Queen Mary University of London, School of Arbitration, and White & Case. "2015 International Arbitration Survey: Improvements and Innovations in International Arbitration." http://www.arbitration.qmul.ac.uk/docs/164761.pdf. Accessed 25 April 2016; Franck 2005; Stephan Schill, "Transparency as a Global Norm in International Investment Law." Kluwer Arbitration Blog. 15 September 2014. http://kluwerarbitrationblog.com/2014/09/15/transparency-as-a-global-norm-in-international-investment-law/. Accessed 25 April 2016; Ruscalla 2015.

[5]Cole et al. 2014.

[6]Warwas 2014.

[7]Decree-Law No 10/2011.

back to 2003.[8] All these have resulted in the growing allocation of highly sensitive disputes often involving matters of public interest to European arbitration both in regional and national contexts, which is also far-reaching for international arbitration practice.

Together, these developments constitute the incremental privatization of civil justice systems within the EU and suggest an increasing trust by public officials in private arbitration regimes and the eagerness of the EU to engage further in the international arbitration debate in a yet not entirely understood manner. At the same time, however, certain fundamental questions of constitutional nature regarding the fairness of new forms of arbitration—the (un)accountability and democratic-deficits of the emerging arbitration regimes, lack of protecting safeguards for the parties to the new forms of arbitration, and finally the role of private arbitration actors in the determinations of various issues concerning national and EU public policy—remain unaddressed. Although such discussions on the boundaries of arbitration have been subject to lively academic debates in the US, these problems appear novel in continental Europe, requiring new answers specific to the dynamics of both European integration and international arbitration settings.

All the aforementioned changes have one thing in common, namely the involvement of arbitral institutions. Arbitral institutions, be it those traditionally perceived as private, commercial entities, or more regional ones offering expertise in the resolution of specific types of disputes falling beyond commercial nature, have been increasingly active in introducing new instruments aimed at regulating institutional arbitration regimes together with the performance of institutional arbitration actors. This is to respond to new challenges facing contemporary arbitration practice. They do so by means of regular revisions of their arbitration rules or by providing guidance to the parties on the effective management of arbitration cases. For example, a few prominent international arbitral institutions such as the International Court of Arbitration at the International Chamber of Commerce in Paris (ICC Court) and the London Court of International Arbitration (the LCIA) have recently introduced new Arbitration Rules that came into force as of 1 January 2012 and 1 October 2014, respectively. These rules reflect the growing institutional interference with the conduct of the parties and their legal representatives in the course of arbitration proceedings in relation to the appointment of arbitrators, the manner in which legal counsel should and should not act in front of arbitral tribunals, or the ways in which various types of submissions are to be handed to arbitral tribunals, to mention a few. Another example is the recent ICC's Guide for In-House Counsel and Other Party Representatives on Effective Management of Arbitration of 2014. The guide provides an explanation of the basic stages of typical arbitration proceedings together with the institutional recommendation regarding the possible means of improvement to the performance of in-house counsel involved in such proceedings. All of these

[8]Spanish Act 11/2011, of May 20, Reforming Act 60/2003, of December 23, on Arbitration, and Regulating Institutional Arbitration Within the Public Administration.

institutional developments—although refreshing and meritorious—tend to be missing one component: they fail to include any guidelines on the conduct of case managers and other actors involved in the administration of institutional arbitration proceedings.

Consequently, the following logical and timely question arises here: why do regulatory practices of arbitral institutions continuously omit the professional conduct of the actors without whom institutional arbitration would simply lose its standing in the arbitration world, namely case managers and the members of institutional organs? Or, if any regulations of this kind exist, why are they kept behind the closed door of institutional arbitration realms?

There is another aspect of institutional arbitration activity that deserves attention here. Regardless of the natural hostility towards any legal interference with institutional arbitration regimes, arbitral institutions directly or indirectly engage in "public", legal dialogue on arbitration. Some institutions do so by means of adopting specialized sets of arbitration rules relating to the resolution of disputes of non-commercial origins (i.e. the rules of the American Arbitration Association (AAA) on consumer, employment, and the healthcare payroll provider arbitrations). The others amend their existent rules, ordinarily applied to commercial disputes, to attract their usage in either new forms of arbitration—traditionally falling outside the spectrum of commercial institutional services such as investor-State arbitrations or commercial arbitrations yet involving new parties to institutional regimes such as States or state entities (e.g. the recently revised version of the 2012 ICC Rules of Arbitration). This is to say that arbitral institutions respond to the emerging demands placed on them by public actors whose role in the geographical and procedural operation of institutional arbitration becomes less and less marginal.

Arbitral institutions are thus growing in power. Is anything potentially worrisome in that? Whereas at first glance institutional arbitration seems to function perfectly, on closer scrutiny of arbitral institutions deeper problems are revealed. Whether taking into account both traditional commercial arbitration institutions administering commercial disputes between private or public parties, as well as the institutions engaged in the management of more publicly oriented disputes, one thing looms beneath the surface of the exclusive institutional arbitration practices: all these institutions remain unaccountable.

What do arbitral institutions do to invite a discussion on accountability? The mainstream understanding of the primary function of arbitral institutions holds that they merely administer international arbitration cases. Holding to this mantra, we will not be able to escape from the discussion on the contractual obligations and the actual functions of arbitral institutions in and outside arbitration proceedings and how their performance could be improved. Certainly, arbitral institutions do not decide cases. Nevertheless, they draft arbitration rules that empower institutional arbitrators to determine the legal rights of the parties in a clearly defined procedural manner that predetermines the atmosphere and the outcomes of institutional arbitration proceedings. Moreover, the same arbitration rules often fall short of the provisions that would allow arbitrators a required room of manoeuvre to

efficiently adjust the phases of arbitration proceedings for the benefit of the parties. Some arbitration counsel have raised concerns regarding the lack of procedures for early depositions in institutional arbitration rules that could largely shorten the conduct of arbitration proceedings while at the same time contributing to their cost-effectiveness.[9] Moreover, there is a wide discrepancy *within* institutional arbitration rules as to the authorization of institutional arbitrators to encourage settlements in the course of the arbitration proceedings, a notion at odds with the original goal of arbitration understood as an amicable and consensual process. Thus, it is not only what arbitral institutions do which directly or indirectly affects the conduct in arbitration proceedings, but also what they do not do that may leave institutional arbitrators with their hands tied when deciding on cases and the parties confused as to their real autonomy in institutional arbitration proceedings. If arbitral institutions keep on acquiring important prerogatives in arbitration processes, why can they not be called into account for their actions or omissions whereas the parties often either bear financial consequences or suffer from procedural irregularities resulting from such actions or omissions?

This book argues that on the margins of the recent corporate, legal, and political debates on the role of arbitration in modern society, arbitral institutions have emerged as powerful players with new procedural and substantive powers in and beyond international arbitration processes. Arbitral institutions no longer only manage international arbitration cases; they design institutional arbitration proceedings in a way that allows them to play with the mandate and discretion of institutional arbitrators and with core principles of international commercial arbitration such as party autonomy. In doing so, they become increasingly exposed to the public authorities involved in legislative and political debates on arbitration (be it legislators, courts, or policy makers) and, hence, they build up their capital also beyond international arbitration marketplace. Institutional arbitration, whether domestic or regional, has serious implications for the functionality of contemporary international arbitration, be it in purely commercial settings or other emerging forms of publicly oriented institutional arbitrations.

The new developments to institutional arbitration could easily give international arbitration a boost through the popularization of the process among new types of disputes. However, it is apparent that any new developments can no longer ignore the current dissatisfaction of arbitration users with the traditional international commercial arbitration. This is not a purely academic concern. This concern would undoubtedly be shared by some commercial parties and practitioners who earn their daily bread as arbitration counsel. It is no longer universally accepted that international arbitration is cost-effective, fast, and procedurally straightforward. To the contrary, international arbitration—in particular as compared to transnational litigation—is increasingly perceived as an expensive,

[9] McIlwrath and Schroeder 2008b.

lengthy, and procedurally intricate process involving burdensome discovery.[10] This is in addition to complaints from the parties and their counsel regarding arbitrators who gradually compromise parties' interest due to their busy agendas. Again, what is the standing of arbitral institutions within this debate?

Whereas this book generally falls within the debate on the possible reforms to international arbitration, it goes much further as it revives an uneasy debate on one of the most intriguing yet unsettled issues in the world of international arbitration, namely the problem of liability in international arbitration. It does so from the perspective of institutional arbitration, hence acknowledging the recent geographical and procedural developments of international arbitration that advanced the position and legal authority of arbitral institutions within the international and regional arbitration communities. At the same time, this book investigates these developments of institutional arbitration also vis-à-vis the actors traditionally perceived as being external to arbitral institutions, that is, various legal authorities engaged in the promotion of arbitration, policy makers, or legislators directly or indirectly influencing the landscape of international arbitration.

This book argues that institutional arbitral liability as a derogative norm is desirable for at least a few reasons. First, from a legal perspective, arbitral institutions operate on a contractual basis and as such there is no good reason to treat arbitral institutions—that are undeniably sophisticated market players—differently than other professional contractors under the general theories of contract law. In this vein, arbitral institutions should not exclude their contractual liability for the performance of their essential contractual obligations.

Furthermore, this book argues that the legal approach to institutional arbitral liability (focusing on the explanation of the contractual bonds and institutional activity through the lens of various contract law theories) *alone* is insufficient to accommodate all aspects of contemporary institutional performance. The contractual obligations of institutional arbitration actors should be analysed in view of the changing societal and economic goals of institutional arbitration regimes. Whereas the *societal goals* correspond to the questions of authority and legitimacy of institutional arbitration in and outside institutional arbitration processes, the *economic aims* relate to the traditional commercial function that arbitral institutions assume in the so-called "market" for international arbitration services. Concurrently, it is claimed that institutional arbitration contracts should be treated as *sui generis* legal instruments that are largely detached from the traditional, contemporary analyses of contract law, hence requiring separate legal and institutional regulations specific to institutional arbitration settings.

The book also identifies the emerging modern public function of institutional arbitration that is in contrast to its traditional commercial function, which long tried to reduce institutional activity to the pure provision of arbitration services.

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

This public function includes both the increasing *private regulatory powers of arbitral institutions*, exercised in and outside arbitration processes, and the emerging exclusive authority of arbitral institutions in the administration of "regulatory" disputes. Furthermore, the book suggests that while the traditional commercial function of institutional arbitration is in decline, despite the continuous institutional attempts to adapt the arbitration rules to the demands of the new arbitration users, paradoxically, the emerging public function of arbitral institutions becomes the major means of competition between contemporary private arbitration "centres". As such, the proposed model of institutional arbitral liability accommodates the tensions between the traditional, commercial function of institutional arbitration and its emerging public counterpart.

1.2 Why Would Arbitration Users Sue Arbitral Institutions?

Why would they not? Most practitioners engaged in international commercial arbitration would certainly recall the law suit against the AAA with its headquarters in New York City and Mr. Peter Liloia, the arbitrator appointed to determine the construction arbitration under the AAA's rules that had its finale before the Appellate Division of the Superior Court of New Jersey in March 2008.[11] In the case in question, both the arbitral institution and the institutional arbitrator with almost 20 years of experience in hearing AAA's arbitration cases were jointly sued for civil liability for personal injuries allegedly suffered by the defendant as a result of a failure to exercise reasonable control over the conduct of institutional arbitration proceedings by the arbitral institution and the arbitrator. Whereas the dispute underlying the AAA's arbitration was rather straightforward,[12] the events that occurred in the corridors of these arbitration proceedings were rather unconventional. Surprisingly, the events that gave rise to the subsequent liability suit against the AAA and its arbitrator in their majority took place in a parking lot. Let us consider the case more closely.

Mr. Malik, a party to the AAA's arbitration proceedings, objected to the performance of one of the homeowners' legal representatives and requested that the latter be removed from the arbitration hearing. The request was denied by the arbitrator who subsequently ordered a break presumably also aimed at toning down the emotions among the participants to the arbitration hearing. The discussion was nevertheless not over and it moved to the infamous parking space

[11] *Malik v. Ruttenberg et al.* 398 N.J. Super. 489, 495 (App. Div. 2008). ; McIlwrath 2008a.

[12] The AAA's arbitration concerned disagreements between Mr. Malik, hired in order to undertake substantial renovations to the house of the homeowners that acted as the opposing party in the arbitration in question. *Malik v. Ruttenberg et al.* 398 N.J. Super. 489, 495 (App. Div. 2008).

where—as alleged by Mr. Malik—he was assaulted by the same legal representative of the counterparty whom Mr. Malik had previously attempted to challenge.[13]

Although the arbitrator did not witness any such disagreement, as it took place outside the hearing room, Mr. Malik filed a motion in the trial court against both the AAA's arbitrator and the AAA itself. He claimed that the defendants must have known of the temperament and highly unusual oral advocacy skills of the legal representative in question, and hence the failure to exercise their duty to control arbitration proceedings should have resulted in their liability. Needless to say, the AAA and its arbitrator based their defence on the provisions of the New Jersey Arbitration Act[14] that in their view immunized them from liability. The case was decided for the benefit of the plaintiff in the first instance, as the motion court found that the duty of defendants to exercise control in arbitration proceedings fell outside the scope of the doctrine on judicial or quasi-judicial immunity that had been long extended into the performance of arbitrators and arbitration providers in the US. As such, the defendants were denied the motion to dismiss. The Appellate Division of the Superior Court of New Jersey, however, revised this judgement. The Court stated that the act of the arbitrator in question, calling the recess of arbitration proceedings and refusing to remove the legal representative of the party to such proceedings together with any potential corresponding acts of the arbitration provider such as the AAA in their entirety fell within the judicial and quasi-judicial authority of such arbitration actors and therefore should be protected under the doctrine on immunity.

This case, although outrageous and uncommon, attracted lively discussion behind the arbitration scenes on both sides of the Atlantic Ocean.[15] Such debate did not only concern the controversial topic of the desirable scope of immunity covering the performance of arbitration actors in the US, but it also provoked dialogue on the functions of both arbitrators and members of arbitral institutions in and outside the institutional premises where arbitration hearings take place. Such discussions—involving differentiated positions represented by different arbitration practitioners—have not yet led to any firm conclusions. What is certain and relevant for the arguments presented in this book, however, is that they intensified the confusion regarding the scope of contractual obligations of institutional arbitration actors, as well as the modern functions of these actors. Consequently, if no consensus could have been reached by the international arbitration practitioners, why would the parties themselves not be puzzled about the scope of duties of institutional arbitration actors? In addition, if they have the right to be puzzled, they have the legal standing to sue such actors in the courts. Again, why would they not?

Another example of a liability claim against an arbitral institution relates to investment arbitration proceedings that attracted considerable public attention in 2013. The arbitration case concerned the subsequent legal suit against the World

[13]It is also argued that the assault might taken place in the lobby. *Malik v. Ruttenberg et al.* 398 N.J. Super. 489, 495 (App. Div. 2008).

[14]New Jersey Arbitration Act; N.J.S.A. 2A: 23B-14a.

[15]McIlwrath 2008a.

Bank Group, the International Centre for the Settlement of Investment Disputes (ICSID), and the Secretary-General of ICSID, Ms. Meg Kinnear. It was filed in a district court in Washington DC by Mr. Jack J. Grynberg, the President and CEO of RSM Production Corporation, an oil and gas exploration and production company.[16] The lawsuit in question, which entailed the first legal proceedings ever brought against the ICSID, was grounded on the allegation that one of the arbitrators appointed by ICSID to sit in an *ad hoc* Committee charged with the annulment proceedings failed to disclose a conflict of interest.[17] Consequently, on 31 May 2013, Mr. Grynberg published an open letter to Dr. Jim Yong Kim, President of the World Back and Chairman of ICSID, in which he pointed to massive irregularities in the conduct of the arbitration underlying the legal suit discussed here, as well as to the increasing judicial power of ICSID—deprived from any public control—that in his view called into question the transparency and fairness of the entire ICSID arbitration system.[18] The case was eventually dropped by Mr. Grynberg due to a new, favourable deal with the government of Central African Republic, who acted as a defendant in the ICSID arbitration being the subject of the legal suit. However, the case proved the increasing dissatisfaction with the internal work of the ICSID, a major institution dealing with investor-State arbitration cases, by its users. Moreover, regardless of the eventual outcome of the legal proceedings brought against the ICSID in the US district court, yet again the defence line taken by the ICSID, based on the immunity claim, shows that institutional arbitration actors continue to remain unresponsive and nearly indifferent towards increasing legal actions related to any potential irregularities within institutional arbitration regimes. This lack of self-reflection on the institutional end may result in the ever-increasing liability claims against arbitral institutions that, in turn, provoke serious but important questions relating to the functionality of the contemporary institutional arbitration.

1.3 The Two Legitimacy Pressures and Efficiency

Most arbitral institutions, while describing the goals and standards underpinning their operations (be it in the preambles to arbitration rules or in the rules themselves), refer to such values as *ethics*, *fairness*, *transparency,* and *efficiency* of

[16]See an open letter by Mr. Jack Grynberg partially published in a press release: "Jack Grynberg Sues the World Bank Group and ICSID Over Concerns of Conflicts of Interest." 31 May 2013. http://www.prnewswire.com/news-releases/jack-grynberg-sues-the-world-bank-group-and-icsid-over-concerns-of-conflicts-of-interest-209710801.html. Accessed 25 April 2016. This example, which refers to ICSID, also represents the contemporary problems of purely private arbitral institutions.

[17]Ibid.

[18]Ibid.

institutional regimes.[19] Additionally, the drafters of the rules often speak about the institutional *mission* or the *commitment* to the expertise resolution of any arbitrable dispute.[20]

Are contemporary institutional arbitration processes in fact that fair, transparent, and efficient? Do the current practices of arbitral institutions correspond to the initial, core aims of the arbitration users associated with the early arbitral institutions? Are the arbitration rules trustworthy while assuring that they will be applied to all arbitrable disputes regardless of the possible membership of arbitration users in any specific institutional regime?[21] Or, is it rather a facade directed towards the furtherance of the exclusive character of each institutional arbitral regime with an institutional support of "in-house" arbitrators, whether they do a good job or not? The questions at hand touch upon the problems of *legitimacy* and *efficiency* of contemporary institutional arbitration in and of itself.

The questions regarding legitimacy and efficiency of institutional arbitration were identified some time ago in regard to the factors that were to determine the then future role of institutional arbitration in the international arbitration system. In 2009, the then Acting Secretary-General of the ICSID, Mr. Nassib G. Ziade, called for more transparent arbitral procedures, efforts to increase the trustworthiness of institutional arbitration, and identified threats to the legitimacy of arbitral institutions as the biggest challenge facing them.[22] A few years after the speech by Mr. Ziade, it is clear that these problems remained unresolved. In fact, the farsighted words of Mr. Ziade are increasingly exemplified in the growing dissatisfaction with the institutional involvement in arbitration proceedings, often resulting in legal suits against arbitral institutions themselves.

Why is this so? First, it is a problem of the shifting legitimacy of institutional arbitration. Institutional arbitral liability entails complex issues regarding the institutional responses (or their lack) to the core values and principles of arbitration, all in relation to the arbitration users and institutional arbitrators, on one side (the bottom-up approach) and public authorities, such as courts, legislators, and policymakers, on the other side (the top-down approach). Broadly speaking, institutional arbitral liability concerns the question of legitimacy of institutional arbitration

[19]See: the Preamble to the recently amended 2012 ICC Arbitration Rules, which reads as follows: "These Rules respond to today's business needs. The 2012 Rules of Arbitration remain faithful to the ethos, and retain the essential features, of the ICC arbitration […]. Both sets of Rules define a structured, institutional framework intended to ensure transparency, efficiency and fairness in the dispute resolution process []".

[20]See: AAA President's Letter and Financial Statements 2010, in particular the subsection on "Our Shared Mission". https://www.icdr.org/icdr/ShowProperty;jsessionid=wLyySnLYHphyPpNvT5VvTL2vqG8l26LcQTNZwJS8pYQSWbBQzhvy!-266738542?nodeId=%2FUCM%2FADRSTG_004001&revision=latestreleased. Accessed 25 April 2016.

[21]See: the Preamble to the 2012 ICC Arbitration Rules, where it is stated that: "[…] these Rules are applicable to disputes between parties in any part of the world, whether or not members of the ICC".

[22]Ziadé 2009.

understood as the accommodation by arbitral institutions of the more general and increasingly changing systemic goals of institutional regimes as voiced by the regional and international arbitration communities and public authorities. It also relates to the sources of institutional authority in the arbitration processes and the increasing unaccountable powers of institutional arbitration actors both vis-à-vis the arbitration users and the public(s).[23]

The rise in institutional liability claims is indicative of the decline in legitimacy of institutional arbitration regimes and processes, at least within the internal aspect of such legitimacy (as seen by the traditional institutional arbitration users). This means that the parties to institutional arbitration express not only dissatisfaction with the institutional "services" but also a growing mistrust in institutional values and authority. This situation is getting progressively worse.

Surprisingly, the case of legitimacy of institutional arbitral regimes vis-à-vis State powers (henceforth "external legitimacy") entails the opposite observations. As noted above, legislators have begun to equip arbitral institutions with additional competences concerning regulatory areas of law that fall within public policy domains. Furthermore, the increasing legal and political considerations related to the new forms of arbitration at the regional level (i.e. the EU consumer arbitration and ADR movement or the increasing promotion of arbitration and ADR within the EU regulated markets)[24] require adequate institutional responses to the new public demands placed on institutional arbitration in order to fully expand its potential as a unique private–public dispute resolution mechanisms. At the same time, growing private–public dialogue in the field of institutional arbitration suggests that the external legitimacy of institutional arbitration—aided by the growth of public trust in those institutions—is increasing just as "traditional" arbitration users are increasingly questioning the internal legitimacy of those same institutions. These two problems are therefore mutually aggravating.

The changing interplay between the internal and external legitimacy of institutional arbitral regimes questions the traditional status and functions of institutional arbitration (that is to say, the resolution of commercial disputes arisen among traders), and relates to the emerging public function of arbitral institutions. The public function of institutional arbitration relates to the growing private regulatory

[23]See the question of Mr. Grynberg related to the prospective excessing of the authority by the Secretary-General of ICSID and to the sources of the Secretary-General's authority. "Jack Grynberg Sues the World Bank Group and ICSID Over Concerns of Conflicts of Interest." 31 May 2013. http://www.prnewswire.com/news-releases/jack-grynberg-sues-the-world-bank-group-and-icsid-over-concerns-of-conflicts-of-interest-209710801.html. Accessed 25 April 2016.

[24]Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on Consumer ADR); Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on Online Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on Consumer ODR).

powers of arbitral institutions in institutional regimes and to the limited though significant public powers that have been granted to institutions by means of public acts. This specific public function of institutional arbitration calls for specific regulations of institutional arbitral liability, particularly when taking into account the linkages between the contractual obligations of institutional arbitration actors. The convoluted content of the contractual obligations of institutional arbitration actors—related to the interconnectedness of the functions of arbitral institutions and individual arbitrators—intensifies the confusion about the prospective scope of institutional arbitral liability that is desirable with a view to the discussion on the democratic deficit of institutional arbitration regimes given their increasing public function. As such, the increasing external legitimacy of institutional arbitration contributes to the increasing pressure of public demands relating to institutional arbitration on more traditional, commercial function of institutional arbitration, implying the new alignment of the private–public goals of arbitration regimes.

The *efficiency* of institutional arbitration is also called into question. The main reason for this puzzle is the confusion among institutional arbitration actors themselves as to the role of modern arbitral institutions in and outside arbitration proceedings. Judging from the contents of the liability claims against arbitral institutions, which assume the failure of institutions in the field of efficiency, it seems that arbitration users expect arbitral institutions to ensure "perfect" arbitrations that would result in the rendering by institutional arbitrators of the awards enforceable in law in line with the parties' expectations towards their dispute. Nobody's perfect, one would say, and most arbitration counsel would certainly agree that such statement holds particularly true with regard to international arbitration practice. Stepping aside from the particularities of human nature, international arbitration—unlike most other fields of legal practice—is built upon these perceptions. This is the case when we speak about the self-perceptions of the status of the members of arbitral institutions, case managers, or institutional arbitrators, as well as regarding the perceptions of the ideal outcomes of an arbitration of the arbitration users. It is often the case that the clashes between these perceptions or visions of efficiency result in liability suits against institutional arbitration actors.

Institutional arbitrators understand efficiency in terms of financial and reputational concerns vis-à-vis the parties' expectations but they tend to rely solely on the institutional procedural matrix and authority as the "guarantors" of efficiency of institutional arbitration processes. In many cases, however, institutional arbitrators have a tendency to take these guarantors for granted by allowing schematic resolution of disputes in line with the internal institutional policies.

In turn, the understanding of efficiency by arbitral institutions appears to be linked to the systemic goals of institutional regimes to increase their external legitimacy (meaning the continuous public recognition of institutional arbitration), which often departs from the perception of efficiency and effectiveness by private users. In fact, institutional arbitral regimes cannot do well without an accurate and consistent understanding of the efficiency of institutional arbitration by all institutional arbitration actors.

1.4 How to Respond to the Trend of Increasing Liability Suits? Preliminary Proposals

Although arbitral institutions are sophisticated market players, there is always room for possible misconduct on the side of institutional arbitration actors. Such misconduct can vary from less significant procedural errors that can be corrected during the regular meetings of the members of institutional organs to more serious irregularities that would have real effects for the exercise of the legal rights by the parties to institutional arbitration proceedings. The assessment of the possible institutional misconduct is thus largely dependent on the content of the obligations of arbitral institutions (be it those determined under the contract or more general obligations of due care) and the severity of such misconduct for the parties' rights in the arbitration processes. The latter situations may concern the following: the failure in assisting with the communications between arbitrators and the parties, improper notification of the parties of documents submitted or produced in the arbitration proceedings, ambivalence of institutions with regard to the delays in the work of arbitrators, and non-reaction to the possible conflict of interests concerning arbitrators, among others. In fact, arbitral institutions vary from one to another and so the prospective institutional misconduct will need to be assessed on a case-by-case basis. In addition, there are some arbitral institutions whose standards of conduct may be quite different from the norms established by prominent international arbitration centres, and to this extent, the sophisticated arbitral institutions (acting as trendsetters) should be particularly interested in initiating the necessary reforms.

This book argues that—in view of the existent practical trend among arbitration users to sue arbitral institutions in cases of misconduct—arbitral institutions should take a proactive approach to institutional arbitral liability and initiate the necessary reforms from the bottom, by way of amendments to their arbitration rules. The proposed model of institutional liability is built around *the triad* of institutional functions, and is intended to respond to the main problems faced by modern arbitration systems, that is to say, the problems of legitimacy and efficiency of institutional arbitration in the face of the recent transformations in institutional arbitration regimes. Taking into account the rather vague institutional approach to the liability issue, this book also addresses the question of the optimal scope of institutional liability. It argues that arbitral institutions should become liable not only for their own acts and omission but also for the effects of certain negligent acts or omission of institutional arbitrators. This stems from the particular *sui generis* status and function that arbitral institutions assume in and outside the arbitration processes.

It is also claimed that the commercial and public functions of institutional arbitration should interact in the proposed model of institutional arbitral liability. The added value of this proposal is to bring together, in a single analysis, two different sorts of legitimacy pressures transforming the institutional arbitration regimes that increasingly impact the operability of international arbitration practice. This

means that institutional arbitral liability is required not only given the commercial, contractual aspect of institutional activity (bottom-up) but also because of the emerging, public facet of institutional functions that necessitates the public control over institutional arbitrations that concern the matters of the public interest (top-down). Only such proposals are able to accommodate all three pillars of institutional operation, while at the same time responding to the emerging dual role of contemporary institutional arbitration.

The normative goal of this book is not to argue for diminishing the "autonomy" of institutional arbitration in front of the private or public actors involved in arbitration. Rather, the book seeks greater functionality of institutional arbitration regimes, which could eliminate the contemporary shortcomings of institutional arbitration. These shortcomings include: (a) the lack of institutional control over institutional arbitrators; (b) the institutional understanding and further observance of the principle of efficiency that is at odds with the perceptions of the parties; and finally (c) the institutional obliviousness of the societal facet of institutional operation. The last issue should be of particular importance given the spectrum of institutional goals referring to paralegal values, which seem to be emphasized by institutions more in theory than in practice.

1.5 Methodology

This analysis is based on theoretical and, to a certain extent, also empirical research on institutional arbitration and institutional arbitral liability.[25] The theoretical analyses are based largely on the soft-law instruments developed by institutional regimes (such as the arbitration rules, codes of conduct, internal policies and documents) as well as on descriptive, secondary sources (such as the guides to arbitration rules, limited academic studies on institutional arbitration, and in some parts even on the web articles or blogs of prominent arbitrators and legal counsel). This approach is largely a function of the problems with transparency and confidentiality of arbitration.

Given the interdisciplinary character of this book, the analyses of institutional arbitration and civil, contractual liability involve legal theories of contract laws (interpreted in arbitration context), as well as the societal and economic dynamics of institutional regimes. Hence, the legal dimension concentrates on the analyses of the legal instruments of arbitration including the national arbitration laws, case studies, or the international arbitration device such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention).[26] Furthermore, the discussion on institutional arbitration contracts uses the terminology and philosophy underpinning the theories of transnational

[25]Conducted in the course of the study for the European Parliament. See Cole et al. 2014.

[26]The New York Convention, 1958.

private regulatory regimes. Moreover, the legal approach concerns the interplay between various contract law theories, different private international laws, and the stances of domestic judges or legislators to arbitration in general and to institutional arbitration in particular, with a view to the particularity of arbitration settings. There is particular focus on the public authorities from jurisdictions where the arbitral institutions under analysis have their assets, namely: France, England, the US, and Sweden. Additionally, the legal dimension concerns the possible transnationality of institutional arbitration and thus the philosophical arguments related to the location of arbitral institutions vis-à-vis sovereign State powers are analysed.

The societal dimension addresses the societal goals and values of institutional regimes and of the local and international arbitration communities. The choice of the leading arbitral institutions under comparative analysis—such as the ICC Court, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Institute), the LCIA, and AAA with its international branch, the International Centre for Dispute Resolution (ICDR)—is aided by the following objectives. First, it aims at proving the historical evolution of the goals of the arbitration communities associated with the very first (and currently leading) arbitral institutions to show the transformations of the contemporary institutional regimes with a view on the societal, communitarian values of arbitration users. Here, comparison is made with the selected regional arbitral institutions to test the changing commercial, legal, and societal demands of the arbitration users over their preferable arbitral institutions. Second, it intends to show the changing external dynamics of the regimes developed by the institutions under analysis with the *law*. Therefore, although the book focuses on the arbitral institutions commonly perceived as purely *private*, dealing with commercial disputes, the discussion concerns both private law and public law aspects of institutional activities and of civil liability in more general terms. In this vein, references are also made to the new, public functions of the private arbitral institutions, as well as to the arbitral institutions administering disputes arising out of public international law (e.g. investor-State arbitrations). The economic analysis is limited to an explanation of the commercial function of arbitral institutions to demonstrate the significance of the self-regulatory, market-based approach to institutional liability with a view to the competition between arbitral institutions together with its implications for both national economies and international economic order.

1.6 Organization of the Book

Chap. 2 starts with a brief presentation of the shortcomings of the mainstream definitions of the status and function of arbitral institutions, and provides an innovative, functional definition of contemporary institutional arbitration. Chap. 3 provides an analysis of the legal, societal, and economic dimensions of institutional functions (the so-called "triad" of institutional functions) in search of the

sources and prospective scope of institutional arbitral liability. Chap. 4 points out the lack of an accurate response by the contemporary regulations of institutional arbitral liability, expressing the trend towards almost blanket exclusion of liability, to the triad of institutional functions. Chap. 5 concentrates on the weaknesses of the public regulation of institutional arbitral liability by looking at the domestic provisions regulating institutional arbitration (if any) as well as at the interpretations of the status, function, and the liability of arbitral institutions by domestic courts (so-called "visions" of liability). To this extent, it involves solely the legal dimension of institutional arbitral liability. Chaps. 6 and 7 put forward a normative model of institutional liability that could respond to the triad of institutional functions. Chap. 6 addresses solely institutional reforms. Chap. 7 proposes changes to national laws on arbitration and domestic contract laws, which could strengthen the efficiency of the proposed institutional reforms. It reflects on both the desirable level of public regulation of institutional liability and the contents of such regulation. The concluding chapter, Chap. 8, reviews the proposals presented in this book in view of the increasing need for arbitral institutions to eventually reform their regulations of liability by means of accepting the risks rooted in the issue in question instead of unremittingly avoiding those risks.

The book aims at contributing to the general academic discourse on institutional arbitration in an innovative manner by identifying its emerging functions and explaining why these functions necessitate institutional arbitral liability. In this view, certain "public life" of institutional arbitration is pointed out that relates to the recent transformations in institutional arbitration regimes. It is argued that the specific public dimension of the work of arbitral institutions can no longer be overlooked in the analysis of the legitimacy of arbitration in general and of institutional arbitration in particular.

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Chapter 2
Status and Functions of Modern Arbitral Institutions

Contents

2.1 Introduction

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

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