Obvezne odredbe u arbitražnim pravilima: granice stranačke autonomije

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Master's thesis / Diplomski rad

2024

Degree Grantor / Ustanova koja je dodijelila akademski / stručni stupanj: **University of Zagreb, Faculty of Law / Sveučilište u Zagrebu, Pravni fakultet**

Permanent link / Trajna poveznica: https://urn.nsk.hr/urn:nbn:hr:199:107210

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MANDATORY PROVISIONS IN THE ARBITRATION RULES: LIMITS OF PARTY AUTONOMY

Master's Thesis

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Zagreb, July 2024

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Summary

The principle of party autonomy is the guiding principle in international commercial arbitration. When choosing how to resolve their dispute, parties often resort to arbitration due to flexibility and time-efficiency it guarantees. Nevertheless, throughout the arbitration practice it has become clear that the autonomy of the parties is not without limits because each arbitral institution demands to protect the quality of its administration. In particular, when choosing an arbitral institution, the parties agree to comply with the already set arbitration rules, provided by that arbitral institution. In turn, the arbitral institution guarantees certain level of quality of arbitral proceedings, achieved through following the carefully composed arbitration rules. Therefore, there is a contractual obligation imposed upon the arbitral institution to ensure effective administration and quality decision-making. Moreover, there is a contractual obligation imposed upon the parties to act in accordance with the agreed arbitration rules by not deviating from them to the extent where such deviation would hinder the arbitral institution's contractual obligation. This paper will focus on the analysis of rationale of limiting the principle of party autonomy in general. Furthermore, it will assess four main arbitral institutions' rules and the mandatory provisions found in each. This paper will, basing its analysis on four main arbitral institutions, demonstrate how the scope of activity of arbitral institution on the one hand, and the autonomy of the parties on the other varies significantly from one set of rules to the other.

Key words: international commercial arbitration; principle of party autonomy; limits of party autonomy; arbitral institution; arbitration rules; contractual obligations.

Sažetak

Načelo stranačke autonomije temeljno je načelo u međunarodnoj trgovačkoj arbitraži. Prilikom odabira načina rješavanja spora, stranke se često izabiru arbitražu zbog fleksibilnosti i vremenske učinkovitosti koju jamči. Ipak, kroz arbitražnu praksu postalo je jasno da autonomija stranaka nije bez granica jer svaka arbitražna institucija zahtjeva zaštitu kvalitete svoje administracije. Naime, pri odabiru arbitražne institucije, stranke su suglasne poštivati već određena arbitražna pravila koja donosi arbitražna institucija u pitanju. Zauzvrat, arbitražna institucija jamči određenu razinu kvalitete arbitražnog postupka koja se postiže poštivanjem već određenih arbitražnih pravila. Upravo je zato ugovorna obveza nametnuta arbitražnoj instituciji da osigura učinkovitu administraciju i kvalitetno donošenje odluka. Štoviše, postoji i ugovorna obveza stranaka da postupaju u skladu sa dogovorenim arbitražnim pravilima, ne odstupajući od istih u mjeri u kojoj bi takvo odstupanje utjecalo na već spomenutu ugovornu obvezu arbitražne institucije. Ovaj rad usmjeren je na analizu opravdanosti ograničenja načela stranačke autonomije. Nadalje, analizirati će pravila četiri najzastupljenije arbitražne institucije i obvezujuće odredbe u svakoj. Ovaj će rad na temelju četiri navedene institucije pokazati kako se opseg djelovanja arbitražne institucije s jedne strane, i stranačke autonomije s druge strane, značajno razlikuje od jednog skupa pravila do drugog.

Ključne riječi: međunarodna trgovačka arbitraža; načelo stranačke autonomije; ograničenja stranačke autonomije; arbitražna institucija; arbitražna pravila; ugovorne obveze.

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1. INTRODUCTION

"An arbitration may be said to be 'owned' by the parties, just as a ship is owned by shipowners. But the ship is under the day-to-day command of the captain, to whom the owners hand control. The owners may dismiss the captain if they wish (and can agree) and hire a replacement, but there will always be someone on board who is in command."[1]

The principle of party autonomy is a well-known institute of international arbitration. Even so, it is the fundamental one. The power of the parties to influence the proceedings is indeed the key difference between court proceedings and arbitration. Therefore, it is safe to say that such autonomy is one of the crucial elements for the parties when choosing arbitration as a means of resolving the dispute at hand. Generally, the parties are considered to be the masters of their arbitration.[2]

However, nothing is limitless. In international arbitration, there is a thin line between the autonomy of the parties and of the arbitral institutions. In fact, such thin line often leads to tensions with respect to determining what is the actual freedom the parties have, when shaping the arbitration proceedings according to their demands. [3] In particular, the arbitral institutions rely on the specific set of rules, provided by that specific institution, which set out the scope of responsibilities given to the arbitral tribunal on the one hand, and the autonomy to the parties on the other. What is more, the arbitral institution also has its own responsibilities, which is the reason why the contractual relationship at hand is characterized as triangular. [4] Therefore, that triangular relationship is part of every institutional arbitration, and it is not hard to imagine the problems which occur when the lines between the responsibilities of each are not expressly defined. Particularly, the parties on the one hand try to cherry-pick provisions which are beneficial for them, while on the other hand the arbitral institutions refuse to administer arbitrations which are not in accordance with their rules.

It is difficult to imagine a scenario where the parties have the absolute freedom to influence the arbitral proceedings, as it would ultimately lead to legal uncertainty. Nevertheless, the real legal uncertainty appears when the parties do not know the extent of the of party autonomy, especially when multiple rules of the arbitral institutions define it differently.

Some scholars argue that the principle of party autonomy should be encouraged to the point of total freedom of the parties, but some assert that it should be subject to restrictions in light of more efficient and certain proceedings. This paper will focus on the actual meaning of party autonomy, and what are the limitations behind that fundamental principle. First, it

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[1] Blackaby Nigel, Partasides Constantine: Redfern and Hunter on International Arbitration, Seventh edition, Oxford, United Kingdom, Oxford University Press, 2023, para 6.03

[2] Schramm Dorothee, Chapter 17, Part II, in: Arrojo Manuel, Arbitration in Switzerland: The Practitioner's Guide (Second Edition), Kluwer Law International, 2018, p.2300

[3] Berger Klaus Peter, Institutional Arbitration: Harmony, Disharmony, and the Party Autonomy Paradox in: Arbitraje: Revista de Arbitraje Comercial y de Inversiones, Kluwer Law International, 2018, p.335

[4] Pryles Michael, Limits to party autonomy in Arbitral Procedure in: Journal of International Arbitration, Kluwer Law International, 2007, p.330

will present a brief introduction of the principle in international arbitration. Second, the focus will be on the tension between the autonomy of the parties and the rules of the institutional arbitration, and whether or not the parties can actually have much influence when the rules are restrictive. Lastly, this paper will analyze some of the most widely recognized arbitral institutions and their rules, in order to ascertain what are the mandatory provisions of each, and how they vary from one arbitral institution to the another.

2. PARTY AUTONOMY IN INTERNATIONAL COMMERCIAL ARBITRATION

2.1. The principle of party autonomy as a fundamental principle of international commercial arbitration

International arbitration gives the parties substantial freedom to impact their own dispute resolution mechanism, largely free of the constraints of national law. Although not always utilized by the parties in the dispute, party autonomy is found at every stage of the arbitral process and is the key difference between international commercial arbitration and the national courts. Nevertheless, it must be noted that frequently, parties do prefer the plain application of the chosen institutional rules.[5]

The increase in preference for arbitration as a way to resolve disputes had grown exponentially. Unlike litigation in national courts, arbitration is considered to be flexible, which is the pivotal reason why the parties choose international arbitration in the first place[6]. It is faster, more confidential, and friendlier in a way that the parties have more freedom to influence the proceedings.[7]

The integral part of every arbitration proceeding is an arbitration agreement, which constitutes an agreement between the parties on how to resolve disputes which may arise or have arisen from their relationship.[8] Pursuant to the guiding principle in international commercial arbitration, the principle of party autonomy, the parties are free to design the arbitral proceedings as they see fit, and the arbitral tribunal must respect it. The power of an arbitration agreement thereby rests its power on the principle of party autonomy.[9] Thus, the parties have the right to shape the proceedings in the arbitration agreement, and that specific agreement reflects the will of the parties.

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[5] Gaillard Emmanuel, Savage John, Fouchard Gaillard Goldman on International Commercial Arbitration, in Emmanuel Gaillard and John Savage (eds), The Hague, Netherlands, Kluwer Law International, 1999, p.39
[6] Livingstone Mia Louise, Party Autonomy in International Commercial Arbitration: Popular Fallacy or Proven Fact? in: Journal of International Arbitration, Kluwer Law International, 2008, p.529
[7] Fagbemi Sunday, The doctrine of party autonomy in international commercial arbitration: myth or reality? in: Journal of Sustainable Development Law and Policy, January 2016, p.223
[8] *Ibid*., p.222
[9] *Ibid*., p. 226

The endorsement of the principle of party autonomy is upheld by the Article 19, paragraph 1 of the UNCITRAL Model Law on International Commercial Arbitration from 1985 with amendments as adopted in 2006 (hereinafter: "the Model Law"), which asserts:

"Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings."[10]

Pursuant to provisions of the Model Law, it seems like the parties are the main drafters of the proceedings, and all other participants of that contractual relationship should respect their demands. However, the drafters of the Model Law did not intend to confer unlimited freedom to the parties.[11] Rather, it is designed to enable a secure framework for the parties which are mostly not from the same legal systems. What is more, drafters of the Model Law recognized that the principle of party autonomy is not limited by constitution of the arbitral tribunal.[12] Thus, it is a continuing right of the parties throughout the proceedings.

Moreover, the significance of the principle of party autonomy is evident from the provisions of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter: "the New York Convention"). In particular, pursuant to Art. V(1)(d), the recognition and enforcement of the award will be refused if the arbitral procedure was not in accordance with the parties' agreement.[13]

Therefore, guaranteeing the autonomy of the parties not only ensures the enforceability of the award but also represents the main objective of the parties when choosing arbitration.

2.2.The conflict of party autonomy and the rules of arbitral institutions

When parties agree to arbitrate under certain arbitration rules, they are considered to have incorporated those rules into their agreement and are therefore bound by them contractually.[14]

As previously acknowledged, although the fundamental objective of international commercial arbitration is the party autonomy, it is not limitless. [15] The parties, when referring to arbitration, have the option to choose to resolve their dispute under the auspices

[10] Article 19 (1) of the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006.
[11] Livingstone Mia Louise, Party Autonomy in International Commercial Arbitration: Popular Fallacy or Proven Fact? in: Journal of International Arbitration, Kluwer Law International, 2008, p.532
[12] Holtzmann Howard M., Neuhaus Joseph, A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary, Kluwer Law International, 1989, P.566
[13] Article V(1)(d) of the New York Convention provides the following reasons for denying the recognition or enforcement of foreign arbitral awards: "The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place".
[14] Born Gary B., International Commercial Arbitration, Third Edition, The Hague, Netherlands, Kluwer Law International, 2021, para 9.03[A]
[15] See: *supra*, p.1

of certain arbitral institution. Arbitral institutions provide a specific set of rules that the parties agree upon when vesting that specific institution with the power to administer the dispute.

The significance of the rules of arbitral institution is widely recognized. In particular, the Article IV(1)(a) of the 1961 European Convention on International Commercial Arbitration (hereinafter: "European Arbitration Convention") provides that:

"The parties to an arbitration agreement shall be free to submit their dispute:

a) to a permanent arbitral institution; in this case, the arbitration proceedings should be held in conformity with the rules of the said institution."[16]

Inevitably, the conflict arises between the authority of the institution and of the parties themselves. On the one hand, there is the contractual authority of the arbitral institution to provide framework of the dispute and organize the proceedings by referring to its set of rules, which are accepted by the parties. On the other hand, there is the authority of the parties to modify those rules according to their demands, pursuant to the principle of party autonomy.[17] Mostly, the conflict will be resolved by the institution itself, which has the authority to refuse to administer the arbitration. In particular, the arbitral institution will refuse to administer the arbitration proceedings where the parties have departed from the rules which are relevant for "the spirit" of those rules, and the reputation of that specific institution.[18] Thus, it is considered that the parties, when choosing a specific arbitral institution to administer the dispute, tacitly limit their autonomy and agree to follow the rules of that institution.

That supervisory role of the arbitral institution is based on the close connection between the institution and its rules.[19] Each arbitral institution provides that certain set of rules and has the authority to determine what is considered to be essential to it. The parties, on the other hand, have the freedom to choose a set of rules to their preference. However, by agreeing to a certain set of rules, it is implied that they accept to respect those essential parts of the chosen rules. Furthermore, the arbitral institution is liable for ensuring that the arbitral procedure is meeting the expectations of the parties. Precisely, the arbitral institution is responsible that the administration of the proceedings follows the rules to which the parties have agreed upon.[20]

There are numerous instances in case law where the parties attempted to circumvent or alter some of the essential rules of certain arbitral institutions. Some of the most famous cases are Insigma Technology Co. Ltd v Alstom Technologies Ltd. and HKL Group C. Ltd. v Rizq

[16] Art. IV(1)(a) of the European Arbitration Convention
[17] Berger Klaus Peter, Institutional Arbitration: Harmony, Disharmony, and the Party Autonomy Paradox in: Arbitraje: Revista de Arbitraje Comercial y de Inversiones, Kluwer Law International, 2018, p.349
[18] *Ibid*., p.350
[19] *Ibid*., p.351
[20] *Ibid*.

International Holdings Pte Ltd. This paper is going to focus on the underlying reasons of each decision and to their common links.

In Insigma Technology Co. Ltd v Alstom Technologies Ltd., the dispute arose over the basis of calculating annual royalties under the License Agreement.[21] The License Agreement provided for arbitration to be resolved by the Singapore International Arbitration Centre (hereinafter: "SIAC") in accordance the Rules of International Chamber of Commerce (hereinafter: "the ICC Rules"). After Alstom referred the dispute to arbitration, Insigma contested that SIAC could administer the arbitration under the ICC Rules. Following the confirmation of SIAC that it could administer the arbitration under the ICC Rules, Insigma appealed against that decision in the High Court, and ultimately, in the Court of Appeal.

Overall, the Court of Appeal concluded that:

1) The parties did not intend to have an ICC institutional arbitration but a hybrid, ad hoc arbitration, administered by the SIAC, applying the ICC Rules.
2) The SIAC, in accordance with the degree of flexibility permitted by the ICC Rules, which respected party autonomy, substituted the various actors specified under the ICC Rules with the proper matching actors in the SIAC to perform their respective functions.[22]

Therefore, the underlying reasoning was that the arbitral tribunals must take effort to give effect to the intention of the parties, as expressed in the arbitration agreement. [23] However, what should be noted is that the Singaporean Courts interpreted this arbitration as an ad hoc one, and not the institutional arbitration.

Furthermore, relying on the decision made in Insigma Technology Co. Ltd v Alstom Technologies Ltd., High Court of Singapore had rendered a decision in HKL Group C. Ltd. v Rizq International Holdings Pte Ltd. [24] In particular, the dispute arose as HKL claimed that Rizq owed it invoices from an agreement for the sale of sand. The agreement contained an arbitration clause which referred the dispute to "the Arbitration Committee at Singapore under the rules of the International Chamber of Commerce".[25]

This case concerns two main issues. Firstly, the parties have agreed to refer the arbitration to an institution which does not exist, namely the Arbitration Committee at Singapore. Secondly, the parties have agreed that the dispute should be resolved, in accordance with the ICC Rules, by an institution that is not The International Chamber of Commerce. What is more, the 2012 revision of the ICC Rules, specifically Art. 1(2) states that:

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[21] Insigma Technology Co. Ltd v Alstom technologies Ltd., Court of Appeal, SGCA, 2 June 2009
[22] Berger Klaus Peter, Institutional Arbitration: Harmony, Disharmony, and the Party Autonomy Paradox in: Arbitraje: Revista de Arbitraje Comercial y de Inversiones, Kluwer Law International, 2018, p.344
[23] Hwang Michael, Insigma Technology Co. v Alstom Technology Ltd., Court of Appeal, [2009] SGCA 24, 2 June 2009, in: A contribution to the ITA Board of Reporters, Kluwer Law International, para 30
[24] HKL Group C. Ltd. v Rizq International Holdings Pte Ltd., SGHCR, 2013
[25] Fry Jason, HKL Group Ltd v. Rizq International Holdings Pte. Ltd. and HKL Group Co. Ltd. v. Rizq International Holdings Pte Ltd. in: Journal of International Arbitration, Kluwer Law International, 2013, p.454

""[…] The [ICC] Court is the only body authorized to administer arbitrations under the [ICC] Rules […]".[26]

Therefore, the problem of conflict arises once more between the party autonomy and the arbitral institutions' specified set of rules.

Nevertheless, the Singaporean High Court ruled that:

1) the phrasing "Committee" could be understood as "Tribunal", in which case the parties drafted a clause that could be read as a standard arbitration clause referring to the ICC arbitration in Singapore, but not to the International Chamber of Commerce.
2) SIAC can administer the arbitration while applying the ICC Rules.[27]

Therefore, the Singaporean High Court held that the parties have intended to have an ad hoc arbitration. [28] In that way, the arbitral tribunal would follow the parties' agreement, and the principle of party autonomy would remain respected. Thus, the amount of conflict between the parties' agreement and the chosen set of rules will define whether the arbitration proceedings will be considered as institutional or ad hoc.

Consequently, those two cases have an important objective in common. In both of these instances, the parties did not manage to change the rules of the arbitral institution, namely the ICC Rules. Pursuant to the ICC Rules, as previously stated, no other body but the International Chamber of Commerce can arbitrate the proceedings. [29] By altering the rules and agreeing to SIAC as the arbitral institution in charge, the parties have started an ad hoc arbitration, and not an institutional one. Therefore, the principle of party autonomy was limited, even though in both cases the arbitral tribunals made an effort to adhere to it.

2.3.Limitations of party autonomy

As previously explained, parties enjoy high level of autonomy to determine how their dispute is going to be resolved. It is well-known that for the parties, the almost maximum of autonomy is what makes the arbitration a very convenient way to resolve their disputes. However, that autonomy is not absolute.

The limitation of party autonomy is based on the parties' presumed will to confer their dispute into the hands of an expert, namely, the chosen arbitral institution. When parties choose certain arbitral institution, it is assumed that they have also accepted the arbitration rules of that institution. Particularly, it is assumed that they have accepted that the mandatory provisions of the rules of that institution will be a restriction of their complete

[26] Art. 1(2) of the ICC Rules
[27] Fry Jason, HKL Group Ltd v. Rizq International Holdings Pte. Ltd. and HKL Group Co. Ltd. v. Rizq International Holdings Pte Ltd. in: Journal of International Arbitration, Kluwer Law International, 2013, p.456
[28] *Ibid*., p.459
[29] See: *supra*, p.6

autonomy to tailor the arbitration proceedings. [30] Therefore, the main limitation of the party autonomy is the contractual relationship between the chosen arbitral institution and the parties themselves.[31]

The arbitral institution, when publishing their arbitration rules, puts out an "permanent offer to contract, aimed at an indeterminate group of persons (those potential litigants operating in the field or fields covered by the institution), but made under fixed conditions".[32] Thus, when the parties decide to choose that institution, and conclude their arbitration agreement with the rules of that institution as procedural rules, they are contractually obligated to ensure that they are not altering the mandatory provisions of those rules.

The logic behind limiting the parties' autonomy with respect to mandatory provisions of the arbitration rules rests on the principle of prohibition of contradictory behavior, also known as venire contra factum proprium[33]. In the event that the parties enter into a contractual relationship with the arbitral institution, fully aware of the mandatory provisions of the arbitration rules of that institution, and nevertheless decide to disregard them, the parties are violating that principle. As in every contractual relationship, there must be legal repercussions for breaching the extent of previously agreed-upon rights and obligations. Every arbitral institution has the tendency to protect their reputation, in order to ensure that each arbitration proceeding taking place under their supervision is respecting the "spirit" of its rules. Even so, it is legitimate that the arbitral institution has expectations that the parties will respect the provisions which that institution considers to be an integral part of their rules because ultimately, those parties have consciously chosen those rules. [34] Therefore, one legal principle is limited, by respecting another one.

Although it is commonly accepted that the principle of party autonomy is not absolute, the degree of limitation varies from one arbitral institution to the another. Certain arbitration rules vest the arbitral institution with more power than usual, in order to ensure faster proceedings with less legal uncertainty. On the other hand, in some arbitral rules the boundaries of party autonomy are very blurred and determined mostly on case-by-case basis.

For instance, the International Chamber of Commerce is an example where a more active role is envisaged for an arbitral institution, in comparison with the other arbitral institutions' rules. In particular, Art. 19 of the ICC Rules determines that:

"The proceedings before the arbitral tribunal shall be governed by the Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may

[30] Berger Klaus Peter, Institutional Arbitration: Harmony, Disharmony, and the Party Autonomy Paradox in: Arbitraje: Revista de Arbitraje Comercial y de Inversiones, Kluwer Law International, 2018, p.351
[31] Gaillard Emmanuel, Savage John, Fouchard Gaillard Goldman on International Commercial Arbitration, in Emmanuel Gaillard and John Savage (eds), The Hague, Netherlands, Kluwer Law International, 1999, p.602
[32] *Ibid*.
[33] Berger Klaus Peter, Institutional Arbitration: Harmony, Disharmony, and the Party Autonomy Paradox in: Arbitraje: Revista de Arbitraje Comercial y de Inversiones, Kluwer Law International, 2018, p.351
[34] *Ibid*.

settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration."[35]

Therefore, the ICC Rules set a clear hierarchy:

1. The ICC Rules;
2. The parties' agreement;
3. Determination of the arbitral tribunal.

Despite the acknowledgement of the principle of party autonomy by mentioning the parties' agreement as relevant, the ICC Rules nevertheless set the boundaries of that autonomy. For a more detailed analysis on the ICC Rules, see *infra*, chapter 3.

On the other hand, the boundaries of the party autonomy are not so clear when it comes to the Rules of London Court of International Arbitration (hereinafter: "the LCIA Rules"). Pursuant to the Art. 14(4) of the LCIA Rules:

"The parties may agree on joint proposals for the conduct of their arbitration for consideration by the Arbitral Tribunal".[36]

What is particularly questionable is the phrasing of that provision, namely, the fact that the parties *may* agree.[37] It is not immediately clear whether the parties' agreement can be refused, or to what extent may the parties shape the proceedings by agreeing on the conduct of their arbitration.[38] Therefore, when it comes to the extent of the supervision of an arbitral institution, this kind of phrasing is not preferred. For a more detailed analysis on the LCIA Rules, see *infra*, chapter 4.

Furthermore, when it comes to phrasing which leaves open the possibility of absolute party autonomy, one should look at the Rules of International Centre for Dispute Resolution (hereinafter: "the ICDR Rules"). In particular, Art. 1(1) of the ICDR Rules provides that:

"[T]he arbitration shall take place in accordance with these Rules as in effect at the date of commencement of the arbitration, subject to modifications that the parties may adopt in writing."[39]

Thus, according to the ICDR Rules, the parties have the right to change the rules provided by that institution, without any reservation. For a more detailed analysis on the ICDR Rules, see *infra*, chapter 6.

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[35] Art. 19 of the ICC Rules

[36] Art. 14(4) of the LCIA Rules

[37] Pryles Michael, Limits to party autonomy in Arbitral Procedure in: Journal of International Arbitration, Kluwer Law International, 2007, p.336

[38] *Ibid*.

[39] Art. 1(1) of the ICDR Rules provides: „Where parties have agreed to arbitrate disputes under these International Arbitration Rules ("Rules"), or have provided for arbitration of an international dispute by either the International Centre for Dispute Resolution ("ICDR"), the international division of the American Arbitration Association ("AAA"), or the AAA without designating particular rules, the arbitration shall take place in accordance with these Rules as in effect at the date of commencement of the arbitration, subject to modifications that the parties may adopt in writing. The ICDR is the Administrator of these Rules."

Even though the parties choose arbitration to be a preferred way to resolve their dispute due to its flexibility and effectiveness, they still prioritize legal certainty and more active role of the arbitral institution. In a study of the School of International Arbitration, Queen Mary University of London, in partnership with White & Case LLP, namely the 2021 International Arbitration Study, very interesting results occurred. [40] In particular, the parties' preferred arbitral institution was the International Chamber of Commerce, voted out by 57% of the data subjects. Notably, party autonomy in the ICC Rules is more limited than compared to other arbitration rules, and the arbitral institution is very active. Despite that limitation, the parties still chose that institution as the leading one. That only proves that it is not the absolute party autonomy that the parties require or even anticipate from the arbitration, but an organized and efficient way to resolve their dispute.

2.4. The role of arbitral tribunals in determining the limitations of party autonomy

Even though the main attraction to the arbitration is the fact that the parties have the freedom to influence on the selection of arbitrators, the arbitral tribunal is still obliged to respect the due process. Arbitrators, like any judicial decision-makers, must ensure that the procedure is carried out impartially and in accordance with the contractually agreed rules.[41]

Arbitration, contrary to litigation, does not include excessive formality, and is less prone to delay and complications.[42] It is a matter of contract, where powers of the arbitrators originate primarily from the parties.

Consequently, the arbitrators are under obligation to respect the parties demands. In particular, they have to respect the contractually agreed objectives. When the parties agree on certain set of rules, they enter into a contractual relationship with that specific institution. Moreover, that specific institution has a reputation to protect by ensuring the quality of the proceedings it provided in its set of rules, which the parties have specifically chosen.

Thus, when determining whether the parties in their agreement departed from the chosen rules, the arbitral tribunal has a responsibility not only towards the parties to respect their demands as much as possible, but also towards the arbitral institution to ensure procedural fairness and guaranteed quality.

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[40] 2021 International Arbitration Survey- Adapting Arbitration to a Changing World, available at: https://www.acerislaw.com/2021-international-arbitration-survey-adapting-arbitration-to-a-changing-world/ ; accessed on: 23 May 2024

[41] Gusy Martin F., Hosking James M., Schwarz Franz T., A Guide to the ICDR Arbitration Rules, Second Edition, Oxford University Press, 2011, p.84

[42] Grenig Jay E., Scanza Rocco M., Case Preparation and Presentation: A Guide for Arbitration Advocates and Arbitrators, Second Edition, Kluwer Law International, 2023, p.2

In the following chapters this paper is going to analyze most prominent arbitral institutions and their set of rules. It will focus on questioning the limits of the principle of party autonomy in each set of rules, and rationale for each limitation.

3. THE ICC RULES

3.1. Generally accepted mandatory provisions of the ICC Rules

The ICC Court protects not only the parties from themselves, but also the arbitration from the potentially disastrous consequences of the parties' derogations from the ICC Rules. Nevertheless, it is still a hard task to draw the line between mandatory and non-mandatory rules of arbitration.[43]

The ICC Rules, by contrast to other prominent arbitration rules, impose an active role of arbitral institution in the arbitration proceedings, and does not contain a provision which seemingly gives out unlimited freedom to the parties.[44] To the contrary, certain provisions of the ICC Rules expressly prohibit possible derogations from the parties. However, the list of mandatory provisions is not a closed one, as the Court of the International Chamber of Commerce can determine mandatory provisions on case-by-case basis (hereinafter:" the ICC Court"). Even though the parties do not know in advance whether their modifications will be accepted by the ICC Court, this case-by-case approach gives the ICC Court the flexibility to determine how that specific modification will influence the parties' dispute at hand.[45] When deciding, it can take into account the nature of the dispute and the specific circumstances of it.

Nevertheless, there are certain general guidelines for the ICC Court when determining whether the particular provision may be deemed mandatory, which can be divided in two categories:

1) Is the provision essential for the fairness, efficacy, and enforceability of arbitration as a means of dispute resolution and,
2) Does that provision constitute an essential and distinctive characteristic of arbitration conducted under the auspices of the International Chamber of Commerce.[46]

The first category concerns general arbitration criteria and majorly focuses on the integrity of the arbitral procedure. Along with that, the second category focuses on the ICC-specific

[43] Smit Robert H., Mandatory ICC Arbitration Rules, in: Aksen Gerald, Böckstiegel Karl-Heinz, Mustill Michael J., Patocchi Paolo Michele, Whitesell Anne Marie, Global Reflections on International Law, Commerce and Dispute Resolution, ICC Publishing, 2005, p. 847
[44] *Ibid*., p. 846
[45] *Ibid*., p. 848
[46] *Ibid*., p. 849

criteria, relevant only for the arbitration administered by the International Chamber of Commerce.[47] This paper is going to focus on the latter.

To ensure that the ICC Court follows thoroughly the process of determination whether certain provision can be considered as ICC-specific, the list of criteria which should be taken into account had been developed throughout the practice. In particular, the ICC-specific criteria are met if:

1) The provision is considered to be an essential and distinctive characteristic of the arbitration conducted under the auspices of the International Chamber of Commerce.
2) The provision is necessary for the ICC Court to perform its administrative functions as agreed by the ICC Rules.
3) The provision is necessary to fix the arbitrators fees, expenses and to ensure that the immunity of arbitrators is intact.

According to the long-standing practice of arbitration administered by the International Chamber of Commerce, four provisions of the ICC Rules are acknowledged as distinctive. In particular, the ICC Court administrating arbitration proceedings, scrutiny of the arbitral awards by the ICC Court, fixed arbitrators' fees and expenses and establishing the Terms of Reference.[48]

3.1.1. An administrative role of the ICC Court

When the parties refer their arbitration to the International Chamber of Commerce, it is often wrongly assumed that the ICC Court will decide on the merits of the case. As a matter of fact, the arbitral tribunal will decide on the merits of the case, which is the reason why its decisions are considered to be jurisdictional, and the ICC Court will render administrative decisions only.[49] Therefore, both the ICC Court and the arbitral tribunal have certain sole responsibilities provided to it by the ICC Rules, to which the parties have agreed to, by choosing that specific set of rules. The intervention of one body in the authority of the other is limited by the rules, and the parties do not have the absolute freedom to alter those responsibilities.[50]

The ICC Court supervises the organization of arbitral proceedings and provides the framework for the arbitration administered under the auspices of the International Chamber of Commerce.[51] It is responsible for ensuring that the administration of the arbitral proceedings is

[47] Smit Robert H., Mandatory ICC Arbitration Rules, in: Aksen Gerald, Böckstiegel Karl-Heinz, Mustill Michael J., Patocchi Paolo Michele, Whitesell Anne Marie, Global Reflections on International Law, Commerce and Dispute Resolution, ICC Publishing, 2005, p. 849
[48] Webster H. Thomas, Bühler W. Michael, Handbook of ICC Arbitration: Commentary and Materials, Fifth edition, United Kingdom, Sweet & Maxwell, 2021, p.34
[49] Dudas Stefan, Regulile de arbitraj ICC: vechea și noua reglementare [ICC Rules of Arbitration: The Old and the New], in: Radu Bogdan Bobei (ed), Revista Română de Arbitraj, Wolters Kluwer Romania, 2012, p.50
[50] Webster H. Thomas, Bühler W. Michael, Handbook of ICC Arbitration: Commentary and Materials, Fifth edition, United Kingdom, Sweet & Maxwell, 2021, p.32
[51] *Ibid*., p. 32

running their course, as it is guaranteed by the rules that the parties have chosen to be the procedural rules of the dispute. As it has been previously stated, the ICC Rules clearly establish the power of the ICC Court to be the only body allowed to administer the arbitral proceedings conducted by the ICC Rules.[52]

The provision ensuring that the ICC Court is the only body allowed to administer the arbitral proceedings conducted by the International Chamber of Commerce was inserted in the 2012 version of the ICC Rules. [53] It was necessary to emphasize the role of the ICC Court because there were instances where the parties tried to circumvent the ICC Rules by not including the ICC Court as the administrative body.[54]

What is more, this authority of the ICC Court is not only provided by the Art. 1(2) of the ICC Rules, but also strengthened out in the Art. 6(2) of the ICC Rules.[55] Such emphasis of the role of the ICC Court is often explained as the ICC Court preventing so called "copycat arbitrations".[56] In particular, this refers to ad hoc arbitrations which are designed to bypass the chosen set of rules, as envisaged by the arbitral institution.[57]

The reasoning behind that was to ensure that the arbitral proceedings are resolved the most effectively. Firstly, the ICC Court provides a flexible and neutral setting. It supervises the proceedings from the beginning to the end, with the main objective of ensuring that the administration is going smoothly, without any damage to the reputation and integrity to the International Chamber of Commerce arbitration. Furthermore, it is the body which is most familiar with the ICC Rules, and any other administrative body would first have to get familiarized with its provisions. Therefore, the ICC Court is the only body which can provide the parties with the arbitration proceedings they have signed up for in the first place and ensure that the ICC Rules are respected.

3.1.2. Establishing the Terms of Reference

One of the hallmarks of the International Chamber of Commerce arbitration is without any doubt the establishment of the Terms of Reference.[58] Article 23 of the ICC Rules deals with the requirement of signing the Terms of Reference.[59]

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[52] See: *supra*, p.6
[53] Webster H. Thomas, Bühler W. Michael, Handbook of ICC Arbitration: Commentary and Materials, Fifth edition, United Kingdom, Sweet & Maxwell, 2021, p.32
[54] See: *supra*, p. 5
[55] Art. 6(2) of the ICC Rules provides: "by agreeing to arbitration under the Rules, the parties have accepted that the arbitration shall be administered by the Court."
[56] Dudas Stefan, Regulile de arbitraj ICC: vechea și noua reglementare [ICC Rules of Arbitration: The Old and the New], in: Radu Bogdan Bobei (ed), Revista Română de Arbitraj, Wolters Kluwer Romania, 2012, p.5
[57] *Ibid*., p.52
[58] Webster H. Thomas, Bühler W. Michael, Handbook of ICC Arbitration: Commentary and Materials, Fifth edition, United Kingdom, Sweet & Maxwell, 2021, p.403
[59] Art. 23(1) of the ICC Rules provides: "As soon as it has received the file from the Secretariat, the arbitral tribunal shall draw up, on the basis of documents or in the presence of the parties and in the light of their most recent submissions, a document defining its Terms of Reference […]"

Signing the Terms of Reference is intended to provide an agreed framework for the dispute. After it has been signed by both parties, it is a document which represents an enforceable agreement between the parties on how they wish to resolve their dispute.[60] This document is also known as the "compromis" between the parties.[61]

The parties have the freedom to shape the arbitral proceedings in the Terms of Reference according to their demands, as long as it is not interfering with the essential characteristics of the ICC Rules. However, it is not forbidden that the parties go beyond the scope of the ICC Rules and agree on certain benefits which are not provided by the ICC Rules. The example which is often found in literature is the option of parties agreeing to a provision on confidentiality, as the ICC Rules do not contain any mentioning of general confidentiality.[62]

Although the signing of the Terms of Reference is vital for the ICC Rules, it is no longer the case that it has to be signed in each arbitration proceeding conducted by the ICC Court. In particular, it changed with the introduction of the 2017 ICC Rules, namely, the Expedited Procedure Provisions. [63] Firstly, the main goal of the Expedited Procedure is to resolve disputes more quickly and efficiently. Secondly, those proceedings are, according to the 2021 ICC Rules, valued up to 3 million US dollars, which therefore classifies them as low value arbitration proceedings. Accordingly, the drafters intended to expedite proceedings which have the already set groundwork to be resolved quicker than usual. Nevertheless, it is still part of every regular arbitration proceeding arbitrated by the ICC Court, and the parties do not have the freedom to circumvent it.

3.1.3. Fixing arbitrators' fees and expenses

The ICC Court has the exclusive power to set the fees for arbitrators, and not the arbitral tribunal. This power of the ICC Court is provided in the Art. 38(1) of the ICC Rules. [64] In doing so, the ICC Court will take into account the rapidity of conducting the proceedings by using its expert knowledge in rendering that decision.[65]

The ICC Court will fix the arbitrators fees and expenses at the end of the arbitration, in order to take into consideration arbitrators' diligence throughout the proceedings. When allocating the fees among the arbitrators, the ICC Court will generally divide it in a way that the president

[60] Webster H. Thomas, Bühler W. Michael, Handbook of ICC Arbitration: Commentary and Materials, Fifth edition, United Kingdom, Sweet & Maxwell, 2021, p.404
[61] *Ibid*.
[62] *Ibid*.
[63] *Ibid*., p.403
[64] Art. 38(1) of the ICC Rules provides: "(1)The costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court, in accordance with the scale in force at the time of the commencement of the arbitration, as well as the fees and expenses of any experts appointed by the arbitral tribunal and the reasonable legal and other costs incurred by the parties for the arbitration."
[65] Webster H. Thomas, Bühler W. Michael, Handbook of ICC Arbitration: Commentary and Materials, Fifth edition, United Kingdom, Sweet & Maxwell, 2021, p. 8

receives between 40% and 50% of the total fees, while each co-arbitrator will receive between 25% and 30% of the total fees.[66]

This specific role of the ICC Court is linked with its responsibility to ensure that the proceedings are conducted efficiently, or more specifically, as it was guaranteed by the ICC Rules. What is more, the ICC Court has a responsibility towards the arbitrators to ensure that the arbitrators' fees and expenses are the ones that were originally provided by the ICC Rules and expected by that arbitrators when accepting to partake in that arbitration proceeding. Therefore, separate agreements between the parties and the arbitral tribunal relating to fixing fees and expenses is prohibited.[67]

3.1.4. Scrutiny of the arbitral awards

One of the essential features of the International Chamber of Commerce arbitration is the scrutiny of the arbitral awards. It is a part of the organizational framework provided by the ICC Court and guaranteed by the ICC Rules. [68]

Pursuant to the ICC Rules, no award, whether it is an interim or a final award, can be rendered by an arbitral tribunal without being scrutinized by the ICC Court.[69] This power of the ICC Court is considered to be a fundamental part of the ICC Rules, and it can be found in the Art. 34 of the ICC Rules. [70]

This role of the ICC Court has often been criticized because it not only delays the proceedings, but also influences the freedom of decision of the arbitral tribunal. [71] Nevertheless, it has been recognized as the essential part of the ICC Rules because it ensures the quality of the decision. In particular, when parties chose the ICC Rules as the procedural rules, they had reasonable expectations of the quality of the proceedings and the decision rendered.

Whole idea of scrutiny is based on avoiding the risk of serious defects which can ultimately jeopardize the enforceability of the award. The ICC Court will question whether the award includes the operative part and gives reasons for that decision, and whether there are typographical or computational errors.[72] However, it is important to note that the ICC Court does not have the authority to change the substance of the decision, but only to draw attention

[66] Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration, 2021, p.25
[67] *Ibid*., p. 26
[68] Webster H. Thomas, Bühler W. Michael, Handbook of ICC Arbitration: Commentary and Materials, Fifth edition, United Kingdom, Sweet & Maxwell, 2021, p. 580
[69] Verbist Herman, Schäfer Erik, Imhoos Cristophe, ICC Arbitration in Practice, Second Revised Edition, Kluwer Law International, 2016, p. 182
[70] Art. 34 of the ICC Rules provides: „ Before signing any award, the arbitral tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance. No award shall be rendered by the arbitral tribunal until it has been approved by the Court as to its form."
[71] Verbist Herman, Schäfer Erik, Imhoos Cristophe, ICC Arbitration in Practice, Second Revised Edition, Kluwer Law International, 2016, p. 182
[72] *Ibid*.

of the arbitral tribunal to some points of the substance. For example, it can point out that there are parts of the decision which are contradictory and could influence the reasonableness of the decision. When doing so, the ICC Court will not indicate what decision should the arbitral tribunal render because it does not have the jurisdictional role.[73]

In the case of non-approval of the ICC Court, the arbitral tribunal will have to resubmit the award after addressing the issues raised by the ICC Court.[74] As for the comments of the ICC Court on the substantive part of the decision, the arbitral tribunal is free to disregard them.[75] However, the practice shows that experienced arbitrators will either consider the suggestions by the ICC Court or address why they decided to disregard them.

3.2. The role of the ICC Court in determining the mandatory provisions of the ICC Rules

There can be no doubt that the parties can alter certain provisions of the ICC Rules. However, as there is no clear line between the mandatory and non-mandatory provisions of the ICC Rules, the ICC Court will play key part and have the final word in determining what are the mandatory provisions of the ICC Rules.[76]

In particular, in case the parties depart from the essential characteristics of the ICC Rules, the ICC Court has the power to refuse to administer that specific arbitration.[77] Acceptance of any modification from the ICC Rules represents a policy question for the ICC Court, as every arbitration proceeding has to live up to the guaranteed administration.[78] This is not only a question of compliance with the guarantee, but also protection of the reputation of that institution.

The decision to refuse to administer the arbitration is often done on a case-by-case basis, depending on the importance of amendments which the parties are trying to implement in their proceedings.[79]

However, even though the ICC Court is vested with such power to ensure that every arbitration proceeding administered by the ICC Court is done as it is agreed between the arbitral institution and the parties, there are certain downsides. For example, the main disadvantage of such

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[73] Verbist Herman, Schäfer Erik, Imhoos Cristophe, ICC Arbitration in Practice, Second Revised Edition, Kluwer Law International, 2016, p.183
[74] Webster H. Thomas, Bühler W. Michael, Handbook of ICC Arbitration: Commentary and Materials, Fifth edition, United Kingdom, Sweet & Maxwell, 2021, p. 587
[75] *Ibid*., p.588
[76] Verbist Herman, Schäfer Erik, Imhoos Cristophe, ICC Arbitration in Practice, Second Revised Edition, Kluwer Law International, 2016, p. 107
[77] Webster H. Thomas, Bühler W. Michael, Handbook of ICC Arbitration: Commentary and Materials, Fifth edition, United Kingdom, Sweet & Maxwell, 2021, p. 34
[78] *Ibid*.
[79] Dudas Stefan, Regulile de arbitraj ICC: vechea și noua reglementare [ICC Rules of Arbitration: The Old and the New], in: Radu Bogdan Bobei (ed), Revista Română de Arbitraj, Wolters Kluwer Romania, 2012, p.51

authority is that ultimately, the parties do not know whether their modifications will be accepted. [80]

One of the most famous examples in case law where the ICC Court considered that the parties departed from the ICC Rules too much and thereby refused to administer that arbitration is the Samsung Electronics Co Ltd v. Michael Jaffe.[81] This case considers insolvency proceedings initiated against company Quimoda for which Mr. Michael Jaffe was the appointed liquidator. In accordance with the applicable German insolvency rules, Mr. Michael Jaffe informed Samsung that it will no longer perform the contract, which subsequently led to Samsung initiating arbitration proceedings before the ICC Court.

However, the problem occurred when the cross-patent license agreement (hereinafter: "Agreement"), the agreement on which the parties' business relationship is based, contained provisions which were derogating from the essential characteristics of the ICC Rules. In particular, Article 9 of the Agreement provided that the appointment of the arbitrators shall not be subject to the ICC confirmation and that the arbitral award shall not be subject the ICC approval.[82] This caused the reaction of the ICC Court, which notified the parties that it would not administer the proceedings unless the parties abandon all the provisions which are deviating from the essential parts of the ICC Rules. As both parties did not agree with such request of the ICC Court, that arbitration was not administered by the ICC Court.

Consequently, even if the principle of party autonomy is the key to every arbitration proceeding, including the ones administered by the ICC Court, there are certain limitations to which the parties must adhere to. Even if there are known hallmarks of the ICC Rules, the ICC Court plays a significant role in determining the limits to party autonomy in each case. Therefore, it is advisable for the parties to comply with the rules they chose. The parties are often not practitioners, and the changes they made can lead to unfavorable results and clauses which are considered as "pathological".[83] In order to avoid such scenarios, the parties are encouraged to advise with the ICC Court before they consider deviating from the ICC Rules.[84]

4. THE LCIA RULES

It is often assumed that the London Court of International Arbitration (hereinafter: "LCIA") is an institution which adopts an approach to administration which is less active than other

[80] Smit Robert H., Mandatory ICC Arbitration Rules, in: Aksen Gerald, Böckstiegel Karl-Heinz, Mustill Michael J., Patocchi Paolo Michele, Whitesell Anne Marie, Global Reflections on International Law, Commerce and Dispute Resolution, ICC Publishing, 2005, p. 848

[81] Samsung Electronics Co Ltd v. Mr. Michael Jaffe, administrator/liquidator of Quimoda AG, Tribunal de Grande Instance of Paris, 22 January 2010

[82] *Ibid*.

[83] Sabharwal Dipen, Chapter 2: The Arbitration Agreement, in: Dushyant Dave, Martin Hunter, et al. (eds), Arbitration in India, Kluwer Law International, 2021 p.29

[84] Smit Robert H., Mandatory ICC Arbitration Rules, in: Aksen Gerald, Böckstiegel Karl-Heinz, Mustill Michael J., Patocchi Paolo Michele, Whitesell Anne Marie, Global Reflections on International Law, Commerce and Dispute Resolution, ICC Publishing, 2005, p. 848

institutions.[85] This approach is often referred as a "light-touch" approach.[86] Unlike the ICC Court, LCIA Court is less interventionist and often more flexible. This approach is based on intervention only when it is necessary, which enhances the role of parties in the arbitration proceedings.

In most cases, parties' specific agreement in the arbitration agreement will take precedence over the already set LCIA Rules. [87] Therefore, the principle of party autonomy has less limitations than, for example, in the ICC Rules. Many provisions of the LCIA Rules indicate that they are default provisions by stating that the parties may agree otherwise. However, even if the provision does not contain such phrasing, it is still generally assumed that the parties may agree on alternative options.[88]

However, there are certain provisions which are considered as mandatory in the LCIA Rules. First, the parties are not allowed to deviate from the LCIA Court's role to appoint the arbitral tribunal. Second, LCIA Court is the only body which can decide on the arbitration costs.[89] It is also important to mention the supervision of the proceedings by the Registrar. [90] It is the part of the LCIA Court which has the role of reviewing the progress of the proceedings as it is always copied in the communication between the parties and the tribunal. Although its functions are informal, it is still a distinguishable part of the LCIA arbitration.

4.1. The LCIA Court's role to appoint arbitrators

Pursuant to Art. 5.7. of the LCIA Rules, the LCIA Court is the only body which can formally appoint arbitrators. [91] This provision is considered as mandatory, and any different agreement by the parties would not be accepted by the LCIA Court.[92]

This provision distinguishes the LCIA Rules from other arbitration rules as it is often the case that the arbitral institution will appoint arbitrators only in the absence of the parties' agreement.[93]

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[85] Scherer Maxi, Richman Lisa, Gerbay Rémy, Arbitrating under the 2020 LCIA Rules: A User's Guide, Kluwer Law International, 2021, p.25
[86] *Ibid*.
[87] Berger Klaus Peter, Institutional Arbitration: Harmony, Disharmony, and the Party Autonomy Paradox in: Arbitraje: Revista de Arbitraje Comercial y de Inversiones, Kluwer Law International, 2018, p.348
[88] Scherer Maxi, Richman Lisa, Gerbay Rémy, Arbitrating under the 2014 LCIA Rules: A User's Guide, Kluwer Law International, 2015, p.37
[89] *Ibid*.
[90] Turner Peter J., Mohtashami Reza, A Guide to the LCIA Arbitration Rules, Oxford University Press, 2009, p.93
[91] Art. 5.7. of the LCIA Rules provides: „ No party or third person may appoint any arbitrator under the Arbitration Agreement: the LCIA Court alone is empowered to appoint arbitrators (albeit taking into account any written agreement or joint nomination by the parties or nomination by the other candidates or arbitrators)."
[92] Scherer Maxi, Richman Lisa, Gerbay Rémy, Arbitrating under the 2020 LCIA Rules: A User's Guide, Kluwer Law International, 2021, p.115
[93] *Ibid*.

The rationale behind such role of the arbitral institution is ensuring that the arbitrators are complying with the criteria which is expected for such prominent institution. For example, the LCIA Court ensures that the candidate has sufficient time, diligence, and knowledge to achieve efficient conduct of the arbitration proceedings.[94] By doing so, the LCIA Court protects the reputation of the arbitral institution. Nevertheless, the LCIA Court had generally in very exceptional cases decided to depart from the parties' selected candidates for arbitrators.[95]

4.2.The LCIA Court's role to decide on the arbitration costs

First and foremost, the LCIA Rules distinguish the arbitration costs, i.e. the fees and expenses of arbitrators and the administrative charges of the LCIA arbitration, and the parties' legal costs.[96]

The LCIA Rules in the Art. 28.1. provide that the LCIA Court, rather than the arbitrators, will determine the costs of the arbitration.[97] The LCIA takes the view that provisions regarding the arbitral costs are of mandatory nature and cannot be departed from. [98]

The rationale behind such authority is based on the specific way that the LCIA Court determines the cost of arbitration. Particularly, the costs of arbitration will not be based on the amount in dispute, but on the actual time spent by the LCIA Court and the arbitrators.[99] Therefore, the only neutral body to decide on the renumeration received will be the LCIA Court, as the way of calculating it is the time basis, and not the already set fee scale.

4.3. Supervision of the proceedings by the Registrar

The Registrar is the head of the LCIA's Secretariat and operates as a body between the parties, arbitrators and the LCIA Court. Its functions are supervised by the LCIA Court.[100]

The Registrar's role is administrative, as it follows the proceedings thoroughly from its beginning to the end. All communications from any party and arbitrators to the LCIA Court are

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[94] Scherer Maxi, Richman Lisa, Gerbay Rémy, Arbitrating under the 2020 LCIA Rules: A User's Guide, Kluwer Law International, 2021, p.120
[95] *Ibid*., p.115
[96] Turner Peter J., Mohtashami Reza, A Guide to the LCIA Arbitration Rules, Oxford University Press, 2009, p.199
[97] Art. 28.1. of the LCIA Rules provides: „ The costs of the arbitration other than the legal or other expenses incurred by the parties themselves (the "Arbitration Costs") shall be determined by the LCIA Court in accordance with the Schedule of Costs. The parties shall be jointly and severally liable to the LCIA and the Arbitral Tribunal for such Arbitration Costs."
[98] Scherer Maxi, Richman Lisa, Gerbay Rémy, Arbitrating under the 2020 LCIA Rules: A User's Guide, Kluwer Law International, 2021, p.374
[99] Turner Peter J., Mohtashami Reza, A Guide to the LCIA Arbitration Rules, Oxford University Press, 2009, p. 200
[100] *Ibid*., p.22

received by the Registrar. It is included in every part of correspondence and is entrusted with keeping records of the case. Therefore, all the basic communication goes through the Registrar and the parties have no direct contact with the LCIA Court. [101] The LCIA Court has the power to delegate other administrative functions to the Registrar, always supervised by the LCIA Court. [102]

The function of the Registrar throughout the arbitration process is a distinguishable part of the LCIA arbitration, and therefore it is important not to discount such role.

5. THE SIAC RULES

The Singapore International Arbitration Centre arbitration (hereinafter: "the SIAC arbitration") is based on party consent. The hallmarks of SIAC arbitration are procedural flexibility and ensuring the application of the principle of party autonomy.[103]

Throughout the history of the SIAC Rules, the SIAC Registrar, part of the SIAC Court, had a very passive role. The parties were expected to shape the proceedings the same way as they would do in the ad hoc arbitration.[104] For example, 1991 SIAC Rules expected from the parties to appoint their arbitrators directly.

Nevertheless, the influence of the ICC Rules was visible already in the 2007 SIAC Rules, as the role of the arbitral institution got more active.[105] For example, the parties were instructed to submit pleadings to the Registrar rather than just serving each other the documents. Furthermore, the SIAC Chairman had the responsibility of appointment, and the arbitral tribunal was required to submit all draft awards to the Registrar for the process of scrutiny.

Therefore, with the influence of the arbitration community, especially the ICC Court, the SIAC Rules developed practice that certain provisions are considered as mandatory. First, the SIAC President alone has the power to formally appoint arbitrators. Second, all draft awards must be submitted to the SIAC Registrar for the process of scrutiny. Finally, the SIAC Registrar will determine tribunal's fees and expenses.

[101] Turner Peter J., Mohtashami Reza, A Guide to the LCIA Arbitration Rules, Oxford University Press, 2009, p.23
[102] *Ibid*.
[103] Savage John, Dunbar Simon, SIAC Arbitration Rules, Rule 1 [Scope of Application and Interpretation], in: Mistelis Loukas A., Concise International Arbitration (Second Edition), Kluwer Law International, 2015, p.766
[104] Choong John, Mangan Mark, Lingard Nicholas, A Guide to the SIAC Arbitration Rules, Second Edition, Oxford University Press, 2018, p.55
[105] *Ibid*.

5.1. The SIAC President formally appoints arbitrators

Parties do not have the power to formally appoint arbitrators, even if they agree to do so in their arbitration agreement.[106] Pursuant to the Art. 9.3. of the SIAC Rules, the SIAC Court, specifically the SIAC President, is the only one which can formally appoint arbitrators. [107]The parties have the right to nominate arbitrators, by selecting candidates which the SIAC Court may take into consideration.

Regardless of the reputation of the SIAC arbitration as very flexible, the principle of party autonomy must have its limits. In this case, the limitations stem from the need of preserving the reputation of the arbitral institution.

When deciding whether it should accept the appointment of arbitrator, the SIAC President will take into consideration the qualifications of arbitrator in question, such as legal expertise, language skills and professional qualifications.[108] By doing so, it ensures that the proceedings are entrusted to the person which has the sufficient time and knowledge to justify the expectations of the parties when choosing that arbitral institution. What is more, the SIAC arbitration emphasizes efficiency by minimizing the options for delay, and with such scrutiny of the arbitrators it verifies that the arbitrator in question has the time to efficiently conduct those proceedings.

5.2. Scrutiny of the awards by the SIAC Registrar

The incorporation of the scrutiny of the awards in the SIAC arbitration was inspired by the similar provision in the ICC Rules.[109] Pursuant to the Art. 32.3., all draft awards must be submitted to the SIAC Registrar.[110]

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[106] Choong John, Mangan Mark, Lingard Nicholas, A Guide to the SIAC Arbitration Rules, Second Edition, Oxford University Press, 2018, p.134

[107] Article 9.3. of the SIAC Rules provides: „In all cases, the arbitrators nominated by the parties, or by any third person including by the arbitrators already appointed, shall be subject to appointment by the President in his discretion."

[108] Choong John, Mangan Mark, Lingard Nicholas, A Guide to the SIAC Arbitration Rules, Second Edition, Oxford University Press, 2018, p. 148

[109] *Ibid*., p.252

[110] Art. 32.3. of the SIAC Rules provides: „Before making any Award, the Tribunal shall submit such Award in draft form to the Registrar. Unless the Registrar extends the period of time or unless otherwise agreed by the parties, the Tribunal shall submit the draft Award to the Registrar not later than 45 days from the date on which the Tribunal declares the proceedings closed. The Registrar may, as soon as practicable, suggest modifications as to the form of the Award and, without affecting the Tribunal's liberty to decide the dispute, draw the Tribunal's attention to points of substance. No Award shall be made by the Tribunal until it has been approved by the Registrar as to its form."

The SIAC Registrar is deemed to scrutinize the award "as soon as possible".[111] It can propose certain changes to the form of the award, draw attention to the errors or ambiguities, or flag the points of substance for which it considers that need to be changed. Moreover, it can point out certain rules of applicable law or the place of enforcement that have to be complied with.

This role of the SIAC Registrar helps to ensure that the awards are of guaranteed quality and comply with the SIAC Rules. What is more, it ensures that the award will be enforceable, and therefore saves time and cost for the parties.

5.3. Determination of tribunal's fees and expenses by the SIAC Registrar

Although the parties can agree on alternative methods of remuneration prior to the constitution of the arbitral tribunal, Article 36.1. provides that the SIAC Registrar determines the tribunal's fees at the stage of conclusion of the arbitral proceedings.[112]

The SIAC Registrar will determine the fees and expenses on ad valorem basis with reference to the value of the claims and with the reference to the Schedule of Fees at the time of the commencement of that arbitration.[113]

Moreover, the SIAC Registrar may allow determination of the additional fee in the "exceptional circumstances", which will be decided on the case-by-case basis. Example often given by the scholars is the situation where the amount in dispute significantly increased in the last weeks before the final hearing.[114]

6. THE ICDR RULES

The International Centre for Dispute Resolution (hereinafter: "the ICDR") is an international division of the American Arbitration Association (hereinafter: "the AAA"). The AAA was founded to guide the parties fairly and efficiently through the arbitration proceedings, while adapting to evolving needs of its users.[115] Given the extensive growth of the international trade

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[111] Choong John, Mangan Mark, Lingard Nicholas, A Guide to the SIAC Arbitration Rules, Second Edition, Oxford University Press, 2018, p.253

[112] Art. 39.1. of the SIAC Rules provides: "The fees of the Tribunal shall be fixed by the Registrar in accordance with the applicable Schedule of Fees or, if applicable, with the method agreed by the parties pursuant to Rule 34.1, and the stage of the proceedings at which the arbitration concluded. In exceptional circumstances, the Registrar may determine that an additional fee over that prescribed in the applicable Schedule of Fees shall be paid."

[113] Choong John, Mangan Mark, Lingard Nicholas, A Guide to the SIAC Arbitration Rules, Second Edition, Oxford University Press, 2018, p.289

[114] *Ibid*., p.290

[115] Gusy Martin F., Hosking James M., Schwarz Franz T., A Guide to the ICDR Arbitration Rules, Second Edition, Oxford University Press, 2011, p.3

in 1980s, there was reciprocity in growth of need for international dispute resolution.[116] In order to provide framework for such disputes, the AAA established the ICDR Rules. Therefore, if the dispute has international character and if the parties determine the ICDR or the AAA as administrating authority, the ICDR Rules will apply. Even if the dispute was not considered as international, the ICDR Rules may be applicable ex post facto. In particular, when a party changed residence after the initiation of the arbitration proceedings, it will cause a change in rules upon which the case is administered.[117]

The ICDR arbitration endorses and protects the principle of party autonomy as a cornerstone of international commercial arbitration. The parties in ICDR arbitration are not bound by the administrative practices and may deviate from them in their arbitration agreement.[118] Even when there is a case of arbitration agreement being "pathological", the ICDR will request a party clarification rather than dismiss whole arbitration proceeding. The ICDR Rules serve as a guiding map for the parties, which are free to adopt variations of the procedures set forth and tailor the proceedings according to their demands.[119]

Therefore, the full control of the arbitration proceedings administrated by the ICDR Rules is in the hands of the parties. The length of parties' freedom to influence the proceedings is visible in the Art. 12 of the ICDR Rules, which can be interpreted as permitting the parties to agree on an even number of arbitrators for the arbitral tribunal.[120]

When choosing ICDR Rules, the parties are deemed to accept distribution of responsibilities, specifically the ones envisaged for the administrative body. In particular, ICDR assigns a case administrator for each arbitration which coordinates the logistics and remains involved throughout the proceedings.[121] Certain responsibilities envisaged for the case administration will be appointment of an emergency arbitrator, conducting an administrative conference, arbitrator selection and challenge procedures, logistical facilitation of the arbitral process and finally, review of the tribunal's award. It is important to note that the review of the award is significantly more limited than the one conducted by the ICC Court, as it only concerns the typographical, computation and clerical errors, and reviewing the form of the award.[122]

Consequently, except for the common responsibilities of the administrative body which are found in all institutional arbitration rules, there are no limits to party autonomy. The only limits to party autonomy in the ICDR arbitration are the mandatory provisions of the law of the seat.[123]

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[116] Gusy Martin F., Hosking James M., Schwarz Franz T., A Guide to the ICDR Arbitration Rules, Second Edition, Oxford University Press, 2011, p.8
[117] *Ibid*., p.22
[118] *Ibid*., V
[119] *Ibid*.
[120] Art. 12 of the ICDR Rules provides: "If the parties have not agreed on the number of arbitrators, one arbitrator shall be appointed unless the Administrator determines that three arbitrators are appropriate because of the size, complexity, or other circumstances of the case."; See also: Gusy Martin F., Hosking James M., Schwarz Franz T., A Guide to the ICDR Arbitration Rules, Second Edition, Oxford University Press, 2011, p.56
[121] Gusy Martin F., Hosking James M., Schwarz Franz T., A Guide to the ICDR Arbitration Rules, Second Edition, Oxford University Press, 2011, p.25
[122] Gusy Martin F., Hosking James M., Schwarz Franz T., A Guide to the ICDR Arbitration Rules, Second Edition, Oxford University Press, 2011, p.29
[123] *Ibid*., p.140

It is known to override the parties' agreement, in order to protect the enforceability of the award. Thus, it limits the arbitrators' and parties' discretion.

The ICDR arbitration do not contain a rule which directs the tribunal and the institution to act in accordance with the "spirit of the rules" when it comes to their interpretation.[124] Nevertheless, it is advised that the arbitrators consult with the ICDR, and in that way respect the basic principles guiding those rules.

Compared to the ICC Rules, which determination to not allow the parties to deviate from its essential characteristics is analyzed first in this paper, the ICDR Rules' flexibility is scrutinized last. This analysis best demonstrates the ever-changing scale of parties' autonomy throughout the proceedings in international arbitration.

7. CONCLUSION

There is no absolute party autonomy. Although it is the main objective when deciding between the litigation and arbitration, party autonomy has certain limitations. Throughout the analysis of arbitral institutions, it has become clear that the rules are purposely defined as such, and every deviation from those rules has to be justified.

Every institution guarantees quality of the proceedings it administrates. When choosing certain arbitration rules, the parties are entering a contractual relationship with the arbitral institution. Therefore, even though arbitration is a more flexible way of resolving a dispute, there are certain rights and obligations on both sides of that contractual relationship.

When determining the limits of party autonomy, the obligation on the side of the arbitral institution is to ensure that the arbitration rules, to which the parties have agreed to, are respected. Accordingly, in every arbitration procedure there are legitimate expectations from both the parties and the arbitral institution. Those expectations emerge from the agreement, established at the beginning of the proceedings. Because of that, the arbitral institutions are not prone to allowing the parties' agreement to depart from the provisions which are considered as essential to that institution. Moreover, that is the reason why the essential parts of arbitration rules are always connected to the responsibilities of the arbitral institution in question. Whether it is the power of scrutinizing the award, or appointment of an arbitrator, the provisions which are considered as essential characteristics are protected in order to safeguard the overall arbitral process. Deviating from those provisions would inevitably create a risk of changing the way that the arbitral institution operates, and thereby, influence the reputation of arbitral institution.

Therefore, the principle of party autonomy is purposely limited because allowing the parties the absolute freedom would lead to abuse of law and the arbitration process.[125] What is more,

[124] Gusy Martin F., Hosking James M., Schwarz Franz T., A Guide to the ICDR Arbitration Rules, Second Edition, Oxford University Press, 2011, p.297

[125] Fagbemi Sunday, The doctrine of party autonomy in international commercial arbitration: myth or reality? in: Journal of Sustainable Development Law and Policy, January 2016, p.244

the absolute freedom is not what the parties expect, nor choose, as their preferred way to resolve the dispute is to refer it to the arbitral institution with an active role.

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