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The Legal Relationship between the Parties and the Arbitral Institution

I Introduction

Arbitration is generally defined as ‘a process by which parties consensually submit a dispute to a non-governmental decision-maker, selected by or for the parties, to render a binding decision resolving a dispute in accordance with neutral, adjudication procedures affording the parties an opportunity to be heard.’¹ Based on this definition, arbitration appears to be a triangular construction, involving at least two opposing parties (claimant and respondent) and a decision-maker (the arbitral tribunal). However, in many – if not most – of the cases, there is a further entity which plays a decisive role in the conduct of arbitration: the arbitral institution, the basic function of which is the administration of arbitral proceedings. In addition to its administrative functions, arbitral institutions sometimes act as adjudicators (decision-makers). This is especially the case if there is a dispute between the parties concerning certain procedural or organisational issues (e.g. whether an arbitrator should or should not be removed for lack of independence or impartiality).

The legal nature of arbitration is a controversial issue. Whereas some authors state that – with regard to its very basis, the parties’ mutual consent – arbitration is clearly of a contractual nature, others put the emphasis on the procedural characteristics, given that, as shown by the above definition, arbitration is a process – a substitute for state court litigation – aimed at the resolution of the parties’ dispute.² The same controversy exists in the context of the arbitration agreement. The legal nature of the relationship between the parties and the arbitral institution is less controversial: it is generally regarded as a contract. However, in other respects, the relationship between the parties and the arbitral institution has not been given much attention either in the

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¹ See Gary B. Born, *International Commercial Arbitration* (Kluwer Law International 2009) 217.

² See Peter Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit* (2nd edn, Mohr Siebeck 1989, Tübingen) 28ff.

literature or in case law. This is somewhat surprising, since the interactions between the parties and the arbitral institution may necessarily produce situations that can only be resolved on the basis of a clear understanding of the features of the relationship between the parties and the institution (e.g. disputes on liability issues or on overcharged administration fees).

In this article, I undertake to provide an in-depth analysis of the legal relationship between the parties and the arbitral institution. As an introductory note, I will first summarise the basic characteristics and the most fundamental differences between ad hoc and institutional arbitration (I). I will then turn to the legal nature and the qualification of the relationship (II, III). After identifying the contracting parties, I will look into the formation of the contract between the parties and the arbitral institution (IV). This is a very intricate issue, which has raised some attention in the literature but remained to a large extent unsettled. I will conclude my analysis with the role of the institution's pre-fabricated arbitration rules (VII), followed by a brief summary of the contents of the contract between the parties and the institution (VIII). The ultimate purpose of the analysis is to find an answer to the question of whether the arbitral institution has a duty to accept the parties' case if the parties agreed to arbitrate under the institution's rules and, if so, on what basis.

For the purposes of this article, I have reviewed a number of arbitration laws and rules. My findings are based, amongst others, on the UNCITRAL Model Law,³ the English Arbitration Act,⁴ the German Code of Civil Procedure⁵ and the Hungarian Arbitration Act.⁶ In addition to these arbitration laws, I have examined the arbitration rules of the following institutions: the Court of International Arbitration of the International Chamber of Commerce (hereinafter: ICC Court or ICC, respectively),⁷ the London Court of International Arbitration (hereinafter: LCIA), the German Institution of Arbitration (*Deutsche Institution für Schiedsgerichtsbarkeit*; hereinafter: DIS), the Vienna International Arbitration Centre (hereinafter: VIAC), and the Arbitration Court attached to the Hungarian Chamber of Commerce and Industry (hereinafter: the HCCI Arbitration Court and the HCCI, respectively).⁸

³ UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006.

⁴ English Arbitration Act 1996, 1996 CHAPTER 23 (hereinafter: EAA).

⁵ Code of Civil Procedure (*Zivilprozessordnung; ZPO*) as promulgated on 5 December 2005 [BGBl. (*Bundesgesetzblatt*, Federal Law Gazette) I p. 3202; 2006 I 431; 2007 I 1781], last amended by art 3 of the Act dated 24 September 2009 (BGBl. I 3145) (hereinafter: GCCP).

⁶ 1994. évi LXXI. törvény a választottbíráskodásról (Act LXXI of 1994 on Arbitration; hereinafter: HAA).

⁷ All references made in this article to the ICC Rules are references to the new ICC Rules, effective as of 1 January 2012. Accordingly, the ICC Rules are hereinafter referred to as the ICC Rules 2012.

⁸ The rules of these institutions are accordingly referred to as the ICC Rules 2012, the LCIA Rules, the DIS Rules, the Vienna Rules, and the HCCI Rules.

II Ad hoc versus Institutional Arbitration

Arbitration, whether domestic or international, has two basic forms: ad hoc and institutional arbitration. Under the principle of party autonomy, which is the guiding principle of arbitration,⁹ the parties are free to refer disputes to arbitration rather than litigation (i.e. state courts), and, once they have opted for arbitration, they can freely decide between ad hoc and institutional arbitration. Why do parties decide for the one rather than the other? This is a question of preferences. In comparison to state court litigation, the parties' broad control over the proceedings is held to be one of the greatest advantages of arbitration.¹⁰ However, the extent and the scope of this control might significantly differ depending on whether the parties submit their dispute to ad hoc or institutional arbitration.

'Ad hoc arbitration is where the arbitration mechanism is established specifically for the particular agreement or dispute.'¹¹ This sort of arbitration offers the parties a great deal of flexibility and 'complete control of every aspect of the procedure to be followed'.¹² However, as a result of the enhanced role of party control, ad hoc arbitration strongly depends on the parties' willingness to co-operate.¹³ If one party is trying to obstruct the proceedings (e.g. fails to appoint an arbitrator or challenges the independence or impartiality of an arbitrator), the solution of the deadlock situation usually requires the intervention of a state court. Accordingly, the effectiveness of ad hoc arbitration is strongly dependent on 'an adequate judicial system at the place of arbitration,' which provides proper and prompt assistance, if needed.¹⁴ Furthermore, in ad hoc arbitration, it might be difficult to establish the procedural rules. If the parties do not want, or are not able, to agree upon the procedures, the default rules of the law of the arbitral seat are always available. However, those rules are usually very general in their terms and need to be supplemented by more detailed rules. As a result, the arbitral tribunal will have a decisive role in the determination of procedural matters, which makes the arbitration somewhat unpredictable.¹⁵

In comparison, '[i]nstitutional arbitration is where parties submit their disputes to an arbitration procedure, which is conducted under the auspices of or administered or directed by an existing

⁹ See Nigel Blackaby, Constantine Partasides, Alan Redfern, J. Martin H. Hunter, *Redfern and Hunter on International Arbitration* (5th edn, Oxford University Press 2009, Oxford) 365, para 6.08.

¹⁰ Varga István, *Beweiserhebung in transatlantischen Schiedsverfahren. Eine Suche nach Kompromissen zwischen deutscher und US-amerikanischer Beweisrechtstradition* (Nomos, Baden-Baden / CH Beck, München 2006) 35.

¹¹ Julian M. Lew, Loukas A. Mistelis, Stefan Michael Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 32, para 3-5.

¹² Julian D.M. Lew, *Applicable Law in International Commercial Arbitration. a Study in Commercial Arbitration Awards* (Oceana Publications 1978, New York) 33, para 62.

¹³ See Blackaby, Partasides and others (n 9) 53-54, paras 1.155-1.157.

¹⁴ See Frank-Bernd Weigand, *Practitioner's Handbook on International Commercial Arbitration* (2nd edn, Oxford University Press 2009, Oxford) 65-66, para 1.178.

¹⁵ See Michael W. Bühler, Thomas H. Webster, *Handbook of ICC Arbitration. Commentary, Precedents, Materials* (5th edn, Sweet & Maxwell 2005, London) 198, para 15-6.

institution'.¹⁶ One of the biggest advantages of institutional arbitration is that, by opting for an arbitral institution, a whole set of pre-fabricated rules is automatically incorporated into the parties' arbitration agreement.¹⁷ This means that the parties do not need to agree upon each and every procedural detail. In addition, arbitral institutions, being themselves business organisations and determined to further the resolution of disputes between business organisations, attach great importance to efficiency. Accordingly, institutional rules are designed to provide for a solution of all situations that might jeopardise the efficiency of the arbitral proceedings. This means situations where the intervention of a third party is necessary to break a deadlock in the procedure: if one party fails to appoint an arbitrator, the institution will appoint the arbitrator for that party; if one party files a challenge to an arbitrator, the institution will decide whether or not to grant that challenge, etc.¹⁸ Thanks to these institutional mechanisms, parties do not necessarily need to resort to a state court for assistance. Besides the pre-fabricated arbitration rules, established and regularly revised by experienced practitioners, arbitral institutions offer the administrative services of a well-trained staff. This staff 'helps to run the proceedings as smoothly as possible'¹⁹ and, through a wide range of services (e.g. appointment and removal of arbitrators, scrutiny of the award), assures the quality of the arbitration and the enforceability of the award. Hence, institutional arbitration is more predictable and usually more efficient than ad hoc arbitration.²⁰

Efficiency, predictability and quality have their price, though, both in a literal and in a metaphorical sense. Even though there are significant differences between the pricing policies of arbitral institutions,²¹ institutional arbitration is necessarily more expensive than *ad hoc* arbitration. An institution will always charge a fee for its administrative services in addition to the remuneration of arbitrators. Furthermore, efficiency and predictability require fixed rules and significant powers of the institution which may be applied against the parties' common intentions, if necessary. Institutional arbitration is therefore less flexible and more exposed to the danger of turning into 'bureaucratic machinery'.²² In extreme cases, institutional arbitration may resemble state court litigation rather than the prototype of arbitration (ad hoc arbitration with one arbitrator, designed for one single dispute).²³ If one takes a look at the Rules of Proceedings of the HCCI Arbitration Court, he will find a rather detailed set of regulations, which has not only been inspired by the

¹⁶ Lew, Mistelis, Kröll (n 11) 32, para 3-6.

¹⁷ See Blackaby, Partasides and others (n 9) 55-56, paras 1.161-1.162.

¹⁸ See Jens-Peter Lachmann, *Handbuch für die Schiedsgerichtspraxis* (3rd edn, Verlag Dr. Otto Schmidt 2008, Köln) 120, para 419.

¹⁹ Weigand (n 14) 67, para 1.180.

²⁰ See Born (n 1) 151.

²¹ E.g. the LCIA applies hourly rates (see the actual Schedule of Arbitration Costs of the LCIA, effective as of 8 July 2011, available at: <http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Costs.aspx> accessed 10 December 2012) while the ICC calculates the administrative expenses and the arbitrators' fee on the basis of the value in dispute (see Appendix III – Arbitration Costs and Fees of the ICC Rules 2012).

²² Weigand (n 14) 67, para 1.181.

²³ See Ujlaki László, 'Az állandó választottbírótság rendhagyó jegyei' [1997] 52 (2) *Jogtudományi Közlöny*, 79-83, 79.

UNCITRAL Arbitration Rules²⁴ but, at several points, also by the Hungarian Code of Civil Procedure.²⁵ At first sight, the ICC Rules are less detailed and generally held to ‘provide little more than a framework for the conduct of the proceedings.’²⁶ Nevertheless, how the ICC Court administers arbitral proceedings is, in comparison to other institutional arbitrations (e.g. LCIA or DIS arbitration), more bureaucratic and formalised. This follows from the fact that ICC arbitration is not merely administered but even supervised by the institution.²⁷

All in all, both ad hoc and institutional arbitration have their benefits and drawbacks, and the features of institutional arbitration strongly depend on which institution the parties have selected. It is, therefore, a matter of taste which type of arbitration and which institution the parties find the most attractive. While ad hoc arbitration is more flexible and gives more room for party autonomy, institutional arbitration is more predictable, convenient and efficient. It is up to the parties to make their choice. However, once they have made their choice, they will have to live with the consequences of their decision.

III The Contractual Nature of the Relationship between the Parties and the Arbitral Institution

The question of the legal nature of the relationship between the parties and the institution is often raised in the context of liability issues.²⁸ Indeed, one of the most important implications of the

²⁴ See Komáromi Péter, ‘A választottbíróóság Eljárási Szabályzata és az UNCITRAL Arbitration Rules kapcsolata’ in *A Választottbíróóság hatvan éve 1949-2009. a Magyar Kereskedelmi és Iparkamara mellett szervezett Állandó Választottbíróóság fennállásának 60. évfordulója alkalmából 2009. november 19-20-án megtartott konferencia előadásai* (Magyar Kereskedelmi és Iparkamara 2009, Budapest) 29-35, 32ff and Szász Iván, ‘A kamarai választottbíróóság a nemzetközi választottbíróóságok rendszerében’ in *Választottbíróóság hatvan éve 1949-2009. a Magyar Kereskedelmi és Iparkamara mellett szervezett Állandó Választottbíróóság fennállásának 60. évfordulója alkalmából 2009. november 19-20-án megtartott konferencia előadásai* (Magyar Kereskedelmi és Iparkamara 2009, Budapest) 65-74, 69.

²⁵ See, for instance, art 30 of the HCCI Rules [‘Change in the Person of the Parties, Interpleading in the Proceedings’] *versus* s 61-62 of Act III of 1952 on the Code of Civil Procedure (hereinafter: HCCP). See also Csehi referring to the procedural provisions of the HCCI Rules as ‘appearing in international comparison overly detailed and building on the principles of the procedural law of the continental, Germanic legal system’; Csehi Zoltán, ‘A nemzetközi kereskedelmi választottbíróóság eljárására alkalmazandó szabályok meghatározása, [1995] 42 (7) Magyar Jog, 431-448, 442.

²⁶ Yves Derains, Eric A. Schwartz, *Guide to the ICC Rules of Arbitration* (2nd edn, Kluwer Law International 2005) 224. See also Born (n 1) 156.

²⁷ See W. Laurence Craig, William W. Park, Jan Paulsson, *International Chamber of Commerce Arbitration* (3rd edn, Oceana Publications 2000, New York) 41-42; Bühler, Webster (n 15) 3-4, paras 0-8–0-12 and 11, para 1-1.

²⁸ See Christian Hausmaninger, ‘ZPO § 594’ in Hans W. Fasching (ed), *Kommentar zu den Zivilprozessgesetzen, §§ 577 bis 618 ZPO* (2nd edn, Manz 2007, Vienna) 459, para 129. Most institutional rules contain disclaimer clauses granting (partial) immunity to the institution. See s 44.2 DIS Rules; art 56 HCCI Rules; art 40 ICC Rules; art 31.1 LCIA Rules; art 8 Vienna Rules.

qualification of the relationship as a contract is the application of the general rules of contractual liability to any misconduct by the institution.²⁹

For the existence of a legally binding contract, civil law systems require the parties' mutual consent.³⁰ Under the common law doctrine, the essential elements of a contract are mutual consent and consideration.³¹ Mutual consent means the concurrence of the parties' wills, reached through the express or implied declaration of an offer and of a corresponding acceptance. 'A valuable consideration, in the sense of the law, may consist either of some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other'.³²

Even though there is some ambiguity as to what constitutes an offer and an acceptance between the parties and the institution, the legal relationship between them is generally considered to be of a contractual nature.³³ It is hardly deniable that there is some kind of consensus (mutual consent) between the parties and the institution, which is directed at the provision of administrative services in aid of the arbitral proceedings. Even the common law requirement for consideration is met: the institution undertakes to administer the arbitration between the parties, and the parties enter into the obligation to pay an administration fee to the institution.³⁴ Put differently, each side promises to give the other side something of value, that is, a 'valuable consideration'.

Nevertheless, the qualification of the legal relationship between the parties and the institution is, even at this very general level (contract or not?), not without any controversy. In the Hungarian literature, there is a view according to which the relationship between the arbitral institution and

²⁹ See Blackaby, Partasides and others (n 9) 332-333, paras 5.61-5.64; Pierre A. Karrer, 'Responsibility of Arbitrators and Arbitral Institutions' in Laurence W. Newman, Richard D. Hill (eds), *The Leading Arbitrators' Guide to International Arbitration* (Juris Publishing 2004, New York, 479-493), 492-493; Franz T. Schwarz, Christian W. Konrad, *The Vienna Rules: a Commentary on International Arbitration in Austria* (Kluwer Law International 2009) 189-192, paras 8-028-8-036; Emmanuel Gaillard, John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 602-604, paras 1109-1110.

³⁰ See Jürgen Ellenberger, 'Introduction to § 145' in *Palandt, Bürgerliches Gesetzbuch, Beck'sche Kurz-Kommentare, Vol. 7* (70th edn, CH Beck 2011, München) 157, para 1; Ernst A. Kramer, 'Introduction to § 145', in Franz J. Säcker (ed), *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Vol. I* (5th edn, CH Beck 2006, München) (beck-online).

³¹ See Rainer Wörlen, *Introduction to English Civil Law for German-Speaking Lawyers and Law Students, Vol. 1* (4th edn, Alpmann und Schmidt Juristische Lehrgänge 2007, Münster) 125; Alexander Dörrbecker, Oliver Rothe, *Introduction to the US-American Legal System for German-Speaking Lawyers and Law Students, Vol. 1* (2nd edn, Alpmann und Schmidt Juristische Lehrgänge 2005, Münster) 143.

³² *Currie v. Misa* (1875) LR 10 Ex 153 (Exchequer Chamber); (1875-76) LR 1 App Cas 554 (House of Lords).

³³ See Schlosser (n 2) 382, para 498; Blackaby, Partasides and others (n 9) 332, para 5.61. See also, in respect of the ICC, Joachim Kuckenburg, 'Vertragliche Beziehungen zwischen ICC, Parteien und Schiedsrichter' in *DIS-Materialien Band I*, 1997, 78-102, 80ff; Jesús Remón Peñalver, Virginia Allan, 'International Arbitration as an Analogue to the International Civil Society' in M. Á. Fernández-Ballesteros, David Arias (eds), *Liber Amicorum Bernardo Cremades* (La Ley 2010) 1013-1024, 1019; and, in respect of the VIAC, Schwarz, Konrad (n 29) 9, para 1-021.

³⁴ See Jörg Risse, 'Schiedsklausel (institutionengebunden), Anmerkungen' in Michael Hoffmann-Becking, Peter Rawert (eds), *Beck'sches Formularbuch. Bürgerliches, Handels- und Wirtschaftsrecht* (10th edn, Verlag CH Beck 2010, München) (beck-online).

the parties is not a contract.³⁵ The author, László Ujlaki, points out that the relationship between adjudicative bodies (courts and other similar entities, including arbitral institutions) and parties is not regarded as a contract governed by private (civil) law anywhere in the world but as a legal relationship governed by (civil) procedural law and is, therefore, of public law nature.³⁶ Although his statement seems to have a universal character, claiming to apply to the whole world, Ujlaki bases his view on the legal background of the HCCI Arbitration Court. This must be kept in mind, since the HCCI Arbitration Court and its legal background (the Hungarian legislation on arbitral institutions) have some features not found in other institutions and jurisdictions.

The HCCI, being an economic chamber (*gazdasági kamara*) under Hungarian law, is a public corporation (*köztestület*): a self-governing, autonomous organisation with registered membership, similar to an association, the establishment of which is ordered by law.³⁷ Public corporations, hence economic chambers and the HCCI, are entrusted with public tasks and operate for public purposes. Pursuant to section 2 para 1 of the Hungarian Arbitration Act (HAA), economic chambers have exclusive right to establish arbitral institutions within the territory of Hungary, unless otherwise provided for by law. This means that, in Hungary, arbitral institutions may be established only if there is an explicit authorisation by law to that effect. From these legal provisions, it follows that the Hungarian State regards the operation of arbitral institutions as a public task that would otherwise be incumbent on the State.³⁸ For this reason Ujlaki emphasises that the arbitration-related activity of the HCCI and, accordingly, the adoption and modification of the HCCI Rules are based on an authorisation by law and carried out by the HCCI within the autonomy it enjoys as a public corporation. Against this background, it is not surprising that he arrives at the conclusion that the HCCI's activity and its relationship with the parties are not of a private (contractual) but of a public law nature.³⁹

In my view, supported by the following considerations, these circumstances do not alter the fact that there is a contract between the parties and the arbitral institution, including the HCCI Arbitration Court.

First of all, the contract as a legal concept does not only exist in private law but also in public law. Therefore, even if the relationship had a public law nature, this would not exclude its qualification as a contract. There are also mixed contracts consisting of elements governed by different fields of law. One of the best examples is the arbitration agreement, which is composed of procedural and substantive (contractual) elements.⁴⁰

³⁵ See Ujlaki (n 23) 80ff.

³⁶ See *ibid*, 81.

³⁷ See 1959. évi IV. törvény a Polgári Törvénykönyvről [Act IV of 1959 on the Civil Code of Hungary (hereinafter: HCC)] s 65 paras 1-2 and 1999. évi CXXI. törvény a gazdasági kamarákról [Act CXXI of 1999 on the Economic Chambers (hereinafter: Chambers Act)] s 3 para 1.

³⁸ This is confirmed by the Preamble of the Chambers Act, which provides that economic chambers shall pursue public tasks related to the economic sector in order to decrease the presence of the State in that sector.

³⁹ See Ujlaki (n 23) 80-82.

⁴⁰ See Lew, Mistelis, Kröll (n 11) 100, para 6-2.

Second, arbitration is a private form of dispute resolution. One of its main features is the equal status of all participants: none of them is in any way superordinate to the others. Not even the arbitral tribunal has coercive powers over the parties, even though the tribunal renders decisions binding upon the parties. Why would and should the arbitral institution, the administrative function of which is definitely subordinate to the adjudicatory function of the tribunal, have such powers and a superordinate ('public law') position over the parties?

Third, from the public law status of the HCCI (a public corporation performing public tasks), it does not follow that the HCCI can only enter into legal relationships governed by public law. The HCCI has legal personality under private law as well. In each case where it does not exercise public authority, the legal relationships triggered by its activity are of a private law and typically contractual nature. The performance of public tasks, hence the administration of arbitral proceedings, is not equal to the exercise of public authority. For instance, in the case of a company operating public utilities, no one would think that the relationship between the consumer and the company is not a contract. Public utility contracts are governed by private law, subject to certain limitations of public law nature that are imposed on the service providers in the public interest. However, these limitations do not alter the private law nature of the relationship.

Finally, as can be seen in other jurisdictions, the operation of arbitral institutions is not necessarily a public task incumbent on the State. Quite the contrary: the only public task incumbent on the State is the maintenance of a state court system and the exercise of a very limited judicial control over the arbitration as such, whether ad hoc or institutional. Arbitration is aimed at providing an alternative to the proceedings of state courts by establishing a system of private adjudication. In order for arbitration to be equivalent to state court proceedings, there is, indeed, a need for action by the State: the arbitral proceedings and the award must be recognised as having the same effect as the proceedings and judgments of state courts. However, the rest (i.e. the organisation of arbitration and its institutionalisation) should be left to the parties and civil society. That is what follows from the spirit and purpose of arbitration as an alternative *and* private dispute resolution method.

IV The Qualification of the Contract between the Parties and the Arbitral Institution

If the legal relationship between the parties and the arbitral institution does qualify as a contract, the first challenge we are faced with is the qualification of the contract for choice-of-law purposes. Once we have found the (national) law governing the contract, which statutory rules of that law are directly applicable to the contract is a further question.

1 Qualification to Determine the Law Governing the Contract

In order to find the law governing the contract between the parties and the institution (hereinafter also referred to as the institution's contract), the contract must be further classified. This is

especially the case under article 4 para 1 Rome I Regulation.⁴¹ Article 4 para 1 determines the law applicable in the absence of the parties' choice of law to particular types of contracts. If a contract does not fit into any of the categories listed in article 4 para 1, or falls within several categories, it is governed by the law of the country where the party required to effect (i.e. fulfil) the characteristic performance of the contract has his habitual residence [see article 4 para 2].

Thanks to the very broad language of article 4 para 1 item b ('a contract for the provision of services'), the law applicable to the institution's contract can easily be determined, without having to analyse the nature of the services rendered by the institution or to resort to article 4 para 2. The contract is clearly 'a contract for the provision of services', with the arbitral institution being the service provider. Accordingly, pursuant to article 4 para 1 item b Rome I Regulation, the institution's contract is governed by the law of the state where the institution is located,⁴² unless there is another country to which the contract is manifestly more closely connected.⁴³

There is only one question left: is the Rome I Regulation applicable to the institution's contract?⁴⁴ Pursuant to article 1 para 2 item e, arbitration agreements and choice-of-court agreements are excluded from the scope of the Regulation. The contract between the parties and the arbitral institution is neither an arbitration agreement nor a choice-of-court agreement. These agreements are excluded from the scope of the Regulation because they are already governed by international conventions and are a matter of international civil procedure rather than a question of the conflict of laws of contracts. Accordingly, the exclusion of these agreements from the scope of the Regulation is warranted by their mixed nature (the close link between procedural and contractual issues).⁴⁵

The above-cited arguments are specifically designed for jurisdiction clauses and are not applicable to the contract between the parties and the arbitral institution. This contract is nothing more than a contract for the provision of services: a contract primarily governed by substantive (contract) law, which has a procedural element only through its indirect implications on the arbitral proceedings.⁴⁶ Hence, there is nothing to prevent the application of the Rome I Regulation to the institution's contract.

⁴¹ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6 (hereinafter: Rome I Regulation).

⁴² Given that the arbitral institution is required to fulfil the characteristic performance rather than the parties, whose main obligation consists in the payment of a fee, the application of art 4 para 2 Rome I Regulation would lead to the same result.

⁴³ See art 4 para 3 Rome I Regulation. The seat of arbitration, for instance, could be regarded as such a country.

⁴⁴ The same question is raised and left unanswered by Kuckenberg in respect of the 'legal predecessor' of the Rome I Regulation, that is, the Convention on the Law Applicable to Contractual Obligations, made in Rome, on 19 June 1980 (hereinafter: Rome Convention). See Kuckenberg (n 33) 80.

⁴⁵ See Section 3.1.4 of the Opinion of 13 September 2006 of the European Economic and Social Committee on the Proposal of the Rome I Regulation [OJ C 318, 23.12.2006, 56 (58)] and Section 4.5.3 of the Opinion of 29 January 2004 of the European Economic and Social Committee on the Green Paper on the conversion of the Rome Convention into the Rome I Regulation [OJ C 108, 30.4.2004, p. 1 (8)]. See also Francisco J. Garcimartín Alférez, 'The Rome I Regulation: Much ado about nothing?' [2009] 2 The European Legal Forum, I-61-79 (I-64, para 17).

⁴⁶ See Joachim Münch, 'Introduction to §§ 1034ff' in Thomas Rauscher, Peter Wax, Joachim Wenzel, *Münchener Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen*, Vol. III

As a matter of fact, the institution's contract could also be excluded from the scope of the Rome I Regulation by its close connection to the arbitration agreement. This is, however, not the case. Even though the contract is ancillary to the parties' agreement to arbitrate, it is a separate (independent) contract. There is, of course, an interrelationship between the arbitration agreement and the institution's contract: should one of them fail (e.g. become invalid), the other one should normally fail as well.⁴⁷ Still, some authorities point out that the invalidity of the arbitration agreement does not necessarily affect the validity of the institution's contract: any dispute about the jurisdiction of the arbitral tribunal is part of the parties' controversy referred to arbitration under the rules of the institution and, as such, falls within the scope of the institution's contractual duty to administer the parties' case.⁴⁸ In other words, the arbitration agreement may prove to be invalid but this does not automatically entail the invalidity of the contract between the parties and the institution. The institution's contract is separable from the arbitration agreement and should, therefore, be subject to a choice-of-law analysis separate from that of the arbitration agreement.⁴⁹ Accordingly, the contract between the parties and the institution should not be excluded from the scope of the Rome I Regulation by the mere fact that it is (inter)related or ancillary to the arbitration agreement.

Outside the temporal scope of application of the Rome I Regulation,⁵⁰ it will depend on the applicable choice-of-law rules whether the determination of the applicable law requires a qualification going beyond the conclusion that the relationship between the parties and the institution is a contract for the provision of services.⁵¹ The few authorities addressing the issue of the law governing the institution's contract agree that the law of the seat of the institution should apply, irrespective of whether the choice-of-law rules of the Rome I Regulation (or its predecessor, the Rome Convention) or the choice-of-law rules of a domestic law are applicable.⁵²

(3rd edn, CH Beck 2008, München) (beck-online). See also Christian Hausmaninger, 'ZPO § 587' in Hans W. Fasching, *Kommentar zu den Zivilprozessgesetzen, §§ 577 bis 618 ZPO* (2nd edn, Manz 2007, Vienna) 289-290, paras 267 and 270.

⁴⁷ See Hausmaninger, ZPO § 587 (n 46) 290-291, para 272.

⁴⁸ See Schlosser (n 2), 382, para 498, citing the case *Cekobanka v. CCI* (Tribunal de grande instance de Paris, 8 October 1986) [1987] 3 Rev. Arb. 367-368. See also Kuckenburg (n 33) 81.

⁴⁹ See Hausmaninger, ZPO § 587 (n 46) 297-298, para 299.

⁵⁰ The Regulation is applicable in the Member States, except Denmark, to contracts concluded after the entry into force of the Regulation (17 December 2009) [see art 1 para 4 and Recitals 44 to 46 of the Regulation and Commission Decision of 22 December 2008 on the request from the United Kingdom to accept Regulation (EC) No 593/2008 of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) (OJ L 10, 15.1.2009, 22).

⁵¹ See, for instance, prior to the entry into force of the Rome I Regulation, s 25 item f and s 26 para 2 of the *1979. évi 13. törvényerejű rendelet a nemzetközi magánjogról* [Hungarian Private International Law Act (Law-Decree No. 13 of 1979 on Private International Law)] contained different regulations as to the two basic types of contracts for services (*megbízási szerződés* and *vállalkozási szerződés*, which have more or less the same characteristics as the *Dienstvertrag* and the *Werkvertrag* under German law). These old provisions are still applicable to contracts concluded before 17 December 2009, insofar as the 1980 Rome Convention does not apply.

⁵² See Kuckenburg (n 33) 80; Schlosser (n 2) 383, para 498; Klaus Lionnet, Annette Lionnet, *Handbuch der internationalen und nationalen Schiedsgerichtsbarkeit* (3rd edn, BOORBERG 2005, Stuttgart–München–Hannover–Berlin/Weimar–Dresden) 196. See also *SNF v. CCI*, (Cour d'appel de Paris, 22 January 2009) [2009] XXXIV Y.B. Comm. Arb. 263-268, 265.

2 Qualification to Find the Directly Applicable Rules of the Governing Law

There is no legal system on earth that would contain specific rules for the institution's contract.⁵³ Hence, there is a need for further qualification in order to find the rules of the applicable law directly governing the issues not settled by the parties (default rules). Similarly, there might be mandatory provisions of the governing law, applicable only to certain but not all types of contracts, which must also be identified to make sure that the institution's contract, or a certain provision thereof, is valid.

Under German law, the contract between the parties and the institution (*Administrierungsvertrag* or *Schiedsorganisationsvertrag*) is regarded either as a *Geschäftsbesorgungsvertrag* ('a contract for the management of the affairs of another'),⁵⁴ that is, a subcategory of *Dienstvertrag* ('service contract') or *Werkvertrag* ('contract to produce a work'),⁵⁵ or as a mixed or sui generis type of contract.⁵⁶ Under French law, the contract between the parties and the institution is a mixed contract, uniting the characteristics of a *mandat* and of a *contrat d'entreprise* (i.e. of an agency contract and of a contract for the provision of services).⁵⁷ Under Hungarian law, it would be a *megbízási szerződés* ('agency contract') or a *vállalkozási szerződés* ('contract for professional services').⁵⁸ Even though the issue has not yet been specifically addressed in the Hungarian case law and literature, it can be predicted that a Hungarian court would regard the contract as an atypical (sui generis) contract or a subcategory of *megbízási szerződés*. Similarly, under Austrian law, the institution's contract (*Schiedsorganisationsvertrag* or *Administrierungsvertrag*) is considered to be either a contract for the provision of services (*Werkvertrag mit Geschäftsbesorgungselementen*)⁵⁹ or 'a contractual relationship sui generis, as it embraces elements of various types of contracts, which can be differentiated by the different services performed'.⁶⁰

⁵³ See Hausmaninger, ZPO § 587 (n 46) 288, para 264.

⁵⁴ See Schlosser (n 2) 382, para 498.

⁵⁵ See s 675 para 1 of the German Civil Code (hereinafter: GCC). The *Dienstvertrag* and the *Werkvertrag* are regulated in s 611ff and a 631ff GCC, respectively. The English translation of the terms is based on the official English translation of the GCC available on the homepage of the German Federal Ministry of Justice at <http://www.gesetze-im-internet.de/englisch_bgb/index.html> accessed 11 November 2013.

⁵⁶ See Mark Wilke, *Prozessführung in administrierten internationalen Handelsschiedsverfahren: eine rechtsvergleichende Untersuchung der internationalen Schiedsordnung der AAA sowie der Schiedsordnungen der DIS und der ICC* (Univ., Diss. 2005, Augsburg) 18. See also Münch, Introduction to §§ 1034ff (n 46) para 68.

⁵⁷ See Kuckenburg (n 33) 86. The *mandat* and the *contrat d'entreprise* are regulated in Arts. 1984ff and 1779ff of the French Civil Code (*Code Civil*), respectively. See also Gaillard, Savage (n 29) 603, para 1110.

⁵⁸ The *megbízási szerződés* and the *vállalkozási szerződés* are regulated in s 474ff and s 389ff HCC, respectively. These types of contracts are very similar to those covered by the German legal terms *Dienstvertrag* and *Werkvertrag*, respectively. The English translation of the Hungarian terms is based on the English text of the HCC published in the electronic legal database *Complex* (Complex Kiadó 2012, Budapest).

⁵⁹ See, in reference to §§ 1002ff. and 1165ff of the Austrian Civil Code, Hausmaninger, ZPO § 587 (n 46) 288-289, paras 264 and 267.

⁶⁰ Schwarz, Konrad (n 29) 9, para 1-021 and 233, para 9-100. See also Hans Walter Fasching, 'Kostenvorschüsse zur Einleitung schiedsgerichtlicher Verfahren' [1993] *Juristische Blätter* (JBl) 545 (550); Kurt Heller, Die Rechtsstellung des internationalen Schiedsgerichts der Wirtschaftskammer Österreich, *Wirtschaftsrechtliche Blätter* (WBL), 1994, 105 (105).

If the rules governing the above-mentioned specific types of contracts do not provide otherwise, the general mandatory and default rules of contract law are applicable to the institution's contract.

V Contracting Parties

In the foregoing, I have referred to the institution's contract mostly by denominating the two contracting sides: the parties and the arbitral institution.⁶¹ Apart from the cases of extension of the contract to non-signatory third parties (i.e. to legal successors or assignees), it is very easy to identify who is bound by the institution's contract on the parties' side. It is always the parties to the arbitration agreement who enter into a contract with the institution.

Even though arbitral institutions are typically separate legal persons (entities), some of the institutions lack legal personality. If the arbitral institution is not a separate legal entity but a subdivision of the sponsoring organisation, the contract is not entered into by the parties and the subdivision directly responsible for the administration of arbitral proceedings but by the parties and the sponsoring organisation. For example, while the LCIA and the DIS are separate legal entities having full legal personality,⁶² the ICC Court and the HCCI Arbitration Court are subdivisions of the ICC and the HCCI, respectively.⁶³ Therefore, with regard to LCIA or DIS arbitration, the LCIA or the DIS will be the contracting party, whereas in the case of ICC or HCCI arbitration, the parties will not enter into a contract with the ICC Court or the HCCI Arbitration Court but with the ICC or the HCCI itself.

VI The Formation of the Contract between the Parties and the Arbitral Institution

The contract between the parties and the arbitral institution, like any other contract, is created by an offer and a corresponding acceptance. Beyond the qualification of the contract, the other big question mark hangs over the formation of the institution's contract. In the process leading

⁶¹ See Hausmaninger, ZPO § 587 (n 46) 288, para 264.

⁶² The LCIA is a not-for-profit company limited by guarantee and governed by English law (see 'Organisation' at <<http://www.lcia.org/LCIA/Organisation.aspx>> accessed 11 November 2013); see also Simon Nesbitt, 'LCIA Arbitration Rules 1998' in Loukas A. Mistelis (ed), *Concise International Arbitration* (Kluwer Law International 2010, 401-465) 401. The DIS is a registered association (*eingetragener Verein*) established under German law (see 'About the DIS' at <<http://www.dis-arb.de/en/57/content/ueber-die-dis-id46>> accessed 11 November 2013).

⁶³ In respect of the ICC, see *Cubic Defense Systems v. ICC* (Cour d'Appel de Paris, 15 September 1998), [1999] XXIV Y.B. Comm. Arb., 287-293, 290. See also Laurence Kiffer, 'Comments on the Paris Court of Appeal Decision in SNF v. International Chamber of Commerce' [2009] 26 (4) J Int'l Arb, 579-589, 581.

to arbitration under the auspices of an institution, and especially at the outset of the arbitral proceedings, there are several events that could possibly constitute an offer or an acceptance.⁶⁴

- (i) the release (publication) of the arbitration rules by the institution;
- (ii) the conclusion by the parties of the arbitration agreement containing a reference to the arbitration rules of the institution;
- (iii) the submission of the request for arbitration;
- (iv) the service of the request for arbitration upon the respondent by the institution (typically by the secretariat);
- (v) the decision by the institution to set the proceedings in motion.

There are a number of authors holding that the release of the institutional rules is a binding offer, which is accepted by the parties' agreement to arbitrate under the rules of the institution.⁶⁵ Other authors are of the opinion that the release of the rules is only an invitation to make an offer (*invitatio ad offerendum*). Accordingly, the filing of the request for arbitration is the offer, and setting the proceedings in motion by the institution is an (implied) acceptance.⁶⁶ Interestingly, the idea that the service of the request for arbitration upon the respondent could serve as an acceptance is not very popular, even though there is case law stating that the institution's contract is formed upon the filing of the request for arbitration as an offer and the service of the request for arbitration as an acceptance.⁶⁷

The essential elements of an offer to contract are defined by the law governing the contract. This is, in our case, the law of the seat of the arbitral institution. Generally speaking, the offer is a proposal for concluding a contract, which is sufficiently definite and indicates the intention of the offering party to be bound in the event of acceptance.⁶⁸ Even though the offer is usually addressed to one or more specific persons, in most jurisdictions an offer can be directed at an indefinite group of persons (at the public) as well (*invitatio ad incertas personas*).⁶⁹ When

⁶⁴ See Kuckenburg (n 33), 80.

⁶⁵ See Lionnet, Lionnet (n 52), 196-197; Peter Schlosser, 'Introduction to § 1025' in Martin Jonas, Friedrich Stein, *Kommentar zur Zivilprozessordnung*, Vol. 9 (22nd edn, Mohr Siebeck 2002, Tübingen) (beck-online); Andreas Reiner, *Handbuch der ICC Schiedsgerichtsbarkeit: die Verfahrensordnung des Schiedsgerichtshofes der Internationalen Handelskammer unter Berücksichtigung der am 1.1.1988 in Kraft getretenen Änderungen* (Manz 1989, Vienna) 20; Gaillard, Savage (n 29) 602, para 1110.

⁶⁶ See Münch, Introduction to §§ 1034ff (n 46) para 69; Lachmann (n 18) 793, para 3509; Schlosser (n 2) 382, para 498; Hausmaninger, ZPO § 587 (n 46) 293, para 280.

⁶⁷ See the case *Cekobanka v. CCI* (Tribunal de grande instance de Paris, 8 October 1986), [1987] 3 Rev. Arb., 367-368, cited in Kuckenburg (n 33) 82. See also Heller (n 60) 105ff.

⁶⁸ See art 2.1.2 ['Definition of Offer'] UNIDROIT Principles of International Commercial Contracts 2010 (hereinafter: UNIDROIT Principles), art 14 para 1. *United Nations Convention on Contracts for the International Sale of Goods, done at Vienna*, opened for signature 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988) (hereinafter: CISG); Jan Busche, '§ 154' in Franz Jürgen Säcker (ed), *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Vol. I* (6th edn, CH Beck, 2012 München) (beck-online); Eörsi Gyula, *Kötelmi jog. Általános rész* (25th edn, Nemzeti Tankönyvkiadó 2010, Budapest) 80-81.

⁶⁹ See Busche, BGB § 145 (n 68), para 17; Hans-Werner Eckert, BGB § 145, in Heinz Georg Bamberger, Herbert Roth, *Beck'scher Online-Kommentar zum BGB* (24th edn, CH Beck 2012, München) (updated on August 1, 2012) 

releasing its rules of proceedings, the arbitral institution does not address one or more specific persons but an indefinite group of persons, that is, everyone who wants to have disputes arbitrated under the auspices of the institution. Whether this action of the institution is an offer or an invitation to make an offer is a matter of interpretation.⁷⁰ However, both qualifications have their weaknesses.

The first theory, holding that the release of the arbitration rules is an offer and the conclusion of the arbitration agreement constitutes the acceptance, is only workable if the release of the rules can be regarded as an offer made for an indefinite period of time. Normally, if the offeror does not fix a deadline for acceptance, the offer must be accepted within a reasonable time,⁷¹ and a late acceptance is only effective as an acceptance if the offeror is willing to accept it.⁷² In other words, a late acceptance will not in itself result in the conclusion of the contract. This means that, eventually, it depends on the offeror whether the contract comes into existence or not.

Rules of arbitral institutions never contain a time for acceptance, that is, a deadline within which parties can agree to arbitrate under the respective rules. There are three ways to ‘convert’ the release of the rules into an offer made for an indefinite period of time:

- (i) re-interpreting the indefinite period into a fixed period of time (i.e. assuming that the institution has set an indefinite time for acceptance);
- (ii) qualifying the release of the rules and their constant availability to the public as a permanent(ly) (renewed) offer; or
- (iii) with regard to the circumstances, defining a reasonable time as an indefinite period of time.

All of these solutions are somewhat weird and artificial. A further problem is that the parties’ agreement to arbitrate under the rules of an institution can only be regarded as an acceptance if there is no need for the acceptance to reach the offeror. This is possible under German law, the CISG and the UNIDROIT Principles, if so required by applicable trade usages or if the notification

(beck-online). See also art 14 para 2 CISG and Peter Schlechtriem, Ulrich G. Schroeter, ‘CISG art 14 Begriff des Angebots’ in Peter Schlechtriem, Ingeborg Schwenzer, *Kommentar zum Einheitlichen UN-Kaufrecht* (5th edn, CH Beck 2008, München / Helbing Lichtenhahn Verlag 2008, Basel) (beck-online); Hester Wattendorf, 2. Formation. Section 1: ‘Offer and Acceptance’ in Hugh Beale and others, *Casebooks on the Common Law of Europe. Contract Law* [Hart Publishing 2002, Oxford/Portland (Oregon)] 185-189.

⁷⁰ See Volker Kitz, ‘Teil 13.1 Vertragsschluss im Internet’ in Thomas Hoeren, Ulrich Sieber (eds), *Multimedia-Recht. Rechtsfragen des elektronischen Geschäftsverkehrs* (29th edn, CH Beck 2011, München) (beck-online); Othmar Jauernig, ‘BGB § 145’ in Othmar Jauernig, *Bürgerliches Gesetzbuch. Kommentar* (14th edn, CH Beck 2011, München) (beck-online).

⁷¹ See, for example, s 147 para 2 GCC; s 211 para 2 HCC. See also Wattendorf (n 69) 208-211.

⁷² Under the different laws, the exact consequences of a late acceptance are determined in different ways. For instance, under the CISG (art 21 para 2) and the UNIDROIT Principles (art 21 para 2), the offeror must explicitly accept the late acceptance for the contract to be concluded. Under German law, the offer expires and the late acceptance is a new offer (s 146 and s 150 para 1 GCC). Under Hungarian law, the offeror is no more bound by the offer (s 211 para 2 HCC). However, these differences do not alter the fact that a late acceptance is ineffective and thus in itself incapable of bringing the contract into existence.

of the acceptance has been waived by the offeror.⁷³ However, other laws⁷⁴ do not provide such an exception from the rule that the acceptance becomes effective upon receipt by the offeror.⁷⁵ Some authors have therefore taken a modified version of the first approach: while upholding that the release of the rules by the institution is the offer, they regard the filing of the request for arbitration as the acceptance.⁷⁶ Under this modified view, the parties, when entering into the arbitration agreement, undertake to submit disputes to the selected institution *vis-à-vis* one another (i.e. not yet towards the institution) and mutually authorise each other to accept the institution's offer by filing a request for arbitration on behalf of both of them.⁷⁷

The second theory, which qualifies the release of the arbitration rules as an invitation to make an offer, has some drawbacks, too. Under this approach, the filing of the request for arbitration is an offer and the setting into motion of the proceedings by the institution is the acceptance. The biggest issue with this solution is that the acceptance is postponed until after the commencement of the arbitration and is left to the institution. As such, when entering into an arbitration agreement, the parties cannot be sure that the institution will accept their offer. Without having an obligation to do so, the institution would be basically free to accept or reject the parties' case.

VII The Role of the Arbitration Rules

When entering into an agreement to arbitrate under the rules of an institution, the parties incorporate those rules into their arbitration agreement.⁷⁸ Accordingly, the arbitration rules become part of the arbitration agreement and substitute the parties' individual agreements on a range of different – mainly procedural – issues.⁷⁹ As article 2 item e UNCITRAL Model Law states, 'where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement.'⁸⁰ Hence, arbitration rules have a double function: on the one hand, they are contractual terms between the parties; on the other hand, they are procedural agreements of the parties, defining the procedures to be followed not only by the parties but also by the arbitrators.

⁷³ See s 151 para 1 GCC; art 18 para 3 CISG; art 2.1.6 para 3 UNIDROIT Principles. See also Lionnet, Lionnet (n 52) 197.

⁷⁴ See, for example, Hungarian law and French law. For the latter, see Kuckenburg (n 33) 83.

⁷⁵ For further critics to this first approach see Hausmaninger, ZPO § 587 (n 46) 291-292, paras 275-279.

⁷⁶ See Kuckenburg (n 33) 82-84; Born (n 1) 1614.

⁷⁷ See Born (n 1) 1614, note 120; Schlosser (n 2) 382, para 498.

⁷⁸ See Born (n 1) 1122. See also Alexander Jolles, Maria Canals de Cediél, 'Chapter 6 – Confidentiality' in Gabrielle Kaufmann-Kohler, Blaise Stucki, *International Arbitration in Switzerland: a Handbook for Practitioners* (Kluwer Law International 2004, 89-114) 95; Bommel van der Bend, Marnix Leijten, Marc Ynzonides, a *Guide to the NAI Arbitration Rules: Including a Commentary on Dutch Arbitration Law* (Kluwer Law International 2009) 9, 38.

⁷⁹ See Lionnet, Lionnet (n 52) 92, 159.

⁸⁰ See also s 9 para (2) HAA; s 4 para (3) EAA; s 1042 para 3 GCCP.

The role of the arbitration rules in relation between the parties and the institution is a more complicated issue. According to some authors, the rules of proceedings of arbitral institutions are in fact standard business terms.⁸¹ Pursuant to article 2.1.19 para 2 UNIDROIT Principles, '[s]tandard terms are provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party'. Other laws provide for a similar definition.⁸² Indeed, arbitration rules are formulated unilaterally by the institution in advance for general and repeated use in a number of contracts, and in most cases they become part of the institution's contract without prior negotiation with the parties. However, an essential feature of the arbitration rules is that the parties can modify the rules to a large extent and the modifications are binding upon the institution.⁸³ For standard business terms, it is very unusual to grant the other party the power to unilaterally determine the terms of the contract by modifying the standard business terms.

Insofar as the arbitration rules allow the parties to deviate from, or supplement, the pre-established rules (e.g. by such explicit terms as 'unless otherwise agreed by the parties [...]'; '[...] as has been agreed in writing by the parties [...]' or 'the parties may agree on [...]'⁸⁴), the parties' power to determine the terms of their contract with the institution derives from the arbitration rules themselves. Hence, the parties' power to adopt rules binding upon the institution is ultimately not unilateral but based on the prior consent of the institution. This means that, by exercising this power in the arbitration agreement or later, the parties do not deviate from the institutional rules but, in fact, follow them.

In other cases where the arbitration rules do not allow the parties to agree otherwise, the procedural rules established by the parties in deviation from the pre-fabricated rules can be subject to individual agreements between the parties and the institution and become part of the contract only in this way. As is well known from the law of standard business terms, individual agreements between the user and the other contracting party prevail over the standard terms.⁸⁵ In this case, the procedural rules agreed upon by the parties become part of the contract and binding upon the institution only if subsequently accepted by the institution.

Consequently, the parties' ample opportunities to determine the actual terms of their contract with the institution do not undermine the qualification of the institutional rules as standard business terms.

⁸¹ See, implicitly, Schlosser (n 2) 474, para 631 and 404, para 526; explicitly, Lachmann (n 18) 343, para 1377. See also judgment of the BGH (*Bundesgerichtshof*; German Federal Supreme Court) of 14 April 1988, Case No. III ZR 12/87 (Stuttgart), *BGHZ* 104, 178, 181 (juris, para 31).

⁸² See, for example, s 305 para 1 GCC; s 205/A para 1 HCC.

⁸³ See Jean-François Poudret, Sébastien Besson, *Comparative Law of International Arbitration* (2nd edn, Thomson Sweet & Maxwell 2007 / Schultess 2002) 70, para 96.

⁸⁴ See, for example, Arts. 5.4, 14.1-14.2, 15.1, 15.7, 16.1, 17.1 and 17.3, 19.1 and 19.4, 21.1-21.2, 22.1, 25.1, 28.2-28.5 and 30.1 LCIA Rules. All other institutional rules (ICC, DIS, HCCI, Vienna Rules) contain similar provisions.

⁸⁵ See, for example, art 2.1.21 ['Conflict between Standard Terms and Non-standard Terms'] UNIDROIT Principles; s 205/C HCC; s 305b GCC.

VIII The Contents of the Contract between the Parties and the Arbitral Institution

Once it has been formed, the contents (i.e. the terms) of the institution's contract are determined by the institutional rules, the parties' arbitration agreement, the law applicable to the contract (i.e. the law of the seat of the institution) and, regarding the institution's procedural competences, by the *lex arbitri* (in general, the law of the seat of arbitration).⁸⁶ The characteristic obligation arising out of the contract is imposed on the institution: the institution is obliged to provide administrative services in support of a dispute resolution process between the parties. From another point of view, upon entering into a contract with the institution, the parties transfer or grant powers to the institution. The purpose of the transfer of powers is to relieve the parties and the arbitrator(s) from the administrative burdens associated with the arbitral proceedings, to entrust a professional organisation with the administrative tasks and to make the dispute resolution more efficient and predictable. In the following, I will only focus on the services and powers of the institution (i.e. on the characteristic performance) and will not go into the duties of the parties.

The most typical services and powers undertaken by or transferred (granted) to the arbitral institution are the following:⁸⁷

- (i) selecting (appointing) and confirming arbitrators, including the power to determine the number of arbitrators (serving as an appointing authority);⁸⁸
- (ii) resolving challenges to arbitrators and removing arbitrators (upon challenge/request or *ex officio*);⁸⁹
- (ii) designating the place of arbitration;⁹⁰
- (iv) fixing the initial language of the proceedings (until the arbitral tribunal finally determines the language of the arbitration);⁹¹

⁸⁶ See Hausmaninger, ZPO § 587 (n 46) 298, para 299.

⁸⁷ See Born (n 1) 149. See also Lionnet, Lionnet (n 52) 196; Schlosser (n 2) 460, para 600; Hausmaninger, ZPO § 587 (n 46) 294, para 286.

⁸⁸ See Arts. 11-13 ICC Rules 2012; art 18 HCCI Rules; s 12, 14 and 17 DIS Rules; art 14 paras 2-5 Vienna Rules. As opposed to arbitration under the rules of other institutions, in LCIA arbitration it is always the institution that appoints the arbitrator(s) (see Arts. 5.5-5.6 LCIA Rules).

⁸⁹ See Arts. 10-11 LCIA Rules; Arts. 14-15 ICC Rules 2012; Arts. 19-20 HCCI Rules; s 18 DIS Rules; Arts. 16-18 Vienna Rules.

⁹⁰ See art 16.1 LCIA Rules; art 18 ICC Rules 2012. Under the HCCI Rules, the seat of arbitration is always Budapest (Hungary) (see art 7 para 1). Under the DIS Rules, failing any agreement by the parties, the arbitral tribunal determines the place of arbitration (see s 21.1). Under the Vienna Rules, unless otherwise provided for by the parties, the place of arbitration is Vienna (see art 2 item a).

⁹¹ See art 17.2 LCIA Rules; art 8 para 3 HCCI Rules. Pursuant to art 6 Vienna Rules, the languages of the correspondence with the institution are German or English and the institution has no discretion to decide between the two. The ICC Rules 2012 and the DIS Rules do not contain any special provisions on the determination of the initial language of the arbitration (see art 20 ICC Rules 2012; s 22 DIS Rules).

- (v) fixing the cost (fee) (advance), including the fees payable to the arbitrators, and ordering advance (interim) or final payments;⁹²
- (vi) fixing or modifying time limits.⁹³

Some arbitration rules, for example, the ICC Rules, grant the institution such unique powers as the determination of the prima facie existence of an arbitration agreement, the consolidation of two or more arbitrations, the approval of the Terms of Reference or the scrutiny of the award.⁹⁴ With regard to these specialties, ICC arbitration is often described as ‘supervised arbitration’, in comparison to ‘administered arbitration’ under other rules which do not grant the institution such extensive supervisory powers over the parties’ case.⁹⁵ Indeed, all institutions have some kind of peculiarity. The LCIA, for example, reserves the exclusive right to appoint the arbitrators for the parties ‘with due regard for any particular method or criteria of selection agreed in writing by the parties.’⁹⁶ In contrast, the HCCI Rules do not even refer to the notion of confirmation of arbitrators.⁹⁷ There is a need for approval by the institution only if a party wants to appoint an arbitrator who is not included in the roll of arbitrators of the HCCI Arbitration Court.⁹⁸

Most of the above-listed powers are of a subsidiary nature: the institution comes into play only if one or both of the parties have failed to arrange for a particular issue (e.g. to determine the place of arbitration) or to perform a procedural act (e.g. to appoint an arbitrator).

In ad hoc arbitration, under the statutory rules of the *lex arbitri*, the overwhelming majority of these powers are specifically granted to the parties: it is the parties who may select and remove the arbitrators, designate the place and the language of arbitration, etc. Other powers emerge from the parties’ general power to establish the procedures to be followed by the tribunal (e.g. the setting of procedural time limits or the establishment of procedures for the constitution of the tribunal, the challenge to arbitrators, the handling of advance and final payments or the rendering of an award). If the parties do not exercise these powers, it is either the tribunal or a state court that has to resolve the situation (e.g. by designating the place of arbitration or appointing an arbitrator). Finally, the parties may also decide to transfer or grant the above-mentioned powers to a third party, for instance to an arbitral institution, instead of exercising those powers

⁹² See Arts. 24 and 28 and the Schedule of Arbitration Costs of the LCIA Rules; Arts. 36-37 and Appendix III ICC Rules 2012; art 12 and Regulation on Fees of the HCCI Rules; s 7, 11 and 40 and Appendix to s 40.5 of the DIS Rules; Arts. 31-36 and Annex I [‘Schedule of Arbitration Costs’] of the Vienna Rules.

⁹³ See art 9.3 LCIA Rules; Arts. 23(2), 30, 38(2) and art 6 para 4 of Appendix V of the ICC Rules 2012; Arts. 18(5), 25(2), 41(3) and 45(3) HCCI Rules; s 7.2, 11.2, 12.1 and 13.2 DIS Rules; art 13 para 1 Vienna Rules.

⁹⁴ See Arts. 6(3)-(6), 10, 23(3) and 33 ICC Rules 2012. In the Vienna Rules, such prima facie powers are not expressly specified but, according to Schwarz and Konrad, they appear to be implied. See Schwarz, Konrad (n 29) 223-225, paras 9-074–9-079.

⁹⁵ See Craig, Park, Paulsson (n 27) 40-42; Bühler, Webster (n 15) 2, para 0-7, 3-4, paras 0-8–0-12 and 11, para 1-1.

⁹⁶ See art 5.5 LCIA Rules.

⁹⁷ See Arts. 4, 18 and 27 HCCI Rules.

⁹⁸ See art 18 para 1 third sentence HCCI Rules.

themselves, or leaving the decision to the arbitral tribunal or a state court.⁹⁹ This follows from the principle of party autonomy.

In all of the above-mentioned typical or atypical powers of arbitral institutions, it is common that these powers are basically of an administrative nature¹⁰⁰ and are directly related to the particular arbitration initiated and pending before the institution. Sometimes a distinction is drawn between the procedural acts (powers) (e.g. determination of the number of arbitrators, the place of arbitration or the language of the procedure) and the administrative services of the institution (e.g. service of documents, the handling of cost advances).¹⁰¹ However justified this distinction may seem, it does not alter the fact that both the procedural powers and the administrative services are of contractual origin. It is another issue that the consequences of a breach by the institution of these duties might differ depending on the procedural or administrative nature of the duty concerned (procedural law or substantive law consequences).¹⁰² In my opinion, the one does not necessarily exclude the other: for the omission of a procedural act by the institution, the liability for damages caused by the institution seems to be appropriate as well. The contractual origin of the procedural duties provides a proper basis for the institution's liability for damages.

IX Conclusion

The arbitration agreement is often said to be the foundation of arbitration.¹⁰³ While this is undoubtedly true for ad hoc arbitration, the parties' agreement to arbitrate is not the only one but one of the foundation stones of institutional arbitration. Institutional arbitration is founded on the contract between the parties and the institution. For that contract, the arbitration agreement is a necessary but not sufficient condition. In order to have institutional arbitration, the institution's consent is essential as well.

Nowadays, it is generally recognised that the legal relationship between the parties and the arbitral institution is of a contractual nature. In general terms, it is a contract for the provision of services: the institution provides administrative services in support of the arbitral proceedings and the parties pay an administration fee for those services. The contract falls within the scope of the Rome I Regulation and is basically governed by the law of the seat of the institution. Since the institution's activities carried out under the contract often have a direct implication on the arbitral proceedings, the provisions of the law governing the arbitration (*lex arbitri*) are also

⁹⁹ See Schlosser (n 2) 460, para 600.

¹⁰⁰ See Gaillard, Savage (n 29) 603, para 1110; Karrer (n 29) 492.

¹⁰¹ See Hausmaninger, ZPO § 587 (n 46) 294, paras 286-287.

¹⁰² A procedural law consequence may be the possibility to resort to court in order to have the 'missing' arbitrator appointed, if the institution fails to make the appointment for a party. A substantive law consequence may be the institution's liability, e.g. for the negligent handling of cost advances.

¹⁰³ See Lew, Mistelis, Kröll (note 11) 99, para 6-1.

relevant to the contract. The relationship between the parties and the institution is in all jurisdictions highly under-regulated. As such, there is generally a wide room for self-regulation in this area. One means of self-regulation is the use of pre-fabricated arbitration rules. These rules are multi-functional: they are contractual terms and procedural agreements between the parties but also contractual terms – standard business terms – between the parties and the institution; moreover, they are binding upon the arbitral tribunal as well.

As to the formation of the contract between the parties and the institution, there are different theories. In most cases, it is not relevant which theory is applied. The differences between the various theories become visible if there is a dispute between one or both of the parties and the institution on the exact terms of the contract (e.g. because the arbitration rules have been changed after the parties entered into the arbitration agreement) or the institution denies to accept, or proceed with, the case (e.g. because in the arbitration agreement the parties agreed to deviate from the pre-fabricated institutional rules). In these cases, it can be of utmost importance when exactly the contract was formed, since after contract formation the contract is binding upon both contracting sides (i.e. the parties *and* the institution) and the terms of the contract can only be modified by their mutual consent.

From the contractual nature of the relationship between the parties and the institution and, in a broader context, from the private (law) nature of institutional arbitration, it also follows that the sole basis for the institution's duty to accept the parties' case is the institution's contract and that there is certainly no constitutional right of access to an arbitral institution.



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