



# Institutional Leadership or Institutional Overreach? Overriding the Parties' Agreement for the Number of Arbitrators in Expedited Proceedings

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## ABSTRACT

The institutions of international arbitration have played an increasingly active role in arbitral governance. The claim that they merely provide administrative services no longer holds water. With the ability to amend institutional rules, update practice guidelines, and revise institutional practices, they wield the power to efficiently effect change – a power which no other actor in international arbitration comes close to having.

However, it has been said that in their quest to lead change, some institutions have overstepped their mandate and overreached their powers. Based on a variety of primary and secondary sources, this article examines the situations in which institutions have overridden the parties' agreement for the number of arbitrators appointed in cases of expedited proceedings. Thereafter, it seeks to analyse whether institutions, in a bid to push progress have overstepped their authority.

**Keywords:** International Arbitration, Arbitral Institutions, Overriding Party Autonomy, Expedited Proceedings, Number of Arbitrators, New York Convention

## INTRODUCTION

1. International arbitration begins from the agreement between two parties to submit present or future disputes to a tribunal of private arbitrators.<sup>1</sup> Because each agreement is separately entered into, reform of the entire system is difficult to achieve.<sup>2</sup> Commercial parties who enter into such agreements are generally risk averse, and typically unwilling to agree to an arbitration agreement

which is unconventional, untested, or novel.<sup>3</sup> They often opt for the safer route.<sup>4</sup> Short of a universal treaty with a level of success comparable to that of the New York Convention,<sup>5</sup> the means and methods to effectively improve the existing system of international arbitration are few and far between.

2. Therefore, insofar as it drives the forward march of the system of international arbitration, institutional innovation is largely welcomed.<sup>6</sup> Through the amendment of

<sup>1</sup> Gary B. Born, "International Commercial Arbitration" (2014) 2 Kluwer Law International at 1.05

<sup>2</sup> Tribunals may also generally be risk averse. See Garreth Wong, Shiva Ostovar and Ben King, "Arbitration SpeedRead – Nipping it in the bud – summary procedures in arbitration" (2017) Lexology, available at <<https://www.lexology.com/library/detail.aspx?g=6bc52aa-a-eee0-4cfb-9404-8878ae795b2e>> (accessed 31 December 2019)

<sup>3</sup> Philip W. Engle, "Controlling Business Risks With International Commercial Arbitration" (2013) Kluwer Arbitration Blog, available at <<http://arbitrationblog.kluwerarbitration.com/2013/11/22>

/controlling-business-risks-with-international-commercial-arbitration-2/> (accessed 31 December 2019)

<sup>4</sup> Jan Engelmann, "International Commercial Arbitration and the Commercial Agency Directive" (2017) Springer International at 120

<sup>5</sup> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) United Nations

<sup>6</sup> Robert Rothkopf, "Innovation by arbitral institutions spells good news for users of arbitration funding" (2016) Thomson Reuters <<http://arbitrationblog.practicallaw.com/innovation-by->



institutional rules, institutions are able to pave the way for more efficient procedures, faster and more cost-efficient arbitrations, as well as the quicker resolution of disputes.<sup>7</sup> As Emilia Onyema writes,

“arbitration institutions are the engines of arbitral reform and development. They spark the flame that kindles enthusiasm in the process both by governmental and private party and users.”<sup>8</sup>

3. However, this does not mean that institutions have free reign to override the parties' agreement.<sup>9</sup> The entire system of international arbitration is premised upon the recognition of party autonomy arising from the arbitration agreement.<sup>10</sup> Undermining party autonomy has the potential to jeopardise the entire arbitration itself.<sup>11</sup> Yet, many institutions, in a bid to lead change and reform, have overridden the clear, express and unequivocal intentions of the parties, substituting the agreement for what the institution deems as more efficient, effective, or commercially sensible. Such override by the institutions is referred to as institutional overreach.

4. At this juncture, I note that institutional override occurs when the institution, usually by way of the application of its institutional rules, overrides the agreement of the parties. Arbitrator override, on the other hand, occurs when the arbitrator overrides the parties' agreement. This essay focuses on the former – situations where it is the institution, rather than the arbitrator, which seeks to override the agreement of the parties.

5. One example of institutional override can be seen in the area of expedited proceedings. Some institutions have published rules which override the parties' specific agreement, appointing a sole arbitrator notwithstanding the parties' agreement for a three-member tribunal. This

arbitral-institutions-spells-good-news-for-users-of-arbitration-funding/> (accessed 31 December 2019)

<sup>7</sup> Sundaresh Menon, “The special role and responsibility of arbitral institutions in charting the future of international arbitration” (2018) SIAC Congress <[https://www.supremecourt.gov.sg/Data/Editor/Documents/SIAC%20Congress%202018%20Keynote%20Address%20\(Checked%20against%20delivery%20with%20footnotes%20-%2020170518\).pdf](https://www.supremecourt.gov.sg/Data/Editor/Documents/SIAC%20Congress%202018%20Keynote%20Address%20(Checked%20against%20delivery%20with%20footnotes%20-%2020170518).pdf)> (accessed 31 December 2019)

<sup>8</sup> Emilia Onyema, “The Transformation of Arbitration in Africa: The Role of Arbitral Institutions” (2016) Kluwer Law International

<sup>9</sup> Agarwal, Anurag K, “Party Autonomy in International Commercial Arbitration” (2007) Indian Institute of Management Ahmedabad, available at <<https://ideas.repec.org/p/iim/iimawp/wp02027.html>> (accessed 31 December 2019)

<sup>10</sup> Gary B. Born, “International Commercial Arbitration” (2014) 2 Kluwer Law International at 1.05

<sup>11</sup> Mia Lousie Livingstone, “Party Autonomy in International Commercial Arbitration: Popular Fallacy or Proven Fact”

has led to the setting aside of some awards by local courts under Article V(1)(d) of the New York Convention.<sup>12</sup> Unsurprisingly, the propriety of institutional override in this area has been called into question.

6. In light of the foregoing, this article seeks to analyse whether institutional override in expedited proceedings has legal basis and practical utility. To do so, I will begin by looking at the present position of the various institutions around the world. Thereafter, I examine the conceptual basis of such override by looking both primary and secondary material from around the world. Finally, I intend to offer my tentative views on the matter – namely whether such intrusion into party autonomy can ever be warranted, and whether it is justifiable in the present situation.

7. For my research, I have chosen the top 10 leading arbitral institutions around the world based on both caseload,<sup>13</sup> and user preference.<sup>14</sup> These are:

- China International Economic and Trade Arbitration (CIETAC)
- International Centre for Dispute Resolution - American Arbitration Association (ICDR-AAA)
- International Chamber of Commerce (ICC)
- Singapore International Arbitration Centre (SIAC)
- London Court of International Arbitration (LCIA)
- Hong Kong International Arbitration Centre (HKIAC)
- German Arbitration Institute (DIS)
- Stockholm Chamber of Commerce (SCC)
- Swiss Chambers' Arbitration Institution (SCAI)
- Vienna International Arbitration Centre (VIAC)

8. It is worthwhile to note that in 2019 alone, these institutions combined handled a total of 6232 cases, which is the bulk of all international arbitration cases around the

(2008) 25 J. Int'l Arb. 529; Andreas Respondek, Carolin Nemeč, Assessorin and Mihaela Dumbrava, Assessorin, “Limits to Party Autonomy in International Commercial Arbitration” (2019) Law Gazette, available at <<https://lawgazette.com.sg/feature/limits-to-party-autonomy-in-international-commercial-arbitration/>> (accessed 31 December 2019)

<sup>12</sup> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) United Nations

<sup>13</sup> Dr. Markus Altenkirch and Malika Boussihmad, “International Arbitration Statistics 2018 – Another busy year for Arbitral Institutions” (2019) Baker McKenzie, available at <<https://globalarbitrationnews.com/international-arbitration-statistics-2018-another-busy-year-for-arbitral-institutions/>> (accessed 20 Sept 2019)

<sup>14</sup> Paul Friedland and Professor Stavros Brekoulakis, “2018 International Arbitration Survey: The Evolution of International Arbitration” (2018) White & Case LLP and Queen Mary University of London

world.<sup>15</sup> I intend to look at whether these institutions allow for the override of parties' agreement in the number of arbitrators appointed in expedited proceedings. Moreover, I also intend to look at the cases where such override was considered by the national courts.

9. Based on my research, I conclude that while there are flaws in the theoretical underpinnings of the legitimacy of institutional override, there are good policy reasons to allow such overreach in the case of the appointment of arbitrators in expedited proceedings.

## THE LEADING ARBITRAL INSTITUTIONS

### A. Institutions which Allow the Overriding of Parties' Agreement

10. Under the ICC Rules, the court may appoint a sole arbitrator even if the parties have agreed otherwise. Article II, Appendix VI of the ICC's 2017 Expedited Procedure Rules states that:

"The court may, notwithstanding any contrary provision of the arbitration agreement, appoint a sole arbitrator."<sup>16</sup>

11. This is further clarified by Article 30 of the ICC Rules.

"By agreeing to arbitration under the Rules, the parties agree that this Article 30 and the Expedited Procedure Rules set forth in Appendix VI (collectively the 'Expedited Procedure Provisions') shall take precedence over any contrary terms of the arbitration agreement."<sup>17</sup> (Emphasis mine)

12. Moreover, in a recent press statement, the ICC Court stated that under "the Expedited Procedure Rules, the ICC Court will normally appoint a sole arbitrator, *irrespective of any contrary term of the arbitration agreement*."<sup>18</sup> This was again confirmed in the 2019 Note to Parties:

"The Court may appoint a sole arbitrator *notwithstanding any contrary provision of the arbitration agreement*."<sup>19</sup> (Emphasis mine)

<sup>15</sup> Dr. Markus Altenkirch and Malika Boussihmad, "International Arbitration Statistics 2018 – Another busy year for Arbitral Institutions" (2019) Baker McKenzie, available at <<https://globalarbitrationnews.com/international-arbitration-statistics-2018-another-busy-year-for-arbitral-institutions/>> (accessed 20 Sept 2019)

<sup>16</sup> Arbitration Rules, International Chamber of Commerce (2017) Appendix VI, Article II

<sup>17</sup> Arbitration Rules, International Chamber of Commerce (2017) Article 30

<sup>18</sup> Denis Brock, "Expedited Procedure Under ICC, SIAC, and HKIAC Rules: Party Autonomy v. Institutional Control" (2017) available at <<https://www.omm.com/resources/alerts-and-publications/alerts/expedited-procedure-under-the-icc-siac-and-hkiac-rules/>> (accessed 20 October 2019)

13. Both the institutional rules and court practice show that the ICC has little qualms about overriding the express agreement of the parties.

14. Similarly SIAC Rule 5.2 states that under Expedited Proceedings, a sole arbitrator would be appointed unless the President determines otherwise.<sup>20</sup>

"... the arbitral proceedings shall be conducted in accordance with the Expedited Procedure, the following procedure shall apply:

...

b. the case shall be referred to a sole arbitrator, unless the President determines otherwise;"<sup>21</sup>

15. Rule 5.3 further clarifies that the institution's power to appoint a sole arbitrator applies notwithstanding any contrary agreement of the parties.

"By agreeing to arbitration under these Rules, the parties agree that, where arbitral proceedings are conducted in accordance with the Expedited Procedure under this Rule 5, the rules and procedures set forth in Rule 5.2 shall apply *even in cases where the arbitration agreement contains contrary terms*."<sup>22</sup> (Emphasis mine)

16. Therefore, should the president of the SIAC deem it appropriate, the court is able to override any agreement for three arbitrators, and instead appoint a sole arbitrator?

17. Under the American Arbitration Association's (AAA) 2016 Commercial Arbitration Rules and Mediation Procedures, an indifferent attitude has been adopted towards the agreement of the parties in relation to the number of arbitrators to be appointed. A sole arbitrator is appointed in the case of Expedited Proceedings, and there is no concession given to the parties' agreement.<sup>23</sup>

18. Likewise, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), under Article 17 of the 2017 Rules for Expedited Arbitrations has mandated that the "arbitration shall be decided by a sole Arbitrator."

<sup>19</sup> Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (2019) ICC, at 109

<sup>20</sup> John Choong, Mark Mangan & Nicholas Lingard, *A Guide to the SIAC Arbitration Rules* (2nd edn, Oxford University Press 2018) at 6.25

<sup>21</sup> Arbitration Rules of the Singapore International Arbitration Centre SIAC Rules (2016) 6 SIAC Rules, Rule 5.2

<sup>22</sup> Arbitration Rules of the Singapore International Arbitration Centre SIAC Rules (2016) 6 SIAC Rules, Rule 5.3

<sup>23</sup> Commercial Arbitration Rules and Mediation Procedures (2013) American Arbitration Association, Section E, available at <<https://www.adr.org/sites/default/files/Commercial%20Rules.pdf>> (accessed 20 October 2019)

However, it is unclear if this rule may be derogated from. In the case of SCC Expedited Arbitration O53/2005,<sup>24</sup> tribunal found that it was permissible for the parties to deviate from the Rules' requirement of a sole arbitrator.<sup>25</sup>

## B. Institutions which are Respectful of the Parties' Agreement

19. In contrast, the Hong Kong International Arbitration Centre (HKIAC) appears to be respectful of the parties' agreement. Article 41.2(b) of the HKIAC Rules reads:

"If the arbitration agreement provides for three arbitrators, HKIAC shall invite the parties to agree to refer the case to a sole arbitrator. If the parties do not agree, the case shall be referred to three arbitrators."<sup>26</sup> (Emphasis mine)

20. Similarly, a deferential attitude towards the parties' agreement has also been adopted by the China International Economic and Trade Arbitration (CIETAC) Arbitration Rules in the case of expedited proceedings (known as "Summary Procedure" under the CIETAC Rules). Article 58 states that:

"Unless otherwise agreed by the parties, a sole-arbitrator tribunal shall be formed in accordance with Article 28 of these Rules to hear a case under the Summary Procedure."<sup>27</sup> (Emphasis mine)

21. This is unsurprising, given the general view taken by China that the specific agreement of the parties should prevail over a set of institutional rules.<sup>28</sup>

22. The London Court of International Arbitration (LCIA) has also been careful in overriding any parties' agreement. Under LCIA Rule 5.8,

"a sole arbitrator shall be appointed *unless the parties have agreed in writing* otherwise or if the LCIA Court determines that in the circumstances a three-member tribunal is appropriate (or, exceptionally, more than three)."<sup>29</sup> (Emphasis mine)

23. A similar position has also been adopted by the Swiss Chambers' Arbitration Institution (SCAI). Article 42.2(b) of the 2012 Swiss Rules of International Arbitration states that in the case of an Expedited Proceeding, "the case shall be referred to a sole arbitrator, *unless the arbitration agreement provides* for more than one arbitrator"<sup>30</sup> (emphasis mine).

24. Also, Section 3 of the German Arbitration Institute (DIS) Supplementary Rules for Expedited Proceedings states that:

"the dispute shall be decided by a sole arbitrator, *unless the parties have agreed* prior to the filing of the statement of claim that the dispute shall be decided by three arbitrators."<sup>31</sup> (Emphasis mine)

25. Similarly, Article 45(5) of the Vienna International Arbitration Centre (VIAC) Rules of Arbitration and Mediation reads:

"Expedited proceedings shall be conducted by a sole arbitrator, *unless the parties have agreed* on a panel of arbitrators."<sup>32</sup>

## C. Our Analysis

26. Our analysis shows that out of the top 10 leading international arbitration institutions, at least 3 institutions have reserved the right to override the express agreement of the parties in the area of the number of arbitrators appointed in expedited proceedings.

<sup>24</sup> Carita C. H. Wallgren-Lindholm, Helle Lindegaard, Per Franke and Eric M. Runesson, "Final Award rendered in SCC Expedited Arbitration O53/2005", Stockholm International Arbitration Review, 2007, No. 1

<sup>25</sup> Yas Banifatemi, "Expedited Proceedings in International Arbitration" in "L. Lévy and M. Polkinghorne, "Expedited Procedure in International Arbitration" (2017) 9, ICC Publ. No. 793E

<sup>26</sup> Rules and Practice Notes: Institutional Arbitration, Hong Kong International Arbitration Centre, available at <<https://www.hkiac.org/arbitration/rules-practice-notes>> (accessed 27 November 2019)

<sup>27</sup> China International Economic and Trade Arbitration Commission CIETAC Arbitration Rules (2014) CIETAC, available at <<http://www.cietac.org/Uploads/201902/5c6148b100105.pdf>> (accessed 5 October 2019)

<sup>28</sup> Paul Teo, Shanghai Court Refuses Enforcement of SIAC Award Made under 2013 SIAC Expedited Procedure (2017) Baker McKenzie, available at <<https://www.bakermckenzie.com/en/insight/publication>

<[s/2017/09/shanghai-refuses-siac-award/](https://www.bakermckenzie.com/en/insight/publication/s/2017/09/shanghai-refuses-siac-award/)> (accessed 29 Sept 2019)

<sup>29</sup> LCIA Arbitration Rules (2014) London Court of International Arbitration, available at <[https://www.lcia.org/Dispute\\_Resolution\\_Services/lcia-arbitration-rules-2014.aspx](https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx)> (accessed 26 October 2019)

<sup>30</sup> Swiss Rules of International Arbitration (2012) Swiss Chambers Arbitration Institution available at <[https://www.swissarbitration.org/files/33/Swiss-Rules/SRIA\\_EN\\_2017.pdf](https://www.swissarbitration.org/files/33/Swiss-Rules/SRIA_EN_2017.pdf)> (accessed 29 September 2019)

<sup>31</sup> DIS Supplementary Rules for Expedited Proceedings (2008) Deutsche Institution für Schiedsgerichtsbarkeit e. V., available at <<http://www.arbiter.com.sg/pdf/rules/DIS%20Supplementary%20Rules%20for%20Expedited%20Proceedings%202008.pdf>> (accessed 20 September 2019)

<sup>32</sup> Vienna Rules of Arbitration and Mediation (2018) Vienna International Arbitration Centre, available at <[https://www.viac.eu/images/documents/vienna\\_rules/Wiener\\_Regeln\\_2018\\_Broschüre\\_en\\_Onlinefassung\\_Einzelseiten\\_20180109.pdf](https://www.viac.eu/images/documents/vienna_rules/Wiener_Regeln_2018_Broschüre_en_Onlinefassung_Einzelseiten_20180109.pdf)> (accessed 1 October 2019)



27. However, among these 3 institutions are some of the most important arbitral institutions in the world in terms of caseload, reputation and thought leadership – the ICC and SIAC.<sup>33</sup> According to the W&C Report, the ICC stands out as the most preferred institution by a significant margin (77%), followed by the LCIA (51%) and SIAC (36%).<sup>34</sup> It was also noted that “as far as the top two choices are concerned, the ICC and the LCIA have been the acknowledged market leaders for well over a decade, and the current numbers suggest that this is not going to change anytime soon.”<sup>35</sup>

## THE CASE OF AQZ V ARA

### A. The Decision

28. Institutional override in the appointment of arbitrators in expedited proceedings has since been considered in the case of *AQZ v ARA*.<sup>36</sup> This was a case in which SIAC Rule 5.2 was argued to be a violation of party autonomy. An application was made by the losing party of the arbitration for the setting aside of the award rendered by the sole arbitrator, on grounds that this was contrary to the parties’ express agreement for the appointment of three arbitrators to hear the dispute. The arbitration clause in question stated that:

“Should no agreement be reached, then the dispute shall be finally settled by arbitration upon the written request of either party hereto in accordance with the rules of conciliation and arbitration of the Singapore International Arbitration Centre (SIAC) by *three arbitrators* in English Language”<sup>37</sup> (emphasis mine).

29. The arbitration clause clearly stated that the dispute would be settled by a tribunal of three arbitrators. Notwithstanding this, the Singapore High Court held that a “purposive and commercially sensible construction” of

the arbitration agreement would incorporate SIAC Rule 5.2 into the arbitration agreement.<sup>38</sup> Otherwise, a sole arbitrator would never be able to be appointed, even if the quantum in dispute was small, and the case was not complex, cases which would warrant the application of Expedited Procedure rules.<sup>39</sup>

30. Notably, this appears to be inconsistent with an earlier Singapore High Court decision, *NCC International*,<sup>40</sup> in which the court held that where parties have expressly agreed on the number of arbitrators and also adopted a set of institutional rules, the better interpretation ought to be that parties have adopted the institutional rules subject to the number of arbitrators expressly agreed between the parties. The incorporation of the institutional rules into the parties’ agreement cannot override the express term of the arbitration clause.<sup>41</sup> Having considered this, the court in *AQZ v ARA* still decided that it would be consistent with party autonomy to override the parties’ express agreement. The application to set aside the award was consequently denied.

31. However, the same award was refused enforcement in China, where the Shanghai First Intermediate Court found the award to have been made in disregard of the parties’ express choice of three arbitrators as set out in the contractual arbitration clause.<sup>42</sup> The SIAC’s appointment of a sole arbitrator had contravened the parties’ agreement, and was therefore unenforceable under Article V(1)(d) of the New York Convention.<sup>43</sup> As one commentator notes, this decision reflects the “general view and approach taken in China that the specific agreement reached between the parties should prevail over any “standard” rules (so long as these are not mandatory legal rules), regardless of whether they are expressly incorporated or not.”<sup>44</sup>

<sup>33</sup> Dr. Markus Altenkirch and Malika Boussihmad, “International Arbitration Statistics 2018 – Another busy year for Arbitral Institutions” (2019) Baker McKenzie, available at <<https://globalarbitrationnews.com/international-arbitration-statistics-2018-another-busy-year-for-arbitral-institutions/>> (accessed 20 Sept 2019)

<sup>34</sup> Paul Friedland and Professor Stavros Brekoulakis, “2018 International Arbitration Survey: The Evolution of International Arbitration” (2018) White & Case LLP and Queen Mary University of London

<sup>35</sup> Paul Friedland and Professor Stavros Brekoulakis, “2018 International Arbitration Survey: The Evolution of International Arbitration” (2018) White & Case LLP and Queen Mary University of London

<sup>36</sup> *AQZ v ARA* [2015] SGHC 49

<sup>37</sup> *AQZ v ARA* [2015] SGHC 49

<sup>38</sup> John Choong, Mark Mangan & Nicholas Lingard, *A Guide to the SIAC Arbitration Rules* (2nd edn, Oxford University Press 2018) at 6.25

<sup>39</sup> *AQZ v ARA* [2015] SGHC 49

<sup>40</sup> *NCC International AB v Land Transport Authority of Singapore* [2008] SGHC 186

<sup>41</sup> *NCC International AB v Land Transport Authority of Singapore* [2008] SGHC 186 at [45]

<sup>42</sup> *Nobles Resources Pte. Ltd. v. Good Credit International Trade Co. Ltd.* [2016] Shanghai No.1 Intermediate People’s Court (Hu 01 Xie Wai Ren No. 1)

<sup>43</sup> Paul Teo, Shanghai Court Refuses Enforcement of SIAC Award Made under 2013 SIAC Expedited Procedure (2017) Baker McKenzie, available at <<https://www.bakermckenzie.com/en/insight/publications/2017/09/shanghai-refuses-siac-award/>> (accessed 29 Sept 2019)

<sup>44</sup> Paul Teo, Shanghai Court Refuses Enforcement of SIAC Award Made under 2013 SIAC Expedited Procedure (2017) Baker McKenzie, available at <<https://www.bakermckenzie.com/en/insight/publications/2017/09/shanghai-refuses-siac-award/>> (accessed 29 Sept 2019)

32. Indeed, it appears that the Singapore High Court in *AQZ v ARA* did not carefully consider the principle of *generalia specialibus non derogant* (the general does not detract from the specific),<sup>45</sup> save for its brief reference to the case of *NCC International*. In general, when two provisions are in conflict and one of them deals specifically with the matter in question while the other is of more general application, the specific provision should be applied.<sup>46</sup> Therefore, where the terms of the arbitration agreement and the institutional rules are in conflict, the better interpretation should be that the parties have adopted the institutional rules subject to their express agreement in the actual arbitration agreement.<sup>47</sup>

33. Admittedly, it is possible to argue that the parties' general agreement for three arbitrators is the general agreement, and the specific case of expedited proceedings is the exception. Therefore, applying the *generalia specialibus non derogant* rule, the parties' agreement for expedited proceedings should apply, and a sole arbitrator should be appointed. However, it must be recognised that the threshold for expedited procedure under Article 5.1 of the 2016 SIAC Rules is S\$6,000,000.<sup>48</sup> The quantum for the value of the claims and counterclaims is high, and many cases have already been heard under SIAC's expedited procedure rules.<sup>49</sup> For contracts valued below the threshold amount, it would be difficult to conceive that the parties had chosen the SIAC rules on the assumption that the standard rules would ordinarily apply. The assertion that the expedited procedure rules are an exception to the general rule in the case of SIAC arbitration is only equivocal at best.

34. Moreover, the principle of *lex deliberato* (lex deliberation) should apply – the negotiated terms generally prevail over incorporated terms. According to *Chitty on Contracts*, where clauses are incorporated by reference into a written agreement, and the incorporated clauses conflict with terms in the written agreement, the latter will ordinarily prevail.<sup>50</sup> Notably, this principle was

accepted by the Singapore High Court in a subsequent case.<sup>51</sup>

35. Notably, some commentators have maintained that the Shanghai Court's decision should be taken with caution because the arbitration was based on the SIAC 2013 Rules, which did not have an express provision giving primacy and precedence to the Rules over the parties' agreement.<sup>52</sup> Rule 5.3 of the SIAC 2013 Rules now provides that the appointment of a sole arbitrator in the case of Expedited Proceedings would "apply even in cases where the arbitration agreement contains contrary terms." They argue that this "is a fundamental and key issue, as the SIAC's 2016 Rules, which replaced the 2013 Rules, as well as the [expedited procedure] of ICC now include express provisions giving precedence to the Rules over the parties' agreement to the contrary."<sup>53</sup>

36. However, such a clause pre-supposes that the clause itself takes precedence over the parties' agreement in the first place. The principles of *generalia specialibus non derogant* and *lex deliberato* still remain unanswered. In any event, it is unclear how a provision giving precedence to a set of institutional rules within the rules itself can override the parties' agreement simply because it declares so.

37. In this regard, I note that it is difficult to see how the parties may agree to a set of external rules which would undermine or override the very agreement which gave rise to the application of the rules in the first place. Even in situations where the parties had made an absurd express agreement in the contract, it cannot be that the SIAC Rules will necessarily override. For example, if the parties agreed to appoint a sole arbitrator named "John Alex Smith", and it is found that there is indeed such a child who is 5 years old, this would open the argument that it cannot reasonably be the intention of the commercial parties to appoint a 5 year old child. Using the interpretive tools of the law of the arbitral agreement, it is possible, depending on the exact wording of the clause, for the clause to be read in a manner in which it can be saved.<sup>54</sup> It may be possible

<sup>45</sup> *Generalia Specialibus Non Derogant* Definition, Duhaime's Law Dictionary, available at <<http://www.duhaime.org/LegalDictionary/G/GeneraliaSpecialibusNonDerogant.aspx>> (accessed 31 December 2019)

<sup>46</sup> *SGS v Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction at 65, available at <<https://cil.nus.edu.sg/wp-content/uploads/2015/10/Day4-11-Case-21.pdf>> (accessed 31 December 2019)

<sup>47</sup> Ruth Sullivan, "Sullivan on the Construction of Statutes" (2014) 6 LexisNexis

<sup>48</sup> Arbitration Rules of the Singapore International Arbitration Centre (2016) 6 ed, SIAC

<sup>49</sup> Dr. Markus Altenkirch and Malika Boussihmad, "International Arbitration Statistics 2018 – Another busy year for Arbitral Institutions" (2019) Baker McKenzie, available at <[https://globalarbitrationnews.com/international-](https://globalarbitrationnews.com/international-arbitration-statistics-2018-another-busy-year-for-arbitral-institutions/)

[arbitration-statistics-2018-another-busy-year-for-arbitral-institutions/>](https://globalarbitrationnews.com/international-arbitration-statistics-2018-another-busy-year-for-arbitral-institutions/) (accessed 20 Sept 2019)

<sup>50</sup> *Chitty on Contracts* (2012) 31 Sweet & Maxwell 1 at [13-082]

<sup>51</sup> *BNP v BNR* [2017] SGHC 269 at [4]

<sup>52</sup> Mohamed S. Abdel Wahab, "Expedited Institutional Arbitral Proceedings Between Autonomy and Regulation: Procedural Efficiency and Enforcement Challenges" in "L. Lévy and M. Polkinghorne, "Expedited Procedure in International Arbitration" (2017) 9, ICC Publ. No. 793E at 143

<sup>53</sup> Mohamed S. Abdel Wahab, "Expedited Institutional Arbitral Proceedings Between Autonomy and Regulation: Procedural Efficiency and Enforcement Challenges" in "L. Lévy and M. Polkinghorne, "Expedited Procedure in International Arbitration" (2017) 9, ICC Publ. No. 793E

<sup>54</sup> Gary Born, "The law governing international arbitration agreements: an international perspective" (2014) 26 SAclJ 814,

to read the clause to refer to a famous arbitrator and member of the SIAC Court of Arbitration named “John Alexander Smith” (fictional). However, even in such situations, it is not that the SIAC Rules have overridden the parties’ specific agreement, but rather, that the parties’ agreement can be read in a manner which is consistent with the SIAC Rules through the application of the law of the arbitral agreement.

38. Where the law of the arbitral agreement does not allow for such an interpretation, the clause should be treated as a pathological clause or a clause which is incapable of being performed under Article II of the New York Convention.<sup>55</sup> The SIAC cannot be forced to administer an arbitration which derogates from the mandatory rules of the institution and is able to decline a request to administer the arbitration because the published SIAC Rules constitute an offer.<sup>56</sup> Where the parties do not wish to undertake this offer, they can either reject the offer, or propose a counter-offer, to which the institution is able to reject. According to Michael Pryles, President of the Australian Centre for International Commercial Arbitration,

“if the parties provided for arbitration in accordance with the ICC Rules of Arbitration (ICC Rules) but provide that article 27 of the ICC Rules (which deals with scrutiny of awards by the ICC Court) will not apply, it is probable that the ICC Court would not accept the case as an ICC case. Court scrutiny of awards is an important feature of ICC arbitrations and the administering body is unlikely to agree to waive it.”<sup>57</sup>

39. In the case where the parties expressly agreed to have 3 arbitrators within the arbitration clause in the contract, it would be difficult to see how it can be read to mean a sole arbitrator. Moreover, it is difficult to argue that the parties did not in fact intend for there to be 3 arbitrators, and instead only wished for a sole arbitrator. The latter option was only part of the institutional rules which were merely referenced to by the parties. Arguments relating to the true intentions of the parties would not be helpful; proper

application of interpretive tools based on the true intentions of the parties is unlikely to reasonably achieve the result reached by the Singapore High Court.

40. Indeed, as one commentator has rightly pointed out, commercial parties generally expect their express agreement in the arbitration clause to govern and trump the institutional rules because they normally do not consider in detail the potential interplay between the institutional rules and their express agreement.<sup>58</sup> There are many potential areas of interplay between the express agreement and institutional rules that are often only recognised by the parties when they arise during a dispute.

41. Notably, in a recent report released by White & Case and Queen Mary University of London (“W&C Report”), it appears to be that the users of international arbitration seem to enjoy the flexibility of international commercial arbitration.<sup>59</sup> 40% of respondents chose “flexibility” as one of the top three most valuable characteristics of international arbitration. It is one of the “the top five characteristics [which] have come to be regarded as the true central pillars of the entire arbitral system and that they are likely to continue to be seen as its most significant strengths in the future as well.” Overriding a principle so fundamental to the system should be done with great caution. As Gary Born notes, “parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract.”<sup>60</sup>

## B. Party Autonomy

42. In relation to party autonomy, two divergent theories have been put forward to explain or criticise such institutional override. On one hand, there are those who view the issue solely from the perspective of party autonomy and view it as so fundamental to the arbitral process that it cannot be derogated from. On the other hand, there are those who argue that party autonomy is

available at <https://journalonline.academyPublishing.org.sg/Journals/Singapore-Academy-of-Law-Journal-Special-Issue/e-Archive/ctl/eFirstSALPDFJournalView/mid/513/ArticleId/343/Citation/JournalsOnlinePDF> (accessed 31 December 2019)

<sup>55</sup> Jae Hee Suh, “Interpretation of pathological clauses: a cautionary tale?” (2019) Thomson Reuters, available at <<http://arbitrationblog.practicallaw.com/interpretation-of-pathological-clauses-a-cautionary-tale/>> (accessed 31 December 2019)

<sup>56</sup> Andrea Carlevaris, “Limits to Party Autonomy and Institutional Rules” in Franco Ferrari, “Limits To Party Autonomy In International Commercial Arbitration” (2016) JurisNet LLC

<sup>57</sup> Michael Pryles, “Limits to Party Autonomy in Arbitral Procedure” (2007) Journal of International Arbitration, Kluwer Law International 327-329

<sup>58</sup> Kah Cheong Lye, “Institutional Overreach? Institutional Arbitral

Rules versus Parties’ Express Agreement” (2013) Kluwer Arbitration Blog, available at <<http://arbitrationblog.kluwerarbitration.com/2013/01/17/institutional-overreach-institutional-arbitral-rules-versus-parties-express-agreement/>> (accessed 10 October 2019)

<sup>59</sup> Paul Friedland and Professor Stavros Brekoulakis, “2018 International Arbitration Survey: The Evolution of International Arbitration” (2018) White & Case LLP and Queen Mary University of London

<sup>60</sup> Gary B. Born, “International Commercial Arbitration” (2014) 2 Kluwer Law International at 16.03[B]

only one of the considerations which have to be taken into account.

43. Yas Banifatemi, Vice-President of the ICC Court of Arbitration, addresses the issue by looking solely at party autonomy, concluding that where overriding provisions are used to defeat the express agreement of the parties, it may be said that by agreeing to the institutional arbitration rules, the parties have agreed to these overriding provisions.<sup>61</sup> It is therefore consistent with party autonomy for the expedited procedure provision to override the agreement of the parties for three arbitrators.<sup>62</sup> To this end, she cites the decision of the Singapore High Court,<sup>63</sup> as well as the Final Award rendered in SCC Expedited Arbitration O53/2005.<sup>64</sup>

44. In contrast, Kah Cheong Lye looks towards party autonomy to show that the use of overriding provisions by institutions could lead to serious consequences.<sup>65</sup> The author argues that "the parties' express agreement concerning tribunal composition is so integral to their agreement to arbitrate, such that the agreement to arbitrate would not subsist at all if that express choice were replaced by alternatives set out in the institutional rules." To this end, he cites the case of *Jivraj v Hashwani* to illustrate the fundamental importance of the parties' express agreement regarding the composition of the arbitral tribunal.<sup>66</sup> The English Court of Appeal found an agreement to arbitrate before an arbitrator of the Ismaili faith to be unworkable because such discrimination was illegal under English law, and there was no way to give effect to the parties' agreement. The entire agreement to arbitrate itself is "premised on what the parties' have expressly agreed concerning composition of the tribunal being given effect."<sup>67</sup>

<sup>61</sup> Yas Banifatemi, "Expedited Proceedings in International Arbitration" in "L. Lévy and M. Polkinghorne, "Expedited Procedure in International Arbitration" (2017) 9, ICC Publ. No. 793E

<sup>62</sup> Yas Banifatemi, "Expedited Proceedings in International Arbitration" in "L. Lévy and M. Polkinghorne, "Expedited Procedure in International Arbitration" (2017) 9, ICC Publ. No. 793E

<sup>63</sup> *AQZ v ARA* [2015] SGHC 49

<sup>64</sup> Carita C. H. Wallgren-Lindholm, Helle Lindegaard, Per Franke and Eric M. Runesson, "Final Award rendered in SCC Expedited Arbitration O53/2005" (2007) 1 Stockholm International Arbitration Review

<sup>65</sup> Kah Cheong Lye, "Institutional Overreach? Institutional Arbitral Rules versus Parties' Express Agreement" (2013) Kluwer Arbitration Blog, available at <<http://arbitrationblog.kluwerarbitration.com/2013/01/17/institutional-overreach-institutional-arbitral-rules-versus-parties-express-agreement/>> (accessed 9 November 2019)

45. Indeed, commentators have noted that the agreement of the parties on the composition of the arbitral tribunal is fundamental to the arbitration process.<sup>68</sup>

"International arbitration is solidly based on a premise of party autonomy, and one of the most salient manifestations of that autonomy arises in the composition of the arbitral tribunal. At stake is the liberty of parties to choose their own judge or judges. Party autonomy in determining the structure of an arbitral tribunal and in selecting arbitrators serves multiple purposes. It enables parties to ensure that those who will judge their dispute have qualifications that the parties deem proper and will conduct the proceedings with the requisite fairness and efficiency. In addition, party-nomination enhances the parties' trust in the arbitration as a dispute resolution mechanism, if only because they have participated in the panel's composition as well as the arbitration ground rules."<sup>69</sup>

46. In this regard, institutional override may lead to the refusal of recognition and enforcement of the final award under Article V(1)(d) of the New York Convention – the arbitral tribunal was constituted in a manner which was not in accordance with the agreement of the parties.<sup>70</sup> Moreover, it may also lead to the setting aside of award, especially in Model Law jurisdictions.<sup>71</sup>

47. Following this argument, it may perhaps be argued that the Singapore High Court in refusing to set aside the award on grounds of violation of Article V(1)(d) of the New York Convention adopted an overly zealous application of the New York Convention's pro-enforcement bias. However, it is indeed permitted to do so due to the permissive language of Article V(1)(d) which states that the "[r]ecognition and enforcement of the award *may* be

<sup>66</sup> *Jivraj v Hashwani* [2010] EWCA Civ 712

<sup>67</sup> Kah Cheong Lye, "Institutional Overreach? Institutional Arbitral Rules versus Parties' Express Agreement" (2013) Kluwer Arbitration Blog, available at <<http://arbitrationblog.kluwerarbitration.com/2013/01/17/institutional-overreach-institutional-arbitral-rules-versus-parties-express-agreement/>> (accessed 9 November 2019)

<sup>68</sup> Lew, Mistelis & Kröll, "The Party Appointed Arbitrator in International Arbitrations – Role and Selection" (1999) 15 ARB. INT'L 381, 381-382

<sup>69</sup> George A. Bermann, "Limits to Party Autonomy in the Composition of the Arbitral Panel" in Franco Ferrari, "Limits to Party Autonomy in International Commercial Arbitration" (2016) *Juris Legal* 83 at 83

<sup>70</sup> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) United Nations

<sup>71</sup> UNCITRAL Model Law on International Commercial Arbitration (2006) United Nations Commission on International Trade Law, Article 34(2)(a)(iv)



refused".<sup>72</sup> Under the New York Convention, the national courts have the discretion to enforce the award even if Article V(1)(d) was satisfied. This discretion has been used by many national courts around the world.

48. In the German case of *Oberlandesgericht*, a sole arbitrator was appointed, instead of two or more arbitrators, as agreed for by the parties.<sup>73</sup> The Munich Court of Appeal enforced the award notwithstanding that the composition of the arbitral tribunal was not in accordance with the agreement of the parties, noting that the respondent did not object to the composition of the tribunal during the course of the arbitration.<sup>74</sup>

49. In similar fashion, the Hong Kong Supreme Court also enforced an award even though the arbitration was conducted under the wrong institution, with arbitrators selected from the wrong list of arbitrators.<sup>75</sup> Although the arbitration agreement had provided for arbitration under CIETAC Beijing, and not CIETAC Shenzhen, and both institutions had a different list of arbitrators for parties to choose from, the Hong Kong Court held that the parties had basically obtained what they had agreed to – arbitration conducted by three arbitrators under CIETAC Rules.<sup>76</sup> The court exercised its discretion to enforce the award notwithstanding that the tribunal may not, strictly speaking, have been constituted in accordance with the agreement of the parties:

"[i]t is clear... that the only grounds upon which enforcement can be refused are those specified in [Article V] and that the burden of proving a ground is

upon the Defendant. Further, it is clear that *even though a ground has been proved, the court retains a residual discretion*".<sup>77</sup>

50. Notably, the Italian courts have refused the enforcement of an arbitration award which had an arbitration clause providing for a tribunal of three arbitrators sitting in London, but only two arbitrators were appointed in accordance with English law.<sup>78</sup> The two arbitrators proceeded on the basis that English law and historical practice in some English business sectors used two arbitrators and an "umpire" to resolve disputes, with the umpire only being selected if the two co-arbitrators are unable to agree.<sup>79</sup> The court held that the tribunal was constituted in a manner which was contrary to the intentions of the parties,<sup>80</sup> because the parties' had explicitly agreed to arbitration with three arbitrators.<sup>81</sup>

51. However, a different result was reached in an Italian appellate decision under Article V(1)(d), where the parties' agreement provided for arbitration to be "referred to three persons in London, one to be appointed by each party, and the third by the two thus appointed."<sup>82</sup> After the respondent failed to appoint a co-arbitrator, the claimant invoked its rights under English arbitration legislation to designate its nominated co-arbitrator as the sole arbitrator. This was successfully enforced in Italy, notwithstanding its tension with the parties' agreement to arbitrate before

<sup>72</sup> Gary B. Born, "International Commercial Arbitration" (2014) 2 Kluwer Law International at 16.01[A]

<sup>73</sup> "Germany: Oberlandesgericht, Munich, 15 March 2006 (Manufacturer v. Supplier, in liquidation) Yearbook Commercial Arbitration XXXIV (2009) pp. 499-503 (Germany no. 117)" in "ICCA's Guide to the interpretation of the 1958 New York Convention" (2011) International Council for Commercial Arbitration

<sup>74</sup> "Request for the Recognition and Enforcement of an Arbitral Award" in "ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges" (2011) ICCA & Kluwer Law International 68-111, at 96

<sup>75</sup> *China Nanhai Oil Joint Service Corporation Shenzhen Branch v. Gee Tai Holdings Co. Ltd.*, High Court, Supreme Court of Hong Kong, Hong Kong, 13 July 1994, 1992 No. MP 2411

<sup>76</sup> CLOUT Case 76, Case Law on UNCITRAL Texts (CLOUT), United Nations Commission on International Trade Law, 14 October 1994, A/CN.9/SER.C/ABSTRACTS/5, available at <[https://www.uncitral.org/clout/clout/data/hkg/clout\\_case\\_76\\_leg-1177.html](https://www.uncitral.org/clout/clout/data/hkg/clout_case_76_leg-1177.html)> (accessed 12 November 2019)

<sup>77</sup> Emmanuel Gaillard & Benjamin Siino, "Enforcement under the New York Convention", Global Arbitration Review, available at <[https://globalarbitrationreview.com/chapter/1178556/enforcement-under-the-new-%E2%80%89york-](https://globalarbitrationreview.com/chapter/1178556/enforcement-under-the-new-%E2%80%89york-convention#footnote-019-backlink)

<<https://globalarbitrationreview.com/chapter/1178556/enforcement-under-the-new-%E2%80%89york-convention#footnote-019-backlink>> (accessed 12 November 2019)

<sup>78</sup> Italy: Corte di Appello, Florence, 13 April 1978 (*Rederi Aktiebolaget Sally v. srl Termarea*) Yearbook Commercial Arbitration IV (1979) pp. 294-296 (Italy no. 32) in "ICCA's Guide to the interpretation of the 1958 New York Convention" (2011) International Council for Commercial Arbitration

<sup>79</sup> "Chapter 12: Selection, Challenge and Replacement of Arbitrators in International Arbitration", in Gary B. Born, "International Commercial Arbitration" (2014) 2 Kluwer Law International 1636-1961, at 1648

<sup>80</sup> Philippe Fouchard, Berthold Goldman, "Fouchard, Gaillard, Goldman on International Commercial Arbitration" (1999) Kluwer Law International at 475

<sup>81</sup> Stephen Leonard, "Recognition and enforcement of foreign arbitral awards under the New York Convention of 1958: Is there uniformity of interpretation or is there need for reform" (2013) University of Bergen, available at <<http://bora.uib.no/bitstream/handle/1956/7743/115998657.pdf?sequence=1&isAllowed=y>> (accessed 12 November 2019)

<sup>82</sup> "Italy No. 16 / E2, S.A. Pando Compania Naviera v. S.a.S. Filmio, Corte di Appello di Venezia, Not Indicated, 21 May 1976", in Pieter Sanders, "Yearbook Commercial Arbitration 1978 - Volume III, Yearbook Commercial Arbitration" (1978) 3 ICCA & Kluwer Law International 277

three arbitrators.<sup>83</sup> It is therefore clear that the Italian courts recognise that they do have some discretion.

52. Next, the United States Second Circuit court refused the enforcement of an award because the chairman was appointed upon the application of one of the arbitrators, rather than jointly by the two party-appointed arbitrators as agreed upon in the arbitration agreement.<sup>84</sup> The court held that “the Tribunal's premature appointment of [the chairman] irremediably spoiled the arbitration process” because the existing “federal policy is simply to ensure the enforceability, *according to their terms*, of private agreements to arbitrate.”<sup>85</sup> However, the court was careful to preserve its discretion by noting that the review of arbitral awards under the New York Convention is “very limited . . . in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation.”<sup>86</sup>

### C. Other considerations

53. In contrast, Mohamed S. Abdel Wahab argues that the principle of party autonomy, though respected, is not absolute. Party autonomy is only one of the considerations which have to be taken into account:

“While it is undeniable that arbitration derives its very existence from freedom of choice and autonomy, it is equally incontrovertible that: (i) tribunals do not exist or exercise their powers in a vacuum and (ii) tribunals do have reasonable inherent, implied and/or discretionary powers to safeguard the integrity and the efficient conduct of the proceedings... a reasonable degree of prudent regulation is needed to achieve efficiency and justice, without sacrificing due process and productive autonomy.”<sup>87</sup>

54. Wahab adopts a broader view and looks beyond party autonomy, placing it among the other considerations

which also have to be taken into account. In doing so, he relies upon the report of the International Law Association (ILA) to establish that party autonomy must end where the need for a “reasonable degree of prudent regulation” begins.<sup>88</sup> In support of this, Wahab offers four reasons why the institutional rules should override the express agreement of the parties in relation to the number of arbitrators appointed in expedited proceedings.

55. Firstly, Wahab asserts that institutions offer their rules to users, and these rules are accepted by the parties through their adoption of the rules in the arbitration clause. Accordingly, parties cannot unilaterally vary the rules without the acceptance of the institution. At best, such variation only amounts to a counter-offer which can only be given effect to if endorsed by the institution. However, this argument overlooks the fact that when the institution rejects the counter-offer, the initial offer proposed by the institution has not yet been accepted by the parties. The proposal of the counter-offer by the parties is not an acceptance of the initial offer proposed by the institution. The institution cannot impose its rules on the parties when the parties have not accepted it – it can only decline to administer the arbitration. In such a situation, the proper view should be that the parties had only accepted the institutional rules as amended by the arbitration clause.

56. Secondly, it is claimed that by agreeing to a set of institutional rules, the parties would have agreed to any provision within the rules giving primacy to the institutional rules. They have “by their very own choice, elevated certain procedural rules to the level of contractual mandatory rules that may not be varied by the parties’ own choice.” However, the author has explained neither the legal basis of a “contractual mandatory rule” nor the theoretical underpinning for the elevation of certain rules

<sup>83</sup> “Chapter 12: Selection, Challenge and Replacement of Arbitrators in International Arbitration”, in Gary B. Born, “International Commercial Arbitration” (2014) 2 Kluwer Law International 1636-1961, at 1649

<sup>84</sup> United States: United States Court of Appeals, Second Circuit, 31 March 2005 (Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.) Yearbook Commercial Arbitration XXX (2005) pp. 1136-1143 (US no. 520) in “ICCA’s Guide to the interpretation of the 1958 New York Convention” (2011) International Council for Commercial Arbitration

<sup>85</sup> Donald Francis Donovan, “Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc., United States Court of Appeals for the Second Circuit, 04-0288- cv, 31 March 2005” (2005) Kluwer Law International; “US No. 796, Changzhou Amec Eastern Tools and Equipment Co., Ltd v. Eastern Tools & Equipment, Inc. et al. and Xuchu Dai, as the Bankruptcy Administrator for Changzhou AMEC Eastern Tools and Equipment Co., Ltd. v. Eastern Tools & Equipment, Inc., United States District Court, Central District of California, 30 July 2012 and United States Court of Appeals, Ninth Circuit, 29 April 2014”, in Albert Jan van den Berg, “Yearbook

Commercial Arbitration 2014 - Volume XXXIX, Yearbook Commercial Arbitration, Volume 39” (2014) Kluwer Law International 534-539

<sup>86</sup> United States: United States Court of Appeals, Second Circuit, 31 March 2005 (Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.) Yearbook Commercial Arbitration XXX (2005) pp. 1136-1143 (US no. 520) in “ICCA’s Guide to the interpretation of the 1958 New York Convention” (2011) International Council for Commercial Arbitration

<sup>87</sup> Mohamed S. Abdel Wahab, “Expedited Institutional Arbitral Proceedings Between Autonomy and Regulation: Procedural Efficiency and Enforcement Challenges” in “L. Lévy and M. Polkinghorne, “Expedited Procedure in International Arbitration” (2017) 9, ICC Publ. No. 793E

<sup>88</sup> ILA Report on Inherent and Implied Powers of International Arbitral Tribunals (2014) International Law Association, and the ILA Resolution No.4/2016 on the Inherent and Implied Powers of International Arbitral Tribunals (2016) International Law Association

above others. As will be explained in the following sections, the conceptual basis for the elevation of certain rules is doubtful.

57. Thirdly, the learned author argues that allowing the variation of institutional rules would mean that “institutional rules would not uniformly apply and could be distorted to the extent of losing their defining characteristics, which is obviously inconsistent with good governance.” However, it is unclear why there is a need for institutions to have their own “defining characteristics”. This would be inconsistent with the numerous efforts taken by the international community to harmonize international arbitration, such as the adoption of the UNCITRAL Model Law,<sup>89</sup> the IBA Rules on Taking of Evidence,<sup>90</sup> and the New York Convention.<sup>91</sup>

58. Fourthly, Wahab suggests that the inability to vary the institutional rules is what distinguishes institutional from *ad hoc* arbitration. This is because in institutional arbitration, the contractual bond between the parties and the institution “militates against unilateral variations by either party insofar as they contravene the core institutional rules, disturb the agreed procedural ecumene and distort the defining characteristics of the agreed institutional rules.” While it is true that the institution is able to reject a request to administer an arbitration which derogates from the mandatory rules of the institution, or perhaps the “core” institutional rules, it is unclear why each institution must be allowed to retain their own distinct character.

59. Nonetheless, there is considerable merit in the recognition that in the system of international arbitration, party autonomy is not the only consideration which must be given due regard. The integrity of the arbitral process is equally governed by other principles such as the opportunity to present one’s case, and equality of arms.<sup>92</sup> Such considerations have been considered so important that party autonomy may have to give way in order for the system of international arbitration to retain its legitimacy. For example, two parties may not agree to arbitrate before

a tribunal which has been unilaterally appointed by one of the parties.<sup>93</sup> Such an agreement would “exclude one of the parties from any voice in the selection of arbitrators and ... conflicts with our fundamental notions of fairness, and tends to defeat arbitration’s ostensible goals of expeditious and equitable dispute resolution.”<sup>94</sup>

## A WARRANTED PUSH FOR PROGRESS?

### A. The Policy Considerations

60. One consideration which motivates institutions to override party autonomy to appoint a sole arbitrator is the need for promoting greater efficiency in the arbitral process.<sup>95</sup> Whether efficiency is so integral to the legitimacy of international arbitration that it warrants a limitation of party autonomy is however doubtful. Unlike equality of arms, it does not rise to the level of a fundamental notion or principle.<sup>96</sup> Rather, it presents itself in a somewhat meek, unforceful manner.

61. Nonetheless, it must be recognised that the need for efficiency is particularly pronounced in expedited proceedings, where lengthy and costly arbitration proceedings could easily become disproportionate to the actual quantum in dispute. Due to the smaller quantum in dispute, there would be a larger incentive to keep the arbitrator fees low due to the higher cost-to-award ratio. As a matter of rational choice, the higher the value of claim, the more likely parties would want to have a three-member tribunal over a sole arbitrator, due to the perception that a three-member tribunal would be less likely to arrive at an incorrect outcome.<sup>97</sup> The greater the monetary stakes, the more likely parties will be willing to tolerate, or to create themselves, complex and costly procedures.<sup>98</sup> Conversely, in a claim for a small quantum, parties would be less willing to foot the bill for three arbitrators.

“One criticism of international arbitration is that it sometimes fails to live up to its potential for the expeditious resolution of disputes... On one hand, parties seek speedy, cost-efficient, and final dispute resolution; while on the other, the absence of an appeal

<sup>89</sup> UNCITRAL Model Law on International Commercial Arbitration (2006) United Nations Commission on International Trade Law

<sup>90</sup> IBA Rules on the Taking of Evidence in International Arbitration (2010) International Bar Association

<sup>91</sup> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) United Nations

<sup>92</sup> George A. Bermann, “Limits to Party Autonomy in the Composition of the Arbitral Panel” in Franco Ferrari, “Limits to Party Autonomy in International Commercial Arbitration” (2016) *Juris Legal* 83 at 89

<sup>93</sup> Gary B. Born, “International Commercial Arbitration” (2014) 2 *Kluwer Law International* at 12.01, page 1819

<sup>94</sup> *Ditto v. RE/MAX Preferred Properties, Inc.*, 1993 OK CIV APP 151, 861 P.2d 1000, 1004

<sup>95</sup> Michelle Grando, “Challenges to the Legitimacy of International Arbitration: A Report from the 29th Annual ITA Workshop” (2017) *Kluwer Arbitration Blog* <<http://arbitrationblog.kluwerarbitration.com/2017/09/19/challenges-legitimacy-international-arbitration-report-29th-annual-ita-workshop/>> (accessed 30 December 2019)

<sup>96</sup> George A. Bermann, “Limits to Party Autonomy in the Composition of the Arbitral Panel” in Franco Ferrari, “Limits to Party Autonomy in International Commercial Arbitration” (2016) *Juris Legal* 83 at 89

<sup>97</sup> Alec Stone Sweet & Florian Grisel, “The Evolution of International Arbitration: Judicialization, Governance, Legitimacy” (2017) Oxford University Press at 27

<sup>98</sup> Alec Stone Sweet & Florian Grisel, “The Evolution of International Arbitration: Judicialization, Governance, Legitimacy” (2017) Oxford University Press at 27

mechanism for arbitral awards generates a perceived need for exhaustive analysis of every fact and conceivable argument and for the retention of the 'best' (and therefore the busiest) lawyers and arbitrators, creating an attendant risk of ever-longer and more expensive arbitration proceedings. That tension is most obvious in cases of exceptional urgency, and in those with relatively small amounts at stake, where procedures used in international arbitration may be neither desirable nor efficient."<sup>99</sup>

62. Furthermore, under arbitral institutions where the fees for expedited proceedings are fixed at a lower rate, it may simply be impossible to complete the arbitration with three arbitrators. As José Ricardo Feris, Deputy Secretary General of the ICC Court of Arbitration notes,

"The arbitrator's fees in these scales are 20% lower than in ordinary proceedings in view of the simplified nature of the procedure. These scales may therefore not be suitable if the parties intend to depart substantially from the procedure established in the Expedited Procedure Provisions."<sup>100</sup>

63. Secondly, it would be more efficient to have fewer arbitrators. Cases which qualify for expedited procedure generally have a smaller quantum in dispute, and are typically less complex. There is a greater incentive to opt for procedures which make the arbitration logistically easier to conduct, and more efficient to hold.

64. While it is true that certain tasks such as the drafting of awards may be delegated amongst the members of the tribunal, the need for deliberation and for the arbitrators to jointly come to a decision would be removed if a sole arbitrator was appointed.<sup>101</sup> There would also be no need to worry about conflicts in schedule amongst the members of the tribunal when fixing deadlines and hearings.<sup>102</sup> This would help to speed up the arbitration process, without compromising the parties' opportunity to present their case.

<sup>99</sup> John Choong, Mark Mangan & Nicholas Lingard, *A Guide to the SIAC Arbitration Rules* (2nd edn, Oxford University Press 2018) at 6.01

<sup>100</sup> José Ricardo Feris, "The 2017 ICC Rules of Arbitration and the New ICC Expedited Procedure Provisions: A View from Inside the Institution" (2017) ICC Digital Library, available at <[https://library.iccwbo.org/content/dr/ARTICLES/ART\\_0658.htm?l1=Articles&l2=2017&AUTH=29d9a5c3-7d2f-4376-816b-3bd735d09cc1&Timeframe=fb&l1=Articles&l2=2017&AUTH=29d9a5c3-7d2f-4376-816b-3bd735d09cc1&Timeframe=fb](https://library.iccwbo.org/content/dr/ARTICLES/ART_0658.htm?l1=Articles&l2=2017&AUTH=29d9a5c3-7d2f-4376-816b-3bd735d09cc1&Timeframe=fb&l1=Articles&l2=2017&AUTH=29d9a5c3-7d2f-4376-816b-3bd735d09cc1&Timeframe=fb)> (accessed 31 October 2019)

<sup>101</sup> Ben Giaretta and Akshay Kishore, "One arbitrator or three?" (2015) Ashurst, available at <<https://www.ashurst.com/en/news-and-insights/legal-updates/one-arbitrator-or-three/>> (accessed 27 September 2019)

65. In the case of arbitration under the SIAC Rules, where Rule 5.2.d. states that "the final Award shall be made within six months from the date when the Tribunal is constituted", the appointment of three arbitrators may result in the arbitration clause being unworkable. Within 6 months, the tribunal typically has to allow time for the parties' written submission and replies, hold hearings, draft the award and also leave time for the institution to scrutinise the award. Requiring the tribunal to additionally deliberate and jointly draft an award may result in the tribunal being unable to fulfil its duties on time. While it is possible for the Registrar to extend the time limit "in exceptional circumstances", this is rarely invoked as a matter of practice, save for situations where the arbitrator has passed away.<sup>103</sup>

66. Furthermore, recent reports have shown that the users of international arbitration find it slow and costly.<sup>104</sup> In the W&C Report, 67% of Respondents indicated that cost is one of the worst characteristics of international arbitration.<sup>105</sup> Therefore, as a matter of commercial sense, it may be wise to override the parties' agreement for three arbitrators in cases of expedited proceedings to save time and costs. This seemed to weigh heavily in the mind of the honourable Judith Prakash J (as she then was) in *AQZ v ARA*:

"A commercially sensible approach to interpreting the parties' arbitration agreement would be to recognise that the SIAC President does have the discretion to appoint a sole arbitrator. Otherwise, regardless of the complexity of the dispute or the quantum involved, a sole arbitrator can never be appointed to hear the dispute notwithstanding the incorporation of the SIAC Rules 2010 which provide for the tribunal to be constituted by a sole arbitrator when the Expedited Procedure is invoked. *That would be an odd outcome.*"<sup>106</sup> (Emphasis mine)

67. Similar considerations motivated the ICC to mandate that certain "essential features" of the Expedited Procedure

<sup>102</sup> Ben Giaretta and Akshay Kishore, "One arbitrator or three?" (2015) Ashurst, available at <<https://www.ashurst.com/en/news-and-insights/legal-updates/one-arbitrator-or-three/>> (accessed 27 September 2019)

<sup>103</sup> Delphine Ho, Registrar of the SIAC (Live interview)

<sup>104</sup> "Arbitration becomes more like litigation" (2011) Law Times, available at <<https://www.lawtimesnews.com/news/focus-on/arbitration-becomes-more-like-litigation/260410>> (accessed 3 October 2019)

<sup>105</sup> Paul Friedland and Professor Stavros Brekoulakis, "2018 International Arbitration Survey: The Evolution of International Arbitration" (2018) White & Case LLP and Queen Mary University of London

<sup>106</sup> *AQZ v ARA* [2015] SGHC 49 at [132]



rules were mandatory and could not be departed from through contrary terms in the arbitration agreement, such as the Court's ability to appoint a sole arbitrator.

"Circumstances have changed over the years. Arbitrations relating to claims below US\$ 2 million represent around 33% of the ICC Court's caseload. Hence, there was clear interest in ICC administering lower-value cases. There is also a demand from users for institutions to adapt their rules to allow such cases to be conducted in the most cost-efficient manner."<sup>107</sup>

68. In developing the rules, the court was mindful that there was a need to "develop a cost-efficient mechanism for settling low-value claims" to ensure that "time and costs are proportionate to what is at stake in the dispute."<sup>108</sup> As one commentator notes,

"More recently, the tide has tilted heavily in favour of expressly recognizing this power under the rules of various institutions due to the increasing dissatisfaction of parties with the length and costs of institutional arbitration, particularly in the context of straightforward and low-value claims."<sup>109</sup>

## B. The Need for Institutional Leadership

69. On the other hand, institutional leadership is integral to the progress and reform of international commercial arbitration.<sup>110</sup> According to the W&C Report, "a clear majority of respondents (80%) indicated that "arbitral

institutions" are best placed to make an impact on the future evolution of international arbitration".<sup>111</sup>

70. Institutions are best placed to institute reforms because they are capable of quickly introducing new and innovative procedures to improve the overall system of international arbitration. Through the amendment of rules, updating of practice guidelines, and revision of practices, institutions are able to quickly effect change. The introduction of expedited procedure proceedings into international arbitration itself is one such example. The newly amended ICC Rules on expedited proceedings came into effect on 1 March 2017.<sup>112</sup> In 2018 alone, the institution heard 96 applications for expedited procedure.<sup>113</sup> Similarly, expedited procedure was first adopted by SIAC in July 2010, and by 31 December 2014, the institution had already received a total of 159 applications, of which 107 requests were granted.<sup>114</sup>

71. It is thus unsurprising that institutions such as SIAC view themselves as having the mandate and responsibility to "be at the forefront of change and thought leadership".<sup>115</sup> Similarly, the ICC, having been an Observer to the United Nations General Assembly since 2017, regards itself as having a "role as the voice of business".<sup>116</sup> As one leading author notes, tribunals do not merely hold in mind the interests of the disputing parties in the present case, but are also fiduciaries or agents of the arbitral system and the

<sup>107</sup> José Ricardo Feris, "The 2017 ICC Rules of Arbitration and the New ICC Expedited Procedure Provisions: A View from Inside the Institution" (2017) ICC Digital Library, available at <[https://library.iccwbo.org/content/dr/ARTICLES/ART\\_0658.htm?l1=Articles&l2=2017&AUTH=29d9a5c3-7d2f-4376-816b-3bd735d09cc1&Timeframe=fb&l1=Articles&l2=2017&AUTH=29d9a5c3-7d2f-4376-816b-3bd735d09cc1&Timeframe=fb](https://library.iccwbo.org/content/dr/ARTICLES/ART_0658.htm?l1=Articles&l2=2017&AUTH=29d9a5c3-7d2f-4376-816b-3bd735d09cc1&Timeframe=fb&l1=Articles&l2=2017&AUTH=29d9a5c3-7d2f-4376-816b-3bd735d09cc1&Timeframe=fb)> (accessed 31 October 2019)

<sup>108</sup> José Ricardo Feris, "The 2017 ICC Rules of Arbitration and the New ICC Expedited Procedure Provisions: A View from Inside the Institution" (2017) ICC Digital Library, available at <[https://library.iccwbo.org/content/dr/ARTICLES/ART\\_0658.htm?l1=Articles&l2=2017&AUTH=29d9a5c3-7d2f-4376-816b-3bd735d09cc1&Timeframe=fb&l1=Articles&l2=2017&AUTH=29d9a5c3-7d2f-4376-816b-3bd735d09cc1&Timeframe=fb](https://library.iccwbo.org/content/dr/ARTICLES/ART_0658.htm?l1=Articles&l2=2017&AUTH=29d9a5c3-7d2f-4376-816b-3bd735d09cc1&Timeframe=fb&l1=Articles&l2=2017&AUTH=29d9a5c3-7d2f-4376-816b-3bd735d09cc1&Timeframe=fb)> (accessed 31 October 2019)

<sup>109</sup> Kartikey M. & Rishabh Raheja, "Recognition of Summary Procedures under the ICC Rules: Considerations, Comparisons and Concerns" (2017) Kluwer Arbitration Blog, available at <<http://arbitrationblog.kluwerarbitration.com/2017/12/04/looked-iccs-new-rules-summary-dismissal-kartikey-mahajan/>> (accessed 11 November 2019)

<sup>110</sup> Michelle Grando, "Challenges to the Legitimacy of International Arbitration: A Report from the 29th Annual ITA Workshop" (2017) Kluwer Arbitration Blog <<http://arbitrationblog.kluwerarbitration.com/2017/09/19>

<[challenges-legitimacy-international-arbitration-report-29th-annual-ita-workshop/](https://challenges-legitimacy-international-arbitration-report-29th-annual-ita-workshop/)> (accessed 30 December 2019)

<sup>111</sup> Paul Friedland and Professor Stavros Brekoulakis, "2018 International Arbitration Survey: The Evolution of International Arbitration" (2018) White & Case LLP and Queen Mary University of London

<sup>112</sup> ICC News, "First arbitral tribunals constituted under ICC expedited procedures" (2017) ICC, available at <<https://iccwbo.org/media-wall/news-speeches/first-arbitral-tribunals-constituted-icc-expedited-procedures/>> (accessed 9 November 2019)

<sup>113</sup> Dr. Markus Altenkirch and Malika Boussihmad, "International Arbitration Statistics 2018 – Another busy year for Arbitral Institutions" (2019) Baker McKenzie, available at <<https://globalarbitrationnews.com/international-arbitration-statistics-2018-another-busy-year-for-arbitral-institutions/>> (accessed 20 Sept 2019)

<sup>114</sup> SIAC Resources, "The Emergency Arbitrator and Expedited Procedure in SIAC: A New Direction for Arbitration in Asia", SIAC, available at <<http://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/420-the-emergency-arbitrator-and-expedited-procedure-in-siac-a-new-direction-for-arbitration-in-asia>> (accessed 10 November 2019)

<sup>115</sup> Kevin Nash, Deputy Registrar of the SIAC (Live interview)

<sup>116</sup> 2017 ICC Dispute Resolution Statistics (2018) ICC Dispute Resolution Bulletin 2

transnational community they serve.<sup>117</sup> Similarly, it can also be said that arbitral institutions have a duty to take into account wider public interests beyond the interests of the cases' disputants. Such leadership is not only beneficial, but also necessary for the continued legitimacy of international arbitration.

"Arbitral institutions have revised their rules and practices to increase the efficiency and fairness of the arbitral process... All this activity shows the vibrancy of international arbitration. As long as the arbitral community does not become deaf to relevant criticisms, international arbitration will not become irrelevant. It will continue to be a legitimate – and the most effective – way of resolving international disputes."<sup>118</sup>

72. At this point, it should be qualified that institutions do not have free reign to implement change. They are only permitted to innovate insofar as such innovation does not violate the New York Convention. Otherwise, the arbitral award rendered would run the risk of being set aside, or refused recognition and enforcement.

73. However, the narrow grounds under Article V of the New York Convention, as well as the general pro-enforcement bias of the convention have made the non-enforcement of an award difficult. Many states, in a bid to be seen as "arbitration friendly", have been slow to set aside awards or refuse enforcement by exercising their discretion to enforce.<sup>119</sup> The result is that many institutions, especially those which strive to be at the forefront of international arbitration, have begun to push the limits of the New York Convention in a bid to remain at the leading edge of thought leadership.

74. But this is not necessarily bad. Within certain acceptable limits, the pro-enforcement bias of the New York Convention may confer upon institutions the much-needed latitude to implement reforms to the system of international arbitration, thereby incrementally improving the system. In determining where these limits should lie, regard should be given to striking the appropriate balance between party autonomy and offering institutions space for reform. Due to the strong policy considerations faced by the institutions in the case of expedited proceedings, derogation from party autonomy by overriding the parties' agreement for three arbitrators is warranted.

## CONCLUSION

75. While the theoretical underpinnings for the institutional override in expedited proceedings are precarious, the result is a system of international arbitration which is more efficient and cost-effective. Against a backdrop of a system which has been increasingly criticised for being slow and expensive, it is difficult to argue that such override is, in practical terms, more harmful than beneficial.

76. Of course, the question remains whether the same can be said of other situations of institutional override, such as for reasons of the promotion of diversity of appointments, for contribution to arbitral precedent in the case of publication of awards, or perhaps for preventing the use of outdated methods such as an umpire system.<sup>120</sup> In these areas, when (if ever) should the practical needs of international arbitration triumph over the parties' agreement?

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### How to Cite this Article

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<sup>117</sup> Alec Stone Sweet & Florian Grisel, "The Evolution of International Arbitration: Judicialization, Governance, Legitimacy" (2017) Oxford University Press at 28

<sup>118</sup> Michelle Grando, "Challenges to the Legitimacy of International Arbitration: A Report from the 29th Annual ITA Workshop" (2017) Kluwer Arbitration Blog <<http://arbitrationblog.kluwerarbitration.com/2017/09/19>

/challenges-legitimacy-international-arbitration-report-29th-annual-ita-workshop/> (accessed 30 December 2019)

<sup>119</sup> See for example Nigeria: Dorothy Ufot, "The Influence of the New York Convention on the Development of International Arbitration in Nigeria" (2008) 25 *Kluwer Law International* 6 at 821-836

<sup>120</sup> see *BNP v BNR* [2017] SGHC 269