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Chapter 2: Institutional Arbitration as a Growing Phenomenon: Quantitative Growth, "Institutionalization" and "Judicialization"

Understanding what arbitral institutions do, the nature of their role, and the impact they may have on the arbitration process, raises questions that are pertinent in themselves. But the “intrinsic” relevance of the topic of this book is accentuated by two “extrinsic” factors, namely: (1) the increasing use of institutional arbitration for the resolution of international commercial disputes (quantitative growth of institutional arbitration); and (2) the alleged increased institutionalization of arbitration (qualitative growth of institutional arbitration).

§2.01 INCREASING USE OF INSTITUTIONAL ARBITRATION: THE QUANTITATIVE GROWTH

There are few phenomena in arbitration that are the object of greater consensus than the quantitative growth of institutional arbitration. It is true that a number of indicators lend support to the idea that institutional arbitration is expanding. There is the increase, first, in the volume of cases administered by institutions and, second, in the number of institutions being created.

[A] Increase in the Volume of Cases Referred to Institutions

While most arbitral institutions are not often prolix when it comes to statistical information relating to their caseload [(114)], a review of the statistics available
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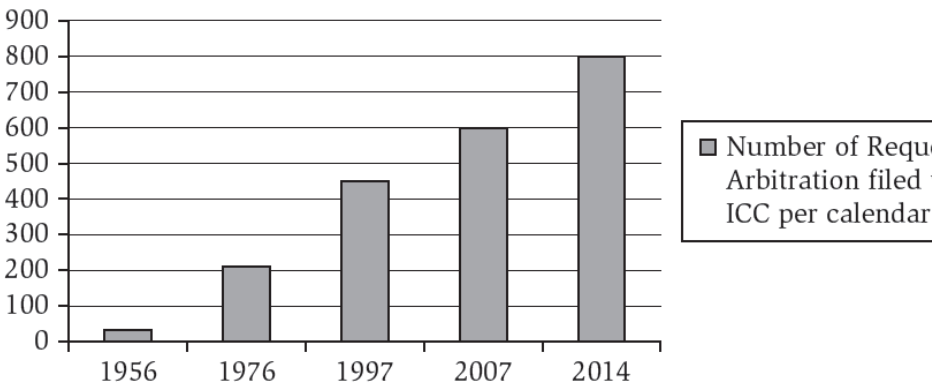
demonstrates that the number of cases referred to institutional arbitration has grown tremendously in the past sixty years.

It is difficult to comment on the development of arbitration prior to that because of the scarcity of statistical information available. If figures for the period before 1960 for the ICC are in the public domain, they are not as readily available for the other institutions that were already in existence at the time [(115)].

Gary Born, reflecting on the “*steadily increasing case-loads at leading arbitral institutions*” explains that “*the number of reported cases* [increased] *between three and five-fold in the past 25 years* [i.e. up to 2009]” [(116)]. In support of his position, Born refers to the number of Requests for Arbitration [(117)] filed with the ICC. Born notes that the number of new Requests increased from 32 in 1956, to 210 in 1976, increasing further to 452 in 1997, and to 599 in 2007 [(118)]. In 2014, the total number of new referrals was 801.

Figure 2.1 Evolution of the Caseload of the ICC (1956-2014)



In fact the number was even higher in 2009 [(119)] but figures for the period 2008 to 2010 should be taken with a measure of caution as the global financial crisis, which started in October 2008, appears momentarily to have caused a somewhat “artificial” increase in the volume of cases. Many institutions indeed recorded a significant increase in the number of cases filed in the period immediately following the crisis, and then recorded a drop in the two years that followed. The figures of a number of institutions for 2007
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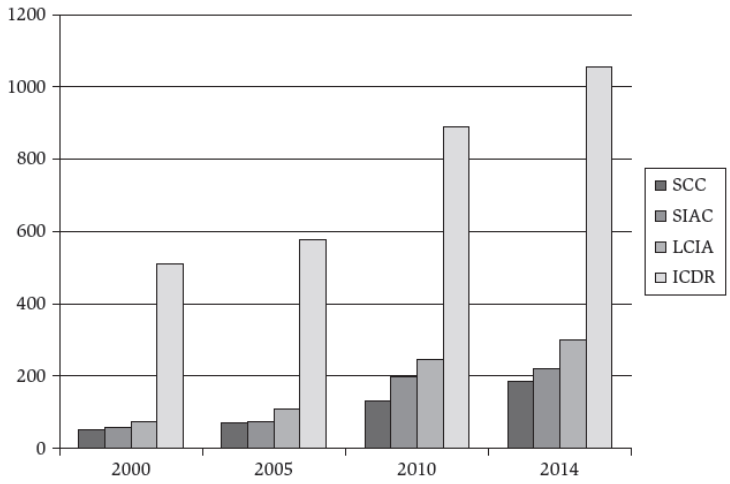
(i.e., to say pre-crisis), 2009 (at the height of the crisis) and 2011 (post crisis) show an increase and then a contraction of the number of cases for a number of institutions [(120)].

Statistical data from other institutions confirms that the number of cases referred to institutional arbitration has continued to grow in recent years [(121)].

Figure 2.2 Evolution of the Caseload of Other Major Institutions (2000-2014)



Three observations may be made in relation to the growth of the caseload of arbitral institutions.

First, the growth of institutional referrals is anything but a recent phenomenon. Figure 2.1 above (ICC caseload 1956-2012) demonstrates that the growth was observable as early as the middle of the twentieth century. Some authors were already observing this phenomenon over twenty years ago in respect of the ICC [(122)] .

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Second, it appears that this growth has been a fairly continuous process. Figures 2.1 and 2.2 above suggest that it was not marked by any sustained periods of plateau. As observed by Tila Maria de Hancock:

> [f]*rom its beginning,* [in 1923]*, the ICC Court grew steadily until World War II interrupted its work. After 1945 its growth and expansion resumed, and during the past decade the case-load of the ICC Court has dramatically increased.* […] *The growth trend continues upward and the amounts in dispute have grown enormously* [(123)] .

Third, the growth has accelerated in recent years. Michel Gaudet observed in the late 1980s that:

> […] *of the 6,130 Requests filed with the ICC in its 65 years existence, as many were registered during the last 11 years (1 January 1977 – 31 December 1987) as in the 54 years before that* (Translation by the author) [(124)] .

As Figures 2.1 and 2.2 above demonstrate, this acceleration has continued after the late 1980s [(125)] . The pace at which institutional referrals have increased has led some commentators to talk of "*exponential growth*" [(126)] . This exponential growth seems to concern not only institutions that deal mostly in commercial arbitration cases, but also the ICSID which administers investment arbitrations. It should be noted that, as far as ICSID is concerned, there are specific legal reasons for the dramatic increase in case referrals including *inter alia* the advent of "arbitration without privity" [(127)] .

The increase in the number of cases referred to institutions does not, of itself, prove an increase in the proportion of cases being referred to institutional rather than ad hoc arbitration.

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Whether or not the proportion has indeed increased is difficult to establish because, by definition, information on ad hoc arbitration remains scarce [(128)] . But if actual data is scarce, general statements by practitioners pointing to an increase of the proportion of institutional arbitration vis-à-vis ad hoc arbitration are legion [(129)] . More generally the private nature of arbitration also explains why data on arbitration, both ad hoc and institutional, remains limited [(130)] . Be that as it may, the increase in the volume of cases suggests that institutional arbitration is more prevalent today than it has ever been and it therefore underlines the importance of this form of arbitration. This stresses, in turn, the importance of better understanding the role that institutions play in the arbitral process.

[B] Increase in the Number of Institutions

The growing importance of institutional arbitration is also reflected in the increase in the number of arbitral institutions. The multiplication, in recent years, of arbitral institutions is well documented [(131)] . As early as the 1960s, Professor Goldman commented that:
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> […] *the increasing number of new national and international organisations offering a permanent framework for arbitral proceedings is a phenomenon that is well known and has often been analysed* (Translation by the author) [(132)] .

Some authors have argued that, similarly to the increase in the caseload of existing institutions, the proliferation of new institutions has accelerated in recent times. For Guy Pendell:

> […] *the growth of the number of institutions has been exponential. Before 1940 only ten percent of the institutions around today existed. Seventy percent of the institutions have been created in the last thirty years; fifty percent in the last twenty and twenty percent in the last ten years* [(133)] .

The number of arbitral institutions in existence has become almost countless. In China alone there are over 180 institutions entitled to administer both domestic and foreign-related arbitrations [(134)] . In Latvia alone, a much smaller country than China, there are over 200 institutions [(135)] . These newly established centres have not all attained the same level of success. Many new centres have, in fact, very limited caseloads and, as previously indicated, those that deal mostly in disputes involving foreign parties are rare [(136)] .

If the rate of creation of new institutions seems to have accelerated, it would be naïve to conclude that institutional arbitration is a new phenomenon. According to Carabiber, if generalist arbitral institutions might have become more frequent in recent times, trade and professional institutions have been around for a long time. For present purposes, it suffices to mention the Chamber of Commerce of New York (founded in 1768), the Chicago Board of Trade, the Milwaukee Grain exchange, the American Seed Trade Association, the Liverpool Cotton Exchange, the London Stock Exchange, the London Corn Association, the Coffee Trade Association, the Baltic Mercantile and Shipping Association, the British Insurance Association, the British Motor Trade Association, all of which were founded in the nineteenth century. Carabiber also mentions, in France, the arbitral chambers organized under the auspices of chambers of commerce in such cities as Marseille, Bordeaux, Strasbourg or Lyon. According to
P 35
him such institutions were, "*before World War II already resolving tens of thousands of disputes*" (Translation by the author) [(137)] .

[C] The Rationale behind the Growth: The Perceived Benefits of Institutional Arbitration

The growth of institutional arbitration may be tentatively explained by the combination of: (1) the general increase in the use of arbitration as a dispute resolution mechanism [(138)] , and (2) the benefits of institutional arbitration over ad hoc proceedings which should mean, naturally, that a proportion of the increase of arbitrations in general will benefit institutional arbitration.

It is difficult to discuss the advantages of institutional arbitration without giving a "laundry list" of the services offered by institutions. After all, on one view, institutional arbitration consists of outsourcing to an institution certain responsibilities that would otherwise fall onto the parties or the tribunal; responsibilities which, it is expected, the institution is better placed to provide. Rather than give an overview of the services offered to institutions [(139)] these sections below highlight why some of these services make institutional arbitration more attractive than its ad hoc counterpart.

[1] Logistical Support

A key benefit of institutional arbitration resides in the logistical support offered by arbitration centres [(140)] . This includes, for example, making arrangements for any hearing. In this respect institutions may, for instance, rent out or otherwise book hearing rooms; offer or book the services of court reporters and interpreters; make catering arrangements for the duration of the hearing; provide video-conferencing or other telecommunications facilities; and make arrangements regarding the accommodation of the tribunal. As pointed out by Redfern and Hunter: "[i]*f an arbitration is not*
P 36
administered in this way, the work of administration will have to be undertaken by the arbitral tribunal itself—or by a registrar or tribunal secretary appointed by the tribunal for that purpose" [(141)] . The tribunal may not be well equipped or accustomed to dealing with these issues. In addition, it may be more cost effective to leave these matters with an institution. Whether the fees of the relevant institution are based on an hourly rate [(142)] or are *ad valorem* [(143)] , these arrangements are likely to be less expensive if made by an institution than by the parties' outside counsel, who can be expected to charge for their time at a comparatively high rate. When making such arrangements, the institution may also benefit from preferential rates that are more advantageous than those available to the parties or their counsel [(144)] .

[2] Pre-established Arbitration Rules

Another benefit resides in the set of arbitration rules offered by the institutions [(145)] . In ad hoc arbitration it falls on the parties, in the first place, to agree on the procedure to be followed in their arbitration. The parties might have done so by providing some details of the procedure in their arbitration agreement (be it an arbitration clause or a submission agreement), but if this is not the case, then the parties will need to agree on procedure once the arbitration has started. Naturally, in some cases the respondents might not participate in the proceedings at all or be obstructive, refusing to agree even on the most basic points. As explained by Redfern and Hunter:

> *The principal disadvantage of ad hoc arbitration is that it depends for its full effectiveness on cooperation between the parties and their lawyers, backed up by an adequate legal system in the place of arbitration. It is not difficult to delay arbitral proceedings—for instance, by refusing to appoint an arbitrator, so that at the very outset of the proceedings there will be no arbitral tribunal in existence, and no book of rules available to deal with the situation* [(146)] .

Even where the respondent collaborates, the parties may face some genuine disagreements which will need to be resolved. If the tribunal is already in place, this means by way of a decision of the

arbitral tribunal on application of a party. Prior to the constitution of the tribunal, it means, in ad hoc arbitration, seeking a decision from the
P 37
domestic courts [(147)] . Having to resort to the arbitral tribunal or the domestic courts to decide every procedural disagreement is, obviously, time consuming and costly. The rules of arbitral institutions, insofar, as they cover basic procedural questions, offer a procedural "safety net" which helps save time and money.

As pointed out by professor Hans Smit, theoretically, at least: "[…] *virtually all of the advantages to be gained from institutional arbitration rules can be gained by making appropriate contractual provisions at the time of making the arbitration agreement*" [(148)] . It is however rare for an ad hoc arbitration agreement to provide as much detail as the rules of procedure offered by institutions. This is probably because doing so would often be both unpractical and disproportionately cumbersome and costly. But even for detailed ad hoc arbitration agreements, their wording may contain ambiguities, or worse, inconsistencies, unlikely to be found in institutional rules. This is so because institutional rules, at least for the older institutions, have been tried and tested over a long period of time. The ICC rules for instance was first enacted in the 1920s, and then amended over the past ninety years. Each revision sought to bring more clarity to the rules on the basis of the experience of the institution acquired in the management of thousands real life cases. For Redfern and Hunter:

> *Rules laid down by the established arbitral institutions (for instance, those of the ICC, the ICDR, ICSID, and the LCIA) will generally have proved to work well in practice; and they will have undergone periodic revision in consultation with experienced practitioners, to take account of new developments in the law and practice of international arbitration* [(149)] .

[3] Authority in the Implementation of the Rules

Equally important is the authority that the institutions reserve to themselves in the application of their arbitration rules [(150)] , which may prove invaluable in case of deadlocks in the phase preceding the constitution of the tribunal. For Michel Gaudet:

> [i]*nstitutional arbitration, especially when the mission of the centre goes as far as that of the ICC, permits to limit the intervention of domestic courts. Whereas, in case of deadlocks in an ad hoc arbitration, a party has no other recourse than going to the domestic courts, thereby adding a multi-layered public procedure to the existing*
> *P 38*
> *arbitration, the supervision of the proceedings by an experienced arbitral institution may, in the parties' view, save time, legal costs and avoid the publicity that would otherwise be occasioned by additional judicial proceedings* (Translation by the author) [(151)] .

[4] Treatment of Costs

Another key advantage [(152)] of institutional arbitration concerns the role played by institutions in respect of fixing the arbitration costs [(153)] . This gives a measure of predictability to the parties, avoids any potentially awkward misunderstandings between the parties and the arbitrators [(154)] , and reduces the risk of mistakes in respect of the calculation of these costs [(155)] . An incidental benefit for the arbitrators, is that, contrary to ad hoc arbitration, they are not required to handle the parties' deposits. This means that they do not have to concern themselves with such issues as the opening of different bank accounts or ledgers for each of their arbitrations, or liaising with the parties with respect to the payment of the advances on cost. In the words of Lew, Mistelis & Kröll, this permits them to "*maintain a certain level of material detachment*" [(156)] .

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[5] Enhanced Enforceability of the Award

There is, in some quarters, a perception that the use of a reputable institution may enhance the likelihood of enforcement of the award, should the losing party not comply with its terms voluntarily. For Lew, Mistelis & Kröll for instance:

> *A strongly perceived advantage of institutional arbitration is the cachet behind the name of the institution. Accordingly, especially in countries where there is political interference or where the courts and law are not always arbitration-friendly, parties consider it beneficial when seeking to enforce an award which was issued by, or which carries the name of, an internationally page respected institution* [(157)] .

The rationale may be that, because arbitral institutions monitor the proceedings they administer (and in some instances scrutinize draft awards before they are issued [(158)]), there is a chance that most procedural defects will have been caught and corrected in time to avoid any difficulties with the enforcement of the award. It is also sometimes argued that the general reputation and standing of certain institutions will, of itself, positively influence the judges that will be called upon to look at the enforcement of the award. According to Aaron, "*the involvement of an institution may afford greater acceptability of the award and facilitate its ultimate enforcement*" [(159)] . For Gary Born: "[…] *an arbitral institution lends its standing to any award that is rendered, which may enhance the*

likelihood of voluntary compliance and judicial enforcement" [(160)] . The author of this book however is not aware of any empirical study supporting the above assumptions.

[6] Lower Costs

It is often stated that the use of an institution may increase the overall costs of arbitration [(161)] . The rationale is that the parties to an institutional arbitration are required to pay the administrative fees of the institution – an expense which does not exist in ad hoc arbitration. There are, however, a number of convincing arguments that institutional arbitration often result of costs savings. A first one is that the procedural rules and the authority of the arbitral institution in implementation of these rules will permit to avoid unnecessary recourse to the domestic courts or the arbitral tribunal in cases of deadlocks, and therefore reduce the cost of legal representation [(162)] . A second
P 40
argument is that the tasks normally performed by the institution (e.g., logistical support) will, in ad hoc arbitration, have to be handled by the parties' outside counsel or by the arbitrators themselves at a higher cost than that charged by the institutions. In this respect it is interesting to note that the administrative fees charged by institutions are often dwarfed by the legal fees of the parties' outside counsel. In a survey of cases that reached a final award in 2003 and 2004 the ICC found that the parties' legal and other costs constituted 82% of the total costs or the arbitration; the tribunal's fees and expenses represented 16%; and the ICC's administrative charges represented a mere 2% [(163)] . A further argument (which admittedly applies only in the circumstances where the fees of the tribunal are based on an hourly rate), is that certain arbitrators charge higher hourly rates in ad hoc arbitrations than in institutional arbitrations because certain institutions place a (relatively low) cap on hourly rates. This is the case of the LCIA, which Schedule of Arbitration Costs currently provides a maximum hourly rate of GBP 450 per hour [(164)] . Along the same lines, it has been argued that institutions are, to a certain extent, able to limit the number of hours charged by arbitrators in circumstances where they appear excessive [(165)] . In fact, the perception that institutions are well placed to exercise such a control was one of the reasons considered by Working Group for the revision of the UNCITRAL rules for extending the role of appointing authorities in respect of costs "[…] *as a precaution to guard against the rare situations where an arbitrator might seek excessive fees*" [(166)] .

Much depends on how cooperative the parties turn out to be once the proceedings are commenced. When a respondent accepts to participate in good faith in the proceedings (which is more likely to be the case where it has a significant counterclaim) the risk of deadlocks is limited and the need to rely on the provisions of a set of institutional rules, or to have recourse to an institution for its decisions, is lower. When a respondent is uncooperative, the situation is different. As a result whether ad hoc or institutional arbitration would have been better for a particular case can only be known with the benefit of hindsight, and that's why, overall, experienced practitioners tend to be of the view that institutional arbitration is safer option than ad hoc arbitration at the drafting stage [(167)] .

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[7] Confidentiality

It is sometimes perceived that the use of an arbitral institution may negatively affect the confidentiality of the proceedings [(168)] . The rationale is that institutional arbitration requires the involvement in the proceedings, in addition to the parties and the tribunal, of a "third party" – the institution. Referring a matter to institutional arbitration will mean that the supervisory organs of the chosen institution (e.g., the ICC Court, the LCIA Court, the HKIAC Council, the SCC Board etc.) will necessarily have to become privy to certain basic information relating to the dispute. Less experienced users of the system may have concerns because these supervisory organs tend to comprise private practitioners whose law firms (or their clients) might have some interest in such confidential information. In circumstances, therefore, where the dispute requires an enhanced level of confidentiality, parties might arguably be better off referring a dispute to ad hoc arbitration. However, more often than not, confidentiality will be seen as an advantage of institutional arbitration [(169)] .

The main reason is that ad hoc arbitration (if private) is not necessarily confidential [(170)] . Much depends on the legal framework applicable to the proceedings. If the parties have not agreed on confidentiality in their arbitration agreement, and if confidentiality is not otherwise required by the law of the seat, it is dubious that the parties and/or the arbitrators will be bound by any duty of confidentiality. While English courts will imply an obligation of confidentiality in any arbitration agreement [(171)] , the same is not true for instance under French law, where the default position for "international" arbitration is that the proceedings are not confidential (unless otherwise agreed by the parties) [(172)] . The arbitration rules of many institutions, do contain some provisions on confidentiality. This is the case of the rules of HKIAC, the LCIA and the ICC rules to mention only
P 42
a few [(173)] . While these provisions vary greatly form one institution to the next they offer a basic level of protection which may very well otherwise be absent in purely ad hoc arbitration proceedings [(174)] .

To conclude, there seems to be a marked preference, amongst practitioners and users, for institutional arbitration compared to ad hoc arbitration. For Born: "[…] *most experienced international practitioners fairly decisively prefer the more structured, predictable character of institutional arbitration, and the benefits of institutional rules and appointment mechanisms, at least in the absence of unusual circumstances arguing for an ad hoc approach*" [(175)] . This preference for institutional arbitration is confirmed by strong empirical evidence. Several successive surveys conducted by Queen Mary, University of London in 2006, 2008 and 2013 show that corporations prefer using institutional arbitration [(176)] . However, while institutional arbitration has the preference of a majority of practitioners and users, it should be noted that its popularity nonetheless varies from region to region and from industry to industry [(177)] . It appears that "legal culture" (being region-specific or industry-specific) plays a role in this respect. For example, cultural

traditions in Mainland China favour institutional arbitration over ad hoc processes. This preference, which may have been inherited from the Soviet model of trade chambers arbitration [(178)], is reflected in the statutory prohibition of ad hoc arbitration for China-seated arbitrations [(179)]. In the shipping
P 43
industry, it is often said that the preference of users is for ad hoc arbitration [(180)]. On this topic, a past President of the LMAA writes:

> […] *the fact that London maritime arbitrations are not administered may be one of the reasons why London is found to be attractive. Certainly, the IMAO, an organisation set up some years ago between the ICC and the CMI to provide an international court of maritime arbitration, has been a singular failure. It is plain that shipping parties do not want administered arbitration* [(181)].

[D] Popularity of Institutional Arbitration versus Legitimacy of Arbitral Institutions

If institutional arbitration enjoys a degree of popularity, it would be naïve to assume that this popularity necessarily extends to arbitral institutions. The statement that institutional arbitration is generally preferred to ad hoc arbitration does not entail that arbitral institutions are perceived as legitimate. In fact, there appears to be, in some quarters, a "mistrust" of arbitral institutions. A number of authors have commented on this phenomenon, but few have expressed this more eloquently than Paulsson [(182)]:

> *It is difficult to establish, nurture, and maintain permanent organizations able to supervise the arbitral process in a manner perceived to be legitimate.* […]
>
> *Only a few arbitral institutions can make credible claims to legitimacy. The naïve boasting of a constant stream of new entrants fools no one acquainted with the field. It is easy for resourceful persons to come up with a lustrous governing board comprised of apparently eminent individuals happy to lend their names to what might be a useful venture (and will cost them little if it fails).*
>
> […]
>
> *My observations of the world of arbitration lead me to believe that many if not most arbitral institutions are empty edifices waiting for someone to bother to dismantle them. Others cannot get away from features of cronyism, which were their raison d'être in the first place. We would hardly entrust the preparation of a penal code to Ali Baba and the 40 thieves* [(183)].

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A number of reasons may be advanced to explain this sentiment. According to Professor Fouchard, it may be because arbitral institutions are perceived as weakening the personal relationship (*intuitus personae*) existing between the arbitrator and the parties, while, at the same time, "*failing to offer the guarantees associated with a public and professional justice system*" [(184)]. According to Professor Fouchard, this alleged mistrust is reflected by the adoption, in 1980, of the then new Article 1451 of the French code of civil procedure, which prevented arbitral institutions from "deciding disputes" themselves (i.e., requiring arbitrators to be individuals rather than legal entities) [(185)].

Another reason may lie in the perception prevailing within the Western ADR tradition (as opposed to the tradition of former socialist countries), that arbitration is a mechanism which was painstakingly carved out of the jurisdiction of State courts by its users because they were dissatisfied with the overly bureaucratic nature of State litigation. Under this "libertarian" perspective, anything that resembles an attempt to provide more permanence to arbitration is looked at with apprehension.

As a result, it is conventionally assumed that the users of arbitration themselves (i.e., the parties) prefer less interventionist institutions (i.e., to say, institutions which role in the institutional arbitration process remains more limited). When the BCICAC was set up in Western Canada, a conscious choice was made to limit the role of the institution in the proceedings because of that very perception. One author explains in this respect:

> *We opted for "administered" not "supervised" arbitrations. Our Centre would provide assistance to the parties and arbitrators whenever, and to the extent, they wished.* […] *Administered arbitrations appeared to be the best approach given the*
> *P 45*
> *criticisms we heard from lawyers and businessmen of the cost and delay associated with some systems of supervised arbitrations* [(186)].

It is, in fact, not uncommon for institutions to advertise their alleged "hands-off" approach to case-administration, on the assumption that this is what their users prefer. This is the case for instance of the HKIAC which, on the occasion of the publication of its latest rules issued a press release emphatically reassuring its users that:

> [t]*he 2013 HKIAC Rules maintain HKIAC's signature "light touch" approach, seeking to facilitate effective institutional involvement within a framework that recognizes the importance of party autonomy* (187) .

Conversely, heavy institutional involvement in the proceedings is often described as a negative. In respect of ICAC, for example, one author complains:

> [t]*he involvement of the ICAC goes clearly beyond what is needed to preserve quality standards and to ensure the uninterrupted continuation of arbitration proceedings. It limits party autonomy by imposing on the parties rules for the formation of the Arbitral Tribunal which they can hardly expect or foresee when entering into the ICAC's standard arbitration clause* (188) .

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But are concerns of institutions' legitimacy really legitimate? On one view, there cannot be more of a legitimacy problem with arbitral institutions than with arbitrators. Parties may select their institution, in their arbitration agreement, just like they may select their arbitrators. In fact, one might argue that because institutions are jointly selected by the parties (usually at the contract-drafting stage) they are arguably more legitimate than co-arbitrators nominated unilaterally by one party only (189) . Of course, one difference is that the parties may specifically designate an individual as arbitrator whereas they cannot vet or choose the case-handler or members of the institution's Court or Board that will make decisions on their case. This being said, when it is not the parties that nominate the arbitrators (and this is done by the institution itself acting as appointing authority), then it appears difficult to claim that the institution is less legitimate than the tribunal it has itself appointed. Indeed in a case like this one, the selection of the institution is made by the parties directly, whereas the choice of the arbitrators is indirect only, being made by the institution.

In this context it is interesting to note that empirical evidence suggests that users (i.e., companies resorting to arbitration to resolve their disputes rather than their outside counsel) prefer a hands-on approach to case administration by institutions. The most recent international arbitration survey conducted by Queen Mary University, which focused on the views of in-house counsel exclusively, found that only 4.55% of in-house counsel preferred the so-called *hands-off* approach, while a staggering 70.45% preferred a "*hands-on*" (25% of the respondents stating that they had "no opinion") (190) .

If the actual users of arbitration do not seem to share arbitration lawyers' mistrust of institutions, it may be because arbitral institutions fill a "formality gap" by offering a sense of predictability and stability that may otherwise seem lacking in arbitration.

Interestingly, this is a perspective often taken in the field of public international law. In this discipline, institutionalization is less frequently depicted as a negative phenomenon. It is often seen as a positive expression of the increasing sophistication of the international legal order (191) .

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§2.02 INSTITUTIONALIZATION OF ARBITRATION? THE ALLEGED QUALITATIVE GROWTH

One may wonder whether the expansion of institutional arbitration does not also take a "qualitative" form. The idea here is not that institutional arbitration is becoming more frequent ("quantitative" growth), but rather that the process of arbitration has become more "institutionalized" ("qualitative" growth).

[A] Institutionalization of Arbitration

It is indeed sometimes suggested that there has been an "institutionalization" of arbitration (192) . What the idea seems to cover is an increasing sophistication of institutional rules (193) coupled with an increased intervention of the institution in the arbitral process (194) . The idea of institutionalization of arbitration is therefore distinct from that of alleged "judicialization" of arbitration which is discussed briefly elsewhere below (195) .

There does seem to be factual evidence of this "institutionalization" of arbitration. The rules of arbitration of a number of institutions, for instance, seem to become incrementally longer and more sophisticated with every successive revision. The number of articles of the ICC arbitration rules has increased overtime as follows: Twenty-six articles in 1975, twenty-six again in 1988, thirty-five in 1998, and forty-one in 2012. The rules are also now accompanied by appendices relating to the statutes and the internal rules of the Court, the schedule of costs, the case management techniques, and the emergency arbitrator which have also inflated over time. The LCIA rules counted twenty articles in 1985 and thirty-two in 1998 and thirty-two again in 2014. The AAA seems to be an exception were the number of articles was thirty-seven articles in 1992 (AAA's international rules), thirty-seven in 2009, and thirty-nine in 2014.

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At the same time, if newly added provisions often contemplate additional responsibilities for the institutions (196) , revisions rarely, if ever, seem to result in a reduction of institutions' scope of action. For example, the 1999 revision of the SCC rules transferred from the arbitral tribunal to the SCC itself the responsibility to determine the costs of the arbitration. The previous edition of the rules (1988) provided for the arbitral tribunal to fix these costs (197) . Similarly, the 2012 revision of the CIETAC rules enhanced the responsibilities of the institution by empowering it, *inter alia*, to

consolidate proceedings. The 2015 revision of the CIETAC rules still provides for this responsibility under Article 19. For Lu Song, "[t]*he 2012 rules* […] *demonstrate that the power of CIETAC has increased* […]" [(198)]. Likewise, the addition, at Article 42(1) of the 2005 ICAC rules, of a provision on the scrutiny of awards, confers additional responsibilities to that institution [(199)]. On the other hand, an example of a rule revision which took away from, rather than added to, the powers of an institution, is the adoption of the 4th edition of the SIAC rules in 2010, which transferred the power to decide on the seat of the arbitration from the Registrar to the Tribunal [(200)].

Some authors [(201)] see in the increasing complexity of the commencement of arbitration proceedings, an illustration of this phenomenon of institutionalization. Johnny Veeder QC for instance writes:

> *Historically, it used to be so easy, cheap and quick. One ship broker would walk across the floor of the Baltic Exchange in the City of London, with a short telex in his hand (still warm), touch a colleague on his shoulder, and say "we've got a dispute, the owner wants to send his claim to arbitration, so bring your charterer's file and meet you in the pub after work tonight". That was how, traditionally many maritime and commodity arbitrations were commenced in England between*
> *P 49*
> *arbitrator-advocates, until we invented arbitral institutions, three-arbitrator tribunals and slow-track arbitration* [(202)].

What is at the source of this institutionalization of arbitration? Some authors suggest that the globalization of the economy and the increased complexity of disputes that has accompanied it is the main cause [(203)]. It is true that the growth of multiparty arbitrations, for example, has forced institutions to revise their rules to provide for joinder and consolidation. According to others, it is because arbitration rules are drafted, and revised, by institutions with a view to accommodate the worst scenarios possible, therefore imposing, as a general rule and across the board, overly burdensome procedural requirements. One example of a provision enacted in reaction to a specific "difficulty" is the addition, at Articles 1(2) and 6(2) of the 2012 ICC rules, of provisions stating that the ICC is the only body authorized to administer ICC rules arbitrations. These provisions were adopted as a result of the infamous *Insigma* case in which the Singapore courts held as valid an arbitration clause providing for the administration by one institution of proceedings conducted under the rules of another, which led to an arbitration being administered by SIAC but under the 1998 ICC rules [(204)].

The institutionalization of arbitration is mostly depicted as a negative development. As previously indicated, some authors [(205)] suggest that the increased role conferred to institutions, be it normative (with the expansion of institutional rules), or decisional (with the enhanced role in the implementation of institutional rules), raises concerns as to their legitimacy. Another concern with institutionalization is flexibility. At first glance it seems evident that the more regulated arbitration procedure is, and the less room for flexibility there remains. On closer look, however, the inflation of arbitration rules does not, of itself, necessarily entail less flexibility. This is first because most provisions of most institutions' arbitration rules are capable of being displaced or waived by agreement of the parties. There are few provisions that institutions consider as "mandatory", so that parties are still at liberty to tailor their proceedings no matter how detailed the institutional rules they have chosen are. Parties to an LCIA arbitration, for example, are free to modify such things as the default timetable for the written
P 50
phase of the proceedings, or to agree a bespoke mechanism for the selection of the arbitrators. On the other hand, the LCIA will not accept that the parties waive by agreement the provisions under which the LCIA confirms the constitution of the tribunal, or the provisions under which the LCIA Court is habilitated to fix the arbitration costs. The ICC, likewise, will accept bespoke nomination mechanisms, but will not accept that the parties displace the Court's confirmation of the constitution of the Tribunal, or its authority to fix arbitrator's fees or to scrutinize awards [(206)].

Likewise, when procedural matters are taken out of the hands of the parties for decision by the institution [(207)] or by the arbitrators, it does not *ipso facto* reduce "flexibility". Arbitral tribunals and institutions are as much able as the parties to tailor proceedings to the particular circumstances of the case. What is affected, at most, is "party autonomy". The power to make a decision as to what is best for the case is taken away from the parties. That is, in our view, the most tangible objection to institutionalization [(208)].

If the institutionalization of arbitration might arguably bring about concerns vis-à-vis party autonomy, one may nonetheless wonder whether it does not also have a more positive side. On one view, the phenomenon of institutionalization assists in filling a "formality gap" by offering a sense of predictability and stability that may otherwise seem lacking in arbitration. In this context, increased institutionalization may assist in rendering the arbitral process more acceptable to national legislators in those jurisdictions that are naturally hostile to it [(209)].

P 51

[B] Institutionalization versus Judicialization

The "institutionalization" of arbitration does not necessarily participate to the alleged phenomenon of "judicialization". As indicated above, the two notions are distinct.

Many practitioners and scholars have commented over the years on the alleged "judicialization" of arbitration [(210)]. For example, Redfern and Hunter (stressing that the defining features of arbitration have not changed) complain that "[…] *the modern arbitral process has lost its early simplicity. It*

has become more complex, more legalistic, more institutionalised, more expensive" (211) . Recent empirical evidence confirms that the same perception exists amongst in-house counsel (212) . At the centre of the notion seems to lay the idea that arbitration resembles litigation more and more (213) . This implies that arbitration has become "procedurally" more complex; that the procedure agreed by

P 52

parties and applied by arbitral tribunals is, across the board (214) , increasingly based on strict rules or at least on clearly identifiable "best practice" (215) .

Different reasons have been advanced for this alleged phenomenon. One is that the parties and their counsel have become more combative in respect of procedural matters in recent years (216) . One illustration of this would be the alleged increase in the number of challenges to arbitrators (217) . Another explanation is that the disputes that are referred to arbitration nowadays are more complex; the increased complexity coming from the number of parties and the increased sophistication of contractual arrangements that give rise to the disputes (218) . Whether the alleged judicialization of arbitration is seen as a consequence of increased complexity of disputes or of more combative advocacy, the fear seems to be that arbitration will become less attractive. For Fali Nariman: "[international commercial arbitration] *as a form of dispute resolution has become so overburdened by its own weight and size, that it is being supplanted by other speedier, more fruitful, more rewarding methods*" (219) . These words, written fifteen years

P 53

ago, at the beginning of a period that saw unprecedented growth in the use of arbitration, might appear a little exaggerated today (220) .

It should be noted, however, that the alleged judicialization of arbitration is by no means a twenty-first century phobia. At an ICCA congress nearly twenty years ago a practitioner was already commenting:

> *Over the years we have often talked of arbitration as being less formal, more flexible, speedier and less costly than litigation, but do we really fight hard to keep it that way? Both lawyers and arbitrators have commented on how often arbitrations today are converted into court-like battles by counsel who are used to litigation. Common Law lawyers are undoubtedly the worst offenders in this regard* (221) .

Even a decade before that, in 1985, Jan Paulsson, in the editorial introducing the very first volume of *Arbitration International* was already writing:

> *This journal is launched at a time when the international arbitral process shows signs of becoming more formalistic, more court-like; French speakers refer to la juridictionnalisation de l'arbitrage. Litigants become more sophisticated, and come up with more difficult procedural stratagems* (222) .

Be that as it may, the relationship between the judicialization of arbitration and arbitral institutions is not immediately clear. It would appear that whether or not the use of institutional arbitration rules brings about judicialization depends on the actual substance of such rules. The presence of institutional rules (or their inflation) does not, of itself, result in more formalism, more complex procedure or more delay. Some rules revision can actually foster increased simplicity. A provision contained in institutional rules imposing an obligation on arbitrators to tailor the procedure to the needs of the case (rather than mindlessly applying "best practices") (223) , or to proceed expeditiously with the arbitration (224) is more likely to foster simplicity than engender indiscriminate complexity.

P 53

References

114)

For Guy Pendell: *"Exactly how many arbitration institutions exist and how many arbitrations they actually administer is unclear. We know the statistics of the major institutions* […]*, but what of all the others?"* Guy Pendell, "The Rise and Rise of the Arbitration Institution" (Kluwer Arbitration Blog 30 November 2011).

115)

Such as the PCA, the AAA and the LCIA.

116)

Gary B. Born, *International Commercial Arbitration* (Kluwer Law International 2009) 68-69; Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2014) 93 <http://www.kluwerarbitration.com/CommonUI/document.aspx?id=KLI-KA-Born-2014-Ch01>.

117)

Hereinafter, "Requests".

118)

Born, *International Commercial Arbitration* 70.

119)

817 cases.

120)

LCIA (137, 272, 224); ICC (599, 817, 796); HKIAC (448, 649, 275), Swiss Chambers (59, 104, 87); KCAB (international cases only) (59, 78, 59), SCC (170, 216, 199). The same, however, is not true of SIAC and ICDR, which both recorded an increase from 2009 to 2011.

121)

The numbers for 2000, 2005, 2010 and 2014 are as follows: SCC (53, 73, 131, 183), SIAC (58, 74, 198, 222), LCIA (75, 110, 246, 296), ICDR (510, 580, 888, 1052). For Schlaepfer and Petti "[…] *during the last twenty-five years, the well-established arbitral institutions have witnessed a significant growth in activity* […]". Schlaepfer and Petti, "Institutional versus Ad Hoc Arbitration" 13. In respect of the SCC specifically see, Marie Öhrström, "The Arbitration Institute of the Stockholm Chamber of Commerce (SCC)" in Loukas A. Mistelis and others (eds), *The World Arbitration Reporter*, vol. 3 (Juris 2010) 1. For the Swiss Chambers specifically, see Anne Veronique Schlaepfer and Philippe Bartsch, "Swiss Chambers' Court of Arbitration and Mediation (Swiss Chambers)" in Loukas A. Mistelis and others (eds), *The World Arbitration Reporter*, vol. 3 (Juris 2010) 19.

122)

Michel Gaudet, "La Coopération des Juridictions Etatiques à l'Arbitrage Institutionnel" (1988) 6 ASA Bulletin, Kluwer Law International 90, 99.

123)

Tila Maria de Hancock, "The ICC Court of Arbitration: The Institution and its Procedures" (1984) 1 Journal of International Arbitration, Kluwer Law International 21, 21. See also Jason Fry who refers to a *"continuously expanding caseload"*. Jason A. Fry, "ICC International Court of Arbitration" in Loukas A. Mistelis and others (eds), *The World Arbitration Reporter*, vol. 3 (Juris 2010) 3.

124)

In the original language: "[…] *des 6130 requêtes enregistrées à la Cour en 65 ans, autant l'ont été pendant les 11 dernières années (1er janvier 1977-31 décembre 1987) que dans les 54 précédentes*" Gaudet, "La Coopération des Juridictions Etatiques à l'Arbitrage Institutionnel" 99.

125)

On this point, see also W. Laurence Craig, William W. Park, and Jan Paulsson, *International Chamber of Commerce Arbitration* (3rd edn, Oceana Publications 2000) 2: *"*[…] *more than two-thirds of all cases brought to ICC arbitration arose in the last 20 years of its 75-year existence"*.

126)

Karin Calvo Goller, "The 2012 ICC Rules of Arbitration – An Accelerated Procedure and Substantial Changes" (2012) 29 Journal of International Arbitration, Kluwer Law International 323, 340; Mark Mangan, "The Arbitrator and the Arbitration Procedure – Sports Arbitration: Citius Altius Fortius?" in Christian Klausegger, Peter Klein, et al. (eds), *Austrian Yearbook on International Arbitration* (2009) 2011 301, 302; Michel A. Calvo, "The Challenge of the ICC Arbitrators: Theory and Practice International" (1998) 15 Journal of International Arbitration, Kluwer Law International 63, 63.

127)

For a discussion of the impact of bilateral investment treaties on the caseload of the ICSID, see Antonio R. Parra, "ICSID and the Rise of Bilateral Investment Treaties: Will ICSID be the Leading Arbitration Institution in the Early 21st Century?" (2000) 94 Proceedings of the 101st Annual Meeting (American Society of International Law) 41-43.

128)

In this sense see, Anne Veronique Schlaepfer and Angelina M. Petti, "Institutional versus Ad Hoc Arbitration" in Elliott Geisinger and Nathalie Voser (eds), *International Arbitration in Switzerland – A Handbook for Practitioners* (Kluwer Law International 2013) 13.

129)

See, for example, Michael Hwang, Lawrence Boo, and Yewon Han, "National Report for Singapore (2011)" (2011) Supplement no. 64 Jan Paulsson (ed), International Handbook on Commercial Arbitration, Kluwer Law International 1, 16. See also Bertie Vigras, "The Role of Institutions in Arbitration" in Ronald Bernstein and Derek Wood (eds), *Handbook of Arbitration Practice* (Second Edition. Sweet & Maxwell in conjunction with the Chartered Institute of Arbitrators 1993) 469. For the same point in respect of arbitrations initiated in the United Arab Emirates following the 2008 global financial crisis, see Gordon Blanke and Celine Abi Habib, "Arbitration in Dubai: A Basic Primer" in Christian Klausegger, Peter Klein, et al. (eds), *Austrian Yearbook on International Arbitration* 2011 (2011) 217, 222. Likewise, general statements to the effect that the majority of arbitrations are nowadays institutional rather than ad hoc can be found in the literature. See for example Calvin Chan, "Of Arbitral Institutions and Provisional Determinations on Jurisdiction, Global Gold Case" (2009) 25 Arbitration International, Kluwer Law International 403, 411.

130)

See Christopher R. Drahozal, "Arbitration by the Numbers: The State of Empirical Research on International Commercial Arbitration" (2006) 22 Arbitration International, Kluwer Law International 291, 291.

131)

Bertold Goldman, "Les Conflits de Lois dans l'Arbitrage International de Droit Privé" (1963) 109 Collected Courses of the Hague Academy of International Law, Martinus Nijhoff Publishers & Brill Academic 352; Pierre Lalive, "Problèmes Relatifs à l'Arbitrage International Commercial" (1967) 120 Collected Courses of the Hague Academy of International Law, Martinus Nijhoff Publishers & Brill Academic 664; William K. Slate, "International Arbitration: Do Institutions Make a Difference?" (1996) 31 Wake Forest Law Review 41, 50; Hans Smit, "The Future of International Commercial Arbitration: A Single Transnational Institution" (1986) 25 Columbia Journal of Transnational Law 9, 12; Toby Landau, "The Effect of the New English Arbitration Act on Institutional Arbitration" (1996) 13 Journal of International Arbitration, Kluwer Law International 113, 114; Gilbert Guillaume, "The Future of International Judicial Institutions" (1995) 44 International & Comparative Law Quarterly 848, 862; Michael Moser and Friven Yeoh, "Choosing an Arbitral Institution Arbitration" (2006) 2 The In-House Perspective 18, 18; Schlaepfer and Petti, "Institutional versus Ad Hoc Arbitration" 13; José M. Alcántara, "An International Panel of Maritime Arbitrators?" (1994) 11 Journal of International Arbitration, Kluwer Law International 117, 117.

132)

In the original language: "*La création d'un nombre croissant d'organismes, nationaux ou internationaux, qui fournissent des cadres permanents aux procédures d'arbitrage est un phénomène bien connu et maintes fois analyses*". Goldman, "Les Conflits de Lois dans l'Arbitrage International de Droit Privé" 352.
133)

Pendell, "The Rise and Rise of the Arbitration Institution".
134)

A survey of the Chinese State Council's Legal Affairs Office numbered 185 such institutions. Survey reported in Michael J. Moser and Yu Jianlong, "CIETAC and its Work — An Interview with Vice Chairman Yu Jianlong" (2007) 24 Journal of International Arbitration, Kluwer Law International 555, 556.
135)

Inga Kačevska, "Latvia" *The European, Middle Eastern and African Arbitration Review*(Global Arbitration Review 2014).
136)

Jan Paulsson, "Moral Hazard in International Dispute Resolution, Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair University of Miami School of Law on 29 April 2010" (2011) 8 Transnational Dispute Management (TDM), 20.
137)

In the original language: *"*[ces institutions] *réglaient déjà avant la guerre de 1939/1945 des dizaines de milliers de différends".* Charles Carabiber, "L'Evolution de l'Arbitrage Commercial International" (1960) 99 Collected Courses of the Hague Academy of International Law, Martinus Nijhoff Publishers & Brill Academic 128-133. See also, Frank D. Emerson, "History of Arbitration Practice and Law" (1970) 19 Cleveland State Law Review 156, 156.
138)

The phenomenon of the increased use of arbitration in general (i.e., both ad hoc and institutional) is also well documented and often commented upon. The increase of arbitration in general can safely be attributed, at least in part, to the increase in cross-border transactions and the globalization of the economy. To cite only a few leading commentators: Bernard Hanotiau, "International Arbitration in a Global Economy: The Challenges of the Future" (2011) 28 Journal of International Arbitration, Kluwer Law International 89, 90; Smit, "Future of International Commercial Arbitration" 10; Jan Paulsson and Nigel Rawding (eds), *The Freshfields Guide to Arbitration Clauses in International Contracts* (3rd edn, Kluwer Law International 2010) 10; Yves Derains and Eric A. Schwartz, *A Guide to the NewICC Rules of Arbitration* (2nd edn, Kluwer Law International 2005) 3.
139)

This is object of Chapter 3.
140)

Smit, "Future of International Commercial Arbitration" 15; Sam Aaron, "International Arbitration III: Choosing an Arbitration Institution and a Set of Rules" (1991) 108 South African Law Journal 306, 306; Blackaby, Partasides, Hunter, and Redfern, *Redfern and Hunter on International Arbitration* 55; Schlaepfer and Petti, "Institutional versus Ad Hoc Arbitration" 16.
141)

Blackaby, Partasides, Hunter, and Redfern, *Redfern and Hunter on International Arbitration* 56.
142)

As in the case of the LCIA.
143)

As in the case of the ICC.
144)

On this second point, see Nassib G. Ziadé, "Reflections on the Role of Institutional Arbitration between the Present and the Future" (2009) 25 Arbitration International, Kluwer Law International 427, 428.
145)

Blackaby, Partasides, Hunter, and Redfern, *Redfern and Hunter on International Arbitration* 55; Born, *International Commercial Arbitration* 150; Smit, "Future of International Commercial Arbitration" 15; Aaron, "International Arbitration III: Choosing an Arbitration Institution and a Set of Rules" Schlaepfer and Petti, "Institutional versus Ad Hoc Arbitration" 20.
146)

Blackaby, Partasides, Hunter, and Redfern, *Redfern and Hunter on International Arbitration* 54.
147)

Paulsson and Rawding, *The Freshfields Guide to Arbitration Clauses in International Contracts* 58.
148)

Smit, "Future of International Commercial Arbitration" 15. This is, however, largely theoretical in light of the complexity of drafting workable ad hoc arbitration clauses. On this point see Paulsson and Rawding, *The Freshfields Guide to Arbitration Clauses in International Contracts* 58.
149)

Blackaby, Partasides, Hunter, and Redfern, *Redfern and Hunter on International Arbitration* 55.
150)

See above the discussion of this authority in the implementation of the arbitration rules as being a defining criteria of institutional arbitration. This "authority" is referred to as the "*management role*" of the institutions by William Slate. Slate, "International Arbitration: Do Institutions Make a Difference?" 55. It is, as discussed above, referred to as a "*reservation of competence*" by Professor P Lalive Lalive, "Problèmes Relatifs à l'Arbitrage International Commercial" 665.

151)

In the original language: *"D"autre part, l'arbitrage institutionnel, surtout lorsque la mission et la responsabilité de l'institution d'arbitrage sont poussées aussi loin que dans l'arbitrage CCI, permet de réduire les interventions des juridictions étatiques. Tandis qu'en cas de difficulté ou même de doute dans le déroulement d'un arbitrage ad hoc une partie n'a d'autre recours que de saisir une juridiction étatique, ajoutant ainsi une procédure judiciaire publique à plusieurs étages à la procédure arbitrale en cours, l'information offerte et la surveillance exercée par une institution d'arbitrage expérimentée peuvent constituer aux yeux des parties des garanties suffisantes pour économiser le temps, la publicité et les frais d'une procédure judiciaire additionnelle".* Gaudet, "La Coopération des Juridictions Etatiques à l'Arbitrage Institutionnel" 505-506.
In the same sense see N. Ziade: *"Arbitration institutions have an inherent advantage over ad hoc arbitrations in that the institutions have built-in mechanisms that support the arbitral process and offer remedies for procedural deficiencies"* Ziadé, "Reflections on the Role of Institutional Arbitration Between the Present and the Future" 428. For example, institutional arbitration rules provide for mechanisms to ensure the constitution of the arbitral tribunal.

152)

Aaron, "International Arbitration III: Choosing an Arbitration Institution and a Set of Rules" 306; Blackaby, Partasides, Hunter, and Redfern, *Redfern and Hunter on International Arbitration* 56; Born, *International Commercial Arbitration* 150; Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration* 37.
153)

See Chapter 3 below for an overview of institutions' role in this respect.
154)

For obvious reasons, parties often feel that it is difficult to query the quantum of their arbitrator's fees or expenses.
155)

In particular when issues of cross-border VAT come into play. Another benefit, concerning arbitrations where the fees of the tribunal are calculated on the basis of an hourly rate, needs to be mentioned. Where the entire anticipated costs of the arbitration are not covered by advance payments at the beginning of the arbitration, there is a need to monitor regularly, at different stages in the proceedings, the amount of time spent by the tribunal to ensure that the deposits held are always sufficient to pay the arbitrators costs (to avoid work being undertaken by the arbitrators which the funds held will be insufficient to cover). In light of their great experience in the domain, this is a role that is more easily dealt with by the institutions.
156)

Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration* 37.
157)

Ibid.
158)

Article 33 ICC Rules (2012). The scrutiny of awards as a function has been discussed in Chapter §3.03[C][1] of this book.
159)

Aaron, "International Arbitration III: Choosing an Arbitration Institution and a Set of Rules" 306.
160)

Born, *International Commercial Arbitration* 150.
161)

Born, *International Commercial Arbitration* 150; Harry L. Arkin, "International Ad Hoc Arbitration: A Practical Alternative" (1987) 15 International Business Lawyer 5-12; Aaron, "International Arbitration III: Choosing an Arbitration Institution and a Set of Rules" 306; Schlaepfer and Petti, "Institutional versus Ad Hoc Arbitration" 20.
162)

See Paulsson and Rawding, *The Freshfields Guide to Arbitration Clauses in International Contracts* 59; Schlaepfer and Petti, "Institutional versus Ad Hoc Arbitration" 21.
163)

ICC, "Techniques for Controlling Time and Costs in Arbitration: Report from the ICC Commission on Arbitration", 2007.
164)

See the LCIA's Schedule of Arbitration Costs, effective 1 October 2014 available on the "Website of the LCIA, http://www.lcia.org".
165)

Christopher Kee, "The Evolving Role of an Appointing Authority" in Stefan Michael Kröll and Loukas A. Mistelis (eds), *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (Kluwer Law International 2011) 312.
166)

See the *travaux preparatoires* of the 2010 UNCITRAL rules: "Report of the Working Group on Arbitration and Conciliation on the work of its forty-eighth session (New York, 4-8 February 2008), UN Doc. A/CN.9/646" (2008) 20-21.
167)

Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration* 35; see also Slate, "International Arbitration: Do Institutions Make a Difference?" 53; see also Paulsson and Rawding, *The Freshfields Guide to Arbitration Clauses in International Contracts* 57.
168)

See Born, *International Commercial Arbitration* 150. See also Schlaepfer and Petti, "Institutional versus Ad Hoc Arbitration" 15, referring to the perception that ad hoc arbitration offers "*greater privacy*".
169)

See Simon Crookenden, "Who Should Decide Arbitration Confidentiality Issues?" (2009) 25 Arbitration International, Kluwer Law International 603-613.

170)

Privacy in respect of arbitration relates to the idea that the hearing of the dispute and the tribunals' deliberations are conducted behind closed doors, "in camera". Privacy of arbitration is recognized in many jurisdictions and is consecrated in various sets of arbitration rules. See for example, Article 25.4 of the 1976 UNCITRAL Rules, Article 28.3 of the UNCITRAL Rules of 2010, Article 21(3) of the 1998 ICC Rules, and the Article 19.4 of the LCIA Rules of 1998. But the concept of confidentiality, in the context of arbitration, goes beyond this and is often expected to mean that nothing from the proceedings may be made available to third parties, including *inter alia:* (1) the evidence and documents produced by the parties, (2) the arbitrators' awards, but also (3) the very existence of the arbitration. On the difference between the two concepts see, for example, Simon Crookenden, "Who Should Decide Arbitration Confidentiality Issues?" (2009) 25(4) Arbitration International, Kluwer Law International 603-613, at 603. On the other hand, on the idea that confidentiality is a necessary corollary to privacy see: Gary B. Born, *International Commercial Arbitration* (Kluwer Law International 2009) 2280, and also M. Young and S. Chapman (n 2) pp. 26-47.

171)

Ali Shipping Corporation v Shipyard Trogir [1999] 1 WLR 314 (CA). For a historical development of the principle of confidentiality in English case law see, M. Young and S. Chapman (n 2) pp. 26-47.

172)

Henri-Jacques Nougein et Romain Dupeyré, Règles et Pratiques du Droit Français de l'Arbitrage, (Gazette du Palais, 2012), pp. 214-216.

173)

For example, Article 42 of the HKIAC rules (2013), Article 22(3) of the ICC Rules (2012), or Article 30 LCIA Rules (2014).

174)

It should be noted that the IBA Rules on Taking Evidence (2010) also deal with confidentiality. Article 2(d) specifically requests tribunals to consult the parties on the issue of confidentiality. Article 3(8) makes a provision for confidential documents to be reviewed for sensitivity by the tribunal. Rule 3(13) is even more express in its statement that "*any Document submitted or produced by a Party or non-Party in the arbitration and not otherwise in the public domain shall be kept confidential by the Arbitral Tribunal and the other Parties, and shall be used only in connection with the arbitration*".

175)

Born, *International Commercial Arbitration* 151.

176)

See Queen Mary, University of London, "Corporate Attitudes and Practices: Recognition and Enforcement of Foreign Awards" (2008); Queen Mary, University of London, "Corporate Attitudes and Practices" (2006); Queen Mary, University of London, "Corporate Choices in International Arbitration: An Industry Approach" (2013).
This is consistent with the Queen Mary survey of 2008 in which 86% of awards rendered were institutional, 14% were ad hoc. See Queen Mary, University of London, "Corporate Attitudes and Practices: Recognition and Enforcement of Foreign Awards".

This is also consistent with the 2006 survey where 76% of participants reported that they opted for institutional arbitration in their clauses. See Queen Mary, University of London, "Corporate Attitudes and Practices".

177)

On the idea that different industries have different approaches to arbitration in general, see Toby Landau: *"Rent review arbitration is different from insurance arbitration, which has different needs to construction, commodity or maritime arbitration; so the list continues".* Landau, "The Effect of the New English Arbitration Act on Institutional Arbitration" 117. For empirical evidence of the same, see Queen Mary, University of London, "Corporate Choices in International Arbitration: An Industry Approach".

178)

Discussed above in the context of the definition of the notation of institutional arbitration.

179)

Article 16 of the Arbitration Law of the PRC requires all arbitrations with a Chinese seat to be administered. Fan Kun, "Prospects of Foreign Arbitration Institutions Administering Arbitration in China" (2011) 28 Journal of International Arbitration, Kluwer Law International 343-353. See also Paul Friedland and Bing Yan, "Negotiating and Drafting Arbitration Agreements with Chinese Parties: Special Considerations of Chinese Law and Practice" (2011) 28 Journal of International Arbitration, Kluwer Law International 467, 473-474. See also Chang, "CIETAC's Perspective on Arbitration and Conciliation Concerning China" 34.

180)

There may be reasons pertaining to the nature of the disputes in that particular industry or to characteristics of the maritime arbitration bar, which may render the practical benefits of institutional arbitration less salient than in other fields, but this is unfortunately beyond the scope of this book.

181)

Harris, "London Maritime Arbitration" 122.

182)

A commentator, who, as a former President of LCIA Court, can hardly be classified as an opponent of institutional arbitration. Expressing the idea that lack of transparency may be the cause of the lack of confidence, see Blanch, "Appointment and Confirmation of Arbitrators" 72.

183)

Paulsson, "Moral Hazard in International Dispute Resolution, Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair University of Miami School of Law on 29 April 2010" 19-20. An example of an "empty edifice" (albeit in the particular context of State-to-State disputes) may be found in the Court for Conciliation and Arbitration of the OSCE, which has, in the two decades since its creation, not administered a single matter. See Aileen Truttmann and Georg von Segesser, "Swiss and Swiss-Based Arbitral Institutions" in Nathalie Voser and Elliott Geisinger (eds), *International Arbitration in Switzerland – A Handbook for Practitioners* (Kluwer Law International 2013) 304.

184)

In the original language: "*Plus généralement, d'autres réserves ont été émises à l'égard de l'arbitrage organisé: copiant l'institution judiciaire, il ne donne pas pour autant les garanties de la justice publique et de la magistrature professionnelle. Mais il fait cependant disparaître, ou du moins affaiblit, le rapport personnel de confiance qui doit exister entre l'arbitre et les parties, et qui est la meilleure justification de cette justice privée*". Fouchard (n 36) 227. In the same sense see, Clay, *L'arbitre* para. 695.

185)

Fouchard writes: *"*[…] *article 1451 represents a prohibition imposed on arbitration centres from acting as arbitrators, and a limitation of their powers. This proceeds from a certain mistrust vis-a-vis institutional arbitration, which may also transpires in article 1455 of the same code, and which was perceived as such by the institutions"* (Translation by the author). In the original language: "*En second lieu, l'article 1451 se présente plutôt comme une interdiction faite aux centres d'arbitrage permanents d'être eux-mêmes arbitres, et une limitation de leurs pouvoirs. Il procède d'une certaine méfiance à l'égard de l'arbitrage institutionnel, que l'on retrouve dans l'article 1455 du même Code, et qui a été perçue comme telle par les principaux intéressés*". Fouchard (n 36) 242-243.

See also Fouchard Gaillard and Goldman, *"The French New Code of Civil Procedure (Art. 1455) therefore sought to limit the role of arbitral institutions in French domestic law, by prohibiting the appointment of an entity or organisation as an arbitrator and by favoring the direct appointment of arbitrators by the parties, even in institutional arbitration".* Gaillard and Savage (n 21) 32.

186)

Thompson, "Building an Arbitration and Mediation Centre: From International Foundations to Domestic Rooftops': The Establishment of the British Columbia International Commercial Arbitration Centre" 202-203.

187)

Hong Kong International Arbitration Centre, "The 2013 HKIAC Administered Arbitration Rules Unveiled (Press Release)" (12 June 2013). In the same sense, see also Chiann Bao, "Hong Kong International Arbitration Centre" in J. William Rowley (ed), *Arbitration World: Jurisdictional Comparisons* (4th Revised edn, Thomson Reuters 2012), The European Lawyer Reference 58: *"The Rules minimise interference by the Centre, and maximise party autonomy, thereby letting parties focus on essential issues while the Secretariat assists with technical details".*

In a similar vein, the Secretary General of the SCC, Annette Magnusson, once described SCC's case management philosophy in the following terms: *"*[a]*fter the referral, the SCC Institute does not take part in the particulars of the planning and conduct of the proceedings, unless specifically provided for by the SCC Rules or upon request from the tribunal. This model of institutional arbitration differs to some extent from the practice of other international institutions, and has been chosen by the SCC Institute to serve the efficiency of the procedure".* Magnusson, "The Practice of the Arbitration Institute of the Stockholm Chamber of Commerce – An Inside View" 53.

For the LCIA: "[…] *the LCIA applies a relatively light touch to its casework administration* […] *it endeavours to intervene only as and when necessary, which will depend to some extent upon the relative sophistication and experience of the parties, their lawyers and the tribunal*". Winstanley, "Review of the London Court of International Arbitration" 3. In respect of the Swiss institution: "*Even though the 2012 revision of the Swiss Rules has strengthened the role of the Swiss Chambers' Arbitration Institution by vesting the Court with additional powers, the 2012 Swiss Rules still provide for a leaner administration of the arbitral proceedings than other institutional arbitration rules, giving the parties and the arbitral tribunal the necessary flexibility to tailor the arbitral proceedings to their needs".* von Segesser, Jolles, and Stark-Traber, "Swiss Rules of International Arbitration" 195. For another author pointing out that the Swiss rules are less interventionist than that of the ICC see Zuberbühler, Muller, and Habegger, "Introduction to the Swiss Rules" 8.

188)

Susan Heger, "The International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation: A Short Overview and the New Arbitration Rules" (2008) 2008 Austrian Arbitration Yearbook 283, 297-298.

189)

Because in that second case only one party (as opposed to all parties to the dispute) has assented to the choice of co-arbitrator.

190)

Unpublished statistics collated for the purposes of the 2013 arbitration survey of Queen Mary which gave rise to the publication of the report: Queen Mary, University of London, "Corporate Choices in International Arbitration: An Industry Approach" (2013) referred to previously. It may be the case that outside counsel and arbitrators prefer a lesser degree of institutional involvement but that actual users, i.e., corporations, prefer the opposite.

191)

Andrea Schneider, "Not Quite a World Without Trials: Why International Dispute Resolution Is Increasingly Judicialized" (2006) 2006 Journal of Dispute Resolution 119-129.
The idea that institutional arbitration offers a reassuring halfway house between ad hoc proceedings and court litigation is reflected implicitly in Article 1(4)) of the Swiss rules. According to von Segesser et al., this rule, which provides in essence that "[*b*]*y submitting a dispute to arbitration under the 2012 Swiss rules, the parties confer on the Court* […] *all powers necessary for supervising the arbitral proceedings otherwise vested in the competent judicial authority*", aims at *"ensuring the smooth running of arbitrations by providing for a fall back competence of the Court for any procedural issue that may arise in the course of an arbitration"*. Georg von Segesser, Alexander Jolles, and Sonja Stark-Traber, "Swiss rules of International Arbitration" in Karyl Nairn and Patrick Heneghan (eds), *Arbitration World: Institutional & Jurisdictional Comparisons* (4th Revised edn, Thomson Reuters 2012), The European Lawyer Reference 182. In the same sense see, Habegger (n 187) 274.

192)

Gaillard and Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 32; Hanotiau, "International Arbitration in a Global Economy: The Challenges of the Future" 99-100 Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration* (Kluwer Law International 2005) 16; Iván Szász, "The Value of a Network of Arbitration Institutions" in Pieter Sanders (ed), *New Trends in the Development of International Commercial Arbitration and the Role of Arbitral and Other Institutions* vol. 1 (Kluwer Law International 1982) 26, 26.

193)

V.V. Veeder, "Strategic Management in Commencing an Arbitration" (2011) 15 in Albert Jan van den Berg (ed), *Arbitration Advocacy in Changing Times* (Kluwer Law International) 2010 27-34.

194)

According to Horacio Grigera Naon, then Secretary General of the Court of the ICC, there are *"*[…] *trends favouring the adoption of a more pro-active attitude towards the administration of arbitration cases"*. Horacio Grigera Naon, "The Powers of the ICC International Court of Arbitration vis-a-vis Parties and Arbitrators" *Arbitration in the Next Decade – ICC Bulletin Special Supplement* (International Chamber of Commerce 1999) 71.

195)

As discussed below, the notion of "judicialization" is broader than that of "institutionalization" in the sense that it is not limited to the role of arbitral institutions, but rather relates to the rising formalism of arbitration and its increasing resemblance with litigation.

196)

For example, the 2012 Swiss rules grant "*broader institutional powers*" to the newly created "Arbitration Court". Philipp A. Habegger, "The Revised Swiss Rules of International Arbitration: An Overview of the Major Changes" (2012) 30 ASA Bulletin, Kluwer Law International 269, 272 and 307. In the same sense see also, See Von Segesser, Jolles, and Stark-Traber, "Swiss rules of International Arbitration" 181.

197)

See Sigvard Jarvin and Briana Young, "A New Arbitration Regime in Sweden – The Swedish Arbitration Act 1999 and the Rules of the Stockholm Chamber of Commerce" (1999) 16 Journal of International Arbitration, Kluwer Law International 89, 103.

198)

Lu Song, "The New CIETAC Arbitration Rules of 2012" (2012) 29 Journal of International Arbitration, Kluwer Law International 299, 321.

199)

Komarov, "Introduction to the Revision of the Rules of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC)" 460.

200)

Gordon Smith, "Commentary on the New Singapore International Arbitration Centre Rules" (2010) 76 Arbitration 727, 738. Rule 18.1 of the SIAC Rules (2013) also continues with the same, the tribunal being given the power to determine seat.
Another example is the 2005 revision of the rules of the ICAC (Russia). Under the previous rules (the 1994 rules) not only the arbitral tribunal but also the President of the ICAC had the power to order interim relief. This provision has been deleted in the 2005 rules so that this prerogative is now solely that of the tribunal. See Khodykin, "International Commercial Arbitration Court (ICAC) and Maritime Arbitration Commission (MAC) at the Russian Federation Chamber of Commerce and Industry" 9.

201)

Veeder, "Strategic Management in Commencing an Arbitration". Hanotiau, "International Arbitration in a Global Economy: The Challenges of the Future" 100.

202)

Veeder, "Strategic Management in Commencing an Arbitration" 28. One may wonder, however, whether the view that little formality should be needed to start arbitration proceedings reflects a British conception of arbitration, where the Request for Arbitration is not normally seen as a key pleading, and therefore does not need to be very detailed. This appears to be in contrast with the position in continental Europe where the Request is expected to contain a detailed presentation of the Claimant's case.

203)

Hanotiau, "International Arbitration in a Global Economy: The Challenges of the Future" See also Gunther Horvath, "Part I: International Commercial Arbitration, Chapter 13: The Judicialization of International Arbitration: Does the Increasing Introduction of Litigation-Style Practices, Regulations, Norms and Structures into International Arbitration Risk a Denial of Justice in International Business Disputes?" in Stefan Michael Kröll and Loukas A. Mistelis (eds), *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (Kluwer Law International 2011) 259.

204)

Veeder, “Strategic Management in Commencing an Arbitration”. “Insigma Technology Co Ltd v Alstom Technology Ltd, Singapore Court of Appeal, 2 June 2009 (Singapore Law Report, 2009, 3, at p. 24)”, Singapore Court of Appeal [2009] 3 SLR(R); Kirby, “Insigma Technology Co. Ltd v. Alstom Technology Ltd SIAC Can Administer Cases under the ICC Rules?”.

205)

Gelinas, “Investment Tribunals and the Commercial Arbitration Model” 585.

206)

Derains and Schwartz, *A Guide to the New ICC Rules of Arbitration* 7-8. See also Bühler and Webster, *Handbook of ICC arbitration* 23. See also Michael Bühler and Sigvard Jarvin, “The Arbitration Rules of the International Chamber of Commerce (ICC)” in Frank-Bernd Weigand (ed), *Practitioner’s Handbook on International Commercial Arbitration* (Oxford University Press 2009) 1152. The same may also be said the Swiss Arbitration Institution in relation to its power to confirm the appointment of arbitrators nominated by the parties. See Tobias Zuberbühler, Klaus Muller, and Philipp A. Habegger, “Introduction to the Swiss Rules” in Tobias Zuberbühler and Klaus Muller (eds), *Swiss Rules of International Arbitration: Commentary* (Kluwer Law International 2005) 10. On this point it is interesting to note that the some institutions do, from time to time, assist parties at the contract drafting stage, in the creation of bespoke dispute resolution mechanisms tailored to the parties’ particular needs. This is the case, for example, of the dispute resolution system designed for large scale infrastructure projects such as the Channel Tunnel Rail Link, or the Hong Kong Airport Core Programme. See Anthony Connerty, “*The Role of ADR in the Resolution of International Disputes*”, (1996) 12(1) Arbitration International, 51-53. Bespoke mechanisms of that sort arguably offer ultimate flexibility to the parties. So, in a sense, arbitral institutions can be seen as a factor of flexibility rather than a hindrance to it.

207)

For example, selection of the Chairperson in all LCIA India Arbitrations.

208)

This being said, the expansion and sophistication of arbitration rules on its own (i.e., not accompanied by an increasing role of the institution) does not affect party autonomy. To the contrary, the choice, made by the parties, to arbitrate under the rules of a particular institution, with its “expanded” rules, is an expression of party autonomy.

209)

Fouchard, “Les Institutions Permanentes d’Arbitrage Devant le Juge Etatique (A Propos d’une Jurisprudence Récente)” 226; Born, *International Commercial Arbitration* 57.
The idea that institutional arbitration offers a reassuring halfway house between ad hoc proceedings and court litigation is reflected implicitly in Article 1(4)) of the Swiss rules. According to von Segesser et al., this rule, which provides in essence that “[*b*]*y submitting a dispute to arbitration under the 2012 Swiss rules, the parties confer on the Court[…] all powers necessary for supervising the arbitral proceedings otherwise vested in the competent judicial authority*”, aims at *“ensuring the smooth running of arbitrations by providing for a fall back competence of the Court for any procedural issue that may arise in the course of an arbitration”*. Georg von Segesser, Alexander Jolles, and Sonja Stark-Traber, “Swiss rules of International Arbitration” in Karyl Nairn and Patrick Heneghan (eds), *Arbitration World: Institutional & Jurisdictional Comparisons* (4th Revised edn, Thomson Reuters 2012), The European Lawyer Reference 182. In the same sense see, Habegger, “The Revised Swiss Rules of International Arbitration: An Overview of the Major Changes” 274.

One may also wonder if the formality gap that the institutionalization of arbitration fills does not also help make more palatable the autonomous or denationalized theoretical representations of international arbitration -representations which have so far failed to convince on a global scale. For a discussion of these representations see Ashique Rahman, “An Insight into the Application of Arbitral Theory: Arising Judicial Practice” (2011) 7 Asian International Arbitration Journal, Kluwer Law International 97-117.

210)

Hanotiau, “International Arbitration in a Global Economy: The Challenges of the Future” 99; Yves Derains, “Synthesis (of the 1993 ICCA Congress in Bahrain)” in Albert Jan van den Berg (ed), *International Arbitration in a Changing World* vol. 6 (Kluwer Law International 1993) 239, 240; Delissa A. Ridgway, “International Arbitration: The Next Growth Industry” (1999) 54 Dispute Resolution Journal 50, 51; Jan Paulsson, “Introduction (to the first volume of Arb. Int.)” (1985) 1 Arbitration International, Kluwer Law International 2, 86; Fali S. Nariman, “The Spirit of Arbitration – The Tenth Annual Goff Lecture” (2000) 16 Arbitration International, Kluwer Law International 261, 262.

211)

Blackaby, Partasides, Hunter, and Redfern, *Redfern and Hunter on International Arbitration* 29.

212)

The interviews of numerous in-house counsel for Queen Mary University’s 2013 International Arbitration Survey confirm that numerous in-house lawyers perceive that arbitration has become more formal: *“Some corporations have expressed concerns over the ‘judicialization’ of arbitration, citing the increased formality of proceedings and their similarity with litigation proceedings, along with the associated costs and delays involved in these proceedings. This trend is potentially damaging to the overall attractiveness of arbitration as a means of dispute resolution”*. Queen Mary, University of London, “Corporate Choices in International Arbitration: An Industry Approach”.

213)

For Fali Nariman, "[international commercial arbitration] *has become indistinguishable from litigation, which it was at one time intended to supplant*". Nariman, "The Spirit of Arbitration – The Tenth Annual Goff Lecture" 262.
See also Jean-Claude Najar, "Inside Out: A User's Perspective on Challenges in International Arbitration" (2009) 25 Arbitration International, Kluwer Law International 515, 526; Edward R. Leahy and Carlos J. Bianchi, "The Changing Face of International Arbitration" (2000) 17 Journal of International Arbitration, Kluwer Law International 19, 51.

214)

Not just for large disputes for which a tailor-made procedure may be justifiable.

215)

A 2012 empirical survey conducted by the School of International Arbitration at Queen Mary, University of London looked into the emergence of this harmonized "best practice" in international arbitration. See Queen Mary, University of London, "Current and Preferred Practices in the Arbitral Process" (2012). See also, Queen Mary, University of London, "Improvements and Innovations in International Arbitration" (2015) at < http://www.arbitration.qmul.ac.uk/docs/164761.pdf> accessed 24 December 2015.

216)

It has been suggested that this increased combativeness reflects the increasing participation (and therefore the growing influence of US litigators in arbitration. This may be referred to as the "Americanisation" of international arbitration. See, for example, Hanotiau, "International Arbitration in a Global Economy: The Challenges of the Future" 99; Ridgway, "International Arbitration" 51. Some authors have argued that this is not the case. See, for example, John E. Beerbower, "International Arbitration: Can We Realise the Potential?" (2011) 27 Arbitration International, Kluwer Law International 75-90.

217)

Nathalie Voser, for instance, points out that the number of challenges to arbitrators at the ICC increased from 37 in 2004 to 57 in 2009. Nathalie Voser, "Removal, Resignation, Dismissal and Replacement of Arbitrators" in Philipp Habegger and others (eds), *Arbitral Institutions Under Scrutiny* (JurisNet 2013), ASA Special Series No. 40, 73. For a comment on the number of challenges at the ICC in the 1980s, see Guillermo Aguilar Alvarez, "The Challenge of Arbitrators" (1990) 6 Arbitration International, Kluwer Law International 203, 205. For the SCC, see Hanna Larsson and Annette Magnusson, "Recent Practice of the Arbitration Institute of the Stockholm Chamber of Commerce: Prima Facie Jurisdiction and Challenges of Arbitrators" (2004) 2004 Stockholm Arbitration Report 47, 48. For a comment that the number of challenges is not growing see Gerbay, Remy, "Is the End Nigh Again? An Empirical Assessment of the "Judicialization" of International Arbitration", (2014) 25(2) American Journal of International Arbitration. Available at SSRN: http://ssrn.com/abstract=2656624.

218)

On the idea that arbitration has become more complex see McLean: *"With the astounding growth in the value and volume of transactions over the last thirty years, economic relationships between commercial parties have become far more intricate than before. As disputes substantively grow more complex, involve more stakeholders, and are fought for higher stakes, international arbitration must continue to offer a less time-consuming, more efficient alternative to cross-border litigation".* David J. McLean, "Toward a New International Dispute Resolution Paradigm: Assessing the congruent evolution of globalization and international arbitration" (2009) 30 University of Pennsylvania Journal of International Economic Law 1087, 1096. See also Born, *International Commercial Arbitration* 2069.

219)

Fali S. Nariman, 'The Spirit of Arbitration – The Tenth Annual Goff Lecture' (2011) 16 Arbitration International 261, 265.

220)

See in general Gerbay, Remy, "Is the End Nigh Again? An Empirical Assessment of the "Judicialization" of International Arbitration" (2014) 25(2) American Journal of International Arbitration. Available at SSRN: http://ssrn.com/abstract=2656624s.

221)

Whitmore Gray, "Is There a Growing International Arbitration Culture?" in Albert Jan van den Berg (ed), *International Dispute Resolution: Towards an International Arbitration Culture* vol. 8 (Kluwer Law International, 1998) Seoul 23, 28.

222)

Paulsson, "Introduction (to the first volume of Arb. Int.)" 3.
Another author taking, in the same volume of Arbitration International, precisely the opposite view is Martin Hunter: *"It is only in the last ten years or so that a modern generation of arbitrators, encouraged by the judiciary, has started to work on making arbitration the more genuine alternative to litigation that it should be; and even nowthere are practitioners who advocate that arbitration procedure should followformal court procedures* […]". J. Martin H. Hunter, "Arbitration Procedure in England: Past, Present and Future" (1985) 1 Arbitration International, Kluwer Law International 82, 86.

223)

See for example of Appendix IV (Case Management Techniques) to the 2012 ICC rules which contains *"examples of case management techniques that can be used by the arbitral tribunal and the parties for controlling time and cost".*

224)

See for example Article 22(1) of the ICC rules (2012): *"The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute".*